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Practical cross-border insights into investor-state arbitration law

Investor-State Arbitration 2022

Fourth Edition

Contributing Editor:

Tafadzwa Pasipanodya
Foley Hoag LLP

CDR Commercial Dispute Resolution

EFILA European Federation for Investment Law and Arbitration

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59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
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Publisher
Jon Martin

Production Editor
Amy Norton

Senior Editor
Sam Friend

Head of Production
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Preface

Welcome to the 2022 edition of *ICLG – Investor-State Arbitration*. I am delighted to introduce this latest exploration of developments in investment arbitration on behalf of Foley Hoag LLP.

As the COVID-19 pandemic has continued to wreak havoc around the world in 2021, we have also experienced the devastating impact of climate change at ever more unprecedented levels. These and other major global events have begun to reverberate in the investment arbitration scene, with international businesses increasingly looking to investment arbitration tribunals to help them obtain compensation for State measures that they perceive to be violating international investment agreements ("IIAs"). At the same time, States have continued to seek reform of the investor-State arbitration legal landscape at various levels. Many are negotiating bilateral and regional IIAs that more explicitly recalibrate the balance of obligations and rights between investors and States, for example. Others are involved in multilateral procedural reform through the United Nations Commission on International Trade Law ("UNCITRAL") and the International Centre for Settlement of Investment Disputes ("ICSID").

As investment arbitration legislation and case law continue to evolve rapidly, it is critical to maintain an accurate guide regarding current relevant practices and law in various jurisdictions. The 2022 edition of this *Guide* accomplishes that objective by providing global businesses leaders, in-house counsel, State representatives, and international legal practitioners with ready access to important information regarding 13 jurisdictions. It also includes environmental considerations in investment arbitrations and treaties, expert analyses on collecting investor-State awards, as well as the impact of EU law on investment arbitration and IIAs and the state of play of European Union ("EU") investment protection.

Congratulations to Global Legal Group for successfully publishing yet another authoritative comparative legal guide. And many thanks to each contributor who made it possible by sharing generously their knowledge and experience.

Tafadzwa Pasipanodya
Foley Hoag LLP

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Environmental Considerations in Investment Arbitrations and Treaties

Foley Hoag LLP

Tafadzwa Pasipanodya

Introduction

In August 2021, the United Nation's Intergovernmental Panel on Climate Change ("IPCC") published a report sharing the most advanced understanding of the physical science of climate change to date, on the basis of more than 14,000 studies developed by scientists around the world.[1] Issuing a "code red for humanity", the report highlights that our delay in reducing fossil fuel emissions for so long means we can no longer stop global warming from intensifying over the next 30 years. We will see new extremes that are unprecedented in magnitude, frequency, and timing in every region of the world, and many of them are now irreversible. The IPCC warns that unless deep reductions in CO_2 and other greenhouse gas emissions occur urgently, it will be impossible to stabilise global temperatures and achieve the internationally agreed threshold of 1.5 degrees Celsius of global warming. Every fraction of a degree of warming is said to count.

In response to the report, UN Secretary-General António Guterres called for immediate action on energy:

> *This report must sound a death knell for coal and fossil fuels, before they destroy our planet. There must be no new coal plants built after 2021. OECD countries must phase out existing coal by 2030, with all others following suit by 2040. Countries should also end all new fossil fuel exploration and production, and shift fossil fuel subsidies into renewable energy. By 2030, solar and wind capacity should quadruple and renewable energy investments should triple to maintain a net zero trajectory by mid-century.*[2]

International investment arbitrations have addressed environmental issues for decades now, but cases are rising and are likely to do so dramatically as the energy transition accelerates. Firstly, many States will rely on international investment agreements ("IIAs") to attract the foreign investment they deem necessary to finance the energy transition required to reduce climate change. But as exemplified by Spain's experience, laudable efforts to transition to renewable energy can result in a slew of investment arbitration claims. With more than 40 arbitrations instituted against it following the alteration of incentives and tariff regimes it had established to attract foreign investment in renewable energy, Spain is the most frequent respondent State in investor-State dispute settlement ("ISDS") cases over the last decade.[3] Similar renewable energy claims have been brought against Italy, the Czech Republic, and others.

Secondly, many State measures to address climate change and the environment more generally are likely to be challenged by investors though investment arbitrations. In particular, lower-carbon energy transition measures by States such as extraction bans or fossil fuel phase-outs may create "stranded assets", i.e. assets that have suffered from unanticipated or premature write-downs, devaluations, or conversion to liabilities.[4] A recent study by the International Institute for Environment and Development ("IIED") predicts that many fossil fuel companies facing asset stranding will resort to investment arbitration to seek compensation for the impact of State climate change measures on their investments.[5] It observes that fossil fuel companies have historically made extensive use of ISDS (around 17% or 173 of known ISDS cases stem from fossil fuel sector investments), and are likely to do so increasingly since most foreign-owned coal plants at risk of asset stranding worldwide are protected by an IIA. The report also emphasises the possible cost of these arbitrations, given that seven of the top 10 largest investment arbitration awards to date have involved fossil fuel companies (ranging from US$1.6 billion to US$40 billion).

