



# ICLG

The International Comparative Legal Guide to:

## **Investor-State Arbitration 2019**

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# Third-Party Funding and Investor-State Arbitration

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### Introduction

When, in 2012, RSM Production Corporation (“RSM”) began ICSID arbitration against the state of St Lucia, it had a problem common to many claimants: it could not finance its claims itself. So, as an increasing number of claimants do, it obtained funding from a third party. Upon learning of this funding, St Lucia feared that this third party would not cover any costs order if RSM’s claim failed, and sought an order for security for costs. The tribunal agreed and ordered RSM to provide security for St Lucia’s costs. Subsequently, the claimant informed the tribunal that it would be unable to pay the security, resulting in an order that the proceedings be vacated for six months. Just over a year after its order, the tribunal dismissed the case.<sup>1</sup>

One of the arbitrators stated that:

*“Respondent acknowledges that the conditions for a discontinuation decision as provided for in the ICSID Convention or the Rules (at least Rules 43 and 44) are not met. However, Respondent contends that the Tribunal has an inherent power to render the discontinuation decision because doing so is necessary for the proper administration of justice. Respondent refers to a number of judgments published by the International Court of Justice in which the inherent power to discontinue the proceedings was exercised because doing so was necessary for the proper administration of justice.*

*Respondent contends that compliance with the Tribunal’s decisions is a basic requirement for procedural good faith that Claimant owes not only to Respondent but also to the Tribunal. Respondent alleges that Claimant acts against good faith and destroys the integrity of the proceedings by treating the Tribunal’s decisions as mere advisory opinions.*

*Respondent argues that the Tribunal may base its decision to discontinue the proceeding on Rule 45, which provides that the proceedings may be discontinued if the parties fail to take any steps in the proceedings during six consecutive months. Respondent submits that there is no need to delay the discontinuation decision because Claimant has already stated that it will not or cannot comply with the Security for Costs Decision.”<sup>2</sup>*

Since 2012, such funding arrangements have only become more common. Yet, Dr. Griffith’s concern still stands: does third-party funding (“TPF”) provoke a rise in frivolous and abusive claims? Such concerns are particularly acute in the context of investor-state arbitration because it is a State’s taxpayers who will be liable for satisfaction of any award favouring the claimant. More and more funders also have close relationships with leading arbitrators, either by funding cases where those arbitrators (or their partners) act as

counsel, or directly employing those arbitrators for the assessment of claims. For some, these arrangements raise an increased risk of arbitrators having conflicts of interest.

As TPF in investor-state arbitration grows, such concerns risk adding yet further fuel to the criticisms of the investor-state arbitration regime.

### What is TPF?

Parties have long sought means of financing their disputes other than through their own resources, through: insurance; contingency fee arrangements; parent company loans; or other forms of corporate finance. Alongside these traditional means of finance is a comparatively new and fast growing industry, in which investment funds provide finance to claimants, in exchange for a share of the returns of any claim. In investor-state arbitrations, where States are unable to bring claims of their own (although this may soon change with the new proposed amendments to the ICSID Rules), TPF has only benefitted investors.

Such funding is on the increase, with anecdotal reports indicating that the global contentious disputes funding market currently exceeds US \$10 billion in committed funding.<sup>3</sup> Such growth has brought an increasing diversity of funding products, including:

1. **portfolio funding**, in which a funder provides a finance package either to (i) a law firm (or to the disputes practice of a law firm), or (ii) a corporate claimant expecting to be involved in numerous legal proceedings. The purpose of such an arrangement is to provide funding for a number of claims;
2. **working capital funding**, in which third-party funders provide working capital to the claimant during proceedings, for example to allow the claimant to discharge pre-existing liabilities;
3. **respondent funding**, where it is the respondent who is the recipient of commercial funding. This is most common where there are significant counterclaims, but some funders have started identifying realistic exit points in the arbitration ahead and paying the funder part of “the amount by which [the respondent’s] liability has been reduced, comparing the amount originally claimed with the amount awarded”<sup>4</sup> in exchange for tranches of funding, similar to a reverse contingency arrangement; and
4. **not-for-(immediate)-profit funding**, where sometimes – rarely – money is not the only thing and a party funds a case for purely charitable purposes.<sup>5</sup> A third party might provide funding for a claim that establishes a point of law favourable to the funder.<sup>6</sup> Alternatively, the third-party funder will hope that its funding will result in some wider business advantage.<sup>7</sup>

This tells us that there are many diverse reasons for obtaining TPF. There is growing recognition that TPF is not necessarily just for those who might not otherwise have the funds to bring a claim, but also for those seeking to release funds for other projects. As a category of investment, TPF is growing and developing. Some of the diverse reasons for considering TPF include:

*“four main forces driving the sharp increase in the demand... [are: (1)] increasing access to justice...; (2)] companies seeking a means to pursue a meritorious claim while also maintaining enough cash flow to continue conducting business as usual...; (3)] worldwide market turmoil and uncertainty...which has inspired...investors to seek investments that are not directly tied to or affected by the volatile and unpredictable financial markets...; and (4)] third-party funding as corporate finance, whereby corporate entities...enter into bespoke arrangements...as a means of raising capital for general operating expenses or expansion to meet new business goals”.*<sup>8</sup>

Not only are the reasons for TPF expanding, but so are the individuals seeking to benefit from TPF. Thus, in addition to the large pool of claimants and law firms heavily seeking TPF, there is a slowly growing pool of respondents seeking to benefit from TPF. The most obvious scenarios being respondents putting forward viable counterclaims – of which we may see an increase from States once the proposed amendments to the ICSID Rules are implemented. Beyond such respondents, some have started identifying realistic exit points in the arbitration ahead and paying the funder part of *“the amount by which [the respondent’s] liability has been reduced, comparing the amount originally claimed with the amount awarded”*<sup>9</sup> in exchange for tranches of funding. Such an arrangement appears still to be in its infancy. A rare example of respondent TPF occurred in *RSM v Grenada*. Grenada was funded by a third party that seemingly had a competing interest in the oil exploration rights that would have been awarded to RSM had it been successful.

We also saw unusual funding in *Philip Morris v Uruguay* in which Uruguay received some funding from the Tobacco Free Kids Foundation, although examples of issue-based funding of respondent defences are likely to remain rare, and highly case-specific.

It is difficult to agree on a uniform definition of TPF. The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (the **“ICCA-Queen Mary Report”**), proposes this working definition:

*“The term ‘third-party funding’ refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,*

*(a) Funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and*

*(b) Such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.”*<sup>10</sup>

This is striking for its width – reflecting the academic concerns of the ICCA-Queen Mary Report – capturing not just the more usual forms of funding but also:

1. not-for-profit funding;
2. payment of legal fees by an insurer *“in return for a premium payment”*; and
3. provision of *“material support”*.

A comprehensive definition would obviously be helpful. However, unsurprisingly, when setting rules, states and institutional bodies have tended to embrace rather more circumscribed definitions. For example, the revised Comprehensive Economic and Trade Agreement, ratified by Canada and the E.U. in October 2017:

*“third party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant”.*<sup>11</sup>

Similar provisions are contained in the (as yet unratified) E.U.-Vietnam Free Trade Agreement, as well as the French Model Bilateral Investment Treaty.<sup>12</sup> The E.U. has also proposed similar language to be included in its Transatlantic Trade and Investment Partnership with the U.S.<sup>13</sup>

The recently published proposed revisions to the ICSID Rules, go somewhat further by including a reference to *“material support”*, providing that:

*“(1) ‘Third-party funding’ is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (‘third-party funder’), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:*

*(a) Through a donation or grant;*

*(b) In return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.”*<sup>14</sup>

The definitions proffered all highlight as key elements: (i) a person or entity that is not a party to the dispute; (ii) the provision of financing or material support; and (iii) remuneration that is dependent on the outcome of the dispute. Some seek to encompass not-for-profit funders who donate money and who stand to benefit commercially from a particular outcome or insurers to provide funding in return for a premium.

## Security for Costs

Central to all of these definitions is that the funder is a third party (which, as discussed below, is not always the default assumption), who will almost certainly not be party to the arbitration agreement. For respondents this creates an obvious problem. If the claimant’s sole means of bringing its claim is through TPF, there is a risk that the claimant will not meet any costs award. As a third party, the funder is outside the tribunal’s jurisdiction, safe from any award of adverse costs. Moreover, the third-party funder may withdraw from the case at any time, leaving the respondent with potentially no recourse to recover its costs.<sup>15</sup> This is not as rare as one might expect, especially when considering that much TPF is in tranches and conditional upon on certain outcomes, or certain expenses such as specific expert reports.<sup>16</sup>

Respondents in funded claims increasingly question whether a funded claimant will have the means to comply with a costs award and demand that the claimant post security for costs as a condition for continuing the proceeding. For respondents hoping to disrupt a claim this can be a useful strategy to cause more difficulties and hassle for the claimant.

Most of the arbitral rules commonly used in investor-state disputes do not provide for an express power for the tribunal to order security for costs, with the SCC Arbitration Rules being an obvious exception.<sup>17</sup> Of note is the proposed amendment to the ICSID Rules, which provides expressly that *“A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security”*.<sup>18</sup> In most cases though, a respondent must argue for the existence of the power relying on less clear language. Thus, in the current ICSID Rules, Rule 39(1) provides that:



*“At any time after the institution of the proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal.”<sup>19</sup>*

Similarly, Article 26 of the 2010 UNCITRAL Rules provide that:

- “1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
  - ...
  - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied.”<sup>20</sup>

A tribunal faced with a security for costs application must consider the claimant’s interest in having access to arbitral justice offset against the respondent’s interest in recovering its costs if it wins. (Especially in investor-state arbitrations, where such costs are rarely negligible.) Even where they recognise that they have a power to order security for costs, tribunals are often reluctant to exercise that power, recognising that the investor-state context means that the claimant will very often be a special purpose vehicle whose assets have been entirely lost. As a result, many tribunals have treated an order of security for costs as an “exceptional remedy”. For example:

- (a) in *Libananco v Turkey*, where the tribunal said that “it would **only be in the most extreme case** – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all”;<sup>21</sup>
- (b) in *Commerce Group v El Salvador*, the ICSID Annulment Committee said that it had an inherent power to order security for costs in its capacity as the guardian of the integrity of the proceedings. However, “the power to order security for costs should be exercised **only in extreme circumstances**, for example, where abuse or serious misconduct has been evidenced”;<sup>22</sup>
- (c) in *Guaracachi v Bolivia*, the tribunal, applying the UNCITRAL Rules, said “Although investment treaty tribunals clearly hold the power to grant provisional measures, an order for the posting of security for costs **remains a very rare and exceptional measure**. Nevertheless, the lack of precedent – and the cautious approach to such requests suggested by the case law – does not limit the power of this Tribunal to grant such a measure”;<sup>23</sup> and
- (d) in *South American Silver v Bolivia*, again under the UNCITRAL Rules, the tribunal said that “investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested”.<sup>24</sup>

Thus, tribunals have relied upon a range of arguments, including:

- (i) the impropriety of prejudging a claimant’s case on the merits;<sup>25</sup>
- (ii) the respondent’s failure to establish a concrete risk of non-payment;<sup>26</sup>
- (iii) that there is nothing unusual in a claimant being a special purpose vehicle with no assets;<sup>27</sup>
- (iv) the claimant’s access to justice would be curtailed as a result of a security for costs order;<sup>28</sup> and
- (v) the failure to award security for costs does not prejudice the integrity of the arbitral proceedings.<sup>29</sup>

The question therefore becomes whether the mere fact that a claimant has received TPF amounts to such exceptional circumstances as to justify an order for security for costs. In principle – and seemingly, in practice – it should not. First, the fact that a party has sought TPF is not in itself a reason to believe that it is unable to meet an adverse costs award. As will be apparent from the discussion so far, parties seek funding for a wide range of reasons, not simply

because they are impecunious. Second, in any event, the mere fact that a party is impecunious should not be the only factor in considering whether to grant security for costs. Too narrow a focus on a test of impecuniosity would have the effect of preventing viable claims by requiring impecunious claimants to provide (potentially prohibitively expensive) security.

Most of the ICSID cases on this issue suggest that tribunals adopt a stricter test than the claimant’s mere impecuniosity. Tribunals appear to usually require evidence of abusive conduct or bad faith on the part of the claimant, on top of the impecuniosity, as seen in *RSM v St Lucia* and in *Luis García Armas v Venezuela*. In *Eurogas v Slovakia*, an ICSID tribunal held that security for costs may be ordered only in exceptional circumstances such as “abuse or serious misconduct”, and that “financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute *per se* exceptional circumstances”.<sup>30</sup> Here, the application was denied and the tribunal found that the existence of a third-party funder was not decisive.

In *Guaracachi v Bolivia*, an UNCITRAL tribunal also rejected the request for security for costs, stating that the existence of TPF was insufficient to demonstrate the claimant’s inability to comply with a costs award: “the Respondent has not shown a sufficient causal link such that the Tribunal can infer from the mere existence of third-party funding that the Claimants will not be able to pay an eventual award of costs rendered against them, regardless of whether the funder is liable for costs or not”.<sup>31</sup> In this case, the respondent already knew of the TPF and the name of the funder. Bolivia wanted the funding agreement to be disclosed, on the basis that it would be relevant to conflicts of interest issues and security for costs. This was declined, although it is important to note that Bolivia sought security for costs before requesting disclosure of the funding agreement and that this may explain why the tribunal determined the issue of security for costs prior to that disclosure.

In *South American Silver v Bolivia*, the UNCITRAL tribunal observed that “the existence of a third-party funder may be an element to be taken into consideration”, but it rejected the request for security on the grounds that “[t]he fact of having financing alone does not imply risk of non-payment” and that ordering security every time that TPF is established would “increas[e] the risk of blocking potentially legitimate claims”, because “[t]he existence of the third-party funder alone does not evidence the impossibility of payment or insolvency. It is possible to obtain financing for other reasons. The fact of having financing alone does not imply risk of non-payment”.<sup>32</sup> This case has been the subject of some criticism for stating an almost impossibly high standard for awarding security for costs: “granted only in case of extreme and exceptional circumstance, for example, when there is evidence of constant abuse or breach that may cause an irreparable harm if the measure is not granted”.<sup>33</sup>

However, some cases do reflect that TPF can be relevant to whether the necessary circumstances exist. In *RSM v St Lucia*, an ICSID tribunal found that the existence of TPF – along with other factors – raised legitimate concerns as to the claimant’s compliance with a potential costs award.<sup>34</sup> It was found that RSM had also failed to comply with its financial obligations in other cases, and thus, this, coupled with the TPF, were considered to be relevant factors in ordering security for costs.<sup>35</sup> One of the arbitrators in that case, Dr. Griffith, went further in his concurring opinion, finding that the integrity of investment arbitration requires that third-party funders “remain at the same real risk level for costs as the nominal claimant”.<sup>36</sup> For Dr. Griffith, once it has been established that the claimant is relying on third-party funding, there is *prima facie* evidence of the claimant’s impecuniosity, and the claimant should then be required to provide positive evidence of its ability to comply with a costs award.

More recently, the tribunal in *Luis García Armas v Venezuela* and *Manuel García Armas, Pedro García Armas, Sebastián García Armas, Domingo García Armas, Manuel García Piñero, Margaret García Piñero, Alicia García González, Domingo García Cámara* and *Carmen García Cámara v Venezuela* ordered the third-party funded claimants to post security for costs. While little is, as yet, known about this case, it is understood that the order was made on the basis of “exceptional” facts, namely that the TPF agreement provided that the funder would not be liable for any adverse costs relating to the arbitrations and the claimants had not satisfied the tribunal that they had the resources to pay an adverse costs order themselves. The claimants were ordered to post a US\$ 5 million bond as security for adverse costs. It has also been reported that the tribunal noted that, given the exceptional nature of the guarantee ordered and the fact that it was being conducted on a *prima facie* basis, if the claimants are successful in their claims, Venezuela should expect to be ordered to reimburse the reasonable expenses incurred by the claimants in obtaining their guarantee.<sup>37</sup>

The generally restrictive approach of tribunals to the grant of security for costs has prompted concern among some state parties to the ICSID Convention. In 2016, ICSID accepted a request from Panama that the ICSID Member States be consulted regarding “the subject of improved protection for respondent states against judgment-proof claimants”.<sup>38</sup> ICSID has sought to address these concerns through the inclusion, at Rule 51(3) of the proposed revised ICSID Rules, of a provision that “In determining whether to order a party to provide security for costs, the Tribunal shall consider the party’s ability to comply with an adverse decision on costs and any other relevant circumstances”.

Local courts have also considered the issue of security for costs orders in investor-state arbitrations involving TPF. In the recent case of *Progas Energy Limited and ors v Pakistan*,<sup>39</sup> the English High Court granted Pakistan’s request for security for their costs in defending a challenge to an investment treaty award. In this case, the claimants brought UNCITRAL arbitration proceedings against Pakistan pursuant to the Mauritius-Pakistan BIT in respect of their investment in an energy company. The tribunal rejected the claimants’ claims and made an award of costs in Pakistan’s favour. The claimants challenged the award under s68(2)(d) of the English Arbitration Act 1996. After an unsuccessful application for summary dismissal of the challenge, Pakistan applied for security for: (i) its costs in defending the challenge to the award; and (ii) the unpaid costs awarded to it by the tribunal. Throughout the arbitration proceedings and the s68 challenge, the claimants were in receipt of TPF.

The key question was whether the claimants had sufficient assets and whether those assets were available to meet any order for costs. The claimants had received two letters from the third-party funder confirming that it would satisfy an adverse costs order if the claimants failed to do so (up to the amount sought by Pakistan). The claimants argued that there were therefore assets available for execution if an adverse costs award was made against them so an order for security would not be appropriate. The claimants also argued that in the event of their non-payment of an adverse costs order, the court could make an order against the third-party funder directly under s51 of the Senior Courts Act 1981.

However, the English High Court found that the third-party funder had made **no legally enforceable commitment** to either the claimants or Pakistan to meet an adverse costs order in the challenge proceedings, and therefore Pakistan would not be able to obtain an order from the court requiring the third-party funder to pay. The English High Court also stated that it was not enough to defeat the application for assets to be merely “available” in the abstract: there

must be a legal entitlement to them. On the evidence, this was not the case. The English High Court also noted that, if the third-party funder was willing to meet an adverse costs order (as it purported to be in the two letters), it could furnish the claimants with the security to fulfil the order. At the same time, the English High Court rejected the contention that it would be an “unnecessary expense” for the third-party funder to provide security.

The English High Court ordered security of £400,000 (which was slightly less than the amount requested) based on a likely assessment of Pakistan’s projected recoverable legal costs for a two-day s68 hearing.

### Transparency and Conflicts of Interest

All of the above issues raise a fundamental concern: how far should a funded party be required to disclose the existence and terms of their funding? Proponents argue that such disclosure is needed for two reasons. Namely, in some circumstances, the presence of a funding arrangement may be a factor to be taken into account in deciding to grant security for costs. Furthermore, a number of funders have close relationships with leading arbitrators. For example, a well-known third-party funder has an Investment Advisory Panel comprised, *inter alia*, of individuals who also act as arbitrators.<sup>40</sup> For proponents of disclosure, these relationships create a risk of actual or apparent bias in cases where one of the party-appointed arbitrators has such a relationship with the funder of a claim. Tribunals have referred to the potential for conflicts of interest between arbitrators and third-party funders as a basis for ordering claimants to disclose whether they are being financed by third-party funders and, if so, to disclose their details. However, there is a risk of overstating these issues – based on publicly available material, no arbitrator has been dismissed for such a conflict.

Requiring such additional disclosure comes with a price: it provides material for recalcitrant respondents to mount frivolous challenge applications and unfounded and disruptive security for costs applications. Such applications in response to disclosure of a third-party funder could also be used to drive up the costs of litigation so as to make the funding untenable.

In considering the issue of mandatory disclosure, the Report of the ICCA-Queen Mary Task Force on Third-Party Funding (the “**ICCA Report**”) identified the following elements as particularly pertinent:

- (a) the existence of third-party funding or insurance in an international arbitral dispute can create the potential for an arbitrator conflict of interest with the funder or insurer;
- (b) knowledge of the existence and identity of a third-party funder or insurer in international arbitral disputes is essential for arbitrators to assess and make necessary disclosures of potential conflicts of interest;
- (c) disclosure of potential conflicts is important to avoid potential challenges to an arbitral award and to preserve the overall integrity of international arbitration;
- (d) TPF may be provided through a variety of structures such that it is difficult to isolate a single definition of third-party funding;
- (e) avoiding conflicts of interest is in the best interest of all parties and arbitrators, and is important for the legitimacy of international arbitration and the assured enforceability of arbitral awards; and
- (f) disclosure should strike an appropriate balance between providing adequate information for arbitrators, parties, institutions, and appointing authorities to assess potential conflicts of interest, and reducing the potential for unnecessary delay, frivolous challenges to arbitrators, or unfounded applications for disclosure of financial information and funding agreements.<sup>41</sup>

As third-party funders are not parties to the arbitration, they cannot be compelled by a tribunal to disclose their participation or the details of their participation. Disclosure is usually ordered on the parties instead.

Thus, the question becomes – where one assumes that disclosure should be required – whether in drafting rules the disclosure obligation should rest on the arbitrator or on the funded party. Here, the consensus is divided, which creates potential complications. Various possibilities arise. Among these possibilities, it may be that the arbitrator discloses, as part of the appointment process any professional relationship s/he may have with third-party funders, and any affected party declares the existence of funding at that time. Alternatively, a funded party may declare the existence of TPF to opposing parties and the tribunal alike, at which point any affected arbitrator makes the appropriate declaration. Similarly, a funded party may declare to the tribunal alone the existence of any TPF, and any affected arbitrator makes the appropriate declaration.

These issues have been the subject of increasing attention from rule makers and tribunals.

#### *The Rules and the Law*

In this vein, the IBA Guidelines on Conflicts of Interest (the “**IBA Guidelines**”) were revised in 2014 to provide that a third-party funder is the “*equivalent of a party*”.<sup>42</sup> As a result, under the IBA Guidelines, where an arbitrator serves as an adviser for a third-party funder, this would fall under the list of non-waivable conflicts of interest. This could be a significant hindrance for some third-party funders making large-scale use of leading arbitrators. The revised IBA Guidelines also introduced an obligation on arbitrators to disclose their relationships:

*“direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.”*<sup>43</sup>

This language was subsequently reflected by the ICC in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, which refers to disclosure by the arbitrators themselves, stating that they should consider disclosing “*relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award*”.<sup>44</sup>

However, on its own, these changes are insufficient to address the potential issue of arbitrator conflicts. If the arbitrators are unaware of a funding arrangement, then they cannot disclose their relationships with the funder. Rule makers therefore increasingly focus upon the disclosure obligations of the parties, with a number of recent or proposed changes:

- (a) in addition, SIAC’s Investment Arbitration Rules enable tribunals to order disclosure of third-party funding, and the identity of the funder.<sup>45</sup> Similarly, CIETAC’s new rules for investment arbitration state that parties receiving funding “*shall notify in writing, without delay*” the existence and nature of the funding and the funder;<sup>46</sup> and
- (b) interestingly, the provisional amendments to the ICSID Rules would place an obligation on a party receiving funding to declare this fact, so as to ensure that arbitrators are then able to declare any potential conflict of interest. This is likely to be a popular proposal among States, and less so with corporate parties and third-party funders. This proposed amendment raises the question whether it is preferable, assuming a disclosure obligation should exist, for the arbitrator to disclose relationships with funders with a funded party under an obligation to declare, or the reverse, where it is the funded party who discloses the existence of funding and for the arbitrator to then declare his or her relationship with the relevant funder.

#### *The Views of Tribunals*

Arbitral tribunals have also cited potential conflicts of interest as a factor warranting disclosure of third-party funding. In *Sehil v Turkmenistan*, the tribunal ordered disclosure of third-party funding for the following reasons:

- “a. To avoid a conflict of interest for the arbitrator as a result of the third party funder;
- b. For transparency and to identify the true party to the case;
- c. For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration;
- d. If there is an application for security for costs if requested; and
- e. To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives.”<sup>47</sup>

The concern about conflicts of interest was also justification for disclosure of the third-party funder in *South American Silver v Bolivia*.<sup>48</sup> When, in *Guaracachi v Bolivia*, the identity of the third-party funder became known, the arbitrators confirmed that they had no link with the funder.<sup>49</sup> Whilst no reported conflict of interest appears to have arisen between an arbitrator and a third-party funder in an investment-treaty arbitration, the issue has still been addressed, and it is likely only a matter of time before such potential (or appearance of) conflict is established.

Much in the vein that over-disclosure is better for maintaining the integrity of the arbitral process, certain investment-treaty arbitral tribunals have favoured disclosure. Thus, in *Sehil v Turkmenistan*, the tribunal considered that disclosure of third-party funding was necessary for “*ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder*”.<sup>50</sup> Similarly, the tribunal in *Eurogas v Slovakia* ordered the disclosure of the existence of the third-party funder “*for the purposes of transparency, and given the position of the Parties*”.<sup>51</sup> After all, justice must not only be done, it must be seen to be done.

Thus, in the view of the authors, it is usually advisable for a funded party – from the outset of funding – to disclose voluntarily the existence of TPF and the identity of its funder, as opposed to waiting for a tribunal order to that effect. Indeed, most funders will now be comfortable with such disclosure. However, with a single exception, the terms of a funding arrangement should remain confidential and should not be disclosed, and that sole exception is that where a credible application for security for costs is made, the tribunal may order disclosure of whether the funding agreement extends to providing adverse costs cover.

#### *What to Disclose*

If, as it seems, we are to evolve towards a policy of mandatory funding, inevitably the question which arises is exactly what should be disclosed. There is increasing agreement on the need for the funded party to disclose the fact of TPF and the identity of the funder, for the purpose of ensuring the lack of any conflicts of interest. Some have suggested that the key terms of the funding agreement should also be disclosed, especially in relation to whether the third-party funder has agreed to satisfy an order for security for costs or an adverse costs order from the tribunal.<sup>52</sup>

It has also been suggested that the funder’s rate of return in the event of a successful award should also be disclosed, so as to ascertain the extent of the funder’s involvement in the case.<sup>53</sup> The authors believe that this is unlikely to be pertinent in many instances and that the rate of return does not necessarily reveal the level of active involvement in the case from the funder. Rates of return are based on diverse and complex assessments of risk.



## Jurisdiction

The argument arises – although seemingly untested – that the transfer of an interest in the claim to a third-party funder may also affect the jurisdiction of arbitral tribunals. If the agreement between the claimant and the funder is deemed to constitute a *de jure* or *de facto* assignment of the claim or a portion thereof, the funder arguably becomes the real party in interest, which may jeopardise the tribunal’s jurisdiction *ratione personae*. This has particular significance in investment arbitration, where jurisdiction is conditioned upon nationality requirements.

The nature of the interest acquired by a third-party funder depends on the terms of the funding agreement. The agreement may expressly provide that the claimant assigns its claim to the third-party funder. For example, this is the practice in Germany, where funding agreements usually contain a provision under which the claimant assigns to the third-party funder its asserted claim against the respondent as well as any later claims arising against the respondent or any other party for compensation for costs, fees and expenses incurred as a result of the litigation.<sup>54</sup> It has been argued that the effect of such a provision is that the claimant no longer owns the claim and must file the lawsuit in its name only after the funder gives it authorisation to do so.<sup>55</sup>

Arguably, even where the funding agreement does not expressly assign the claim, the funder’s entitlement to receive a portion of any damages paid to the claimant may be deemed to constitute a *de facto* assignment. This is especially the case where the agreement also contains provisions that confer a significant degree of control or influence to the funder, such as the right to approve the filing of a claim, control the selection of the claimant’s counsel, decide on fact and expert witnesses, receive, review and approve counsel’s bills, veto settlement agreements, or buy the claim at some point in the future – although caution must be exercised as, in some jurisdictions, this could result in champerty, which is still not permissible, as for example under English law.<sup>56</sup>

In that vein, England set up a voluntary Code of Conduct for Litigation Funders in 2014, which provides that:

*“Litigation funding is where a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial litigation funder, who has no direct interest in the proceedings. In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money and nothing is owed by the litigant.”*<sup>57</sup>

A similar position has been adopted in Singapore. The High Court stated that:

*“Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give a maintainer a share in the proceeds or subject matter of the action.”*<sup>58</sup>

This was further clarified in Singapore’s Civil Law (Third-Party Funding) Regulations of 2017 which defines a third-party funder as an entity that “carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution to which the Third Party Funder is not a party” and “has a paid-up share capital of not less than S\$5 million or the equivalent amount in foreign currency in managed assets”.<sup>59</sup> Notably, this definition does not appear to capture those investment funds who occasionally fund litigation or enforcement proceedings.

In 2017, Hong Kong adopted long-awaited legislation expressly allowing third-party funding of arbitration and mediation. Amendments to the Hong Kong Arbitration Ordinance clarified that the common law doctrines of maintenance and champerty do not prohibit third-party funding of arbitrations seated in Hong Kong. Furthermore, the amendments extended the cover beyond arbitrations to include related court proceedings and proceedings before emergency arbitrators. These positions sit in stark contrast with Ireland’s decision that third-party funding is unlawful on the grounds of champerty.<sup>60</sup>

The question necessarily arises that if the TPF agreement is deemed to effect an assignment of the claim or a portion thereof, what consequences might it have on the jurisdiction of an investment arbitration tribunal?

In the context of investment treaty arbitration, a highly relevant principle is that the beneficial owner, rather than the nominal owner, of a claim is the proper party before an international tribunal.<sup>61</sup> This principle was recently applied by the *ad hoc* committee in *Occidental v Ecuador* when it partially annulled an investment arbitration award, finding that the tribunal “illicitly expanded the scope of its jurisdiction” by compensating the claimant for 100% of the investment, even though a third party was the beneficial owner of 40% of the investment.<sup>62</sup> The committee applied the “uncontroversial principle of international law” that “when legal title is split between a nominee and a beneficial owner...international law only grants standing and relief to the owner of the beneficial interest – not to the nominee”.<sup>63</sup> It explained that this reflected the “more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty”.<sup>64</sup> The committee added that “tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument”.<sup>65</sup>

There is an argument that the above principles may apply by analogy in the context of TPF. If a claimant is deemed to have expressly or *de facto* assigned its claim or a portion thereof to a funder, the claimant may be seen as the nominal owner and the funder as the beneficial owner, at least as regards the portion of the claim that has been assigned.<sup>66</sup> Under the principle discussed in *Occidental*, any award of damages would therefore have to exclude the portion that was transferred to the third-party funder.

A second important consideration is the principle in investment treaty arbitration that tribunals can only adjudicate the claims of investors having the nationality of one of the contracting parties to the treaty.<sup>67</sup> If a claim or portion thereof is deemed to be owned by the third-party funder, and the funder does not have the same nationality as the claimant investor (which is often the case), this raises serious doubts as to whether the claim meets the requisite nationality requirements.<sup>68</sup>

Significantly, the tribunal in *Teinver v Argentina* found that the alleged transfer of the claimants’ interest to a third-party funder that did not meet the nationality requirements could not affect its jurisdiction because it occurred after the case was initiated.<sup>69</sup> The same result may not have followed if the transfer had occurred prior to the initiation of the arbitration.<sup>70</sup> Moreover, the timing may not be relevant where what has been assigned is not just the investment but the claim itself.<sup>71</sup>

Furthermore, by way of analogy, in the UK, the exemption for liquidators allows the assignment of claims to other parties. This option has led to a rise in the practice of funders offering to buy claims arising in insolvency rather than fund the claims directly. The structure may involve an upfront purchase price (allowing an



immediate distribution to creditors), a deferred structure whether the funder pays a share of any amounts recovered to the insolvent estate, or a combined part upfront, part deferred payment structure.

Similarly, related to the purchase of claims is the market for the purchase/assignment of awards and judgments. This practice is permitted in most jurisdictions and pre-dates modern concepts of TPF. Many of the funds that operate in this space would not consider such opportunities. Like claims sales, the sale of awards can be structured in a number of different ways, from a simple upfront purchase price to a payment which is in whole or in part based upon the amount collected.

## Conclusion

In sum, TPF is most definitely set to stay, and can play a truly important role in the pursuit of strong and valid claims. Many third-party funders consider investor-state arbitrations to be a relatively reliable form of litigation funding investment, considering the outcomes to be more reliably predictable and the potential damages relatively straightforward to assess. TPF is evolving, funding arrangements are becoming more expansive, and are opening up to respondents. Some States are understandably concerned about this and are calling for greater transparency. Generally speaking, third-party funders do not object to this transparency, although there is resistance to the idea of disclosing all the exact details of a funding agreement. Tribunals must be wary of obstructive and abusive security for costs applications. With increasing voluntary and mandatory disclosure of TPF, we are likely to see a clear increase in such applications, although there is no reason to believe that we will see a clear increase in successful applications. For the moment, tribunals are likely to look beyond the existence of TPF and any impecuniosity, and look for 'bad behaviour' reasons for awarding security for costs.

## Endnotes

1. *RSM v St Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings dated 8 April 2015.
2. *RSM v St Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings dated 8 April 2015, paras 12–14.
3. Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p17.
4. Von Goeller, Third-Party Funding in International Arbitration and its impact on Procedure, pp.48–49, as per Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p23.
5. For example, in *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, the Tobacco Free Kids Foundation provided funding to Uruguay to assist its defence of its tobacco control laws.
6. See *Quasar de Valores SICAV S.A v The Russian Federation* (SCC Case No. 24/2007).
7. See *RSM v Grenada* ICSID Case No. ARB/10/6, in which Grenada was seemingly funded by a third party that had a competing interest in the oil exploration rights that would have been awarded to RSM had RSM succeeded.
8. L. Bench Nieuwveld V. Shannon Sahani, 'Third Party Funding in International Arbitration', 2<sup>nd</sup> edn. (Kluwer 2017), p11, as per Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p19.
9. Von Goeller, Third-Party Funding in International Arbitration and its impact on Procedure, pp.48–49, as per Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p23.
10. Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, p50.
11. Article (1) of Section (3) of the European Union's Proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership, dated 12 November 2015.
12. Article (2) of Chapter 8 of the draft EU-Vietnam Free Trade Agreement, January 2016 ("*Third Party funding means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant*"). See Draft French Model BIT (2006) ("*third party funder means any natural or legal person other than the disputing party who supports part or all of the costs of the arbitration in return for remuneration as a percentage of the compensation awarded by the tribunal entrusted to settle a dispute between an investor and the recipient host state of the investment of the investor*").
13. Commission TTIP Draft Text – Investment, September 2015 ([http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)).
14. Proposals for Amendment of the ICSID Rules – Working Paper, Rule 21, p129.
15. Third-party funders are known to have withdrawn funding in a number of cases, including *S&T Oil Equipment & Manufacturing Ltd v Romania* (ICSID Case No. ARB/07/13) and *Ambiente Ufficio S.p.A. & ors v Argentine Republic* (ICSID Case No. ARB/08/9).
16. See, e.g., Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted To Know (But Were Afraid To Ask): Part 1', 1 International Business Law Journal 53 (2012), para 59.
17. Article 38(1) SCC Arbitration Rules: "*The Arbitral Tribunal may, in exceptional circumstances and at the request of a party, order any Claimant or Counter-Claimant to provide security for costs in any manner the Arbitral Tribunal deems appropriate*".
18. Proposals for Amendment of the ICSID Rules, Rule 51.
19. ICSID Arbitration Rule 39.
20. Article 26(2)(c) 2010 UNCITRAL Rules.
21. *Libananco v Republic of Turkey*, (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, para. 57 (emphasis added).
22. *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v Republic of El Salvador*, (ICSID Case No. ARB/09/17 (Annulment Proceeding)), Decision on El Salvador's Application for Security for Costs, para. 45 (emphasis added).
23. *Guaracachi v Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, para. 6 (emphasis added).
24. *South American Silver Limited v the Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, para. 59 (emphasis added).
25. *Emilio Agustín Maffezini v Kingdom of Spain*, (ICSID Case No. ARB/97/7), Procedural Order No. 2 (28 October 1999), para. 21.
26. *Victor Pey Casado and President Allende Foundation v Republic of Chile*, (ICSID Case No. ARB/98/2), Decision on Provisional Measures (25 September 2001), para. 89.
27. *BSG Resources Limited v Republic of Guinea*, (ICSID Case No. ARB/14/22), Procedural Order No. 3 (25 November 2015), para. 78.
28. *Burimi S.R.L. and Eagle Games S.H.A. v Republic of Albania*, (ICSID Case No. ARB/11/18), Procedural Order No. 2 (3 May 2012), para. 41.

29. *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v Republic of El Salvador*, (ICSID Case No. ARB/09/17), Annulment Proceeding, Decision on El Salvador's Application for Security for Costs (20 September 2012), para. 49.
30. *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3 dated 23 June 2015, paras 121 and 123.
31. *Guaracachi v Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14 dated 11 March 2013, para. 7.
32. *SAS v Bolivia*, Procedural Order No. 10 dated 11 January 2016, paras 77–78.
33. *South American Silver Limited v Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 66; see also Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding Created by Third-Party Funding', *Journal of International Arbitration*, p142 (2016) 33 J. Int. Arb. 2.
34. *RSM v St Lucia*, para. 83.
35. *RSM v St Lucia*, para. 85.
36. *RSM v St Lucia*, Assenting Reasons of Gavin Griffith dated 12 August 2014, para. 14.
37. 'Funded BIT claimants ordered to pay security', GAR, 6 August 2018.
38. ICSID News Release, '50<sup>th</sup> Annual Meeting of ICSID's Administrative Council' (7 October 2016) available at <https://icsid.worldbank.org/en/Pages/News.aspx?CID=196>; Memorandum from Panama's Ministry of Economy and Finance to ICSID (12 September 2016) available at [http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop\\_memorandum\\_to\\_icsid\\_administrative\\_council\\_re\\_effective\\_protection\\_english\\_version\\_2\\_219116\\_1641.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1477064514/rop_memorandum_to_icsid_administrative_council_re_effective_protection_english_version_2_219116_1641.pdf); Tom Jones, 'ICSID to Explore Protections against "Judgment-Proof Claimants"', *Global Arbitration Review* (21 October 2016) available at <http://globalarbitrationreview.com>.
39. *Progas Energy v Islamic Republic of Pakistan* [2018] EWHC 209 (Comm).
40. See Woodsford Litigation Funding, 'About Us', available at <http://woodsfordlitigationfunding.com>.
41. Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, pp82–83.
42. IBA Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014, General Standard 6(b), p13 and Explanation to General Standard 6(b), pp14–15.
43. IBA Guidelines on Conflicts of Interest in International Arbitration, adopted on 23 October 2014, General Standard 6(b), p13 and Explanation to General Standard 6(b), pp14–15.
44. ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration dated 1 March 2017, para. 24.
45. Singapore International Arbitration Centre Investment Arbitration Rules, Rule 24(1).
46. CIETAC Arbitration Rules, Article 27.
47. *Sehil v Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 paras 1 and 9.
48. *SAS v Bolivia*, UNCITRAL, PCA Case No. 2013-15 Procedural Order No. 10 dated 11 January 2016, para. 79.
49. *Guaracachi v Bolivia*, UNCITRAL, PCA Case No. 2011-17 Procedural Order No. 13 dated 21 February 2013, para. 9.
50. *Sehil v Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 paras 9–12.
51. *Sehil v Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 dated 12 June 2015 paras 79, 80 and 84.
52. Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding Created by Third-Party Funding', *Journal of International Arbitration*, p138 (2016) 33 J. Int. Arb. 2.
53. Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding Created by Third-Party Funding', *Journal of International Arbitration*, p138 (2016) 33 J. Int. Arb. 2.
54. Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration* (Kluwer Law International 2012), page 166 (quoting Michael Coester and Nitzche Dagobert, 'Alternative Ways to Finance a Lawsuit in Germany', 24 *Civil Justice Quarterly* 49 (2005)).
55. Victoria Shannon and Lisa Bench Nieuwveld, *Third-Party Funding in International Arbitration* (Kluwer Law International 2012), p166 (quoting Michael Coester and Nitzche Dagobert, 'Alternative Ways to Finance a Lawsuit in Germany', 24 *Civil Justice Quarterly* 49 (2005)).
56. Aren Goldsmith and Lorenzo Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part Two', 2 *International Business Law Journal* 221 (2012) (Goldsmith and Melchionda, 'Part Two'), p228; Philippe Pinsolle, 'Comment on Third-Party Funding and Nationality Issues in Investment Arbitration', in *Yearbook on International Investment Law & Policy 2010–2011* (Karl P Sauvant ed., Oxford University Press 2012) (Pinsolle, 'Third-Party Funding and Nationality'), p646.
57. See Association of Litigation Funders, definition available at: <http://associationoflitigationfunders.com/litigation-finance>.
58. *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2012] 4 SLR 597, para. 33.
59. Section 2 of the Civil Law (Amendment) Act 2017 to amend the Civil Law Act (Chapter 43 of the 1999 Revised Edition) and to make a related amendment to the Legal Profession Act (Chapter 161 of the 2009 Revised Edition), passed 10 January 2017 and assented by the President on 3 February 2017. S\$5 million represents approximately US\$3,655,000, £2,600,000, and €3,200,000 as at 6 August 2018.
60. *Persona Digital Telephony Ltd & ors v The Minister for Public Enterprise & ors* [2017] IESC 27].
61. David J Bederman, 'Beneficial Ownership of International Claims', 38 *International and Comparative Law Quarterly* 935 (1989), p936.
62. *Occidental v Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award dated 2 November 2015, paras 266 and 268.
63. *Occidental v Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award dated 2 November 2015, para. 268.
64. *Occidental v Ecuador*, Decision on Annulment of the Award dated 2 November 2015, para. 262.
65. *Occidental v Ecuador*, Dissenting Opinion of Brigitte Stern dated 20 September 2012, paras 138 and 140.
66. See, e.g., Goldsmith and Melchionda, 'Part Two', pp229–231 ("Whatever the basis for finding an assignment (i.e., whether de facto or de jure), where a funder has acquired rights through assignment, it will arguably be necessary to assess the potential impact of the assignment, both upon jurisdiction and the admissibility. In relation to jurisdiction, where an assignment has been qualified, it would be worthwhile to consider whether a valid jurisdictional basis, *ratione personae*, exists to support the arbitration of any claim (or fractional interest in a claim) deemed to have been assigned to the funder.... Depending upon the terms of the funding employed, TPF may raise issues in respect of the identity of the real party in interest behind the claim, which may in turn have an impact on jurisdiction and admissibility").

67. See, e.g., Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009), p285.
68. See, e.g., Goldsmith and Melchionda, 'Part Two', p232 ("If we assume that the relevant nationality is that of the real party in interest – the real investor – and not that of the party that appears as such, in cases involving a *de jure* or *de facto* assignment of claims to a funder having a different nationality from the investor, it could be argued that neither the funder nor the original investor has standing to bring a claim. The investor, although a national of the contracting State, would no longer be the real party in interest. The funder, as the new owner of the claim, would not fulfil the nationality requirement. Therefore, if a protected investor assigns its treaty claims to a funder that does not have the requisite nationality – leaving aside the issue of the assignability of treaty claims – a risk may exist that the funder could find itself unable to enforce the claim").
69. *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction dated 21 December 2012, para. 256. See also Pinsolle, 'Third-Party Funding and Nationality', page 647 ("[I]f the assignment has taken place after the initiation of the arbitration, and absent any other circumstances such as fraud, there is in principle no issue of nationality, and no objection can be raised by the respondent on that basis").
70. See, e.g., Pinsolle, 'Third-Party Funding and Nationality', page 647 ("[I]f the assignment has taken place before the initiation of the arbitration, there may be an issue of nationality depending on the nationality of the third party").
71. See, e.g., *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 April 2006, para. 135.

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# Arbitration of Corruption Allegations

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A primary goal of the investor-state arbitration regime is to encourage development by providing investors recourse to a neutral forum for resolving disputes concerning lawfully made investments, separate and independent from the host state's judiciary. At the same time, in some countries where such investments are made, corruption may occur. Thus, it is occasionally contested whether an investment that is the subject of an international dispute has been tainted with corruption. In such cases, a host state could face claims for tens or hundreds of millions of dollars due to alleged violations of investment treaty protections. In recent years, it has become apparent that corruption in the making of an investment can serve as a complete bar to recovery by the claimant. This development has been accompanied by an evolution regarding the burden of proof and the standard of proof in corruption cases. In other words, such corruption may serve to completely immunise the state from liability for violations of treaty protections. As such, allegations of corruption have proliferated as a result of state parties raising a so-called "corruption defence" to the admissibility of the investors' claims and the tribunal's jurisdiction.

## 1 International Policy Toward Corruption

Generally speaking, corruption is "the abuse of entrusted power for private gain".<sup>i</sup> That umbrella encompasses many types of conduct. Although many variations of alleged corruption arise in the international arbitration context, it is the alleged bribery of public officials that has garnered the most attention.

The international legal community strongly condemns corruption, which has a host of ill-effects on the societies in which it occurs. Corruption, and in particular bribery of public officials, redistributes assets so that resources are diverted into the personal pockets of those in power. Projects tainted by corruption may be of subpar quality and a country's citizens may have to cope with lower-quality infrastructure than would have been implemented in a fair tender. Certain externalities are inevitable, such as environmental degradation or excessive offshoring of profits and resources.

Thus, Judge Lagergren concluded in an oft-quoted passage from the 1963 arbitral award in ICC Case no. 1110 that bribery "is an international evil; it is contrary to good morals and to an international public policy common to the community of nations". Parties engaged in such conduct have thus "forfeited any right to ask for assistance of the machinery of justice...in settling their disputes".<sup>ii</sup>

The bribery of foreign public officials is today proscribed by multilateral treaties and national laws. Among these treaties are the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"); the

United Nations Convention Against Corruption; and the Council of Europe Civil Law Convention on Corruption. Among national laws forbidding corruption, perhaps the most well-known are the Foreign Corrupt Practices Act in the United States and the UK Bribery Act, but a host of other national laws exist in various jurisdictions, mainly as a result of the incorporation into domestic legislation of the obligations undertaken by states that are signatories to the treaties mentioned above. In addition, other domestic laws, such as civil and commercial codes, often contain provisions providing for the nullity of agreements procured by corrupt activities.

## 2 Legal Consequences of Corruption

The 2006 award in the ICSID case *World Duty Free v. Kenya* marked the first time a respondent state successfully rebuffed an investor's claims by showing that it had corruptly procured its investment.<sup>iii</sup> There, the tribunal concluded that the claimant had paid a USD 2 million cash bribe to the President of Kenya to obtain its investment in duty-free stores. Since then, parties have raised corruption allegations in dozens of investor-state cases.

These cases have established unanimously that corruption may bar recovery by an investor. However, they demonstrate different avenues of legal reasoning to reach the same conclusion.

*Firstly*, tribunals have held that corruption may invalidate a respondent state's consent to arbitration as embodied in an investment treaty. Investment treaties frequently contain provisions indicating that consent to arbitration extends only to investments made "in accordance with the law" of the host state (the Energy Charter Treaty is a notable exception). Tribunals have disallowed claims on the basis that corruptly made investments violate legality provisions under applicable law or treaty. Such provisions generally require that an investment must be made in accordance with the host state's law in order to qualify for investment protections.

For example, in *Fraport v. Philippines*, which dealt with allegations of fraud on the part of the investor (and so not technically a corruption case), the tribunal found that the claimant had intentionally circumvented the host state's "anti-dummy" law by way of secret shareholding agreements.<sup>iv</sup> The tribunal therefore lacked jurisdiction because Fraport did not make its investment in accordance with the law.

*Secondly*, where there is no such legality requirement, tribunals have invoked transnational public policy as a basis for disallowing claims tainted by corruption. In *World Duty Free v. Kenya*, which arose from an investment contract rather than a treaty, the contract contained no explicit legality requirement.<sup>v</sup> Accordingly, the tribunal held that the claimant's payment of a bribe violated the



transnational public policy against corruption and that it therefore deprived the tribunal of jurisdiction to hear the dispute.<sup>vi</sup>

However, a finding of corruption is not necessarily outcome-determinative. *Niko Resources v. Bangladesh* charted a different path: if the act of bribery fails to procure an investment contract, a tribunal may still uphold jurisdiction.<sup>vii</sup>

There, the claimant gave the respondent's minister of energy and mineral resources a Toyota Land Cruiser worth CAD 190,000 and invited him to attend a conference in Calgary for which it paid CAD 5,000 of his "non-business-related" expenses. Notwithstanding the tribunal's findings on corruption, it also found that the bribes had not affected the outcome of the two contracts at issue, as one was signed two years before the bribe took place and the second was concluded after the resignation of the minister. Thus, the *Niko* tribunal upheld jurisdiction despite a finding of corruption because the corruption did not succeed in procuring the investment contract.

A tribunal may also reject corruption allegations if it is not clear (i) who the intended beneficiary of the bribe was, or (ii) whether that beneficiary was considered a government official at the time. In *Kim v. Uzbekistan*, the failure to prove that the payments were made to an Uzbek official was one of the key reasons for not upholding the bribery objection. It was established by the tribunal that a bribe had been paid to the Uzbek President's daughter, but it was not clear that she was an Uzbek government official at the relevant time.<sup>viii</sup> To the contrary, both *Spentex* and *Metal Tech* upheld corruption allegations even though no bribed official was identified.

Claimants have also levelled allegations of corruption against host states. In *EDF v. Romania*, the claimant alleged that host state officials had attempted to solicit or extort bribes. However, the state was not held accountable for the alleged bribe solicitation.<sup>ix</sup> The tribunal concluded that in order to trigger the host state's liability, the claimant would need to demonstrate that the solicitation was made "not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect".

### 3 Evaluating Evidence of Corruption

#### 3.1 Burden of Proof

The default position *vis-à-vis* corruption allegations, as with other claims and defences generally, is that each party must prove the facts on which it wishes to rely. Thus, it is widely acknowledged that a party alleging corruption as an objection to jurisdiction or admissibility bears the burden of proving the allegedly corrupt conduct.

The question sometimes arises, however, as to whether it is permissible to shift that burden to the opposing party upon a *prima facie* showing of corruption. According to the *Metal Tech* tribunal, whether it is permissible to do so depends on the law governing the dispute:

Here, the question is whether for allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption.<sup>x</sup>

Ultimately, the tribunal drew "inferences" from the claimant's failure to substantiate the payments made to Uzbek consultants, but it did not formally shift the burden of proof to the claimant.

Rather, the evidence was sufficient to establish corruption "with reasonable certainty":

As in *World Duty Free*, the present factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence of the nature and purpose of such payments.<sup>xi</sup>

In *Karkey v. Pakistan*, the tribunal confirmed that the burden of proof rested on the party asserting corruption; however, that burden could shift in the presence of "unequivocal (or unambiguous) *prima facie* evidence".<sup>xii</sup> There, the respondent accused a Turkish investor of corruption for hiring a politically-connected representative. Ultimately, the tribunal declined to shift the burden as the evidence presented by the respondent did not rise to the level sufficient to justify such a shift in the standard of proof.

Apart from the question of which party has the burden of proving corruption, there is an important question as to the standard of proof that must be satisfied to meet that burden. The standard of proof is a question of the amount of evidence needed to make out the allegation. Tribunals evaluating corruption allegations have reached divergent conclusions regarding the appropriate standard of proof for corruption allegations.

On the one hand, most tribunals have applied a heightened standard of proof to corruption allegations. This is due largely to the severity of such allegations, which may entail loss of claim, reputational harm, and even criminal prosecution. According to the *ECE Projektmanagement v. Czech Republic* tribunal, corruption allegations, if true, inevitably involve individual criminal liability and "implicate the reputation, commercial and legal interests" of business ventures, often including undertakings and individuals who are neither party to nor represented in the proceedings.<sup>xiii</sup>

As articulated by several tribunals, "the graver the charge, the more confidence must there be in the evidence relied on".<sup>xiv</sup> As such, tribunals have demanded "clear and convincing" proof,<sup>xv</sup> a high standard of proof,<sup>xvi</sup> near certainty,<sup>xvii</sup> irrefutable proof,<sup>xviii</sup> or proof beyond a reasonable doubt.<sup>xix</sup>

The presumption of good faith is another reason tribunals may require more convincing evidence for corruption allegations. According to the tribunal in *Croatia v. MOL*, "the presumption of good faith means that the starting point is, in effect, a presumed preponderance against the claim".<sup>xx</sup> Put differently, even if an allegation of fraud or other serious wrongdoing did not require a heightened standard of proof, it might "require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged".<sup>xxi</sup>

On the other hand, some tribunals have evaluated corruption allegations according to the same standard of proof applicable to other claims. This is generally referred to as the "balance of probabilities" or "preponderance of evidence" standard. These tribunals (and commentators) reason that this standard is appropriate because corruption is notoriously difficult to prove, intended to be concealed. Moreover, they argue, corruption is not meaningfully different from other kinds of allegations, which require proof only on the balance of probabilities. This was the position taken in *Tokios Tokelés v. Ukraine* as well as in *Churchill Mining v. Indonesia*.

A third category of cases has declined to articulate a precise standard but has evaluated corruption allegations on the basis of "reasonable certainty". *Metal-Tech* was one such case; the *Croatia v. MOL* tribunal followed the same approach. In the latter case, Croatia was the claimant, marking the first time a state had used corruption allegations as a "sword" as opposed to a "shield". It sought to nullify contracts with the investor on the basis that the contracts had been obtained by a bribe paid by the investor's CEO

to the state's prime minister. The tribunal applied a "reasonable certainty" standard and rejected the bribery allegation, finding the state's key witness to be thoroughly unreliable.

Thus, even those tribunals that have eschewed "specific levels of proof or of rebuttal in respect of particular factual allegations" have emphasised that adjudicators confronting allegations of bad faith, fraud, or corruption may well "be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence—as opposed to pure probabilities or circumstantial inferences".<sup>xxii</sup>

In assessing the appropriate standard of proof, local law is a relevant consideration. According to the tribunal in *Kim v. Uzbekistan*, where the allegation is that the alleged act violated a provision of a particular host state's law, the standard and burden of proof to be employed is that provided for in that law.

### 3.2 Inferences and "Red Flags"

Although arbitral tribunals lack the police powers available to domestic investigators and prosecutors, they do have a number of fact-finding tools at their disposal in order to evaluate corruption allegations. First, tribunals may draw adverse inferences from non-production of evidence. Second, tribunals may draw conclusions from circumstantial evidence. One formulation of this approach relies on identifying and assembling recognised *indicia* of corruption sometimes called "red flags". Another formulation seeks to connect "dots" to draw a complete picture.

The adverse inference is among the most powerful tools in the arbitrator's toolbox. The threat of adverse inferences incentivises parties to produce evidence and can aid a party in satisfying its burden of proof. However, it is hotly contested when precisely it may be appropriate to deploy this tool.

The *Metal-Tech* tribunal relied on recognised *indicia* of corrupt activity, coupled with adverse inferences, to establish corruption through circumstantial evidence. There, the respondent first raised corruption allegations with its rejoinder, indicating that Uzbek authorities were investigating allegations of bribery against the claimant. At the evidentiary hearing, the claimant's CEO admitted on examination that the company had paid approximately USD 4 million to several consultants in connection with its purported investment. The tribunal requested the claimant provide documentation regarding the reasons for those payments, but the claimant was unable to provide it. Thus, the tribunal inferred that the evidence was either non-existent or adverse to the claimant.

It may also be possible for the tribunal to draw conclusions from circumstantial evidence, looking to "red flags" or "connecting the dots". Relying on circumstantial evidence may allow a tribunal to overcome the deficits of evidence that sometimes occur in corruption cases, but at the risk of finding corruption where there is none.

The *Metal-Tech* tribunal is also a notable example of a tribunal that based its conclusions on circumstantial evidence. Its adverse inferences coupled with numerous "red flags" were enough, in the view of that tribunal, to support a conclusion that the USD 4 million paid to the consultants had constituted a bribe by which Metal-Tech procured its investment in Uzbekistan. Although noting this was only one of several such lists, the tribunal relied upon a list of "red flags" authored by Lord Woolf, former Chief Justice of England and Wales:

"(1) an Adviser has a lack of experience in the sector; (2) non-residence of an Adviser in the country where the customer or the project is located; (3) no significant business presence of the Adviser within the country; (4) an Adviser requests urgent payments or unusually high commissions; (5) an Adviser

requests payments be made in cash, use of a corporate vehicle such as equity, or be paid in a third country to a numbered bank account, or to some other person or entity; (6) an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision."<sup>xxiii</sup>

Other tribunals have reasoned that tribunals may be empowered to "connect the dots", or to draw inferences based on available evidence. In *Methanex v. United States*, the claimant argued that the evidence gave rise to certain inferences; it requested that the Tribunal infer "malign intent" by connecting certain "dots" that arose from the available evidence. The tribunal rejected the claimant's request because the "dots" it chose presented a "self-serving" selection and interpretation of events:

"[I]t is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened..."<sup>xxiv</sup>

In *ECE v. Czech Republic*, the Tribunal rejected the notion that generalised allegations regarding a climate of corruption in a host state can support a finding of bribery. Rather, the evidence must be particularised and must rise to more than mere insinuations. Further, the tribunal acknowledged that while "connect[ing] the dots" may sometimes be necessary in light of the covert nature of corruption, the serious nature and consequences of such allegations requires that they be established either by direct evidence or "compelling circumstantial evidence.... The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof".

By contrast, it has been reported that the tribunal in *Spentex v. Uzbekistan* (in a still-unpublished award) adopted a "connect-the-dots" approach of the sort advocated by the claimant in *Methanex*. There, the tribunal held that an eleventh-hour payment of USD 6 million to consultants made on the eve of the public tender gave rise to a presumption that the funds were intended as a bribe for public officials, even though the parties had not identified a particular recipient of the alleged bribe.<sup>xxv</sup>

Although unlike "red flags", the "dots" to be assembled according to this approach can signal illicit or innocent conduct, in practice, it is unclear whether there is any appreciable difference between this "connect-the-dots" methodology and the technique of assembling "red flags".

### 3.3 Arbitrators' Duty To Inquire

While arbitral practice has not been entirely consistent, some believe that where genuine suspicions of corruption arise (beyond baseless allegations), arbitrators have a duty *ex officio* to investigate. An investigation may be needed in order to protect the enforceability of an eventual award, and from an obligation to the public of the host state and the international community. *Metal-Tech*, as described previously, is the marquee example of this exercise of arbitral authority.

In *Spentex*, the tribunal reprimanded the respondent for failing to cooperate in the tribunal's fact finding. The respondent had declined to provide the tribunal with the names of officials who may have been involved in the corruption that the respondent was alleging had occurred. The tribunal, suggesting that it has an apparent duty to investigate, chastised the respondent for its failure to cooperate.

#### 4 Future Directions in Addressing Corruption

There remain lingering concerns regarding the bluntness of available remedies when corruption is found. The fact that a finding of corruption often allows states to avoid liability entirely based on their own officials' bad conduct raises questions of state responsibility for its own conduct as well as fairness to investors. Some commentators have called for a remedy for findings of corruption in the form of an obligation on the part of states to prosecute state officials who are identified as having been involved in corruption. They argue that there should be a cost to alleging corruption and that requiring prosecution may avoid corruption allegations that are made-for-arbitration claims with no basis in reality.<sup>xxvi</sup>

Cases like *World Duty Free* highlight that the state may invoke the corrupt actions of its officials in order to avoid liability for acts that may otherwise constitute breaches of investment treaty protections. This can lead to perverse situations in which, rather than triggering the state's liability under international law, a state official's illicit act serves to immunise the state from such liability. State parties that have failed to conduct a *bona fide* investigation of the allegations of corruption, will also face an uphill task in discharging their burden.

In particular, concerns of fairness arise because of the dual role of the official, acting both officially and illicitly, implicated in the allegations of corruption that the state lodges as a defence in arbitration. The state's defence indeed depends on disclaiming the action of the official in accepting a bribe, even though he or she will have generally been exercising a measure of discretion by virtue of his or her official position. If a tribunal did consider the official's conduct to be that of the state, it could conceivably invoke either the common-law rule of estoppel or the doctrine of contributory fault to prevent the state from asserting the defence.

One interesting approach recently adopted by the *Spentex* tribunal "urged" the respondent to make a substantial donation (USD 8 million) to a United Nations anti-corruption fund. The tribunal warned that Uzbekistan's failure to make such a payment would lead to an adverse cost order in the case, with the government held liable for the costs of the proceedings, as well as reimbursing the claimant for 75% of more than USD 17 million in legal fees and expenses. (Conversely, if Uzbekistan made the contribution, it would bear only its own legal costs, and half the cost of the proceedings.) The *Spentex* tribunal's approach is an example of a unique way of dealing with corruption allegations that also takes into consideration the respondent state's involvement in the corruption.

In conclusion, arbitral jurisprudence makes clear that the applicable principles are still in flux. It is now acknowledged that corruption can serve as a bar to recovery, but the reasoning behind this conclusion has varied. As corruption allegations are invoked more and more frequently, tribunals will likely refine the way in which they address, analyse, and provide remedies for these defences.

#### Endnotes

- i. Transparency International, *What is Corruption*, available at <https://www.transparency.org/what-is-corruption> (last accessed on 27 Sept. 2018).
- ii. ICC Case No. 1110, Final Award (1963), reprinted in 21 Y.B. Comm. Arb. 52, ¶¶ 20, 23.
- iii. *World Duty Free Company v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award (4 Oct. 2006).

- iv. *Fraport AG Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug. 2007).
- v. The underlying contract was governed by English law, which provides that contracts procured by an illegality are voidable at the election of an innocent party. Contracts procured by an illegality are not automatically void and unenforceable. See *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd*, [2016] EWHC (Comm) 510.
- vi. Most tribunals treat allegations of corruption as an issue of jurisdiction when it is alleged that the corruption induced the investment and the underlying agreement dictates that an investment must be made legally, and as an issue of admissibility when the corruption arises after the agreement has been procured and executed.
- vii. *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction (19 Aug. 2013).
- viii. *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 Mar. 2017), pp. 122–123, 126.
- ix. *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2008).
- x. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013), ¶ 238.
- xi. *Id.*, ¶ 243.
- xii. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 Aug. 2017).
- xiii. *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010–5, Award (19 Sept. 2013), ¶ 4.876.
- xiv. See *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011), ¶ 125; *Rompotrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013), ¶ 182 (both relying on the Separate Opinion of Judge Higgins in *Oil Platforms (Islamic Republic of Iran v. United States)*, *Judgments*, 1996 I.C.J. Reports (12 Dec.), p.856).
- xv. See, e.g., *Getma Int'l v. Republic of Guinea*, ICSID Case No. ARB/11/29, Award (16 Aug. 2016), ¶ 184 ("[This Arbitration Court] will verify whether the evidence submitted by the Defendant is clear and convincing and whether it can provide this Court with reasonable certainty that the Concession Agreement was obtained by the active corruption of Getma International."); *Metal-Tech*, ¶ 237 ("Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty.").
- xvi. See, e.g., *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 Jun. 2010), ¶ 422; *ICC Case No. 13384*, Final Award (2005) ¶¶ 67, 71; *ICC Case No. 4145*, Interim Award (1983), ¶ 28 ("high probability").
- xvii. See, e.g., *ICC Case No. 14470*, Award (2008) ("more than likely or almost certain"); *ICC Case No. 12472*, Final Award (2004), ¶ 95 ("certainty").
- xviii. See, e.g., *African Holding Co. of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République Démocratique du Congo*, ICSID Case No. ARB/05/21, Award on Admissibility (20 Jul. 2008), ¶ 52 ("irrefutable proof").
- xix. See, e.g., *Oil Field of Texas, Inc. v. Gov't of the Islamic Republic of Iran and National Iranian Oil Co. (NIOC)*, Award No. 258-43-1 (8 Oct. 1986), 12 IRAN-U.S. CL. TRIB. REP. 308 (1986), ¶ 25.