Given this backdrop, the present chapter reviews key findings from investment arbitration decisions addressing the environment (Section 2, "Key Investment Arbitration Findings Concerning the Environment"), and then considers innovations by States in the negotiation of IIAs to improve the likelihood that their investment promotion goals align with their environmental laws and objectives (Section 3, "IIA Provisions to Support Environmental Efforts and Objectives").

Key Investment Arbitration Findings Concerning the Environment

Investment arbitration jurisprudence affirms the customary international law principle that States enjoy wide latitude to regulate within the realm of their police powers, including in the area of the environment.[6] As determined in *Marvin Feldman v. Mexico*:

> *[G]overnment must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation.*[7]

Philip Morris v. Uruguay, in the context of cigarette packaging regulations, also demonstrated the broad discretion owed to States taking *bona fide* measures in the public interest:

> *The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors. As held by another investment tribunal, '[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation.*[8]

Despite the broad recognition of a State's right to regulate the environment in the public interest, investment tribunals have not uniformly accepted police powers as a defence. The *Santa Elena v. Costa Rica* tribunal took a narrow approach to police powers, concluding that the environmental purpose of a State's measure was irrelevant to the question of whether compensation was owed:

> *Expropriatory environmental measures — no matter how laudable and beneficial to society as a whole — are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*[9]

Other tribunals have adopted a broader reading of the principle. The *Chemtura v. Canada* tribunal, for example, held that Canada's regulations phasing out the use of harmful chemicals constituted a valid exercise of Canada's police powers, and thus did not constitute expropriation:

> *Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.*[10]

Still, other tribunals have limited the defence of police powers where an investor was granted specific assurances to the contrary by the respondent State. In this vein, the *Methanex v. United States* tribunal held in a case concerning a U.S. ban on additives to gasoline: "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process" is lawful, even if affecting investors, unless "specific commitments have been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation".[11]

Similarly, the *Greentech and Novenergia v. Italy* tribunal held that the "repeated and precise assurances to specific investors" amounted to guarantees that renewable energy tariffs would remain fixed for two decades, thus Italy "effectively waived its right to reduce the value of the tariffs".[12] In a case that involved related claimants, Spain too was found liable for violating its obligations under the Energy Charter Treaty when it sought to scale back on incentives offered to renewable energy producers following the 2008 global economic crisis. The *Novenergia v. Spain* tribunal held that given Spain's prior statements and assurances, the challenged measures were "radical and unexpected" and "fell outside the acceptable range of legislative and regulatory behavior".[13]

Tribunals have also differed on the extent to which they scrutinise whether the measures taken by a State are proportionate to the environmental concern in question. Whereas the *Tecmed v. Mexico* tribunal questioned whether Mexico's non-renewal of the investor's permits to operate a landfill purportedly for environmental reasons was proportional,[14] the *Chemtura v. Canada* tribunal held that its task "is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies".[15]

Beyond the question of State liability for environmental measures affecting foreign investment, investment tribunals have occasionally been asked to consider counterclaims concerning environmental breaches by investors. While investment tribunals can be reluctant to interpret certain treaties as imposing treaty obligations on investors or granting tribunals jurisdiction over such claims, Ecuador has successfully raised several counterclaims concerning environmental harm caused by hydrocarbon companies. In *Perenco v. Ecuador*, for example, Perenco brought a claim for breach of the France–Ecuador bilateral investment treaty ("BIT") in response to Ecuador's termination of the company's contracts to exploit hydrocarbons.[16] Although Ecuador was found liable, it was also awarded over US$54 million dollars in compensation for the environmental damages to the rainforest caused by Perenco's operations.

IIA Provisions to Support Environmental Efforts and Objectives

Investment arbitration jurisprudence related to environmental matters suggests that there are various ways in which States can seek to align their objectives to attract foreign investment with those to promote environmental protection and curb climate change.

Explicit acknowledgments of States' right to regulate the environment and exclusions from substantive treaty protections

In response to the threat of investment claims on States' right to take measures to protect the environment, many States have begun negotiating treaties that expressly acknowledge this right.

The US–Oman Free Trade Agreement ("FTA"), for example, includes the following provision within its chapter on investment:

> *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*[17]

The express acknowledgment of States' right to regulate the environment informed the tribunal's decision in the *Al Tamini v. Oman* case concerning a claim that Oman's termination of mining agreements in response to wrongful environmental conduct violated the US–Oman FTA. The tribunal emphasised that the US–Oman FTA placed a high premium on environmental protection and held:

> *In the present case, Article 10.10 expressly qualifies the construction of the other provisions of Chapter 10, including Article 10.5. The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "undertaken in a manner sensitive to environmental concerns", provided it is not otherwise inconsistent with the express provisions of Chapter 10.*[18]

For the *Infinito v. Costa Rica* tribunal, however, similar language securing the right to regulate in the Canada–Costa Rica BIT was of little import in its determination of whether Costa Rica had violated the BIT. The tribunal held that such language was "not a carve-out from the BITs protections, but rather a reaffirmation of the State's right to regulate".[19] In the tribunal's view, the provision merely acknowledged and reminded interpreters that contracting States' two objectives of environment and investment protection should "if possible, be reconciled so that they are mutually supportive and reinforcing", but "it did not exempt a respondent State from liability for breaches of the substantive protections granted by the BIT".[20]

In light of the differing interpretations of the import of provisions explicitly acknowledging the right to regulate, some States have gone further in making clear the extent to which they wish to protect their right to regulate the environment.

The 2016 Nigeria–Morocco BIT, for example, includes a dedicated article on the right to regulate, establishing that "the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives".[21] The article further provides that "a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States", and "for greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement".

Other IIAs expressly exclude non-discriminatory environmental regulatory actions from substantive treaty protections. The Hong-Kong, China SAR-ASEAN Investment Agreement (2017), for example, establishes that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute expropriation of the type referred to in subparagraph 2 (b)".[22]

Similarly, the 2018 Singapore–Rwanda BIT establishes that: "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations."[23]

In another example, the 2019 Hungary–Cape Verde BIT not only expressly protects the contracting States' right to regulate through measures to protect the environment, but also protects their right to modify their laws, even where such changes may frustrate an investor's expectations.[24]

Express incorporation of environmental obligations for investors

Traditionally, IIAs have primarily imposed obligations and responsibilities on States, rather than on investors. The 2012 Model BIT of the Southern African Development Community ("SADC") was among the first to buck that trend by expressly "seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments" under the agreement, and including numerous articles that imposed obligations on investors concerning the environment, human rights, corruption, and other socio-economic matters.

In a similar fashion, Article 14 of the 2016 Morocco–Nigeria BIT establishes that:

> *[I]nvestors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.*

It also requires investors to "apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment".

In addition, Article 18 of the Morocco–Nigeria BIT imposes "post-establishment obligations" concerning the environment upon investors: "[I]nvestments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard." Moreover, "investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties".

Provisions such as these could be emulated by other States seeking to attract and protect those investments that align with their environmental objectives and commitments. Given the growing and increasingly foreseeable and imminent impact of climate change, States should also consider requiring climate change assessments in their IIAs. Understanding the climate change risks on a project at the onset can enable States and investors to appropriately allocate risks when negotiating their contracts and avoid possible disputes concerning the respective burdens of the parties for damage caused by the effects of climate change.

Enforcement of investor environmental obligations through provisions pertaining to jurisdiction, counterclaims, and compensation

IIAs can encourage investors to comply with their environmental obligations in a number of ways. One is to limit expressly the protections of the IIA to those investors that comply with their environmental obligations. Provisions of this nature would facilitate a State's challenge of jurisdiction of an arbitral tribunal to hear claims instituted by investors that violate their environmental obligations.

In *Cortec Mining v. Kenya*, Kenya successfully argued that the tribunal lacked jurisdiction because of the claimant's failure to obtain an environmental impact assessment and fulfil other environmental obligations required for its operations.[25]

IIAs could also make clearer a respondent State's right to bring counterclaims against investors. The 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"),[26] the 2016 Iran-Slovakia BIT,[27] and the Investment Agreement adopted by the Common Market for Eastern and Southern Africa ("COMESA"),[28] for example, all explicitly establish a respondent State's right to assert counterclaims.

Relatedly, IIAs could also require investment tribunals to take into consideration an investor's lack of compliance with its environmental obligations in assessing any compensation that might be owed to the investor for a State's violation of its treaty obligations. For example, the India Model BIT directs tribunals to reduce damages to reflect "mitigating factors", which can include "any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor".[29]

The question of the extent to which an investor's conduct should be factored into the calculation of damages was raised in *Bear Creek v. Peru*.[30] There, the tribunal decided that Peru had violated the relevant BIT by revoking a licence to operate a silver mine in response to strong community opposition, including violent protests, against the mine operations and the investor. In his dissenting opinion, one of the arbitrators, Philippe Sands, argued that the compensation awarded to the investor ought to have been reduced by half in light of the investor's failure to obtain a "social license" to operate from the local community. BITs seeking to enforce investors' environmental and other socio-economic obligations could require tribunals to consider compliance with such obligations in calculating compensation.

Conclusion

To conclude, States around the world will increasingly heed the urgent call to more effectively address climate change. In response, we can expect to see a surge in investment arbitration claims by foreign investors affected by State measures to curb climate change and address other environmental concerns. Given the wide variations in interpretations of IIA provisions by tribunals that have decided environmental cases to date, States seeking to better align their goals to promote investment and also to address environmental concerns will likely negotiate treaties that leave less room for debate on their position concerning the appropriate balance between the two goals.

Note

Tafadzwa Pasipanodya is a partner in Foley Hoag LLP's international litigation and arbitration department. The views expressed in this chapter are her own and do not necessarily represent those of the firm or its clients.