- xx. *Republic of Croatia v. MOL Hungarian Oil and Gas Plc*, PCA Case No. 2014–15, Award (23 Dec. 2015), ¶ 118.
- xxi. *Rompetrol*, ¶ 182 (citing *Libananco*, ¶ 125).
- xxii. *Id.*
- xxiii. *Metal-Tech*, ¶ 293 (citing Woolf Committee Report on Business Ethics, *Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc* (2008) 25–26).
- xxiv. *Methanex v. United States*, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award (7 Aug. 2005).
- xxv. *Spentex Netherlands B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Final Award (27 Dec. 2016).
- xxvi. In *World Duty Free*, the bribe recipient was identified as the president of the state. He was not prosecuted, and his receipt of the bribe nonetheless immunised the state from the investor's claims. This struck many commentators as unfair. In contrast, in *Croatia v. MOL*, the state did prosecute the alleged bribe recipient – its former prime minister – but the conviction was overturned by the state's constitutional court for violation of the right to a fair trial. The tribunal found that the evidence underlying that conviction was insufficient to meet any applicable standard of proof.

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# Substantive Protections in Investment Law

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### Introduction

Investment treaty arbitration is a relatively new but rapidly expanding forum for the resolution of international disputes. It allows investors that do business in foreign countries to seek recourse against the governments of those countries for serious interference with their businesses. The operative legal instrument creating this remedy is an investment protection treaty, if one exists, ratified by the home State of the investor and the host State of the investment. Investment protection treaties set out the substantive protections that are available to qualifying investors. They also allow investors to refer their claims against the host State government to international arbitration. While the precise scope of the protection available to an individual investor depends on the language of the specific treaty, some basic commonalities can be discerned from the general body of jurisprudence in this area. This note offers a primer on key investment protections available in investment treaty law.

### Expropriation

At its core, expropriation is the taking of private property by a government acting in its sovereign capacity. The basis of this legal claim is the taking itself, as opposed to the reasons for the taking. Whether or not an investment is expropriated for the benefit of the State, whether it is destroyed (rather than taken), or whether the taking was intentional, is of little consequence. The threshold question is whether the subject government measure deprives an affected investor of all meaningful benefits or of its rights in the investment.

Expropriation can take the form of either a direct taking or indirect taking. While direct expropriation covers outright seizures, indirect expropriation encompasses acts that, without divesting the investor of its formal property rights, affect its control or enjoyment of the investment. Indirect expropriations can be effected through a wide range of governmental actions. For example, indirect expropriations can take the form of the following: (a) interference with business operations of the investment in the host State (*CME v. Czech Republic*); (b) interference with the management of the investment in the host State (*Biloune v. Ghana*); (c) intervention with the investor's marketing of its products through fixing of sales prices (*Benvenuti v. Congo*); and (d) revocation or denial of government permits necessary for the company's business (*Middle East Cement v. Egypt*). Expropriation provisions in many bilateral investment treaties also encompass measures that are "tantamount to" or "equivalent to" expropriation. Tribunals are not uniform in their views as to the precise import of those terms. Some tribunals have

held that they expand the scope of the protection (*Waste Management v. Mexico*) and others have found that they merely represent another way of referring to indirect expropriation (*Pope & Talbot v. Canada*). Ultimately, however, the meaning of these words will depend, and is to be interpreted, in the context of a specific treaty.

To constitute expropriation, the deprivation of an investor's rights to use or enjoy the benefits of its property must be: (a) substantial (rather than ephemeral); and (b) of a permanent nature (rather than temporary). To meet the "substantial" requirement, an expropriation must be of a certain magnitude, degree and intensity. Tribunals have found that substantial deprivation has occurred where: (a) the investor's control over the use and operation of the investment was no longer effective; (b) the *raison d'être* of the investment was undermined; or (c) the investor's rights were rendered so useless that they must be deemed to have been expropriated. Where the interference is not sufficiently substantial, a claim for expropriation will not stand. In *Glamis Gold v. United States*, for example, Glamis Gold maintained that the United States had expropriated its gold mining rights through a series of federal and local government measures designed to protect Native American lands. Key to the tribunal's dismissal of the expropriation claim was its analysis of whether Glamis Gold's mining rights had lost its economic value. The tribunal found that Glamis Gold's project retained a value in excess of \$20 million (out of the alleged \$49.1 million prior to the relevant measures), and thus the complained-of measures did not cause a sufficient economic impact to effect an expropriation. The requirement of "permanency" ensures that a deprivation that is only temporary or ephemeral in nature does not qualify as compensable expropriation. In *SD Myers v. Canada*, for example, the tribunal dismissed a claim for expropriation based on a regulation that lasted for approximately 16 months, holding that the deprivation did not satisfy the "permanency" requirement.

Indirect expropriations may take the form of "consequential" (or regulatory) expropriation or "creeping" expropriation (or both). Consequential expropriation occurs when the taking becomes a consequence of the host State's failure to maintain an appropriate regulatory framework. A host State may effect expropriatory measures through the enactment of a decree, regulation or legislation that has the effect of depriving an investor of the "use" and "benefit" of his or her investment. For example, in *Middle East Cement v. Egypt*, the claimant, a Greek investor that set up a business in Egypt to carry out the importation, storage and sale of cement, brought an expropriation claim based on Egypt's issuance of a decree prohibiting the intended activity. Given that the decree deprived the claimant of the value of its investment, it amounted to an expropriation, even though the claimant retained nominal ownership of its rights in the investment. Similarly, in *Kardassopoulos v. Georgia*, the claimants

held the exclusive rights to operate a pipeline facility in Georgia until the State issued a decree that designated a new, State-owned entity to take over those privileges, thereby preventing the claimants' use of their rights. The tribunal found that the decree constituted an expropriation because it had extinguished the claimants' rights in the investment.

Creeping expropriation typically involves a series of acts attributable to the State that, over a period of time, culminate in an expropriatory taking. The distinct feature of this expropriation is that it occurs in the absence of a single decisive act, and instead results from a series of acts and/or omissions that collectively result in a deprivation of property rights. The focus is thus on the cumulative effect of the host State's acts – not a single stand-alone measure.

Importantly, it is not necessary for the injured investor to establish that the host State intended to expropriate in order for a measure to be deemed expropriatory. Nor must the injured investor show that the expropriatory measure was adopted for the obvious benefit of the host State. It is the effect of the measure on the subject investment that plays the determinative role. As the *Metalclad v. Mexico* tribunal stated, so long as the “incidental interference with the use of property... has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property”, an expropriation has occurred.

All types of expropriation – direct, indirect, consequential, and creeping – are equally prohibited by international law, unless they satisfy certain conditions of lawfulness and the investor is properly compensated. The conditions of lawfulness are set out in the relevant treaties, but they typically include requirements that the expropriation was: (a) done for a public purpose; (b) accomplished under due process of law; (c) not discriminatory; (d) accompanied by prompt, adequate and effective compensation, freely realisable; and (e) not violative of any specific contractual engagement. A host State can rely on those conditions of lawfulness to demonstrate that it acted within its sovereign authority and for legitimate purposes and that, therefore, its actions were lawful. Should any of the relevant conditions of lawfulness remain unmet, however, the expropriatory act will be regarded as unlawful.

### Fair and Equitable Treatment

The Fair and Equitable Treatment (FET) standard is frequently invoked by foreign investors because it may offer relief where facts do not support a claim for expropriation. The ambit of the FET standard is wide, as it is intended to fill in gaps left by other, more specific treaty standards. A former judge of the Iran-US Claims Tribunal, Charles Brower, posited that the term “fair and equitable treatment” is “an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes”.

Some treaties qualify the FET standard as an expression of the “minimum standard of treatment” of aliens under international law. This minimum standard of treatment is a set of obligations developed through informal State practice in the 19<sup>th</sup> and 20<sup>th</sup> centuries that, generally, impose only minimal restraints on a State's ability to regulate foreigners and their property within the State's territory. However, where the treaty giving rise to the FET obligation does not expressly link this obligation to the minimum standard of treatment of aliens under international law, tribunals have tended to interpret the FET obligation under an “autonomous” standard (*i.e.*, one derived from the treaty rather than directly from customary international law). The tribunals addressing such “autonomous” protection have tended to focus on the literal meaning of the provision itself and the context of the relevant treaty.

FET clauses generally refer to “treatment” of investments. “Treatment” refers to the host State's conduct towards the investment. In other words, all actions by the host State (or those whose actions are attributable to the host State) may give rise to an FET claim if they violate the investor's right to enjoy “fair and equitable treatment” of their investments.

As noted above, this broad and flexible standard of protection cannot be confined to any one simple definition. The FET standard may be violated by a host State's: (a) actions that defeat investors' legitimate expectations; (b) denial of justice and the lack of due process; (c) manifest arbitrariness in decision-making; (d) discrimination; and (e) outright abusive treatment. The hallmark of the FET standard is the protection of the investor's “legitimate expectations”. This standard of protection was created in recognition of the fact that an investment is not a transient one-off transaction, and therefore there is a risk that the environment within which the investment operates may be changed so substantially with time as to undermine the very reason for that investment.

A host State may violate its FET obligations by reneging on assurances it provided to an investor that informed, and possibly induced, the investment decision. To make a claim for the violation of this standard of protection, an investor has to show that: (a) it had a legitimate expectation that the legal framework it relied upon when making its investment would remain in place; and (b) its expectations were breached by the host State.

*The existence of legitimate expectations.* This category of protection is based on the overarching principle of good faith, which precludes a host State from promoting an investor's legitimate expectations and later reneging on the commitments that had given rise to those expectations. Tribunals are, however, split as to what may constitute the foundation for an investor's “legitimate” expectations.

**First approach:** “Legitimate” expectations can be based either on the host State's regulatory framework (legislation, treaties, decrees, other executive or administrative statements) or specific representations given by the host State to the investor (investor-specific promises and assurances). Tribunals adopting this approach (*see, e.g., Murphy Exploration v. Ecuador (II)*) reasoned that:

An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State.

Many of these tribunals relied on the concept of “stability and predictability” of the legal framework, particularly where the relevant investment protection treaty guaranteed “legal stability” (*CMS v. Argentina and LG&E v. Argentina*). One tribunal, for example, found that the host State's change of its tax regime for oil exports had changed the underlying legal and business framework for the investment and, as such, violated the State's FET obligations (*see Occidental v. Ecuador (LCIA Case)*).

**Second approach:** “Legitimate” expectations can be based only on specific representations made by the host State. Tribunals adhering to this school of thought have considered that it is not realistic to require host States to never change their laws. One tribunal in particular has noted that “it is [not] the BIT's purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*” (*El Paso v. Argentina*). It reasoned that “it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze”. Another tribunal explained that

“[i]t is each State’s undeniable right and privilege to exercise its sovereign legislative power”, that a host State “has the right to enact, modify or cancel a law at its own discretion [unless a stabilization clause exists]”, and that “any businessman or investor knows that laws will evolve over time” (*Parkerings v. Lithuania*). A recent tribunal found that a regulatory scheme in reliance on which the investor at issue had made its investment did not represent “specific commitments” by the host State to the investor and, as such, the regulation could not have generated a legitimate expectation that its benefits would not change (*Charanne v. Spain*). The tribunal concluded that “[t]o convert a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an excessive limitation on [the] power of states to regulate the economy in accordance with the public interest” and found that no legitimate expectations existed.

The middle-ground approach: The reasonableness test. A more balanced approach has been adopted by a third group of tribunals that seek to avoid an overbroad application of the FET standard, but, at the same time, want to ensure that foreign investors receive adequate protections. The tribunals in this group have expanded the relevant test beyond “specific commitments” given to the investor to also include the investor’s expectation that the existing legal framework will not be changed “unreasonably”. One tribunal (*El Paso v. Argentina*) framed the relevant test as follows:

The legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not *unreasonably* modify the legal framework or modify it in contradiction with a specific commitment not to do so.

Another tribunal (*Blusun v. Italy*) held that, in the absence of specific commitments, a host State may modify its regulation, but that “this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime”.

This obligation of a host State to refrain from “unreasonable” modification of its legal framework is premised on the proposition that “legitimate expectations” is an objective concept that is the result of a balancing of interests and rights of both the investors and the host States. Tribunals adopting this middle-ground approach tend to take into account a panoply of factors, including: (a) whether the host State has made any specific representations or commitments to the investor, on which the investor has relied; (b) whether the investor was aware of the general regulatory environment in the host country; and (c) the relative weight of the investor’s expectations as compared to the legitimate regulatory activities of the host State.

Violation of legitimate expectations. When assessing whether a particular complained-of measure constitutes an FET violation, tribunals have taken into account the “proportionality” of the measure. One recent tribunal (*Charanne v. Spain*) ruled that the proportionality requirement “is satisfied as long as the changes are not capricious or unnecessary and do not...suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework”. Another tribunal (*Eiser v. Spain*) explained that the proportionality requirement is “fulfilled inasmuch as the modifications are not random or unnecessary, provided that they do not suddenly and unexpectedly remove the essential features of the regulatory framework in place” (emphasis omitted). Proportionality, accordingly, is to be assessed through the prism of reasonableness of the measure and the magnitude of its effect on the investor’s business. A “total alteration of the entire legal setup” clearly amounts to a violation of the investor’s legitimate expectations (*El Paso v. Argentina*). Similarly, a host State that “completely dismantl[es] the very legal framework constructed to attract investors” violates

the legitimate expectations of investors relying on that framework (*LG&E v. Argentina*). A disruption of a legal regime upon which the investor relied at the time of investment may also constitute a breach of the investor’s legitimate expectations. For example, one tribunal found a violation of legitimate expectations where the host State stripped the claimants of certain tax incentives “reduc[ing] almost to nothing [the] advantages” of claimants’ investment and violated their legitimate expectations (*Micula v. Romania*).

### Full Protection and Security

Many international instruments include Full Protection and Security (FP&S) provisions designed to protect the security and integrity of an investment. This provision sets out the host State’s guarantee to protect the security and integrity of a qualifying investor’s investment. The scope of this provision is two-fold: (a) it requires host States to refrain from actively interfering with foreign investments; and (b) it imposes on host States an obligation of due diligence and vigilance in protecting investments from the actions of third parties. These two obligations are sometimes referred to as “the duty to abstain and the duty to protect”. The former (duty to abstain) means that the State has a negative obligation to refrain from engaging in actions that may jeopardise the security of investors. The latter (duty to protect) means that the State has an affirmative obligation to protect investors from harmful activities carried out by third parties in its territory and to punish wrongdoers. A violation of the FP&S standard can arise where the host State fails to: (a) prevent damage to a qualifying investment; (b) restore the conditions that existed before the violation; or (c) punish a perpetrator.

Many tribunals have found that, absent a specific indication to the contrary, FP&S clauses are intended to provide protection for both physical and legal security (see *Siemens v. Argentina*, *Azurix v. Argentina*, *Biwater v. Tanzania*, and *CME v. Czech Republic*), although there are a number of tribunals that have found that only physical protection is covered under FP&S clauses (see *Gold Reserve v. Venezuela*, *Saluka v. Czech Republic*, and *AWG v. Argentina*).

Tribunals also differ on the standard to which host States are to be held. While early tribunals (see, e.g., *AAPL v. Sri Lanka*) adhered to the view that there is an unconditional obligation to provide absolute, or “full” protection to covered investments, subsequent tribunals adopted a more flexible approach being guided by the obligation of “vigilance” or “due diligence” (*AMT v. Zaire*, and *Wena Hotels v. Egypt*). More recently, tribunals have been willing to relax the standard even further and some have adopted a modified standard, which takes into account the host State’s particular circumstances, such as its level of development and stability (*Pantechniki v. Albania*).

### Protections Against Discrimination

Like protection against illegal expropriation, ensuring fair and equitable treatment, and providing full protection and security, protection against discrimination is one of the cornerstones of international investment law. Investment treaties typically offer two types of protections to foreign investors: (a) protection against discrimination based on nationality; and (b) protection against unreasonable and discriminatory measures that are not limited to nationality-based discrimination.

Protection against nationality-based discrimination. The economic rationale for prohibiting nationality-based discrimination is based on promoting efficient economic exchange and ensuring equality of competitive opportunities for investors regardless of their nationality. There are two different standards that provide for protection against

discrimination based on nationality: the obligation to provide national treatment (NT) and most-favoured nation treatment (MFN). Both NT and MFN are relative standards in that they are contingent on the host State's treatment accorded to other investments. When assessing whether the NT standard has been violated, State treatment of a foreign investment is compared to the treatment the State has accorded for domestic investments. When assessing whether the MFN standard has been violated, State treatment of a foreign investment is compared to treatment the State has accorded to other foreign investments of different nationality.

To demonstrate a breach of either the NT or MFN standard, a foreign investor must prove three main elements: (a) there must be a "treatment" accorded by the host State; (b) the claimant-investor must be in "like circumstances" with either a local investor (for purposes of the NT claim) or a foreign investor of a different nationality (for purposes of the MFN claim); and (c) the host State must treat the foreign investor less favourably than it would treat one of its domestic investors (for purposes of the NT claim) or a foreign investor of a different nationality (for purposes of the MFN claim). Key to proving a breach of either the NT or MFN standard is showing that the foreign investor was in "like circumstances" and was accorded "less favourable treatment" in relation to at least one comparator.

With regard to the first element, the "treatment" accorded by the host State generally refers to the aggregate of measures undertaken by the State that bear on the foreign investor's business activity in that State. Relevant treatment can be either *de jure* or *de facto*.

With regard to the second element, while the term "like circumstances" does not lend itself to a one-size-fits-all definition (because it varies by context), tribunals have taken the following factors into account:

**Common market.** The complained-of treatment should be compared to the treatment accorded by the host State to a comparable investment in the same business or economic sector. The compared-to investment, however, need not be identical to the claimant-investor's investment. In *Cargill v. Poland*, for example, the tribunal found that the investment and the proposed comparator were in "like circumstances" as both produced sweetener products "used for the confection of beverages...and processed foods". That Cargill's products had additional potential uses was of no consequence to the tribunal since prospective comparators need not be in "identical" circumstances. Similarly, the tribunal in *Cargill v. Mexico* held that producers of high fructose corn syrup and producers of sugar were in "like circumstances" where both participated in the same industry.

**Competing products.** In assessing "like circumstances", tribunals frequently consider whether the comparators have invested in businesses that compete in terms of goods or services such that the comparators' products are "interchangeable and indistinguishable from the point of view of the end-users" (see *Corn Products v. Mexico*). In *Archer Daniels v. Mexico*, the tribunal held similarly that the appropriate class of comparators to the claimants' investment in fructose syrup was Mexican sugar cane producers because the fructose syrup producers and the domestic sugar cane producers "compet[e] directly in supplying sweeteners to soft drink bottlers and processed food firms in Mexico".

**Same regulatory regime.** Tribunals have also given weight to the legal regimes applicable to particular entities in assessing whether they are in "like circumstances". In *Feldman v. Mexico*, the claimant's Mexican company was a reseller and exporter of cigarettes. The tribunal determined that "the 'universe' of firms in like circumstances [were] those foreign-owned and domestic-owned firms that [were] in the business of reselling/exporting cigarettes".

Mexican cigarette producers, on the other hand, though they might also export cigarettes, were not in "like circumstances" and thus not eligible comparators. In other words, the tribunal focused on comparators subject to the same legal regime: "the trading companies, those in the business of purchasing Mexican cigarettes for export".

With regard to the third element, "less favourable treatment" means that the claimant-investor was accorded treatment not as favourable as that accorded to the relevant comparator. The term "no less favourable" means equivalent, or no worse, than the best treatment accorded to a comparator. Therefore, when assessing the treatment afforded to claimants, tribunals begin with the premise that claimants and their investments are entitled to the best level of treatment available to any other domestic investor, or foreign investor of different nationality, operating in "like circumstances". In comparing treatment accorded to the different investors at issue, tribunals take into account: (a) whether the practical effect of the measure is to create a disproportionate benefit for host State nationals over non-nationals; and (b) whether the measure, on its face, appears to favour host State nationals over non-nationals who are protected by the relevant treaty. It is not necessary for a claimant to demonstrate that the host State had a subjective intent to discriminate and the degree of differential treatment is irrelevant.

Even if a complained-of measure is objectively less favourable than that accorded to a similarly-situated comparator, the host State may be able to defend its actions if it can show that they constitute a legitimate regulatory activity within the scope of its sovereign prerogative.

An MFN clause offers another benefit to qualifying investors. Because this provision entitles investors to treatment no less favourable than that available to other foreign investors, tribunals have consistently allowed investors to rely on more favourable protections available in other investment treaties ratified by the host State. With a few rare exceptions (see, e.g., *İçkale v. Turkmenistan*), tribunals are virtually uniform in holding that investors can avail themselves of substantive protections available under other treaties of the host State.

Tribunals are split, however, as to whether dispute resolution provisions can be expanded in the same manner. Where the treaty at issue clearly provides that the MFN provision is to be extended to the dispute resolution clause, tribunals typically honour the parties' agreement. However, where the treaty does not contain specific language to this effect, there is a split of authority. Some tribunals (*Maffezini v. Spain*, *Impreglio v. Argentina*, *RosInvest v. Russia* and *Rights of U.S. Nationals in Morocco*) have held that investors can avail themselves of more favourable dispute resolution clauses in other treaties of host States, while other tribunals have reached the opposite conclusion (*Plama v. Bulgaria* and *Ansung v. China*).

**Protection against unreasonable and discriminatory measures.** This protection is comprised of two elements: (a) protection against "unreasonable measures"; and (b) protection against "discriminatory measures". Tribunals generally agree that those two terms should be read disjunctively as they have separate meanings.

A host State's conduct is unreasonable where it does not bear a relationship to some rational policy of that State. Although unreasonable or arbitrary measures may take a variety of forms, conduct that is likely to qualify as a violation includes: (a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (b) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (c) a measure taken for reasons that are different from those put forward by the decision maker; or (d) a measure taken in willful disregard of due process and proper procedure. For a State's



conduct to be reasonable, that conduct must not only be declared to further a rational policy adopted by the State, but there must also be a reasonable correlation between that conduct and the means by which the policy is implemented.

A measure is discriminatory when it provides the investor's investment with treatment that is less favourable than the treatment afforded to another, similarly-situated investment. Significantly, a measure may be discriminatory regardless of whether the discriminatory conduct was contrary to domestic law or whether the host State had any intent to discriminate or to act in bad faith. The concept of discrimination is thus straightforward: a measure that treats two similarly-situated objects differently is discriminatory. It bears noting that, within the context of the protection at issue here, discrimination does not need to be based on nationality. As such, discrimination may well occur where a foreign investor is treated differently from another investor, whether national or foreign, in a similar situation.

## Conclusion

It is beyond peradventure that the rise of foreign direct investment has created countless opportunities for both investors and host States. Despite its tremendous economic potential, foreign investment nevertheless remains a risky endeavour. Examples of risk factors are countless. The host State may find itself in circumstances requiring it to enact legislation that deprives the investor of the ability to carry on its business. Political turbulence or social instability in the host State may create a challenging business environment. Local guerilla groups may decide to impose an illegal "tax" on the investor for the privilege of conducting business in that country. But the protections available under international investment law both to investors and host States are equally extensive. Careful planning, both at the time of the investment and at the time when the dispute arises, will ensure that investors and host States use the tools available to them to manage risks and maximise investment opportunities.



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# Issues in Cross-Border Valuation and the Implications for Damages Assessments in Investor-State Disputes

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## Introduction

Assessing damages in an Investor-State dispute often requires the quantum expert to either conduct a valuation – of a firm, a project, or some other investment – or to quantify the impact of the alleged wrongful behaviour on the value of an investment. Increasingly, these valuation approaches rely on the discounted cash flow (DCF) methodology, whereby the future cash flows of the investment are discounted back to the valuation date at a rate that reflects both the time value of money and the level of risk or uncertainty. Clearly, a critical element of any DCF-based valuation is determining the appropriate discount rate. This chapter provides a high-level overview of key considerations in undertaking such an exercise, with an emphasis on the additional complexities introduced by the cross-border nature of the valuations required in the Investor-State arena.

The chapter is divided into three sections. The first of these ignores the international dimension and, adopting a purely domestic perspective, reviews some basic ideas regarding what is referred to as the “risk-return trade-off”. The section then shows how a consideration of this trade-off leads to the Capital Asset Pricing Model (CAPM), which is by far the most commonly used approach for determining discount rates in a wide range of practical settings. The second section presents a specific example of a project valuation in a fictitious emerging market country from the perspective of a US investor, and discusses the various considerations that result from the need to incorporate the international nature of the exercise. In particular, this section examines questions that arise when implementing the CAPM in an international setting. The third section introduces country risk and political risk, and discusses the issue of how such risks should be incorporated into a valuation.

## Risk and Return, and the CAPM

To illustrate the concepts of risk and return, suppose that we live in a world that consists of a single country, the currency of which is the dollar (\$). Consider first the case of an investment which will – with absolute certainty – pay \$105 at the end of next year. Suppose that the current interest rate is 5%. In this case, the “present value” of the future cash flow (equivalently, the amount that an investor would be willing to pay today to acquire the investment) is simply  $\$105/1.05$ , or \$100. Because there is no uncertainty in the amount that will be received a year from now, the investment is said to be “risk-free” – moreover, the investment offers the investor a guaranteed (net) return of 5%.<sup>1</sup>

Now consider a second investment which will – with probabilities of 50% and 50% – pay either \$125 or \$85 at the end of next year. The

expected, or average, amount that will be received is  $50\% \times \$125 + 50\% \times \$85 = \$105$ . How much would an investor be willing to pay today for this investment? If we assume that investors are risk-averse, and therefore prefer an investment offering \$105 with certainty to one offering \$105 on average, the answer is something less than \$100 – but the question is how much less? Answering this question requires determining how much risk the investor perceives the investment to carry. If a lot, maybe the investor will be willing to pay only \$80, in which case the expected return offered by the investment is 31.25%.<sup>2</sup> Note that this is also the rate at which the expected payoff of \$105 needs to be discounted in order to arrive at the \$80, while the “risk premium” on the investment (the expected return less the guaranteed return on a risk-free investment, or the “risk-free rate”) is  $31.25\% - 5\% = 26.25\%$ . However, an investor who perceives only a small amount of risk may be willing to pay \$90, in which case the expected return is 16.67%, and the risk premium 11.67%.<sup>3</sup>

This illustrates the risk-return trade-off: the riskier an investment is, the lower its current price will be, and the higher the expected return and risk premium it will offer. While intuitively obvious, for this observation to be useful when undertaking a valuation, we need to be able to (i) specify how risk should be quantified, and (ii) having quantified risk, translate this into a risk premium or expected return.

With respect to the quantification of risk, a key point is that an investor will typically not hold a single investment, but rather a portfolio of investments, and therefore what the investor cares about is the risk of the portfolio, not the risk of any individual investment. Consequently, when asking the question “how much would I be willing to pay for this investment” (equivalently, “what expected return does it need to offer me for it to be an attractive investment”), the investor will assess not the risk of the investment in isolation, but will consider its impact on the risk of an existing portfolio.

In general, the amount by which the risk of a portfolio increases when an investment is added will be less than the total risk of the investment viewed on a standalone basis.<sup>4</sup> This is the result of what is typically referred to as diversification. Broadly speaking, the total risk of an investment can be decomposed into two distinct elements, (i) its diversifiable, or non-systematic, risk, and (ii) its systematic risk. Further, providing a portfolio is sufficiently well diversified, only the systematic element remains – the diversifiable risk is diversified away – and it is the systematic risk of the investment, rather than the total risk, that determines the risk premium that investors demand from a particular risky investment.

This is still somewhat vague – however, under certain assumptions (which are beyond the scope of this chapter to discuss), what follows from this line of thinking is the CAPM, which may be written as follows:

$$E[r] = r_f + \beta (E[r_m] - r_f)$$

This asserts that the expected return  $E[r]$  offered by a risky investment (e.g., an investment in a listed equity share) comprises two elements. The first is the risk-free rate ( $r_f$ ), which may be thought of as compensation for the time value of money. The second is the risk premium, the compensation for the systematic risk inherent in the investment, and itself is the product of two terms.

The first of these ( $\beta$ ) (beta) may be thought of as measuring the quantity of systematic risk that the investment carries – it essentially measures the extent to which the returns on the investment are “correlated” with returns on the market for risky investments as a whole (for all practical purposes, it is reasonable to interpret this as meaning the overall equity market). If the investment is positively correlated with the market – meaning that it tends to offer high returns when the market is performing well, and low returns when the market is performing poorly – the beta will be positive. It follows that the higher this positive correlation, the higher the beta, and the higher the risk premium that the investment will command. However, if there is little correlation between the investment and the market – meaning that how the market performs has little or no impact on whether the investment offers high or low returns – the beta will be close to zero, and the risk premium on the investment will be relatively low.

The second term ( $E[r_m] - r_f$ ) is referred to as the expected market risk premium (EMRP). As the name suggests, this is the expected return on the market as a whole in excess of the risk-free rate, and may be thought of as the risk premium per unit of risk (as measured by beta). For example, if the EMRP is estimated at 6%, an investment with a beta of 0.4 will be priced so that it offers a risk premium of  $0.4 \times 6\%$ , or 2.4%; an investment with a beta that is twice as large at 0.8 will offer a risk premium that is twice as large at 4.8%.

In this simple, one-country setting, implementing the CAPM to determine the appropriate discount rate for a valuation is *conceptually* straightforward, although one that is subject to a number of significant practical challenges:

- Using information regarding the prices of, and interest rates offered by, government securities (which are assumed to be free of default risk) to determine the risk-free rate  $r_f$ .<sup>5</sup>
- Estimating the EMRP – this is acknowledged to be an extremely challenging question with a wide range of opinions across both finance academics and market practitioners. A discussion of the different approaches that are typically employed when tackling this question, and the results from utilising these approaches, is beyond the scope of this chapter.
- Estimating the beta of the investment being valued, a standard approach to which is as follows:
  - identify publicly listed companies in the same industry;
  - estimate a beta for each such “comparable” company, using historical data on that company’s stock returns and on the returns to a broad-based stock market index<sup>6</sup> (a proxy for the market as a whole), and a statistical technique known as regression analysis; and
  - use the average across these comparable company betas as an estimate of the required beta.

For illustrative purposes, suppose that we have estimated  $r_f = 4\%$ ,  $EMRP = 6\%$ , and  $\beta = 0.7$ . If we input these estimates to the CAPM, we obtain an estimate of the discount rate for this investment of  $0.04 + 0.7 \times 0.06 = 0.082$ , that is, 8.2%. In other words, to determine the value of this investment, we need to discount the future cash flows that the investment is expected to generate at 8.2%.<sup>7</sup>

### The CAPM in an International Setting

We now turn to the question of what happens when we relax the assumption of a one-country world. To make the discussion

concrete, we consider an example of the valuation of a project in Ruritania, a fictitious emerging market country, from the perspective of a large US firm with a New York Stock Exchange listing. What discount rate should be used in such a valuation? The short answer is that we are still able to use the CAPM – however, we need to be extremely careful when thinking about how to estimate the required inputs (risk-free rate, beta, and EMRP).

To start, we need to consider in what currency the expected future cash flows will be denominated. Given that it is a Ruritanian project, an obvious answer is the Ruritanian currency (denoted RUR). However, as explained below, this approach would introduce a number of complications to the discount rate estimation – consequently, we assume that the projected cash flows will be denominated in US dollars (denoted USD).

Given this assumption, it should be obvious that the discount rate needs to be a USD rate. For the risk-free rate, it is clear what that means – the government securities that are used to estimate this input to the CAPM are those issued by the US government. However, when determining the appropriate risk premium (both the beta and EMRP), the situation is somewhat more complex. A key factor when answering this question – and one that is often overlooked – relates to what assumption the quantum expert makes regarding the extent to which capital markets across the globe are integrated. Assuming that capital markets are fully integrated (meaning that investors in all countries hold portfolios that are well diversified internationally) can lead to a very different discount rate estimate to that generated when assuming that capital markets are fully segmented (meaning that US investors hold only US stocks, French investors hold only French stocks, and so on). Under both assumptions, the fundamental approach is the same – namely, to determine what risk premium the US firm should incorporate into its discount rate for the Ruritanian project, the firm should consider how much risk the project brings to the existing portfolios of its investors. However, these existing portfolios differ significantly under the two assumptions.

Under the assumption of fully integrated capital markets, the US firm’s investor base will comprise investors from all over the world, each of which will have an existing portfolio that is geographically diversified. Consequently, what this investor cares about is the extent to which the USD-denominated cash flows from the project are correlated with the USD-denominated returns on the investor’s geographically diversified existing portfolio. In practice, this will typically involve identifying “comparable” Ruritanian companies that operate in the same industrial sector as the project being valued, computing the historical USD-denominated returns on these companies, using regression analysis on these returns and the *historical USD-denominated returns on a global stock market index (such as the FTSE All-World Index)*<sup>8</sup> to estimate a beta for each company, and averaging across these betas to obtain an estimated beta for the project. Similarly, the EMRP to be input to the CAPM is an estimate of the excess of the forward-looking expected USD-denominated return on this index over the current USD risk-free rate. This version of the CAPM – whereby betas and the EMRP are measured with respect to a world stock market index – is typically referred to as the World CAPM.

By contrast, under the assumption of fully segmented capital markets, the US firm’s investor base will comprise investors from the US only, each of which will have an existing portfolio that is diversified across US stocks but not internationally. Consequently, this investor cares about the extent to which the USD-denominated cash flows from the project are correlated with the returns on the investor’s existing US portfolio. In practice, this will once again involve identifying “comparable” Ruritanian companies that operate in the same industrial sector as the project being valued, computing

the historical USD-denominated returns on these companies, using regression analysis on these returns and *the historical returns on a US stock market index (such as the S&P 500)* to estimate a beta for each company, and averaging across these betas to obtain an estimated beta for the project. As might be expected, the EMRP to be input to the CAPM is an estimate of the excess of the forward-looking expected USD-denominated return on this US index over the current USD risk-free rate.

One point that should be stressed is that whether we assume that markets are integrated or segmented, what enters the beta estimation exercise should be the USD-denominated historical returns of comparable Ruritanian companies. While we could use RUR-denominated returns, this would require that the entire analysis be conducted in RUR. For example, the expected future cash flows would need to be denominated in RUR, while the EMRP to be input to the CAPM would need to be an estimate of the excess of the forward-looking expected RUR-denominated return on the FTSE All-World Index over the current RUR risk-free rate. Generally, this would make the exercise unnecessarily complicated, and so it is standard to conduct these valuation exercises in USD. Further, the use of comparable companies from Ruritania is important if we are to measure the impact of the project on the risk of the existing portfolios of the US company's investors. This is because even within the same industrial sector, US companies may exhibit different levels of correlation with the world index than Ruritanian companies.<sup>9</sup>

We conclude this section with two observations. First, in reality, capital markets are neither fully integrated nor fully segmented. Various suggestions have been advanced as to how to overcome this issue but these tend to lack theoretical justification and as such are somewhat *ad hoc*. Consequently, it is probably prudent to estimate discount rates under both assumptions – judgment may be required as to how much weight to place on each estimate, but this is likely preferable to adopting an approach that is absent any conceptual foundation.

Second, in many cases, whichever assumption – integrated or segmented – is adopted, the resulting discount rate may be lower than seems intuitively reasonable. This reflects an implicit belief that an investment in Ruritania must be riskier from the perspective of a US investor compared to that of a Ruritanian investor. The discussion above reveals the potential flaw in this reasoning: an investment in Ruritania is likely to be less correlated with either the US or the world stock markets than it is with the Ruritanian stock market – as a result, an investor holding a well-diversified US or world portfolio will demand a lower risk premium than will an investor holding a portfolio that is heavily concentrated in Ruritanian stocks.

### Country Risk and Political Risk

Among the most heavily debated questions in the context of damages assessments in Investor-State disputes are those relating to the measurement, and the appropriate treatment, of so-called country risk. One of the key challenges in addressing such questions is that there is no consensus as to how to define country risk, making its measurement somewhat problematic. Loosely speaking, however, the notion of country risk stems from the idea that an investment in a project in an emerging market is in some sense inherently riskier than an investment in an equivalent project in a developed market, and as such, the former should have a lower value than the latter. Therefore, it is often argued, having determined the appropriate discount rate for the developed market project, a “country risk premium” should be added when estimating the discount rate for the emerging market project. In this final section, we explain the

flaws in this logic and argue that – providing discount rates are estimated using the approach set out in the previous section – no adjustment is required for country risk, however defined. We also discuss the concept of political risk, one of the principal components of country risk, and explain why such risk should be accounted for via an adjustment to the expected future cash flows that are being discounted, rather than via an adjustment to the discount rate. Finally, we briefly consider how the magnitude of such cash flow adjustments might be quantified.

We start by providing a definition of country risk as articulated in a textbook written by two of the leading academics in the field of international finance:

“Country risk includes the adverse political and economic risks of operating in a country. For example, a recession in a country that reduces the revenues of exporters to that nation is a realization of country risk. Labor strikes by a country's dockworkers, truckers, and transit workers that disrupt production and distribution of products, thus lowering profits, also qualify as country risks. Clashes between rival ethnic or religious groups that prevent people in a country from shopping can also be considered country risks.”<sup>10</sup>

Consider again the valuation of the project in Ruritania from the perspective of a US firm. Recall that the starting point for such a valuation is the set of projected future (USD-denominated) cash flows that the project is expected to generate. Implicit in the word “expected” is the idea that the level of a given future cash flow is, as of the valuation date, uncertain and that what is input to the DCF valuation is a probability-weighted average of all the possible levels that the cash flow might take. For example, if the possible levels of the future cash flow are USD 10 million, 50 million, and 100 million, with probabilities of 20%, 50%, and 30%, respectively, the expected future cash flow is USD  $(0.2 \times 10 \text{ million} + 0.5 \times 50 \text{ million} + 0.3 \times 100 \text{ million}) = \text{USD } 57 \text{ million}$ . What is important here is that the possible cash flow levels, and the respective probabilities, that are used (if only implicitly) in estimating the expected future cash flow that is input to the valuation *should be those that relate to the Ruritanian project in question*. To the extent that (relative to an equivalent project in the United States) the expected future cash flow levels are reduced as a result of the risks set out in the quote above, then the risks from investing in the Ruritanian project are clearly being incorporated into the valuation.

Does the discount rate need to be increased to reflect these risks? In short, the answer is no. As discussed in the previous section, the appropriate discount rate for the project comprises the USD risk-free rate, together with a risk premium that reflects the systematic risk carried by the project, that is, the risk that the project adds to the portfolios of the US firm's investors. This systematic risk is measured by the project's beta with respect to the relevant portfolio (a broad-based index of US stocks if capital markets are segmented, or a geographically diversified world index if capital markets are integrated), and, providing that this beta has been properly estimated, no country risk premium is required. In other words, if the risks that arise from the project being located in Ruritania lead to the project's cash flows being more correlated with the relevant portfolio than would be the cash flows from an equivalent US project, this will translate into a higher beta, risk premium, and discount rate. The key point is that no further adjustment is required. Increasing the discount rate to reflect country risk would be either double counting the project's systematic risk, or bringing diversifiable, non-systematic risk into the discount rate calculation, neither of which is appropriate.

While the above observations apply to country risk in general, they are particularly apposite when it comes to the case of political risk which “is a special case of country risk in which a government



or political action negatively affects a company's cash flow".<sup>11</sup> Included within the factors leading to political risk are "the risk of expropriation, contract repudiation, currency controls that prevent the conversion of local currencies to foreign currencies, ... laws that prevent [multinational corporations] from transferring their earnings out of the host country[,] [c]orruption, civil strife, and war..."<sup>12</sup> However, for ease of exposition, we restrict ourselves to the case of expropriation. Specifically, suppose again that the possible levels of a future cash flow are USD 10 million, 50 million, and 100 million, with probabilities 20%, 50%, and 30% respectively, *if the host country government does not expropriate* – however, there is a 40% probability that the government will expropriate the project in its entirety. In this case, the USD 57 million previously calculated is the expected future cash flow assuming no expropriation, and the expected future cash flow to be input to the valuation is equal to  $40\% \times \text{USD } 0 + 60\% \times \text{USD } 57 \text{ million} = \text{USD } 34.2 \text{ million}$ . Once more, no adjustment is required to the discount rate unless the risk of expropriation is considered to be systematic in nature, that is, if the likelihood of expropriation is in some way correlated with overall equity market conditions. In general, this is unlikely to be the case:

"[I]t remains best to view political risk as country-specific risk that can be diversified away by global investors. For that reason, we recommend not adjusting the discount rate for pure political risk and using only business risk to increase the magnitude of the discount rate above the risk-free rate."<sup>13</sup>

A criticism that is often levied against this approach – of accounting for political risk in the expected future cash flow, rather than in the discount rate – is that it can be very difficult to estimate the appropriate political risk probability, and thus easier to leave the expected future cash flow as it is and adjust the discount rate. There are two responses to this line of argument. First, while difficult, it is not – as we explain shortly – impossible. Second, adjusting the discount rate does not eliminate the problem; it simply sweeps it under the carpet. If an expert is unable to estimate the required political risk probability, the expert is surely equally unable to determine by how much the discount rate should be increased to reflect political risk.

To illustrate how realistic political risk probabilities might be estimated, consider the following simplified example. Suppose that the government of Ruritania has outstanding USD 100 million notional of debt with a one-year maturity and a 5% coupon, so that the investors are promised a payment of USD 105 million at the end of the year. The current USD one-year risk-free rate (extracted from the prices of securities issued by the US government) is 3%, meaning that if there was no possibility of default on the debt, its value would be equal (in millions of USD) to  $105/1.03 = 101.94$ . However, suppose that there is a 10% probability that Ruritania defaults before the year ends, in which case the investors in the debt receive nothing. Then, the expected (rather than the promised) payment to investors is  $90\% \times 105 + 10\% \times 0 = 94.5$ , and its value is  $94.5/1.03 = 91.75$ . From this, it is possible to calculate what is referred to as the "yield" on the debt – this is defined as the rate at which the promised payment of 105 must be discounted in order to arrive at the value of the debt of 91.75, that is,  $91.75 = 105/(1 + \text{yield})$ , or  $\text{yield} = 105/91.75 - 1 = 14.44\%$ . Further, we can calculate Ruritania's sovereign spread as the difference between this yield and the equivalent USD risk-free rate, that is,  $\text{sovereign spread} = 14.44\% - 3\% = 11.44\%$ .

In this analysis, we used the probability of default to determine the debt's value, yield, and sovereign spread. Importantly, it is possible to work in the reverse direction – given one of value, yield, or sovereign spread, we can back out an implied probability of default. For example, a value of USD 89.71 million is equivalent to a yield

of 17.04% and a sovereign spread of 14.04%, from which we can determine that the implied probability of default is 12%.

While this example is based on the simplest case of one-year debt, it is possible to apply a similar analysis to imply default probabilities from debt with longer maturities. Consequently, it is tempting to use these implied default probabilities as the basis for the political risk probabilities that are used to adjust the expected future cash flows in a valuation. However, this assumes that defaults on sovereign debt occur only as a result of political risk factors that affect the country's *willingness* to pay. In reality, there are other factors, unrelated to political risk, that affect the *ability* to pay and so these implied probabilities of default will typically overstate the likelihood of a political risk event in the country in question. The previously cited textbook makes this point in no uncertain terms:

"Recent academic research on sovereign spreads ... dramatically shows why unadjusted spreads cannot be used to infer political risk probabilities. These articles determine what factors drive the cross-country and temporal variation in credit spreads, invariably finding that local macroeconomic conditions and, importantly, global risk factors (such as US credit spreads) play an important role. This implies that the use of credit spreads leads to a double counting of risk factors. Macroeconomic risk factors should already be accounted for in the usual cash flow analysis, whereas global risk factors presumably should already be part of the usual discount rate factor. It therefore makes no economic sense to simply add a sovereign credit spread to a discount factor obtained from, say, the world CAPM. Only the part of the sovereign spread that is driven by pure political risk factors is useful to enter political risk computations."<sup>14</sup>

In a related paper, the authors develop a methodology that allows for extracting "the part of the sovereign spread that is driven by pure political risk factors" and for computing the related political risk probabilities.<sup>15</sup> The details of this methodology are beyond the scope of the current chapter, but an example in the paper illustrates the potential magnitude of the valuation errors that may arise if this issue is not addressed properly. In this example (which involves a Pakistani power plant being valued as of the end of 2009), the unadjusted sovereign spread for Pakistan as of the valuation date is 6.88%. This is shown to correspond to an annual probability of default of 6.2%, meaning that the probability of default by the end of the project's 20-year life is 72.3%. If this is used to estimate the annual probability of a political risk event, the value of the project is shown to be USD 493.3 million. However, the authors show (using their methodology) that the part of the sovereign spread attributable to political risk factors lies somewhere between 2.56% and 4.56%. This corresponds to estimates of the annual *probability of a political risk event* of between 2.32% and 4.12%, and a value of the project of between USD 582.5 million and USD 677.7 million.<sup>16</sup> In other words, a failure to strip from the sovereign spread the part that is unrelated to political risk factors leads to the project being undervalued by somewhere between 15.3% and 27.2%.<sup>17</sup>

## Conclusion

While this chapter has covered a lot of ground, there are two key messages. The first is the importance of distinguishing between diversifiable and systematic risk, and of ensuring that the former is accounted for via adjustments to the expected future cash flows in a valuation exercise. The fact that this might be challenging should not be used as the rationale for making *ad hoc* adjustments to the discount rate. The second key message is that when determining the risk premium to be included in the discount rate, attention

must be paid to the existing portfolios of the investors from whose perspective the valuation is being assessed. Without this, the analysis will be devoid of any consideration of how much additional systematic risk the investment carries, and this is one of the crucial determinants of the required risk premium.

### Endnotes

1. The gross return is calculated as the amount to be received a year from now (\$105), divided by the amount paid for the investment (\$100), that is, 1.05. The net return is calculated by subtracting one from the gross return, that is,  $1.05 - 1 = 0.05$ , or 5%. Henceforth, all references to returns should be interpreted as net returns.
2. Calculated as  $\$105/\$80 - 1 = 0.3125$ , or 31.25%.
3.  $\$105/\$90 - 1 = 16.67\%$ ;  $16.67\% - 5\% = 11.67\%$ .
4. In certain cases, it is even possible to *reduce* the risk of a portfolio by adding a new investment to it.
5. For the purposes of this discussion, we ignore the fact that governments issue securities with different maturities, and that the risk-free interest rate may differ by maturity.
6. For example, the S&P 500 in the US, the FTSE 350 in the UK, or the CAC 40 in France.
7. Throughout this discussion, we ignore the fact that firms and projects are typically financed by a mix of debt and equity, rather than equity alone – a fact that introduces additional complications into the discount rate question.
8. See <http://www.ftse.com/Analytics/FactSheets/Home/DownloadSingleIssue/GAE?issueName=AWORLDS>.
9. In practice, the existence of comparable companies in the market in which the project is located may be limited, in which case judgment may be required to determine an appropriate set of comparable companies.
10. Geert Bekaert and Robert Hodrick, *International Financial Management*, 3<sup>rd</sup> ed. (Cambridge, UK: Cambridge University Press, 2018), p. 603.
11. *Ibid.*, p. 655.
12. *Ibid.*, p. 655.
13. *Ibid.*, p. 620.
14. *Ibid.*, p. 645.
15. Geert Bekaert, Campbell R. Harvey, Christian Lundblad, and Stephan Siegel, “Political Risk and International Valuation”, *Journal of Corporate Finance* 37 (2016), pp. 1–23.
16. *Ibid.*, pp. 18–19.
17. Calculated as  $1 - 493.3/582.5$  and  $1 - 493.3/677.7$ , respectively.

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# Investor-State Dispute Settlement Reform

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### Introduction

Rumbles against the investor-state dispute settlement (ISDS) system that have emanated over time from the negative experience of certain developing countries are at a cataclysmic level today. As countries such as Germany and Spain have joined Ecuador, Argentina, and others in the list of countries that have faced arbitral claims in response to their *bona fide* efforts to regulate in the public's interest, civil society organisations have escalated their calls for states to reform the system. States have responded by seeking a variety of reforms at multiple levels. While some are mere tweaks to the system, others are best described as revolutionary.

We divide this chapter into three sections. We begin by considering briefly the current moment of disruption within the ISDS system in the context of its development over the past several decades. We then address six of the key concerns that have been the impetus of the reform of the system. Finally, we discuss the multiple efforts under way to reform the system at the multilateral, regional, bilateral and national levels.

### ISDS Reform in the Context of the Development of the ISDS System

To reform the ISDS system effectively, it might be helpful to keep in mind why it developed in the first place. What caused states around the world to choose to give foreign investors the right to sue them before international arbitrators who are generally beyond the shores, jurisdiction, and authority of those states? The bilateral investment treaties (BITs) and free trade agreements that form the bedrock of the ISDS system make clear that states believed that concluding such agreements would increase trade and investment, and that these, in turn, would lead to economic development and prosperity.

The very first BIT to be concluded, the 1959 BIT between Germany and Pakistan, stated that the BIT was motivated by a desire to “promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States”.

With similar goals, states have concluded more than 3,300 international investment agreements to date, consenting therein to resolve investment disputes under the auspices of UNCITRAL, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), and other international arbitral fora.

Significantly, the ISDS system that developed over the years borrowed heavily from international private commercial arbitration. With

private commercial arbitration, objectives of speed, confidentiality, and finality justifiably override other considerations. But as has come to be realised, this is not necessarily the case in investor-state arbitration, where issues of sovereignty and public interest are at stake, and the implications of the arbitral decisions often reach far beyond the confines of the particular arbitration. Indeed, as is evident below, many of the concerns at the core of the legitimacy crisis facing the ISDS system stem from the recognition that the ISDS system should not function as arbitrations between private entities do.

### Concerns with the ISDS System

#### 1 Arbitrator appointment, impartiality, and independence

An initial concern with the ISDS system is with the selection of the arbitrators, the key individuals appointed to decide whether, for example, a state's new environmental law is an expropriation of a mining company's rights and whether a state's treatment of an investor was so unfair that the state owes the investor billions of dollars. Critics of the ISDS system do not perceive some of the arbitrators making these decisions to be sufficiently impartial or independent. They take issue with the fact that the arbitrators of each of these cases are usually three individuals picked and paid for by the parties themselves. Unlike a judge in a domestic U.S. court with lifetime appointment and insulation from political or economic processes, an arbitrator might worry about how every award he or she renders will affect his or her likelihood to be appointed in another case. An arbitrator might not want to upset the party that appointed them, and is acutely aware that depending on how she decides, she will be crossed out of – or added – to lists of arbitrator candidates for future cases.

Critics have also expressed concern with the fact that some of the arbitrators who decide investor-state claims also periodically serve as counsel in investor-state cases – the so-called double-hatting practice. Their fear is that an arbitrator's decision might be influenced by arguments she wishes to make in a case in which she is a litigant. While these questions may not cause concern in the context of private commercial arbitration, there is a growing belief that more stringent standards are called for where arbitrators are deciding multi-million – or multi-billion – dollar claims that implicate the rights of a sovereign and the preservation of the public interest on a local or global scale.



## 2 Potential impairment of the state's right to regulate in the public interest

Relatedly, a second critique of the ISDS system is its perceived potential to impair the right of the state to regulate in the public interest. For those who espouse this view, the current ISDS system robs the state of core regulatory powers to protect fundamental public interests. That is because the system allows investors to file claims against regulations undertaken in good faith to protect health, the environment or public security simply because they negatively affect an investor's bottom line. The ability of investors to obstruct measures taken in the public interest is evident in two cases in which our law firm acted on behalf of the state. In the first case, *Pacific Rim*, a U.S. gold mining company, used the ISDS system to pressure El Salvador to withdraw a nationwide moratorium on gold mining while El Salvador assessed the dangers of gold exploration on its scarce water resources. In the second case, the large Swiss-American tobacco company *Philip Morris* tried to force Uruguay to change its laws regulating cigarette packaging and marketing by claiming that the laws were an expropriation of its rights. Philip Morris almost achieved its objective because Uruguay considered relaxing its laws to avoid arbitration. Ultimately, however, Uruguay was able to secure financing assistance from the Tobacco Litigation Fund (founded by Michael Bloomberg & Bill Gates) to help it defend its laws. Even though these states ultimately won their cases, one can see how the claims had the potential to chill regulatory action in the public interest in those countries and beyond.

## 3 Inability to correct factual and legal errors in awards

A third critique of the ISDS system relates to the so-called "sovereignty of the arbitral tribunals", which stems from the inability to correct most factual and legal errors in arbitral decisions and awards. Investment arbitration decisions cannot be appealed. The successful party is able to enforce the award pursuant to the New York Convention or the Washington Convention, in the case of ICSID awards, and both conventions establish very narrow defences to recognition of the award and its enforcement.

Whereas the absence of appeal has clear value in the context of resolving a commercial arbitration dispute between two private parties, it is objectionable, in the view of many, that it is impossible to correct most errors of fact and law in awards addressing important issues of public interest and sometimes condemning states to pay billions of dollars.

## 4 Lack of transparency

A fourth area of criticism with the current system is the lack of transparency. Civil society organisations and the public in many countries have been disturbed by the fact that claims that seek to overturn wide-ranging policies and regulations of a state are aired in confidential pleadings and closed hearings. In contrast, U.S. criminal and civil proceedings, including claims against the U.S. government, are virtually always open to the public. This transparency, at least in the United States, contributes to the legitimacy of the legal and court system.

## 5 Absence of consistency and coherence in the decisions of *ad hoc* tribunals

A fifth concern with the current ISDS system is the perceived absence of consistency and coherence in the decisions of *ad hoc*

tribunals. Some inconsistency is, of course, inevitable given the differences among international investment agreements and the fact-based nature of the tribunals' inquiries. Nevertheless, in some cases, the same investment treaty standard or same rule of customary international law has been interpreted differently by different tribunals without any justifiable ground for distinction.

Leading arbitrator Gabrielle Kaufmann Kohler has argued in various articles that we need consistency for the development of the rule of law. She explains that the rule of law is only the rule of law if it is consistently applied so as to be predictable. In her view, since rules cannot emerge without consistency, decision-makers have an obligation to strive for consistency and predictability and thus to follow precedents.

Indeed, with more consistency and predictability within the field of international investment arbitration, states, investors and other stakeholders are better able to conduct themselves in a way that does not lead to disputes. More stability and predictability will also lower the costs of international investment arbitration itself since counsel will not have to expend resources arguing every permutation of every potential issue in dispute.

## 6 Frivolous claims

A final key concern that we address is that of frivolous claims. For some, it is important to find a way to curb frivolous claims, because in certain cases even winning a case against a frivolous claim cannot undo the financial and reputational damage to a state. A state might be forced to incur millions of dollars in legal costs and to defend itself in proceedings that could last five or more years, and the "loser pays" practice is not common in ISDS.

## Ongoing Reforms of the ISDS System

A wide variety of efforts to reform ISDS are currently under way universally in order to address, to varying degrees, each of the critiques discussed. We briefly address examples at the national level, at the bilateral level, at the regional level, and at the multilateral level.

### 1 National-level reform

#### a. Netherlands

In May 2018, the Netherlands issued a draft Model BIT that shook the ISDS world through its intent to upend existing investor protections under the Dutch BITs – the BITs that investors have long considered the "gold standard" of investment protection. Following the issuance of a final version of the Model BIT later this year, the Netherlands intends to renegotiate its existing 79 BITs with states outside the EU so as to replace the terms therein with those of the new Model BIT. The Draft Model BIT aims, *inter alia*, to address concerns raised by civil society organisations by creating "more balance between the rights and duties of host States and investors" and to protect the interests of the Netherlands in the event of claims by foreign investors.

In addition to limiting the kinds of investors who qualify for protection (Article 1(b) and 16(3)), the draft Model BIT circumscribes the scope of an investor's substantive protection in various ways. For example, a breach of "fair and equitable treatment" is now limited to a closed list of six measures (Article 9(2)). Expectations, even if legitimate, by an investor that the regulatory regime in place when the investment was made will not be fundamentally amended are now unlikely to be protected unless

the host state made specific representation to the investor. (Articles 9(2) and (4).) This would mean that a host state has no duty to compensate an investor if it decides to terminate or overhaul a feed-in-tariff regime that was designed to attract investment, unless there was specific representation to the investor. More generally, the draft Model BIT states that it will not affect the right of the contracting parties to regulate within their territories to achieve “legitimate policy objectives” (Article 2(2)).

In order to balance the responsibilities of the host state and those of the investor, the draft Model BIT allows a tribunal to consider an investor’s non-compliance with its commitments under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises when deciding the amount of compensation to award for a breach of the BIT (Article 23).

The draft Model BIT also introduces significant procedural changes. The Secretary-General of ICSID or the Secretary-General of the Permanent Court of Arbitration – not the parties to an arbitration – will select all arbitrators, although parties would be “thoroughly” consulted (Article 20(1)-(2)). The draft Model BIT also prohibits “double hatting”: “members of the tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes” (Article 20(5)).

Finally, the draft Model BIT increases transparency by applying the “UNCITRAL Transparency Rules” to arbitrations brought pursuant to the BIT and requiring the Tribunal and disputing parties to “give positive consideration to a request from a third party to submit as an *amicus curiae* oral or written submissions” (Article 20 (11)). It also requires that the identity of any third-party funder be disclosed to the respondent and the tribunal (Article 19(8)).

#### **b. South Africa**

South Africa has undertaken dramatic reforms at the domestic level following the country’s conclusion that there was no clear relationship between its BITs and foreign investment. Those reforms include terminating most of South Africa’s existing 49 BITs and enacting the Protection of Investment Act. In terms of substantive protections, the Protection of Investment Act excludes entirely a Most Favored Nation clause, and replaces the Fair and Equitable Treatment protection standard with a narrower “Fair Administrative Treatment” protection (Section 6).

The Act also preserves South Africa’s right to regulate in the public’s interest. One of the three stated purposes of the Act is to affirm South Africa’s “sovereign right to regulate investments in the public interest” (Section 4). The Act also has a section on the right to regulate that establishes that the government may, in accordance with the Constitution and applicable legislation, take measures, which may include “redressing historical, social and economic inequalities and injustices”, “promoting and preserving cultural heritage and practices”, “fostering economic development”, “achieving the progressive realisation of socio-economic rights”, or “protecting the environment” (Section 12(1)). The section on the right to regulate also allows the government to take measures necessary for “the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the Republic” (Section 12(2)).

Most significantly, the Act does not provide the possibility of investor-state arbitration. Disputes between investors and South Africa are to be resolved by mediation or through normal national courts and administrative bodies. Subject to exhaustion of domestic remedies, South Africa may consent to international arbitration, but such arbitration will be conducted between the Republic and the home state of the applicable investor (Section 13).

## **2 Bilateral-level reform**

According to UNCTAD (May 2018 IIA Issues Note), investment treaty-making has “reached a turning point”. It notes that 2017 concluded with the lowest number of new international investment agreements since 1983 and “for the first time, the number of effective treaty terminations outpaced the number of new IIA conclusions”. Moreover, most of today’s new international investment agreements include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of ISDS.

The bilateral investment treaty between Nigeria and Morocco concluded in December 2016 exemplifies the new progressive bilateral investment treaty model. Starting with the preamble, the difference between this treaty and the first generation BITs is palpable. The Nigeria-Morocco BIT affirms the importance of sustainable development investment and “the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives”. The preamble also emphasises that the State Parties seek “an overall balance of the rights and obligations among the State Parties, the investors, and the investments” under the Agreement.

The Nigeria-Morocco BIT also includes an article on transparency requiring that any arbitration hearings be open and that any documents submitted to the tribunal and issued by the tribunal be available to the public (Article 10).

The Nigeria-Morocco BIT also includes several articles dedicated to addressing investors’ obligations concerning the environment (Articles 13 and 14), social impact, labour and human rights (Articles 14 and 15), anti-corruption (Article 17), corporate governance (Article 19), and corporate social responsibility (Article 24).

In addition, the Nigeria-Morocco BIT includes an article on the right of the state to regulate “consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives” (Article 23).

Finally, concerning dispute settlement, the Nigeria-Morocco BIT requires that any dispute between the parties be assessed through consultations and negotiations by a Joint Committee prior to the initiation of international arbitration (Article 26).

## **3 Regional-level reform**

### **a. CETA**

At the regional level, the European Union has been concluding trade agreements that also seek to address some of the concerns with ISDS. Examples are CETA (the EU-Canada Comprehensive Economic and Trade Agreement), the EU-Vietnam Free Trade Agreement and the EU-Singapore Free Trade Agreement. A key element of those agreements is their establishment of a permanent court for the purposes of resolving investor-state disputes. CETA establishes a tribunal composed of 15 members, with five nationals appointed from each of the EU and Canada alongside five nationals appointed from third parties (Article 8.27). Tribunal members will serve a five-year term, renewable once, and will be paid a monthly retainer or a regular salary depending on whether or not they serve on a full-time basis. The judges will not be able to serve as counsel or party-appointed experts or witnesses in investment disputes during their terms. Cases will be heard by three-member divisions of the Tribunal selected by the President of the Tribunal on a rotational basis.

Pursuant to CETA, the Tribunal may dismiss a claim at an early stage on the grounds that it is manifestly without legal merit and/or the facts, even if true, would not support a case as a matter of law (Article 8.32).

Moreover, CETA allows decisions of the Tribunal to be appealed to an Appellate Tribunal composed of six members (two from each of the EU and Canada and two from third countries) (Article 8.28). The Appellate Tribunal would substantively review errors of law and misapplication of facts and it would be able to uphold, reverse or modify awards.

Following the issuance of the *Bilcon v. Canada* NAFTA award (finding that a violation of the Minimum Standard of Treatment (MST) can be satisfied by the frustration of legitimate expectations), a limitation that an investor's expectations were not necessarily sufficient to trigger a violation of the FET (MST) obligation was incorporated into CETA. In applying the FET obligation, a tribunal is asked to "take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated" (Article 8.10.4).

CETA also limits the use of the MFN provision to import dispute settlement provisions by explaining that neither dispute resolution nor obligations in other agreements are "treatment" (Article 8.7).

Finally, CETA protects host states' regulatory space by affirming the parties' "right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity" (Article 8.9). Moreover, in response to the wave of claims against Spain, Italy, Germany and Poland relating to the withdrawal of alternative energy subsidies, under CETA, the failure to issue or renew subsidies is only protected if there is a specific agreement governing such subsidies (Article 8.9).

#### **b. TPP**

Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam address many of the same concerns as Canada and the EU do in CETA in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Like CETA, CPTPP protects states' regulatory space by circumscribing indirect expropriation when states regulate to protect legitimate public welfare objectives such as public health, safety, and the environment (Annex 9-B and 9-C) and limiting claims related to subsidies (Articles 9.6 and 9.8), tobacco (Article 29.5), debt restructuring and prudential regulations (Annex 9-G and Article 29.3). CPTPP also makes clear that the MST standard does not generally cover investors' expectations, stating: "For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result" (Article 9.6.4).

In an effort to balance the responsibilities and obligations of host states and investors, CPTPP allows states to file counterclaims in certain circumstances (Article 9.19.2) and reaffirms "the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party" (Article 9.17).

Like CETA, CPTPP requires the disclosure of all filings (including notices of disputes, pleadings, orders and decisions), open (or live-streamed) hearings, non-disputing party submissions, and third-party submissions (Articles 9.23 and 9.24). CPTPP also seeks to address frivolous claims early and expeditiously (Article 9.23).

CPTPP does not follow CETA's establishment of a permanent tribunal to resolve investment disputes.