Endnotes

1. IPCC, "Climate Change 2021: The Physical Science Basis". Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, 2021 (https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/).
2. Secretary-General's statement on the IPCC Working Group 1 Report on the Physical Science Basis of the Sixth Assessment, 9 August 2021 (https://www.un.org/sg/en/content/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment).
3. United Nations Conference on Trade and Development, IIA Issues Note: Investor-State Dispute Settlement Cases: Facts and Figures 2020, p. 2, September 2021 (https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf).
4. Ben Caldecott, Elizabeth Harnett, Theodor Cojoianu, Irem Kok, Alexander Pfeiffer, Ana Rios, "Stranded Assets: A Climate Risk Challenge", Inter-American Development Bank, 2016.
5. Kyla Tienhaara and Lorenzo Cotula, "Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets", IIED, London (2020), p. 7.
6. *See* Christina L. Beharry and Melinda E. Kuritzky, "Going Green: Managing the Environment through International Investment Arbitration", *American University International Law Review* 30 no. 3 (2015): pp 383–429, 422 (RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 cmt. g (1987)); Laurence Boisson de Chazournes, "Environmental Protection and Investment Arbitration: Yin and Yang?", *Anuario Colombiano de Derecho Internacional* (2017), no. 10, pp 371–399, 384.
7. *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, para. 103.
8. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016, para. 399.
9. *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award, 17 February 2000, para. 72.
10. *Chemtura Corporation v. Canada*, PCA, Award, 2 August 2010, para. 266.
11. *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 7.
12. *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic* (SCC Case No. V 2015/095), Award, 23 December 2018, para. 450.
13. *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. 063/2015), para. 695.
14. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, ¶¶ 139, 144, 151.
15. *Chemtura Corporation v. Canada*, PCA, Award, 2 August 2010, para. 134.
16. *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6), Award, 27 September 2019, para. 1023.
17. Free Trade Agreement between the United States and Oman (adopted 19 January 2006; entered into force 1 January 2009), Article 10.10.
18. *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para. 387 (emphasis in original).
19. *Infinito Gold Ltd. v. Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021, paras 777–780.
20. *Ibid.*
21. Morocco–Nigeria BIT (2016) (awaits ratification by Nigeria), Article 23.
22. Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (adopted 12 November 2017; entered into force 17 June 2019), Annex 2.4.
23. Singapore–Rwanda BIT (2018), Annex I.
24. Hungary–Cape Verde BIT (2019), Article 3.
25. *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29), Award, 22 October 2018, para. 365.
26. Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") (adopted 8 March 2018; entered into force 30 December 2019), Article 9.18.2.
27. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (adopted 19 January 2016; entered into force 30 August 2017).
28. COMESA Investment Agreement, adopted 23 May 2007, Article 28.9.
29. India Model BIT (2015), Article, 26.4, footnote 4, adopted 28 December 2015.
30. *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017.

Tafadzwa Pasipanodya is a partner in Foley Hoag LLP's international litigation and arbitration department and chair of its Africa practice. She has represented sovereign States from all over the world before international courts and arbitral tribunals in State-to-State and investor-State disputes concerning mining, hydrocarbons, the environment, human rights, infrastructure, the law of the sea, and territorial boundaries. She also represents foreign States in U.S. federal court proceedings.

Tafadzwa was named to Africa's 30 Arbitration Powerlist by the Africa Arbitration Academy, Africa Arbitration and the Association of Young Arbitrators, and has been ranked by *Latinvex* as one of the top female lawyers working on Latin American matters. She is also recognised by *Who's Who Legal: Arbitration* and *The Legal 500: USA* and *Latin America*.

Tafadzwa currently serves as a member of the International Chamber of Commerce ("ICC") Court of Arbitration, Vice President of the African Society of International Law, and a member of the American Society of International Law Executive Council. She understands English, Shona, Spanish, French, German, and Portuguese.

Foley Hoag LLP
1717 K Street
N.W. Washington, D.C.
US 20006-5350
USA

Tel: +1 202 261 7358
Email: tpasipanodya@foleyhoag.com
URL: https://foleyhoag.com/

Founded in 1943, Foley Hoag is a law firm of over 300 attorneys with offices in Washington, D.C., Boston, New York, and Paris. Its International Litigation and Arbitration Practice is globally recognised as a leader in representing sovereign States in cutting-edge and high-profile international arbitrations. It has represented over 60 States in more than 180 international investment and commercial arbitrations and litigations, with an extraordinary record of success. It is also recognised as one of the world's leading public international law firms. Recent accolades include the recognition of its practice as 2020 "Arbitration Practice of the Year" by *Law360*, and as "Arbitration Team of the Year" by Jus Mundi. Foley Hoag's team members come from diverse backgrounds and work effectively in many languages. Their common objective is to provide creative, strategic legal advice tailored to their clients' unique goals.

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Collecting Investor-State Awards

Kobre & Kim

Andrew Stafford QC

On 25th November 1959, Germany and Pakistan signed the first bilateral investment treaty (BIT). Sixty years on, there are currently 2,896 such treaties, of which 2,339 are in force. The most recent BIT is between two BRIC states – India and Brazil. BITs have facilitated the export of capital into some of the most capital-starved economies in the world, permitting the development of infrastructure projects and the exploitation of natural resources by promising to foreign investors a more or less level playing field, with legal recourse in the event that the promise is broken.

When the promise is broken, International Centre for Settlement of Investment Disputes (ICSID), United Nations Commission on International Trade Law (UNCITRAL), London Court of International Arbitration (LCIA) arbitration procedures (amongst others) are triggered. As a consequence of the numerous BITs and the disputes to which they have given rise, a highly specialised sub-set of arbitration advocates has built a formidable professional expertise, constructing a large body of jurisprudence and honing its skills to the specific context of litigating investor-state disputes. To further refine their specialised skills, these advocates have often set up boutique firms which focus almost exclusively on investor-state disputes.

Collecting an award is what makes meaningful to a victim-investor the right of legal recourse which a BIT offers. The proliferation of BIT awards has in fact given rise to numerous, long-running and complicated collection sagas, usually involving multijurisdictional efforts. The collection efforts demand a specialist skill-set different from that required to secure the award itself. Our experience of acting in monetisation campaigns is that we need to combine our specialist experience in collecting an award with the separate specialised skills of the arbitration advocates.

This chapter concentrates on the challenges facing an investor seeking to monetise an award made against a sovereign state.

Sometimes, the awards secured by arbitration specialists for their investor clients are so large as to represent a material percentage of a state's GDP. A recent example is the $6 billion award made against the Federal Republic of Nigeria which, with accumulated interest, now tots up to an eye-watering $10 billion. Large awards can represent not only a financial problem for the debtor-state, but also a political problem. Even were there to be a commercial willingness to pay part or all of the award, if the political environment is hostile, the decision-makers in the government would have strong incentives not to do so. The decision-maker will look to see what tools are to hand to prevent the need for payment, or at least delay payment until it has become a problem for his successor in ministerial office.

The challenges to collection are more numerous and more complicated than those confronting an award-creditor seeking to monetise an award against a commercial counterparty. In the latter case, the playbook is pretty well known. Identify assets and revenue streams. Secure the recognition of the award in relevant jurisdictions. Garnish debts owed to the debtor. Obtain freezing orders if the debtor appears to be playing fast and loose with its assets. Use insolvency tools to take over the levers of power, and to hold the previous management personally to account for the enforcement-evading defalcations. There are plenty of options to keep the collection efforts on an offensive footing: and very few counter-offensive strategies available to the debtor.

By contrast, a debtor-state has plenty of opportunities to slow down or even prevent effective monetisation. Some of these opportunities are legal barriers to enforcement, and some comprise powers specific to sovereign status, re-purposed from their original objective, and turned into debt-evasion techniques.

If we run through some parts of the commercial award monetisation playbook, it can readily be seen that some of those plays are – in theory – equally valid in the context of collecting on an investor-state award. But there is a big difference between theory and practice.

I start by looking at garnishment and asset seizure. An award-creditor can pursue garnishee proceedings against a third party which owes money to a state. However, even the simple garnishee process can pose tricky problems when the award debtor is a sovereign state. First, at a factual level, although many sovereign states dabble in the commercial exploitation of, say, natural resources which thereby generate third-party debts, this activity is more often than not undertaken by a state-owned entity of which the sovereign state is simply the sole shareholder. Money owed by a commercial debtor to the state-owned enterprise (SOE) is obviously not the same as money owed to the state and, in order to progress a garnishee campaign, it may then become necessary for the investor to grasp what can prove to be a real stinging-nettle – the alter ego doctrine.

The jurisprudence across numerous jurisdictions demonstrates that proving an SOE to be the alter ego of a debtor-state is a tough gig. Ordinary principles of separate corporate personality will likely apply. The limited exceptions permitting the corporate veil to be drawn aside are not frequently applicable. Tough, but not impossible, as two recent cases demonstrate. In the first, a French court held that the Libyan Investment Authority was an alter ego for Libya. In the second, Esso and Shell were able to secure a ruling from a US court that a Nigerian SOE was an alter ego of the Nigerian state.

Sometimes, the evidence shows that the debtor-state has actually undermined the stand-alone status of its SOE by political meddling. Some governments, having gone to the trouble of setting up stand-alone SOE structures, seemingly cannot resist the temptation to pack the board of the SOE with government ministers and senior civil servants, or dip into the money held by the SOE. In our experience, a change of government or regime is often the trigger for this kind of board-packing, as the incoming government grabs hold of as many levers of financial power it can, without pausing to consider the knock-on effects. The evidence-gathering needed to construct a viable alter ego case theory will obviously involve digging into public source materials, much of which will no doubt be online, but often much of it is only accessible through boots on the ground within the territory of the debtor-state. The accuracy with which material is identified and the care with which it is then obtained involves highly acute and sensitive project management.

Once the materials have been gathered, and a conclusion has been reached that the alter ego case theory can be deployed against a debtor-state's SOE, the next step is to pick your target and strike.

But where? A state most probably will have many of its assets and revenue streams within its own territories, but litigating in the courts of the debtor-state is often not an attractive option. In litigation currently brought in the United States against the Federal Republic of Nigeria, Esso and Shell have filed evidence (including expert evidence) which asserts that the Nigerian courts very rarely made a decision against the state or an SOE. Although this evidence has been disputed, the point remains that in some countries, separation of powers between legislature, executive and judiciary can be doubted. An award-creditor has to think very carefully before seeking to use the courts of the debtor-state as its means of collecting on the award. Oftentimes, the better option is to look at collection opportunities elsewhere.

In the case of oil- or gas-exporting debtor-states, this will involve looking at bills of lading to understand whether or not the purchaser of the oil/gas pays upfront (in which case there is no debt to garnish). If, instead of garnishment, what is planned is to seize a particular cargo of oil or gas, shipping routes need to scrutinised to identify where and when to strike.

This is as much a matter of law as of fact. Into which jurisdiction(s) does the ship carrying the cargo enter? Does that jurisdiction have an easy or difficult recognition regime? Is it a jurisdiction which accepts the alter ego doctrine as a valid way of enforcing against a state? Do the courts of that jurisdiction grant pre-judgment attachments so that the cargo is impounded pending determination of the recognition and alter ego issues? Do the courts allow for discovery against a debtor-state so that all the materials relevant to the alter ego issue are available to the award-creditor and the court? Do the courts demand the award-creditor to post a bond as part of the pre-judgment attachment and, if so, will the bond be small or prohibitively large?