## **4 Multilateral-level reform**

### **a. UNCITRAL**

In July 2017, during the 50<sup>th</sup> annual session of the United Nations Commission on International Trade Law (UNCITRAL), the Commission asked its Working Group III to identify concerns regarding ISDS, to consider whether reform was desirable and, if so, to develop any relevant solutions to recommend to the Commission. At sessions in November 2017 and April 2018, the Working Group completed a review of many of the concerns addressed above, with a focus on the procedural aspects of ISDS rather than on underlying investment protection standards. The Working Group will consider reforms such as the development of soft law instruments to address procedural concerns, appeal mechanisms, and the creation of a multilateral investment court, as proposed by the European Union.

UNCITRAL has already played a critical role in reforms related to transparency. In July 2013, UNCITRAL adopted the Rules on Transparency in Treaty-Based Investor-State Arbitration ("Rules on Transparency"). Among other things, the Rules require disclosure of a wide range of information submitted to and issued by tribunals, facilitate participation by *amicus curiae* and non-disputing state parties, and open hearings to the public. In December 2014, the United Nations adopted the Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"), an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the Rules on Transparency.

### **b. ICSID**

In August 2018, ICSID unveiled a broad range of proposals to amend its rules for arbitration, conciliation, mediation, fact-finding, and the governance of ICSID. The proposals seek to "provide states and investors with a range of modern dispute settlement options" and to "modernize, simplify, and streamline the rules, while leveraging information technology to lessen the environmental footprint of ICSID proceedings". We highlight a few of the proposals that address the primary concerns with the ISDS system.

First, the proposals address concerns with arbitrator independence and impartiality. They note that ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators in order to ensure a consistent Code of Conduct across all the major sets of rules used for ISDS. In the interim, the proposed amendments increase arbitrator disclosure requirements in the declarations. Moreover, the proposed amendments require parties to disclose whether they have third-party funding and the source of that funding, and require arbitrators to confirm that they have no conflicts with any named funders (AR 21; (AF)AR 32). The proposed amendments also suggest reforming the decision-making process in arbitrator challenges (AR 30; (AF)AR 39–40).

Second, the proposals seek to increase the transparency of ICSID proceedings in various ways. One proposed amendment tries to circumvent the ICSID Convention's requirement that parties consent to the publication of Convention awards by deeming such consent after 60 days if a party does not object in writing (AR 44). If a party does object, the proposed rules permit ICSID to publish legal excerpts of the award. Since Additional Facility awards are not constrained by the Convention, ICSID proposes that they be automatically published with redaction where necessary ((AF)AR 54). The proposed amendments also require open hearings and the publication of recordings and transcripts of hearings unless a party objects (AR 47; (AF)AR 56).

Third, many of the proposals seek to lower costs and save time. For example, the proposals require that all filings be done electronically, unless there are special reasons to maintain paper filing (AR 3; (AF) AR 11). Moreover, they encourage tribunals to make costs orders on an interim basis and not only in the final award in order to keep parties cost-conscious during the interlocutory stages (AR 19; (AF)AR 29). There is also a proposed new rule allowing a tribunal to order security for costs (AR 51; (AF)AR 60), which could reduce frivolous claims. ICSID Member States will vote on the proposed amendments in 2019 or 2020.

## Conclusion

Notwithstanding the deluge of critiques against it, ISDS is very much alive. But there is no doubt that states have responded to these critiques by seeking to reform it in order to ensure that it serves their goals to attract foreign investment while protecting their interests as sovereign states to the extent possible. The challenge going forward will be for each state to determine the appropriate balance for its own context and to work with others to ensure coherency and consensus within the evolving system.



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# Assignment of Investment Treaty Claims

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### Introduction

In contemporary commerce and trade, the assignment of rights and choses in action is “routine practice”.<sup>1</sup> However, arbitral practice reveals that when assigned rights are to be enforced by arbitration, a host of complex issues may arise, including whether assignees may compel arbitration against the assignor’s counterparty and *vice versa*, whether assignment of choses in action is permissible under the proper law of the contract or the law of the cause of action,<sup>2</sup> whether an assignment after the commencement of the arbitration is possible and if so, whether it has the effect of a joinder, and whether and how assignment affects the rights and obligations of the assignor or the assignor’s counterparty.<sup>3</sup>

In arbitration under investment treaties, whether an assignee has standing to sue has to be considered in the light of the investment treaty at hand and public international law.<sup>4</sup> In ICSID cases, a claim can only be brought under an assignment provided the nationality requirements of the ICSID Convention are satisfied.<sup>5</sup>

### Investment Treaty Provisions on Assignment of Rights

When it comes to assignment of rights, investment treaties say very little (if at all). For example, the Energy Charter Treaty does contain language mentioning assignments. It provides that:

*If a Contracting Party or its designated agency (hereinafter referred to as the “Indemnifying Party”) makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the “Party Indemnified”) in the Area of another Contracting Party (hereinafter referred to as the “Host Party”), the Host Party shall recognize: (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.*<sup>6</sup>

However, such provisions do not settle the broader question, which is whether an assignment of investment treaty rights is generally permissible.

### Arbitral Practice

Issues of assignment of claims have arisen in both treaty and contract-based arbitrations, in ICSID and non-ICSID proceedings. In one of the early ICSID cases, *Amco v. Indonesia*, Indonesia contested jurisdiction arguing that some years after the entering into the original

agreement, the shares of the original investor were assigned to a subsidiary, which became the eventual claimant. Both the assignor and the assignee’s home States were ICSID Contracting States. However, the tribunal rejected Indonesia’s argument finding that:

*the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its share in P.T. Amco, and may be transferred with those shares. To be sure, for such a transfer to be effective, the government of the host-country must approve it, which approval has as its consequence that said government agrees to the transferee acquiring all rights attached to the shares, including the right to arbitrate, unless this latter right would be expressly excluded in the approval decision. Such approval having been given in the instant case, it constitutes, together with Amco Asia’s Request to transfer the shares, the agreement in writing to submit to ICSID arbitration the disputes with the transferee, requested by the Convention (Art. 25).<sup>7</sup>*

Amco thus supports the proposition that in contract cases, a prospective claimant will be required to demonstrate the host State’s consent to the assignment. Further, when a claim is brought under the ICSID Convention, an assignment to a third person who does not have the nationality of a Contracting State will not suffice to establish jurisdiction over the assignee.

However, such contract-based cases as *Amco* do not necessarily address all the issues that arise in the context of assignment of investment treaty claims.

Investment treaties typically set out specific nationality requirements. Unlike contracts, the investor-State arbitration clause found in most investment treaties actually constitutes an open offer. Once that offer is accepted, the arbitration agreement is perfected.

When the assignor is a national of a non-ICSID Contracting State or a person or entity that is not otherwise covered under an investment treaty, yet the assignee is a national of an ICSID Contracting State or a national who would satisfy an investment treaty’s nationality requirements, several tribunals have considered that this is not sufficient to establish jurisdiction. In effect, the assignor cannot assign a right she does not have (*nemo dat quod non habet*).

In *Mihaly v. Sri Lanka*, the original investor, a Canadian corporation, had assigned its rights to the US claimant. At the time, Canada was not a party to the ICSID Convention. The tribunal therefore held that the assignor could not put the assignee in any better position without Sri Lanka’s consent. In the words of the tribunal:

*whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment, with or without, and especially without, the express consent of Sri Lanka, on the ground that nemo dat quod non habet or nemo potest transferre quam ipse habet. That is, no one could transfer a better title than what he really has*

... [a] claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit.<sup>8</sup>

Similar, but distinct, are the findings in cases such as *Phoenix* and *Philip Morris (Australia)*, where the tribunals held that it is impermissible to engage in investment treaty structuring in order to benefit from investment treaty protection in respect of a dispute that was foreseeable or otherwise anticipated at the time the restructuring took place.<sup>9</sup>

However, when there “are no indications that this case might have involved a strategy such as was the case in *Mihaly*”, the transfer of an investment does not preclude “the existence of a protected asset”.<sup>10</sup> Indeed, this was endorsed by the tribunal in *Société Générale v. Dominican Republic*, which held that “the question of transfer of investments ... has become a normal feature of a global economy and the transfers are not as such disqualified from treaty protection”.<sup>11</sup> Nevertheless, the *Société Générale* tribunal held that:

*a claimant must have the nationality of the relevant Contracting Party at the time of the breach ... unless a different rule is expressed, and it will apply whether the claim is introduced directly by the individual or company concerned or by the State of nationality on its behalf.*<sup>12</sup>

The *ad hoc* Committee in *Vivendi v. Argentina* has similarly observed that difficulties may arise when a claim which already is covered under an investment treaty is assigned to a person or entity that has a different nationality despite the fact that it may also be covered under a separate investment treaty. Whilst the *Vivendi* Committee did not have to opine on this matter it observed that:

*if [the assignor] had a Spanish treaty claim prior to March 1996 questions might arise as to how the claim could be later transferred to a French company [the assignee] or as to how [the assignee] could have acquired a French treaty claim in respect of conduct concerning an investment which it did not hold at the time the conduct occurred and which at that time did not have French nationality. At least such questions might affect the quantum of recovery, but they might have further and even more basic legal consequences.*<sup>13</sup>

Such temporal considerations stem from the customary international law rule enshrined in Art. 13 of the International Law Commission’s Articles on State Responsibility, which provides that:

*An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*<sup>14</sup>

For example, in *Fedax v. Venezuela*, promissory notes were assigned from a Venezuelan national to the Dutch claimant prior to the cause of action arising.<sup>15</sup> The tribunal upheld jurisdiction, on the basis that the promissory notes were freely transferrable and the breach complained of had occurred subsequent to the assignment.<sup>16</sup>

Interesting questions may also arise in respect of co-nationals as well as other nationals who were equally covered under other investment treaties at the time the act occurred.<sup>17</sup> Likewise, whether the breach complained of, was continuous or is the result of a composite act could also impact on any determination on these issues.

In *Loewen*, the Canadian claimant (Loewen Group, Inc.) declared bankruptcy during the pendency of the arbitration proceedings. These bankruptcy proceedings led to its reorganisation as a US corporation. However, right before its reorganisation Loewen Group, Inc. assigned its treaty (NAFTA) claim to a newly-established Canadian corporation, Nafcanco. In turn, Nafcanco was owned and controlled by Loewen’s principal US subsidiary, the Loewen Group International, Inc.<sup>18</sup> As alluded to above, the Loewen Group

emerged from the bankruptcy proceedings as a US corporation. The question that therefore arose was whether the claimant continued to maintain its Canadian nationality, which granted it standing to sue. The tribunal held that since the Loewen Group, Inc. no longer existed, it did not have jurisdiction as it was not enough for the claimant to have Canadian nationality at the time the request for arbitration was filed. Rather, the claimant had to possess Canadian nationality up until the issuance of the award. In the words of the tribunal:

*[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo through the date of the resolution of the claim, which date is known as the dies ad quem.*<sup>19</sup>

Nafcanco was not a claimant and the tribunal did not explain whether its findings would have been any different had Nafcanco been joined in the proceedings as a claimant or had filed a separate claim.

Other tribunals have held that an assignment of the investment or the investment treaty claim *after* the proceedings have commenced does not affect their jurisdiction in the sense that the claimants continue to have standing to sue.<sup>20</sup>

For example, in *El Paso v. Argentina*, the claimant sold its shares in the Argentinian companies (which formed the covered investment) shortly after the institution of the proceedings.<sup>21</sup> Disagreeing with Argentina, the tribunal held that there was no rule of continuous ownership or nationality that prevented the claimant from continuing to be the proper claimant.<sup>22</sup> The sale of the investment did not necessitate the sale of the claim itself. Therefore, the tribunal was not called upon to opine on the issue of assignment of claims. That said, the *El Paso* tribunal did observe that the “right to demand compensation for the injury suffered at the hands of the State remains” unless “it can be shown that it was sold with the investment”.<sup>23</sup>

The outcome was similar in *Enron v. Argentina*, where the tribunal held that the sale of the investment subsequent to the institution of the proceedings did not affect its jurisdiction,<sup>24</sup> considering in particular that the sales transaction expressly safeguarded *Enron*’s rights in the arbitration.<sup>25</sup>

## Conclusion

The cases discussed above indicate that the issues regarding the assignment of investment treaty claims are complex and not entirely settled. Arbitral practice shows that transferring an investment is not necessarily the same as assigning an investment treaty claim. However, whether the assignment of the investment treaty claim (as opposed to the assignment/transfer of the investment) will be effective, will depend on several factors, including timing, nationality requirements and the nature of the dispute.

In practice, many of the economic benefits sought to be achieved via assignment can be achieved in other ways that do not require assignment or a change in the nationality of the claimant entity. Consider, for example, possibilities of changes in ownership at a level above the claimant entity or a carefully constructed funding arrangement. Indeed, tribunals have not taken issue with assignments that are limited to the proceeds of any resulting award, as opposed to the assignment of the claim itself.<sup>26</sup> Award creditors also have the option to assign any resulting award, but, at that stage, the formalities and effect of such assignments would most likely rest entirely within the purview of domestic, as opposed to international, law.<sup>27</sup>

## Endnotes

1. See Stephen Jagusch and Anthony C. Sinclair, 'The Impact of Third Parties on International Arbitration – Issues of Assignment', in Loukas A. Mistelis and Julian D. M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 291.
2. See Dicey, Morris and Collins on the Conflict of Laws, para. 24R-050 ("[t]he law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtors obligations have been discharged"); Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) para. 698 ("[t]he law governing the arbitration agreement determines the assignability of the agreement, the conditions to which the assignment is subject, and the consequences of the assignment, at least as far as relations between the assignor and its initial co-contractor are concerned ... By contrast, relations between assignor and assignee are governed by the law chosen by those parties for that purpose").
3. Jagusch and Sinclair (n 1) 291-2; Daniel Girsberger and Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate', 8 Arb. Int'l 121 (1992); V. V. Veeder, 'Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris', Albert Jan van den Berg (ed), *Planning Efficient Arbitration Proceedings: The Law Applicable to Arbitration* (ICCA Congress Series No. 7, Kluwer Law International, 1996) 268.
4. See generally Jagusch and Sinclair (n 1) 291-319; William Lawton Kirtley, 'The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes', 10(3) J. World Inv. & Trade 427 (2009); Hanno Wehland, 'The Transfer of Investments and Rights of Investors under International Investment Agreements – Some Unresolved Issues', 30(3) Arb. Int'l 565 (2014); Pierre Lalive, 'Some Objections to Jurisdiction in Investor-State Arbitration', Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (ICCA Congress Series No. 11, Kluwer Law International, 2003) 376, 385-387; Mauro Rubino-Sammartano, 'Are All Transfers of an Investment Protected by the Treaty Which Deals with the Original Investment?', 31(1) *Journal of International Arbitration* 97 (2014); Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press 2009), Art. 25, paras 39-40, 336-373.
5. When there is a succession in title by merger or otherwise, there will be a threshold question in the case where, under the law of the home State, the merger was valid and if so, what rights it could transfer to the claimant entity. This issue arose in *EuroGas v. Slovakia*, where the tribunal held that it did not have jurisdiction as no valid assignment could have happened by way of merger under the applicable domestic law. See *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paras 206, 420-424.
6. See ECT, Art. 15(1).
7. *Amco Asia Corporation, Pan American Development Ltd and PT Amco Indonesia v. The Republic of Indonesia*, Decision on Jurisdiction, 25 Sept. 1983, 1 ICSID Rep 377 (1993) para. 31. See also *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, 27 Sept. 2001, Decision on Jurisdiction, para. 129.
8. *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 Mar. 2002, para. 24. See also the contract case of *Banro v. Congo DR*, where the tribunal denied jurisdiction on the basis that the assignor (the claimant's Canadian parent company) had assigned its shares in its Congolese investment to its subsidiary, Banro American (a US corporation). *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 Sept. 2000, para. 14 ("What is at stake here, is not the question of relationship among companies of the same group, that is to say a question of private law, but rather a question of international law: the conditions required under the ICSID Convention for a State to be considered as a Contracting State will or will not be fulfilled depending on which company of the group files the request for arbitration").
9. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 Apr. 2009, paras 89-92, 100, 136, 144; *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 Dec. 2015, para. 535 ff. See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 Jun. 2012, para. 2.99 ("in the Tribunal's view, the dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case. As already indicated above, the Tribunal is more concerned here with substance than semantics; and it recognises that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area").
10. *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 Sept. 2008, para. 44.
11. *Id.*
12. *Ibid.*, para. 109.
13. *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision of *ad hoc* Committee on Annulment, 3 Jul. 2002, 6 ICSID Rep 340 (2004), para. 50.
14. International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 13.
15. *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 Jul. 1997.
16. *Ibid.*, paras 18-19.
17. See *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 Jul. 2008, paras 62-63 (unofficial translation: "The Claimants have established in a convincing manner a distinction between that case and the present case, in which African Holding 'does not seek to assert a right that SAFRICAS did not have' and in which the assignment of claim was between a company which had the nationality of a Contracting State (SAFRICAS) and another company which also had the nationality of the same Contracting State (African Holding), that Contracting

- State being the United States. Whereas the situation before 2000 was different, in that SAFRICAS belonged to Belgian investors, at the time of the assignment of receivables the only relevant nationality was that of the United States ... The Tribunal accordingly finds in this regard that all the rights held by SAFRICAS were transferred to African Holding, including claims and consent to arbitration, since the State whose nationals benefit from the consent expressed under the bilateral investment treaty has not changed. The situation in this case is clearly different from that of the *Mihaly* and *Banro* cases, in which a Canadian corporation was trying to assign rights it did not have”).
18. *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 Jun. 2003, paras 1, 9.
  19. *Ibid.*, para. 225 and 237 (“Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding”). For the debate about the continuous nationality test see Jan Paulsson, ‘Continuous Nationality in Loewen’, 20(2) Arb. Int’l 213 (2004).
  20. See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 Apr. 2006; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 Jun. 2010; *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.
  21. *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 Apr. 2006, para. 130.
  22. *Ibid.*, paras 117, 135–6.
  23. *Ibid.*, paras 117, 135–6.
  24. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007, para. 192.
  25. *Ibid.*, paras 196–198. Similarly in *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 Jun. 2010, Part V, paras 5–33; *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 32.
  26. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 Jul. 2017, paras 239–242; *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras 29–32.
  27. See, e.g., *Blue Ridge Investments, LLC v. Republic of Argentina*, No. 10 Civ. 153, S.D.N.Y. 30 Sept. 2012. See also *Glencore Grain Ltd v. Agros Trading Co Ltd*, [1999] C.L.C. 1696. In that case, Agropol had obtained a commercial arbitration award against Glencore, which it had then assigned to Argos and notice was given to Glencore a week later. The main issue that had to be dealt with by the English Court of Appeal was whether Glencore could set-off certain debts against its liability under the award ([1999] C.L.C. 1696, at 1697). In order to opine on this issue, the Court of Appeal had to determine whether the assignment of the award was valid in the first place. In this respect, the Court of Appeal held that it was “common ground” that “[t]he assignment of Agropol’s rights under [the] award ... is a valid legal assignment under s. 136 of the Law of Property Act 1925 and notice of the assignment was duly given to Glencore” ([1999] C.L.C. 1696, at 1701).

#### Disclaimer

The views expressed in this chapter are those of the authors alone and do not reflect the opinions of Quinn Emanuel Urquhart & Sullivan, LLP.



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Quinn Emanuel is the largest business disputes specialist firm in the world. The Wall Street Journal describes us as a "global force in business litigation". International arbitration is one of the cornerstones of the firm's practice. The firm has international arbitration specialists in all of its offices, globally. Operating as a single, integrated team, our lawyers have achieved success representing the world's largest companies, high net worth individuals, States and state-owned enterprises, in all of the world's major arbitration centres and applying all major applicable legal systems including public international law.

# Investor-State Arbitration Before The SCC Institute

Arbitration Institute of the Stockholm  
Chamber of Commerce (SCC)

James Hope



## Introduction

The Arbitration Institute of the Stockholm Chamber of Commerce (the **SCC**) is well known in investment arbitration circles. Whilst of course ICSID and UNCITRAL account for many more Investor-State dispute settlement (**ISDS**) cases overall, the SCC comes a clear third in the list of ISDS institutions, having hosted 5% of all known ISDS cases filed from 1987 up to 31 July 2017.<sup>1</sup>

Sweden and the SCC are listed as a forum for disputes between investors and States in at least 120 Bilateral Investment Treaties (**BITs**), as well as in the Energy Charter Treaty (**ECT**). Of these 120 BITs, 61 agreements stipulate that the SCC Arbitration Rules shall apply to disputes arising out of the agreement. The remaining 60 BITs stipulate that the SCC shall act as Appointing Authority under the UNCITRAL Arbitration Rules or that Sweden shall be the legal seat of the dispute.

A detailed report of ISDS disputes before the SCC, “*Investor-state disputes at the SCC*” written by SCC legal counsel Celeste E. Salinas Quero in 2017, can be found on the SCC website.<sup>2</sup> In this short chapter, I propose to summarise some key points from that report, and to highlight some important recent changes to the SCC arbitration rules concerning ISDS cases.

## The SCC Secretariat and The SCC Board

The SCC was founded in 1917. The institute, which is part of the Stockholm Chamber of Commerce, administers both international and domestic arbitration as well as mediation, and plays an active part in promoting dispute resolution both in Sweden and around the world.

The SCC is made up of an active Secretariat, presided over by the Secretary General Annette Magnusson, and a Board of 15 lawyers, presided over by the Chairperson: Kaj Hobér. The current Board includes lawyers from China, Finland, Germany, Italy, Russia, Sweden, the UK and the USA, and the Board members play an active part in the monthly meetings of the Board.

The Secretariat’s primary task is to administer the SCC’s caseload, and the legal counsel and administrators of the Secretariat are on-hand to provide assistance to the parties and to the arbitrators.

The Board takes decisions, when required, regarding *prima facie* jurisdiction, appointment of arbitrators in the absence of party appointment or agreement, the number of arbitrators, challenges to arbitrators, the seat of arbitration, the amount of advance on costs, and also consolidation and joinder.

## ISDS Cases Before The SCC

A total of 92 ISDS cases were registered at the SCC between 1993 and 2016: 67 cases under the SCC Rules and 25 cases in which the SCC was requested to act as appointing authority under the UNCITRAL Rules. Eight more ISDS cases were registered with the SCC in 2017.

Energy disputes form a significant part of the SCC’s overall caseload, and it is therefore not surprising to see that there have been several cases under the ECT, all of which have been administered under the SCC Rules.<sup>3</sup>

Most ISDS cases before the SCC between 1993 and 2016 involved investors and States from Europe and Central Asia (88% and 96%, respectively). Parties from other regions of the world have only rarely been involved in ISDS cases before the SCC.

Intra-EU disputes account for a significant number of these cases, 53% of cases registered between 2012 and 2016.

## Arbitrators in ISDS Cases Before The SCC

Given the importance and value of ISDS cases, it is also not surprising that the majority of such cases before the SCC have been decided by three-member tribunals, with only 8% of such cases being decided by a sole arbitrator.<sup>4</sup>

Parties generally prefer to make their own appointments, if possible. Accordingly, the parties or the co-arbitrators made 70% of the appointments in ISDS cases before the SCC between 1993 and 2016. The remaining 30% of appointments were made by the SCC, with 92% of SCC appointments being appointments of the chairperson.

Between 1993 and 2016, the arbitrators appointed in SCC ISDS cases have been of 29 different nationalities. Sweden, the UK, Germany, the USA, France and Switzerland are the most frequently appointed nationalities, in that order, with the remainder coming mostly from other European and Central Asian countries.

It should be noted in this context that, while the majority of ISDS cases before the SCC are conducted in the English language, that is not always the case. In particular, some recent cases have taken place in Spanish.<sup>5</sup>

When making appointments, the SCC takes considerable care to appoint arbitrators who are suitable for the particular dispute at hand. The Board considers, *inter alia*, the nationality of the parties, the subject matter of the dispute, the languages involved, the arbitrators already appointed, the counsel involved in the case, and other relevant circumstances. The international members of the Board are often particularly active when it comes to making appointments in ISDS cases.

### The Seat of Arbitration in ISDS Cases Before The SCC

Although parties in commercial arbitration cases generally stipulate the seat of arbitration in their arbitration agreement, in ISDS cases the seat is generally not specified in advance and it is therefore rather common that the parties disagree over this issue.

The SCC Board is frequently asked to determine the seat of arbitration in ISDS cases, and this issue is sometimes the subject of lengthy correspondence between the parties and the SCC. In determining the seat, the SCC Board again considers all relevant circumstances, bearing in mind that each case is different. In some cases, it can be a determining factor that the parties chose to arbitrate before the SCC, which can suggest a default position in favour of Stockholm as the seat of arbitration. In other cases, however, there may be reasons for choosing a seat other than Stockholm.

One particular factor in this regard is the impact of the *Achmea* case,<sup>6</sup> which has created considerable concern and uncertainty for parties involved in intra-EU ISDS disputes. Arguably, choice of a seat of arbitration within the EU allows parties to argue that the concerns expressed by the CJEU in *Achmea* should not apply, since there is then the possibility of a review of the arbitral award by a court of a Member State based on EU law, together with an opportunity to make a request for a preliminary ruling.<sup>7</sup> On the other hand, choice of a seat of arbitration outside the EU would enable the arbitration to proceed outside the scope of the CJEU's jurisdiction. The SCC continues to monitor developments carefully in light of the *Achmea* case.

### Procedure in ISDS Cases Before The SCC

ISDS cases before the SCC take place pursuant to the SCC Arbitration Rules, where those rules have been chosen by the parties. Alternatively, if the SCC has been called upon to act as appointing authority under the UNCITRAL Rules or to administer cases under the UNCITRAL Rules, the SCC acts according to its established practices as set out in its UNCITRAL Procedures.<sup>8</sup>

Cases under the SCC Arbitration Rules proceed, in general terms, as follows:

- Cases are commenced by the Claimant submitting the Request for Arbitration to the SCC by email to [arbitration@chamber.se](mailto:arbitration@chamber.se).
- Upon receipt of the Request for Arbitration, the SCC sends the Request to the Respondent and sets a time period for submission of the Respondent's Answer.
- Following receipt of the Answer, and possible additional preliminary submissions, the case is then referred to the SCC Board in order for decisions to be taken on *prima facie* jurisdiction,<sup>9</sup> appointment of arbitrators in the absence of agreement, the choice of the seat of arbitration, the amount of the advance on costs, and other possible procedural issues.
- The case is referred to the arbitral tribunal once the advance on costs has been paid.
- The arbitral tribunal's first task is to establish the timetable for the arbitration, in conjunction with the parties. Although Article 43 of the 2017 SCC Rules provides that the final award should be made within six months of the referral of the case to the arbitral tribunal, in practice, the timetable is almost always considerably longer in ISDS cases.<sup>10</sup> In fact, the average duration of cases decided by three-member tribunals up to 1 January 2016 was 36 months, with a median duration of 32 months.<sup>11</sup>
- Thereafter, it is up to the arbitral tribunal to determine the procedure, subject to any agreement between the parties and the general principles of efficiency and due process.<sup>12</sup>

- Article 42(1) of the 2017 SCC Rules requires that the arbitral tribunal must state the reasons upon which its award is based, unless otherwise agreed by the parties. In practice, all SCC awards contain reasons, and in most cases the arbitral tribunal gives very detailed reasons for its award.
- The SCC does not provide for any scrutiny of awards. The arbitral tribunal issues its award to the parties once it is finalised, and the final award includes a decision regarding the costs of the arbitration.<sup>13</sup>

### The Amounts in Dispute in ISDS Cases Before The SCC

In the course of 20 years, the SCC has seen a wide range of ISDS arbitrations, from small disputes brought by natural persons to large-scale arbitrations brought by multinational companies.

Whereas the average amount in dispute for the cases decided by sole arbitrator is only just over EUR 400,000, the average amount in dispute for the cases decided by a three-member tribunal is over EUR 340 million – although this figure is inflated by three cases worth over EUR 1 billion.

### Emergency Arbitration in ISDS Cases Before The SCC

One particular feature of the SCC Rules, which is not found in the ICSID or UNCITRAL Rules, is that claimants have an opportunity to seek emergency interim measures under the Emergency Arbitrator provisions in Appendix II to the SCC Rules. The purpose of such an emergency arbitration is to enable claimants to seek and obtain emergency interim relief before the arbitral tribunal has been constituted.

Emergency Arbitrations under Appendix II to the SCC Rules are designed to proceed under a very fast timetable. The application is made by email to the Secretariat<sup>14</sup> together with payment of the applicable costs,<sup>15</sup> whereupon the SCC Board seeks to appoint an emergency arbitrator within 24 hours of receipt of the application. The application is then referred to the emergency arbitrator as soon as possible, and the emergency arbitrator is asked to make a decision on the application for interim measures no later than five days thereafter.

The SCC has developed considerable experience of emergency arbitrations, having been 30 such cases between 2010 and 2017. The initial 24-hour deadline has been met in all but one case,<sup>16</sup> and the subsequent five-day deadline has been met in many cases, with the vast majority of emergency decisions having been issued within eight days.<sup>17</sup> It should be noted that, even though the timetable for such decisions is very short, most cases involve carefully reasoned written submissions by the parties, and fully reasoned decisions by the emergency arbitrator. It is also quite common for telephone hearings to be held between counsel and the emergency arbitrator.

The SCC has seen a number of Emergency Arbitrations in relation to ISDS cases in recent years. These include the following:<sup>18</sup>

- An ISDS case concerning the oil and gas industry, in which the investors sought to restrain the respondent State from taking measures to restrict the claimants' ability to sell gas. The request for interim measures was granted.<sup>19</sup>
- An ISDS case concerning a claim by an investor who owned shares in a bank that had been the subject of measures taken by decree of the national bank of the respondent State. The investor sought an emergency decision declaring that the decree at issue should be stayed or suspended pending final resolution of the dispute. The request for interim measures was denied.<sup>20</sup>

- An ISDS case concerning a claim by an investor who owned shares in a bank that had been the subject of measures taken by decree of the national bank of the respondent State. The investor sought an emergency decision declaring that the respondent should be ordered to refrain from enforcing or implementing the decree, and should refrain from interfering with the claimant's shareholding in the bank pending final resolution of the dispute. The request for interim measures was granted.<sup>21</sup>

It can be noted that, in all the above cases, the emergency arbitrator found that he or she had *prima facie* jurisdiction to award interim measures.

### Appendix III to The 2017 SCC Rules

The SCC Rules are designed to apply to both commercial cases and ISDS cases. Nevertheless, the SCC recognises that there are some particular features of ISDS cases that call for particular regulation. Accordingly, the 2017 SCC Rules introduced a new Appendix III, which applies specifically to ISDS cases.<sup>22</sup>

The particular features of Appendix III can be summarised as follows:

- Article 1(2) of Appendix III provides the rules on joinder, multiple contracts and consolidation apply *mutatis mutandis* to ISDS cases. In practice, this gives the SCC Board some flexibility to adapt these rules for ISDS cases.
- Article 2 of Appendix III provides that, for ISDS cases, the default number of arbitrators shall be three. This is an exception to the general rule that, where the parties have not agreed upon the number of arbitrators, the SCC Board has discretion to choose the number of arbitrators.
- Article 3 of Appendix III sets out special rules which allow a third person<sup>23</sup> to apply to the arbitral tribunal for permission to make a written submission in the arbitration.
- Article 4 of Appendix III sets out special rules which allow a non-disputing treaty party to apply to the arbitral tribunal for permission to make a written submission in the arbitration.

Thus, Articles 3 and 4 of Appendix III recognise that there is often, although not always, a special need for transparency in ISDS cases.<sup>24</sup>

### The Outcome of ISDS Cases Before The SCC

Of the 92 ISDS cases that were registered at the SCC between 1993 and 2016, most awards have been rendered in favour of respondent States:<sup>25</sup>

- 21% of the arbitral tribunals have declined jurisdiction;
- 37% of the arbitral tribunals denied all of the investor's claims;
- in 78% of cases where the investor's claims were denied in full, the respondent State was not found in breach, and in 22% the investor failed to prove any damages, despite the respondent State being found in breach; and
- the arbitral tribunals upheld the investor's claims in part or in full in 42% of cases.

### Costs

When considering the costs of an arbitration, it is useful to distinguish between arbitration costs (*i.e.* the fees and costs of the arbitrators and of the SCC) and party costs (*i.e.* the fees and costs for legal representation and other costs incurred by each party).<sup>26</sup>

Party costs typically account for more than 80% of the overall costs of the arbitration.<sup>27</sup>

If so requested by one or more of the parties, the arbitral tribunal has the power to apportion both the arbitration costs and the party costs as between the parties in its final award.<sup>28</sup> The standard to be applied in both cases is that the arbitral tribunal shall have regard to “*the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances*”.<sup>29</sup>

In practice, it appears that SCC tribunals tend to regard the outcome of the case as the primary factor to be taken into account. However, there are different views on what should be considered to be the outcome of the case. Some tribunals look at the success of a party in relation to the quantum of the claims awarded, while others define the outcome of the case on the basis of the relevance of the issues decided, and which party succeeded in a specific issue, and some tribunals combine both approaches.<sup>30</sup>

### Stockholm Treaty Lab

The SCC seeks to be modern and forward-thinking in its approach to dispute resolution, and nowhere can this approach be seen more clearly than in the SCC's Stockholm Treaty Lab.

The Stockholm Treaty Lab<sup>31</sup> is a crowdsourcing platform through which the SCC invited teams from around the world to submit ideas for international law with the aim of promoting green investment and solving climate change problems.

In total, 43 teams registered to compete in this challenge, representing some 270 innovators from four continents, and more than 25 countries and 22 teams submitted entries.

The Stockholm Treaty Lab Jury announced its decision on 20 July 2018, and two teams were selected as winners:

- “the creative disrupters” who proposed a treaty on sustainable investment for climate change mitigation and adaptation; and
- “team innovate” who proposed a protocol for the encouragement, promotion, facilitation and protection of investments in climate change mitigation and adaptation.

The prize is broad exposure – including exposure at the United Nations in New York in September 2018 and in Davos in January 2019 – and an opportunity for the winners to engage in this important question on a global level.<sup>32</sup>

### Conclusion

The SCC regards ISDS cases to be a key part of its work. The SCC will continue to work hard to promote ISDS cases, and to ensure that the cases before it are administered and run as well as possible.

At a time when others question or even threaten the existence of ISDS arbitration, such work is as important as ever.

### Endnotes

1. UNCTAD IIA Issues Note, “*Special Update on Investor-State Dispute Settlement: Facts and Figures*”, page 5: [http://unctad.org/en/PublicationsLibrary/diaepcb2017d7\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf).
2. <https://sccinstitute.com/about-the-scc/news/2017/new-report-on-investment-arbitration-at-the-scc/>.
3. The SCC is one of the chosen fora for disputes between an investor and a Contracting Party under Article 26(4)(c) of the ECT.
4. Article 2(2) of Appendix III to the SCC Rules provides that the default rule for ISDS cases is three arbitrators, if the parties have not agreed otherwise. It can be expected that the



- SCC Board will almost always decide that it is appropriate to have three arbitrators for ISDS cases, although the SCC Board does have discretion to appoint a sole arbitrator.
5. SCC cases are administered by the Secretariat in English, Russian or Swedish. The SCC Rules are available in Arabic, Chinese, English, German, Italian, Russian, Spanish and Swedish.
  6. Case C-284/16 before the CJEU, *Slovak Republic v Achmea BV*.
  7. Article 8 of the BIT in the *Achmea* case was considered by the CJEU to be particularly problematic, since it allowed the arbitral tribunal to choose a seat of arbitration outside the EU, and thus the CJEU was concerned that the arbitral tribunal might be able to interpret and apply EU law without the possibility of an effective review by a court of a Member State based on EU law, and without an opportunity to make a request for a preliminary ruling.
  8. “SCC Procedures for the Administration of Cases under the 2010 UNCITRAL Rules” and “SCC Procedures as Appointing Authority under the 2010 UNCITRAL Rules”, respectively.
  9. In practice, the Board only dismisses cases on the basis of a lack of *prima facie* jurisdiction in the clearest of cases. All other cases are referred to the arbitral tribunal in order that the issue of jurisdiction can be thoroughly considered and determined.
  10. Article 43 states that the Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.
  11. “Investor-state disputes at the SCC”, page 5. The average duration for disputes decided by a sole arbitrator was 13 months, with a median duration of only 10 months; however, as the article makes clear, the discrepancy can be explained by particular circumstances in those cases.
  12. Article 23(2) of the 2017 SCC Rules (entitled “Conduct of the arbitration by the Arbitral Tribunal”) states: “(1) The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties. (2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case.”
  13. This is required by Article 49(5) of the 2017 SCC Rules.
  14. It is important to note that there is a dedicated email address for applications for emergency arbitration, which is also monitored during out of office hours: [emergencyarbitrator@chamber.se](mailto:emergencyarbitrator@chamber.se).
  15. The costs of emergency proceedings are currently set at EUR 20,000 plus VAT, of which EUR 16,000 is the fee of the emergency arbitrator and EUR 4,000 is the application fee.
  16. In the one case where the deadline was missed, the claimant failed to use the dedicated email address.
  17. See generally the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015–2016: <https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf>.
  18. See generally the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015–2016.
  19. EA 2015/002.
  20. EA 2016/082.
  21. EA 2016/095.
  22. Article 1(1) of Appendix III provides that it applies to cases under the Arbitration Rules based on a treaty providing for arbitration of disputes between an investor and a State.
  23. A “Third Person” is defined as “[a]ny person that is neither a disputing party nor a non-disputing treaty Party”.
  24. See also the SCC Practice Note on the Mauritius Convention and UNCITRAL Rules on Transparency in SCC cases, 15 February 2016: <https://sccinstitute.com/media/72819/scc-application-of-mauritius-convention-and-uncitral-rules-on-transparency.pdf>.
  25. “Investor-state disputes at the SCC”, page 7.
  26. The 2017 SCC Rules make this distinction, in Articles 49 and 50, respectively.
  27. “Investor-state disputes at the SCC”, page 7.
  28. 2017 SCC Rules, Articles 49(6) and 50.
  29. The reference to efficiency and expeditiousness is a new element, which was added by the 2017 SCC Rules.
  30. “Investor-state disputes at the SCC”, page 7.
  31. <http://stockholmtreatylab.org/>.
  32. In addition, the Stockholm Treaty Lab is also seeking to give wide exposure to the non-finalists in order that as many ideas as possible can reach a wider audience.



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James Hope is head of international arbitration at the Stockholm office of Vinge in Sweden. He also sits as a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

He is a dual-qualified Swedish Advokat and English Solicitor-Advocate, and is well placed to compare common law and civil law practices and procedures.

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James has sat as arbitrator in international arbitrations under the ICC, SCC, Danish Institute of Arbitration, UNCITRAL and the Finnish Chamber of Commerce arbitration rules, in Stockholm, London, Paris, Copenhagen and Helsinki, under Swedish, English, Danish, Russian, Ukrainian and Finnish substantive laws, as well as under CISG. He is a Member of the ICSID international panel of arbitrators, the CIETAC panel of arbitrators and the Asian International Arbitration Centre (AIAC) panel of arbitrators. He is also a CEDR Accredited Mediator.

In addition to private practice, James is also a part-time supervisor and lecturer for the Master's Programme in International Commercial Arbitration Law at Stockholm University, and a guest lecturer at Edinburgh University and at Uppsala University. He is the author of a number of articles on dispute resolution issues, and is a frequent speaker at conferences.

James is fluent in English and Swedish.



ARBITRATION INSTITUTE  
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The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) was established in 1917 and is part of the Stockholm Chamber of Commerce. The SCC has developed into one of the world's leading forums for efficient dispute resolution for both Swedish and international parties.

The high number of international cases proves that the SCC is a preferred venue for dispute resolution among the international business community: every year parties from as many as 30–40 countries use the services of the SCC, and today, the SCC is the world's second largest institution for investment disputes worldwide.

The SCC was recognised in the 1970s as a neutral centre for the resolution of East-West trade disputes, and has since expanded its services in international commercial arbitration and emerged as one of the most important and frequently used arbitration institutions. In 2017, the SCC launched its new Arbitration Rules.

# The Impact of EU Law on ISDS

European Federation for Investment Law and Arbitration (EFILA)

Prof. Dr. Nikos Lavranos



### The EU's Investment Law and Arbitration Policy Since The Lisbon Treaty

On 1 December 2009 when the Lisbon Treaty entered into force, the EU obtained exclusive competence regarding Foreign Direct Investment (FDI) (Art. 207 TFEU). In the past 10 years, the EU has become a new active player in international investment law and arbitration by affecting the internal investment law policy of the Member States as well as externally by introducing modifications to substantive and procedural aspects of international investment law. The primary focus of the EU's effort has been to modify, or as it calls it, "reform" the existing investor-State dispute settlement system (ISDS) contained in practically all bilateral investment treaties (BITs) and free trade agreements (FTAs).

In the following sections, the impact of EU law on ISDS will be reviewed by discussing the most important developments. By way of setting the scene, the following section will discuss the difficulties of demarcating the distribution of competence regarding FDI, ISDS and BITs between the EU and its Member States. Subsequently, a number of specific developments regarding ISDS will be discussed, starting with the impact of the infamous *Achmea* ruling of the CJEU regarding intra-EU BITs and the wider potential impact on the Energy Charter Treaty (ECT).

We will then focus on the external dimension of the EU's efforts to modernise the ISDS by introducing the concept of an Investment Court System (ICS) in its recently concluded FTAs and within UNCITRAL.

### The Mixed Exclusive Competence of the EU

On 7 July 2010, the EU published its first Communication "Towards a comprehensive European international investment policy" (COM(2010)343 final). In that very first Communication on its new FDI competence, the European Commission (EC) started off with the premise that the EU has, from now on, full exclusive competence over all aspects of investment law, including ISDS. Accordingly, the EC claimed that the Member States had no role to play anymore and that their approximately 1,500 BITs which they had concluded over the past 50 years would need to go away and be replaced by EU trade and investment agreements. In contrast, the Member States disagreed with the EC, arguing that the exclusive competence of the EU was limited to the FDI only and that Member States continue to have competence regarding ISDS. Similarly, Member States were not ready to simply give up their BITs, since it would take decades for the EU to negotiate so many BITs and FTAs, which in the meantime would create legal uncertainty for investors and third States.

### The grandfathering Regulation

Accordingly, the first important milestone was the adoption of the so-called grandfathering Regulation 1219/2012, which ensures the continued existence of the approximately 1,200 BITs, which the Member States have concluded with third States. These BITs continue to remain in force until they are replaced by EU BITs or FTAs with the third State concerned. For example, if and when the FTA, between the EU and Singapore, enters fully into force (including the investment protection chapter), all the BITs which Singapore has concluded with the Member States would be replaced by the EU-Singapore FTA. In that way, a clear and seamless transition would take place, which ensures maximum legal certainty and protection for investors and third States. The fact that after 10 years no EU FTA with an investment protection chapter has yet entered into force (the reasons for that will be explained below) underlines the necessity of the grandfathering Regulation.

### The Financial Liability Regulation

Looking forward, the EU and its Member States also had to sort out the question of who will be respondent in investment disputes initiated on the basis of the new EU FTAs and who will be paying for any awards against them: the EU? The Member States? Or both?

The solution for these complicated questions is to be found in the so-called Financial Liability Regulation 912/2014. Simply put, this Regulation follows the basic concept that the entity which is responsible for the measure that caused the damage should act as respondent and be financially responsible for any awards. Accordingly, if the measure falls in the exclusive competence of the EU, the EU would be respondent and pay any awards, whereas if a measure falls within the exclusive competence of the Member States, the respective Member State would be respondent and financially responsible. The main problem, however, is the "grey area" where it is not clear whether the EU or the Member State is responsible for the disputed measure. This is particularly the case regarding the implementation of EU Directives where Member States are obliged to achieve the envisaged result of the Directive but have a large margin of appreciation to determine the manner how to achieve that result.

In such a situation, the question arises of whether the EU, which adopted the Directive, is ultimately responsible, or if the Member State that implemented the said Directive by adopting the disputed measure is responsible. While the Regulation gives some indications on how to decide this issue, it ultimately will be decided on case-by-case negotiations between the EC and the Member States.

Despite the adoption of these two Regulations, which set the foundations for the EU's investment policy, the thorny question of the exact demarcation of the competence between the EU and the Member States remained unresolved.

#### Mixed exclusive EU FDI competence

Eventually, in late 2014, the EC asked the Court of Justice of the EU (CJEU) to resolve that issue when it requested an opinion on the EU-Singapore FTA. In its Opinion 2/15, the CJEU determined that the EU's exclusive FDI competence does not extend to the ISDS provisions and to non-direct FDI. Consequently, the EU-Singapore FTA as well as CETA are mixed agreements, which must also be signed and ratified by all Member States. While this opinion clarified some of the competence issues, the EC obviously was disappointed by the outcome. Indeed, the EC has now changed gears and does not include ISDS provisions in its newest FTA with Japan and neither in the current FTA negotiations with New Zealand and Australia. Effectively, the EC now prefers to conclude trade agreements without an investment chapter in order to be able to conclude them without the Member States. Consequently, investment protection and ISDS provisions will only be part of EU FTAs if all Member States sign up to it.

As is apparent from the above, the process of developing and shaping the EU's investment law competence has been a cumbersome process, which – as will be explained below – is still ongoing.

#### The Impact of the *Achmea* Ruling on Intra-EU BITs and the ECT

By far the most far-reaching effect of EU law on ISDS has been caused by the *Achmea* ruling of the CJEU delivered in March 2018. The background of the *Achmea* case is as follows.

*Achmea*, a Dutch health insurance company, initiated arbitration proceedings against Slovakia based on the Netherlands-Czechoslovakia BIT of 1991, after Slovakia had adopted a legislation which re-nationalised the health insurance sector and thus effectively expropriated *Achmea*. Frankfurt was the seat of the arbitration. In 2012, *Achmea* won the arbitration proceedings and was awarded €22 million plus interest. Subsequently, Slovakia initiated setting aside proceedings before the Frankfurt Court, claiming that the arbitral tribunal lacked jurisdiction – this intra-EU BIT no longer being applicable since Slovakia's accession to the EU – and in any case, EU law prohibits the use of international arbitration within the EU. The Frankfurt Court rejected said application, which Slovakia then appealed before the German Federal Civil Court (the *Bundesgerichtshof*). Not convinced by the Slovak arguments, it nonetheless felt obliged to request a preliminary ruling from the CJEU to answer the question on the (in)compatibility of international arbitration based on intra-EU BITs with EU law.

The CJEU declared the arbitration provision in the BIT incompatible with EU law, the main reason being that arbitral tribunals operate “outside” the domestic legal system of the Member States and therefore cannot request preliminary rulings from the CJEU whenever EU law is at issue.

In other words, arbitral tribunals operate outside the control of the CJEU, which might endanger the uniformity and consistency of EU law and undermine the final authority of the CJEU. It is worth noting that the CJEU in *Achmea* did not make any distinction between UNCITRAL and ICSID arbitral awards. Neither did the CJEU distinguish between arbitral tribunals seated within the EU –

as was the case in *Achmea* – and arbitral tribunals seated outside the EU. Arguably, these differences could lead to different conclusions.

In any event, the implications of the *Achmea* judgment are difficult to predict. First of all, it should be emphasised that the CJEU did not declare the whole Netherlands-Czechoslovakia BIT incompatible with EU law, but solely the particular ISDS provision contained therein. Neither did the CJEU say anything more general regarding the other approximately 190 existing intra-EU BITs. However, it should be noted that CJEU judgments have a generally binding effect within the EU. Therefore, it remains questionable whether European investors could still use the ISDS provisions in the other intra-EU BITs. Second, it should be emphasised that despite the announcement of, for example, the Netherlands as now being obliged to terminate all its intra-EU BITs, no termination of intra-EU BITs following the *Achmea* judgment has ostensibly taken place so far. Accordingly, *prima facie*, European investors are still able to bring cases against EU Member States based on intra-EU BITs. This is particularly the case since the arbitration provisions in the other intra-EU BITs differ from the one that has been declared incompatible with EU law. Whether that is indeed the case will have to be tested by future intra-EU BIT disputes and ultimately decided by the CJEU.

#### The potential impact of the *Achmea* ruling on the ECT

Beyond intra-EU BITs, the *Achmea* judgment could also affect the use of the ISDS provisions contained in the ECT. In fact, the *Achmea* judgment has been used by several States as an argument to annul or set aside intra-EU awards rendered under the ECT. In particular, Spain, which is facing more than 30 intra-EU ECT claims, has been attempting to use the *Achmea* judgment to vacate awards that have been rendered against it. However, various ECT arbitral tribunals have not been impressed by Spain's attempt and concluded that the *Achmea* judgment has no bearing on their ECT cases (notably in *Masdar*). Indeed, most recently (in September 2018), the *Vattenfall* arbitral tribunal issued an extensive decision in which it rejected the objections against its jurisdiction raised by Germany based on the *Achmea* judgment. In particular, it did not consider that the *Achmea* judgment has any impact on the ECT or the jurisdiction of ECT arbitral tribunals, nor did it see any conflict between EU law and the ECT.

Meanwhile, in one of the Spanish setting aside cases, the Stockholm Court has reportedly asked preliminary questions to the CJEU on whether the ISDS provision in the ECT is compatible with EU law. Depending on the CJEU's conclusion, the impact for European investors could be significant, in particular if the CJEU would conclude that also intra-EU ECT ISDS arbitrations are incompatible with EU law. This would force investors to rely on domestic courts in the Member States, which would be less than ideal because of their perceived lack of independence and impartiality.

Finally, the *Achmea* judgment (and the *Micula* case, still pending before the CJEU) could have negative implications for the recognition and enforcement of investment treaty awards within the EU. A domestic court in a Member State, asked to recognise and enforce an award that has presumably been rendered based on an incompatible ISDS clause, would most likely refuse such a request. While only the coming years will provide clarity on how the domestic courts in the Member States will handle this issue, it seems safe to assume that the recognition and enforcement of awards within the EU is facing increasing difficulties.

In short, the impact of the *Achmea* judgment could be far-reaching depending on the future decisions of the CJEU and arbitral tribunals confronted with the objection that ISDS provisions are incompatible with EU law. So far, the arbitral tribunals have not been convinced



that EU law prevents them from exercising their jurisdiction. Irrespective of that, it seems likely that the EC will increase its pressure on the Member States to terminate their intra-EU BITs. Similarly, it can be expected that the EC will propose to the Member States to issue a declaration, which would effectively exclude the application of the ECT ISDS provision in intra-EU disputes, i.e., a so-called disconnection clause. Another option would be that the other Member States follow Italy and withdraw from the ECT, which would leave the EU as the only party to act as a respondent for the EU and its Member States.

### The Investment Court System (ICS)

Already in its Communication of 2010, the EC identifies several shortcomings of the existing ISDS system, which it aims to address in its new FTA with third States. Notably, the EC identified the lack of transparency of ISDS proceedings and the lack of consistency and predictability of the ISDS system, as important issues. In that Communication, the use of quasi-permanent arbitrators and/or appellate mechanisms was already mentioned as possible remedies. Regarding the issue of increasing the transparency of ISDS proceedings, the EC has been one of the main driving forces of the UNCITRAL Transparency Rules which entered into force in 2014. These rules significantly expand the publication of ISDS awards and related submissions of the parties, expert opinions, etc. The UNCITRAL Transparency Rules also expand the possibility of non-disputing third parties to submit *amicus curiae* briefs to arbitral tribunals, thereby increasing the possible participation of NGOs in ISDS disputes, which in turn could lead to further politicisation of ISDS disputes.

Forced by the mounting public backlash against ISDS, which started when the TTIP negotiations were gaining traction around 2014, the EC decided to propose the investment court system (ICS) as a radical change to the existing ISDS system in the hope that this would appease the European Parliament, NGOs and the general public. In essence, the ICS – largely inspired by the WTO Dispute Settlement System – would create a semi-permanent two-tier court-like system, which would essentially be a move away from arbitration. The ICS would consist of a first instance tribunal with 15 members and an appellate tribunal of six members. The most important change is that the claimant would not have any say in the selection of the members of the tribunal. Instead, the Contracting Parties, including the Respondent in the respective dispute, would appoint all members by common agreement for several years. Consequently, the party autonomy, which is one of the hallmarks of arbitration, would be effectively eliminated. This obviously shifts the balance to the advantage of the States. In particular, it is not difficult to anticipate that States will appoint members which they consider to be more pro-State biased rather than pro-investor biased. Indeed, the damaging effect of the politicisation of the appointment of members of international courts and tribunals is currently visible regarding the WTO Appellate Body for which the US refuses to agree on the re-appointment of several WTO Appellate Body members. This could effectively paralyse the Appellate Body and prevent it from exercising its function.

The other important feature, which strongly deviates from arbitration, is the possibility of lodging an appeal on both points of law and fact. This obviously will increase the costs of the parties and extend the proceedings further. It also gives both parties a second bite of the apple, which is exactly what arbitration intends to avoid by offering only a one-shot procedure with a final binding award.

Putting aside the question of whether the ICS is the best solution to address the (perceived) shortcomings of the current ISDS system,

the EU has so far successfully been able to convince Canada, Vietnam, Singapore and Mexico to accept the ICS system in their new FTAs.

However, the fate of the ICS is currently pending before the CJEU. In exchange for giving its consent to sign CETA, Belgium (on behalf of Wallonia) has requested the CJEU to determine whether the ICS system is compatible with EU law (Opinion 1/17). It remains to be seen what the CJEU will decide. However, if it determines that the ICS is incompatible with EU law, this would essentially mark the end of the EU's effort in the area of ISDS.

### Towards a Multilateral Investment Court (MIC)

Despite this looming insecurity, the EC continues its efforts to promote the ICS at an international level. The EC, together with Canada and Mauritius, convinced the UNCITRAL to set up a Working Group with a broadly formulated mandate to identify and examine any of the shortcomings of the current ISDS system and to propose possible solutions. The discussions started in late 2017 and have made significant progress in 2018. In these discussions, the EC, Canada, Mauritius and several South American States have repeatedly referred to the MIC as being the panacea that would solve most, if not all, the perceived shortcomings of the current ISDS system. However, many States are not convinced that creating a new international court would be the appropriate solution. In particular, the US, Japan and Russia, and also some Asian States are not yet convinced and instead consider reforming or modifying the existing rules and institutions, such as, for instance, the ICSID Convention or the PCA, to be a more effective and realistic option. After all, in the past 50 years more than 3,000 BITs and FTAs have been concluded and more than 800 ISDS disputes have been initiated, much to the general satisfaction of the users. Indeed, according to statistics by UNCTAD, States win more cases than claimants. Thus, States have little reason to complain about the current ISDS system, which is also confirmed by the fact that States continue to conclude BITs with ISDS provisions.

In any event, it is too early to say whether the MIC proposal will gain sufficient traction and support by all the major economies, investors and the arbitration community generally. Nonetheless, the EU managed to direct the debate towards its MIC proposal.

### Outlook

Over the past decade, the EU has become a new driver in shaping international investment law and arbitration. The impact of EU law on ISDS is particularly noticeable regarding the intra-EU BITs after the CJEU determined in *Achmea* that the relevant ISDS provision is incompatible with EU law. Besides, it seems conceivable that EU law will also affect the use of the ISDS provisions of the ECT in intra-EU disputes. It is also possible that EU law will have a negative impact on the recognition and enforcement of awards within the EU.

At the international level, the EC's ICS proposal, if it obtains the blessing of the CJEU, would be a game changer with potentially far-reaching consequences for investment treaty arbitration. The impact would be even more sweeping if the MIC proposal were to be embraced by a significant number of States around the world.

In any event, one thing is clear: EU law will continue to impact international investment law and arbitration. Consequently, the arbitration community must engage more actively than in the past with the EU and its institutions and address more pro-actively any perceived shortcomings of the ISDS system, for example, by proposing improvements to the existing ISDS system that are credible, effective and workable.


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Since EFILA was established in Brussels in 2014, it has developed into a highly regarded think-tank that specifically focuses on the EU's investment law and arbitration policy.

EFILA is unique in that it brings together arbitration practitioners, academics and policy makers, which have extensive first-hand experience and a deep understanding of the relevant investment law and arbitration issues. EFILA provides a platform for a fact- and merit-based discussion on the pros and cons of the EU's investment law and arbitration policy.

In recognition of its important role, EFILA has been granted Observer Status at the UNCITRAL Working Group III, which is working on the reforms of the ISDS system.

EFILA's regular events, such as the *Annual Conference* and *Annual Lecture*, have established themselves as key-events of the investment arbitration community.

EFILA also publishes – together with Queen Mary University of London – the *European Investment Law and Arbitration Review*.

# Australia

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Lee Carroll



Frances Williams



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Australia has entered into 10 free trade agreements with individual countries (Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and the USA) or groups of countries (the AANZFTA between Australia, Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, New Zealand, the Philippines, Singapore, Thailand and Vietnam).

Australia is also party to 20 bilateral investment treaties (BITs) that are in force with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, the Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

The provisions of a terminated BIT with India remain applicable to pre-termination investments.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Australia has signed, but not yet ratified, the Pacific Agreement on Closer Economic Relations Plus (PACER Plus), Peru-Australia Free Trade Agreement, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, also known as TPP-11). Generally, there is a delay between signature and ratification because a process of inquiry must be undertaken by the Joint Standing Committee on Treaties (JSCOT).

The PACER Plus was signed in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific Island countries. The most recent report issued by the JSCOT recommended the PACER Plus be ratified.

The Peru-Australia FTA was signed by representatives from Australia and Peru on 12 February 2018. It has been tabled in Parliament and was discussed in a public hearing of the JSCOT on 7 May 2018 where a key concern was the potential overlap between PAFTA and the CPTPP. The JSCOT has not yet reported back to Parliament.

The CPTPP was signed in Santiago on 8 March 2018. It is likely to be ratified later in the year.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is an Australian model Investment Promotion and Protection Agreement (IPPA) text. It provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text can be seen, for example, in the Australia-Mexico IPPA, the Australia-Egypt IPPA, the Australia-Uruguay IPPA and the Australia-Lithuania IPPA.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

We are not aware of diplomatic notes with other States being published.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

We are not aware of official commentaries concerning the intended meaning of treaty clauses being published.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is party to both the New York Convention and the Washington Convention. Australia signed the Mauritius Convention on Transparency on 18 July 2017. Ratification will be considered by the Australian Parliament through the JSCOT.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia is comprised of the *Foreign Acquisitions and Takeovers Act 1975* (FATA), the *Foreign Acquisitions Takeovers Fees Impositions*

*Act 2015* and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

Like the rest of the market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001*. Additionally, all dealings must be conducted in accordance with the Corporations Act with regard to insider trading, market manipulation, disclosure of shareholdings, takeovers and acquisitions and capital raisings.

FATA (and its associated regulations) does not contain dispute resolution provisions.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances which involve a "foreign person" as defined by s 4 of FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) holds a controlling interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural or business investment.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**). FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, FATA empowers the Treasurer to veto foreign investment proposals which are contrary to the national interest (FATA, s 67). The Policy is instructive of what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, p 8). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

FATA also requires compulsory notification of certain business activities which are considered to be significant (or notifiable) actions. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either:

- the amount paid for an interest; or
- the value of the entity or the asset,

exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e. the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements, however, as strict penalties apply for breaches of FATA, foreign investors in doubt should seek legal advice.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40, the Full Federal Court considered, among other issues, the connection between Australia's domestic law and the *Convention Relating to the Status of Refugees*. *SZOQQ* demonstrates that the Australian courts' approach to treaty interpretation is, subject to contrary legislation, consistent with the approach in international law reflected by arts 31 and 32 of the *Vienna Convention on the Law of Treaties* (VCLT). The VCLT provides that a treaty shall be interpreted in good faith and according to the ordinary meaning of its words in their context and in the light of the treaty's object and purpose. Recourse to explanatory materials (i.e., *travaux préparatoires*) is permitted (*Great China Metal Industries Co Ltd* (1998) 196 CLR 161 at 186).

In *Minister for Home Affairs v Zentai* [2012] 246 CLR 213, the High Court of Australia considered Hungary's request for the extradition of the respondent to face questioning for an alleged war crime in 1944. The issue before the High Court was the interpretation of the *Australia-Hungary Extradition Treaty* (**Treaty**), which had been incorporated into domestic law. Having ascertained the Treaty's object and purpose, the majority of the Court found in favour of a strict textual interpretation. The Chief Justice remarked that the VCLT rules of interpretation were "generally consistent" with Australian common law principles on treaty interpretation (paragraph [19]). Ultimately, as the crime with which the respondent was charged did not exist at the time of the alleged offence, the Court denied the request for extradition.

The Full Federal Court case of *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 provides a comprehensive analysis on the interpretation of treaties in Australia. The case concerned the *Indian Double Taxation Agreement* (**Agreement**). The Court noted that India was not a party to the VCLT. However, as the VCLT is reflective of customary international law, the Court held that the rules of interpretation codified by arts 31 and 32 of the VCLT applied to the construction of the Agreement (paragraph [53]). Further, the Court emphasised that where parliament had adopted the exact text of a treaty into domestic legislation, it can be assumed Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The current Australian Commonwealth Government's policy is to consider investor-State dispute settlement (**ISDS**) provisions on a case-by-case basis, and there is ministerial support for ISDS provisions. ISDS provisions were agreed to in the Korea-Australia FTA (2014), the China-Australia FTA (2015), as well as the recent CPTPP.

It is worth noting, in the case of any change in government, that the Labour Party and the Greens are opposed to ISDS provisions.



### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

None of Australia's current treaties contain anti-corruption provisions (although the CPTPP, which has not yet entered into force, contains provisions which permit a State taking measures necessary to eliminate bribery and corruption in international trade).

Australia's more recent FTAs:

- recognise a State's right to adopt measures necessary to protect the environment or conserve natural resources (e.g., with Japan and China);
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the MFN clause (e.g., with Malaysia, Japan and China); and
- protect assets owned or controlled "directly or indirectly" by an investor of a party (e.g., with China, Japan, Korea and Malaysia).

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, however, India unilaterally terminated its BIT with Australia on 23 March 2017.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

As of September 2018, Australia has only been a party to one reported investor-State case. However, the status of a second case is unknown.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong-Australia Bilateral Investment Treaty. The dispute arose out of Australia's implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the Tribunal dismissed Philip Morris' claims for jurisdictional reasons.

In November 2016, an American power generation company, APR Energy, commenced UNCITRAL arbitral proceedings against Australia under the Australia-United States FTA (AUSFTA). Broadly, the dispute relates to the seizure of the claimant investor's power turbines by one of Australia's major private banks. Australia responded to the Notice of Dispute stating that APR Energy cannot bring a dispute under AUSFTA because, *inter alia*, the treaty does not provide for investor-State arbitration. The status of the matter is unknown.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

There have been no awards made against Australia.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Australia has not had cause to bring any annulment proceedings.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no relevant satellite litigation.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law on which to make any relevant observations.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Yes. Third-party litigation funding was legalised by the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] 229 CLR 386. A majority of the High Court held that litigation funding was not contrary to public policy or an abuse of process. Australia permits third-party funding of other dispute resolution proceedings, including arbitral proceedings.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

In Australia, there is no case law directly relating to the funding of investor-State claims. This fact is unsurprising given Australia has been party to only one investor-State dispute (the Philip Morris plain-packaging laws dispute mentioned above).

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

It has been reported that third-party litigation funders operating in Australia capture approximately 15% of Australia's \$21 billion litigation market (Jason Geisker and Jenny Tallis, *The Third Party Litigation Funding Law Review* (The Law Reviews, 1<sup>st</sup> edition, 2018)). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims.

By contrast, it is understood that few arbitral matters in Australia are funded.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host States for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as "National Treatment" and "Minimum Standard of Treatment" which exist in many of Australia's Free Trade Agreements. For example, in the Singapore-Australia FTA, the minimum standard of treatment includes an express "*obligation not to deny justice in criminal, civil or administrative*

*adjudicatory proceedings*". Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

## 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

In contrast with the Model Law, arbitrations under the Washington Convention are "self-contained", that is, all procedural issues are to be resolved by ICSID and the arbitral tribunal themselves. For example:

- the Chairman of ICSID's Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, art 38; Rules of Procedure, art 4);
- the tribunal can make provisional measures if necessary (Washington Convention, art 47, Rules of Procedure, art 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party's application) interpret, revise, stay or annul awards (Washington Convention, arts 50–52, Rules of Procedure, arts 50–55).