One example of successfully managing such a targeted campaign relates to the *PDVSA* case.[1] The award-creditor held an award against a Venezuelan SOE which exported oil from Venezuela. Investigations revealed that ships carrying export oil from Venezuela docked in Caracas in the Dutch Antilles to decant small cargoes from numerous small ships into fewer larger ships, then continued the voyage to the final destination. The law of the Dutch Antilles permitted pre-judgment attachment. One small, low-value cargo was duly seized. The effect was disproportionate to the value of the cargo seized. PDVSA immediately recalled its entire fleet of small ships to their home ports on the basis that, if one seizure could be done, why not many? The award-creditor's show of legal strength in the form of the pre-judgment attachment triggered the SOE to settle, so that the export of oil from Venezuela could resume.

Mapping assets is an obvious feature of any collection campaign against a debtor-state. Only by mapping is it possible to sift through the various potential targets, identify the collection opportunities, the legal characteristics of relevant jurisdictions, and analyse the chances of success. The most prominent features of such mapping will be property and banking arrangements outside the territory of the debtor-state.

…Which brings me to the *Chevron–Ecuador* case. A good military strategy is to sneak up on your adversary and, unseen, park your tanks on his lawn. This was successfully done by my firm in one case in which the award-creditor (Chevron) harnessed US post-award discovery, and combined it with gagging orders. Banks were required to provide to Chevron documents relating to Ecuador's finances. The courts ordered the banks not to tip off Ecuador that the documents had been provided. Once all of the information had been collated, Chevron laid out to the Ecuadorian government the scale of its knowledge. Ecuador folded, and paid 100% of the award, leading to a Presidential broadcast in which it was explained to the people of Ecuador that there was no alternative because Chevron knew everything about Ecuador's assets. The recidivist bank-robber Willie Sutton, when asked why he robbed banks, famously answered: "*[B]ecause that's where they keep the money*." Chevron's successful strategy demonstrates the continued usefulness of Willie Sutton's one-page playbook.

With banking and other state-owned assets, there is a particular feature of the monetisation landscape which significantly differentiates debtor-state collections from monetising against a commercial award-debtor – state immunity. For entirely proper and laudable reasons, comity of nations dictates that the property and assets of a sovereign state are generally immune from execution. Since all sovereign states are equally sovereign, one state (and the courts of one state) cannot force another state to submit to a judicial order. The problem for an award-creditor is that this immunity positively incentivises the debtor-state to cock a snook at the award, and simply refuse to pay what is due. "*Catch me if you can*" may not be an especially dignified posture for a state to adopt, but it can be highly effective. And very useful if the award is a political hot potato. If a debtor-state can play this game for long enough, exasperation or financial exhaustion may prompt the award-creditor to settle for a significant discount.

Targeting a debtor-state's banking facilities might naturally fit into a garnishee strategy because the basic relationship of customer-banker is debtor-creditor. Typically, however, the relationship is more complicated because many states entrust asset management to banks in one of the world financial centres – New York, London, Hong Kong and so forth. So, the next question becomes – whose money is it? That of the debtor-state, an SOE (such as a sovereign wealth fund) or that of the debtor-state's central bank? The position under the law of state immunity is that a state's central bank is given special protection, so this question is pretty fundamental to an effective strategy.

Get through that barrier (and it can be done by careful analysis and targeting), and the next obstacle to clear is the need to collect evidence which will support the proposition that the asset, property or money is in commercial use. Although the law of each jurisdiction has its own important subtleties, the fundamental rule is that only assets which are in commercial use are outside the scope of state immunity.

However, sometimes an award-creditor will choose to cut through legal barriers, the evasions of a debtor-state and the protections of state immunity by putting on a show of muscle to send a message to the debtor-state that the award-creditor will never give up. The most famous example of this is the celebrated case in which an award-creditor seized an Argentinian warship. In due course, the seizure was reversed (apparently a warship is not something which is in commercial use – who knew?). Despite the discharge of seizure order, the award-creditor had sent a very powerful message to the debtor-state – "*Yeah? You and whose navy?*"

Pausing for a moment, one might rightly conclude that these debtor-state evasions would not be possible in the case of a commercial debtor. You would get a worldwide freezing injunction, or put the debtor into insolvency. But you cannot put a sovereign state into insolvency. And under many systems of law, you cannot get a freezing injunction against a state because an injunction involves compelling one state to obey the commands of another state. Creativity and persistence are definitely required to bring the debtor-state to the table.

One of the most striking differences between collecting a commercial debt and a debt owed by a state relates to the capacity which a state has to fight back against collection efforts. This can be seen clearly in the context of recognition proceedings where facially identical rules operate very differently when seeking recognition of an award rendered against a sovereign state.

As with a commercial arbitration award, the investor seeking to enforce an award against a debtor-state will need to secure recognition of its award either under domestic legislation or under the New York Convention, except in the case of an award made under ICSID arbitration procedures (under which the award is automatically recognised). Although most rule-of-law jurisdictions are "arbitration friendly", and are enthusiastic proponents of finality and certainty, one of the constant features of legal regimes is a fraud exception – your award may be set aside, or recognition of your award may be refused if the award is shown to have been procured by fraud. In some jurisdictions, this is part of domestic legislation, and it certainly falls within the ambit of the "public policy" exception to recognition enshrined within the New York convention.

The fraud exception to recognition *operates* differently when the award arises from a BIT arbitration award against a sovereign state. In both commercial and investor-state cases, evidence of fraud can be hard to find, but the state's capacity to investigate is much greater than that of a commercial award creditor. The state also has the power to take counter-measures against the award-creditor (and its principals) in ways which are not available to an ordinary commercial award-debtor.

Compare the investigatory tools which each can bring to bear. A commercial award-debtor might be able to investigate by informal means, and might be able to take discovery from third parties, but the former is something of a blunt instrument, and the latter is invariably highly adversarial and often runs the risk of tipping off the award-debtor. By contrast, under its own criminal justice system and through its international cooperation treaties, a debtor-state is highly likely to have wide and strong investigatory powers. These powers are aimed at the detection of crime and the enforcement of criminal penalties against wrongdoers. Using its domestic powers, the state can search and seize documents. It can arrest suspected fraudsters and those suspected of aiding and abetting their activities, or it can seek their extradition from abroad if there are relevant treaties. It can put the fraudsters and their accomplices on trial and, on conviction, can exercise powers of criminal forfeiture. It can invoke public policy to place a company into liquidation on public policy grounds. It can trigger Mutual Legal Assistance Treaties. It can seek and obtain Interpol Red Notices. A commercial debtor has none of these powers.

With these domestic and treaty-based powers, a debtor-state intent on resisting collection efforts can weaponise criminal investigatory and prosecutorial powers against the creditor whom the state suspects is guilty of fraud. One might argue that, if fraud is suspected, what is wrong with a state making use of these powers? Nothing, in the genuine case of fraud. But if the award is large, and if payment of the award would cause political trouble, the temptation to pursue "suspected fraud" can lead to over-zealous investigations and prosecutions.

When should an award-creditor start thinking about or preparing an enforcement strategy to maximise the chances of monetisation? You could argue that a potential investor should actually start thinking about this issue before it even makes its inward investment – after all, if the existence of the BIT encourages inward investment, surely part of that investment decision should be to consider whether, if my investment is, for example, expropriated and I have to go to arbitration, do I trust the expropriators to pay up meekly when I eventually get an award? As Machiavelli counselled – "*Put not your trust in Princes*".

Counsel of pre-investment perfection aside, it is highly desirable to prepare collection strategies before the award is rendered. The pressure on the debtor-state of an unfavourable award followed immediately by a well-aimed collection effort can induce decision-makers in the debtor-state to find a quick way out, especially if the decision-maker has to face domestic political music over the arbitration defeat. Specialist investor-state advocates working alongside specialist sovereign debt collection lawyers is a pretty formidable combination.

BITs are amongst the engines of globalisation, driving capital to where it can do good, and at the same time provide to the investor a satisfactory return on investment. Recourse to BIT arbitration is one of the ways in which the inherent investment risks can be mitigated. But without the ability to *collect* on a BIT award, an investor's ability to invoke the protection of a BIT yields only an official piece of paper declaring the investor to be a victim. You can't take that to the bank.

Endnote

1. Note that this is not an alter ego case. And full disclosure – Kobre & Kim was the firm which executed this strategy.

Andrew Stafford QC is an English barrister and Queen's Counsel who represents corporations, hedge funds and high-net-worth individuals in complex, high-value litigations spanning multiple jurisdictions and which involve significant cross-border elements. He has particular experience in international judgment enforcement, developing and executing strategies designed to secure effective collection of awards and judgments, including relating to enforcement against sovereign judgment debtors. In the area of financial services and products, Mr. Stafford QC handles swaps litigation, including matters of currency fixing related to Libor, Euribor and foreign exchange markets.

A highly regarded appellate advocate and trial lawyer, Mr. Stafford QC appears in the Supreme Court of the United Kingdom and acts in international arbitrations on a range of matters, including financial derivatives, insurance and international commercial fraud. He has been cited by industry publications as "*a really good lateral thinker*" and "*a great tactician*" with "*fantastic courtroom demeanor*".

Kobre & Kim
Tower 42
25 Old Broad Street
London EC2N 1HQ
United Kingdom

Tel: +44 20 3301 5709
Email: andrew.stafford@kobrekim.com
URL: www.kobrekim.com

Founded in 2003, Kobre & Kim is a global law firm focused exclusively on international disputes and investigations, often involving allegations of fraud or misconduct. Kobre & Kim has developed a reputation as a go-to firm for complex cross-border dispute resolution. Founded by two former U.S. Department of Justice prosecutors, the firm has organically grown to more than 300 employees who work out of offices in Asia, Europe, the Middle East, the U.S., South America, and the Caribbean.