The self-contained nature of ICSID arbitrations is consistent with the IAA, which is silent on the Australian courts' role (or lack thereof) concerning procedural issues. Accordingly, the Australian courts' role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, art 54; IAA, s 35).

## 6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards. It gives the Washington Convention the force of law in Australia (s 32). Part IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part II of the IAA.

## 6.4 To what extent are there laws providing for arbitrator immunity?

Section 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

## 6.5 Are there any limits to the parties' autonomy to select arbitrators?

A party should not appoint an arbitrator which is a national of the contracting State party to the dispute or the contracting State whose national is a party to the dispute unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (Washington Convention, art 39).

Further, if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "*of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*" (Washington Convention, arts 14(1) and 40(2)).

These articles above have the force of law in Australia under section 32 of the IAA.

Parties should also be aware of any contractually imposed limits.

## 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, the default procedure in the Washington Convention has the force of law in Australia.

If the parties fail to agree on the number of arbitrators, the default number is three (Washington Convention, art 37(2)(b)).

If the parties fail to agree upon a procedure for the appointment of arbitrators in a three-member tribunal, each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the third, who shall be the president of the Tribunal (Washington Convention, art 37(2)(b)).

## 6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree the arbitrator or the method of appointment fails. However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (see art 37(2)(b)) or where the tribunal has not been constituted within time (see art 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator.

# 7 Recognition and Enforcement

## 7.1 What are the legal requirements of an award for enforcement purposes?

Article 48 of the Washington Convention requires the award to be in writing, and signed by the arbitrators. The award shall also state the reasons upon which it is based.

## 7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under art 54 of the Washington Convention, a State must enforce an ICSID award as if it were the final judgment of a court in that State. The Federal Court of Australia and the Supreme Courts of the States and Territories are designated for the purposes of art 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, s 34).

There are limited grounds on which a party may request annulment of an award in art 52 of the Washington Convention.

## 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the *Foreign States Immunities Act 1985* (Cth). It provides for

limited State immunity. A foreign State is generally immune from the jurisdiction of Australian courts unless it has submitted to the jurisdiction (s 10) or the proceedings concern the State's commercial activities (s 11). In *Lahoud v The Democratic Republic of Congo* [2017] FCA 982 (which concerned the enforcement of an ICSID award), the Federal Court of Australia held that the Democratic Republic of Congo was not immune because it had submitted to the jurisdiction of the ICSID tribunal.

The property of a foreign State will generally not be subject to any order of the Australian courts for the enforcement of an arbitration award unless the foreign State has waived immunity (s 31) or the property is commercial (s 32).

The case of *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] ALR 228 considered these provisions. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (NFC) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in a Tokyo District Court. Firebird then sought to register that judgment in Australia, and to freeze Nauru's Australian bank accounts. The High Court of Australia held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

#### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The *Foreign States Immunities Act* expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of the foreign State) are covered by the immunity from jurisdiction provided under s 9 and execution of an arbitration award against State property under s 30 (see ss 22 and 35, respectively).

The Full Court of the Federal Court of Australia considered the definition of separate entity in *PT Garuda Indonesia v ACCC* [2011] FCAFC 52. It was held that an instrumentality is a body created by the State for the purpose of performing a function for the State.

Therefore, a separate entity will be covered by sovereign immunity unless one of the exceptions under the Act (discussed in question 7.3 above) applies.

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# Austria

Oblin Rechtsanwälte GmbH

Miloš Ivković



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

To date, Austria has signed and ratified 69 Bilateral Investment Treaties (“BITs”), out of which BITs with the following 60 states are presently in force: Albania; Algeria; Argentina; Armenia; Azerbaijan; Bangladesh; Belarus; Belize; Bosnia-Herzegovina; Bulgaria; Chile; China; Croatia; Cuba; Czech Republic; Egypt; Estonia; Ethiopia; Georgia; Guatemala; Hong Kong; Hungary; Iran; Jordan; Kazakhstan; Kosovo; Kuwait; Kyrgyzstan; Latvia; Lebanon; Libya; Lithuania; Macedonia; Malaysia; Malta; Mexico; Moldova; Mongolia; Montenegro; Morocco; Namibia; Oman; Paraguay; Philippines; Poland; Romania; Russia; Saudi Arabia; Serbia; Slovakia; Slovenia; South Korea; Tajikistan; Tunisia; Turkey; Ukraine; United Arab Emirates; Uzbekistan; Vietnam; and Yemen.

The Treaty on the Functioning of the European Union (“TFEU”) entered into force on 1 December 2009 establishing the European Union’s (“EU”) competence over direct investments. Based on the transferred competence, the European Parliament and the EU Council adopted Regulation 1219/2012 according to which existing BITs remain valid subject to authorisation by the European Commission after “evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries” (Regulation 1219/2012, Article 5). The European Commission further initiated infringement proceedings with respect to 12 Intra-EU BITs (bilateral investment treaties between EU Member States) signed and ratified by Austria.

Austria signed the Energy Charter Treaty in 1994, followed by a formal ratification in 1997.

Various trade agreements and treaties with investment provisions are in force with respect to Austria in its capacity as an EU Member State.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

BITs signed with Zimbabwe (2000), Cambodia (2004) and Nigeria (2013) have yet to come into force.

The most important agreement awaiting ratification in EU Member States’ national parliaments is the EU-Canada Comprehensive Economic and Trade Agreement (“CETA”) which has been in provisional force since 21 September 2017.

Negotiations with China, Japan, Mexico, Myanmar, the Philippines, Tunisia, and the US (“TTIP”), are currently in progress.

Trade agreements negotiated at the EU level are facing strict scrutiny by Member States including Austria. It may be concluded that the scope and dispute resolution mechanisms enshrined in the stated trade agreements are the subject of relentless legal and political debate.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Austria does have a Model BIT adopted in 2008 (“Model BIT”). It is, however, crucial to recall that the prevailing number of BITs signed and ratified by Austria predate the newest version of the Model BIT. An assessment of the impact the latest model BIT may have in the future is likewise challenging to make.

A comparable analysis of BITs signed after the Austrian Model BIT had been introduced shows a lack of uniformity. On the one hand, investment treaties with Tajikistan and Kosovo were strictly drafted along the lines of the Model BIT. Contrariwise, agreements of the same nature with Kyrgyzstan and Kazakhstan introduced amendments to the Model BIT in some important aspects.

Furthermore, investment protection provisions are commonly becoming a part of EU trade agreements with third countries, thus limiting the purpose envisaged for the Model BIT.

As far as the content of the Model BIT is concerned, Austria certainly presented a concise, functional, and advanced platform for successful protection of foreign investments. The key provisions ensure:

- a. equal treatment of foreign investors in comparison to (i) national investors and/or (ii) investors from third countries;
- b. obligation of a fair treatment according to the standards of international law (closely regulated expropriation; payments made in the context of an investment must be effected without restrictions, *etc.*); and
- c. effective dispute resolution in front of (i) national courts, (ii) the International Centre for Settlement of Investment Disputes (“ICSID”), (iii) a sole arbitrator or an *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”), and (iv) a sole arbitrator or an *ad hoc* tribunal under the Rules of Arbitration of the International Chamber of Commerce (“ICC”).

Further peculiarities of the Model BIT include characteristic defining of the terms “investor” and “investment”, as well as a rather wide-reaching umbrella clause. A commentary addressing important aspects of the Model BIT in greater detail is conveniently accessible online: [https://www.iisd.org/pdf/2012/austrian\\_model\\_treaty.pdf](https://www.iisd.org/pdf/2012/austrian_model_treaty.pdf).

#### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

A rare example of diplomatic notes exchanged for the purpose of establishing the intended meaning of a BIT is related to the BIT concluded with Paraguay and available in electronic form under [https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/Bilaterale\\_Investitionsschutzabkommen/Paraguay2.pdf](https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/Bilaterale_Investitionsschutzabkommen/Paraguay2.pdf).

#### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

All available supporting materials to any international treaty ratified by the Parliament of the Republic of Austria are officially accessible in an electronic form under <https://www.parlament.gv.at/PAKT/>. While the Federal Ministry of Digital and Economic Affairs makes German versions of the ratified BITs with accompanying instruments available on its website for review and public scrutiny (<https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen-Laender.aspx>), English versions may be found under <http://investmentpolicyhub.unctad.org/IIA/CountryBits/12>.

## 2 Legal Frameworks

#### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Austria became a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) on 2 May 1961. The New York Convention applies to Austria without limitation, since the initial reciprocity reservation was withdrawn in 1988.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) was ratified on 25 May 1971, entering into power with respect to Austria on 24 June 1971.

Austria is not a party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Mauritius Convention”).

#### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Austria does not have a specific (foreign) investment law.

#### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Formal admission of a foreign investment is generally not required. However, some non-discriminatory national and EU measures may

become applicable (e.g. in acquisition of real estate, antitrust, energy sector, etc.).

## 3 Recent Significant Changes and Discussions

#### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Pursuant to the Austrian Supreme Court’s (“OGH”) landmark case on point (3 Nd 506/97) multinational agreements ought to be seen from the international application angle. A multinational agreement loses its meaning and effectiveness if its rules were to be interpreted exclusively nationally. Therefore, the interpretation of individual text elements must not be based on the sole meaning of the national legal language. It is rather to be examined whether these parts of the text were deliberately adopted by the contracting parties with due regard to specific national traditions.

OGH proceeded to state that the purpose of unified law requires international legal unity to be valued higher than that of a seamless incorporation into a national legal order. Although systemic breaks with autonomous civil law are to be avoided as far as practically possible, they must, if necessary, be accepted under international uniformity. The systematic interpretation is thus confined to the international context.

#### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The Austrian Government has yet to announce any crystallised policy regarding investor-state arbitration.

As a matter of general attitude unrelated to any particular investment disputes, the Federal Ministry of Digital and Economic Affairs does, however, indicate the Government’s openness to binding international arbitration as a proper alternative to national courts in dispute resolution under the applicable BITs.

#### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country’s treaties?

##### 1. Corruption:

The issue of corruption is not uniformly addressed by the applicable legal instruments. The preamble of the Model BIT emphasises “*the necessity for all governments and civil actors alike to adhere to UN and OECD anti-corruption efforts, most notably the UN Convention against Corruption (2003)*”. Preambles of the post-Model-BITs signed with Kazakhstan, Kyrgyzstan, Tajikistan and Nigeria contain similar provisions.

An example of a pre-Model-BIT stipulation that tackles the issue of corruption in a limited form may well be Article 25(1)(c) of the Uzbekistan BIT that introduces corruption as a ground for annulment of an award if shown on “*the part of a member of the tribunal or on the part of a person providing decisive expertise or evidence*”.

##### 2. Transparency:

The issue of transparency is addressed in Article 6 of the Model BIT. This provision introduced obligations of prompt: (i) publishing of all instruments that may affect the operation of the BIT; and (ii) response to information requests. Notable limitation to the above

is stipulated insofar as to remove mandatory access to “information concerning particular investors or investments the disclosure of which would impede law enforcement”.

BITs currently in force follow somewhat opposite approaches to the Model BIT’s rules on transparency. While a significant number of the agreements contain wording corresponding to the above (e.g. BITs concluded with Armenia, Azerbaijan, Bangladesh, *etc.*), an equally evident number comes without a distinct transparency clause (e.g. BITs concluded with Belarus, Bulgaria, *etc.*). Finally, the third group of BITs incorporates rules on transparency with significant redactions (see e.g. Iran BIT, Article 4; Kuwait BIT, Article 3; and Libya BIT, Article 3, *etc.*).

### 3. Most-Favoured Nation clause:

Article 3(3) Model BIT stipulates that “[e]ach Contracting Party shall accord to investors of the other Contracting Party and to their investments or returns treatment no less favorable than that it accords to its own investors and their investments or to investors of any third State”. The protection is provided with respect to “management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favorable to the investor”. (Some of the pre-Model-BITs (e.g. with Belarus, Hong Kong, India, Malaysia, Montenegro, Serbia, *etc.*) do not contain a specified list of protected investment actions.)

### 4. Indirect investment:

The Model BIT covers both direct and indirect investments. However, some of the Pre-Model-BITs have more restrictive definitions of “investments” and possibly do not cover indirect investments (see, e.g., the BIT concluded with Iran).

### 5. Environmental protection:

The preamble of the Model BIT addresses the issue of environmental protection insofar as it stipulates that contracting states:

- are committed to the objectives stated in a manner consistent with the protection of the environment; and
- acknowledge the principles of the UN Global Compact and that “investment agreements and multilateral agreements on the protection of environment [...] are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection”.

Pre-Model BITs generally do not have similar provisions incorporated in their preambles. Contrary to this general observation, preambles of Post-Model-BITs signed with Nigeria and Tajikistan are similar to the Model BIT and it is only the preambles of the BITs with Kazakhstan and Kyrgyzstan that are less comprehensive on the point than the Model BIT.

As far as the body of the Model BIT is concerned, Article 4 specifically states that “[t]he Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic environmental laws”. Post-Model BITs have provisions to a similar extent.

Article 7(4) of the Model BIT states that “non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as...the environment, do not constitute indirect expropriation”. Apart from the BIT concluded with Kazakhstan, other post-Model BITs contain a comparable provision.

An example of a Pre-Model-BIT’s stipulation that takes account of environmental protection is Article 3(4) of the BIT concluded

with Kuwait which states: “investments shall not be subjected in the host Contracting State to additional performance requirements which may hinder or restrict their expansion or maintenance in a manner as to adversely affect or be detrimental to their viability, unless such requirements are deemed vital for reasons of [...] the environment [...]”.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Austria has not given notice to unilaterally terminate any BIT, yet.

It must be emphasised, however, that the conclusive effects of the transfer of competences over direct investments to the EU (see question 1.1 above) are yet to be determined.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

As of the day of this publication, Austria has been actively involved in a single publicly known investor-state arbitration: *B.V. Belegging-Maatschappij “Far East” v. Republic of Austria* (ICSID Case No. ARB/15/32).

The proceeding was initiated in July 2015 under the BIT Austria had concluded with Malta in 2002 (in force as of March 2004). The moving investor thereby alleged that Austria: (i) imposed arbitrary, unreasonable and/or discriminatory measures; (ii) denied full protection and security; (iii) violated applicable prohibitions of direct and indirect expropriation; and (iv) denied fair and equitable treatment.

The Arbitral Tribunal dismissed the claims on jurisdictional grounds in October 2017, following a hearing on a point which had arisen in March that same year.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Not applicable (see question 4.1 above).

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Not applicable (see question 4.1 above).

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

Not applicable (see question 4.1 above).

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Not applicable (see question 4.1 above).

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Austrian lawmakers have not yet introduced any legislation intended to govern the matter of third-party funding in litigation and/or arbitration, yet. The regulatory framework has thus been embraced by the courts, which seemed to endorse (in general) the legality of third-party funding in dispute resolution proceedings (*see* question 5.2 below).

Openness towards the permissibility of third-party funding in investor-state disputes may moreover be derived from the trade agreements currently negotiated at the EU level. By way of example, Article 8.26 of the closely scrutinised CETA permits third-party funding only subject to a mandatory disclosure of the “*name and address of the third party funder*”.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

The OGH landmark decision of February 2013 (6 Ob 224/12b) provides thus far the closest insight into the Austrian highest court’s perception of third-party funding’s legality.

The relevant issue presented to OGH was in essence whether third-party funding agreements violate *pactum de quota litis* prohibition stipulated in Section 879 para. 2 Austrian Civil Code (“ABGB”). While refraining from making a decision on point, OGH concluded that the standing of a party in a proceeding may not be affected by the existence of a third-party funding agreement, even if such agreement were to be found in violation of the *pactum de quota litis* rule.

The holding of OGH has been widely interpreted as upholding legality of third-party funding not only in national litigation proceedings, but also in international arbitration.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

The Austrian market’s interest in third-party funding has consistently been increasing in the past few years. In particular in international arbitration proceedings, disputing parties tend to carefully explore advantages and disadvantages of funding in securing their claims. Investor-state disputes are no exception. As a traditionally established arbitration centre embraced by political neutrality, affected investors worldwide strongly consider retaining the services of Austrian leading practices whether or not claims are related in any manner to Austria. Depending on the nature of the claims thereby intended to be raised, third-party funding agreements are time and again negotiated with specialised institutions abroad.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

As a well-established rule of Austrian law, the legal force of a *final* criminal conviction must be understood in such a way that the convicted person, as well as any third party, have to accept the verdict. Thus, in a subsequent legal dispute, no person may claim that she

had not committed an act for which she was convicted, regardless of whether the opposing party in the subsequent proceedings was involved in the criminal proceedings in any capacity.

Subject to the stated, international tribunals may have a rather limited power to evaluate *effects* of a criminal conviction and/or investigation as a matter of (established) fact against any applicable obligations of the state *vis-à-vis* investors as a matter of law.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

National courts may intervene in arbitration proceedings if so expressly provided for in the Austrian Code of Civil Procedure (“ZPO”). Two groups of national courts’ permissible dealings with procedural issues arising out of arbitration may be distinguished:

- a. Subject to a prior request from an arbitral tribunal:
  - enforce an interim measure issued by the arbitral tribunal (Section 593 ZPO); or
  - conduct judicial acts for which the arbitral tribunal has no authority (e.g. compelling witnesses to attend, ordering the disclosure of documents, *etc.*), including requesting foreign courts and authorities to perform such actions (Section 602 ZPO).
- b. Subject to specific procedural authorisations arising out of ZPO:
  - grant interim measures (Section 585 ZPO);
  - appoint arbitrators (Section 587 ZPO; *see* question 6.7 below); or
  - decide on the challenge of an arbitrator (Section 589 ZPO).

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Austria is a party to both the New York and ICSID Conventions (*see* question 2.1 above). Nonetheless, both international instruments (*see* Article III *et seq.* New York Convention; Article 54 *et seq.* ICSID Convention) look up to the national rules of procedure for a proper implementation.

Austrian lawmakers make a clear distinction between the rules on enforcing domestic (*i.e.* rendered in arbitral proceedings with the agreed seat of arbitration in Austria) and foreign (*i.e.* rendered in arbitral proceedings with the agreed seat of arbitration out of Austria) arbitral awards.

In the case of the former, Section 1 of the Austrian Enforcement Act (“EO”) stipulates that domestic awards not subject to appeals (inclusive of settlement agreements) may be enforced directly as inherently conferring executory titles.

Contrary to the above, Title III EO (Section 403 *et seq.*) requires formal recognition of foreign arbitral awards prior to domestic enforcement, unless the awards ought to be enforced without prior separate declaration of enforceability by (i) virtue of an applicable international agreement (e.g. treaties with applicable obligation of reciprocity in recognition and enforcement), or (ii) an act of the European Union.

### 6.4 To what extent are there laws providing for arbitrator immunity?

Austrian applicable law favours the concept of legal liability over absolute immunity of arbitrators. Section 594(4) ZPO in this respect clearly stipulates that “[a]n arbitrator who does not fulfil his obligation resulting from the acceptance of his appointment at all



*or in a timely manner, shall be liable to the parties for all damages caused by his wrongful refusal or delay”.*

#### **6.5 Are there any limits to the parties’ autonomy to select arbitrators?**

There are no express limitations to the parties’ autonomy to select arbitrators. Nonetheless, it should be emphasised that the generally accepted interpretation of Section 587 ZPO only permits appointments of natural persons as arbitrators. Furthermore, active judges are not allowed to act as arbitrators.

#### **6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?**

Yes. In accordance with Section 587(3) ZPO, if the parties’ agreed method for selecting arbitrators fails due to one of the enumerated reasons, *“either party may request from the court to make the necessary appointment, unless the agreed appointment procedure provides for other means for securing the appointment”*.

For the avoidance of doubt, in case of parties’ failure to reach an agreement on the appointment procedure to begin with, the applicable default appointment procedure is expressly stipulated in Section 587(2) ZPO.

#### **6.7 Can a domestic court intervene in the selection of arbitrators?**

Domestic courts may be invited to appoint arbitrators in accordance with Section 587(3) ZPO (see question 6.6 above).

## **7 Recognition and Enforcement**

#### **7.1 What are the legal requirements of an award for enforcement purposes?**

According to Article IV(1)(a) New York Convention, an applicant seeking recognition of an award has to furnish the original award (or a certified copy) plus the original arbitration agreement (or a certified copy). Section 614(2) ZPO places in this respect the decision on whether to request the applicant to table the relevant arbitral agreement (or a certified copy) within the discretion of the judge. Since the competent district courts only examine whether the formal requirements are satisfied, the Austrian Supreme Court’s take on this has been more formalistic – they require an examination of whether the name of the debtor as indicated in the Request for enforcement authorisation is in line with the name indicated in the arbitral award.

In addition to the stated, an award may be subject to Section 606 ZPO requiring the award to be (i) in writing, and (ii) signed by arbitrators. Further formal requirements may be applicable in the absence of parties’ agreement.

#### **7.2 On what bases may a party resist recognition and enforcement of an award?**

Austrian courts are not entitled to review an arbitral award on its merits. There is no appeal against an arbitral award. However, it is possible to bring a legal action to set aside an arbitral award (both awards on jurisdictions and awards on merits) on very specific, narrow grounds, namely:

- the arbitral tribunal accepted or denied jurisdiction although no arbitration agreement or a valid arbitration agreement, exists;
- a party was incapable of concluding an arbitration agreement under the law applicable to that party;
- a party was unable to present its case (e.g. it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings);
- the award concerns matters not contemplated by, or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration – if such defects concern a separable part of the award, such part must be set aside;
- the composition of the arbitral tribunal was not in accordance with Sections 577 to 618 ZPO or the parties’ agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (*ordre public*); and
- if the requirements to reopen a case of a domestic court in accordance with Section 530(1) ZPO are fulfilled.

#### **7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**

Foreign countries are only granted immunity for actions to the extent of their sovereign capacity. Immunity does not apply to conduct of private commercial nature. Foreign assets in Austria are thus exempt from enforcement depending on their purpose: if meant to be used solely for private transactions, they may be seized and become subject to enforcement; but if meant to exercise sovereign powers (e.g. embassy tasks), no enforcement measures may be ordered. In a relevant decision on the issue, OGH concluded (*see* 3 Ob 18/12) that general immunity for state assets is not envisaged, instead it is the duty of the obliged state to prove that it was acting with sovereign power in suspension of enforcement proceedings according to Section 39 EO.

#### **7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**

In the absence of instructive case law, it may be rational to conclude that piercing the corporate veil with respect to sovereign assets would be legally permissible so long as the rules on the scope of sovereign immunity (*see* question 7.3 above) are complemented with satisfaction of the applicable legislative requirements on piercing the corporate veil.

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Oblin Rechtsanwälte GmbH is a leading Austrian international law firm, with partners and principle consultants around the world. We represent our clients in all phases of international commercial arbitration, investor-state arbitration and national commercial litigation – from their initiation to successful enforcement of court judgments and arbitral awards.

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# Brazil

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## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Brazil has ratified one Cooperation and Facilitation Investment Agreement (CFIA) entered into with Angola. Brazil is also part of the following trade agreements: MERCOSUR; ALADI; GATS; TRIM; TRIPS; complementation agreements with Argentina, Mexico, Suriname, Uruguay and Venezuela; and an agreement of partial scope of economic complementation with Guyana, San Cristobal and Nevis. As a MERCOSUR member, Brazil has entered into cooperation agreements with the European Union and Canada, complementation agreements with Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Peru and Venezuela, framework agreements with the Andean Community and Egypt, India and Israel, and an auto sector agreement with Mexico. Sources: <http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/796-negociacoes-internacionais-2>; and <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu>; <https://concordia.itamaraty.gov.br/>.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

The following CFIA's have been signed but not yet ratified: Chile; Colombia; Ethiopia; Malawi; Mexico; Mozambique; Peru; and Suriname. The Following BITs have been signed and never entered into force: BLEU (Belgium-Luxembourg Economic Union); Chile; Cuba; Denmark; Finland; France; Germany; Italy; Korea; Netherlands; Portugal; Switzerland; United Kingdom; and Venezuela. Pursuant to information available from the Ministry of Foreign Affairs, the CFIA's were created as a response to the negative experience of many countries with BITs, particularly with the inadequacy of the investor-State dispute settlement mechanism. In 2016, Brazil signed an Agreement for Economic and Commercial Growth with Peru, which is under analysis by the Brazilian Congress. MERCOSUR signed a FTA with Palestine in 2011 that is subject to ratification by the MERCOSUR members. Sources: <http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/796-negociacoes-internacionais-2>; and <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu>; <https://concordia.itamaraty.gov.br/>.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The CFIA's are based on a 2015 model that was initially drafted in 2013 by the Brazilian Government. Its purpose is to attract investments preserving the States' regulatory autonomy. The Model CFIA 2015 is based on three pillars: risk mitigation; institutional governance; and thematic agendas for investment cooperation and facilitation. The following provisions are also found in the Model CFIA 2015: national treatment; most-favoured nation treatment; transparency; specific conditions for direct expropriation; and compensation in case of conflicts. Unlike BITs, the CFIA's do not set forth mechanisms to settle investor-State disputes. In case an investor considers that the host State has breached any provision of the CFIA, the model encourages dialogue and bilateral consultation between the States. If the States do not reach an understanding, such model provides for State-State arbitration. In other words, the State of nationality of the investor shall bring the investor's claim against the host State.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Brazil does not publish notes exchanged with other States concerning its treaties. However, memoranda of understanding for cooperation on trade and investments can be found at the following link: <https://concordia.itamaraty.gov.br/>.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Brazilian Ministry of Foreign Affairs published a note explaining the development and the key clauses of the Model CFIA 2015. However, the note is brief and does not detail the meaning of every clause. Other than that, there are no explanatory notes on trade agreements available for public consultation.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Brazil has been a party to the New York Convention since 2002.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

There is no investment law in Brazil. There is sparse legislation that fosters foreign investment on different industry sectors, for instance, telecommunications (Federal Law No. 9,472/97), oil (Federal Law No. 9,478/97), mining (Federal Decree-Law No. 227/67) and public-private partnerships (Federal Law No. 11,079/04). More recently, the Brazilian Senate approved the Federal Law No. 13,448 that aims to regulate the extension and rebidding processes in partnership agreements related to railway, highway and airports entered into by the Federal Union. Among the most important changes introduced, it is worth highlighting that any dispute arising out of agreements regulated by Federal Law No. 13,448 related to freely disposable rights shall be settled through arbitration or other alternative dispute resolution mechanisms. The arbitration seat shall be Brazil and the arbitration shall be conducted in Portuguese. The Federal Decree No. 8,465/2015 also provides for arbitration to settle disputes in the port sector.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Foreign capital is not subject to prior approval by the government. As a matter of fact, Federal Law No. 4,131/62 regulates the investment of foreign capital in Brazil and Article 2 provides that foreign capital invested in Brazil shall receive the same legal treatment granted to national capital. In this regard, there is no limitation as to the amount that may be invested in Brazil. Nonetheless, it should be noted that there are some exceptions. There can be no foreign investment when it comes to activities involving nuclear energy; certain areas of healthcare services; mail and telegraph services; and certain activities related to aerospace. There are also some limitations causing foreign investments to be subject to an authorisation process in case of acquisition/rental of rural property, financial institutions, air transportation companies, media, and the mining sector. In any case, foreign capital is subject to registration, through the Brazilian Central Bank's (BCB) e-registration tool. The BCB also has important rules on the admission and registration of foreign capital that can be found in its Circular No. 3,689/13 and Resolution No. 3,844/10.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Since the BITs signed by Brazil never entered into force and only one CFIA was ratified in 2017, there is no case on treaty interpretation about this subject in Brazil.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Please see the answers to questions 1.2 and 1.3 above.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Corruption is expressly addressed in some of the CFIA's signed by Brazil. Each State can take the measures and make the necessary efforts to eliminate corruption. States agreed that they would be under no obligation to protect investments obtained by means of corruption. It is worth mentioning that measures adopted by a State to fight corruption cannot be arbitrated under the CFIA's. As to MFN, it is a key provision in most of the Brazilian CFIA's. The MFN treatment: (i) is subject to the laws and regulations in force when the investment is made; and (ii) relates to the expansion, administration, conduction, operation, selling or other disposal of the investment in the territory. The CFIA's provide for different exceptions to the application of the MFN treatment. Rules about indirect investments are not found in all CFIA's. In the treaty involving Angola, for instance, Article 16.3.ii.b states that it is possible for a State to deny the benefits of the agreement to a legal person (investor) not effectively controlled by national or permanent residents of one of the States, directly or indirectly. There are no provisions on climate change. All the CFIA's have rules to promote transparency of laws, regulations and proceedings related to the agreements.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, Brazil has not given notice to terminate any BITs or similar agreements.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Brazil has never been involved in an investor-State case.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

There is no public information available about the enforcement of arbitral awards against the Brazilian State.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Brazil has never been involved in an ICSID case.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

No, there has never been satellite litigation arising in relation to substantive claims.



#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

No, this is not currently applicable in Brazil.

## 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

Brazil does not have any specific provision regarding the funding of investor-State claims. However, the third-party funding (TPF) market has been in constant growth in the country. Therefore, arbitral institutions, such as the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), have issued guidelines pertaining to this issue.

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no case law on this subject.

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Although it is a relatively recent practice in Brazil, TPF has experienced relevant growth in the past three years due to the undeniable interest of national and foreign funding companies. The amount invested by such companies in Brazil is not publicly available.

## 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

The Brazilian Federal Constitution provides in its Article 5, paragraph 4, item V that Brazil submits itself to the jurisdiction of the International Penal Tribunal to which creation it has adhered to. In 2002, by means of Decree No. 4,388, Brazil adhered to the Rome Statute for the International Penal Tribunal that acts as supplemental jurisdiction competent for serious crimes, such as genocide, crimes against mankind, war crimes and violent crimes.

Likewise, the Inter-American Court for Human Rights (ICHR) has jurisdiction over any violation to the provisions of the American Convention on Human Rights (Pact of San Jose of Costa Rica), that was ratified by Brazil on 25 September 1992 through Decree No. 678/92. The competence granted to ICHR was ratified by Brazil through the Legislative Decree No. 89/98. Although the matter for judgment by the ICHR does not involve criminal justice, its decisions on violations of human rights can result in granting damages against the defaulting State.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Since Brazil ratified the New York Convention, the national courts have shown a more favourable position towards the autonomy of

the arbitral jurisdiction. Nonetheless, the national courts have the jurisdiction to deal with certain procedural issues arising out of arbitration, which are expressly defined in the Brazilian Arbitration Act (Federal Law No. 9,307/96). In this regard, the national judge shall appoint the arbitrators if the parties have failed to make an agreement as to the procedure of appointment of arbitrators (Article 7, §4); the court may intervene when one of the parties refuses to allow the commencement of arbitration, even though there is an arbitration clause that provides for it (Article 7); the courts can be asked to enforce certain decisions from the arbitral tribunal as (Article 22-C) or award (Chapter VI). State courts also have jurisdiction to declare arbitral awards null and void (Article 32).

#### 6.3 What legislation governs the enforcement of arbitration proceedings?

Both the Brazilian Arbitration Act (Articles 3, 4, 5 and 7) and the Brazilian Civil Procedural Code (Articles 69, 237 and 260) govern the enforcement of arbitration proceedings.

#### 6.4 To what extent are there laws providing for arbitrator immunity?

Arbitrators in Brazil do not enjoy full immunity. In fact, Article 17 of the Brazilian Arbitration Act provides that the arbitrators are an equivalent to public servants for the purposes of criminal law; as well as Articles 14 and 18 that establishes that the arbitrators enjoy the same duties and responsibilities as a judge.

#### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

The right to appoint the arbitrator provided in the New York Convention is widely respected in Brazil. Nevertheless, the Brazilian Arbitration Act provides that the arbitral tribunal should always be composed of an odd number of arbitrators and that the arbitrators should enjoy full civil capacity (Article 13). Additionally, individuals linked to the parties or to the submitted dispute, by any of the relationships resulting in the impediment or suspicion of State Court members, are prevented from acting as arbitrators (Article 14).

#### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Whenever the arbitration agreement provides for a sole arbitrator, the rules of most of the Brazilian arbitration institutions establish that, in case of disagreement of the parties, the arbitrator will be appointed by the institution itself. Should the arbitration agreement provide for a three-arbitrator panel, each party may nominate one co-arbitrator, who will jointly nominate the presiding arbitrator. If the co-arbitrators fail to appoint the chairman, he or she will be appointed by the institution. If the arbitration agreement is silent as to the arbitration institution, the interested party may resort to State courts and request the appointment of the arbitrators (Article 7, §4 of the Brazilian Arbitration Act). The Brazilian Arbitration Act expressly provides that the parties may, by common agreement, set aside institutional rules that limit the choice of arbitrators to those that are part of the respective institution's list (Article 13, §4). In case of multiple-party arbitration, the lack of agreement on the appointment of one co-arbitrator will cause the arbitration institution to appoint all members of the Arbitral Tribunal (*Dutco*).

## 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, pursuant to Article 7 of the Brazilian Arbitration Act. Please see our answer to questions 6.2 and 6.6.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

Domestic awards (rendered by an arbitral tribunal seated in Brazil) are automatically enforceable in Brazil. For that purpose, an arbitral award should contain: (i) a report, including the parties' relevant data and a summary of the dispute; (ii) the grounds for the decision; (iii) the actual decision; and (iv) the date and place of the making of the award. Additionally, unless one of the arbitrators is unable or refuses to sign the award, all of the arbitrators should sign it (Article 26 of the Brazilian Arbitration Act).

As to the foreign arbitral awards, pursuant to the Brazilian Federal Constitution, as amended in 2004, foreign awards are only enforceable after undergoing a recognition procedure before the Superior Court of Justice. Such procedure does not entail re-examining the decision on the merits and the requirements for enforcement are provided in Articles 15 and 17 of Decree-Law No. 4.657/42 and Articles 216-A and following of the Internal Rules of the Superior Court of Justice. According to such provisions, the foreign arbitral award will be enforceable in Brazil if it was issued by the competent authority, it is final (*res judicata*) and it does not violate the sovereignty, the dignity of the human being or the public order. It should also comply with the terms of the New York Convention, meaning that the enforcement may be refused if any of the hypothesis set forth in Article V is verified. However, the Superior Court of Justice's decisions make reference almost only ever to the Brazilian law requirements, which mirror most of the provisions of the New York Convention.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

A party may resist recognition and enforcement as long as one shows that the award lacks any of the requirements set forth in the

previous question. Moreover, the opposing party may raise formal objections such as the notarisation of the translation of the arbitral award by the Brazilian consular authority or the lack of service of process in the original proceedings. Furthermore, Article 39 of the Brazilian Arbitration Law states that the recognition and enforcement of a foreign arbitral award shall be denied if: (i) in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; and (ii) the decision is offensive to national public policy.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

The Brazilian Supreme Court (STF) used to consider that foreign States were completely immune from jurisdiction. However, its position has changed. STF analyse whether the act of the State was public or private. STF admitted in a leading case that sovereign immunity can be mitigated when the foreign State intervenes in matters not related to public acts in the context of private relations (STF, AI-AgR No. 139,671, Rep. *Celso de Mello*, judged on 06.20.1995). The Superior Court of Justice is of the same understanding, as evinced in the following case: STJ, Ag. No. 757/DF, Rep.: *Sálvio de Figueiredo Teixeira*, 08.21.1990. In summary, there is State immunity in case of acts *ius imperii*. As to the recovery against State assets, the Superior Court of Justice rendered a decision in a case where it received a rogatory letter from a court in Spain to seize assets of a Brazilian company that was succeeded by the Brazilian Federal Union. The Superior Court of Justice found that the assets of the Brazilian company were part of the national treasury and that the Federal Union had not waived its immunity from enforcement. Therefore, enforcement was denied (ST, Rog. Letter No. 3,324, Rep.: *Humberto Martins*, judged on 5.12.2011). In the same sense, STF decided in the context of labour litigation that the States' immunity from execution is broad, except (i) when the State has waived its immunity, or (ii) if there are State assets in Brazil that are not related to diplomatic missions or representations (STF, AgR-RE No. 222,368-4/PE, Rep.: *Celso de Mello*, judged on 04.30.2002).

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There is no case law on this matter.

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LILLA, HUCK  
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ADVOGADOS

Lilla, Huck, Otranto, Camargo was founded in 1993 by a group of highly experienced lawyers and professors of the most prestigious universities in Brazil, with a strong presence both in Brazil and abroad in a wide range of legal practices.

The firm has developed a unique model in which all lawyers are effectively partners. Since the beginning of their careers, all partners are encouraged to understand the clients' needs in depth and develop planned and creative action towards the clients' best interests.

Lilla Huck's arbitration team has extensive experience in assisting its clients in pre-arbitral proceedings, domestic and international arbitrations and in the enforcement of foreign arbitral awards before Brazilian courts. Our partners have acted both as counsel and arbitrators under different arbitral rules.

# China

Zhong Lun Law Firm

Huawei Sun



### 1 Treaties: Current Status and Future Developments

#### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Up to 1 August 2018, China has ratified:

- 108 bilateral investment treaties (“BITs”);
- two multinational investment treaties, i.e. the Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment (effective as of 17 May 2014) and the ASEAN-China Investment Agreement (effective as of 1 January 2010); and
- 17 free trade agreements (“FTAs”) with investment provisions/chapters.

In addition, the Chinese central government has concluded and ratified special trade and investment arrangements with Hong Kong Special Administrative Region (“SAR”), Macao SAR and Taiwan, respectively.

#### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

There are approximately 20 BITs that China has signed but have not yet come into force due to unfinished domestic ratification procedures. Public information only shows two BITs that have not yet been ratified by China (i.e. the Botswana-China BIT (2000) and the China-Turkey BIT (amended)), with the approval of the counterpart states also pending.

#### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

No official version of the Chinese model BIT has been published by the Chinese government. However, the reader can find the unofficial versions of the Chinese Model BIT in Norah Gallagher & Wenhua Shan (eds): “Chinese Investment Treaties: Policy and Practice” (Oxford University Press: 2009), Appendices II to IV. As introduced in this treatise, the key provisions in the Chinese Model BIT Version III include fair and equitable treatment (Article 3.1), national treatment (Article 3.2), most-favoured-nation (“MFN”) treatment (Article 3.3), expropriation (Article 4), investor-state dispute settlement (Article 9), an umbrella clause (Article 9.2), etc.

#### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

The exchange of diplomatic notes between China and its counterparties will generally be annexed to the relevant BITs as an integral part of them, and published on the official website of the Ministry of Commerce (“MOFCOM”).

In the cases of new or succeeding states, for example, China acknowledges that Serbia, as a successor of the Former Yugoslavia, continues to be the counterparty to the China-Yugoslavia BIT (1995).

#### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

To our knowledge, no consolidated official commentaries have been published.

The Selected Works of China’s Practice on International Law (published by the Department of Treaty and Law of the Ministry of Foreign Affairs (“MFA”) in March 2018), may serve as a reference, as it covers the history of China’s treaty practice and China’s position on treaty interpretation, provisional applications, treaty successions, treaty reservations, dispute settlement of treaty-related issues, etc.

Occasionally, after China signs an FTA, MOFCOM will release an interpretation, or a Q&A (in Chinese) to highlight the features, clarify China’s position on specific provisions and explain the rationale behind the text. This practice has been followed by the China-Australia FTA (2015), China-Korea FTA (2015), etc. (available at: <http://fta.mofcom.gov.cn/english/index.shtml>).

### 2 Legal Frameworks

#### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

China acceded to the New York Convention on 22 January 1987, with the reservation that it will only apply the New York Convention to the recognition and enforcement of awards made in the territory of another contracting state, and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. The New York Convention became effective in China as of 22 April 1987, with its effects extending to the Hong Kong SAR and the Macao SAR on



1 July 1997 and Macao on 20 December 1999, respectively, upon resumption of China's sovereignty.

China signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") on 9 February 1990 and notified the International Centre for Settlement of Investment Disputes ("ICSID") on 7 January 1993 that pursuant to Article 25(4) of the ICSID Convention, the Chinese Government would only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalisation. The ICSID Convention entered into force in China on 6 February 1993.

China is not a party to the Mauritius Convention.

## 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Yes. The Law of the People's Republic of China ("PRC") on Chinese-Foreign Equity Joint Ventures (amended in 2016, the "EJV Law"), the Law of the PRC on China-foreign Co-operative Enterprises (amended in 2017, the "CJV Law"), and the Law of the PRC on Wholly Foreign-owned Enterprises (amended in 2016, the "WFOE Law") set forth the conditions, forms and procedures for foreign investment in China.

**Expropriation:** Article 2 of the CJV Law and Article 5 of the WFOE Law stipulate that the state shall not nationalise or expropriate equity joint ventures ("EJV") and wholly foreign-owned enterprises ("WFOE") unless in special circumstances where it is necessary to the public interest and the expropriation or nationalisation is conducted in accordance with legal procedures, with appropriate compensation.

**Dispute resolution:** pursuant to Article 16 of the EJV Law and Article 26 of the CJV Law, if any dispute arises between the Chinese and foreign investors in equity joint venture or co-operative enterprises, it can be settled through consultation, conciliation or arbitration by a Chinese or other arbitral body agreed on by all parties. Failing a valid arbitration agreement, the dispute can be filed before a People's Court in China.

There are also various administrative regulations, rules and measures at the national and local levels which provide detailed guidelines on market access, incorporation formalities and other operational aspects of foreign investment.

On 19 January 2015, MOFCOM published the draft PRC Foreign Investment Law (the "FIL Draft") for public comments. In March 2018, the FIT Draft was submitted to the legislative agenda of the PRC State Council.

The FIL Draft commits to investment protection (Article 3), national treatment (Article 6) and investment promotion (Article 7), and adheres to the principles of openness and transparency (Article 8). In particular, Article 10 indicates China's determination to promote and develop mutual investment with other countries and regions and conclude multilateral, bilateral or regional investment treaties, conventions and agreements. In addition to the newly defined "foreign investor" (Article 11) and "foreign investment" (Article 15), the FIL Draft proposes an independent chapter for investment protection, which covers expropriation (Article 111), state compensation (Article 113), transparency (Article 115) and dispute resolution (Article 118).

## 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Yes. China requires formal admission of a foreign investment, which has been much simplified in the 2018 reform.

Foreign investment in China is subject to the Catalogue of Industries for Guiding Foreign Investment (revised in 2017 and jointly issued by the National Development and Reform Commission ("NDRC") and MOFCOM, the "2017 Catalogue"), which sets out the "encouraged", "restricted" and "prohibited" sections for foreign investment. Foreign investors are not allowed to invest in a "prohibited" industry and are recommended to invest in an "encouraged" industry. Compared to "encouraged" industries, foreign investment in a "restricted" industry is subject to stricter conditions, procedures, and a longer time taken for scrutiny and approval by the higher authorities. Foreign investment in industries other than "prohibited", "restricted" or "encouraged" can be considered "permitted".

The notable reform is the issuance of the Special Administrative Measures (Negative List) for Foreign Investment Access (2018 Version) ("2018 Negative List") and Special Administrative Measures (Negative List) for Admission of Foreign Investments to Pilot Free Trade Zones (2018 Version) ("2018 FTZ Negative List"), both of which entered into force on 30 July 2018. Compared with the 2017 Catalogue, the 2018 Negative List reduces the number of "restricted" sections from 63 to 48.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In general, PRC courts have limited involvement in treaty interpretation issues. The following are the recent cases where the PRC courts interpreted international conventions or treaties to which China is a party:

- *Lou Mengjie v. Aeroflot-Russian Airlines* (2017) Hu 02 Min Zhong No. 10786 concerned the compensation standard for a passenger's claim for luggage damage. When interpreting the conflicting provisions in the Warsaw Convention and Montreal Convention on the limit of liability, the Jing'an District People's Court of Shanghai Municipality ("Jing'an DPC") followed the Vienna Convention on the Law of Treaties ("VCLT") and confirmed that, in terms of the rights and obligations of states' parties to successive treaties relating to the same subject matter, when the parties to the later treaty do not include all the parties to the earlier one, the treaty to which both states are parties governs the mutual rights and obligations between them. Accordingly, as China and Russia are parties to the Warsaw Convention and as Russia did not ratify the Montreal Convention, the court held that the Warsaw Convention should apply to the compensation standard. The appeal court upheld this decision.
- *Shanghai Jwell Machinery Co., Ltd. and Retech Aktiengesellschaft, Switzerland* (2009) Hu Gao Zhi Fu Yi Zi No.2 Enforcement Review Ruling. In its reconsideration of the binding decision of the Higher People's Court of Shanghai Municipality ("the HPC of Shanghai") on the enforcement of a foreign-related award where enforcement actions were also sought in other jurisdictions, the Supreme People's Court of China ("SPC") confirmed that the objective of the New York Convention is to facilitate the successful enforcement of arbitral awards in each contracting state and therefore does

not prevent the parties from applying to several contracting states for the recognition and enforcement of the award. The case was selected and re-issued by the SPC as a *de facto* binding Guiding Case to guide the adjudication of similar subsequent cases and ensure the uniform application of law.

- *Lu Hong v. United Airlines*, published in the Gazette of the SPC in 2002 (Issue No. 4). The dispute concerned a personal injury compensation claim of a Chinese citizen against United Airlines. The Jing'an DPC opined that the hierarchy of the applicable law for foreign-related civil cases in China is: international convention or treaties (subject to the reservations); PRC law; and international customs and practice. Since China and the United States are parties to the Warsaw Convention (as well as the Hague Protocol to amend the Warsaw Convention), and the parties also chose to apply the Warsaw Convention, the court ruled that the Warsaw Convention should apply. As permitted by the Warsaw Convention, the court upheld a higher limit of liability agreed by the carrier and the passenger on the flight tickets.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

With the deepening of the reform and opening-up since the 1980s, particularly the expansion of outbound trade and investment, China has gradually changed its attitude to investor-state arbitration from caution and prudence to proper openness. Since the conclusion of the China-Barbados BIT in 1998, China has signed an increasing number of new-generation BITs, with a broad arbitration clause covering all disputes arising from the investments. After winning the early dismissal under ICSID Arbitration Rule 41(5) in *Ansung v. China*, MOFCOM stated that China “will continue to insistently maintain and safeguard its rights under international treaties”, while endeavouring to protect “the legitimate rights of foreign investors”.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

**Anti-corruption:** China-related BITs and FTAs have not included provisions addressing anti-corruption issues. Nonetheless, China was among the earliest countries to ratify the United Nations Convention against Corruption (“UNCAC”) in 2003 and has since increased its anti-corruption campaign domestically, as well as its international cooperation on enforcement, extradition and asset recovery.

**Climate change and environmental protection:** China-related BITs and FTAs have not included provisions specifically addressing climate change issues. Nonetheless, China ratified the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1993. In 2015, China submitted its new climate action plan to the UNFCCC for the post-2020 period. In 2016, China acceded to the Paris Agreement to mitigate worldwide greenhouse gas emissions.

Some recent BITs have addressed environmental concerns. For instance, Article 23 of the China-Japan-Korea TIA (2012) provides: “Each Contracting Party recognizes that it is inappropriate to encourage investment by investors of another Contracting Party by relaxing its environmental measures. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as encouragement for the establishment, acquisition or expansion of investments in its territory”. Similar provisions can be seen in Article 18(3) of the China-Canada BIT (2012).

**Transparency:** Most of the FTAs signed by China contain a chapter addressing transparency of laws, regulations and policies, which

usually requires that the contracting parties publish any laws and regulations regarding the matters covered by the FTA, and that foreign investors be given the opportunity to comment on the relevant legislation proposals. It also requires that the administrative proceedings be conducted in accordance with domestic law. Similar provisions can be found in some BITs concluded after 2010, e.g. Article 10 of the China-Japan-Korea TIA (2012) and Article 17 of the China-Canada BIT (2012). Some newly signed BITs have adopted a greater transparency of dispute resolution. For example, Article 28 of the China-Canada BIT (2012) permits the publication of the awards and other written documents and participation of the non-disputing contracting parties.

**MFN:** The MFN clause has been a common feature in all Chinese BITs, and may be summarised into two types: (1) a stand-alone treatment expressly set forth in the BIT, e.g. Article 2 of China-Turkey BIT (1990), or Article 3 of China-Belarus BIT (1993); and (2) a treatment linked with a Fair and Equitable Treatment (“FET”) and/or National Treatment standard, e.g. Article 3 of the China-Poland BIT (1988), or Article 3 of the China-Morocco BIT (1995). Notably, some recent BITs, e.g. Article 4(1) of the China-Korea-Japan TIA (2012) and Article 12.1 of the China-Korea FTA (2015), make it clear that the MFN clause does not extend to dispute settlement.

**Indirect investment:** As not all Chinese BITs recognise indirect investment as an “investment”, it should be examined on a case-by-case basis. Recent BITs recognising indirect investment include, for example, Article 1.3 of the China-Canada BIT (2014) and Article 1(1) of the China-Japan-Korea TIA (2012).

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

China has not given any notice to terminate any BIT or similar agreements. However, according to the United Nations Conference on Trade and Development (“UNCTAD”), the China-Ecuador BIT, China-India BIT, and China-Indonesia BIT have been unilaterally terminated due to a change in the attitudes of Ecuador, India and Indonesia towards investor-state arbitration.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

There are nine cases in which the claimants are Chinese investors (including investors from Hong Kong and Macao):

- **Concluded:** *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6); *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuaungdaoshi Qinlong International Industrial Co. Ltd. (“Beijing Shougang and others”) v. Mongolia* (PCA Case No. 2010-20); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No. ARB/12/29); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20); *Sanum Investments Limited (“Sanum”) v. Lao People's Democratic Republic (“Laos”)* (PCA Case No. 2013-13); *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12); and *BUCC v. Yemen* (ICSID Case No. ARB/14/30).
- **Pending:** *Sanum v. Laos* (ICSID Case No. ADHOC/17/1); *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/15/41).

As a respondent, China has participated in three investor-state cases, two of which have been concluded, with one pending.

- **Concluded:** *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25); and *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15).
- **Pending:** *Hela Schwarz GmbH v. People's Republic of China* (ICSID Case No. ARB/17/19).

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

So far, there has been no investment arbitration award made against China.

By ratifying the ICSID Convention, China is obligated to recognise and enforce an ICSID award, pursuant to Article 54 thereof. However, China has not designated a competent authority for this purpose. It is therefore not clear how Chinese courts would deal with the awards seeking enforcement in China. Such uncertainty is increased by Article 55 of the ICSID Convention, which provides that each state's laws regarding sovereign immunity from execution continue to apply.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

No, because China has not lost a case.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

The author is aware of a commercial arbitration case following the issuance of an ICSID award on the same substantive claims, but the information is not available in the public domain.

The recently released Procedural Order No. 2 of *Hela v. China* reveals that the ICSID arbitration originated from a domestic administrative lawsuit in relation to the alleged expropriation of the right to use the land of Hela's local subsidiary.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

The common trends or themes can be summarised below:

- **Applicable investment treaties:** The China-related cases mostly involve the older generation of Chinese BITs. However, two out of three cases in which China was respondent were initiated under the new generation of Chinese BITs, i.e. the China-Korea BIT (2007) and the China-Germany BIT (2003). Since China has signed more than 130 BITs, the old and new generations of BITs may create conflicting problems, such as temporal application issues as reflected in *Ping An v. Belgium*.
- **Scope of arbitration:** The dispute resolution clauses of the older generation of Chinese BITs often provide for arbitration of disputes "involving" or "relating to" the amount of compensation for expropriation. The *Tza Yap Shum v. Peru* tribunal ruled that a good-faith reading of the word "involving" means that the reference for arbitration need not be limited to the compensation for expropriation and may also cover the broader dispute about expropriation. Its

interpretation approach has been followed by *Sanum v. Laos* (PCA Case No. 2013-13) and *BUCG v. Yemen*. In contrast, the *Beijing Shougang and others v. Mongolia* tribunal, by a restrictive interpretation approach, refused to exercise jurisdiction on the investor's claim for expropriation when examining a similarly conventional dispute resolution provision. The conflicting results will hopefully be reduced, along with a greater number of new-generation BITs containing a broader and more definite scope of arbitration.

- **Treaty's territorial application to Hong Kong and Macao:** Whether a BIT concluded by the central government of China can apply to Hong Kong and Macao is pivotal for the investors from these two SARs seeking treaty arbitration for investment protection. In *Tza Yap Shum v. Peru*, the tribunal held that all Chinese nationals, including those residing in Hong Kong, are covered by the ICSID Convention and the China-Peru BIT. In *Sanum v. Laos* (PCA Case No. 2013-13), the tribunal concluded that the BIT applies to all the territory over which the PRC is sovereign and that Sanum, as a Macao-registered company, is protected by the China-Laos BIT. The tribunal's decision was ultimately upheld by the Singaporean Court of Appeal, although Laos was able to successfully challenge the tribunal's jurisdiction at the High Court of Singapore. The MFA of China has expressed in public its disagreement with the findings of the Court of Appeal; in particular, the weight given to the *notes verbales* between the MFA of Laos and the Chinese Embassy in Vientiane and the letter from the MFA of China, both confirming that Macao is not covered by the Chinese BITs. The issue is likely to remain uncertain and subject to case-by-case analysis of the evidentiary value of the documents presented.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Although the regulatory framework on third-party funding ("TPF") has not been established yet, TPF is not prohibited in Mainland China. In a broader sense, TPF has gradually developed by way of costs insurance, claim assignment and other alternative funding options to reduce the parties' financial burden of pursuing the claims.

In June 2017, Hong Kong SAR passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, giving the green light to TPF for arbitration and mediations in Hong Kong.

The China International Economic and Trade Arbitration Commission ("CIETAC") Investment Arbitration Rules include provisions on TPF.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

No such case has been reported in China.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Strictly speaking, there is no arbitration funding in China. The litigation financing platforms, such as WeAnd Internet Legal Finance Information Service Co. Ltd. in Shanghai, the Federation of Multi-level Capital Market, and DS Legal Capital in Shenzhen, have grown rapidly in providing funding options for domestic litigation.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Tribunals are free to consider criminal investigations and judgments of the domestic courts as facts.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

In accordance with the CPL and the Arbitration Law, Chinese courts have the jurisdiction to grant provisional relief (e.g. property and evidence preservation measures; and act preservations, which are similar to interim injunctions in English law) in support of an arbitration conducted in China, either before or after the arbitration is initiated. The Chinese courts also have the jurisdiction to determine the validity of an arbitration agreement if one party applies to it to make the decision and the matter has not yet been determined by the arbitral tribunal.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

The arbitration proceedings conducted in Mainland China are governed by the Arbitration Law and the Interpretation of the SPC on Certain Issues Concerning the Application of the Arbitration Law of PRC (effective as of 8 September 2006). For procedural matters that are not provided for in the provisions above, references are usually made by tribunals to the Civil Procedure Law ("CPL") and the relevant interpretations issued by the SPC regulating the enforcement of civil litigation proceedings.

### 6.4 To what extent are there laws providing for arbitrator immunity?

Chinese law contains no explicit provisions on arbitrator immunity. Article 38 of the Arbitration Law imposes sanctions on an arbitrator in two scenarios: (1) where the arbitrator has privately met with a party or a party's counsel, or has accepted an invitation to entertainment or a gift from a party or a party's counsel, and the circumstances are serious; and (2) while arbitrating the case, the arbitrator has accepted bribes, resorted to deception for personal gains or perverted the law in the ruling. Under these circumstances, the Arbitration Law provides that the arbitrator concerned shall assume liability "according to the law". It is generally understood that the liability may include either civil liability or criminal liability, or even both.

Further, an arbitrator who deliberately renders an award in violation of the law and against the facts may be charged with criminal liability under Article 399 of the Criminal Law.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

Under Article 11 of the Arbitration Law, each Chinese arbitration institution must have appointed arbitrators. Article 13 (revised in 2017 and effective from 1 January 2018) further sets out the criteria for a qualified arbitrator. In practice, the major arbitration institutions in Beijing, Shanghai and Shenzhen have adopted the

rules to permit the parties to select and appoint arbitrators from outside their lists of arbitrators.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. Under Article 32 of the Arbitration Law, if the parties fail to agree on a method for forming the arbitral tribunal, or fail to appoint the arbitrators within the time limit specified in the arbitration rules, the arbitrators shall be appointed by the chair of the arbitration commission. The arbitration rules of the arbitration institutions often incorporate similar provisions.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

No, domestic courts have no role in the selection of arbitrators.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

According to Article 3 of Provisions of the SPC on Several Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by the People's Courts (effective as of 1 March 2018) ("SPC Enforcement Provisions"), an enforceable domestic award must meet the following criteria:

- (1) the subject of rights and obligations is clear;
- (2) the specific amount of payment and/or the calculation method is clear to the extent that the specific amount can be calculated;
- (3) the specific item to be delivered is clear or can be determined; and
- (4) the standard, object and scope of performance of action are clear.

Besides, in cases of enforcement of continuous performance of contract, the award shall specify the specific contents (e.g. scope, method, period, etc.) of the rights and obligations to be continuously performed.

In terms of enforcing a foreign award, the applicant shall supply the documents as required under Article IV of the New York Convention.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

China has not adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, but has adopted separate standards for enforcing foreign/foreign-related arbitral awards and domestic arbitral awards.

- **Foreign arbitral award:** Pursuant to Article 283 of the CPL and Article 4 of the Circular of the SPC on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, a Chinese court may deny the recognition and enforcement of a foreign arbitral award if one or more of the grounds set out in Article V of the New York Convention are met.
- **Foreign-related arbitral award:** The grounds for refusing the enforcement of a foreign-related award are set out in Article 274 of the CPL and are very similar to those for refusing enforcement of a foreign award under the New York Convention.



- **Domestic arbitral award:** Article 237 of the CPL allows the court to refuse enforcement on much broader grounds, ranging from defects of evidence to the tribunal's malpractice.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

There is no public record showing that any domestic courts in Mainland China have dealt with issues of sovereign immunity and recovery against state assets.

In the Hong Kong case of *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, a 3:2 majority in the Court of Final Appeal held that state immunity covered not only sovereign acts but also the state's commercial activities, which has been confirmed by an interpretation of the Standing Committee of the PRC National People's Congress. This means that, as in the rest of China, absolute state immunity applies to Hong Kong.

In March 2016, the draft Foreign State Immunity Act (drafted by the MFA) was submitted to the legislative agenda of the PRC State Council.

China is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2005 (the "CJISTP"), which is widely acknowledged to be a treaty that endorses a restrictive approach to state immunity. Under the CJISTP, signatory states will be subject to essentially the same jurisdictional rules as private entities with respect to commercial transactions. However, the CJISTP has not yet come into force in China.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

Mainland China has no legislation or case law on the corporate veil issue in relation to sovereign assets.



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Huawei Sun specialises in international commercial and investment treaty arbitration, and has represented Chinese and foreign clients in cases conducted under ICC, UNCITRAL, LCIA, SIAC, HKIAC, CIETAC and ICSID arbitration rules. She has significant experience working as counsel and arbitrator on disputes involving cross-border M&A, energy and resources projects, financial products, intellectual property, and construction projects; with governing laws including English law, Hong Kong law, Singaporean law, French law, Swiss law, Dutch law, Malaysian law and Chinese law.

Prior to joining Zhong Lun, Huawei worked for more than seven years at the Beijing and Hong Kong offices of a leading international law firm, where she was later responsible for managing the firm's China-related arbitration matters.

She has advised MOFCOM on various investment treaty issues, and recently achieved victory for China in *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25).



Founded in 1993, Zhong Lun Law Firm is a leading full-service law firm, with over 1,500 professionals and 290 partners across 16 offices in China and abroad. Zhong Lun provides high-quality, efficient and practical legal advice on complex business issues and transactions. The firm's practice groups and lawyers are frequently cited and recommended by distinguished legal media entities such as *Chambers and Partners*, *Asia Law and Practice*, *Asian Legal Business* and *International Financial Law Review*, among others. The dispute resolution group was ranked Band 1 by *Chambers and Partners* from 2014 to 2017 and, in particular, was named "2017 Dispute Resolution – PRC Firm of the Year" by *Chambers and Partners* in 2017.

The international arbitration team based in Beijing and Shanghai comprises about 20 leading practitioners licensed in China and abroad who work exclusively in this field, and includes some of the most reputable arbitration specialists in China. We handle a wide range of challenging disputes before all the major arbitration institutions including HKIAC, SIAC, ICC, LCIA, SCC, CIETAC and IDRC. We are also experienced in investment treaty arbitration and achieved a victory for China in the ICSID proceeding brought by *Ansung Housing Co, Ltd.*

# Ecuador

Flor & Hurtado

Agustín Hurtado-Larrea



Carlos Torres Salinas



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Ecuador originally ratified BITs with Argentina, Bolivia, Canada, Chile, China, Cuba, the Dominican Republic, El Salvador, Finland, France, Germany, Great Britain, Guatemala, Honduras, Italy, Netherlands, Nicaragua, Northern Ireland, Paraguay, Peru, Romania, Spain, Sweden, Switzerland, United States, Uruguay and Venezuela. Unfortunately, since 2008, the previous government initiated the process to denounce these BITs. The process concluded on May 2017 and at present, none are in force.

Depending on the BIT, the denunciation would produce an effect after a certain period of time after the notification of termination (six to 12 months). This period has elapsed for most of the treaties. However, some of these treaties contain provisions that contemplate a “survival period” ranging from five to 15 years in respect of investments that were made when the treaties were in force.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

There are no bilateral or multilateral agreements that Ecuador has signed and has not yet ratified. However, there are some trade agreements that Ecuador is a signatory of, one of the most recent and important being the Trade Agreement with the European Union.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

As mentioned before, all the BITs that were in force were denounced by Ecuador. Originally, most of the BITs were not based on any specific model, the majority of BITs that Ecuador signed were based on models proposed by the other contracting states, from our knowledge, with little negotiation taken place.

At present, the current administration is promoting a new BIT model with the aim of starting negotiations with the international community. There is a non-official version that has circulated which, in general terms, determines the scope, the definition of investor, the standards for fair and equitable treatment (FET), expropriation, non-discrimination and some other usual protections for foreign investment. The non-official model contains some exclusions and

exceptions that were not used in the previous models. There is no indication at this moment of the progress of these new negotiations.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

As determined in the previous response, the majority of BITs that Ecuador signed were at the initiative of the other contracting state, not of Ecuador, so there was no greater process of exchange of diplomatic notes during the negotiation. As part of several arbitration processes in which Ecuador has participated, the Attorney General’s office has tried to gather information from the preparatory processes of the BITs, to present them as evidence within the proceedings, but they have not been successful in finding relevant exchanges of diplomatic notes. Regarding the negotiations of the future BITs that Ecuador may sign, up to the present date we do not have knowledge of any exchange of diplomatic notes, the terms of these negotiations have not been made public.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

No. There are no official comments published by the Government, all the interpretations that have been given to the intended meaning of a treaty or its clauses have taken place within the different arbitration proceedings in which Ecuador has participated.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

With respect to international arbitration, Ecuador is a signatory to the following conventions:

- The 1928 Havana Convention on Private International Law.
- The 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
- The 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention).
- The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention).

Unfortunately, in 2009 Ecuador denounced the 1966 International Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention), and it is not signatory of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency).

## 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

In the year 2010, Ecuador enacted the Organic Code of Production, Commerce and Investment (hereinafter, the “**Production Code**”) which replaced the Investment Promotion and Protection Law. The Production Code contains a chapter which describes the standard protections for foreign investors, such as the difference between productive investment, national investment and foreign investment; the principle of non-discriminatory treatment, and the rights that investors have once their investment is made. The Production Code offers investors with the possibility of executing Investment Contracts in order to protect and guarantee the stability of certain tax incentives contained in the Production Code which are applicable to certain sectors, geographical areas, minimum investments, etc. Since its enactment, the Production Code contained a dispute resolution mechanism for such Investment Contracts; however, the scope was limited due to specific exclusions in relation to tax matters and acts deriving from the exercise of the sovereign powers of the State.

Such exclusions have been repealed very recently on August 21, 2018, through the enactment of the Organic Law for the Encouragement of Production, Attraction of Investments, Generation of Employment, Stability and Fiscal Equilibrium (hereinafter, the “**Production Encouragement Law**”), which included a mandatory dispute resolution mechanism for investment contracts with amounts exceeding US\$ 10 million.

The Production Encouragement Law also contains regulations in order to promote foreign investment in Ecuador, establishing new tax incentives, remission of interest, fines and surcharges in case of payment of taxes under litigation, provisions promoting social interest housing projects and the strengthening in standards for public-private partnerships projects, among others.

With respect to investor-state arbitration, the Production Encouragement Law recognises the possibility of submitting to international arbitration contractual controversies, under three possibilities of *lex arbitri*: (i) UNCITRAL Arbitration Rules – United Nations administered by the Permanent Court of Arbitration of The Hague (CPA); (ii) Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce based in Paris (ICC); or (iii) Inter-American Commercial Arbitration Commission (IACAC). The homologation procedure for the enforcement of awards was eliminated and also the need to exhaust internal administrative and judicial channels and mediation, as a prerequisite for the filing of international arbitration. Finally, the prohibition of submitting to international arbitration differences of a tax nature was also eliminated.

## 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

No. There is not a formal admission requirement. Foreign Investment is defined in the Production Code as an investment that is owned or controlled by foreign individuals or legal entities domiciled abroad, or that involves capital that has not been generated in Ecuador.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

There have been no recent cases in which national courts have ruled on the interpretation of treaties within the Ecuadorian jurisdiction.

Regarding the arbitration proceedings in which Ecuador has been a party, there have been several issues that have been discussed, such as the effective means of proof, what is understood as a denial of justice, when the legitimate expectations of the investors operate, among other standards.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

After the unfortunate process mentioned above in relation to the denunciation of all its BITs, the new administration has indicated a new policy with respect to investor-state arbitration, which is set out in the provisions in the aforementioned Production Encouragement Law, and also in the intent to renegotiate new BITs with the international community.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

At present, Ecuador does not have any BITs in force. However, the non-official new BIT model mentioned before does contain draft provisions addressing corruption, transparency, MFN, environmental responsibility, among others. We cannot anticipate if such provisions will remain or in what terms they will be negotiated with foreign countries.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

As mentioned above, in 2008, Ecuador initiated a process to denounce all of its BITs. Such process concluded in May 2017, and no BITs are in force at present (notwithstanding the survival periods mentioned above).

The previous administration maintained a policy against the BITs based on the position that submitting disputes to foreign jurisdiction was an attack on Ecuador's sovereignty. This was in response mainly to the ideological position of the previous administration that lasted 10 years.

Fortunately, this is changing, and we now envisage a new policy more inclined to the protection of foreign investment through the BITs and investment protection provisions in local legislation.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

The most recent and relevant Investor-State (concluded) cases Ecuador has been involved in are as follows:

1. *OXY v. Ecuador* (OXY II, Expropriation of an oil concession – Block 15, US\$ 1 billion settlement paid to the investor).
2. *Burlington v. Ecuador* (imposition of windfall taxes in an oil concession, US\$ 330 million paid to the investor).
3. *City Oriente v. Ecuador* (modification of terms in an oil concession, US\$ 70 settlement paid to the investor).

Some of the most relevant ongoing Investor-State cases Ecuador is involved in are as follows:

1. *Chevron v. Ecuador* (Chevron III, Denial of Justice – damages to be awarded in favour of claimant in the final stage of the process).
2. *Perenco v. Ecuador* (imposition of windfall taxes, expropriation of an oil concession).
3. *Albacora v. Ecuador* (elimination of tax incentives in a free trade zone, US\$ 25 million claimed).
4. *Merck Sharp & Dohme v. Ecuador* (denial of justice, US\$ 42 million claimed).

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Despite its policy against BITs, even during past administration Ecuador has taken an easy attitude towards enforcement of awards. Some examples we can mention are: (i) the post-award settlement agreement reached with OXY, under which around US\$ 1 billion were paid to the claimant; (ii) the settlement agreement with City Oriente under which approximately US\$ 70 million were paid to the investor; and (iii) the post-award settlement agreement with Cooper Mesa Mining Corporation under which approximately US\$ 20 million will be paid to the investor.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Annulment proceedings have been frequent in Ecuador's investor-state arbitration cases.

Some examples are as follows: (i) OXY ICSID annulment procedure, OXY VAT UNCITRAL case, under judicial review before UK courts; and (ii) Burlington Resources Inc. ICSID annulment proceedings, claiming the lack of jurisdiction of the tribunal (currently discontinued).

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

We do not know of any relevant cases where satellite litigation has arisen. From our knowledge, the majority of the cases have been focused on arguments in the merits of the case, especially regarding the measures taken by the Republic of Ecuador. For example, *Perenco*, *Burlington* and *City Oriente*, are based on the issuance of Law 42 (windfall tax on extraordinary profits). The *Cooper Mesa* claim is based on the issuance of the Mining Constituent Mandate (No. 6), regarding the expiration of the majority of mining concessions granted by Ecuador. OXY II, Expropriation of an oil concession. Finally, there is *Albacora*, in which the denegation of tax incentives in a free trade zone is discussed.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

In general, each case has been based on different substantive arguments regarding the underlying claims. The only common

trend we can point out is Ecuador's frequent defence arguing lack of jurisdiction of the tribunal in cases that deal with tax matters and exercise of sovereign powers.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

There are no provisions in our legislation explicitly allowing or prohibiting funding of investor-state claims, and to the best of our knowledge, no privately funded investor-state claims have been significant in any of Ecuador's cases.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

None, to the best of our knowledge.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

None, to the best of our knowledge.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Ecuador maintains as a principle that only matters that can be transacted can be submitted to arbitration. Based on this, Ecuador has maintained that matters that derive from the mandatory exercise of sovereign powers cannot be subject to the decision of arbitration tribunals. However, to the extent that an international tribunal reviews the "effects" of sovereign decisions made by courts (not the decisions themselves) under the provisions of a BIT that does not contain specific exclusions in such regard, we could say that judgments of domestic courts can be indirectly reviewed by international tribunals (for example, in the case of denial of justice awards such as *Chevron III*).

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

During a procedure to enforce an award, national courts have the duty of certifying that such enforcement does not violate matters of public interest. Such concept, when understood correctly, gives national courts the power to deal with procedural issues arising out of an arbitration in cases of severe violations of due process, right of defence, etc.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

The enforcement law for arbitration proceeding is the Arbitration and Mediation Law and the Procedural Code (hereinafter, the "COGEP"). Since its latest amendments on both laws, foreign arbitral awards are enforced in the same way as local awards, which is, in the same manner as final instance rulings from the judicial



system. Since the approval of the Production Encouragement Law, the enforcement of arbitration awards becomes simpler to the extent that no “homologation” procedure of the award is necessary.

#### **6.4 To what extent are there laws providing for arbitrator immunity?**

Ecuador has no laws regarding the arbitrator immunity.

#### **6.5 Are there any limits to the parties’ autonomy to select arbitrators?**

No, there is not a formal limitation to the autonomy of the parties. The only aspect to take into account on this point is that, if one of the parties is the State, the selection process of arbitrators must be previously stipulated and incorporated in the arbitration agreement.

#### **6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?**

It will depend on the rules of the institution or arbitration centre chosen as administrator of the arbitration. If the parties consent in applying the rules of a certain arbitration centre that contains such default procedures, then such procedures would apply.

#### **6.7 Can a domestic court intervene in the selection of arbitrators?**

No. The possibility of a domestic court intervening in the selection of arbitrators is not contemplated in Ecuadorian legislation.

## **7 Recognition and Enforcement**

#### **7.1 What are the legal requirements of an award for enforcement purposes?**

For enforcement purposes, there is the possibility to apply the New York Convention or the Procedural Code (COGEP).

As mentioned before, Ecuador is a signatory of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”), with a reservation to apply the Convention only in commercial matters under national law. The Convention is directly applicable.

Regarding the procedure established in the COGEP, originally a homologation (recognition) procedure was required before the Provincial Court of the respondent’s domicile. However, since

the enactment of the Productive Encouragement Law (August 21, 2018), the homologation procedure for the enforcement of awards was eliminated and awards are enforced in the same way as ultimate instance, definitive judicial rulings.

#### **7.2 On what bases may a party resist recognition and enforcement of an award?**

The current Ecuadorian legal system does not establish legal bases for a party to resist recognition of an award. The aforementioned recent amendments established that awards are executed directly, and the homologation procedure was eliminated.

However, with respect to enforcement, we must take into account that, according to Ecuadorian law, a foreign arbitration award has the same value as a domestic award, which means that it has the effect of an enforceable judgment (*res judicata*), and therefore is executed in the same way as judgments of last resort. Coercive or compulsory measures are available and the execution or enforcement judge cannot accept any defence or exception, except if it has arisen after the issuance of the award.

In this sense, pursuant to the COGEP, once in the execution procedure of an arbitral award, the respondent can oppose the execution within a term of five days, demonstrating any of the following causes: a) that the due payment has already been made; b) that there has been a transaction between the parties; c) that there has been a remission of the debt; and d) that a compensation between the parties has operated, among other similar standard defences applicable to execution procedures.

In the process, the defence invoked must be duly justified, as well as the fact that it occurred after the execution of the judgment or the enforceability of the respective enforcement title.

#### **7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**

We do not have knowledge of any domestic cases where the matter of sovereign immunity and recovery against state assets has been discussed.

#### **7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**

We do not have any knowledge of any investor-state case that has discussed the corporate veil in relation to sovereign assets. However, we cannot assure if this matter has not been discussed at any commercial arbitration case.

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His experience includes the advising of contract negotiation and litigation in oil & gas, antitrust, public contracting, private – public associations, tax law, among others. He also has experience in the public sector, working in the staff of the Mayor of Quito, Minister of Interior, Minister of Economy and President of the Republic. Acted as Secretary of Arbitration Tribunals in the Quito Chamber of Commerce for approximately 10 years, and since then has intervened in several local arbitrations. He has participated directly in two investor-state arbitrations (*Encana v. Ecuador* at the LCIA) and (*Albacora v. Ecuador* at the PCA), and indirectly in *OXY v. Ecuador* at ICSID. In addition, he is professor of Hydrocarbons and Mining Regime at the Universidad San Francisco de Quito.

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He focuses his practice on Natural Resources, mainly on Mining, advising the main companies worldwide in the process of granting concessions, illegal mining, as well as in sales transactions and project financing. Besides this, he provides its integral consultancy in corporate and environmental matters. Carlos also has vast knowledge in public procurement, negotiation, mediation, domestic and international arbitration (UNCITRAL, ICSID, ICC). In addition, he is adjunct professor of the Hydrocarbons and Mining Regime at the Universidad San Francisco de Quito.



Flor & Hurtado is a new firm in the Ecuadorean legal market, formed by very well-reputed professionals with experience in local and cross-border transactions, following international standards as main rule of practice. The firm has six partners and four associate lawyers, and its main business areas include domestic and international arbitration, natural resources (oil, gas, mining), banking and finance, tax and tax planning, corporate and commercial, antitrust, telecommunications, electricity and labour.

In arbitration matters, the experience of partners and associates of Flor & Hurtado include direct and indirect participation in several domestic and international arbitration processes, under UNCITRAL, ICSID, LCIA and ICC rules. Recently, Flor & Hurtado has represented the claimant at the *Albacora S.A. v. Republic of Ecuador* case, alleging denial of certain tax exemptions to which the claimant considered its company to be entitled as a user of the free economic zone.

# France



Nicole Dolenz LL.M. & Claire Pauly LL.M.

## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

According to the United Nations Commission on International Trade Law (UNCTAD), France currently has 95 bilateral investment treaties (BITs) in force (including with countries such as China, the Russian Federation, Singapore and the United Arab Emirates).

In addition, 59 multilateral treaties including investment provisions are in force in France, in particular the Energy Charter Treaty, the Cotonou Agreement with the African, Caribbean and Pacific Group of States (ACP), and the Agreement between the European Union and the Southern African Development Community (SADC).

France has been a WTO member since 1995 and a member of GATT since 1948. It should be noted that all European Union (EU) Member States are indeed WTO members, and that the EU is also a member *per se*.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

According to UNCTAD, France has to date signed 10 BITs that are not in force, namely the BITs with Angola, Belarus, Brazil, Colombia, Ghana, Guinea, Iraq, Mauritius, the Syrian Arab Republic and Zimbabwe.

Treaties with investment provisions between the EU and 14 countries or areas have been signed but not ratified yet, especially the Canada-EU Trade Agreement (CETA). Draft Free Trade Agreements (FTAs) with Singapore, Thailand and Vietnam have also been discussed but not signed yet.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The French Model BIT of 1999 was drafted by the French Ministry of Foreign Affairs.

The key provisions of the French Model BIT are the following:

- *Definition of investor*: One must distinguish between natural and legal persons. As far as natural persons are concerned,

protected investors are defined as nationals of a contracting party. As far as legal entities are concerned, protected investors must be incorporated in one of the contracting parties, according to the laws of this contracting party, and have their registered office (“*siège social*”) in the same state. Alternatively, a legal entity may be considered to be a protected investor if it is directly or indirectly controlled by nationals of one of the contracting parties, or by legal entities having their registered office in one of the contracting parties and incorporated according to the laws of the same State.

- *Definition of investment*: The definition of a protected investment is broad and includes “all assets”. The BIT protection covers investments made before and after the entry into force of the BIT.
- *Fair and equitable treatment*: Article 4 provides that the host State must provide fair and equitable treatment in accordance with the principles of international law.
- *Most-favoured nation treatment*: Article 5 provides that each contracting party shall apply to the other party’s investors, in respect of their investments and activities connected with such investments, treatment no less favourable than that granted to its nationals or companies, or to nationals or companies of the most-favoured nation if it is more advantageous.
- *Expropriation*: Article 6 protects investments against both direct and indirect expropriation. Expropriation measures may only be taken for public utility reasons provided they are neither discriminatory nor contrary to a specific undertaking, and subject to fair compensation being paid (equal to the actual value of the relevant investment).
- *Settlement of investment disputes between an investor and a contracting party*: The investor and the contracting party shall first attempt to amicably settle disputes. If they fail to do so within six months, either of them may initiate arbitral proceedings before ICSID.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

No such diplomatic notes are available.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

To our knowledge, no such commentaries have been published.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

France is a party to both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed on 25 November 1958 and ratified on 26 June 1959) and the Washington Convention on the Settlement of Investment Disputes (which entered into force on 20 September 1967).

In 2015, France signed the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration. However, like all EU Member States, France has not ratified it yet.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

France does not have an investment law. Foreign investments are protected by the substantive provisions in the relevant BITs. Most BITs concluded by France provide for ICSID arbitral proceedings for disputes arising out of the investment. Some BITs provide for UNCITRAL or ICC arbitration.

Pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU), the EU has exclusive competence to negotiate and sign investment treaties. EU Regulation No. 1219/2012, adopted on 12 December 2012 aims to progressively replace the EU Member States' BITs by investment treaties concluded by the EU. FTAs (see question 1.2 above) are currently being negotiated by the EU with third States.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Pursuant to Article L 151-1 of the French Monetary and Financial Code, financial relations between France and foreign countries are free. This means that in principle, foreign investments are freely admissible in France. However, pursuant to Article L 151-3 of the same code, strategic and sensitive investments are subject to prior authorisation by the French Minister of the Economy. Strategic and sensitive investments include activities that may breach public order or the interests of national defence, and activities related to the research, production and commercialisation of weapons, ammunition and explosives.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In a decision of 7 February 2017, the Paris Court of Appeal interpreted the notion of investor and investment in the BIT between Venezuela and Canada, in the context of an action to set aside an award rendered by a Tribunal constituted under the ICSID Additional Facility Rules. Among other grounds for annulment, Venezuela argued that the Tribunal had wrongfully upheld jurisdiction, because Gold Reserve did not qualify as a Canadian investor under the BIT. Venezuela's argument rested on the fact that all of Gold Reserve's management decisions had been made in the United States. Venezuela also

argued that the group had been restructured in order to benefit from the BIT provisions, which allegedly amounted to an abuse of right.

The Paris Court denied Venezuela's application for annulment. It held that, since Gold Reserve was incorporated in Canada it qualified as a protected investor under the BIT.

The Court nonetheless listed all of the investors' connections to Canada (e.g., that it was held by a majority of Canadian shareholders and that it was publicly-traded in Toronto). Scholars have interpreted this reference as a warning that awards may be annulled in the future based on the fact that the registered seat does not correspond with the company's effective place of incorporation.

The Court also dismissed Venezuela's argument that Gold Reserve's restructuring amounted to an abuse of right, on the ground that the restructuring had taken place well before the dispute had arisen.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Ninety-five BITs are in force in France, which all contain arbitration clauses. This reflects France's favourable approach towards investor-State arbitration.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

See question 1.3 above regarding MFN and indirect investment. Regarding transparency, France has signed the Mauritius Convention. BITs do not specifically address corruption and climate change. France is a member of the UN Convention against corruption, the UN Framework Convention on Climate Change and the Kyoto Protocol.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

As reflected on the UNCTAD website, the BITs that were in force with Bolivia, Ecuador, Indonesia and South Africa have been terminated without renewal. They were terminated upon these countries' initiatives for political reasons.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

To date, France has been involved in two investor-State cases.

The first case involved two entities of the Eurotunnel group (as Claimants) and the British and French Governments (as Respondents) (the Eurotunnel Arbitration). It was administered by the Permanent Court of Arbitration (PCA Case No. 2003-06) under the Treaty between the French Republic and the United Kingdom concerning the construction and operation by private concessionaires of a channel fixed link. In its partial award dated 30 January 2007, the arbitral tribunal held the Respondents liable for their failure to prevent the incursions of refugees via the fixed link after France opened a refugee hostel near the terminal of the fixed link, but rejected the Claimants' claim for discrimination. The tribunal deferred the issue of quantum to a later stage. According to the Investment Arbitration Reporter, the parties later settled the case for EUR 32 million.



The second case was initiated before ICSID in 2013 by the Turkish company Erbil Serter against the French Republic under the BIT Turkey-France of 2006 (ICSID Case No. ARB/13/22), in relation to a ship hull design. The case was discontinued in March 2018 before the constitution of the arbitral tribunal (the parties had each appointed an arbitrator but no president had been appointed).

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

This is not applicable.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

This is not applicable.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

This is not applicable.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

This is not applicable.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Pursuant to Article 1342-1 of the French Civil Code, payment of a sum of money (including legal fees), may be made by a third person. Third-party funding is therefore legal in France. On 21 February 2017, the Paris Bar Council adopted a Resolution regarding third-party funding declaring it favourable to the interests of the litigants and the attorneys registered with the Paris Bar, particularly in international arbitration ([http://www.avocatparis.org/system/files/publications/resolution\\_financement\\_de\\_larbitrage\\_par\\_les\\_tiers.pdf](http://www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf)). The resolution recommends that counsel encourages clients to disclose the existence of the funding to the arbitral tribunal.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This issue has not been addressed much before French courts.

In 2006, the Versailles Court of Appeal (Versailles, 12ème Ch. Sect. 2, No. 05/01038, *Sté Veolia Propreté c. Fortis AG*) was asked to decide if a successful party in an arbitration could claim the third-party funder who had funded the arbitration to pay the arbitration fees *in lieu* of the liable party. On 1 June 2006, the Versailles Court of Appeal declined jurisdiction in favour of the German courts. However, it did not express any doubt regarding the validity of the third-party funding. It merely observed that the funding agreement is a *sui generis* contract, unknown to EU Member States with the exception of States with a Germanic culture.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Third-party funding is growing significantly in France. The Resolution adopted by the Paris Bar Council in 2017 mentioned above at question 5.1, and the increasing number of conferences held on this topic, contribute to its growth.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

The scope of a tribunal's review in an arbitration between a foreign investor and a State depends on the instrument from which the tribunal derives its jurisdiction. Typically, criminal investigations and domestic judgments are subject to review under standards of protection provided in the relevant instrument, such as fair and equitable treatment in a BIT. The review by an investment tribunal of the substantive correctness of a domestic court decision will generally be very limited (for instance to denial of justice).

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The jurisdiction of domestic courts in the context of arbitration proceedings depends on the rules applicable at the seat and the applicable arbitration rules. Regarding ICSID Arbitration, domestic courts have no jurisdiction to deal with procedural issues. For investor-State arbitrations seated in Paris, a supporting judge ("*juge d'appui*") has jurisdiction to deal with procedural issues under French law. For Paris-seated arbitrations this *juge d'appui* is the President of the Paris First Instance Court. The *juge d'appui* may rule on any issues relating to the constitution of the tribunal, including by appointing an arbitrator where the parties fail to agree.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitrations seated in France are governed by Book IV of the French Code of Civil Procedure (FCCP) which includes Articles 1442 to 1527. To enforce arbitration proceedings, one must enforce the arbitration agreement. Article 1447 of the FCCP provides that the arbitration agreement is independent from the contract to which it relates and shall not be affected if said contract is void. Pursuant to the *compétence-compétence* principle, the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction and shall rule on its jurisdiction before any other court (Article 1465 of the FCCP). The only exception to this is where the arbitration agreement is manifestly void or inapplicable. Thus, when a dispute subject to an arbitration agreement is brought before a French domestic court, said court must decline jurisdiction, except if an arbitral tribunal has not yet been seized by the dispute and if the arbitration agreement is manifestly void or inapplicable (Article 1448 of the FCCP).

#### 6.4 To what extent are there laws providing for arbitrator immunity?

Under French law, arbitrators are, as a matter of principle, immune from liability. Thus, a party may not sue an arbitrator for having allegedly ruled in an inadequate manner. However, arbitrators may be held liable for committing a breach that is “incompatible with their jurisdictional remit” (Paris Court of Appeal, 22 May 1991, Rev Arb 1996, p 476).

#### 6.5 Are there any limits to the parties’ autonomy to select arbitrators?

Pursuant to Article 1450 of the FCCP, only a natural person having full capacity to exercise his or her rights may act as an arbitrator.

#### 6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Yes. Pursuant to Article 1452 of the FCCP, if the arbitration clause provides for a sole arbitrator, the arbitrator shall be designated by the “person responsible for administering the arbitration” or by the supporting judge. Where the arbitration clause provides for three arbitrators, each party shall appoint an arbitrator and the two arbitrators shall appoint the president. If either party fails to appoint an arbitrator within one month of receiving a request to that effect, or if the two arbitrators fail to agree within one month of having accepted their mandate, the arbitrator(s) shall be designated by the “person responsible for administering the arbitration” or by the supporting judge.

#### 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, see above at question 6.2.

## 7 Recognition and Enforcement

#### 7.1 What are the legal requirements of an award for enforcement purposes?

Pursuant to Article 1514 of the FCCP, the following two conditions must be met for the recognition or enforcement of an award: (a) the party relying on it must prove the existence of the award; and (b) the recognition of the award must not be manifestly contrary to international public policy.

Article 1515 of the FCCP requires that the existence of an arbitral award be proven by producing the original award, together with the arbitration agreement, or duly authenticated copies of such documents. If these documents are in a language other than French, the party applying for recognition or enforcement shall produce a translation. The applicant may be requested to provide a sworn translation.

#### 7.2 On what bases may a party resist recognition and enforcement of an award?

A party may resist recognition and enforcement of an award by bringing an action to set aside the award (if the arbitration was seated in France) or by challenging an order granting leave to enforce the award (exequatur) (if the arbitration was seated in France or abroad).

The grounds for annulment or appeal of the order granting leave to enforce the award are the same. They are the following: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; (2) the arbitral tribunal was not properly constituted; (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; (4) due process was violated; or (5) recognition or enforcement of the award would be contrary to public policy.

#### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

We shall discuss immunity from jurisdiction and immunity from enforcement in turn.

##### Immunity from jurisdiction

Sovereign States and emanations of the State as a matter of principle enjoy immunity from jurisdiction in France. According to this principle, sovereign States and emanations of the State may not be sued before French courts with regard to acts made in their sovereign capacity (*jure imperii*). On the other hand, States are not immune from jurisdiction when the dispute relates to their acts of a private or commercial nature (*jure gestionis*).

A waiver of immunity from jurisdiction may be provided expressly, in terms that must be certain, express and unequivocal. A waiver may also be implied if the State or State-emanation agreed to submit disputes to arbitration or failed to raise an immunity defence at the outset of the proceedings before French domestic courts.

##### Immunity from enforcement

Pursuant to Article L 111-1-2 of the Code of Civil Enforcement Procedures, assets belonging to a sovereign State are, as a matter of principle, immune from enforcement in France, unless:

- (i) the State has expressly consented to the taking of interim and/or enforcement measures at stake;
- (ii) the State has earmarked or allocated assets for the satisfaction of the relevant claim; or
- (iii) a judgment or an arbitral award has been rendered against the relevant State and the asset at stake (*a*) is in use or intended for use for purposes other than non-commercial purposes; and (*b*) has a connection with the entity against which the proceeding was brought.

Under Article L 111-1-1 of the Code of Civil Enforcement Proceedings a party must apply for prior judicial authorisation to carry out any interim or enforcement measures against the assets of a foreign State. Such application is brought *ex parte* and heard by the President of the Paris First Instance Court.

Under Article L 111-1-2 (1) of the Code of Civil Enforcement Proceedings, a State may waive its immunity from enforcement. Such waiver must be express. With respect to assets used or intended for use in the performance of the State’s diplomatic mission, an express and special waiver is required (Article L 111-1-3 of the French Code of Civil Enforcement Procedures).

#### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

French courts are very reluctant to allow the attachment and seizure of assets belonging to entities other than the debtor itself. When an award-creditor holds a debt against a State, the French courts will only allow the creditor to seize the assets of a State-owned entity in satisfaction of the State’s debt provided that the State-owned entity can be shown to be a mere “emanation” (*alter ego*) of the State. Under French law, this is a difficult standard to meet.

To prove that a State-owned entity is an emanation of the State, French case law requires proof that the relevant company:

- lacks functional independence from the State, which requires showing a “permanent control of the State over the entity’s day-to-day existence” (CA Paris, 31 October 2013, No 12/16888; CA Paris, 31 January 2013, No 12/10267); and
- does not have a separate asset base (“*patrimoine*”) from that of the State (see French Supreme Court, First Civil Section, 6 February 2007, *Société Nationale des Pétroles du Congo Holdings Ltd*, No 04-13.108 and 04-16.889).

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## Disclaimer

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.



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# Germany

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## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

According to the German Federal Ministry for Economic Affairs and Energy, Germany currently has 126 bilateral investment treaties (“BITs”) in force (including with countries such as China, Qatar, Russia, Saudi Arabia, Singapore, and the UAE) and is a party to the multilateral Energy Charter Treaty. These treaties contain wide-ranging guarantees for investors, including fair and equitable treatment, non-discrimination (national as well as most-favoured nation treatment), and protection from expropriation with full compensation.

In 1954, Germany concluded a Treaty of Friendship, Commerce and Navigation (“FCN treaty”) with the United States, which includes similar but more limited guarantees. Moreover, unlike (most) bilateral investment treaties, the FCN treaty with the United States does not permit investors to directly enforce their rights against Germany through arbitration.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Germany has signed but not ratified BITs with Congo, Iraq, and Israel. The BIT with Israel is, however, provisionally applicable. There are no official pronouncements about the reasons for this. However, both treaties were signed after the Treaty of Lisbon (2009) was concluded which moved part of the competences for foreign direct investments to the EU (Articles 206, 207 TFEU). Four further treaties have been ratified by Germany but not by the respective counter-party (Brazil, Israel, Pakistan, and Timor-Leste). With Pakistan and Congo, older BITs exist which continue to remain in force.

Moreover, the EU has signed multilateral agreements including investor-state dispute settlement provisions with Canada and Vietnam which have not yet been ratified by any EU Member States (including Germany). Ratification by all Member States is required because the Court of Justice of the European Union held in Opinion 2/15 that the EU and its Member States share the competence for investor-state dispute settlements. There are no official pronouncements about the reasons for the non-ratification of these treaties. This may, however, be related to various legal proceedings concerning the compatibility of investor-state dispute settlement with EU law.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

German BITs are generally based on the German Model BIT. The latest publicly available version is dated from 2009. Like most BITs in force today, the German Model BIT is rather short and, unlike, e.g., the US Model BIT, does not contain elaborate definitions and explanations concerning each protection standard.

It has a broad investment definition (“*every kind of asset*”) and also applies to indirect investments provided they are “*realize[d] via a company situated in the other Contracting State*”. It contains protection from direct and indirect expropriation without compensation and guarantees fair and equitable treatment, full protection and security, national and most-favoured nation treatment, and the observance of obligations entered into with investments of an investor (“umbrella clause”). It also guarantees the free transfer of payments and returns from the investment.

An investor can enforce violations of the BIT through international arbitration. Arguably, also other investment-related disputes unrelated to BIT provisions can be arbitrated under the Model BIT’s arbitration clause as it only refers to “*disputes concerning investments*”. In terms of arbitration rules, the Model BIT lists ICSID, ICSID Additional Facility, UNCITRAL, ICC and SCC. From this list, German BITs typically include ICSID and ICSID Additional Facility together with one or two further sets of rules.

With the Lisbon Treaty (2009), part of the competence for foreign direct investment shifted to the EU. Therefore, international investment agreements are today concluded at an EU level, mostly as separate agreements in the context of, or chapters in free trade agreements. There is not yet an “EU Model BIT” but common features in final or draft investment agreements negotiated by the EU with other states can be used as guidance. The agreements exclude certain areas (such as audio-visual services) from its scope, establish various restrictions on protection standards, emphasise the state’s right to regulate, and include new procedural provisions.

Investments are required to have “*the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*”.

In terms of protection standards, the treaties negotiated to date (with Canada [CETA] and Vietnam), for example, limit the fair and equitable treatment (“FET”) standard to certain breaches, namely: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process [including a fundamental breach of transparency] in judicial and administrative proceedings;



(c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; and (e) abusive treatment [of investors], such as coercion, [further examples under CETA: duress and harassment/under the EU-Vietnam FTA: abuse of power or similar bad faith conduct]. Notably, the violation of legitimate expectations of the investor is not part of this list but may only be “taken into account” when applying the FET standard. Other breaches of the FET standard can be added to this list through amendment procedures established by the respective agreement. Other restrictions include the limitation of full protection and security obligation to the protection of the physical security of investors. Moreover, CETA does not contain an umbrella clause.

A notice of dispute must be filed within three years after the alleged treaty breach became known or should have become known or two years after the investor ceased to pursue a related domestic claim. Investor-state disputes under these treaties are to be submitted to a three-member tribunal constituted as part of an “investment court”. The investment court has 15 members (five EU nationals, five Canadian/Vietnamese nationals, and five nationals from third states), one of each group being appointed to form a tribunal. Awards can be reviewed by a three-member Appellate Tribunal with regard to: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1) of the ICSID Convention. The treaties with Canada and Vietnam also establish special procedures for claims allegedly manifestly without legal merits or unfounded as a matter of law.

#### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Diplomatic notes issued in the context of the signing or ratification of a treaty are generally published in the German Official Journal together with the law ratifying the treaty. These notes may report on the modifications or understandings relating to the treaty.

Diplomatic notes concerning the application of treaties in cases of state succession have been published, e.g., regarding the treaties with the Soviet Union and the Czech and Slovak Federal Republic.

#### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

No, there are no official commentaries that have been published by the Government concerning the meaning of treaty or trade agreement clauses.

## 2 Legal Frameworks

#### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Germany has ratified the 1958 New York Convention on 30 June 1961 (effective 28 September 1961) and the 1965 Washington Convention on 18 April 1969 (effective 18 May 1965). In 1998, it withdrew its declaration to apply the New York Convention only to awards made in other contracting states (Article I(3)).

Germany has signed but – like all EU Member States – not yet ratified the Mauritius Convention.

#### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

No. However, the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*) contains certain provisions relevant for foreign investments (see question 2.3 below).

#### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Germany is open and welcoming towards foreign investments and, with few exceptions, places no restrictions on foreign investments. Pursuant to the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), the acquisition of 25% or more of the voting rights by non-EU investors in a German company must be notified to the Federal Ministry of Economy. The Ministry can examine whether the acquisition endangers “the public order or security of the Federal Republic of Germany”. Such an examination is, however, naturally rare and is generally limited to acquisitions relating to sensitive industries or activities, in particular critical infrastructure (including related special software) in areas such as energy, IT, telecommunication, transport, food, finance and insurance.

## 3 Recent Significant Changes and Discussions

#### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The single most important German case arose from the setting-aside proceedings relating to the Frankfurt-seated investment arbitration *Achmea v. Slovak Republic*. It concerns the compatibility of the investment arbitration clause in the Dutch-Slovak BIT with EU law. In March 2016, the German Supreme Court (*Bundesgerichtshof*, “BGH”) referred this question to the Court of Justice of the European Union (“CJEU”). In its request, the BGH clearly stated that it considers the intra-EU investment arbitration clause compatible with EU law. In its March 2018 judgment, the CJEU however ruled that clauses such as the one in the Dutch-Slovak BIT are not compatible. It is now on the BGH to implement this conclusion in its setting-aside ruling, which, at the time of writing, is still pending.

The intra-EU issue has also emerged in a number of other investment arbitrations, including in the ICSID case *Vattenfall v. Germany*. In its decision of 31 August 2018, the tribunal affirmed its jurisdiction over this particular dispute under the Energy Charter Treaty.

A second key case addressed the sovereign immunity defence against the jurisdiction of a Geneva-seated ICC investment tribunal. The issue arose in the context of recognition and enforcement proceedings before German courts. In *Walter Bau v. Thailand*, Thailand had raised jurisdictional objections but had not challenged the decision affirming jurisdiction at the seat. Under German law, if a jurisdictional decision has not been challenged, a party is generally precluded from challenging the jurisdiction at the enforcement state. The BGH, however, held that this does not apply with regard to state immunity. A state only waives its immunity to the extent of the arbitration agreement. Where a dispute falls outside the scope of the arbitration agreement, a state’s immunity from jurisdiction continues to apply – also in recognition and enforcement proceedings.

According to the BGH, also the non-challenge of a decision on jurisdiction does not constitute itself a waiver.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

For a long time, Germany has been a clear defender of investment treaties and investor-state dispute settlement (ISDS). It is considered to be the inventor of investment protection through bilateral investment treaties (the first BIT ever was concluded in 1959 with Pakistan) and still today Germany is one of the countries with the most BITs currently in force. According to UNCITRAL statistics, German parties are also the fourth most frequent users of ISDS.

Until recently, ISDS was not an issue of public debate in Germany. This changed with the negotiations of the EU free trade agreements with Canada ("CETA") and the US ("TTIP"). *Inter alia*, the investment chapters of such agreements were viewed critically by the public. As a consequence, the German government also appears to have shifted to a more restrictive view.

Moreover, while Germany in the CJEU proceedings referred to in question 3.1 above, argued in favour of the compatibility of investor-state dispute settlement in intra-EU disputes, it has now adopted a position against ISDS in such disputes.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

The German Model BIT covers indirect investments provided they are "*realize[d] via a company situated in the other Contracting State*". It guarantees most-favoured nation treatment and also includes a so-called "umbrella clause". Issues such as corruption, transparency, or climate change are not specifically addressed in the German Model BIT. There are also no specifications or limitations to, e.g., the fair and equitable treatment standard.

New investment treaties will, however, be concluded on the EU level (see question 1.3 above). These typically cover indirect investments. However, in terms of protection standards, they e.g. limit the scope of most-favoured nation ("MFN") clauses in various respects; in particular, they exclude investor-state dispute settlement provisions from the scope of MFN clauses.

To date, corruption is not specifically addressed in these treaties. However, investments are only protected if they are "*made in accordance with the applicable law*". Climate change is equally not specifically addressed. The treaties merely "*reaffirm the right to regulate [...] to achieve legitimate policy objectives, such as the protection of [...] environment*". Moreover, the applicable law to the disputes also includes "*rules and principles of international law applicable between the Parties*".

EU investment agreements provide for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Parties are also required to disclose third-party funding.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, Germany has not terminated any international investment agreements. Some BITs with Germany, however, have been terminated by the counter-party (Bolivia, Ecuador, India, Indonesia, and South Africa) due to policy changes in these countries regarding investment protection.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Germany has been a Respondent in three investor-state arbitrations. In the 1990s, an Indian investor brought a claim against Germany but, according to the German government, failed to pay the cost advances. Hence, the case was discontinued.

The other two cases were filed by the Swedish energy company Vattenfall.

The first *Vattenfall* case (ICSID Case No. ARB/09/6) concerned the construction of a coal-fired power plant in Hamburg. It arose out of delays in the permitting procedure and, eventually, the imposition of new conditions after a new government (including the "Green" party) had taken office. The new conditions were based on alleged environmental grounds which would have required significant additional investments. The arbitration was eventually settled.

The second *Vattenfall* case (ICSID Case No. ARB/12/12) arose out of Germany's decision to phase-out nuclear power plants in the aftermath of the Fukushima nuclear disaster. The hearing in this case has taken place in October 2016. On 31 August 2018, the tribunal issued a decision relating to its jurisdiction in light of the March 2018 *Achmea* judgment of the Court of Justice of the European Union (see question 3.1 above). An award in this case is still outstanding.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

So far, no enforcement has been necessary. The first *Vattenfall* case brought against Germany was settled. The second *Vattenfall* case against Germany is still pending.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

The issue of annulment has not arisen so far since no final award has yet been rendered against Germany.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

In the first arbitration against Germany, Vattenfall also challenged the measure under German law in administrative courts. The proceedings before the administrative courts were settled together with the ECT claim in the ICSID arbitration.

In the second arbitration, Vattenfall also filed a constitutional complaint with the German Federal Constitutional Court against the relevant amendment to the German nuclear law. In 2016, the Federal Constitutional Court held that the amendment was partially unconstitutional and ordered the German government to remedy certain issues. The arbitration has continued separately.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

No general trends can be derived from the two *Vattenfall* cases brought against Germany. As a common detonator, both are intra-

EU investment disputes in the Energy sector (based on the Energy Charter Treaty) and involve(d) questions of the state's right to regulate.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Third-Party Funding is permitted and available in arbitral proceedings in Germany.

German law does not contain special regulations addressing Third-Party Funding. It is generally considered not to trigger regulatory supervision because it does not qualify as an insurance or financial service. Moreover, German law does not contain doctrines like the common law doctrines of champerty and maintenance. Due to the general prohibition of success fees for lawyers in Germany (knowing only very narrow exceptions), lawyers cannot fund (their own) cases in Germany. These restrictions, however, do not apply to funders.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no recent case law relating specifically to the funding of investor-state claims.

With regard to financing costs for general litigation proceedings, German courts have decided, however, that these cannot be recovered under sections 91 *et seq.* of the German Code of Civil Procedure (*Zivilprozessordnung*).

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Historically, Third-Party Funding has played only a marginal role in Germany. German parties more commonly use “before-the-event” insurance. Nevertheless, the activity of the Third-Party funders in the German market has noticeably increased over the last couple of years. While there are no official statistics, the numbers of funded cases appear to be rising.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

The scope of a tribunal's review depends on the instrument from which it derives its jurisdiction. Typically, criminal investigations and domestic judgments are subject to review under the protection standards (such as fair and equitable treatment) of the BIT. The scope of review concerning the substantive correctness of a court decision will generally be very limited (e.g. denial of justice).

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The jurisdiction of domestic courts in the context of arbitration proceedings will depend on the chosen seat and arbitration rules. Due to the denationalised nature of ICSID arbitrations, domestic courts will have no jurisdiction with regard to procedural issues in such cases. In an *ad hoc* arbitration seated in Germany, German

courts will have jurisdiction to carry out the typical support functions of domestic courts (e.g., relating to the taking of evidence, interim measures, appointment and challenges of arbitrators, etc.).

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitrations seated in Germany are governed by Book 10 of the German Code of Civil Procedure (*Zivilprozessordnung*, “ZPO”; sections 1025–1066 ZPO). The provisions were adopted in 1998 and are based on the 1985 UNCITRAL Model Law.

Deviations from the Model Law are very limited: Section 1032(2) ZPO, for example, permits a party – until the constitution of the tribunal – to petition the court to determine the admissibility or inadmissibility of arbitration proceedings. This allows a party to receive a ruling on the jurisdiction of the tribunal and validity of the arbitration agreement at an early stage and avoids going through a full arbitration proceeding only to see the obtained award being set aside by domestic courts.

Section 1063(3) ZPO moreover permits the courts to provisionally enforce an award before it has been recognised and declared enforceable. Such a decision may also be issued *ex parte*. Provisional enforcement measures are, however, limited to securing assets (i.e. attaching assets without yet transferring them to the creditor).

Furthermore, since it is based on the 1985 version (i.e. prior to the 2006 revision), it does not contain the detailed provisions on interim measures from Articles 17A to 17J of the Model Law; it merely provides that the arbitral tribunal may order provisional measures (section 1041 ZPO). For a further example, see question 6.7 below.

### 6.4 To what extent are there laws providing for arbitrator immunity?

The German arbitration law does not contain specific provisions regarding the liability of arbitrators. Hence, arbitrators are, in principle, liable in accordance with the applicable private law provisions, unless, e.g., the contract with the arbitrator(s) establishes a different standard. In the absence of specific provisions, the German Supreme Court generally assumes an implicit limitation of the liability of arbitrators similar to that of domestic judges, which excludes liability for negligence.

The Arbitration Rules of the German Arbitration Institute (“DIS”) limit the liability of arbitrators to intentional breaches of their duties.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

The parties are generally free to select the arbitrator of their choice, provided there are no circumstances that might give rise to doubts as to his or her independence or impartiality.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties have not agreed on the method of selecting and appointing arbitrators, the default under German arbitration law is a three-member tribunal where each party appoints one arbitrator and the two-party appointed arbitrators appoint the presiding arbitrator.

If a party does not comply with this default appointment method or if the party-appointed arbitrators cannot agree on a presiding arbitrator, the other party may request the Higher Regional Court at the seat of the arbitration to appoint the respective arbitrator. The

Higher Regional Court can also be asked to adopt the necessary measures if a party does not comply with an appointment mechanism agreed between the parties or if an appointing authority fails to act (unless the parties' agreement stipulates for a different mechanism in this case).

When making appointments, the courts shall – in addition to any requirements agreed by the parties – consider whether “*appointing an arbitrator of a different nationality than that of the parties might serve the intended purpose*” (section 1035(5) ZPO). This provision appears to be primarily geared towards international arbitrations.

#### **6.7 Can a domestic court intervene in the selection of arbitrators?**

Apart from the rules set out in response to question 6.6, upon request by a party, the competent Higher Regional Court may, where the “*arbitration agreement provides for one party to be more strongly represented in the composition of the arbitral tribunal, and this places the other party at a disadvantage*”, appoint an arbitrator in derogation from the agreed appointment method.

### **7 Recognition and Enforcement**

#### **7.1 What are the legal requirements of an award for enforcement purposes?**

With regard to enforcement of awards, the German arbitration law reflects the UNCITRAL Model Law and New York Convention. Hence, any award must be final in order to be enforceable.

In addition, a domestic arbitral award must be in writing, signed by the arbitrators and specify the date of the award and place of arbitration. Unless the parties have agreed otherwise, the award shall state the reasons upon which it is based.

When applying for enforcement of an award (domestic or foreign), the original or a certified copy of the award must be submitted. A copy of the arbitration agreement is not required, neither is a translation into German of the award and agreement. Pursuant to Article VII(1) of the New York Convention, this less stringent form requirement also applies to foreign awards. The agreement and translations may, however, be requested by the court. To avoid delays, it might therefore be useful to nonetheless submit the arbitration agreement and, at least where an award (or agreement) is in a language other than English, to submit a German translation.

#### **7.2 On what bases may a party resist recognition and enforcement of an award?**

German law distinguishes between foreign and domestic awards. Foreign arbitral awards are recognised and enforced in Germany

in accordance with applicable international treaties, in particular the 1958 New York Convention. Domestic arbitration awards are enforced pursuant to section 1059, 1060 of the German Code of Civil Procedure (*Zivilprozessordnung*, “ZPO”). These provisions are based on the 1985 UNCITRAL Model Law.

The grounds for non-recognition are thus those in the New York Convention and UNCITRAL Model Law.

As regards ICSID Awards, the law approving and implementing the ICSID Convention provides that an application for enforcement of an ICSID award may only be rejected if the award has been annulled or revised pursuant to Articles 51 or 52 of the ICSID Convention.

#### **7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**

Germany does not have a law on state immunity. It has also not signed the UN Convention on Jurisdictional Immunities of States and Their Property. Instead, the customary international law on state immunity directly applies in Germany via Article 24 of the Basic Law (*Grundgesetz*). On this basis, German courts differentiate whether the asset against which enforcement is sought serves sovereign or rather commercial purposes.

Based on this distinction, German courts, *inter alia*, granted the attachment of a Thai airplane and enforcement in real estate property formerly used as a Russian trade mission. Similarly, enforcement in Russian real estate property used for a cultural centre was initially granted. However, the decision was later reversed when it turned out that also three diplomats lived there. Also denied was the enforcement into the bank account of the Philippines' embassy and into VAT reimbursements to the Russian embassy. The courts considered it sufficient that the funds were necessary to ensure the functioning of the embassy in general, be it by using them for purchases of office supplies or sovereign acts. Enforcement into airline payments to the Russian state for overflight rights were also deemed to be covered by state immunity since these payments were used for financing the air traffic administration.

The findings regarding the above assets are, however, case-specific. Depending on the specific facts, there could be different outcomes.

#### **7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**

The “corporate veil” issue has not been discussed by German courts regarding sovereign assets. However, under German law, a title can only be enforced against the debtor stated in a given title. An amendment of the debtor in the title is limited to certain instances, in particular succession. Hence, awards obtained against a state can generally only be enforcement against the state itself.



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# Luther.

Luther is a leading German full-service law firm that offers comprehensive legal and tax services. It employs more than 380 lawyers and tax advisors and has offices in 10 locations in Germany and at important investment locations and financial centres in Europe and Asia (Brussels, London, Luxembourg, Shanghai, Singapore and Yangon). Our clients are medium-sized enterprises and large corporations, as well as the public sector.

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# Hungary

András Nemescsói



David Kohegyi



Horváth and Partners DLA Piper

## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

As of October 1, 2018, Hungary has bilateral investment treaties with the following countries: the Republic of Albania; Argentina; Australia; the Republic of Austria; the Republic of Azerbaijan; the Kingdom of Belgium and the Grand Duchy of Luxembourg BLEU; Bosnia and Herzegovina; the Republic of Bulgaria; the Kingdom of Cambodia; Canada; the Republic of Chile (signed but not yet in force); the People's Republic of China; the Republic of Croatia; the Republic of Cuba; the Republic of Cyprus; the Czech Republic; the Kingdom of Denmark; the Arab Republic of Egypt; the Republic of Finland; the French Republic; the Federal Republic of Germany; the Hellenic Republic; the Republic of India (terminated in 2017); the Republic of Indonesia (terminated in 2016); the State of Israel (terminated in 2007); the Republic of Italy (terminated in 2008); the Hashemite Kingdom of Jordan; the Republic of Kazakhstan; the State of Kuwait; the Republic of Latvia; the Lebanese Republic; the Republic of Lithuania; the former Yugoslav Republic of Macedonia; Malaysia; the Republic of Moldova; Mongolia; the Kingdom of Morocco; the Kingdom of the Netherlands; the Kingdom of Norway; the Republic of Paraguay; the Republic of Poland; the Portuguese Republic; the Republic of Korea; Romania; the Russian Federation; the Republic of Serbia; the Republic of Singapore; the Slovak Republic; the Republic of Slovenia; the Kingdom of Spain; the Kingdom of Sweden; the Swiss Confederation; the Republic of Tajikistan (ratified but not yet entered into force); the Kingdom of Thailand; Tunisia (signed but not yet in force); the Republic of Turkey; Ukraine; the United Kingdom of Great Britain and Northern Ireland (including the territories of Bermuda, Gibraltar, Guernsey, Isle of Man, Jersey, and the Turks and Caicos Islands); the Eastern Republic of Uruguay; the Republic of Uzbekistan; the Socialist Republic of Vietnam; and the Republic of Yemen.

Hungary is also party to the Energy Charter Treaty.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

According to publicly available sources of information, Hungary has signed, but has not ratified its bilateral investment treaties with Chile (1997) and Tunisia (2003). Presumably, these treaties have not been ratified as a result of Hungary's accession to the European Union in 2004.

Hungary is actively negotiating treaties with non-EU countries, hence the conclusion of new treaties may be announced before the end of 2018.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Hungary has a model BIT which dates back to 2016.

Its provisions are rather modern and reflect Hungary's experience as an open economy with a welcoming attitude towards foreign direct investment.

Hungary's model BIT affords fair and equitable treatment (FET), full protection and security, national and most-favoured nation treatment (MFN) as substantive protections to investors.

The model BIT provides a narrow interpretation of the breach of the FET standard when it lists the following measures as potential breaches: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) harassment, coercion, abuse of power or similar bad faith conduct. It also declares that the breach of another obligation included in the treaty or another international obligation or the breach of domestic law in and of itself does not establish a breach of the FET standard. Nevertheless, it provides all parties with an opportunity to request a review of the content of the FET obligation.

Moreover, the model BIT restricts full protection and security provisions to "physical security of investors and investments".

With respect to the MFN treatment, the model has a specific carve out concerning procedural rights when it declares that the resolution of investment disputes is not considered "treatment".

On the issue of expropriation, Hungary's model BIT lists the following factors to be considered during a "case-by-case, fact-based inquiry" into whether indirect expropriation has taken place: (a) the economic impact of the measure or series of measures; (b) the duration of the measures; and (c) the character of the measures, notably their object and content. In this context the model BIT specifically declares that "the sole fact that a measure or a series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred".

Hungary's model BIT offers five distinct mechanisms for investor-state dispute resolution: (a) domestic courts of the parties; (b) ICSID arbitration; (c) *ad hoc* UNCITRAL arbitration; (d) arbitration under

ICSID's Additional Facility Rules; or (e) any other form of dispute settlement agreed by the parties. The model contains a fork-in-the-road provision and stipulates a three-year limitation for investors to submit a dispute to arbitration from the date they first acquire knowledge of the alleged breach. Presumably, as a reflection on potential future developments in this area, the model BIT declares that its relevant provisions would cease to exist in the event "an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement" entering into force.

Hungary's model BIT applies the UNCITRAL Transparency Rules to disputes.

Presumably, in response to the regulatory challenges faced during the recent global financial crisis, Hungary's model BIT offers carve outs so as to enable contracting parties to adopt reasonable measures to safeguard the integrity and stability of financial institutions or a contracting party's financial system.

Finally, the model BIT includes a denial of benefits clause.

#### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Hungary does not officially publish such diplomatic notes. Nevertheless, the Ministry of Foreign Affairs and Trade offers assistance to anyone seeking to conduct research related to the preparatory documentation of treaties (provided they are not protected by confidentiality).

#### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Hungarian Government has not published any official treaty commentaries yet.

## 2 Legal Frameworks

#### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

(1) Hungary acceded to the New York Convention on March 5, 1962 and its provisions entered into force on June 3, 1962 in respect of Hungary; (2) Hungary signed the Washington Convention on October 1, 1986 and its provisions entered into force on March 6, 1987 in respect of Hungary; (3) as of October 1, 2018 Hungary has not signed the Mauritius Convention yet.

#### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The Act on the Investments of Foreigners in Hungary (Act XXIV of 1988) was introduced shortly before the 1989 collapse of the communist regime in Hungary. Tellingly, its introductory provisions declare that it aims to "facilitate the direct participation of foreign operating capital in the Hungarian economy". Hungary has gone through many significant positive developments since the introduction of the act, such as becoming a Member State of the European Union in 2004. Although the act remains effective

to date, about two-thirds of its early provisions, containing various administrative restrictions on foreign direct investment, have long been abolished.

Nevertheless, much like an investment treaty, the current version of the act grants substantive protections to investors, such as full protection and security or protection against expropriatory measures (as well as measures having an equivalent effect). It stipulates that any expropriatory measures may only be carried out upon the payment of prompt compensation at the actual value of the assets of the foreign investor. Compensation is granted through the competent administrative state agencies, in the same currency in which the investment was made. In the event of an alleged violation of the law, a competent domestic court may be seized to review the decision of the administrative agency on the issue of compensation.

#### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

There are no such formal requirements. As a Member State of the European Union, Hungary has a rather favourable attitude towards foreign investment, which is also reflected in the prevailing legal regime.

## 3 Recent Significant Changes and Discussions

#### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Hungarian courts have not had a chance to weigh in on investment treaty interpretation yet. However, given the potential implications of the preliminary ruling of the Court of Justice of the European Union in *Slovak Republic v. Achmea BV* (C-284/16), Hungarian courts may soon be seized by investors, affording domestic courts the opportunity to interpret Hungary's investment treaties.

#### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

It can generally be stated that Hungary has shown a positive attitude towards investor-state arbitration. This is evidenced by the number of bilateral investment treaties it can pride itself with and its voluntary compliance with arbitral awards rendered against it.

Although there is no generally advocated uniform policy by the Government, during the course of the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) Hungary, as an OECD country with an independent judiciary, has voiced its preference for a dispute resolution mechanism that differs from the investment arbitration model proposed at the time. While we have yet to see the Government's official stance on the investment court system (or ICS) framework proposed under the CETA, some government officials referred to it as an "interesting development" in comparison to investment arbitration.

Notably, the investment dispute settlement provisions of the 2016 Hungarian Model BIT also favor a potential future multilateral investment tribunal and/or a multilateral appellate mechanism over "traditional" dispute resolution mechanisms. (See question 1.3 above.)

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

The Government has not yet issued a policy paper to the general public on its current or future stance regarding these issues in investment treaties.

Hungary's most recent, publically accessible treaties are the 2016 BIT with the Kingdom of Cambodia and the 2017 BIT with the Republic of Tajikistan. These treaties both remain silent on the issues of corruption, transparency and climate change. They both contain an identical MFN clause and an identical general exception that an investor-state dispute settlement "shall not be considered as treatment, preference or privilege". Accordingly, these treaties follow a more modern approach in that they exclude these procedural rights from the scope of MFN treatment. Finally, both of these treaties contain quite a broad denial of benefits clauses. Benefits under both treaties may be denied in circumstances where investors of a third state own or control the given investment and either the investor (i) has no substantial business activities in the territory of the contracting party under whose law it is constituted, or (ii) a measure with respect to the given third state adopted by the denying party would be violated or circumvented if the benefits of the treaty were accorded to these investments.

For a glimpse on how Hungary's 2016 model BIT addresses some of these issues please refer to question 1.3 above.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Hungary has not yet terminated a BIT on its own initiative. There have been four instances in the past when Hungarian BITs were terminated. In three instances BITs were unilaterally denounced by the other contracting state, such as India (2017), Indonesia (2016) and Israel (2007). Hungary agreed to terminate the BIT upon mutual consent with Italy (2008).

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Hungary has been involved in a total of 17 investor-state arbitrations to date. 15 of these cases have been administered by ICSID, one under the UNCITRAL Rules and one under the ICC Rules.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Out of the 17 known investment claims made against Hungary, so far a total of four have been successful. Hungary has voluntarily complied with three of these awards rendered against it (*ADC Affiliate Limited* and *ADC & ADMC Management Limited v. Hungary*; *EDF v. Hungary*; *Edenred S.A. v. Hungary*). In respect of the latest award against it (*Dan Cake (Portugal) S.A. v. Hungary*), Hungary has sought both revision and annulment under the ICSID Convention and filed for the stay of the enforcement of the award.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Yes. Hungary has sought the annulment (and the revision) of two ICSID awards against it (*Edenred S.A. v. Hungary and Dan Cake (Portugal) S.A. v. Hungary*). All of these challenges are pending. As reported in the press, one of the grounds for these challenges is the implications of the preliminary ruling issued by the Court of Justice of the European Union in *Slovak Republic v. Achmea B.V.* (C-284/16).

For the sake of disclosure, the authors of this chapter are counsel to Hungary in both of these cases.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has not been any satellite litigation related strictly to the arbitration proceedings against Hungary.

However, in three recent interrelated ICSID cases the claimants had launched complaints with the European Commission, as a result of which, infringement proceedings were initiated by the Commission against Hungary. This infringement proceeding culminated in a ruling unfavourable to Hungary, by the Court of Justice of the European Union.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Some of the cases brought may be grouped based on the government measures they relate to. Three cases were launched by three investors as a result of the termination of long-term power purchase agreements by the state due to mandatory rules related to EU state aid. Moreover, two claims were filed by two media broadcasting enterprises related to the same tender for nationwide radio frequencies. Finally, three French investors filed claims in connection with certain amendments in the Hungarian tax laws and rules governing so-called fringe benefits.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Although Hungarian law does not have a specific legal provision dedicated to the issue of third-party funding yet, under the prevailing sentiment, there are no legal obstacles to third-party funding.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

Given the relatively novice nature of the issue of third-party funding on the Hungarian market, we are not familiar with any publically accessible Hungarian court decision or arbitral award on the issue.



### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Although the issue provokes an increasing interest, particularly amongst potential claimants in international arbitrations, third-party funding is not used widely.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

It can generally be stated that this issue is in the center of attention as oftentimes claimants are tempted to try to override decisions of domestic courts by turning to international tribunals for relief. This is particularly true in the investment arbitration context.

The question may be answered by looking at the underlying arbitration agreement that forms the basis of the jurisdiction of the given arbitral tribunal and the general principles of international law.

Some of Hungary's earlier investment treaties grant jurisdiction to international tribunals to decide claims of expropriation only. Hungary's bilateral investment treaties entered into as of the second half of the 1990s also grant jurisdiction to international tribunals over claims of alleged violations of various other substantive treaty protections, such as national treatment, fair and equitable treatment or full protection and security. Typically, these treaty protections afford limited room for tribunals to look at decisions of domestic courts or other. Nevertheless, tribunals in the past have in general insisted that although they are not necessarily bound by decisions of domestic courts, they cannot second-guess the interpretation or application of local laws carried out by domestic courts, hence any such review is usually very narrow in scope.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Yes. If the seat of arbitration is in Hungary, Hungarian courts may grant interim measures, injunctive relief, or order protective measures. Hungarian courts may also assist the arbitral tribunal in taking evidence (such as preserving evidence or applying coercive measures to ensure witness appearance).

The recently introduced new Arbitration Act (Act LX of 2017) specifically stipulates that irrespective of the venue of an arbitration proceeding, Hungarian courts have the power to order the taking of preliminary evidence (i.e. even before the commencement of the arbitration), to order interim measures or protective measures, to issue writs of execution, or to order the provision of a security. Hungarian courts proceed on the basis of and within the restrictions stipulated in the Hungarian Civil Procedure Code (Act CXXX of 2016) when taking these measures.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Hungary has recently introduced a completely revamped Arbitration Act, which entered into force on January 1, 2018. It is based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.

### 6.4 To what extent are there laws providing for arbitrator immunity?

The Arbitration Act (which applies if the seat of the arbitration is in Hungary, or in certain instances if the venue of the proceeding conducted by a permanent arbitration court seated in Hungary is outside of Hungary) stipulates that the rules and regulations of a permanent arbitration court or, in the case of an *ad hoc* arbitration, the agreement of the arbitration panel and the parties may exclude or limit the liability of the permanent arbitration court, the arbitration panel and the arbitrators. Limitation of liability for damage caused intentionally or by gross negligence is prohibited.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

This generally depends on the particular rules that apply to the arbitration proceedings. If the seat of the arbitration is in Hungary, the Arbitration Act lists specific criteria which prohibits anyone from serving as an arbitrator. These are the following: (i) any person under the age of 24 years; (ii) any person barred from participation in public affairs by a final court ruling; (iii) any person sentenced to imprisonment by a final court ruling (until he or she regains a clean criminal record); (iv) any person under guardianship; (v) any person barred from practicing a profession requiring a university degree in law; or (vi) any person under probation under the final order of a court (during the course of the probationary period).

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

This generally depends on the particular rules that apply to the arbitration proceedings. If the seat of the arbitration is in Hungary, save for an agreement to the contrary between the parties or if the arbitration rules applicable to the dispute provide otherwise, the Arbitration Act affords the opportunity to either of the parties to turn to the Metropolitan Court of Budapest for the appointment of the remaining arbitrator(s).

### 6.7 Can a domestic court intervene in the selection of arbitrators?

Please refer to question 6.6.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

Hungary has been signatory to the New York Convention since 1962. When acceding the New York Convention, Hungary made a reciprocity reservation and a commercial reservation. Accordingly, Hungarian courts only apply the New York Convention to arbitral awards rendered in the territory of another New York Convention contracting state, and only to awards related to disputes that concern legal relationships that are commercial in nature under Hungarian law.

In addition to Law Decree 25 of 1962 implementing the New York Convention, the party wishing to enforce a foreign arbitral award in Hungary must also comply with the requirements stipulated by the

relevant provisions of Act III of 1994 on Judicial Enforcement. For recognition and enforcement by Hungarian courts foreign arbitral awards must: (i) contain a ruling against the debtor; (ii) be final and binding (non-appealable); and (iii) the deadline for their voluntary performance must have passed when the request for recognition and enforcement is submitted to the competent court.

As noted above, Hungary is also party to the ICSID Convention. At present the Metropolitan Court of Budapest is the designated court for the recognition and enforcement of ICSID awards in Hungary under Article 54 (2) of the ICSID Convention.

## 7.2 On what bases may a party resist recognition and enforcement of an award?

Given that Hungary is a signatory to the New York Convention, in the case of non-ICSID awards, the party against whom enforcement is sought may resist enforcement under the grounds listed in Article V (1) of the New York Convention.

Hungarian courts may refuse to recognize and enforce foreign arbitral awards on the grounds stipulated in Article V (2) of the New York Convention.

## 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Hungary has recently introduced a new Act on Private International Law (Act XXVIII of 2017) which devotes a specific title (Title 34) to the issue of sovereign immunity. Hungary adheres to the so-called “restrictive immunity” principle and modeled the relevant provisions of the Act on Private International Law on the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (Hungary is not party to the convention).

There are no publically available Hungarian court decisions over these issues.

## 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There are no publically available Hungarian court decisions over these issues in the context of sovereign assets. All known cases deal with the liability of controlling shareholders whose intentional or grossly negligent acts contribute to loss-generating operations.



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DLA Piper's lawyers are skilled in litigation, arbitration, investigations and ADR and will deploy that experience to help you devise the best strategies.

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DLA Piper's Budapest team has a second to none investment treaty arbitration portfolio, coupled with a solid reputation in the field of commercial arbitration both domestic and international. We regularly represent clients in disputes under the ICC, UNCITRAL and ICSID rules and in front of all major Hungarian domestic fora.

# India

AZB & Partners

Rajendra Barot



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## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

India is a signatory to 83 Bilateral Investment Treaties (“BITs”), of which it has ratified 74. Information available in the public domain as of August 2018 (including the Joint Interpretative Statement for BITs), suggests that 55 are currently in force.

India has signed and ratified trade agreements with several countries such as Japan, Korea, Malaysia and Singapore. Additionally, India is a signatory to several tax treaties as well as intergovernmental agreements such as the General Agreement on Trade-in Services (GATS). India has also signed framework agreements with the Association of South East-Asian Nations (ASEAN), *Mercado Común Sudamericano* (MERCOSUR) and the European Union (EU).

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

India has not ratified a total of nine BITs and five other trade agreements.

The making of international treaties is an executive act. Accordingly, in order to ensure that India is in a position to discharge all obligations under a given treaty, the process of ratification is undertaken only after the relevant domestic laws have been amended, or the enabling legislation has been enacted in cases where there are no domestic laws on the subject. While there is no publicly available information on the status of the ratification of treaties, the long, drawn-out process may cause some delay in concluding the ratification.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Indian BITs were largely based on the Model India BIT 2003. On December 28, 2015 a new Model BIT (“**Model BIT**”) was introduced. This was seen as India’s reaction to the large number of treaty claims brought against India over the last decade. Through the Model BIT, India has adopted an approach which tilts in favour of the State. The Indian government has also expressed its intention to terminate at least 58 of the existing BITs and renegotiate the same on the conservative wording of the 2015 Model BIT. Some of the key provisions of the Model BIT are outlined below:

- (a) The Model BIT seeks to narrowly define “investment” by adopting a hybrid asset/enterprise-based definition. An enterprise has been defined to mean any legal entity constituted in compliance with the laws of the Host State and having its real and substantial business operations in the territory of the Host State. For the purpose of the definition of an enterprise, “real and substantial business operations” are required to satisfy certain cumulative criteria, such as, the enterprise must: (i) be a commitment of capital or other resources; (ii) for a certain duration; (iii) for expectation of profit or gain; (iv) involve the assumption of risk; and (v) be of significance for the development of the Host State.
- (b) The definition of investor includes both natural and juridical persons who own or control an investment in the Host State.
- (c) The Model BIT does not include a Most Favoured Nation obligation or a broad Fair and Equitable Treatment obligation. Instead, the Model BIT provides for a defined scope of Standard of Treatment. The 2015 Model BIT, however, does accord full protection and security to the investor and its investment and also extends National Treatment to investors.
- (d) Notably, the Model BIT requires an investor to exhaust local remedies before initiating arbitration proceedings.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

India does not maintain publicly accessible treaty preparatory materials.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Government of India does not publish official commentaries concerning the intended meaning of a treaty or trade agreements.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

India is party to the United Nations Convention on the Recognition and Enforcement of Foreign Awards, 1958 (“**New York Convention**”). India is not, however, a signatory to either the Convention on the Settlement of Investment Disputes between States and Nationals of

Other States (the Washington Convention) or the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention).

## 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

In addition to compliance with statutes that govern every contract, India is an exchange controlled jurisdiction and investments made by non-resident investors require compliance with the Foreign Exchange Management Act 1999 and Regulations (“FEMA”). Further, depending on the target entity, investments may also require to be made in compliance with the Securities and Exchange Board of India Act 1992 and Regulations (that apply to an entity whose shares are traded on a stock exchange). Further, if the investment crosses certain thresholds, one needs to comply with the Competition Act 2002. There are also specific verticals where specific laws may be applicable, for instance, the Insurance Act, 1938 that governs investments by a non-resident.

Disputes in India are adjudicated in a manner similar to commonwealth jurisdictions. They are dealt with by either civil courts or specialised tribunals. Given the backlog of cases in Indian courts, large commercial contracts often provide for adjudication of disputes by arbitration.

## 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

The principal law governing foreign investment in India is the FEMA, the rules prescribed under the FEMA and circulars issued by the Reserve Bank of India (“RBI”). Additionally, the Department of Industrial Policy and Promotion (“DIPP”) makes policy pronouncements on foreign investment through press notes or press releases which are notified by the RBI. Such regulations, press notes, press releases, circulars, etc., together constitute the regulatory framework for foreign investment.

In India, foreign investment can be made either:

- (1) by the Automatic route which does not require formal/prior approvals from the RBI; or
- (2) by the Government route which requires prior approval from the concerned Ministries/Departments through a single window: The Foreign Investment Facilitation Portal (“FIFP”). The FIFP is administered by the DIPP, Ministry of Commerce and Industry and the Government of India.

The Government route however, is mandatory in investments made beyond certain thresholds in some sectors such as mining, defence, broadcasting, telecommunications and banking.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The Indian courts have not yet had the opportunity to interpret the terms and/or standards of protection under an investment treaty.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Investor-State Arbitration began to gain major traction in India as a result of the treaty award passed against India in *White Industries Australia Limited v. Republic of India* (“*White Industries*”). In May 2002, the Investor-Claimant (White Industries Australia Ltd.) obtained an ICC award against Coal India Limited (a State-owned Indian company). For a period of over nine years, White Industries sought to enforce this award before the Delhi High Court. Finally, in 2010, White Industries took the matter to investment treaty arbitration under the India-Australia BIT on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violated various substantive protections afforded under the said BIT.

*White Industries* led to a drastic shift in India’s stance on Investor-State Arbitration, which is clearly reflected in India’s Model BIT. India recently concluded a BIT with Brazil. While the text of the India-Brazil BIT is not available at present, it has been widely reported that the BIT does not contain a provision for Investor-State Arbitration.

India also recently approved a BIT with Cambodia, which is the first BIT to be based on the Model BIT.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country’s treaties?

The Model BIT lays down certain obligations pertaining to corruption. These obligations provide that an investor shall not (i) offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, either (ii) directly or indirectly, to a (iii) public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act, or (iv) make any illegal contributions to candidates for public office or to political parties amongst others.

The Model BIT provides for transparency in the form of specific disclosures to be made by an investor from time to time, as well as transparency in arbitral proceedings.

The Model BIT has omitted the MFN obligation altogether. Further, the cumulative requirements to constitute an investment (as outlined in detail in question 1.3 above) leave little scope for an indirect investment to be afforded substantive protections under the Model BIT.

Finally, the Model BIT carves out broad exceptions for actions or measures of the Host State which have been taken with a view to protect and conserve the environment.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

As of 2018, India has discontinued several BITs with most of its trading partners and has issued termination notices to about 58 countries, including several EU States. While no other official government clarification is presently available on the subject, several newspaper reports have noted that only a few countries such as Armenia, Belarus, Kyrgyz Republic, Oman, Qatar, Switzerland, Tajikistan, Thailand, Turkmenistan, the UAE and Zimbabwe have agreed to renegotiate the treaties after the draft model BIT was approved by the Union Cabinet in December 2015.



## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

As of September 11, 2018, a total of 24 treaty arbitrations have been initiated against India [according to publicly available information, including the website of the United Nations Conference on Trade and Development (“UNCTAD”)]. Currently, 13 claims are pending, nine have been settled, and an award has been passed in two claims. The White Industries award (discussed in question 3.2 above) was decided against India. In what may be termed as India’s first known victory in treaty arbitration – *Louis Dreyfus Armateurs SAS v. The Republic of India*, India has recently defeated a claim of USD 36 million by Louis Dreyfus (a French investor), under the France-India BIT. This case has not been updated on the UNCTAD website – which still reflects 14 pending cases.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

As it has been noted in respect of question 4.1 above, of all the treaty claims that have been made against India, only one has resulted in an adverse award (*White Industries*) so far. According to publicly available information, Coal India Limited paid AUD 9.8 million to the investor. There are no known cases at present, wherein India has sought to resist the enforcement of unfavourable awards.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

India has not sought annulment proceedings in relation to ICSID cases.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

No. Refer to questions 3.1 and 4.2 above.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Of the 13 treaty arbitration cases pending against India, a majority of the cases include a claim for indirect expropriation, the most prominent one being the claims brought by the Vodafone Group.

It has also been observed that there is a trend amongst investors to institute parallel commercial proceedings. For instance, Devas Multimedia (a Mauritian entity) pursued treaty arbitration against India for the termination of its contract with government-owned Antrix Corp Ltd., the commercial wing of the Indian Space Research Organisation. Devas Multimedia also pursued a parallel commercial arbitration under the investment contract in which it received a favourable award for an amount of USD 562.5 million. As far as the treaty arbitration is concerned, the investor has received a favourable determination on the issue of liability, the valuation of which is currently pending.

Investment arbitration disputes in India have been growing in number mostly in sectors such as telecommunications, oil and gas.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Third-party funding has not been blessed with specific legislation in India. Although there is no express bar on obtaining third-party funding (“TPF”), TPF agreements will nevertheless be subject to several complications due to the lack of legislative framework to regulate such funding.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

The subject of TPF is still at a very nascent stage in India and there is no recent case law that adequately addresses the subject. However, the Supreme Court of India has in *Bar Council of India v. A.K. Balaji & Ors.* (2018 5 SCC 379) observed that there appears to be no restriction on third-parties’ funding litigation and getting repaid upon the outcome of the litigation.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

In practice, TPF institutions have claimed to pursue opportunities in India. Due to the absence of publicly available data on the subject, it is, however, not possible to provide a definitive position on this.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Article 14.2 of the Model BIT clearly states that in addition to the specified limits on a tribunal’s jurisdiction, the tribunal will not have jurisdiction to re-examine any legal issue which has been finally settled by any judicial authority of the Host State. It also provides that the tribunal cannot review the merits of a decision made by a judicial authority of the Host State.

However, the bar on a tribunal’s jurisdiction to review judgments of domestic courts is not absolute, insofar as Article 3 of the Model BIT provides that each Party shall not subject investments of investors of the other Party to measures which constitute a denial of justice under customary international law. Thus, it appears that where the tribunal is required to decide as to whether the Host State’s treatment of an investor constitutes denial of justice, the tribunal would be in a position to review the decision of domestic courts.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

A recent decision of the Delhi High Court in *Antrix Corporation Ltd. v. Devas Multimedia* (FAO (OS) (COMM) 67/2017) highlights some of the procedural difficulties associated with arbitrations seated in India. Devas initiated arbitration proceedings before the International Chamber of Commerce (“ICC”) for wrongful termination of the contract by Antrix Corporation Limited (“Antrix”) (see question 4.5 above).

The arbitration clause (pertaining to the appointment of arbitrators) substantially departed from the ICC Rules in relation to the appointment of arbitrators. ICC notified the parties that it was not in a position to make such a departure from its Rules. Antrix objected to the position taken by the ICC and filed an application before the Chief Justice of India under Section 11 (for appointment of an arbitrator) of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

Thereafter, Antrix filed an application under Section 9 of the Arbitration Act (for interim reliefs) before the Bangalore City Civil Court, seeking to restrain Devas from proceeding with the ICC arbitration which was contrary to the parties’ arbitration agreement. In April 2014, the ICC arbitration was stayed by the Chief Justice’s designate and was only subsequently dismissed by the Supreme Court. Finally, the ICC tribunal awarded Devas USD 562.5 million on the basis that Antrix had wrongfully terminated the agreement with Devas. Upon obtaining the award, Antrix Ltd. proceeded to file a Section 9 application to attach Antrix’s bank accounts in the Delhi Courts. Finally, the Delhi High Court held that designating a seat does not automatically confer exclusive jurisdiction upon the courts of the seat.

In Indian seated arbitrations, parties do, in some cases, run the risk of arbitration-related proceedings being dragged before different forums.

It must be noted, however, that the ICC award was passed in relation to the commercial arbitration proceedings initiated against Antrix. The outcome of the treaty arbitration between Devas and Antrix is still pending.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

The enforcement of a foreign award in India is governed by Part II of the Arbitration Act, which incorporates the provisions of the New York Convention. With respect to enforcement of a domestic award, the same is governed by Part I of the Arbitration Act.

Pertinently, the Delhi High Court in *Union of India v. Vodafone Group PLC United Kingdom & Anr.* (“**Vodafone Case**”) (CS (OS) 383/ 2017) held that investment arbitration disputes are fundamentally different from commercial disputes and are thus not governed by the provisions of the Arbitration Act. An appeal before a Division Bench of the Delhi High Court is currently pending.

### 6.4 To what extent are there laws providing for arbitrator immunity?

A new provision has been introduced in the Arbitration Act by way of the Arbitration and Conciliation (Amendment) Bill, 2018 (“**Amendment Bill**”). At present, the Amendment Bill has been passed by the Lok Sabha (Lower House) and is pending approval of the Rajya Sabha (Upper House) of the Indian Parliament. The newly inserted Section 42B provides that no suit or other legal proceedings shall lie against the arbitrator for anything which is done in good faith or intended to be done under the Arbitration Act or the rules or regulations made under it.

### 6.5 Are there any limits to the parties’ autonomy to select arbitrators?

Where India is the seat of arbitration, the parties’ choice of arbitrators would be subject to Schedules V and VII of the Arbitration Act. On

October 23, 2015, India became the first jurisdiction to statutorily adopt the IBA Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”) in Schedules V and VII. Schedule V contains circumstances under the Orange List and Schedule VII contains circumstances under the Red List of the IBA Guidelines. Parties can, however, waive the bar on the appointment of an arbitrator (where such arbitrator is squarely covered by the circumstances under Schedule VII) after a dispute has arisen between such parties.

### 6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Where India is the seat, as per Section 11 of the Arbitration Act, if the parties’ chosen method for selecting arbitrators fails, a party may apply to the Supreme Court (in case of an international commercial arbitration) to take the necessary measures to secure an appointment. The Amendment Bill now provides for appointment by arbitral institutions designated by the Supreme Court, for international commercial arbitrations.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

As addressed in question 6.6 above, in arbitrations where India is not the seat, there would be no court involvement in the selection of arbitrators.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

Under Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (embodied in the First Schedule of the Arbitration Act), India has declared that the New York Convention applies only to differences arising out of legal relationships, whether contractual or not, that are considered “commercial” under Indian law.

At present, it is uncertain whether investment arbitrations are covered by the Arbitration Act for the purposes of enforcement. This has already been highlighted with respect to the *Vodafone Case* in question 6.3 above.

India has not officially recognised all of the signatories to the New York Convention and thus, Indian courts will only enforce foreign awards under the Convention if such awards have been issued in a State that has been notified in the Official Gazette of India, as a country to which the New York Convention applies. At present, only Australia, China, France, Hong Kong, Japan, Singapore, the United Kingdom and the United States have been notified by India in the Official Gazette.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

A party may resist the enforcement of an award in the circumstances set out in Article V of the New York Convention. These circumstances have been incorporated in Part II, Chapter I of the Arbitration Act along with some amendments. Section 44 lays down circumstances in which an award may be declared to be in conflict with the public

policy of India. These circumstances have been limited to an award which is (i) induced or affected by fraud or corruption, (ii) in violation of Section 75 of Section 81 of the Arbitration Act, (iii) in contravention with the fundamental policy of Indian law, and (iv) in conflict with basic notions of morality or justice.

An explanation to Section 44 further clarifies that a test as to whether there has been a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

India does not have a separate legislation on foreign State sovereign immunity. Section 86 of the Code of Civil Procedure (“CPC”) provides that no foreign State may be sued in any Court (otherwise competent to try the suit) without prior consent of the Central Government.

While India became a signatory to the United Nations Convention on the Jurisdictional Immunities of the States and their Property on January 12 2007, the same has not yet been brought into force. It is however, indicative of India’s inclination to more formally adopt the “qualified” immunity approach, which has, in any case, been adopted by Indian courts. In *Ethiopian Airlines v. Ganesh Narain Saboo* (“*Ethiopian Airlines*”) (2011 8 SCC 539), the Supreme Court held that Ethiopian Airlines was not entitled to sovereign immunity with respect to a commercial transaction, which was in consonance with the growing body of international law principles.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

As highlighted in the preceding question, the Supreme Court in *Ethiopian Airlines* made it abundantly clear that a corporate entity which carries on business or trade in India does not fall within the protection of the doctrine of sovereign immunity as embodied in Section 86 of the CPC.

In *Qatar Airways v. Shapoorji Pallonji* (2013 2 BomCR 65), the Bombay High Court placed reliance upon the decision of the Supreme Court in *Andhra Pradesh State Road Transport Corporation v. Income-tax Officer* (AIR 1964 SC 1486), to hold that in dealing with corporations established by a State, the corporation, though statutory (or not), has a personality of its own and this personality is distinct from that of the State or other shareholders. In this context, the Supreme Court also referred to the observations made in *Tamlin v. Hanna* (1950 1 K.B. 18) that “*the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities and privileges of the Crown. Its servants are not civil servants and its property is not that of the crown*”.

These decisions collectively lay down a position that so far as commercial actions of a given corporation are concerned, the corporate veil may not be lifted for the purpose of claiming sovereign immunity.

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- Successfully represented a client before the Supreme Court of India, which held that an arbitration agreement cannot be considered to have been concluded at the stage of submitting tenders in a bid process.
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- Appeared in a landmark decision of the Supreme Court of India in 2014, which distinguished between "seat" and "venue" of arbitration.
- Advised and represented the former shareholders of an oil company in filing a petition for enforcement of an arbitral award in India, against the assets of a foreign State in India. The award is one of the largest claims awarded in international treaty arbitration against a State.



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# Japan

Nishimura & Asahi

Lars Markert



Shimpei Ishido



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

- (1) Japan has ratified the following 32 bilateral and multilateral investment treaties:
- Japan-Armenia BIT (ratified in Japan, but not yet in force).
  - Japan-Bangladesh BIT (in force since 1999).
  - Japan-Cambodia BIT (in force since 2008).
  - Japan-China BIT (in force since 1989).
  - Japan-China-Korea TIT (in force since 2014).
  - Japan-Colombia BIT (in force since 2015).
  - Japan-Egypt BIT (in force since 1978).
  - Japan-Hong Kong BIT (in force since 1997).
  - Japan-Iran BIT (in force since 2017).
  - Japan-Iraq BIT (in force since 2014).
  - Japan-Israel BIT (in force since 2017).
  - Japan-Kazakhstan BIT (in force since 2015).
  - Japan-Kenya BIT (in force since 2017).
  - Japan-Korea BIT (in force since 2003).
  - Japan-Kuwait BIT (in force since 2014).
  - Japan-Laos BIT (in force since 2008).
  - Japan-Mongolia BIT (in force since 2002).
  - Japan-Mozambique BIT (in force since 2014).
  - Japan-Myanmar BIT (in force since 2014).
  - Japan-Oman BIT (in force since 2017).
  - Japan-Pakistan BIT (in force since 2002).
  - Japan-Papua New Guinea BIT (in force since 2014).
  - Japan-Peru BIT (in force since 2009).
  - Japan-Russia BIT (in force since 2000).
  - Japan-Saudi Arabia BIT (in force since 2017).
  - Japan-Sri Lanka BIT (in force since 1982).
  - Japan-Turkey BIT (in force since 1993).
  - Japan-Ukraine BIT (in force since 2015).
  - Japan-Uruguay BIT (in force since 2017).
  - Japan-Uzbekistan BIT (in force since 2009).
  - Japan-Vietnam BIT (in force since 2004).
  - Energy Charter Treaty (in force for Japan since 2002).

- (2) Japan has ratified the following 13 bilateral or multilateral trade agreements that have investment chapters:

- Japan-Australia Economic Partnership Agreement (in force since 2015).
- Japan-Brunei Economic Partnership Agreement (in force since 2008).
- Japan-Chile Strategic Economic Partnership Agreement (in force since 2007).
- Japan-India Comprehensive Economic Partnership Agreement (in force since 2011).
- Japan-Indonesia Economic Partnership Agreement (in force since 2008).
- Japan-Malaysia Economic Partnership Agreement (in force since 2006).
- Japan-Mongolia Economic Partnership Agreement (in force since 2016).
- Japan-Mexico Economic Partnership Agreement (in force since 2005).
- Japan-Philippines Economic Partnership Agreement (in force since 2008).
- Japan-Singapore Economic Partnership Agreement (in force since 2002).
- Japan-Switzerland Free Trade and Economic Partnership Agreement (in force since 2009).
- Japan-Thailand Economic Partnership Agreement (in force since 2007).
- The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (ratified in Japan, but not yet in force).

Note: The investment chapters of the Japan-Philippines EPA and the Japan-Australia EPA do not provide for investor-state dispute settlement.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Japan signed a bilateral investment treaty with the UAE (Japan-UAE BIT) on 30 April 2018, and a trade agreement with the European Union (Japan-EU Economic Partnership Agreement) on 17 July 2018. Japan has not ratified these agreements yet. However, it is expected that the Diet will have given its approval soon, likely in late 2018.

Note: the Japan-EU EPA does not include investment protection provisions and investor-state dispute settlement, the conclusion of which was left to future negotiation.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Japan does not have a model BIT.

The most recent example of Japan's BIT practice is the Japan-Armenia BIT. The Japan-Armenia BIT has been approved by the Japanese Diet, and it is now awaiting ratification by Armenia.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Japan has never published diplomatic notes exchanged with other states concerning its treaties.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Japanese government has never published official commentaries concerning the intended meaning of a bilateral investment treaty or trade agreement. However, some materials on the website of the Ministry of Economy, Industry and Trade indicate the Government's general understanding on the meaning of clauses in its investment treaties (see, [http://www.meti.go.jp/policy/trade\\_policy/epa/investment/](http://www.meti.go.jp/policy/trade_policy/epa/investment/) (in Japanese)).

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Japan is a party to the New York Convention and the Washington Convention. It acceded to the New York Convention in 1961, and ratified the Washington Convention in 1967. It has not yet signed the Mauritius Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

No, Japan does not have an investment law to promote foreign investment.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Japan does not require formal admission of foreign investments. However, it should be noted that Article 27 of the Foreign Exchange and Foreign Trade Law sets out a prior notification requirement and screening procedures for inward direct investments in certain sectors. Depending on the screening result, the investor may be required to alter the content of the investment or discontinue the investment process. The screening of inward direct investment is conducted from the viewpoint of whether the investment is likely to cause a situation in which:

- (1) a significant adverse effect is brought to the smooth operation of the Japanese economy; or

- (2) the national security is impaired, the maintenance of public order is disturbed, or the protection of public safety is hindered.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

There have been no arbitration cases where the tribunal addressed the interpretation of one of Japan's bilateral investment treaties. As for domestic court cases, there is one court judgment that addressed the interpretation of a most-favoured nation clause in the Japan-Hong Kong BIT (Judgment of Tokyo High Court, 30 August 2011).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The Japanese government has repeatedly indicated that investor-state arbitration is essential for the protection of Japanese businesses investing overseas. This is because the option to settle an investment dispute with the host state by way of international arbitration enhances the predictability and legal stability of the business environment of the host state. The Government has also expressed its intention to continue to pursue inclusion of investor-state arbitration clauses in the future negotiation of BITs.

In a House of Representatives Committee on Foreign Affairs session of 16 May 2018, Foreign Minister Kono stated, in response to questions concerning the EU's investment court approach, that he considers that investor-state arbitration remains the best option for Japan despite the concerns raised by the EU and other stakeholders. Minister Kono further stated that Japan should contribute to the discussion about a reform of investor-state arbitration (rather than pursuing the investment court approach proposed by the EU).

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

As for corruption, Japanese BITs generally provide for a state's obligation to endeavour to take appropriate measures and make efforts to prevent and combat corruption regarding matters covered by the respective BIT in accordance with its laws and regulations (e.g., Article 10 of Japan-Armenia BIT).

Regarding transparency, Japanese BITs generally provide an obligation on the state to promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures, administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect the implementation and operation of the respective BIT (e.g., Article 8 of Japan-Armenia BIT). As for the transparency of investor-state arbitration, Japan's recent approach has been to leave the issue to the applicable arbitration rules, however, Japanese BITs do generally allow a respondent state to make available to the public all documents submitted or issued by an arbitral tribunal (e.g., Article 24.17 of Japan-Armenia BIT). Therefore, the UNCITRAL Rules on Transparency in Treaty-based investor-state arbitration may apply when an investor chooses to bring a claim to arbitration under the UNCITRAL Arbitration Rules. In contrast, the CPTPP is a rare example in that it provides for the application of advanced

transparency rules to any investor-state arbitration regardless of the applicable arbitration rules (see, Article 9.24 of TPP).

In terms of MFN, Japan's recent approach is to confirm that MFN shall not be applied to international dispute settlement procedures or mechanisms (Article 3 of the Japan-Armenia BIT).

Except for a small number of exceptions, recent Japanese BITs protect investments that an investor of a contracting party owns or controls indirectly (see, Article 1(a) of Japan-Armenia BIT). With regard to an investment indirectly owned or controlled by an investor of a third country, or the host state through a shell company established in the home state, however, recent Japanese BITs allow the host state to deny the benefit of a BIT to such an investment (Article 22.2 of the Japan-Armenia BIT).

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Japan has never given notice to terminate any BITs or similar agreements.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Japan has never been involved in an investor-state case as a respondent. At this moment, the following three ICSID cases and one UNCITRAL case have been initiated by Japanese investors:

- (i) *Eurus Energy Holdings Corporation v. Kingdom of Spain* (ICSID Case No. ARB/16/4);
- (ii) *Itochu Corporation v. Kingdom of Spain* (ICSID Case No. ARB/18/25);
- (iii) *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27); and
- (iv) *Nissan Motor v. India* (UNCITRAL).

Further, the following three cases have been initiated by affiliates of Japanese companies:

- (i) *Saluka Investments BV v. The Czech Republic* (UNCITRAL);
- (ii) *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No. ARB/14/15); and
- (iii) *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34).

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

This is not applicable, as there have been no cases in which awards were rendered against Japan.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

This is not applicable, as no ICSID cases have been brought against Japan.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

This is not applicable, as no investor-state arbitration has been brought against Japan.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

No investor-state arbitration has been brought against Japan. Three out of the four pending cases brought by Japanese investors relate to renewable energy projects in Spain.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Japan has not explicitly allowed for the funding of litigation/arbitration in its laws and regulations, official guidelines or official statements. Furthermore, the discussion about whether third-party funding is allowable under the Japanese legal system has not yet been resolved. However, on 25 April 2018, the Inter-ministerial Conference for Vitalising International Arbitration issued a list of possible measures to vitalise international arbitration in Japan, one of which is considering appropriate regulation for third-party funding. Therefore, there is a possibility that the Japanese government will affirm the legality of third-party funding in the future.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This is not applicable.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

It is still rare for disputing parties to use litigation/arbitration funding for litigation before Japanese courts or arbitrations seated in Japan. However, according to well-informed sources, at least one of the investor-state arbitrations initiated by Japanese investors is being funded by a third-party funder.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Yes, they can. The Japanese law does not prohibit arbitral tribunals from reviewing criminal investigations and judgments of domestic courts.

## 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The Arbitration Act of Japan (Law No. 138 of 2003), which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration, grants Japanese courts the jurisdiction to deal with, *inter alia*, the following procedural issues arising out of an arbitration seated in Japan:

- (i) determination of number of, and appointment of arbitrators;
- (ii) challenge to or removal of arbitrators;
- (iii) jurisdiction of arbitral tribunal;
- (iv) assistance in the taking of evidence; and
- (v) interim measures.

## 6.3 What legislation governs the enforcement of arbitration proceedings?

The Arbitration Act, Chapter 8 governs the recognition and enforcement of arbitral awards.

## 6.4 To what extent are there laws providing for arbitrator immunity?

There are no laws providing for arbitrator immunity.

## 6.5 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the parties' autonomy to select arbitrators under Japanese law.

## 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, there is. Article 17.5 of the Arbitration Act provides that when the parties' chosen method for selecting arbitrators fails, one of the parties can request the court to select the arbitrators. Article 17.6 sets out that the court, in appointing an arbitrator, shall have due regard to: (i) any qualifications required of the arbitrator by the agreement of the parties; (ii) the independence and impartiality of the arbitrators; and (iii) in the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

## 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, but the court can only intervene in the selection of arbitrators in the following limited circumstances:

- (i) failure of selection of arbitrators by the parties' chosen method (as described in the answer to question 6.6 above);
- (ii) challenge to arbitrators, in the case where a challenge is rejected by the arbitral tribunal or in the procedures as otherwise agreed by the parties (Article 19.4 of the Arbitration Act); and
- (iii) decision on the termination of an arbitrator's mandate, in the case where a party requests the court to decide on the termination of the mandate due to: (a) an arbitrator's inability to perform his functions; or (b) an arbitrator's failure to act without undue delay for other reasons.

# 7 Recognition and Enforcement

## 7.1 What are the legal requirements of an award for enforcement purposes?

Domestic and foreign arbitral awards will automatically be recognised in Japan. No court proceedings for recognition are necessary. Article 46.2 of the Arbitration Act requires an applicant in enforcement proceedings to submit:

- (a) a certified copy of the arbitral award; and
- (b) a Japanese translation of the award, if the award is not in Japanese. This translation need not be certified.

Article 45.2 of the Arbitration Act sets forth the circumstances for which enforcement of an arbitral award may be refused, four of which concern the arbitral award itself. Article 45.2 (5), (7), (8) and (9) provide that enforcement of an arbitral award, irrespective of the country in which it was made, may be refused, where:

- (a) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (b) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;
- (c) the subject matter of the dispute is not capable of settlement by arbitration under the law of Japan; and
- (d) the recognition or enforcement of the award would be contrary to the public policy of Japan.

## 7.2 On what bases may a party resist recognition and enforcement of an award?

Article 45.2 (1)-(7) of the Arbitration Act sets forth the circumstances in which recognition or enforcement of an arbitral award may be refused at the request of a party, as follows:

- (1) a party to the arbitration agreement was under some incapacity;
- (2) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (3) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;
- (4) a party was unable to present his case;
- (5) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (6) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (7) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.



### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Japan signed the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2007. To ratify the Convention, the Japanese Diet enacted the Act on the Civil Jurisdiction of Japan with respect to a foreign state, etc. (Law No. 24 of 2009). Although there are no court cases that have addressed the issue of sovereign immunity and recovery against state assets, the Act will apply when a court deals with the enforcement of arbitral awards against state assets.

Articles 17 and 18 of the Act provide that a foreign state shall not be immune from jurisdiction with regard to proceedings for execution of a temporary order or for civil execution procedure against assets held by the foreign state, where: (i) consent of the foreign state has been given expressly by international agreements, an arbitration agreement or written contracts; or (ii) the assets are in use or intended for government non-commercial use.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There have been no cases before the Japanese court that have considered the corporate veil issue in relation to sovereign assets.



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Lars Markert is a Foreign Law Partner at Nishimura & Asahi, Tokyo Office. He is admitted to the German and New York bars, a registered foreign lawyer (*gaikokuho-jimu-bengoshi*) in Japan, and advises clients in both investor-state and international commercial arbitrations. Lars has experience in representing investors and states in proceedings under the ICSID Convention and the UNCITRAL Arbitration Rules, and in advising on potential claims under bilateral investment treaties and related negotiation strategies. He holds a PhD in investment arbitration from the University of Cologne on the topic of dispute settlement clauses in investment agreements. He is an academic advisor to the International Investment Law Centre Cologne (IILCC), teaches investment law and procedure at the University of Cologne, and regularly speaks and publishes on issues of commercial and investment arbitration. He is recommended for his arbitration expertise by various legal directories.



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Shimpei Ishido has been active in the field of international trade matters and international investment disputes for many years. He advises governments and major corporations with regard to anti-dumping and countervailing duties proceedings as well as ICSID and PCA arbitrations. He currently serves as a member of the Japanese delegation to the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform). Before joining Nishimura & Asahi, he led, as legal counsel to the Ministry of Foreign Affairs of Japan, the negotiations of Japan's international investment agreements including the investment chapters of the Trans-Pacific Partnership, the Japan-EU EPA, the ASEAN-Japan Comprehensive Economic Partnership, the Japan-Australia EPA and the Japan-Mongolia EPA, and the Japan-Mozambique BIT.

## NISHIMURA & ASAHI

Japan's largest law firm, Nishimura & Asahi was established in 1966 and has been involved in numerous arbitrations over the years, spanning M&A, joint ventures and construction. It has been active in disputes across Asia, taking on cases at major institutions like the ICC, SIAC and CIETAC, as well as the Japan Commercial Arbitration Association (JCAA) the Korean Commercial Arbitration Board (KCAB) and other recognised bodies in Indonesia, Thailand and Vietnam. In 2018, Nishimura & Asahi was Japan's first ever entrant into the *GAR100*, the list of law firms with the busiest arbitration practices globally. Besides its commercial arbitration experience, Nishimura & Asahi also boasts a strong public international law practice, advising companies and governments on issues of international trade and investment. On the basis of that, it is building a specialised investment arbitration practice consisting of several team members with significant prior experience in the field.

# Kenya

Njeri Kariuki Advocate

Njeri Kariuki



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

To name but a few, Kenya has signed BITs with the following countries: Burundi; China; Finland; France; Germany; Iran; Italy; Kuwait; Libya; Mauritius; the Netherlands; Slovakia; Switzerland; Turkey; and the United Kingdom. There are also ongoing negotiations for a BIT between the East African Community and the United States. While some are in force, others have been signed but are yet to come into force. Other Investment Agreements include the Trade and Investment Framework Agreement between the United States and the East African Community (EAC) (2008). The Registrar of Treaties is currently compiling a register of all such treaties and agreements but a date for completion of this work has not been indicated.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Information of this nature will become readily available once the Registrar of Treaties completes the compiling of a database of all signed/ratified treaties and trade agreements.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Kenya does not have a model BIT. Kenya Investment Authority or Keninvest is in the process of developing a model BIT. Keninvest works hand-in-hand with the State Law Office, the Ministry of Foreign Affairs, the Ministry of Trade, Kenya Revenue Authority and the Treasury to grow trade, facilitate and promote investment, both domestic and foreign.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Although Diplomatic Notes are exchanged, these have not been published but rather are retained by the Registrar of Treaties. I am not aware of any intention to publish such notes.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

There are no official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses as of yet.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Kenya is a party to both the New York Convention and the Washington Convention (ICSID), but not the Mauritius Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The Constitution protects private property, although there are restrictions in respect of foreigners holding freehold property. The Foreign Investment Protection Act (Cap. 518) as revised in 2016 allows foreign investors to repatriate their profits after payment of taxes; this includes retained profits that are not capitalised (S.7). The Constitutional provision that prohibits the deprivation of property has been incorporated (Art.75).

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Kenya does not, as such, require formal admission of foreign investment. Investors are, however, required to comply with all local/domestic laws and regulations relating to employment, labour, tax, work visas, statutory payments and the like. Keninvest, already referred to in question 1.3, is a facilitator, and is available to foreign investors to give guidance through the process of registration on all levels. Kenya's ranking in the Ease of Doing Business Index has vastly improved over the last few years.

### 3 Recent Significant Changes and Discussions

#### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Kenya has yet to evolve any jurisprudence on treaty interpretation.

#### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The current policy promotes an amicable settlement of disputes. However, in the event that litigation or arbitration be the preferred mode of the investor, the Republic is not averse to defending its position.

#### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

It is intended for the BIT Policy currently under creation by the Registrar of Treaties to address such issues.

#### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, Kenya has not given notice to terminate any BITs or similar agreements.

### 4 Case Trends

#### 4.1 What investor-state cases, if any, has your country been involved in?

Kenya has been involved in the below investor-state cases:

- *World Duty Free Vs. the Republic of Kenya* ICSID Arb. No. 00/07.
- *Cortec Mining Limited, Cortec Pty Limited, Stirling Capital Limited Vs. The Republic of Kenya* ICSID Arb No. 15/29.
- *WALAM Energy Inc. Vs. The Republic of Kenya* ICSID Arb. No. 15/7.

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Kenya, at all times, complies.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

To date, Kenya has not sought any annulment proceedings.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has not been any satellite litigation arising from enforcement.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There are no common trends or themes that have been noted.

### 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

No, this is not permitted in Kenya.

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

Local jurisprudence on the issue of funding of investor-state claims has yet to evolve within the Kenyan jurisdiction.

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

There are several instances where litigation involving third-party funding has been brought against the Republic of Kenya, but these have been challenged and disclosure sought by the Republic of the source of the funding. The concept is relatively new within the jurisdiction and has yet to build ground in the realm of arbitration.

### 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Unless by prior agreement, international/domestic tribunals are not permitted to review criminal investigations and judgments of Kenya's national courts.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Yes, but only within restricted statutory limits.

#### 6.3 What legislation governs the enforcement of arbitration proceedings?

The Arbitration Act (1995 as amended in 2010) governs the enforcement of arbitration proceedings.

#### 6.4 To what extent are there laws providing for arbitrator immunity?

S.16B of the Arbitration Act referred to in question 6.3 provides for arbitrator immunity.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits as such.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Parties may fall back on the High Court of Kenya as per S.12 of the Arbitration Act in the event that their arbitration clause does not contain a default appointing party.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

As per S.10 of the Arbitration Act, Kenyan Courts are not permitted to intervene in any arbitration proceeding unless so mandated by the Act. Accordingly, only in the event that the High Court is called upon by one of the parties, by application, may it become involved in the selection of arbitrators.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

S.32 of the Act is very clear that an award shall:

- i) be in writing and signed by the Arbitrator/Arbitrators;
- ii) state the reasons upon which it is based, unless:
  - (a) the parties have agreed that no reasons are to be given; or
  - (b) the award is an arbitral award on agreed settlement terms;
- iii) state the date of the award and the juridical seat of arbitration; and
- iv) a signed copy shall be delivered to each party.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

S.37 of the Arbitration Act sets out the limited grounds upon which enforcement of an arbitral award may be refused:

The recognition or enforcement of an arbitral award, irrespective of the State in which it was made, may be refused only:

- (a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that:
  - i. a party to the arbitration agreement was under some incapacity;
  - ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the State where the arbitral award was made;
  - iii. the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

- iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;
  - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the State where the arbitration took place;
  - vi. the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the State in which, or under the law of which, that arbitral award was made; or
  - vii. the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.
- (b) if the High Court finds that:
- i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
  - ii. the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

In question 4.2, I have already noted that the Republic of Kenya normally complies where an award is sought to be enforced against it. Accordingly, any award that has undergone the recognition and enforcement process (under the NYC and the domestic Arbitration Act, as is appropriate) will be registered with the State Law Office. The process of actually seeking recovery against the State through the domestic courts is long and laborious, containing many checks and balances. In respect of the sovereign immunity of foreign States that have a domestic presence, there exists the Privileges and Immunity Act (Cap. 179) which provides that States and their property are immune from the jurisdiction of courts of another State. The position adopted by the domestic courts is fully supportive of this position but go further to state that the immunity is not absolute but rather is dependent on the nature of the transaction. The Kenyan Courts have taken the position that where a State engages in purely private commercial activities, it would be prejudicial and contrary to public policy to uphold sovereign immunity.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The following case laws relate to the corporate veil issue and sovereign assets:

- *Tononoka Steels Limited Vs. Easter and Southern Africa Trade and Development Bank* [1999] eKLR.
- *Ministry of Defence of the Government of the United Kingdom Vs. Joel Ndegwa* [1983] eKLR.
- *Unicom Limited Vs. Ghana High Commission* [2016] eKLR.



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Njeri is an advocate who has specialised in resolving disputes through arbitration and ADR. During the course of her career, she has delivered awards as a sole arbitrator spanning the petroleum, insurance, banking, industry and corporate sectors, mainly in the domestic arena. Njeri has also sat on several three-panel tribunals, as co-arbitrator, determining disputes in similar sectors. Besides being an arbitrator, Njeri is also an accredited mediator and is listed as a trainer and a tutor of several courses with the AFL of the Chartered Institute of Arbitrators. In addition, Njeri sat as Chair of a Dispute Adjudication Board set-up to nurse an international geothermal project to fruition for a period of three years. In her primary profession as an advocate, Njeri takes on, in the main, non-contentious matters in the realm of real estate (conveyancing) law, probate and succession, commercial contracts, company/business formations and company secretarial matters.

Njeri trained with Kaplan & Stratton, Advocates (1987–88) and was admitted to the Kenyan Bar in December 1988. She started as an associate with Walker Kontos, Advocates 1988–1990, before becoming a partner in 1990. She has been the proprietor of Njeri Kariuki Advocate since 1993, a Chartered Arbitrator since August 2008 and in July 2016, Njeri was certified as an Accredited Mediator by the Chartered Institute of Arbitrators.

Njeri has been listed as a leading individual of the 2014–2018 editions of *Chambers Global*, has received the 2017 Arbitration Award in Kenya from *International Advisory Experts*, and has also been nominated by the Government of the Republic of Kenya to the Panel of Arbitrators at ICSID.

Additionally, Njeri has contributed to publications such as *Chambers, Practical Law – Arbitration Global Guide*, *Lexology Navigator Arbitration* and the *International Comparative Legal Guides*. She has also written and presented many of her own papers, including a paper on “The Effective Skills required for building an Arbitration Practice in Africa: a Woman’s Perspective” during the Joint IBA/ICC Conference held in Nairobi, Kenya, on 5<sup>th</sup> June 2017.

Njeri has been a Member of the ICC-International Court of Arbitration, representing Kenya, since June 2018.

## Njeri Kariuki Advocate

Njeri Kariuki Advocate is a Nairobi-based, medium-sized law firm founded by Njeri Kariuki with a view to growing clientele in the areas of real estate (conveyancing) law, probate and succession, commercial contracts, company/business formations, and secretarial matters. Njeri has ended up building a niche for herself in arbitration and ADR. She holds a Diploma in International Commercial Arbitration (Keele College, Oxford) from the Chartered Institute of Arbitrators and is a Fellow & Chartered Arbitrator of the Institute. Njeri is a trainer and tutor with the Institute as well as an accredited mediator and conducts mediations under the High Court of Kenya-annexed Mediation Scheme. Over a period of three years, Njeri chaired a Dispute Adjudication Board, which was set up to help bring an international geothermal project to fruition, and besides contributing to several international journals on arbitration, has received citations from *Chambers Global* over the last four years.

# Korea

Yoon & Yang LLC

Junsang Lee



Sungbum Lee



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

The Republic of Korea has ratified 2,556 bilateral treaties and 692 multilateral treaties as of December 31, 2017. Among them, 15 are free trade agreements.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

The free trade agreement between the Republic of Korea and the Republics of Central America (Korea-Central America FTA) has been signed but not yet been ratified. Paragraph 1 of Article 60 of the Constitution of the Republic of Korea stipulates that the consent of the National Assembly is required for the ratification of treaties of friendship, trade and navigation, treaties pertaining to any restriction in sovereignty, treaties which will burden the State or people with an important financial obligation, or treaties related to legislative matters. In such case, the Ministry of Foreign Affairs drafts a ratification bill requesting the consent of the National Assembly to the ratification of treaties, and then submits the bill to the National Assembly. Once this domestic procedure is completed, the treaty will be ratified.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Korea's bilateral investment treaties (BITs) have been based on a model BIT since 2009. Key provisions relate to (i) National Treatment, Most-Favoured Nation Treatment, Minimum Standard of Treatment for Investors, (ii) Compensation for Expropriation, (iii) Guarantee of Transfers Relating to Investments, and (iv) Dispute Resolution Procedures.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

The Korean government does not publish diplomatic notes exchanged with other states.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

There is no official commentary published by the Korean Government.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Korea has been a party to the New York Convention since May 9, 1973 and also a party to the Washington Convention since October 7, 1993. However, Korea is not a party to the Mauritius Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The Foreign Investment Promotion Act has been in force since 1998. The key substantive provision is Article 3 (Protection of Foreign Investment). Under this article, remittance is guaranteed in accordance with the details of the report or permission of the foreign investment at the time of such remittance, foreign investors and foreign-capital invested companies shall be treated in the same manner as nationals of the Republic of Korea or Korean corporations are treated in respect of their business operation, and the provisions concerning tax exemptions and reductions of the tax Acts applied to nationals of the Republic of Korea or Korean corporations shall also apply to foreign investors, foreign-capital invested companies, and persons. However, the Act does not have specific dispute resolution provisions.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under the Act, a foreigner who intends to make a foreign investment has to report to the Minister of Trade, Industry and Energy, and those who intend to make a foreign investment in a defence industry company in the form of holding stocks or shares have to obtain permission from the Minister of Trade, Industry and Energy in advance. In order to be admitted as a foreign investment, it should be any of the following with an investment amount of at least 100

million won: (i) where a foreigner owns at least 10/100 of either the total number of voting stocks issued by a Korean corporation (including a corporation in the process of establishment) or a company run by a national of the Republic of Korea, or its total equity investment; or (ii) where a foreigner who owns stocks of a Korean corporation or a company run by a national of the Republic of Korea dispatches or appoints an executive officer to or at such corporation or company. These requirements are contained in Article 2.2 of the Enforcement Decree of the Act.

### 3 Recent Significant Changes and Discussions

#### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

On December 22, 2017, the Supreme Court of Korea has made an interpretation regarding Article 5.1(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The court has decided that in order to refuse the recognition and enforcement of an award under Article 5.1(d) of the New York Convention, the non-accordance and violation on procedural rights should be so significant that it cannot be ignored. Also, the court decided where a party fails to raise an objection without delay, or proceeds with arbitration without raising an objection within the specified period for raising an objection, the party shall forfeit its rights to object in the recognition and enforcement procedure of an award.

#### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

In its “2018 Performance Management Implementation Plan”, the Ministry of Justice indicated its willingness to strengthen its ability in counteracting investor-related disputes.

#### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Many of Korea's BITs and FTAs include provisions regarding transparency, MFN and indirect investment. Though these treaties may not directly deal with corruption or climate change, these issues may be dealt with under the issues of transparency and environment, respectively. Also, Korea has ratified the United Nations Convention against Corruption in 2008 and is also a member of United Nations Framework Convention on Climate Change since 1994.

#### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Korea has not given notice to terminate any BITs or similar agreements. However, Korea received notice from India for the termination of the Korea-India BIT in 2017. Therefore, such BIT is now terminated.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Korea has been involved in seven investor-state cases so far. Among them, four investor-state cases were filed in 2018. An investor-state dispute was first filed against Korea by Lone Star Fund in 2012 and Hanocal Holding, a company backed by the UAE's royal family member Sheikh Mansour in 2015. Hanocal dropped its claims in 2016. In 2015, Entekhab, owned by Iran's Mohammad Reza Dayyani, filed a lawsuit saying that Korea violated a BIT in the process of its taking over of what was then Daewoo Electronics in 2010. Among the cases filed in 2018 are by Elliott Associates LP and a private investor, Ms. Seo, respectively, and two Notices of Arbitration were filed by Mason Capital Management LLC and Schindler Holding AG.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

In June 2018, the arbitral tribunal decided the Korean government shall pay about 73 billion won to an Iranian investor, Entekhab, who filed an investor-state lawsuit. This marked the first time the Korean government lost an ISD lawsuit filed by a foreign investor. The Korean government applied for a cancellation of the award made by the tribunal in accordance with the UK Arbitration law in July 2018.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

In respect to the abovementioned cancellation proceeding, the Korean government announced that it will question validity in the ruling, claiming Dayyani cannot file a suit since the deal had been signed between KAMCO and D&A, and KAMCO is not a government entity and therefore cannot be applied with ISD clause.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no satellite litigation in relation to current ICSID cases.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

As there is only one case that has been finalised, it is difficult to say if there are any common trends or themes in the cases so far. In the case of Entekhab, of which the ruling has recently been published, violation of Fair and Equitable Treatment was the main argument brought by Entekhab.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

There is no law relating to the funding of investor-state claims in Korea.

## 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There has been no case on this issue in Korea.

## 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Litigation/arbitration funding is not common in Korea.

# 6 The Relationship Between International Tribunals and Domestic Courts

## 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Arbitral tribunals can review the judgments of the domestic courts and the result of criminal investigations because those may be included in the scope of the measures adopted or maintained by the government. However, it would be difficult for the tribunals to review ongoing criminal investigations.

## 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The national courts have jurisdiction to deal with procedural issues arising out of an arbitration. Pursuant to Articles 36 and 38 of the Arbitration Act, and Article 5 of the New York Convention, an arbitral award may be set aside by the national courts if the party seeking the setting aside of the arbitral award was not given proper notice of the appointment of arbitrators or of the arbitral proceeding, or was otherwise unable to present the case, or the composition of the arbitral tribunal or arbitral proceedings were not in accordance with the parties' agreement, unless such agreement was in conflict with any mandatory provision of the Act, or failing such agreement, were not in accordance with the Act.

## 6.3 What legislation governs the enforcement of arbitration proceedings?

In general, the Arbitration Act governs the enforcement of arbitration proceedings in Korea. However, for some special topics, there are special statutes for media, medical and labour arbitration.

## 6.4 To what extent are there laws providing for arbitrator immunity?

The Arbitration Act is silent on the issue of arbitrator immunity. However, Article 13 of the Domestic Arbitration Rules of the Korean Commercial Arbitration Board stipulates the exclusion of liability for arbitrators. Under this article, except in case of willful or gross negligence, the court of arbitration, arbitrators, or the Secretariat and its staff shall not be liable for any act or omission in connection with the arbitral proceedings.

## 6.5 Are there any limits to the parties' autonomy to select arbitrators?

There is no limit to the parties' autonomy to select arbitrators. Under Article 12 of the Arbitration Act, no person shall be precluded by

reason of his/her nationality from acting as an arbitrator, unless otherwise agreed by the parties, and the parties shall be free to agree on a procedure of appointing arbitrators.

## 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. Under paragraph (4) of Article 12 of the Arbitration Act, even if an agreement has been made by the parties, arbitrators shall be appointed by a court or the arbitration agency designated by a court upon a request from the parties, in case: (i) a party fails to appoint an arbitrator according to the procedure agreed upon; (ii) the parties or two arbitrators fail to appoint an arbitrator according to the procedure agreed upon; or (iii) an institution or any other party, entrusted to appoint an arbitrator, fails to select an arbitrator.

## 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes. Under paragraph (3) of Article 12 of the Arbitration Act, if the parties fail to reach an agreement on the selection of arbitrators, a court or the arbitration agency designated by a court shall appoint an arbitrator upon a request from either party.

# 7 Recognition and Enforcement

## 7.1 What are the legal requirements of an award for enforcement purposes?

Pursuant to paragraph (2) of Article 37 of the Arbitration Act, as an arbitral award may be enforced only by a court's decision, the party applying for the recognition or enforcement of an arbitral award shall submit the authentic copy or a copy of the arbitral award: if an arbitral award is written in a foreign language, it shall be accompanied by a translation in Korean.

In accordance with Article 38, domestic arbitral awards shall be enforced, unless either party to an arbitral award proves (i) there is reason to set aside such arbitral award, (ii) the arbitral award has no binding power over the parties yet, or (iii) the arbitral award was set aside by a court.

The recognition or enforcement of arbitral awards in a foreign country which is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is governed by that Convention in accordance with Article 39. Article 217 of the Civil Procedure Act and Articles 26 (1) and 27 of the Civil Execution Act apply *mutatis mutandis* to the recognition or execution of a foreign arbitral award which is not subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

## 7.2 On what bases may a party resist recognition and enforcement of an award?

Pursuant to paragraph (2) of Article 36 of the Arbitration Act, the party may resist the recognition and enforcement of an award if it proves that: (i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid in accordance with the applicable law; (ii) the party resisting recognition and enforcement was not given proper notice of the appointment of arbitrators or of the arbitral proceeding or was otherwise unable to present the case; (iii) the award has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or



contains decisions on matters beyond the scope of the submission to arbitration: provided, that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or arbitral proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with any mandatory provision of the Arbitration Act from which the parties cannot derogate, or failing such agreement, were not in accordance with the Act.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

The Supreme Court of Korea has adopted a restrictive approach to sovereign immunity.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There is no case law with respect to the corporate veil issue in relation to sovereign assets in Korea.



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YOON & YANG

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Yoon & Yang LLC is one of South Korea's largest law firms with more than 400 legal professionals.

The firm has a well-established reputation among practitioners as a pioneer in international trade practice in Korea, advising and representing the Korean government and numerous private companies in relation to various international trade issues. Yoon & Yang LLC was the first Korean law firm to act as the lead counsel to the Korean government and continues to actively assist the Korean government in most of the WTO disputes that the Korean government is engaged in. Yoon & Yang LLC is also the first and most experienced Korean law firm to act as the counsel to the Korean government in countervailing duty (CVD) investigations conducted by the United States and Canadian authorities.

In addition, the firm is comprised of attorneys who have experience and thorough knowledge of the arbitration rules of major international arbitration institutions such as: International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); Singapore International Arbitration Centre (SIAC); Hong Kong International Arbitration Centre (HKIAC); International Center for Dispute Resolution (ICDR); and American Arbitration Association (AAA) of the U.S.; Japan Commercial Arbitration Association (JCAA); and Korean Commercial Arbitration Board (KCAB).

# Nigeria

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## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

#### Bilateral treaties

- a. Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (1990).
- b. Agreement between the Government of the Republic of France and the Government of the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments (1990).
- c. Agreement on the Encouragement and Reciprocal Protection of investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria (1992).
- d. Nigeria – Taiwan Province of China BIT (1994).
- e. Agreement between the Government of the Republic of Korea and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (1998).
- f. Agreement between the Government of Romania and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments (1998).
- g. Agreement between the Government of the Republic of South Africa and the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (2000).
- h. Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Federal Republic of Nigeria (2000).
- i. Nigeria – Sweden BIT (2000).
- j. Agreement between the Swiss Federal Government and the Government of the Federal Republic of Nigeria concerning the Promotion and Reciprocal Protection of Investments (2000).
- k. Treaty between the Federal Republic of Germany and the Federal Republic of Nigeria concerning the Encouragement and Reciprocal Protection of Investments (2000).
- l. Agreement between the Government of the Italian Republic and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments (2000).
- m. Agreement between the Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (2000).

- n. Agreement between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (2001).
- o. Agreement between the Government of the Federal Republic of Serbia and Government of Nigeria on mutual stimulation and protection of investments (2002).
- p. Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Federal Republic of Nigeria (2002).
- q. Agreement between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments (2005).
- r. Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria concerning the Reciprocal Promotion and Protection of Investments (2011).

#### Multilateral Treaties

- a. Treaty Establishing the Economic Community of West African States (1975).
- b. Treaty Establishing the Economic Community of West African States – Protocol A/P1/5/79 on Free Movement of Persons, Right of Residence and Establishment (1979).
- c. Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (1981).
- d. Treaty Establishing the African Economic Community/African Union (1991).
- e. Revised Treaty of the Economic Community of West African States (1993).
- f. Partnership Agreement between the Members of the African, Caribbean and Pacific Group of states of the one part, and the European Community and its Member States, of the other part (2000).
- g. Agreement between the Government of the United States of America and the Government of the Federal Republic of Nigeria concerning the Development of Trade and Investment Relations (2000).
- h. ECOWAS Energy Protocol (2003).
- i. Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (2008).
- j. Trade and Investment Framework Agreement between the Government of United States of America and the Economic Community of West African States (2014).

## 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

The Federal Government of Nigeria is yet to ratify the following bilateral treaties:

- a. Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria concerning the Reciprocal Promotion and Protection of Investments (1996).
- b. Bulgaria – Nigeria BIT (1998).
- c. Agreement between the Government of the Federal Republic of Nigeria and the Government of the Arab Republic of Egypt for the Reciprocal Promotion and Protection of Investments (2000).
- d. Agreement between the Government of the People's Democratic Republic of Algeria and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments (2002).
- e. Jamaica – Nigeria BIT (2002).
- f. Uganda – Nigeria BIT (2003).
- g. Ethiopia – Nigeria BIT (2004).
- h. Agreement between the Government of the Russian Federation and the Government of the Federal Republic of Nigeria on Mutual Investment Protection (2009).
- i. Agreement between the Government of the Republic of Turkey and the Government of the Federal Republic of Nigeria concerning the Reciprocal Promotion and Protection of Investments (2011).
- j. Kuwait – Nigeria BIT (2011).
- k. Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria (2013).
- l. Canada – Nigeria Foreign Investment Promotion and Protection Agreement ("FIPA") (2013).
- m. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (2016).
- n. Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore (2016).
- o. Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Arab Emirates on the Reciprocal Promotion and Protection of Investments (2016).

There are currently no published reasons for the delay in ratifying these BITs.

## 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The Federal Republic of Nigeria does not currently base its BITs on a model BIT.

## 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

No, diplomatic notes exchanged with other states are not published in Nigeria.

## 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

There are no official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses. Information relating to Nigerian foreign policy may, however, be found at [www.foreignaffairs.gov.ng](http://www.foreignaffairs.gov.ng).

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

1. Yes, Nigeria is a party to the New York Convention.
2. Yes, Nigeria is a party to the Washington Convention.
3. No, Nigeria is not a party to the Mauritius Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Yes, the Nigerian Investment Promotion Commission Act, CAP N117, Laws of the Federation of Nigeria 2010 (the "NIPC Act").

Section 22 of the NIPC Act provides that the Nigerian Investment Promotion Commission may negotiate specific incentive packages for the promotion of identified strategic investments.

Section 24 of the NIPC Act guarantees the unconditional transferability of invested funds, dividends, proceeds, and payments to service loans, through an authorised dealer, in freely convertible currency.

Section 25 of the NIPC Act guarantees that no enterprise will be nationalised, expropriated or forcefully acquired by any Government of Nigeria in the absence of fair and adequate compensation, and a right of access to the courts.

Section 26 of the NIPC Act provides that in the event of a dispute between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement. Any dispute which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows:

- a. in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act;
- b. in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
- c. in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

The Act further provides that where in respect of any dispute, there is a disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply (Section 26 of the NIPC Act).

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

There is no general statute/provision which requires the formal admission of a foreign investment in Nigeria. However, depending on the nature of the investment, formal admission may be required.

For example, where a foreign company is carrying on business in Nigeria, or where a non-Nigerian invests in an enterprise within Nigeria, Section 54 of the Companies and Allied Matters Act, Cap C20, Laws of Federation of Nigeria 2010 and Section 19 of the NIPC Act require that the Company be incorporated in Nigeria. Section 20 of the NIPC Act requires that such an enterprise be registered with the NIPC.

There is an argument as to whether the provisions of Section 20 of the NIPC Act amount to a formal admission requirement, and whether a company which is not registered with the NIPC (for example, where there is an indirect investment) would be entitled to the guarantees contained in the NIPC Act. This is a matter in dispute in the Interocean Arbitration (see question 4.1 below).

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *JFS Inv. Ltd. v. Brawal Line Ltd.* (2010) 18 NWLR (Pt. 1225) 495, in determining whether the provisions of Section 12 of the 1979 Constitution (which requires treaties to be domesticated before they can apply within Nigeria) will operate to affect the application of The Hague Rules 1924, a pre-1960 (i.e. pre-independence) Treaty/Convention, the Nigerian Supreme Court held that being a pre-1960 convention, the Hague Rules require no further legislative act such as ratification or adoption before its provisions can be implemented in Nigeria.

In *Harka Air Services (Nigeria) Ltd. v. Keazor* (2011) LPELR-1353 (SC), the Nigerian Supreme Court held that the Warsaw Convention (which has been domesticated in Nigeria), being an international treaty, supersedes conflicting Nigerian domestic legislation.

In *Abacha v. Fawehinmi* (2000) 6 NWLR (pt. 660) 228, in interpreting the African Charter on Human and People's Rights, the Nigerian Supreme Court held that the courts would not interpret domestic legislation in such a way as to conflict with Nigeria's international obligations (as contained in treaties and conventions to which it is signatory) but that this rule of interpretation did not confer any special status on those treaties and conventions.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Nigeria has, by virtue of the NIPC Act, indicated that it is supportive of investor-state arbitration as a relevant dispute resolution technique. See question 2.2 above. Nigeria has also passed the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act Cap 120 Laws of the Federation of Nigeria, 2004 which guarantees the enforcement of ICSID awards.

In addition, the most recently negotiated BITs to which Nigeria is signatory expressly provide for investor-state arbitration. See for

example, the Nigeria – Morocco BIT, although this BIT contains an elaborate pre-arbitration procedure including submitting the dispute first to a joint committee.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

**Corruption** – parties to the treaties are encouraged to take measures to prevent and combat corruption, including by incorporating internationally recognised standards of Corporate Social Responsibility and implement measures to combat corruption. Investors are proscribed from being complicit in acts of corruption. See for example, Article 17 of the Nigeria – Morocco BIT (2016).

**Transparency** – parties are required to publish laws, regulations and administrative rulings of general application pertaining to or affecting any matter in relation to the agreement in question. See for example, Article 15 of the Finland – Nigeria BIT (2005).

**Most-Favoured Nation** – this status is accorded to most states in international treaties with Nigeria and are accorded equal trade advantages. See for example, Article 5 of the Canada – Nigeria BIT (2013).

**Climate Change** – in its most recently negotiated BITs, parties undertake to recognise, respect and observe each other's environmental policies, and a common obligation to protect the environment. See for example, Article 13 of the Nigeria – Morocco BIT (2016).

**Indirect Investment** – the definition of investment includes both foreign direct and indirect investments. See for example, Article 1 of the Finland – Nigeria BIT (2005), and Article 1 of the Nigeria – Morocco BIT (2016).

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

The 1997 China – Nigeria BIT was terminated and replaced with the China – Nigeria BIT (2001) on 18 February 2010.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Pending Cases	Case Number
a. <i>Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria.</i>	ARB/13/20.
Concluded Cases	
a. <i>Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria.</i>	ARB/07/18.
b. <i>Guadalupe Gas Products Corporation v. Nigeria.</i>	ARB/78/1.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

As noted above in question 3.2, Nigeria has passed the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act Cap 120 Laws of the Federation of Nigeria, 2010 which guarantees the enforcement of ICSID awards.



Nigerian courts have yet to be called upon to enforce an ICSID award made against Nigeria.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Nigeria has not sought the annulment of any ICSID proceedings.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

We are not aware of any satellite litigation arising in relation to the substantive claims or upon enforcement.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

The cases that have been instituted against Nigeria at the International Centre for Settlement of Investment Disputes relate to investments in oil and gas mining, exploration and production.

## 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

Nigerian law does not currently provide for the funding of investor-state claims.

In general, under the Common Law which applies in Nigeria, third-party funding is considered champerty and is proscribed.

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no recent case law on the funding of investor-state claims in Nigeria.

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

No, litigation/arbitration funding is not common in Nigeria.

## 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

A tribunal cannot review criminal investigations, and/or judgments. Criminal matters are generally not arbitrable under Nigerian law.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Yes, in specific instances.

The Arbitration and Conciliation Act allows court intervention in the following matters: (i) appointment of arbitrators; (Section

7 (3) of the Arbitration and Conciliation Act); (ii) revocability of arbitration agreement (Section 2 of the Arbitration and Conciliation Act ); (iii) staying court proceedings for matter to be submitted to arbitration (Section 5 of the Arbitration and Conciliation Act ); and (iv) enforcement and recognition of arbitral award (Section 31 and 51 of the Arbitration and Conciliation Act).

#### 6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitration in Nigeria is governed generally by the Arbitration and Conciliation Act 1988 (Cap A18 of the Laws of the Federation of Nigeria) (the “ACA”) and other sub-national legislation, including the Lagos State Arbitration Law of 2009 (the “LSAL”). Although the ACA governs both domestic and international arbitration, Section 43 stipulates that Part III of the ACA which provides for the appointment of arbitrators, the making of awards, the termination of proceedings, and the recognition and enforcement of awards applies only and strictly to international arbitration.

Both the ACA and the LSAL are largely based on the UNCITRAL Model Law, with modifications.

#### 6.4 To what extent are there laws providing for arbitrator immunity?

The most commonly used arbitration legislation, the ACA, does not provide for statutory immunity for arbitrators. However, the Lagos State Arbitration Law grants arbitrators statutory immunity unless they act in bad faith (Section 18, Lagos State Arbitration Law).

#### 6.5 Are there any limits to the parties’ autonomy to select arbitrators?

Generally, in Nigeria, parties to arbitration have unlimited autonomy to select arbitrators. In the exercise of this freedom, parties may by an arbitration agreement determine the number of arbitrators to be appointed (Section 6 of the ACA). The parties may also specify in the agreement the procedure to be followed in appointing arbitrators.

#### 6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

The ACA provides for a default method of selecting arbitrators where no procedure is specified or where the method chosen by the parties fail.

Under Section 7 of the Act:

- where the number of arbitrators is not specified, the default number is three;
- where no procedure is specified for their appointment, each party is to appoint one arbitrator each and the co-arbitrators are to appoint a chair; and
- where a party fails to act as required under the procedure, the counter party may request the court to take the necessary measure in the appointment of an arbitrator (Section 7 (3) of the ACA).

Section 8 of the Lagos State Arbitration Law provides for a different default method of selecting arbitrators in the following manner:

- where the parties have not reached an agreement on the choice of a sole arbitrator within 30 days, the sole arbitrator shall be appointed by the designated appointing authority;
- in the case of an arbitration with one arbitrator, where the parties fail to agree on the arbitrator, the appointment shall

be made by the Lagos Court of Arbitration on the application of any party to the Arbitration Agreement made within thirty (30) days of such disagreement;

- c. where it is a case of an arbitration with three arbitrators, each party shall appoint one arbitrator and the two so appointed shall appoint the third who shall act as the presiding arbitrator of the Arbitral Tribunal. However, if:
  - i. a party fails to appoint the arbitrator within thirty (30) days of receipt of a request to do so by the other party, that other party, having duly appointed its arbitrator, may give notice in writing to the party in default proposing the appointment of its arbitrator to act as sole arbitrator;
  - ii. the party in default does not within seven (7) clear days of that notice being given, make the required appointment and notify the other party of the name of its arbitrator, the other party may appoint its arbitrator as sole arbitrator whose award shall be binding on the parties as if the sole arbitrator had been so appointed by agreement; and
  - iii. the two arbitrators fail to agree on the third and presiding arbitrator within thirty (30) days of their appointments, the appointment shall be made by the Lagos Court of Arbitration on the application of any party to the Arbitration Agreement.

#### 6.7 Can a domestic court intervene in the selection of arbitrators?

According to the provisions of the ACA, a party to the arbitration may request that the court intervene in the selection of arbitration where under the appointment procedure agreed upon by the parties: (a) a party fails to act as required under the procedure; (b) the parties or two arbitrators are unable to reach an agreement as required by the procedure; or (c) a third party, including an institution, fails to perform any duty imposed on it under the procedure (Section 7 (3) of the ACA).

The decision of the court in this instance is not subject to appeal.

## 7 Recognition and Enforcement

#### 7.1 What are the legal requirements of an award for enforcement purposes?

An arbitral award is required to be in writing and signed by the arbitrators, where the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of all the members of the arbitral tribunal shall suffice if the reason for the absence of any signature is stated. The arbitral tribunal shall also state on the award the following:

- a. the reasons upon which it is based;
- b. the date it was made; and
- c. the place of the arbitration as agreed or determined under Section 16(1) of this Act which place shall be deemed to be the place where the award was made.

Finally, a copy of the award, made and signed by the arbitrators in accordance with and signed by the arbitrators in accordance with the law and shall be delivered to each party (Section 26 of the ACA).

In order to enforce an award, the party seeking to enforce the award is required to submit an application to the court, in writing, attaching a duly authenticated original award and the original arbitration agreement, or a certified copy in either case (Section 31 and 51 of the ACA).

#### 7.2 On what bases may a party resist recognition and enforcement of an award?

With respect to a foreign award, an application may be made for refusal of its recognition or enforcement on the following grounds:

- a) incapacity of a party to the arbitration agreement;
- b) invalidity of the arbitration agreement;
- c) lack of due process;
- d) dispute not contemplated by submission to arbitration;
- e) award outside the scope of reference;
- f) composition of arbitral tribunal or arbitral procedure inconsistent with arbitration agreement;
- g) composition of arbitral tribunal or arbitral procedure inconsistent with the ACA;
- h) lack of arbitrability under the Nigerian law; and
- i) breach of the public policy of Nigeria (Section 48 and 51 of the ACA).

#### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Generally, the Federal Government of Nigeria is not conferred with any immunity from enforcement of arbitral awards and court judgments in Nigerian courts. A party who obtains a favourable award or judgment against the government is at liberty to enforce the same against said government at the appropriate court.

There are, however, some limitations created by law with respect to the recovery against specific state assets such as the provisions of the Nigerian National Petroleum Corporation Act (Cap N.123 of the Laws of the Federation of Nigeria 2010) which provides that: *"In any action or suit against the Corporation no execution or attachment or process in the nature thereof shall be issued against the Corporation but any sums of money which may, by the judgment of the court, be awarded against the Corporation shall, subject to any directions given by the court where notice of appeal has been given by the Corporation, be paid from the general reserve fund of the Corporation"* (Section 14 of the Nigerian National Petroleum Corporation Act).

Also, a garnishee order nisi may not attach public funds until consent of the Attorney General of the Federation is first obtained with respect to the funds to be attached (Section 84, Sheriffs and Civil Processes Act, Cap S6 of the Laws of the Federation of Nigeria 2010).

#### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The courts of Nigeria have not made any specific pronouncements with respect to the corporate veil in respect to sovereign assets.

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Tunde heads the firm's dispute resolution and maritime practice groups, and specialises in commercial litigation and arbitration; with particular emphasis on complex commercial matters. He regularly represents Nigerian, foreign and multi-national clients in high-profile proceedings before the ICC International Court of Arbitration and the London Court of International Arbitration.

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Hamid is an experienced litigator and arbitration counsel, and regularly advises and represents clients in disputes on an extensive range of issues, including those pertaining to energy and natural resources, taxation, company and labour law. Some of his cases have resulted in landmark judgments from the Nigerian courts, including the decision that Nigerian courts have no jurisdiction to issue anti-arbitration injunctions (*Statoil v. NNPC*, 2013).

Hamid has in recent years been involved in the resolution of a wide range of disputes arising from Nigeria's petroleum industry, and is a trusted adviser in this area.

## Aluko & Oyebo

Aluko & Oyebo is one of the largest integrated law firms in Nigeria providing a comprehensive range of specialist legal services to a highly diversified clientele including top-tier Nigerian, international and multinational clients. Areas of the Firm's specialisation include: Admiralty and Shipping; Aviation; Banking and Corporate Finance; Capital Markets; Compliance and Investigation; Corporate and Commercial Practice; Energy and Natural Resources; Intellectual Property; Litigation and Arbitration; Media & Technology; Mergers & Acquisitions; Power and Infrastructure Finance; Privatisation; Public-Private Partnerships; Real Estate and Construction; Taxation; and Telecommunications.

Established in January 1993, the firm has 17 partners and a full complement of highly qualified professional staff, with offices in three Nigerian cities: Lagos; Abuja; and Port Harcourt.

The firm was named the African law firm of the year in the African Legal Awards 2018, the Nigerian law firm of the year 2010 by *Who's Who Legal*, law firm of the year at the 2015 Law Digest Awards and law firm of the year 2016 at the ESQ Nigerian Legal Awards. It is ranked as a top-tier firm by *The IFLR 1000* in 2018, and *The Legal 500* in 2017.

# Panama

Morgan & Morgan

José D. Carrizo D.



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Panama has ratified free trade agreements with the following countries: Canada; Chile; Costa Rica; El Salvador; Guatemala; Honduras; Iceland; Liechtenstein; Mexico; Nicaragua; Norway; Peru; Singapore; and Switzerland.

Panama has also ratified Commercial Protection Treaties with the United States of America, as well as with the European Free Trade Association.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Panama has signed but not yet ratified agreements with Israel and South Korea. Both cases are pending ratification by the Panama Assembly.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The key provisions vary depending on the different states involved.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

It is not common for diplomatic notes relating to treaties with other states to be published in Panama.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

To our knowledge, there have not been any official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Panama is a signatory of the New York Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

There is not a specific investment law. There are, however, several laws that protect investments in specific cases.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

No. The formal admission of a foreign investment is not required in Panama.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

We do not know of any case within our jurisdiction in which treaty interpretation has been discussed.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

No. Normally, that is a matter that is handled by the arbitration courts, pursuant to arbitration provisions commonly included in those treaties.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Acts of corruption are not only against the law but sanctioned as well. As for climate change, Panama is a signatory to various relevant conventions and declarations.



### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

To the author's knowledge, Panama has not given any notice to terminate any BITs or similar agreements.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Panama has been involved in different arbitration cases, mostly based on the Trade Protection Treaty signed with the US.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Panamanian law establishes the procedure for those cases. The attitude that Panama has taken has been to comply with those procedures.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

To the author's knowledge, Panama has not sought any annulment proceedings.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

We are not aware of this occurring in Panama.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There have not been any identifiable common themes or trends from the cases that have been brought.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Panama funds its own legal defence costs.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This is not applicable.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

We know of approximately 10 current cases.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

No, tribunals cannot review criminal investigations and judgments of the domestic courts.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The Supreme Court of Justice has jurisdiction to decide annulment motions filed against arbitral awards, governed by Panamanian law.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

The legislation that governs the enforcement of arbitration proceedings is Law 131 of 2013.

### 6.4 To what extent are there laws providing for arbitrator immunity?

There is no such concept in Panamanian law.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

No, there are no existing limits to the parties' autonomy to select arbitrators.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

That would depend on the applicable rules, which depend on the arbitrations' provisions.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

No, a domestic court cannot intervene in the selection of arbitrators.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

Law 131 of 2012 regulates the Arbitration Process for foreign arbitral awards and their enforcement in Panama. To this effect it states that the competent Chamber for the recognition and enforcement of foreign arbitral awards is the Fourth Chamber of the Supreme Court of Panama. It also establishes the requirements the party has to fulfil for the arbitration award to be enforced. To this effect, the party must enclose the following documents:

- a. An authentic copy or certified copy of the arbitration award.

- b. An authentic copy or certified copy of the arbitration agreement. In the event the arbitration was not held in Spanish, an official translation is required. Panama is a State Party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

## 7.2 On what bases may a party resist recognition and enforcement of an award?

The party may resist the recognition and enforcement of an award if the following requirements are not met:

- that the foreign judgment was rendered as a consequence of the exercise of an action *in personam*, with the exception of what the Law especially regulates for probate matters opened in other countries;
- that the foreign judgment was rendered as part of a proceeding where the law suit was personally served to the defendant;
- that the obligation which is sought to be enforced in Panama is legal in the territory of Panama; and
- that the copy of the foreign judgment must be authentic (that is, it must have been authenticated either by the Panamanian Consul of the place where it was issued or by Apostille prior to its submission in Panama as part of the request of enforcement).

## 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

It has been established that assets owned by foreign governments could not be attached locally.

## 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The *Tanques Argentinos*, *Masmetal vs La Nacion Argentina* case has considered the corporate veil issue in relation to sovereign assets.



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Jose Carrizo is a Partner and Head of the Litigation and Dispute Resolution Department at Morgan & Morgan, leading a team that advises clients extensively in the area of commercial litigation, corporate dispute resolution and criminal law. Mr. Carrizo has been involved in complex matters, especially in the fields of civil, criminal, administrative, commercial, banking, insolvency and insurance law.

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Mr. Carrizo is also involved in *pro bono* activities as he assists regularly to Legal Open Houses organised by the firm in very low-income communities to provide free legal orientation on subjects such as family law, domestic violence, labour law, immigration and litigation, among others.

Mr. Carrizo graduated from the Universidad Santa María La Antigua in Law and Political Science (1996). In 2003, he completed his Master's Degree in Universidad Externado de Colombia, in Bogotá, specialising in Civil Liability.

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MORGAN & MORGAN

Morgan & Morgan has a great reputation in all types of litigation and arbitration proceedings involving Panamanian jurisdiction, before the various courts of the Republic of Panama: civil courts; maritime courts; labour courts; administrative agencies; arbitration bodies; and criminal courts.

Our practice is well-recognised for the handling of complex disputes and some of the most transcendental cases in Panama in civil, administrative, banking, insurance, corporate and commercial matters. We attend business of judicial transcendence with connectivity of litigation that exceeds the thousands of processes.

Our team is made up of experienced lawyers who have a solid academic preparation capable of effectively serving any litigation or controversy that is put into our hands.

We are constantly attending legal proceedings by law firms from different parts of the world, in which we are required to obtain local legal measures that are related to disputes raised outside the Panamanian jurisdiction.

On the other hand, to cover very specific needs of some of our clients in the banking and financial sector, we have established a section for the collection of high-risk loans.

In addition, our team has extensive experience in both local and international arbitration processes. We have lawyers duly certified to act as arbitrators, mediators and conciliators in arbitration processes at both the local and international levels.

We represent multinational corporations, banks, financial institutions, Government offices and recognised private companies.

# Romania

Dr. Victor Tănăsescu



Cristian Gavrilă



Tănăsescu, Gavrilă & Asociații

## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Currently, Romania is party to 80 Bilateral Investment Agreements (“BIT”) and 68 Treaties with Investment Provisions (“TIP”), altogether referred to as International Investment Agreements (“IIA”). Although most of the TIPs were concluded by the European Union (which Romania joined in 2007) with non-EU countries, Romania is *eo ipso* part of the Energy Charter Treaty since 16.04.1998.

In addition to IIAs, there is also an open-ended category of investment-related instruments which Romania is party to, ratifying 21 such agreements and instruments. It encompasses various binding and non-binding instruments and includes, for example, model agreements and draft instruments (e.g. Draft Supplementary Treaty to the Energy Charter Treaty), multilateral conventions on dispute settlement and arbitration rules (e.g. New York Convention, ICSID Convention), or documents adopted by international organisations (e.g. World Bank Investment Guidelines).

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

There are no BITs or TIPs concluded by Romania yet to be ratified, as it arises out of publicly available information, but several more recent TIPs signed by the EU are still pending ratification, such as Canada – EU CETA (24.10.2016) and Armenia – EU CEPA (24.11.2017), etc.

We notice, for example, that the Canada – EU CETA Treaty replaces all BITs between Canada and EU Member States, including the Romania – Canada BIT signed in 2009. CETA provisionally came into force on 21.09.2017 (being ratified by Canada), but requires full ratification by the EU Council and Parliament, as well as by all EU Member States.

CETA provides for investment-related disputes to be settled after preliminary consultation procedures, by ICSID arbitration, alternatively with any other arbitration rules agreed, such as the UNCITRAL Rules of Arbitration.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Romania does not have a standard model BIT.

Nevertheless, most BITs are quite similar, and define “investment” as to non-exclusively include any type of asset invested according to each Contracting Party’s laws, such as: (i) ownership rights over moveable and immoveable assets, along with any other accessories, such as mortgages, warranties, pledges, etc.; (ii) shares, bonds, and any other participations in a company, loans, receivables, or any pecuniary valuable performance under a contract; (iii) intellectual and industrial property rights, including copyright, trademarks, trade-names, patents, process technology, know-how; and (iv) any legal or contractual right for prospection, cultivation, extraction, or exploitation of natural resources.

The term “investor” is mostly defined as either a natural person having a Contracting Party’s citizenship or nationality, or a legal person incorporated, or duly organised under the laws of a Contracting Party, and/or having its headquarters on the Contracting Party’s territory.

Other clauses for securing investments typically include: fair and equitable treatment; no arbitrary or discriminatory measures; lawful expropriation/nationalisation; national and Most Favoured Nation (“MFN”) treatment; and umbrella clauses, etc.

As dispute resolution mechanisms, Romanian BITs generally provide that the investor may choose to submit the dispute, if a preliminary amiable settlement was not reached, either to: (a) ICSID; (b) an *ad hoc* tribunal according to the parties’ agreement, or to an *ad hoc* arbitral tribunal under UNCITRAL Arbitration Rules; or (c) the alleged defaulting Contracting Party’s competent Courts of law.

Most BITs provide the possibility of unilateral termination with a sunset clause (providing the treaty shall still be effective for a specific period, usually 10 years, as of the termination date for any prior investments).

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

There are no publicly available records regarding diplomatic notes exchanged by Romania with other States concerning BITs, TIPs or IIAs, including with new or succeeding States. An interested party may address any queries to the Ministry of Foreign Affairs in this respect, and answers will be provided within 30 calendar days.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

There are no publicly available records regarding official commentaries concerning BITs, TIPs or IAAs. An interested party may address any queries to the Ministry of Foreign Affairs, or the Ministry of Commerce in this respect, and answers will be provided within 30 calendar days.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

The New York Convention was ratified by Romania on 03.09.1961 by State Decree no. 186/24.07.1961. The Convention entered into force on 12.12.1961. Romania applies the Convention, for awards made on non-contracting States territory, only to the extent those States grant reciprocity.

Romania signed the ICSID (Washington) Convention on 06.09.1974, ratified it by State Decree no. 62/07.06.1975, and following that the ICSID Convention entered into force with respect to Romania on 12.11.1975.

Romania is not party to the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Romania has enacted specific laws for investments, the main instrument being the Government's Emergency Ordinance no. 92/1997 ("GEO 92/1997"), which sets up the legal framework regarding guarantees and facilities granted to foreign investors and direct investments in Romania.

Pursuant to GEO 92/1997, investors can primarily benefit from: (i) the possibility to invest in any field according to any legal method; (ii) fair and impartial treatment, as equally provided for nationals of Romania; (iii) guarantees against nationalisation and expropriation, or other equivalent decisions; (iv) customs and fiscal facilities; (v) investors' right to choose the Courts of law or the arbitral tribunals to settle litigations; (vi) the possibility to deduct advertising expenses from the taxable profit; and (vii) the possibility to hire foreign citizens, etc.

As a dispute resolution mechanism, GEO no. 92/1997 provides that the investor may address to: (i) the Romanian Courts of law specialised on Administrative Disputes Law no. 554/2004; (ii) ICSID; and (iii) *ad hoc* arbitral tribunals under UNCITRAL Arbitration Rules.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Romanian legislation does not require formal admission of a foreign investment. There is no limit on foreign participation in commercial enterprises. Foreign investors are entitled to establish wholly foreign-owned enterprises in Romania.

According to GEO 92/1997 and Law no. 312/2005 (on acquiring real estate by foreigners) an investor, whether resident or non-resident, may acquire any real estate in the same conditions as a national.

In several areas of strictly regulated activities, such as telecommunications, energy, natural resources, banking, insurance etc., specific licences, permits or authorisations are required.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Most ICSID cases involving Romania (see Question 4.1 below) raise interpretation issues, the most relevant pertaining to the compatibility of different international law instruments, such as BITs, TIPs, or IIAs with EU law (further detailed at Questions 4.2 and 4.3 below).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Romania did not manifestly issue its policy on Investor-State Arbitration, but it is a member of the ICSID Convention, and one of the countries with the largest numbers of BITs still in force (*i.e.* 80).

Despite that, Romania initiated termination procedures in respect of the 22 BITs concluded with EU Member States, as a consequence of European Commission's infringement proceedings initiated (also) against Romania (see Question 3.4 below).

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Most Romanian BITs do not have explicit provisions regarding such matters as corruption, transparency, or climate change, but there are some guarantees for foreign investors. Thereby, investors of each Contracting Party shall benefit from full protection and security against unjustified or discriminatory measures affecting the management, maintenance, use, capitalisation, growth, sale, or liquidation of any investments.

Investment treaties to which Romania is a party to comprise of MFN clauses, and an important number of BITs provide National Treatment clauses.

As for "indirect investments", there are no express provisions within Romanian BITs. As detailed at Question 1.3 above, these treaties provide for a non-exclusive list of assets classified as "investments". In case of treaty interpretations disputes in this respect, we consider applicable the rationale of *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8 Case) Tribunal which stated: "*The plain meaning of this provision [Article 1(1)b) of the Treaty] is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, the literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.*" [Emphasis added.]

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

As a consequence of the EU Commissions infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden, for terminating all intra-EU BITs, due to their alleged incompatibility



with EU Law, Romania enacted Law no. 18/17.03.2017 providing the termination of all the 22 BITs between Romania and other EU Member States. The Ministry of Foreign Affairs was mandated to conduct the termination proceedings, but no official termination of any intra-EU BIT has been announced to this date.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Romania has been involved in 15 ICSID Investor-State Arbitrations, of which 6 are still pending, and 9 have been concluded. For the purpose of this guide, we shall address only the following:

- *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1) – “*Spyridon Roussalis case*”;
- *S&T Oil Equipment & Machinery Ltd v. Romania* (ICSID Case No. ARB/07/13) – “*S&T Oil Equipment & Machinery case*”; and
- *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) – “*Micula case*”.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

Romanian Courts were first called to enforce an investment treaty award, issued in the *Spyridon Roussalis* case, where the claims arose out of disagreements over compliance with a post-privatisation obligation related to the Claimant’s purchase of shares in a large former State-owned frozen food warehousing company (also, other measures were taken against the company, as foreclosing its operations due to an alleged failure to comply with EU food safety regulations). Romanian Courts considered the award directly enforceable as provided by the ICSID Convention, and granted leave for enforcement.

In 2014, Romanian Courts were called to enforce another investment treaty award issued in the *Micula* case. Initially, the Courts granted leave for enforcement, but in May 2014 the EU Commission issued an injunction against Romania, ordering the State to suspend any payment of the award until the EU Commission’s final decision on the compatibility of the award with the EU Internal Market. In March 2015, the EU Commission issued its final decision, declaring that payment of the award constituted illegal State aid and prohibited Romania to liquidate the award.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

The ICSID Tribunal awarded the Claimants in the *Micula* case damages amounting to approx. USD 116 million, excluding post-award interest.

Romania did not voluntarily comply with the award and filed a request for annulment under Article 52 of the ICSID Convention, also requesting the award’s enforcement be stayed until a final decision.

The stay was rejected, Romania refusing to commit to the *ad hoc* annulment committee’s request to liquidate the award in case of an unfavourable decision, following the EU Commission’s decision mentioned at Question 4.2 above.

Romania’s main reason for annulment was the Tribunal’s failure to comply with the applicable EU Law. Romania concurred with the EU Commission’s *amicus curiae* arguments that the Tribunal

manifestly exceeded its powers due to: (i) failure to apply EU State aid Law to the dispute; (ii) misinterpretation and misapplication of EU treaties and Romanian Law in a “*gross and egregious manner so as to substantially amount to a failure to apply the proper law under the underlying dispute*”; and (iii) failure to address the inherent conflict of treaties in the underlying dispute.

The ICSID *ad hoc* committee also rejected the annulment claim, considering the Arbitral Tribunal duly construed its judgment under the applicable law and gave sufficient reasons for its decision.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

The echoes of *Micula* case effects continued in respect of regarding the compatibility between EU Law and intra-EU BITs, newly issued CJEU *Achmea* Decision (Case C-284/16) confirming that, from the EU institutions’ point of view, intra-EU BITs are incompatible with EU Law.

Therefore, *Micula* case Claimants initiated the enforcement procedure also in the United States, where, in April 2015, the US District Court for the Southern District of New York rendered a decision granting *ex parte* confirmation and conversion of the award into a US judgment. However, on 23.10.2017, the US Court of Appeals for the Second Circuit reversed the abovementioned judgment, vacated the ruling, and remanded the case to the district court with instructions to dismiss the petition without prejudice.

Subsequently, Claimants filed a new petition to confirm the *Micula* case award in front of the US District Court for the District of Columbia, but the case is currently pending.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Subsequent to the CJEU *Achmea* Decision, Investor-State Arbitration awards based on intra-EU BITs might become difficult to enforce within the EU territory, and all intra-EU BITs shall be terminated not before long. It remains to be seen how investment treaties will be enforced against the EU itself as party thereto.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Third-Party Funding (“TPF”) is not very well known in Romania and is yet to be expressly regulated. Therefore, as long as there are no specific prohibitions, TPF should be deemed permitted in Romania. It is worth mentioning that in case of TPF more generic regulations could apply, such as the rules governing the conflict of interest for attorneys/councils and arbitrators.

Specific disclosure provisions for TPF are not stipulated by Romanian Law, but parties are free to insert such provisions in their arbitration clauses, or the arbitral tribunals can resort to the widely accepted inherent powers doctrine [e.g., Article 26 (2) of the Court of International Commercial Arbitration pertaining to the Chamber of Commerce and Industry of Romania Arbitration Rules provides “*In the absence of an agreement of the parties or if these Rules do not provide otherwise, the arbitral tribunal may conduct the arbitration as it considers appropriate.*”].

Implementing the inherent powers doctrine for TPF disclosure seems to gain more ground in Investor-State disputes. In *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6) the Arbitral Tribunal ordered the disclosure of any TPF for the following reasons: (i) assessing the potential impact of TPF upon the impartiality of the arbitrators; and (ii) securing the other party's rights to a potential application for costs.

Reverting to the regulations applicable to attorneys/councils, their duties of acting in the client's best interests and client-attorney privileges prohibit third-parties from legal assistance agreements from receiving information or making decisions about a client's cases.

Law no. 51/1995, regulating the attorney profession in Romania, and the Attorneys' Professional Statutes expressly, but restrictedly, allow for a third-party to pay attorney fees, but solely the client is the beneficiary of the legal assistance and the attorney's duties are only towards the client and not the third-party financier.

Under the Romanian Criminal Code (Article 293), the members of arbitral tribunals (irrespective if they are Romanian citizens or not) can be prosecuted for corruption and conflict of interest criminal offences related to their arbitration duties. Any kind of monetary connection between the arbitrator and a third-party financier (e.g. actual or former business/employment relations with the financier, or with entities associated with or part of the third-party financier's group of companies), could lead to the commencement of criminal inquiries.

Criminal charges could also be raised against attorneys/councils who breach their client-attorney privileges and allow for a third-party to make calls in respect of the arbitration proceedings that could harm the client interests (i.e. disloyal legal assistance – Article 284 of Romanian Criminal Code).

## 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

A hallmark for Romania in respect of TPF effects on Investor-State Arbitration is the *S & T Oil Equipment and Machinery* case. This arbitration was discontinued due to the Claimant's failure to pay the advance of ICSID fees.

Later, information emerged to reveal the Claimant actually benefitted from two TPFs, respectively: (i) a contingency fee agreement concluded with its counsel; and (ii) an investment agreement concluded with a TPF entity, Juridica Investments Limited. Several contractual issues determined the latter TPF entity to stop financing the arbitration, leading to the discontinuation of the proceedings.

This situation had major effects, rendering it impossible for Romania to recover several thousand USD in arbitration costs, and probably another million USD in legal fees, which would have been avoided if TPF disclosure clauses were provided in the US – Romania BIT, or such disclosure was ordered by the arbitral tribunal.

As the first precedent, it is highly appropriate that the *S & T Oil Equipment and Machinery* case could determine Romania to survey, with greater attention, the financial situation of future investor claimants and request the arbitral tribunals to implement the inherent powers doctrine with respect to disclosing any TPF.

## 5.3 Is there much litigation/arbitration funding within your jurisdiction?

TPF occurrence and disclosure are not expressly regulated by Romanian Law, thus, in addition to the confidential status of arbitration proceedings (whether Investor-State or commercial), it is difficult to assess if arbitration funding is a firmly established practice on the Romanian market.

As for court litigation funding, it is quite a common practice in Romania to acquire litigious rights (i.e. any rights subject to pending law suits), which could be easily encompassed as TPF. However, the Romanian Civil Code regulates such activity (Article 1653) by prohibiting it, *rationae personae* for attorneys/councils and other kinds of lawyers, as a matter of principle.

Also, contingency fee agreements are strictly prohibited by Romanian Law, similarly to regulations among most EU jurisdictions which do not allow *pacta de quota litis* (i.e. attorney fees taken exclusively as part of the final gain, as a result of a favourable court ruling or settlement agreement). Attorneys/councils are entitled to success fees, but it is mandatory to have fixed or hourly fees provided by the legal assistance agreement, apart from the success honorarium.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Under Romanian Law, final judgments of national Courts and criminal proceedings are part of *jure imperii*, thus being included in public order/public policy clauses under international law (entitling the State to refuse the recognition and enforcement of awards in breach thereof) and cannot be reviewed by foreign jurisdictional bodies (either international Courts or arbitral tribunals). Not even international Courts such as the European Court of Human Rights have the jurisdiction to overturn final judgments in Romania (although extraordinary domestic appeals can be pursued on the grounds of ECtHR decisions).

However, Romania's compliance with (or liability under) international (and investment) law can be (and often was) duly assessed by reference to internal criminal proceedings or final court judgments, subject to special proceedings agreed within international treaties (such as the ICSID Convention).

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Pursuant to Articles 547 and 1123 of the Romanian Civil Procedure Code ("RCPC") Romanian Courts have full jurisdiction to deal with procedural matters related to arbitrations (both internal and international), such as establishing the arbitral tribunal, taking provisional or conservatory measures, producing evidence, awarding the costs of arbitration. These rules are enforced by the court which has jurisdiction over the seat of arbitration, the judgment being final and binding, issued in an expedite procedure.

The Romanian Courts' role is, nonetheless, subsidiary to the arbitration agreement and to the institutionalised arbitration's rules of procedure, thus only when these provisions are silent one may resort to court intervention in arbitration cases.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Party Autonomy is a fundamental principle duly recognised in Romania, thus any arbitration proceedings are first and foremost governed by the law set up in the arbitration agreement (or by the arbitration rules of the institutionalised arbitration chosen by the parties).

In case the seat of arbitration is in Romania, and the arbitration agreement does not specify a procedural law, the provisions of RCPC shall be applied.

However, according to Articles 576 and 1120 RCPC, when parties are omitted to select a procedural law, the arbitral tribunal is empowered to apply specific procedural regulations at its choice. If the arbitral tribunal cannot be established, parties may resort to the Romanian Courts (as presented at Question 6.2 above) which shall apply the relevant provisions of RCPC to resolve this issue.

Whenever the arbitral tribunal is established, but fails to make the procedural law choice, RCPC shall become duly applicable (*i.e.* Book no. IV – On Arbitration, Articles 541–621 and Book no. VII – International Civil Lawsuit, Title no. IV – International Arbitration and the effects of international awards, Articles 1111–1123).

#### 6.4 To what extent are there laws providing for arbitrator immunity?

Arbitrators' immunity is not expressly regulated in Romania, although their personal liability is. To the extent it can be deemed applicable as the law of arbitration, RCPC provides under Article 565 that arbitrators can be held liable for damages only if they:

- unjustifiably renounce their task after accepting the appointment;
- unjustifiably fail to participate in the arbitral proceedings or fail to deliver the award in the time set by the arbitration agreement or by the applicable law (RCPC provides for **domestic arbitration** under Article 567 a time limit of 6 months since the establishment of the arbitral tribunal, that can be extended by 3 months only for sound reasons; for **international arbitration** with its seat in Romania, these time limits double, pursuant to Article 1115(4) RCPC);
- breach the confidentiality obligation, by publishing or divulging information obtained in their capacity as arbitrators, without the parties' authorisation; and/or
- breach other duties in bad faith or gross negligence.

#### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

In Romania, the principle of Party Autonomy has a few restrictions, namely the arbitration agreement not to breach the public order and morality. Currently, there are not any mandatory regulations to restrict one's capacity of serving as arbitrator.

Any individual who fulfils the arbitration agreement's requirements can serve as arbitrator, except for those criminally convicted related to their duties as arbitrators, whose right to continue practising was prohibited by the criminal Courts. Pursuant to Articles 562(1)(a) and 1114(2)(a) RCPC, an arbitrator can be disqualified if he/she does not meet the requirements of the arbitration agreement.

#### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the appointing mechanism is absent, not valid, or lacks effects, Articles 558–560 RCPC provide a default procedure:

- the party that pursues arbitration notifies the opposing party in writing to nominate one of the three arbitrators which shall form the tribunal, and a potential substitute;
- the notification must comprise, *inter alia*, the names, personal and professional data of the arbitrator nominated by the party that pursues arbitration, and of the substitute's;

- the opposing party must reply in 10 days as of receiving the notification with its own nominations;
- either person nominated as arbitrator or as substitute must also be notified and will communicate their answer to both parties in 5 days as of receiving the notification; and
- the two arbitrators thus appointed shall nominate the presiding arbitrator, and a potential substitute, which will communicate their answer to both parties in 5 days as of receiving the notification.

If otherwise the arbitral tribunal is not established following the appointing mechanism/the abovementioned procedure (*e.g.* refusals from all the nominations), Romanian Courts can be called to intervene, as detailed at Question 6.7 below.

#### 6.7 Can a domestic court intervene in the selection of arbitrators?

Unless the arbitration agreement or the applicable rules of arbitration provide otherwise, or in case of a deadlock, when the arbitral tribunal cannot be established, according to Articles 561 and 1114(4) RCPC, the party that still intends to pursue the arbitration may address to the court which has jurisdiction over the seat of arbitration, in order to appoint the (remaining members of the) arbitral tribunal. The judgment is final and binding, and is issued within 10 days as of filing the claim.

## 7 Recognition and Enforcement

#### 7.1 What are the legal requirements of an award for enforcement purposes?

Recognition and enforcement (*exequatur*) proceedings of foreign arbitral awards are governed by Articles 1124–1133 RCPC. It is worth mentioning that ICSID and domestic arbitral awards can be directly enforced just as final national court decisions.

The requirements for granting the *exequatur* proceedings are: (i) the subject matter of the award may be settled by arbitration in Romania; and (ii) the award does not contain provisions contrary to the public order/public policy under Romanian Private International Law.

Articles 542(1) and 1112(1) RCPC allow to be settled by arbitration all claims except those regarding (i) civil status, (ii) legal capacity of entities, (iii) inheritance/succession, (iv) family relationships, and (v) any other right that parties cannot dispose of (*e.g.*, related to criminal charges, insolvency etc.). The State and public authorities may be subject to arbitration, only if laws or international treaties provide so. State-owned enterprises are free to conclude arbitration agreements, unless their incorporation law or statutes provide otherwise.

#### 7.2 On what bases may a party resist recognition and enforcement of an award?

Apart from the reasons provided under Article V of the New York Convention, recognition or enforcement of the foreign arbitration award may be refused by the national court, if the party against whom the award is invoked argues that one of the following circumstances exists:

- the parties did not have the legal capacity to conclude the arbitration agreement as per their applicable law (established under the seat of arbitration's law);
- the arbitration agreement was not valid according to (i) the law chosen by the parties or (ii), in lack thereof, to the seat of arbitration's law;

- the party against whom the award is invoked was not rightfully informed about the arbitrators' appointment, or about the rules of arbitration, or was unable to present its defence during the arbitration;
- the arbitral tribunal's establishment or the rules of arbitration were not in accordance with the arbitration agreement or, in lack thereof, with the seat of arbitration's law;
- the subject matter of the award is (i) not provided by, or (ii) outside the scope of the arbitration agreement, or the award contains provisions exceeding the arbitration agreement. However, if the award provisions that fall within the scope of the arbitration agreement are severable, they may be recognised and enforced; or
- the award has not yet become binding for the parties, or has been annulled, or suspended by a competent authority under the seat of arbitration's law or under the award's applicable law.

When assessing the abovementioned circumstances, Romanian Courts are prohibited to examine (or alter) the substance of the award.

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### **7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**

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Romanian law does not provide any specific regulations on foreign sovereign immunity. However, Romania is a member of the New

York United Nations Convention on Jurisdictional Immunities of the States and their Property, signing this instrument in 2005 and ratifying it in 2006.

As a matter of principle, according to the abovementioned convention, assets that are part of the State's private/commercial activities are lacking sovereign immunity and are subject to recovery proceedings, while those exclusively intended for public activities (as in exercising sovereign powers) are not.

Romanian law allows claims against the State or public authorities for the recovery of assets which are part of private/commercial property of these entities. Public/Sovereign property cannot be alienated, seized, or time barred. The Romanian State's public/sovereign property assets are specifically provided by Law no. 213/1998.

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### **7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**

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As previously stated, for an asset to be considered part of the State's public/sovereign property, it is required for a law to be enacted in this respect. Therefore, it is highly improbable under Romanian law that one could cloak the State's private assets as sovereign, as the lack of publicly available case law currently shows.



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He has a broad experience in managing extremely complex disputes, from their very initial stages, and in organising and leading teams of different specialists and experts.



Tănăsescu, Gavrilă & Asociații attained its distinctive character from its professional tradition of being a small firm with a sophisticated practice focused mainly on litigation and arbitration.

Our team has a wide dispute resolution experience, gained by assisting major clients in high-profile cases. We take pride in having in our team prestigious lawyers with a comprehensive experience in serving as mediators and arbitrators in both *ad hoc* and institutional arbitral proceedings.

Our general expertise, gained throughout years of having instrumented high-profile cases in various law areas and business industries, covers a wide range of practices: Foreign Investments; Telecommunications; Energy; Gas & Oil; Environment & Natural Resources; and Construction & Infrastructure.

Our main focus, though, is represented by International and Domestic Arbitration, Litigation & Mediation in respect of Competition, Public Procurement, and Regulatory, areas in which we have become a true brand due to the outstanding results obtained in several landmark cases.

# Senegal

Mouhamed Kebe



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Jocelyn Ismaël Itoua Ongagna



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Senegal has signed the following bilateral treaties to protect foreign investments with the following countries: Argentina; Canada; China; Egypt; France; Germany; Guinea; India; Italy; Kuwait; Mali; Mauritius; Morocco; the Netherlands; Qatar; Romania; South Africa; South Korea; Sweden; Switzerland; Turkey; the United Kingdom; and the United States.

Senegal also has signed double taxation treaties with the following countries: Belgium; Canada; France; Italy; Lebanon; Malaysia; Mauritania; Mauritius; Norway; Qatar; Spain; and Tunisia.

Senegal has also signed the following multilateral trade agreements: ECOWAS (Economic Community of West African States); WAEMU (West African Economic and Monetary Union); and the Agreement establishing the African Continental Free Trade Area.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Bilateral and multilateral treaties signed by Senegal which have not yet been ratified concern the following countries: Egypt; Malaysia; Portugal; Qatar; Syrian Arab Republic; Taiwan Province of China; and Tunisia.

We do not have the relevant information for why they have not yet been ratified.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is not yet a model BIT. In common practice, the provisions below are mainly representative of Senegalese BITs:

- Fair and equitable treatment.
- National treatment.
- Most-favoured-nation.
- Definitions.
- Promotion and protection of investments.
- Treatment of investments.
- Right to regulate.

- Expropriation and compensation.
- Compensation for losses.
- Repatriation and transfer.
- Subrogation.
- Settlement and disputes between one contracting party and investors of the other contracting party.
- Settlement and disputes between the contracting parties.
- Scope of application.
- Entry into force.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Yes. For more information you can refer to the Ministry of Foreign Affairs' website and the website of the General Secretariat of the Government.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

In the abovementioned websites, there are no official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Yes, Senegal is a party to the New York Convention, the Washington Convention and the Mauritius Convention.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Yes, Senegal has an investment Code (Law No. 2004-06 relative to the Investment Code).

All disputes resulting from the interpretation or application of this Code that have not found amicable solutions are settled by the

Senegalese courts in accordance with the laws and regulations in force in Senegal.

Disputes between a foreign natural or legal person and the Republic of Senegal concerning the application of this Code shall be settled in accordance with the conciliation and arbitration procedure resulting from:

- mutual agreement between the two parties; and
- investment protection agreements and treaties concluded between the Republic of Senegal and the State of which the investor is a national.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

No. In accordance with the Senegalese Investment Code, an investor is any natural person, or legal entity, of Senegalese nationality or foreign nationality, performing under the conditions defined in the Code, investment operations in the territory of Senegal.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Before the ICSID, the Vicat group accused the State of Senegal of violating its bilateral treaty signed with France, including the violation by the State of Senegal of fair and equitable treatment.

- *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21).
- *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* (ICSID Case No. ARB/08/20).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Senegal has indicated its vision with regard to investor-state arbitration in the investment Code. Disputes between a foreign natural person or legal entity and the Republic of Senegal concerning the application of the investment Code shall be settled in accordance with the conciliation and arbitration procedure resulting from:

- the mutual agreement between the two parties; or
- investment protection agreements and treaties concluded between the Republic of Senegal and the State, of which the investor is a national.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

In Senegal, Act No. 2012-30 of 28 December 2012 entrusts the National Anti-Corruption Programme (French acronym of OFNAC) with the mission of prevention and fight against fraud, corruption, related practices and related offences. Although it is often seen to be public officials who engage in this, corruption is also present in the private sector. It creates obstacles to growth and development and must therefore be fought with vigor and determination. It discourages private investment, reduces the resources available for infrastructure spending, fuels political and social tensions, and leads

affected countries to drift and instability. It distorts the rules of the democratic game and the market economy.

Senegal publicly demonstrates its determination to eradicate corruption and has adopted a strategic plan of combatting fraud and corruption.

Senegal has remained constant in respect of the international conventions that it has ratified.

Among these are:

- The United Nations Convention against Corruption (2003).
- The United Nations Convention against Transnational Organized Crime (2003).
- The African Union Convention on Preventing and Combating Corruption (2003).
- The Protocol of the Economic Community of West African States (ECOWAS) against corruption (2001).
- The Extractive Industries Transparency Initiative (2003).

Investment treatment obligations require the host State to grant foreign investors, on the one hand, treatment similar to that accorded to nationals (national treatment) and, on the other hand, treatment similar to that granted to third-country nationals (most-favoured-nation treatment). These obligations are provided for in all existing Senegalese BITs, with the exception of BITs with Romania, Sweden and Switzerland which contain only a most-favoured-nation clause and a no-national treatment clause.

Investment represents capital employed by any natural person, or legal entity, for the acquisition of movable, tangible and intangible assets and to ensure turnover, essential for the creation or extension of companies. Senegal is in favour of investment operations on its territory in accordance with the laws and regulations in force.

In Senegal, the National Climate Change Committee (COMNACC) has become a central platform for inter-ministerial cooperation on climate change. It also plays a key role in assisting with the development of national and subnational climate change projects. Several State agencies, NGOs, and civil society organisations are members of the COMNACC.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

As far as we know, Senegal has not yet given notice to terminate any BITs or similar agreements.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Among investor-state cases, we can cite:

- the Kumba Iron Resources group against the State of Senegal;
- *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21);
- *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* (ICSID Case No. ARB/08/20);
- *African Petroleum Senegal Limited v. Republic of Senegal* (ICSID Case No. ARB/18/24);
- *Senegal v. ArcelorMittal* (ICC, 3 September 2013, Partial award);
- the Vicat Group against the State of Senegal; and
- the EEXIMCOR Afrique S.A Company against the State of Senegal; etc.

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

One main example that highlights this is when the Kumba Iron Resources group appealed to the International Chamber of Commerce and condemned Senegal to pay \$75 million in compensation, including \$60 million directly to Kumba Iron Resources over five years, with the remaining \$15 million to be used as an investment in social projects. Senegal enforced this award.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Not to our knowledge.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

Not to our knowledge.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Not to our knowledge.

## 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

In the context of investment arbitration, the parties may provide for the use of “third-party funders” who provide the funds to conduct the arbitration proceedings against a share of the outcome of the case. In our knowledge, Senegal is not yet committed to this funding.

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

Please refer to question 5.1.

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Please refer to question 5.1.

## 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Yes. At an international level, there is the International Criminal Tribunal; and at a regional level, there is West Africa’s Community Court of Justice, which applies only to questions regarding human

rights violations. There is also the Common Court of Justice and Arbitration (CCJA), based in Ivory Coast, which can only decide “on the final decisions rendered by the appellate courts of the States Parties in all cases raising questions relating to the application of the OHADA Uniform Acts and the Regulations provided for in Treaty, with the exception of decisions applying criminal sanctions”.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Yes, in the context of the OHADA exequatur. The OHADA Treaty provides that the judgments of the Common Court of Justice and Arbitration shall be enforced in the territory of each State Party in the same conditions as decisions of national courts.

The national courts competent to deal with procedural issues arising out of arbitration are the relevant Grand Courts (regarding Articles 22 and 30 of the OHADA Uniform Act on Arbitration), and the relevant court of appeal, (regarding Articles 22 and 30 of OHADA Uniform Act on Arbitration). Arbitration proceedings are processed here.

#### 6.3 What legislation governs the enforcement of arbitration proceedings?

The legislation that governs the enforcement of arbitration proceedings are the following:

- Decree No. 2016-1192 laying down the national court competent for State cooperation in the context of the Uniform Act on the Law of Arbitration.
- Decree No. 2016-1447 of 27 September 2016 on the designation of the National Authority to affix the executor formula on the judgments of the CCJA and the awards that have been granted by this Court or, where appropriate, its President.

#### 6.4 To what extent are there laws providing for arbitrator immunity?

CCJA Arbitrators benefit from Diplomatic Privileges and Immunities under Article 49 of the OHADA Treaty. Judges may also be prosecuted for acts performed outside the performance of their duties only with the authorisation of the Court.

#### 6.5 Are there any limits to the parties’ autonomy to select arbitrators?

The will of the parties in the constitution of the arbitral tribunal is more important in the arbitration of the uniform act than in that of the CCJA. According to Article 5 paragraph 1 of the Uniform Act: “The arbitrators shall be appointed, dismissed or replaced in accordance with the agreement of the parties”.

On the other hand, in the CCJA arbitration, the last word in the constitution of the arbitral tribunal belongs to the CCJA.

#### 6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

If the implementation of the arbitration clause fails, an arbitration agreement can be signed between the Parties. The arbitration agreement is an arbitration convention entered into after the dispute arises.



### 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, the support judge in the OHADA uniform act, which in this case is the judge competent in the State Party, intervenes in case of difficulties of constitution of the arbitral tribunal according to the terms of Articles 5, 7 and 8 of the uniform act on the arbitration law. His field of intervention includes appointment, disqualification and the replacement of arbitrators.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

With regard to arbitration conducted under the auspices of the Common Court of Justice and Arbitration, the administrator of the registry of the Supreme Court is appointed in Senegal to stamp the executor formula on the judgments of the CCJA and the sentences which have received the exequatur of that Court or of its President, as the case may be. Without this stamp, judgments of the CCJA and the sentences which have received the exequatur cannot be enforced in Senegal.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

In the case where one of the parties is reluctant, forced execution can be sought. The exequatur provided for by the Uniform Act on the Right of Arbitration should be distinguished from the CCJA Community Exequatur.

According to Article 30.6 of the CCJA Arbitration Rules, “an exequatur cannot be refused and the opposition to exequatur is only open in the following cases:

- if the arbitrator has ruled without an arbitration agreement or on a null or expired agreement;
- if the arbitrator has ruled without complying with the mission entrusted to him;
- when the principle of the adversarial procedure has not been respected; and

- if the sentence is contrary to international public order (or international public order States Parties for OHADA Uniform Act relative to Arbitration Law)”.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

More and more, the voluntary enforcement of awards made against a State party to the OHADA Treaty poses some difficulties in the implementation. Paragraph 2 of Article 2 of the OHADA Uniform Act on Arbitration law gives legal entities under public law in the OHADA area the possibility of concluding arbitration agreements and authorises them to do it at the same time, to waive their immunity from jurisdiction. Senegal agrees to waive its sovereign immunity by the signature of the arbitration agreement.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

Senegal has adopted Law No. 2002-12 of 15 April 2002 on the Code of Civil Obligations, which stipulates that there is no compulsory execution against the State, local authorities and public institutions (Article 194). By way of exception, the State may waive its immunities from jurisdiction and execution by signing an arbitration agreement.

In the context of the OHADA arbitration, whose binding and enforceable nature of awards is affirmed, respectively, in Articles 23 of the Uniform Act on the Right of Arbitration and Article 27 of the CCJA Arbitration Rules, such awards may be subject to compulsory execution, in the absence of spontaneous execution, by virtue of the principles of the binding force of the contract and the *bona fide* performance of the contract. But the acceptance of an arbitration agreement and, therefore, the waiver of immunity, do not entail the distrainability of property assigned to the exercise of a public service mission.

In the grand scheme of things, it appears that the special status of commercial companies with public capital offers special protection in OHADA law for the simplified procedures of debt collecting and enforcement, in particular because of the extremely important limits attached to the elusive goods which make the liquidation difficult to conceive.

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GENI & KEBE is full-service commercial law firm providing legal services in sub-Saharan Africa. We provide advice and advocacy to companies, States and State entities in various aspects of law with a focus on oil and gas, arbitration, mergers and acquisitions, finance, corporate, infrastructure, tax, and employment. GENI & KEBE has a team of over 20 lawyers based in our offices in Dakar, Mbour and Tambacounda in Senegal and Abidjan in Côte d'Ivoire. We also work with affiliate firms in 14 sub-Saharan countries to provide services across the region.

# Singapore

Allen &amp; Gledhill LLP

Chua Kee Loon



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Singapore currently has 41 (Ministry of Trade and Industry, “International Investment Agreements”, <https://www.mti.gov.sg/MTIInsights/Pages/IAs.aspx> (accessed 5 September 2018)) bilateral treaties (“BITs”) and 17 regional investment agreements and free trade agreements (“FTAs”) (Excluding the China-Singapore FTA (1 January 2009)), which incorporates the provision of the ASEAN-China FTA (15 February 2010) by reference) with investment chapters in force (“Investment Agreements”). (See also, Enterprise Singapore, “Singapore Free Trade Agreements”, <https://ie.enterprisesg.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/Singapore-FTA> (accessed 5 September 2018).) Where there is an overlap in coverage between the various Investment Agreements, the later treaty would typically specify that it is to operate the earlier treaty without prejudice. As a result, rights and obligations under the various Investment Agreements would remain in force. (See, e.g., ASEAN-China FTA (15 February 2010), Article 18.) For example, the investment relationship between Singapore and China is governed by the Singapore-China BIT (7 February 1986), the China-Singapore FTA (1 January 2009) and the ASEAN-China FTA (15 February 2010).

However, one exception is the Singapore-Peru FTA (1 August 2009). Article 10.20 thereof provides that “all the rights and obligations derived from [the Singapore-Peru BIT (27 February 2003)] will cease to have effect on the date of entry into force of this Agreement”.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

In 2014, Singapore and the European Union (“EU”) concluded the negotiations of the Investment Protection Chapter of the EU-Singapore FTA (“EUSFTA”). However, the ratification of the EUSFTA has been delayed because of the European Commission’s decision to request for a European Court of Justice opinion on its competences with regard to the EUSFTA. (See, Ministry of Trade and Industry, “Singapore and the European Union Initial the Investment Protection Chapter” press release on the EUSFTA (22 May 2015) and, Ministry of Trade and Industry and European Union Delegation to Singapore, “Singapore and the European Union Affirm Commitment to Putting Free Trade Deal in Place”,

joint press release on the EUSFTA (8 March 2017) (<https://www.mti.gov.sg/MTIInsights/Pages/EUSFTA.aspx>).)

Separately, Singapore ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) on 19 July 2018. (Ministry of Trade and Industry, “Singapore Ratifies the Comprehensive and Progressive Agreement for Trans-Pacific Partnership”, press release on the CPTPP (19 July 2018) <https://www.mti.gov.sg/MTIInsights/Pages/CPTPP.aspx>). The CPTPP is an FTA between 11 members of the Asia-Pacific Economic Cooperation (“APEC”). It will enter into force 60 days after six of the 11 ratify the Agreement. As of 5 September 2018, Singapore is the third nation to do so after Mexico and Japan.

In addition, Singapore has also signed BITs with Colombia, Burkina Faso, Cote d’Ivoire, Kenya, Mozambique, Nigeria and Rwanda, but these agreements are not yet in force.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Singapore has not developed a model BIT. However, it has been noted that the format and language of its BITs since the early 1990s appear “remarkably similar”, and generally adopt the substantive provisions developed by the world’s leading capital exporting nations. (Samuel Wordsworth, “Investment Treaty Arbitration” in David Joseph & David Foxton, *Singapore International Arbitration: Law and Practice* (LexisNexis, 2<sup>nd</sup> Ed, 2018) ch 13 at para [2.4].) The learned authors however note that the Singapore-Mexico BIT (3 April 2011) “repeatedly and significantly departs” from this apparent similarity and trend. See also, Paul Stothard *et al*, “Investment Protection and International Dispute Resolution in Singapore” in *Arbitration in Singapore: A Practical Guide* (Sundares Menon & Denis Brock eds) (Sweet & Maxwell, 2014) ch 20 at paras [20.063] and [20.064].) This set of key common provisions includes protections related to fair and equitable treatment, full protection and security, unlawful taking and expropriation. Many of Singapore’s BITs also include provisions regarding compensation for loss after war or other armed conflict, subrogation and transfer of investments. Consistent with international practice, Singapore’s BITs also utilise broadly drafted definitions for terms such as “investment” and “investor”.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Where they exist, Diplomatic Notes and Protocols are published together with the text of the treaty. (See, e.g., Agreement between the

Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments (1986) and Singapore-Germany BIT (1975).)

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Singapore Government has not published any official commentary concerning the intended meaning of treaty or trade agreement clauses. However, it has been noted that these treaties are “designed to promote greater investment flows between two countries”, and provide a “legal framework setting out investment norms and protection while investing in the other country”. (Enterprise Singapore, “International Agreements” <https://ie.enterprisesg.gov.sg/Trade-From-Singapore/International-Agreements> (accessed on 5 September 2018).) Such expressed intention is likely relevant in interpreting the treaty or trade agreement clauses.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Singapore is a party to the New York Convention and the Washington Convention, but not the Mauritius Convention on Transparency.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

There are no specifically designated domestic investment laws or an Investment Act in Singapore. However, Singapore enacted the Arbitration (International Investment Disputes) Act to implement the ICSID Convention and the International Arbitration Act to give effect to the Model Law and the New York Convention.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Some of Singapore's BITs require investments to be specifically approved in writing, whether by the Singapore government or a designated competent authority. For example, Article 1(1)(ii) of the Singapore-Germany BIT (1 October 1975) requires investments to be “approved in writing by the Government of the Republic of Singapore”. By contrast, protection under the Singapore-Kuwait BIT (15 April 2013) applies to investments “specifically approved in writing by the Singapore Economic Development Board or any other body or authority so designated in writing notified by the Government of the Republic of Singapore to the other Contracting Party and upon such conditions, if any, as it shall deem fit” under Article 2(a). (See also, similar clauses in Singapore-China BIT (7 February 1986), Article 2(1)(b) and Singapore-Poland BIT (29 December 1993), Article 2(1)(b).)

Failure to adhere to these registration requirements could exclude an otherwise eligible investment from protection under the treaties. (*Yaung Chi Oo v Myanmar* ASEAN ID Case No ARB/01/1, Award 31 March 2003.) Investors are thus well advised to check the requisite administrative preconditions to ensure that qualifying investments are registered at the outset.

Additionally, business entities in Singapore are licensed and regulated by the Accounting and Corporate Regulatory Authority. Investors can use one of the many business vehicles to set up a local presence in Singapore; e.g., private limited company, sole proprietorship, partnership, limited partnership and limited liability partnership. Each has its own benefits, registration requirements and is governed by its own set of legislation and regulations. (Accounting and Corporate Regulatory Authority, “Setting up a Local Company” <https://www.acra.gov.sg/components/wireframes/howToGuidesChapters.aspx?pageid=1241> (accessed on 5 September 2018).) Further, certain forms of business involved in the banking, finance and insurance industries and some manufacturing businesses require special licensing. (Singapore Economic Development Board, “Incorporating Your Business” <https://www.edb.gov.sg/en/how-we-help/setting-up.html> (accessed 5 September 2018).)

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536, the Singapore Court of Appeal confirmed that the rules of interpreting a BIT are governed by the Vienna Convention on the Law of Treaties; particularly, the process of interpretation under Article 31 is a holistic one, embracing the three aspects of ordinary meaning, context, and object and purpose (at [125]).

Subsequently, the Singapore High Court in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 (“*Lesotho*”) further observed that “Article 32 of the VCLT ‘cautiously qualifies’ the textual approach enshrined in Article 31 by permitting recourse to further means of interpretation in certain circumstances” (at [98]). Unfortunately, there was little opportunity for the Court to elaborate further on this issue based on the facts.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Singapore has long indicated its intention to “steer Singapore's overall development and growth as a hub for international dispute resolution, including in the area of investment arbitration”. (Mahdev Mohan, Nominated Member of Parliament, “Written Answer by Minister for Law, K Shanmugam, to Parliamentary Question on Proposed Reforms to Investor-state Arbitration Regime”, parliamentary response on Proposed Reforms to Investor-State Arbitration Regime (7 November 2017) <https://www.minlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/written-answer-by-minister-for-law--k-shanmugam--to-parliamentary9.html>.) To this end, policies and regimes are implemented to poise Singapore as an ideal option for investor-State arbitration both as a venue for ICSID arbitrations and as a seat for non-ICSID investor-State arbitrations. Pertinently, the SIAC promulgated its Investment Arbitration Rules in 2017, becoming the first private institution to introduce a specific set of arbitration rules for investment arbitrations.

Moreover, Singapore's judiciary enjoy a reputation of independence and impartiality, and is viewed as one attuned to the sophisticated needs of modern business and commerce. (Singapore typically scores high on the rule of law and corruption indicators. See World Bank, “Country Data Report for Singapore, 1996–2014 (English)” (2015)



<http://documents.worldbank.org/curated/en/666041467993465894/Country-data-report-for-Singapore-1996-2014> (accessed 5 September 2018).) Local jurisprudence also evidences a “pro-arbitration” stance (*PT Central Investindo v Franciscus Wongso and Ors* [2014] 4 SLR 978 at [55]. See also, Sundaresh Menon, The Honourable, The Chief Justice, patron’s address at the Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/ciarb-centenary-conference-patron-address.pdf>) and a steadfast observance of the principles underlying modern international arbitration – confidentiality of the process, party autonomy and the finality of arbitration awards. (See Michael Hwang and Charis Tan, “New Developments in Arbitration in Singapore” (2009) 5(2) *Asian International Arbitration Journal*, 210-222.)

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country’s treaties?

MFN clauses are common to most of Singapore’s Investment Agreements. However, they generally do not extend to matters relating to customs, monetary, tariff, trade or taxation. (See *e.g.*, Singapore-Sri Lanka BIT (30 September 1980), Art 5; Singapore-Turkey BIT (27 March 2010), Art 5; Singapore-Kuwait BIT (15 April 2013), Art. 4; Singapore-Qatar BIT (25 April 2018), Art 4. See also, Paul Stothard *et al*, *supra* n 8, at para [20.097]; Samuel Wordsworth, *supra* n 8, at paras [4.20]-[4.21].) Recent treaties require the host State to accord investors’ treatment as no less favourable than that it accords “in like circumstances”, to investors of any third State. (See *e.g.*, Qatar-Singapore BIT (2018), Art 4(1)(a).) This clarifies that an investor may only complain of differences in the treatment of otherwise comparable investments. (Samuel Wordsworth, *supra* n 8, at para [4.7].)

By contrast, national treatment clauses are less common in Singapore’s Investment Agreements. (*Ibid.*, at para [4.11].) In Singapore’s recent FTAs and regional investment agreements, the tendency has been to extend national treatment obligations to the “establishment” of investments. (*Ibid.*) This extension is significant as foreign investors are entitled to make investments on the same basis as local investments. As a result of such provision in the Singapore-US FTA (1 January 2004), US investors do not have to pay the higher rate of stamp duty on land acquisitions levied on other foreign buyers.

Fair and equitable treatment (“FET”) clauses feature in almost all of Singapore’s investment treaties with a notable degree of consistency – most require investments be accorded as “fair and equitable treatment” and shall enjoy “protection and security” (Singapore-France BIT (18 October 1976), Art 2(1); Singapore-Hungary BIT (1 January 1999), Art 3(2)) or “full protection and security” (Singapore-Oman BIT (12 October 2008), Art 4(1); Singapore-UAE BIT (8 April 2012), Art 3(2)).

Moreover, many of Singapore’s FTAs supplement FET and full protection and security using the wording “in accordance with customary international law”. (Two exceptions are the ACIA, Article 11 and the ASEAN-China FTA (15 February 2010), Art 7.) Such reference likely allows some flexibility in the FTAs to take into account the evolving standards of protection under customary international law.

One of Singapore’s more recent Investment Agreements include transparency clauses. For example, Art. 39 of the ASEAN Comprehensive Investment Agreement provides that “the disputing Member State may make publicly available all awards, and decisions produced by the tribunal”, subject to the redaction of confidential information. The EUSFTA appears to go further. Art. 3.16 read with Annex 8 thereof states that proceedings before the Tribunals

will be fully transparent. All documents will be made publicly available and all hearings will be open to the public. Interested third parties will also be allowed to make submissions in proceedings before the Tribunal.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No. However, Indonesia notified Singapore of its intention not to renew the Singapore-Indonesia BIT which expired on 20 June 2016. (“Indonesia Not Renewing 2005 Bilateral Agreement” *TodayOnline* (5 June 2015) <https://www.todayonline.com/world/asia/economic-ties-strong-despite-jakarta-not-renewing-treaty> (accessed 5 September 2018).) Nonetheless, Indonesia is a member of the ASEAN and remains a party to the ACIA and Investment Agreements and FTAs concluded by ASEAN.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Singapore has yet to be involved as a respondent State in any investor-State case. However, the growing popularity of Singapore as the seat for non-ICSID investor-State arbitrations have resulted in related matters being brought before the Singapore courts. The following recent decisions are of note:

*Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536 arose out of an UNCITRAL arbitration seated in Singapore, brought by a Macanese investor against Laos under the China-Laos BIT. One of the issues was whether the BIT extended to Macau, which was handed over to China *after* the conclusion of the treaty. The Tribunal concluded that the BIT applied and it had jurisdiction to hear the dispute. Dissatisfied, Laos sought to set aside the Tribunal’s decision before the Singapore courts. In a formidable and comprehensive judgment, the Singapore Court of Appeal dismissed Laos’ application on the following grounds: (1) the China-Laos BIT applied to Macau and the claimant qualified as an “investor”; and (2) the claim fell within the dispute resolution clause of the BIT.

More recently, Singapore heard its first case in which an investor-State arbitral award was sought to be set aside on the merits in *Kingdom of Lesotho v Swissbourn Diamond Mines (Pty) Ltd* [2017] SGHC 195. The arbitration was administered by an *ad hoc* tribunal constituted under the auspices of the Permanent Court of Arbitration and Singapore was elected as the seat of arbitration. Following an exhaustive review on the issues of jurisdiction and admissibility, the Singapore High Court found that the Tribunal lacked jurisdiction and set aside the entire award. As of 5 September 2018, the appeal is pending before the Court of Appeal.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

There has not been any reported investor-State award made against Singapore.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

No. There is yet to be a reported ICSID case involving Singapore.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no satellite litigation arising from an investor-State arbitration involving Singapore, save the observations in question 4.1 above.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

The Singapore courts have shown that it will not shy away from performing their functions under the IAA, even if it is to interpret and apply treaties to which Singapore is not a party. In this regard, Singapore has adopted a *de novo* standard of review for investment arbitration awards, thereby rejecting the argument that a more deferential standard of review should apply *vis-à-vis* commercial arbitration awards.

### 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

Yes. Singapore amended its laws in March 2017 to allow third-party funding for international arbitrations (including, investor-State arbitrations) and litigation arising from or out of or in any way connected with international arbitrations. In a similar vein, funding is allowed for the application for a stay of proceedings referred to in Section 6 of the IAA and any other application for the enforcement of an arbitration agreement; and proceedings for or in connection with the enforcement of an award or a foreign award under the IAA. (See, Civil Law Act (Cap 43, 1999 Rev Ed) s 5B, read with Civil Law (Third-Party Funding) Regulations 2017 s 3.)

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There has been no reported case law on this issue in Singapore. (“Jurisdictional Issues and Third Party Funding”, in Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure* (Kluwer Law International, 2016) ch 6 at p 229.)

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Unfortunately, there is a dearth of data on the extent of arbitration funding within Singapore given that this new framework is in its infancy stages. Indeed, the Singapore Ministry of Law recently issued a public consultation to seek feedback on the third-party funding framework. (Consultation Period from 3 April 2018 to 15 May 2018. See, Ministry of Law, “Public Consultation to Seek Feedback on the Third-Party Funding Framework”, <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-third-party-funding.html> (accessed 5 September 2018).) Therefore, continued refinements to the third-party funding regime in Singapore should be expected.

Regardless, it is encouraging to note that Singapore saw its first (and seemingly, only) reported instance of arbitration funding in July 2017 (merely three months after it was allowed). (KC Vijayan, “First Third-Party Funding for S’pore Arbitration Case”, *The Straits Times* (1 July 2017).) Additionally, it is indicative that notable third-party funders have since launched offices in Singapore. Such developments foreshadow the growth of arbitration funding in Singapore.

### 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

This issue has not arisen in the Singapore context. The answer would necessarily depend on a plethora of considerations, such as the specific nature and subject matter of the complaint, the terms of the Investment Agreement relied upon and the governing arbitral rules.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Consistent with Singapore’s position on minimal curial intervention, procedural issues should be dealt with by the Tribunal. In this regard, the Tribunal’s procedural orders/directions are not only “insulated” from judicial challenges (insofar that they are not susceptible to being set aside), they may be enforced as a court order. (International Arbitration Act (Cap 143A, 2002 Rev Ed) (“IAA”) s 12. See also, *PT Pukuaifu Indah v Newmont Indonesia* [2012] 4 SLR 1157.) That said, it remains open for a party to seek interim relief from the Singapore courts under limited specified circumstances; (IAA (Cap 143A, 2002 Rev Ed) s 12A) *e.g.*, if the case is one of urgency or the Tribunal has no power or is unable for the time being to act effectively.

#### 6.3 What legislation governs the enforcement of arbitration proceedings?

Section 6 of the IAA mandates a stay of court proceedings in respect of any matter which is the subject of an arbitration agreement.

#### 6.4 To what extent are there laws providing for arbitrator immunity?

An arbitrator shall not be liable for: (1) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (2) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award. (*Ibid*, s 25.)

#### 6.5 Are there any limits to the parties’ autonomy to select arbitrators?

Parties are “free to decide how their tribunal is to be constituted”, (*Bovis Lend Lease Pte Ltd v Jay-Tech Marin & Projects Pte Ltd* [2005] SGHC 91 at [18]) so long as the agreed arrangement is “workable”. (*Insignia Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [34].) In this respect, Article 11(2) of the Model Law “fetters the parties rights to agree an appointment regime that contains no procedure for the Tribunal to be appointed by a third party upon the agreed upon procedure not working”. (David

Mildon & Dominic O’Sullivan, “Commencing an Arbitration and Constituting the Tribunal” in David Joseph & David Foxton, *Singapore International Arbitration: Law and Practice* (LexisNexis, 2<sup>nd</sup> Ed, 2018) ch 4 at para [5.6].)

#### 6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

Yes. In such event, any party may request the President of the SIAC Court or such other persons appointed by the Chief Justice of Singapore to “take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment”. (UNCITRAL Model Law on International Commercial Arbitration (2006 Amended) Art 11(4), read with IAA s 8. The Model Law, with the exception of Chapter VIII thereof, have the force of law in Singapore.) In making the appointment, the designated authority shall have regard to the matters set out at Article 11(5) of the Model Law.

#### 6.7 Can a domestic court intervene in the selection of arbitrators?

Singapore adopted the challenge procedure under Article 13 of the Model Law. In other words, the challenge must first be brought before the Tribunal. (Model Law, *supra* n 38, Art 13(2).) Should the Tribunal reject the challenge, recourse may be had to the Singapore High Court for a final determination. (*Ibid*, Art 13(3), read with IAA (Cap 143A, 2002 Rev Ed) s 8.)

## 7 Recognition and Enforcement

#### 7.1 What are the legal requirements of an award for enforcement purposes?

An ICSID award must be one that “includes any decision interpreting, reversing or annulling an award, being a decision pursuant to the [ICSID] Convention, and any decision as to costs which under the [ICSID] Convention is to form part of the award”. (Arbitration (International Investment Disputes) Act (Cap 11, 2012 Rev Ed) s 2(1).)

By contrast, a non-ICSID investor-State award shall be one that is “a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any order or directions made under section 12”. (IAA (Cap 143A, 2002 Rev Ed) s 2(1). S 12 of the IAA deals with the tribunal’s powers on procedural orders and interim measures.) Furthermore, such award must satisfy the following formal requirements: (Model Law, *supra* n 38, Article 31).

- It shall be made in writing.
- It shall be signed by the arbitrator, or where the tribunal comprises two or more arbitrators, by all or the majority of the arbitrators, provided that the reason for any omitted signature is stated.
- It shall state reasons, unless the parties agreed that no reasons are to be given or the award is an award on agreed terms.

- It shall state its date and the place of arbitration.
- The signed award must be delivered to each party.

#### 7.2 On what bases may a party resist recognition and enforcement of an award?

The Arbitration (International Investment Disputes) Act is silent and does not provide for any other separate basis for resisting an ICSID Award outside of the enforcement/annulment framework contained in the ICSID Convention.

On the other hand, a non-ICSID investor-State award may be resisted on either of the following bases: (IAA s 31(2).)

- (a) A party to the arbitration agreement in pursuance of which the award was made was, under the law, applicable to him under some incapacity at the time when the agreement was made.
- (b) The arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made.
- (c) The applicant was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings.
- (d) The award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration. However, the award may be enforced to the extent that it contains decisions on matters submitted to arbitration.
- (e) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- (f) The award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

#### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

This specific issue has not arisen before the Singapore courts. Nonetheless, the Singapore Court of Appeal’s decision in *Maldives Airports Co Ltd v GMR Male International Airport Pte Ltd* [2013] SGCA 16 is instructive – it was held that the Singapore courts had the jurisdiction and power to grant provisional relief (here, an injunction) against States which have submitted to arbitration.

#### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The Singapore Courts have not had the opportunity to consider whether and in what circumstances should the corporate veil of a State-owned entity be pierced, such that its assets may be used to satisfy an award against the State.

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Chua Kee Loon is the Co-Deputy Head of the Firm's International Arbitration practice. Specialising exclusively in international arbitration, his areas of practice encompass all aspects of commercial, energy and building disputes with a focus on major engineering projects and investments in the South-east Asia region. He has appeared as lead counsel in arbitrations seated not only in the various Asian cities but also further abroad such as London, Geneva and the Hague. Naturally, Kee Loon's extensive experience has seen him involved in international arbitrations conducted under various rules such as the International Chamber of Commerce ("ICC"), Singapore International Arbitration Centre ("SIAC"), Asian International Arbitration Centre ("AIAC"), United Nations Commission on International Trade Law ("UNCITRAL") and the Vietnam International Arbitration Centre ("VIAC"). Kee Loon's expertise is recognised in *The Legal 500 Asia Pacific*, where he is described as "quick minded", "creative" and a "strategic thinker".

## ALLEN & GLEDHILL

Allen & Gledhill is an award-winning full-service South-east Asian commercial law firm which provides legal services to a wide range of premier clients, including local and multinational corporations and financial institutions. Established in 1902, the Firm is consistently ranked as one of the market leaders in Singapore and South-east Asia, having been involved in a number of challenging, complex and significant deals, many of which are the first of its kind. The Firm's reputation for high-quality advice is regularly affirmed by the strong rankings in leading publications, and by the various awards and accolades it has received from independent commentators and clients. Together with its associate firm, Rahmat Lim & Partners in Malaysia and office in Myanmar, Allen & Gledhill has over 450 lawyers in the region, making it one of the largest law firms in South-east Asia. With this growing network, Allen & Gledhill is well-placed to advise clients on their business interests in Singapore and beyond, in particular, on matters involving South-east Asia and the Asia region.



# Sweden

Hannes Snellman Attorneys Ltd

Pontus Ewerlöf



Andreas Johard



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Sweden currently has bilateral investment treaties in force with 65 countries, and two additional treaties under sunset provisions. The only multilateral investment treaty to which Sweden is a contracting state is the Energy Charter Treaty (ECT).

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Sweden has entered into but not ratified bilateral investment treaties with the Philippines, Nicaragua and Zimbabwe, respectively.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is a model agreement, created in 1995 and then updated in 2003. However, this is not publicly published with reference to confidentiality.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

No, Sweden does not publish diplomatic notes exchanged with other states.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

No, there are no official commentaries published by the Swedish Government.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Sweden has signed all three, the details of which are listed below:

- (1) Yes.
- (2) Yes.
- (3) Yes (not yet ratified).

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

No, Sweden does not have an investment law.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Sweden currently has no investment review, but there are two Swedish Government Official Reports suggesting it. In addition, negotiations in the European Union are currently under way on an investment review regulation. When this comes into force, grounds for refusal will be limited to matters of security and public order. States may not be able to decline investments for other reasons.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The case law on treaty interpretation in Sweden is scarce. In fact, the only cases that remotely include treaty interpretation are those relating to setting aside proceedings, in which the treaty interpretation often concerns the issue of jurisdiction of the arbitral tribunal. Recent setting aside cases relevant in this respect are, e.g., *Russian Federation v. Ciudad Grupo Santander et al* (Svea Court of Appeal, Case No. 9128-14, 18 January 2016), and *The Republic of Kazakhstan v. Ascom Group S.A. et al* (Svea Court of Appeal, Case No. T 2675-14, 9 December 2016).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

Sweden is favourable towards investor-state arbitration. This is accentuated by the fact that the SCC Arbitration Rules is the third most commonly-used set of arbitration rules in investment disputes. This makes the SCC the second largest arbitration institute in the world, after the ICSID, for the administration of investment disputes under its own rules.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

In general, Sweden has no official policy with respect to such matters. The last treaty that was negotiated and entered into was modelled on older versions of bilateral investment treaties and thus did not focus on such matters in particular. It should further be noted that the existing treaties concern investment protection and not access to the market, which is why such matters have not been singled out specifically. It should be mentioned, however, that MFN clauses have been long included in Swedish BITs. Moreover, the aim has been to include indirect investments with references to, *inter alia*, shareholding. In later BITs, this has been clarified by references to indirect investments already in the definition of an "investment", see, e.g., the Sweden-Algeria BIT of 2005. As regards corruption, Sweden has been part of establishing the Mauritius Convention for increased transparency. However, this took place only after Sweden entered into its last bilateral investment treaty. Subsequently, after 2009 the European Commission negotiated and entered into investment treaties, as investment protection is part of EU's Common Commercial Policy and the Member States in the EU have thus delegated this competence.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No. Previous BITs or similar agreements have either been unilaterally denounced by both parties or replaced by new treaties. Two current treaties are governed by sunset provisions and will consequently expire.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Sweden has never been involved in an investor-state dispute in the role as a respondent state.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

This is not applicable.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

This is not applicable.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

This is not applicable.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

This is not applicable.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

Yes. There exists no legislation or other rules that specifically set out to regulate the funding of investor-state claims.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

Since a party is not obliged to disclose whether it is receiving funding for a dispute, there is no recent case law on the issue of litigation/arbitration funding.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Since a party is not obliged to disclose whether it is receiving funding for a dispute, it is difficult to establish to what extent litigation/arbitration funding occurs in Sweden. It is, however, fair to say that third-party funding of investor-state cases have increased in recent years.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

No, tribunals cannot review criminal investigations and judgments of the domestic courts.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

The Courts have jurisdiction to facilitate arbitration in various ways, e.g., in the appointment or discharge of arbitrators, and the taking of evidence, even witness testimonies under oath. Moreover, the Courts may handle interim/security measures in relation to arbitration. The Courts of Appeal are the exclusive forum for the setting aside and invalidation claims, which may only be based on procedural grounds. Pursuant to the anticipated new arbitration act, the parties will be able to appeal the arbitrators' decision on jurisdiction to the Courts of Appeal.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitral awards rendered in Sweden are enforceable pursuant to Section 3 (1) of the Swedish Enforcement Code. With respect to foreign arbitral awards, the Swedish Arbitration Act is applicable. Foreign arbitral awards must be recognised by the Svea Court of Appeal through an exequatur procedure, provided that the New York Convention is applicable. If the Washington Convention is applicable, the arbitral award can be enforced in the same manner as if the award was domestic, in accordance with the Swedish Act on Recognition and Enforcement of Arbitral Awards in Certain International Investment Disputes (1966:735).

### 6.4 To what extent are there laws providing for arbitrator immunity?

There are no laws in Sweden that provide for arbitrator immunity. Accordingly, arbitrators may be sued for the reimbursement of fees, provided that it can be demonstrated that they have not acted with reasonable care or skill, or if they have decided on unreasonable high fees. Arbitrators are further liable for damages incurred due to neglect or intent while performing their duties. Arbitrators may also be subpoenaed to give testimony in challenge proceedings.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

No, save for applicable rules on conflict of interest.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the opposing party fails to appoint an arbitrator within the stipulated time that has been given, the District Court shall appoint an arbitrator upon request by the first party. The same applies if an appointed arbitrator resigns or is discharged, then the District Court shall, upon request by a party, appoint a new arbitrator. If the arbitrator that resigns or is discharged was appointed by a party, the District Court shall, unless there are special circumstances against it, appoint an arbitrator proposed by the same party.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, upon request by either of the parties, see above under questions 6.2 and 6.6.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

The award shall be made in writing and signed by the arbitrators. It suffices that the award is signed by a majority of the arbitrators, provided that the reason why all of the arbitrators have not signed the award is noted therein. The parties may also decide that the chairman of the arbitral tribunal alone shall sign the award.

Furthermore, the award shall state the place of arbitration and the date when the award is made. The award shall be delivered to the parties immediately.

The award must also state the reasons upon which the arbitral award is based, since the absence of such may result in grounds for challenging the arbitral award.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

Pursuant to Section 54 of the Swedish Arbitration Act (which corresponds to Article 5 of the New York Convention), recognition and enforcement of an international arbitral award may be refused, at the request of the party against whom it is invoked, only if that party demonstrates to the competent authority where the recognition and enforcement is sought, proof that:

- (a) the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

The United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted in 2004 and Sweden ratified this convention on 23 December 2009. In Supreme Court case No. NJA 2011 p.475, a foreign state, the Russian Federation, appealed the lower court's judgment that real property owned by Russia could be subject to execution following an enforcement order of an arbitral award. It was contended that the property in question was used for official purposes and therefore protected from the enforcement order by sovereign immunity. The Supreme Court examined the use of the property and concluded that the property in question was not substantially used for official purposes by the appellant. Hence, the Supreme Court dismissed the appeal and concluded that the property could be subject to enforcement measures.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

This is not applicable.

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Andreas has extensive experience in both competition law and transactions but is specialised in commercial dispute resolution and specifically international arbitration. He is a member of the board of Young Arbitrators Sweden (YAS). Andreas has acted as counsel in both domestic and international arbitrations under, for example, the SCC and the ICC rules, as well as *ad hoc* proceedings. Andreas has further acted as counsel before domestic courts, including the Supreme Court. Andreas' dispute resolution experience encompasses, *inter alia*, the fields of general commercial law, international sales, post M&A, international investment law, complex disputes in the financial sector, construction and energy. Further, Andreas has acted several times as counsel for states in complex setting aside proceedings regarding investments made under the Energy Charter Treaty (ECT).

## HANNES SNELLMAN

Hannes Snellman Attorneys Ltd is a premier Nordic law firm focusing on significant business transactions and complex dispute resolution. Hannes Snellman's dispute resolution practice has a long and proven track record of generating successful results for its clients. Hannes Snellman advises clients in their business disputes, regulatory investigations and cases of insolvency. Hannes Snellman has a wealth of experience in domestic and cross-border litigation, *ad hoc* and administered arbitration proceedings as well as in mediation and other forms of alternative dispute resolution. In addition, Hannes Snellman has vast experience in challenge proceedings, with a particular focus on investor-state arbitration. With a focus on complex international cases, Hannes Snellman provides a dedicated team of experts who litigate and arbitrate disputes across different business sectors and under a wide variety of jurisdictions in an efficient and result-oriented manner.



# Switzerland

Matthias Scherer



Lorraine de Germiny



LALIVE

## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Switzerland has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and is one of the States with the largest network of bilateral investment treaties (BITs). As of July 2018, it had concluded 121 such treaties. A list is available at: [https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale\\_Investitionen/Vertragspolitik\\_der\\_Schweiz/overview-of-bits.html](https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz/overview-of-bits.html).

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

This is not applicable in Switzerland.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is no (public) model BIT.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Yes, such diplomatic notes are published.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Government submits a draft of any new BIT to the Parliament. The draft is accompanied by explanatory notes which are public.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Switzerland is a party to all three Conventions.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

No, there is no such law.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

There is no specific investment law. Foreign investments must comply with ordinary Swiss law. In certain areas there are limitations on foreign investments; for instance, acquisition of real estate by foreigners (including through acquisitions of companies whose main assets are real estate).

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Switzerland regularly hosts investment treaty arbitrations. Certain cases have become public when a party has sought to annul the award before the Swiss Federal Supreme Court (which has exclusive jurisdiction to deal with all “set aside” requests). These are summarised in Matthias Scherer & Veijo Heiskanen, *Domestic review of investment treaty arbitrations: the Swiss experience*, ASA Bulletin 2009, 279.

Since then, a number of other cases have become known where an arbitral award based on a BIT was brought before the Swiss Federal Supreme Court, including:

- 4A\_157/2017 of 14 December 2017: Dispute under the Dutch-Polish BIT.
- 4A\_507/2017 of 15 February 2018: Greek-Serbian BIT.
- 4A\_616/2015 of 20 September 2016: French-Vietnamese BIT.

- 4A\_34/2015 of 6 October 2015 (Energy Charter Treaty).
- 4A\_98/2017 of 20 July 2017 (Energy Charter Treaty).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The policy is explained on the webpage of the Swiss State Secretariat of Economic Affairs (SECO): [https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale\\_Investitionen/Vertragspolitik\\_der\\_Schweiz.html](https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz.html).

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

There is no model BIT. Some or all of these issues may be covered. As to transparency, Switzerland has signed the Mauritius Convention.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

In the past, BITs with South Africa, India and Indonesia were terminated.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

Switzerland has not been a respondent in any known investment treaty case. Swiss investors are regularly claimants in treaty disputes against States that have entered into investment treaties with Switzerland. (See Matthias Scherer, *Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties*, in ASA Bulletin 2015, 66, available at: [http://www.lalive.ch/data/publications/07\\_p\\_66\\_Article\\_Scherer.pdf](http://www.lalive.ch/data/publications/07_p_66_Article_Scherer.pdf).)

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

There has been no known treaty award made against Switzerland.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

There has been no ICSID award made against Switzerland.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There were no such proceedings (see question 4.3 above).

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Switzerland regularly hosts investment treaty arbitrations. A certain number of the cases have become public when a party sought to

set aside an award before the Federal Supreme Court. Please see the answer to question 3.1 above. The cases were very different in nature, and no common trend can be identified. The definition of investments eligible under the BITs, and the BITs' scope of application in general, are often raised as grounds for annulment.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

This is not a matter addressed by Swiss arbitration law or case law of the Federal Supreme Court.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

This is not applicable.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

Third-party funding of international arbitration is increasing in Switzerland but remains uncommon for court litigation.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Arbitral tribunals cannot review such investigations or judgments.

### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

According to Articles 184 and 185 of the Swiss Private International Law Act (PIL Act), the court at the place of arbitration assists the parties and the arbitral tribunal in setting up the arbitral tribunal and taking evidence.

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Chapter 12 of the PIL Act governs international arbitration in Switzerland, and the enforcement of agreements to arbitrate.

### 6.4 To what extent are there laws providing for arbitrator immunity?

The PIL Act does not address this issue.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

The parties have full autonomy. The PIL Act only states that arbitrators must be independent.

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**6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?**


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The arbitrator can be appointed by the courts at the place of arbitration (Article 179 PIL Act). In some cases the court will also examine whether the impossibility to apply the chosen method has an impact on the validity of the arbitration agreement.

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**6.7 Can a domestic court intervene in the selection of arbitrators?**


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Yes, a domestic court may intervene in the absence of a chosen method or if the chosen method fails.

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## 7 Recognition and Enforcement

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**7.1 What are the legal requirements of an award for enforcement purposes?**


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Switzerland has ratified the New York Convention. Foreign arbitral awards will be enforced in accordance with the New York Convention. Swiss domestic awards will be enforced in accordance with Swiss domestic law.

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**7.2 On what bases may a party resist recognition and enforcement of an award?**


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On the grounds available under the New York Convention.

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**7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**


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Supreme Court Decision 5A\_681/2011 dated 23 November 2011 provides guidance regarding the attachment of assets belonging to a foreign State or an instrumentality. An investor who had won an ICSID arbitration against the Kyrgyz Republic (ICSID Case No. ARB(AF)/06/1) tried to attach assets held in Geneva by the International Air Transport Association (IATA) in the name of Kyrgyzaeronavigatsia, a Kyrgyz State company. Pursuant to the case law, three requirements must be met in order for a Swiss court to determine that a State asset is not immune from execution, namely: (1) the foreign State must have acted in a private or commercial capacity (*de iure gestionis*); (2) the transaction out of which the claim against the foreign State arises must have a qualified connection to Switzerland; and (3) the asset must not be intended for uses incumbent upon the foreign State in the exercise of its sovereign authority. (See Matthias Scherer & Sandrine Giroud, *Swiss Federal Supreme Court provides guidance on rules of State immunity applicable to enforcement of ICSID awards*, Kluwer Arbitration Blog, December 2011, available at: <http://arbitrationblog.kluwerarbitration.com/2011/12/13/swiss-federal-supreme-court-provides-guidance-on-rules-of-state-immunity-applicable-to-enforcement-of-icsid-awards/>; see also Sandrine Giroud, *Enforcement against State Assets and Execution of ICSID Awards in Switzerland: How Swiss Courts Deal with Immunity Defences*, ASA Bull. 4/2012, p. 758.)

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**7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**


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See question 7.3 above.

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# LALIVE

LALIVE is an independent international law firm with offices in Geneva, Zurich and London, which is renowned for its expertise in international legal matters; in particular, international commercial and investor-State arbitration.

LALIVE is a pioneer in the field of international investment arbitration and is the only firm in Switzerland to have a significant Swiss and global investment arbitration practice, and is also among the largest investment arbitration practices worldwide. Our investment treaty arbitration specialists regularly act as counsel for investors and States globally and are frequently appointed as arbitrators in high-value, complex disputes arising out of bilateral and multilateral investment treaties, investment contracts, and other instruments, and involving a wide range of industries, including energy, telecommunications, construction and transportation.

Many LALIVE lawyers are recognised as leading figures in the field and hold key positions in international organisations and institutions.



# United Kingdom

Dominic Roughton



David Turner



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## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

The UK is party to more than 14,000 bilateral and multilateral treaties and agreements. As a member of the European Union and the Council of Europe, the UK is party to all major EU treaties (although this is set to change with the UK's exit from the EU in 2019), as well as, *inter alia*, the European Convention on Human Rights, the European Social Charter and the European Convention for the Prevention of Torture.

In the trade and investment field, as a member of the EU, the UK currently enjoys preferential trade agreements, either fully or partly in place, with more than 60 countries. The UK's continued participation in these agreements after Brexit remains unclear. The UK is a member of the New York Convention, the ICSID Convention and the Energy Charter Treaty (ECT). The UK also has one of the greatest numbers of BITs of any country in the world, with more than 90 BITs currently in force.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

The UK has signed but not yet ratified the Mauritius Convention on Transparency in International Arbitration. The UK also has 11 BITs that are signed but not yet ratified, and therefore not in force with: Angola; Brazil; Ethiopia; Gambia; Kuwait; Libya; Qatar; Vanuatu; Zambia; and Zimbabwe.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The first UK Model BIT was produced in 1991. The Model BIT was updated in 2008, and is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>. The UK Model BIT is quite a typical BIT, containing common protections relating to expropriation, fair and equitable treatment, full protection and security, national treatment, free transfer of payments and non-impairment. The Model BIT also contains a "most-favoured nation" clause. The Model BIT provides for reference of investor-state disputes to ICSID for settlement by conciliation or arbitration, or (additionally or as an alternative) to arbitration under the ICC Rules of Arbitration or to *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

The UK uses diplomatic notes to make amendments to the contents or application of its treaties. Perhaps the most significant use in respect of the UK's BITs is to extend their application to the Crown dependencies (Jersey, Guernsey and the Isle of Man) and British overseas territories (such as Bermuda, the Cayman Islands and Gibraltar). Currently, some 30 BITs extend to the Crown dependencies, and some also extend to overseas territories.

The UK has also used diplomatic instruments to make amendments to existing BITs – as with, for example, the Protocol to the (now-terminated) UK-South Africa BIT – and to make provision for territorial succession issues, including, in respect of the succession of Serbia to the former UK-Federal Republic of Yugoslavia BIT.

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The UK Foreign and Commonwealth Office (FCO) issues a guide entitled "Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures" which provides some basic advice on how UK treaties are drafted, signed and ratified. It may be accessed at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/293976/Treaties\\_and\\_MoU\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf).

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

The UK has signed all three, the details of which are listed below:

- (1) The UK is a party to the New York Convention, having signed and ratified the convention on 24 September 1975 (subject to a reciprocity reservation). The UK has also extended the application of the New York Convention to the Crown dependencies (Guernsey, Jersey and the Isle of Man) and certain British overseas territories (Bermuda, the Cayman Islands and Gibraltar).
- (2) The UK is a party to the Washington (ICSID) Convention, having signed the convention on 26 May 1965 and ratified it on 19 December 1966.

- (3) The UK signed the Mauritius Convention on 17 March 2015 but has not yet ratified it.

## 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The UK does not currently have a domestic investment law. As a current member of the EU, the UK is prohibited under the Treaty of Rome from restricting the cross-border inflow of capital from within the EU, subject to certain public interest exceptions. This situation may change following the UK's departure from the EU.

## 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

The UK does not require formal admission of inbound foreign investment, and English law treats foreign-owned businesses identically to UK-owned businesses. However, government approval is required before any company, whether UK- or foreign-owned, can operate in certain regulated sectors, including media and telecommunications, defence, banking, financial services, and energy and water. A certain number of other industries are also subject to licensing, including gambling, waste disposal and food and drink production.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The English High Court issued a significant recent decision concerning the interpretation of BITs in *GPF GP S.à.r.l. v Republic of Poland* [2018] EWHC 409 (Comm). In that case, the High Court overturned parts of a London-seated arbitral tribunal's decision on jurisdiction, in which the tribunal had found that it lacked jurisdiction to hear the majority of the claimant's claims. The High Court, interpreting the BLEU-Poland BIT as part of a *de novo* review of jurisdiction, held that the BIT's prohibition on "state measures that lead to consequences similar to expropriation" could be read to encompass FET breaches and also set out a broad test for an indirect "creeping expropriation" under the treaty.

The judgment reaffirms, as a matter of English law, the textual rule of interpretation of treaties set out by the Vienna Convention on the Law of Treaties, as well as the relevance of the interpretive principle of *effet utile*. The decision appears to indicate a readiness on the part of the English courts to intervene in the jurisdictional findings of UK-seated arbitral tribunals and to take an expansive approach to the interpretation of UK BITs.

Earlier significant English decisions on the interpretation of BITs include *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432 (establishing the principle that the English courts may interpret BITs in exercise of their power to determine jurisdiction under the Arbitration Act) and *Czech Republic v European Media Ventures SA* [2008] 1 All ER (Comm) 531 (broadly interpreting the Czech-BLEU BIT to confer jurisdiction on the arbitral tribunal to determine both liability and quantum for expropriation).

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The UK has a widespread reputation as an arbitration-friendly jurisdiction, and successive UK governments have generally been very favourable to investor-state arbitration. As noted above, the UK has one of the greatest numbers of BITs of any country in the world, with more than 90 BITs currently in force, and the UK legal market is very actively involved in all aspects of investor-state arbitration.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Many of the UK's BITs date back a number of years, before newer generations of BITs were developed addressing such issues. The UK Model BIT in 2008 does not expressly address these issues, although it does preserve some measure of state regulatory discretion by carving out "measures which are necessary to protect national security, public security or public order" from the scope of the MFN/national treatment standard. The UK Model BIT does expressly provide that "investment" covers investments made both directly and indirectly.

However, recent BITs entered into by the UK suggest it is amenable to the inclusion of greater protections for state regulatory discretion, at least in individual instances. For example, the UK-Colombia BIT, which entered into force in 2014, contains a provision preserving the parties' rights to adopt proportionate and non-discriminatory measures to protect the environment. The UK-Morocco BIT, which definitively entered into force in 2002, carves out government aid given in the context of national development programmes and activities from the scope of the national treatment standard.

It remains to be seen whether the UK will seek to include such contemporaneous issues in any new BITs, especially post-Brexit.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No. The only instance to date in which a UK BIT has been terminated is South Africa's termination of the South Africa-UK BIT in 2014. Although the European Court of Justice ruled in a 2018 judgment that intra-EU BITs are incompatible with EU law, it is not certain that this will require the UK to terminate its existing BITs with other EU Member States, given the UK's impending exit from the EU in 2019. However, if the UK negotiates a new trade and investment agreement with the EU after Brexit, this would likely replace the UK's existing BITs with individual EU Member States.

The UK has also replaced three BITs: the UK-Romania BIT (1976) in 1995; the UK-Sierra Leone BIT (1981) in 2000; and the UK-Colombia BIT (1994) in 2010.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

There has been no publicly known investment treaty award rendered against the UK to date. There has been only one known investor-state claim brought against the UK: an UNCITRAL claim notified

in 2006 by an Indian investor under the UK-India BIT, concerning a commercial lease between the claimant and the Corporation of London (*Ashok Sancheti v UK*). Little is known about this claim, including its outcome; its existence was revealed only in a 2008 decision of the UK Court of Appeal in which the claimant unsuccessfully sought to stay related domestic proceedings.

On the other hand, UK nationals have been involved as claimants against other states in more than 70 investor-state claims under UK BITs. Of these claims, over 30 have resulted in final awards; UK investors were partly or wholly successful in approximately 50% of these cases. The most recent known claim involving a UK investor is an ICSID proceeding filed against Turkey in May 2018 by a UK member of the Koza mining and media conglomerate, whose assets were seized by Turkey following accusations of terrorism financing (*Ipek Investment Ltd v Republic of Turkey*).

#### 4.2 What attitude has your country taken towards enforcement of awards made against it?

As noted above, there are no publicly known investment treaty awards rendered against the UK to date.

#### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

As noted above, there are no publicly known investment treaty awards rendered against the UK to date.

#### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

As noted above, there are no publicly known investment treaty awards rendered against the UK to date. In the case of *Ashok Sancheti v UK*, described above, satellite litigation was brought by the claimant under the UK Arbitration Act 1996 seeking to stay related domestic proceedings brought against the claimant by the Corporation of London for non-payment of rent. The Corporation of London opposed the application for a stay, which was unsuccessful both at first instance and on appeal.

#### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

As noted above, there are no publicly known investment treaty awards rendered against the UK to date.

## 5 Funding

#### 5.1 Does your country allow for the funding of investor-state claims?

The UK allows the funding of investor-state claims, and London has developed as a major international market for litigation and arbitration funding. There is, at present, no legislation regulating third-party funding in the UK, and the government has indicated it has no current intention to regulate the sector. However, many funders belong to the Association of Litigation Funders of England and Wales (ALF), whose members are required to adhere to the

voluntary Code of Conduct for Litigation Funders (last updated by the ALF in 2016).

#### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

A significant recent decision concerning the funding of UK-seated international arbitrations was rendered by the English High Court in *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm). In that case, the High Court found that an arbitrator's general power to award costs under the UK Arbitration Act 1996 included the power to award to a winning party the costs of obtaining litigation funding (in the particular case, the High Court found that as a result of the other party's oppressive conduct, the claimant had had no choice but to obtain third-party funding in order to progress its claims). Although the case concerned an international commercial arbitration, the same reasoning could well be applied to any investor-state arbitration seated in the UK.

#### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

As noted above, London is one of the major international markets for litigation and arbitration funding. It is estimated that the amount of assets under management by the 16 main litigation funders operating in the UK now exceeds £1.5 billion.

## 6 The Relationship Between International Tribunals and Domestic Courts

#### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Criminal offences are not arbitrable under English law, and arbitral tribunals cannot revisit criminal judgments. This does not, however, preclude UK-seated tribunals from considering criminal investigations and judgments as part of the factual matrix of a case, and arbitral tribunals are increasingly being called upon to address allegations of criminal conduct (bribery, corruption, fraud) raised by the parties as factual elements of their dispute.

There is no necessary priority given to criminal proceedings over arbitral proceedings under UK law, although the UK courts have a discretion to stay arbitral proceedings in appropriate circumstances (*Akciné Bendrov Bankas v Antonov* [2013] EWHC 131 (Comm)). Whether a UK-seated tribunal may enjoin a state from initiating or continuing criminal proceedings has not yet been considered by the UK courts. However, a set of principles has been emerging on this issue in recent ICSID jurisprudence (emphasising the need for exceptional circumstances to justify the infringement of state sovereignty), and it is possible this jurisprudence might be followed by the UK courts in appropriate circumstances.

#### 6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Under the Arbitration Act 1996, the courts may, on application by one of the parties, exercise a variety of powers in support of arbitral proceedings. The courts may make orders in relation to the taking of evidence, the preservation of evidence, the inspection, preservation, custody, detention or sampling of property, the sale of goods, or grant an interim injunction or appoint a receiver. The courts may

also assist in the appointment of arbitrators, where necessary (see further below) and hear challenges to an arbitral tribunal's substantive findings on jurisdiction by way of *de novo* review (see discussion of *GPF GP SARL v Republic of Poland* above).

### 6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitration proceedings seated in the UK (excluding Scotland) are governed by the UK Arbitration Act 1996, which applies to both domestic and international arbitrations.

### 6.4 To what extent are there laws providing for arbitrator immunity?

The Arbitration Act 1996 provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator, unless the act or omission is shown to have been in bad faith. This immunity does not apply, however, if the arbitrator incurs liability by reason of resigning, unless the court grants relief.

### 6.5 Are there any limits to the parties' autonomy to select arbitrators?

The Arbitration Act 1996 requires that an arbitrator must be impartial. An arbitrator may be removed by the courts, *inter alia*, if circumstances exist giving rise to doubts as to an arbitrator's impartiality, if he or she lacks the qualities required by the arbitration agreement, if he or she is physically or mentally incapable of conducting the proceedings, or if there are justifiable doubts as to his or her capacity to do so.

### 6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting one or more arbitrators fails, and the arbitration agreement contains no agreement on what is to happen in this event (including, by implication, any arbitration rules selected by the parties in the arbitration agreement), then any party may apply to the court to exercise its powers: (a) to give directions as to the making of necessary appointments; (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made; (c) to revoke any appointments already made; and (d) to make any necessary appointments itself.

In addition, if the parties fail to agree even on the procedure to appoint the arbitrator or arbitrators then: (a) if the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after the service of a request in writing by either party to do so; (b) if the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request; and (c) if the tribunal is to consist of three arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request, and the two so appointed shall appoint a third arbitrator as the chair.

### 6.7 Can a domestic court intervene in the selection of arbitrators?

Yes. As noted above, if the parties' chosen method for selecting one or more arbitrators fails, then any party may apply to the court to exercise its powers to give directions, confirm or revoke appointments already made, and/or to make any necessary appointments itself.

## 7 Recognition and Enforcement

### 7.1 What are the legal requirements of an award for enforcement purposes?

As noted above, the United Kingdom is party to the New York Convention (subject to a reciprocity reservation), the ICSID Convention and the Geneva Convention on the Execution of Foreign Arbitral Awards.

The Arbitration Act 1996 provides broadly that an award, whether domestic or foreign, made by an arbitral tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is so given, judgment may be entered in terms of the award.

The Arbitration Act 1996 further provides that an arbitral award rendered in the territory of another party to the New York Convention (a "New York Convention award") shall be recognised as binding on the persons as between whom it was made, and may be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings. Where a party seeks to enforce a New York Convention award, that party must produce the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it, and a translation of each into English if necessary. In *Lombard-Knight (and another) v Rainstorm Pictures Inc* [2014] EWCA Civ 356, the Court of Appeal held that the term "certified" does not require independent certification.

The registration and enforcement of ICSID awards is governed by a separate regime set out in the Arbitration (International Investment Disputes) Act 1966. Enforcement of awards subject to the Geneva Convention is governed by a separate regime set out in the Arbitration Act 1950.

Foreign awards that are subject neither to the New York Convention, the ICSID Convention nor the Geneva Convention may be capable of enforcement either under legislation applicable to the Foreign Judgments (Reciprocal Enforcement) Ordinance, applicable to certain former Commonwealth countries, or under common law principles.

### 7.2 On what bases may a party resist recognition and enforcement of an award?

Where recognition or enforcement of a New York Convention award is sought under the Arbitration Act 1996, the limited statutory grounds on which the courts may refuse recognition or enforcement mirror those set out in Article V of the New York Convention.

Where registration of an ICSID award is sought, the Arbitration (International Investment Disputes) Act 1966, reflecting the terms of the ICSID Convention, provides no substantive statutory grounds on which the courts may refuse registration.

Where enforcement of a Geneva Convention award is sought, the Arbitration Act 1950, like the Arbitration Act 1996, contains a limited number of grounds on which the court may refuse enforcement.

In general, the UK courts adopt a strong pro-enforcement approach, and are reluctant to refuse the enforcement of awards on grounds of public policy (see e.g., in the context of an international commercial award, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 3 WLR 811 (CA), where enforcement was upheld despite allegations that the underlying contract was the product of bribery, the court deferring to the arbitral tribunal's finding that the contract was not illegal). Moreover, the UK courts have indicated that they have discretion, at least in exceptional circumstances, to enforce an



arbitral award notwithstanding that it has been set aside at the seat: see *Malicorp v Government of the Arab Republic of Egypt* [2015] EWHC 361.

### 7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

The State Immunity Act 1978 governs the immunity of states and quasi-state bodies under English law. Where a state has agreed in writing to submit a dispute to arbitration, it is not immune from proceedings in the English courts that relate to the arbitration, including the recognition and enforcement of foreign awards: *Svenska Petroleum Exploration AB v Government of Republic of Lithuania and AB Geonafra* [2006] EWCA Civ 1529.

However, the State Immunity Act provides that relief may not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property, and that the property of a state shall not be subject to any process for the enforcement of a judgment or arbitral award or, in an action *in rem* for its arrest, detention or sale. There are only two exceptions to this rule: (i) the state may expressly agree in writing to waive its immunity from execution or injunctive relief; or (ii) enforcement proceedings (but not injunctive relief) are permitted in respect of property belonging to the state where the relevant property is “in use or intended for use for commercial purposes”.

The leading case on the scope of the “commercial purposes” exception is *ServVaas Incorporated v Rafidain Bank* [2012] UKSC 40, in which the Supreme Court considered whether debts owed to the Republic of Iraq by an insolvent state-controlled bank could be the subject of a third-party attachment order. The Supreme Court held that the commercial purposes exception does not take into

account the origin or source of the property and, in the absence of any proof that the debts were to be applied for a commercial purpose, the claim failed.

Accordingly, the test focuses on the use to which the property is put. In *LR Avionics Technologies Ltd v Nigeria* [2016] EWHC 1761 (Comm), the High Court discharged a charging order over state-owned premises leased to a company for the purposes of providing visa and passport services, on the grounds that the services provided (although outsourced) were consular in nature and therefore the property was immune from execution.

### 7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The question of whether a claimant can pursue a state-owned company for the debts of the state has received significant judicial attention in the UK. The recent trend has been to take a more restrictive approach. In *Walker International v Republique Populaire du Congo* [2005] EWHC 2813 (Comm), the High Court identified the relevant legal test as whether the entity is to be equated with the state, so that it does not exist separately from the state and its assets can be regarded as belonging to the state. In that respect, the High Court held that the test was akin to that used to determine whether an entity is to be regarded as a department of state under the State Immunity Act – i.e. whether the organisation is under government control and exercises governmental functions.

There has, however, been some criticism of this approach. In *Continental Transfert Technique Ltd v Federal Government of Nigeria & Others* [2009] EWHC 2898 (Comm), the High Court observed that, in the absence of a sham or fraud, it is not obvious why the courts should ignore the separate status of a corporation merely because that corporation is the organ of a foreign state.

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David has served as lawyer, tribunal secretary, and tribunal assistant in many significant international investment, international commercial, and inter-state arbitrations, including ICSID, ICC, LCIA, and *ad hoc* proceedings. He also has experience advising and representing clients on commercial, employment, and property disputes as a barrister.

# BSF

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# USA

Boies Schiller Flexner LLP

Kenneth Beale



Alicia Fitch



## 1 Treaties: Current Status and Future Developments

### 1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

As of 29 August 2018, the US is party to thousands of bilateral and multilateral treaties and agreements. In the trade and investment category, the US is a party to bilateral investment treaties (BITs) with 39 countries. In addition, the US has Treaties with Investment Provisions (TIPs) with 68 nations or regions, either partially or fully in force. The US has also joined 36 multilateral agreements, conventions and protocols in the Trade & Investment category.

The US has adopted 33 Investment Related Instruments (IRIs) at multilateral, regional, and national levels, including the New York Convention, the ICSID Convention, the MIGA Convention, and the Pacific Basin Investment Charter.

The US has 14 bilateral and multilateral free trade agreements (FTAs) currently in force, which involve 20 other countries. Among these agreements are NAFTA, CAFTA-DR (Central America and Dominican Republic) and CARICOM (Caribbean Community). Additionally, the US is a signatory to Trade & Investment Framework Agreements (TIFAs) with 52 counterparties (nations, or regional groups of nations), and to 28 WTO Agreements. The current executive formally withdrew the US from the TPP on 30 January 2017; the US continues to participate in the negotiation process for T-TIP.

### 1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

There are currently 41 treaties pending in the Senate for ratification. The US has signed but not yet ratified the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration. The US has signed BITs with six additional nations, pending exchange of ratification instruments (Belarus, El Salvador, Uzbekistan) and in three other instances, also pending domestic ratification by one or more parties (Haiti, Nicaragua, Russia); these six BITs are therefore not in force.

### 1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The first US Model BIT was produced in 1994. The Model BIT was updated in 1998, 2004, and again in 2012. The current version

is available here: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2870>. The US Model BIT is a fairly typical BIT, containing common protections relating to expropriation, fair and equitable treatment, full protection and security, national treatment, free transfer of payments, and non-impairment of (i) control over the investor's investment, (ii) investor protections, and (iii) investments covered by the BIT. The Model BIT also contains a "Most-Favoured Nation" clause. The Model BIT provides for reference of investor-state disputes to ICSID for settlement by conciliation or arbitration, or (additionally or as an alternative) to *ad hoc* arbitration under the UNCITRAL Arbitration Rules, or (upon agreement by the parties) to "any other arbitration institution or under any other arbitration rules".

### 1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

The webpage of the Treaty Affairs section of the Office of the Legal Adviser at the US State Department includes information on Diplomatic Notes, and states that the exchange of diplomatic notes may constitute an international agreement (see webpage here: <https://www.state.gov/s/treaty/faqs/70136.htm>). Though that page includes a link to examples of different types of diplomatic notes, the link offered is defunct. Similarly, the link offering details on when diplomatic notes are used to negotiate international agreements is also defunct.

The Foreign Affairs Manual (FAM) and Foreign Affairs Handbooks (FAH) are authoritative State Department resources governing the department's organisation structures, policies, and procedures. One such handbook (originating in the Office of the Executive Secretariat within the State Department) includes sections on the use and preparation of diplomatic notes. (Please see: <https://fam.state.gov/fam/05fah01/05fah010610.html> and <https://fam.state.gov/searchapps/viewer?format=html&query=gis&links=GIS&url=/FAM/05FAH01/05FAH010610.html>.)

The US has in the past employed diplomatic-note exchange to bring an agreement into force, or to modify the content or application of its treaties and international agreements. On 13 April 2012, the US and the UK exchanged diplomatic notes to bring the treaty between them (Treaty between the Government of the US and the Government of the UK of Great Britain and Northern Ireland concerning Defense Trade Cooperation) into force. On 26 April 2016, the governments of Japan and the US exchanged diplomatic notes to modify a 1952 bilateral agreement regarding civil air transport, which was further modified by an MOU in 2010. The notes by their terms (please see here) contemplated that their exchange would constitute an agreement, which would enter into force six months hence (30 October 2016).

### 1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Treaty Affairs section of the Office of the Legal Adviser at the US State Department offers general guidance on linguistic features distinguishing agreements that are intended to be binding under international law from arrangements of a political nature that do not give rise to binding obligations under international law. Such guidance is accessible here: <https://www.state.gov/s/l/treaty/guidance/>.

In addition, for any given treaty, the US agency with oversight of a subject matter covered by the treaty will often issue guidance on interpretation of provisions that relate to the subject of its oversight. For example, the Environmental Protection Agency (EPA) issues guidance on data requirements for tolerances on imported commodities in the US and Canada: <https://www.epa.gov/sites/production/files/2015-10/documents/nafta-guidance.pdf>.

## 2 Legal Frameworks

### 2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

The US is party to the following conventions:

- (1) The US ratified the New York Convention in September 1970, subject to reciprocity, and only in the context of disputes arising out of legal relationships that are considered commercial under US federal law. Its application extends to all territories for which the US has international-relations responsibility.
- (2) The US is a party to the Washington (ICSID) Convention, having signed the convention on 27 August 1965 and ratified it on 10 June 1966. The Convention entered into force 14 October 1966.
- (3) The US signed the Mauritius Convention on 17 March 2015 but has not yet ratified it.

### 2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The US does not currently have a domestic investment law. There are no requirements over the form of contracts specific to foreign investors in the US, whether contracting with the government or a private party. Nevertheless, the US government will review certain foreign investments to ensure they do not present national security concerns and that they comply with various applicable US national security laws. In recent years, national security concerns have had an impact on attempted FDI in strategic geographic areas such as ports of entry and in the telecommunications and semiconductor industries. Government contractors, whether domestic or foreign, are typically subject to the procurement rules that govern the particular state interest.

### 2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

There is a basic framework for assessing legal and regulatory risk for market entry in the US, which, under certain circumstances, may restrict foreign direct investment (FDI) in the US. The US has no

law prohibiting, or subjecting to review, FDI based on economic security concerns, or with limited exceptions, national origin. The US does impose sector-specific limitations and review procedures on FDI in several regulated industries, including the aviation, banking, communications, energy, and shipping industries. Additionally, the US has a national security review process applicable to those foreign investments that could have an impact on national security interests.

The national security review process applicable to transactions that could result in a foreign person acquiring control of a US business is referred to as the Exon-Florio or CFIUS (Committee on Foreign Investment in the US) review. Companies operating in regulated-industry sectors are typically required to obtain a licence from the government to operate in the sector; proposed foreign investment in regulated sectors is subject to review and approval by sector-specific regulators. Some states also impose separate limits on foreign investment in certain sectors. Regulations issued by the sector-specific administrative agency outline the process and standards applicable to the review of FDI in the sector. For example, the FCC issues regulations for FDI in communications entities.

## 3 Recent Significant Changes and Discussions

### 3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

*Chevron Corporation and Texaco Petroleum Co. v. The Republic of Ecuador*, 795 F.3d 200 (D.C. Cir., 2015)

In 1995, Texaco Petroleum Co. (TexPet), a subsidiary of Chevron Corporation, and the nation of Ecuador entered into a settlement agreement to resolve a decades-long commercial dispute over revenue allocation in connection with a 1973 agreement between TexPet and Ecuador. Under the 1973 agreement, TexPet committed to develop Ecuadorian oil fields in exchange for providing below-market oil to the country for domestic use. The 1995 settlement resolved most of the parties' areas of dispute and permitted TexPet to continue to pursue seven lawsuits pending in the Ecuadorian courts for amounts payable to TexPet under the 1973 agreement, which amounts had been outstanding prior to the settlement. Chevron contended that the delays in adjudicating these claims resulted from political interference by the executive and legislative branches in Ecuador, and from continuing turmoil and corruption in the nation's courts.

In 1993, the US and Ecuador entered into a BIT, which became effective in 1997. The BIT provided that US investors could arbitrate claims against Ecuador existing on or after the 1997 effective date. In 2006, Chevron commenced arbitration proceedings in The Hague claiming that the Ecuadorian courts had failed to resolve the seven pending claims in a timely fashion and had thus violated Chevron's rights under both the BIT and governing international law. At the same time, the Lago Agrio plaintiffs were making unexpected progress against Chevron in their Ecuadorian damage case, in which Chevron was facing potential liability of up to \$27 billion for injury to the health and environment of villagers from Ecuador's Amazon rainforest.

Chevron commenced a separate Lago Agrio arbitration against Ecuador (also under the BIT), this time alleging that President Rafael Correa of Ecuador and others had interfered improperly with the judicial process adjudicating those claims. The Lago Agrio tribunal of arbitrators issued a provisional order in 2011 that ordered the Ecuadorian government to direct its courts not to enforce or recognise the expected trial-court judgment against Chevron for \$18



billion. The Ecuadorian government condemned that arbitration order from the UNCITRAL tribunal as an improper interference in the country's judicial process. Ecuador's appellate courts also ignored the tribunal's order, but ultimately reduced Chevron's liability under the Lago Agrio award to just over \$9 billion.

Against this backdrop, the arbitration tribunal addressed Chevron's seven oil-revenue claims against Ecuador. That tribunal issued an interim award on the merits in December 2008, in which it found that Ecuador had improperly delayed and interfered with the judicial claims made by TexPet and was presumptively liable for approximately \$700 million in cumulative damages, subject to the tribunal's final assessment of damages and costs of the arbitration itself. In August 2011, the tribunal reduced this amount to \$96 million.

Ecuador challenged the award in the Dutch courts, which affirmed the award on the ground that the arbitrators were authorised to determine both jurisdictional and substantive questions and that their decision was in any case reasonable. Chevron then sought enforcement against Ecuador in the US, where the D.C. District Court held that the UNCITRAL award was enforceable under the New York Convention.

The D.C. Circuit treated this case as an ordinary commercial dispute that happened to involve a foreign nation operating in the commercial sphere. It therefore afforded considerable deference to the arbitrators' findings that: (i) the tribunal had jurisdiction to decide the case; (ii) Ecuador had interfered improperly in the judicial process to the detriment of TexPet; and (iii) the interference by Ecuador amounted to a violation of both the BIT and governing international law. This D.C. Circuit decision found that Ecuador owed Chevron \$96 million following a dispute stemming from a 1973 agreement between a Chevron subsidiary and Ecuador.

*Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9<sup>th</sup> Cir., 2017)

The court in this case provided guidance on sources for treaty interpretation, and declined to adjudicate a treaty provision that it found to be non-self-executing. The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of a suit brought by the Republic of the Marshall Islands seeking a declaration that the US was in breach of its treaty obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, and asking the court to order that the US engage in good-faith negotiations. The court held that Article VI was non-self-executing and that because such provisions were not judicially enforceable, claims seeking to enforce them were non-justiciable. The court also stated that the interpretation of a treaty begins with its text; a court may also look to the negotiation and drafting history of the treaty, as well as the post-ratification understanding of signatory nations as aids to interpretation.

*Medellin v. Texas*, 128 S.Ct. 1346 (2008)

*In dicta*, Chief Justice Roberts asserts that Treaties of Friendship, Commerce, and Navigation (FCNs) are generally self-executing. Though not a finding of the court, this assertion finds support in a significant volume of lower-court rulings, in academic scholarship, and in an examination of Senate committee reports.

### 3.2 Has your country indicated its policy with regard to investor-state arbitration?

The US is a party to 50 agreements worldwide that include various forms of Investor-State Dispute Settlement (ISDS). According to the ISDS Fact Sheet promulgated by the Office of the United States

Trade Representative (<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>), ISDS in US trade agreements is "significantly better defined and restricted than in other countries' agreements". The Fact Sheet states that foreign investors "rarely pursue arbitration against the US and have never been successful when they have done so", which it attributes to the high standards of the US legal system and the safeguards in US agreements.

The Office of the US Trade Representative website includes a page of information (<https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>) on ISDS, which lists eight facts about ISDS provisions under US trade agreements. The page indicates that the provisions included in US agreements are "stronger" than provisions in many other investment agreements in which the US is not a participant. The US ISDS provisions are intended to: (i) provide basic legal protections for American companies abroad that are based on the same assurances the US provides at home; (ii) protect the right of governments to regulate in the public interest; (iii) allow federal, state, and local governments to maintain (or adopt) any measure that they deem necessary; (iv) prevent exposure of state or local governments to new liabilities; (v) preclude challenges to laws on the basis of their effect on corporate profits; (vi) include strong safeguards to deter frivolous challenges to legitimate public interest measures; (vii) ensure fair, unbiased, and transparent legal processes; and (viii) ensure independent and impartial arbitration.

Information pertaining to treaty arbitrations where the United States has been named as a respondent is publicly available on the website (<https://www.state.gov/s/l/c3433.htm>) of the US State Department.

### 3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

The US Model BIT includes provisions that: (i) reserve the rights of each to take actions, or decline to take actions, necessary to maintain its "essential security interests" and to maintain the confidentiality of information the disclosure of which would be contrary to the public interest (Articles 18, 19); (ii) set forth standards for transparency and for periodic consultation between the parties for the improvement of applicable transparency practices (Article 11); and (iii) require the parties to conform to the host-country's environmental laws, and forbids the waiver of domestic environmental laws. The MFN provisions in the US Model BIT require each party to accord investors of the other party treatment as "no less favourable" than it accords investors in like circumstances of any non-party (Article 4). The definition of "investment" in the US Model BIT expressly includes assets owned or controlled directly or indirectly.

The main environmental article in NAFTA provides a requirement to maintain current Environmental, Health and Safety (EHS) standards. In January of this year, negotiators in talks to update NAFTA agreed to measures aimed at preventing corruption, such as compelling members to criminalise government corruption, taking steps to discourage corruption, and prosecuting those engaged in corrupt activities by: (i) requiring maintenance of accurate books and records to detect and trace corrupt payments; (ii) establishing codes of conduct to promote ethical standards among public officials; and (iii) requiring parties to prohibit the deduction of corrupt payments for income tax purposes.

### 3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No. The US has not given notice to terminate any BITs. In May 2018, the US received a notice of termination from Ecuador for the cancellation of the BIT between the two nations. In consequence, the treaty terminated as of 18 May 2018; the BIT continues in force for a further 10 years for investments made or acquired prior to the date of termination, and to those investments to which the BIT otherwise applies. In 2012, Bolivia terminated its BIT with the US, in what appears to be part of a policy decision to extract itself from BITs with many countries.

The executive administration that took office in January 2017 has (i) withdrawn from the 2015 Paris Agreement and the Joint Comprehensive Plan of Action (the Iran Nuclear Deal), and (ii) publicly announced its desire to modify or “just tear up” NAFTA. Though the current executive has referred to NAFTA as “the worst trade deal in the history of the world”, and has proclaimed his intention to “get rid of NAFTA” or to “renegotiate NAFTA”, most legal experts dispute that any US executive has the unilateral authority to withdraw from NAFTA, or to renegotiate the treaty without the cooperation of the other two signatory countries.

At the start of October 2018, it was announced that the US, Mexico and Canada reached an agreement on a revised NAFTA.

## 4 Case Trends

### 4.1 What investor-state cases, if any, has your country been involved in?

According to the Office of the United States Trade Representative, in the more-than three decades that the US has had agreements for investment arbitration, only 13 cases have been brought to conclusion and the US has won every case. There is, however, controversy in connection with a well-known case brought under NAFTA, *Loewen v. United States*; the decision has been widely criticised as having been wrongly decided. Some commentators reference a “far-fetched” procedural rationale as the basis for dismissal of the claimant’s suit. Further, the case is often cited as an example of undue influence of an arbitrator by the appointing-party.

American investors have prevailed in 11 cases brought against Mexico and Canada under NAFTA. US nationals have brought 156 claims under US BITs and IIAs, making the US the most frequent home-state claimant. Of the 81 of those claims that resulted in final awards, the US claimant was successful in 34 of those cases. Eight claims were brought by US claimants in 2017, all of which remain pending.

### 4.2 What attitude has your country taken towards enforcement of awards made against it?

As noted above, there has been no publicly known investment treaty award rendered against the US to date.

### 4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

As noted above, there has been no publicly known investment treaty award rendered against the US to date.

### 4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

As noted above, there has been no publicly known investment treaty award rendered against the US to date. The US District Courts have judicially reviewed awards in follow-on proceedings from ISDS decisions on numerous occasions; judicial review has occurred even in circumstances where the US was not the respondent nor was a US national a party. In each case brought for judicial review to a US District Court, the court upheld the award or decision, though in one case, the award was partially set aside.

### 4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

As noted above, there has been no publicly known investment treaty award rendered against the US to date.

## 5 Funding

### 5.1 Does your country allow for the funding of investor-state claims?

There is currently no prohibition of third-party funding of arbitration (including investor-state claims), and litigation claims. Third-party funding and financing is a developing, unsettled area of the law.

### 5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

Most case law in the US involving third-party funding of litigation or arbitration involves challenges to the funding arrangement based on champerty law, with varying results in different states and under different circumstances.

### 5.3 Is there much litigation/arbitration funding within your jurisdiction?

A recent study by funder Burford Capital found that 36% of US law firms polled in 2017 said they used outside funding compared with only 3% in 2013.

## 6 The Relationship Between International Tribunals and Domestic Courts

### 6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

Criminal law disputes are non-arbitrable in the US, and arbitration is not available as a forum for the review of judicial decisions. However, a treaty may by its terms provide for the review of judicial decisions by a tribunal contemplated by the treaty. For example, the provisions of NAFTA provide for tribunals that may hear challenges to American (or Canadian, or Mexican) court judgments. Any US, Canadian or Mexican business that contends it has been treated unjustly by the judicial system of another member country can file a claim that may invoke review by a three-person tribunal, comprised of judges and

former judges. The tribunal decisions are binding as to the particular matter addressed. Under NAFTA, the government whose court system is challenged is responsible for awards by the tribunals. Since NAFTA has been in force, about 20 challenges to decisions of US courts have been challenged through the tribunal process.

## **6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?**

The Federal Arbitration Act (FAA) allows for judicial review of arbitration, including arbitral awards and procedure, under limited and defined circumstances. However, courts have largely upheld efforts by parties to expand the standard of judicial review contractually. Neither the FAA nor state arbitration laws allow for court intervention in the selection of arbitrators, except in circumstances where a default appointment is necessary; for example, if the process selected by the parties fails to result in appointment of an arbitrator, the FAA and most state arbitration laws permit the court to appoint an arbitrator (see below).

When a question of arbitral jurisdiction is presented to a court for decision, the court will decide the issue unless there is “clear and unmistakable evidence” that the parties intended to submit that particular question to arbitration.

## **6.3 What legislation governs the enforcement of arbitration proceedings?**

Arbitration legislation exists at both the federal and state level. The primary federal statute governing arbitration is the FAA. Section 2 of the FAA (9 USC §2) provides for the validity, irrevocability, and enforceability of arbitration agreements, is substantive federal law that applies in state courts, and supplants inconsistent state laws for all transactions affecting interstate commerce. Each state has enacted arbitration legislation that applies to arbitrations seated in the applicable state. Most state arbitration acts are based on a version of the Uniform Arbitration Act and as a result are largely similar to one another.

## **6.4 To what extent are there laws providing for arbitrator immunity?**

The FAA does not address immunity for arbitrators, but US courts have held that an arbitrator is immune from civil liability for actions in the execution of the arbitrator’s decision-making function.

## **6.5 Are there any limits to the parties’ autonomy to select arbitrators?**

No. The FAA does not restrict the appointment of arbitrators and state law provisions generally defer to the selection made by the parties.

## **6.6 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?**

Where the parties fail to specify a method for appointing arbitrators, the institutional rules governing the arbitration provide for default appointments, usually of one to three arbitrators, depending upon the complexity of the case. In circumstances where the parties have not selected institutional rules, or if there is a failure of appointment for another reason, the FAA and state arbitration laws permit the

court to appoint an arbitrator. However, the laws do not specify or describe who may or may not be selected as an arbitrator in the default appointment.

## **6.7 Can a domestic court intervene in the selection of arbitrators?**

The FAA and state arbitration laws do not provide for court intervention in the selection of arbitrators, other than in the case of default appointments, as described above.

# **7 Recognition and Enforcement**

## **7.1 What are the legal requirements of an award for enforcement purposes?**

The US is a party to the New York Convention, the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the ICSID Convention. As such, foreign arbitration awards by entities of Member States are subject to enforcement pursuant to the terms thereof. The FAA implements the New York Convention and Panama Convention in the US.

The FAA provides an arbitral award is to be confirmed unless one of the articulated grounds for vacating the award exists. Section 207 of the FAA allows parties to international arbitration to apply to a district court for confirmation of the arbitration award within three years of its issuance. For enforcement of an international award, Article IV of the New York Convention requires the enforcing party to furnish the following: (i) a duly authenticated original award or a duly certified copy; (ii) the original arbitration agreement or a duly certified copy; and (iii) an official or sworn translation when the award is not made in an official language. Section 9 of the FAA requires that the party seeking enforcement also give notice to the other party of its enforcement action.

In *Mobil Cerro Negro Limited v. Bolivarian Republic of Venezuela*, No. 15-707 (2d Cir. 2017), the appeals court ruled that the district court erred in declining to vacate Mobil’s *ex parte* petition seeking enforcement of the award granted pursuant to arbitral proceedings under the ICSID Convention. The ruling affirms that the Foreign Sovereign Immunities Act (FSIA) provides the sole basis for subject-matter jurisdiction over actions to enforce ICSID awards against a foreign sovereign, and clarifies that claimants seeking enforcement may not avail themselves of proceedings not specifically authorised by either the FSIA or the ICSID. Accordingly, because Mobil employed unauthorised *ex parte* proceedings to enforce the arbitral award, the court vacated the district court judgment in favour of Mobil, remanding with instructions to dismiss the *ex parte* petition.

See the response to questions 7.2 and 7.3 below for further detail on the FSIA and enforcement of arbitral awards.

## **7.2 On what bases may a party resist recognition and enforcement of an award?**

For international arbitration awards that are covered by the New York Convention, the party seeking enforcement may apply to the district court to refuse enforcement and recognition citing at least one of the grounds enumerated in Article V of the NY Convention. In general, foreign arbitral awards are enforceable in the US when the award was rendered in another contracting state, unless one of the limited enumerated grounds for refusal of enforcement is satisfied. Successful challenges are rare.

Recognition or enforcement of an award issued by an arbitration arrangement between foreign investors and Member State parties to the ICSID Convention requires that the party seeking enforcement provide a certified copy of the award to a competent court of other authority designated by the parties for enforcement purposes. Member States must recognise and enforce the award, subject to each party's laws relating to sovereign immunity. ICSID awards cannot be attacked on the merits, nor on grounds applicable to enforcement under the New York Convention. The US Supreme Court, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 (1989), determined that the FSIA is the sole basis for obtaining jurisdiction over a foreign state in US courts. In rehearing, the Second Circuit held that the FSIA provides jurisdiction of the federal courts over actions brought to enforce ICSID awards against foreign sovereigns, but that the FSIA's service and venue requirements must be satisfied before the federal courts may enter judgment on such awards.

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**7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?**

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Section 15 of the FAA precludes the state action doctrine, but a state or state entity may successfully raise a sovereign immunity defence in an enforcement proceeding in limited circumstances. Under the FSIA, a foreign state waives its sovereign immunity from the jurisdiction of US courts upon agreement to arbitrate disputes with a private party. But this waiver of immunity does not extend to enforcement proceedings. However, enforcement against a sovereign may proceed if the counterparty sovereign is a Member State of the ICSID Convention (see the response to question 7.2, above).

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**7.4 What case law has considered the corporate veil issue in relation to sovereign assets?**

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In determining whether an arbitration award may permit the party seeking enforcement to attach the assets of a sovereign located in US territory depends upon whether the relevant assets independently satisfy the exemptions to sovereign immunity under federal law, specifically, 28 USC 97, §§1610-11. Those code sections delineate the exceptions to immunity from attachment or execution, and the types of property immune from execution, respectively. Section 1610(6) specifically exempts from attachment in satisfaction of a judgment entered by a US court property of a sovereign state that is used for a commercial activity in the US if the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided the judgment attachment is not inconsistent with any provision of the arbitral agreement.

Relevant case law has recently focused upon a 2008 amendment to FISA that expands the availability of assets of foreign state sponsors of terrorism for attachment in satisfaction of judgments. In 2017 the US Supreme Court addressed the issue in *Rubin et al. v. Islamic Republic of Iran et al.*, 583 US (2018) and held that a judgment under the terrorism exception to the FSIA may execute the judgment only against property for which immunity has been rescinded under a separate provision within §1610.



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