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The Impact of EU Law on ISDS, Intra-EU BITs and the ECT

European Federation for Investment Law and Arbitration (EFILA)

Prof. Dr. Nikos Lavranos

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

It is now more than 10 years ago that the Lisbon Treaty entered into force by which the European Union (EU) obtained exclusive competence regarding foreign direct investment (FDI) (Art. 207 Treaty on the Functioning of the European Union (TFEU)). As a consequence thereof, the EU has become an active player in international investment law and arbitration by affecting the investment law policy of the Member States, both internally and 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 (ISDS) system contained in practically all bilateral investment treaties (BITs) and free trade agreements (FTAs). In addition, the Court of Justice of the EU (CJEU) has become another central player by rendering decisions which increase the tension between EU law and international investment law.

In the following sections, the impact of EU law on ISDS, intra-EU BITs and the Energy Charter Treaty (ECT) will be reviewed by discussing the most important developments of the past year. This analysis starts with reviewing the situation post-*Achmea*, which culminated in the recently signed Termination Agreement that aims to terminate most, if not all, intra-EU BITs.

Subsequently, we will examine the recent developments regarding the ECT, in particular concerning its current modernisation process.

Finally, we will 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 on a global level within the United Nations Commission on International Trade Law (UNCITRAL), by pushing for the creation of a so-called Multilateral Investment Court (MIC).

The Termination Agreement Regarding Intra-EU BITs

Following the CJEU's *Achmea* judgment, delivered in March 2018, 23 Member States signed a Termination Agreement that would terminate all their intra-EU BITs. This Termination Agreement has now entered into force for all signatory Member States.

For obvious reasons, the UK did not sign this Termination Agreement, and neither did Austria, Finland, Ireland, and Sweden.

The Termination Agreement declares all intra-EU BITs and all disputes based on them to be incompatible with EU law, and thus moot. New intra-EU BIT arbitrations are declared to be no longer possible.

In addition, all sunset clauses are also declared inapplicable, meaning that investors cannot rely on the sunset clauses of those intra-EU BITs for investments made prior to their termination. In other words, whereas sunset clauses kick in when BITs are terminated in order to protect the vested rights of investors for investments made prior to termination, the Termination Agreement retroactively takes that right away from investors.

As an alternative to intra-EU BITs, the European Commission has proposed setting up an upgraded Solvit mechanism – so-called "Solvit-Invest" – which would be adapted to investment disputes. The Solvit-Invest procedure would aim to resolve individual cases amicably and prevent escalation into a formal legal dispute. The intention is to set up a Solvit branch that specialises in investment cases, equipped with specific independence safeguards.

Moreover, Solvit-Invest would allow reporting of issues of general concern in a Member State, such as recurring investment protection missteps. In that case, contact points would be set up within Solvit-Invest where stakeholders could provide structured feedback. This feedback would provide a better overview of structural issues at the national and EU level.

Obviously, the proposed Solvit-Invest mechanism cannot be considered an adequate replacement of the ISDS system contained in the intra-EU BITs. This means that European investors could only rely on domestic courts in Member States in order to seek protection against (in)direct expropriation and other unfair treatment, whereas the very same European Commission and the CJEU have repeatedly confirmed the existence of a significant backsliding of the Rule of Law level in several EU Member States – in particular, due to the political pressure and influence imposed on domestic court judges. Hence, the level of investment and investor protection within the EU is being significantly lowered. This could make it particularly attractive for European investors to restructure their investments via non-EU Member States, such as Switzerland or the post-Brexit UK.

The Compatibility of the ISDS Clause of the ECT With EU law Before the CJEU

Despite the fact that the *Achmea* judgment does not mention the ECT at all, several Member States are attempting to use it as an argument to annul or set aside intra-EU awards rendered against them under the ECT. In particular, Spain (but also Germany, Italy, Romania, and the Czech and Slovak Republics), which is facing more than 40 intra-EU ECT claims, has been attempting to use the *Achmea* judgment to vacate awards that have been rendered against it. However, so far, all ECT arbitral tribunals have rejected the *Achmea* objection and concluded that the *Achmea* judgment has no bearing on their jurisdiction under the ECT.

At the same time, the focus has now shifted towards the question of the compatibility of the ISDS clause of the ECT with EU law before the CJEU. Recently, several Advocate Generals have opined that the ISDS clause of the ECT is incompatible with EU law by essentially extending the *Achmea* judgment to the ECT. Thus, it seems very likely that the CJEU will follow these opinions, which would make the ISDS clause of the ECT inapplicable for European investors for claims against EU Member States. Such a decision of the CJEU would question the very *raison d'être* of the ECT.

Simultaneously, the EU and its Member States are pushing to conclude the modernisation process of the ECT, which was started a few years ago. Next to the main aim of excluding the application of the ECT for intra-EU investment disputes, the EU and its Member States want to replace the currently existing ISDS system with the ICS (see next section). However, there is some resistance against these proposals, in particular from Japan.

In addition, in the context of the increasing effort to fight climate change and to meet the Paris Agreement CO_2 emission targets, the "greening" of the ECT has become a new top priority for the EU and its Member States. Essentially, the idea is that all fossil fuels would be excluded from the scope of application of the ECT. Again, this would be another blow to the *raison d'être* of the ECT and could push the ECT into a fundamental identity crisis.

However, for the time being not all ECT members are yet fully convinced. As a result, the ultimate outcome of the ECT modernisation process remains to be seen.

The Investment Court System

In recent FTAs with Canada (CETA), Singapore and Vietnam, the EU and its Member States have replaced the ISDS system with the new so-called ICS.

Essentially, the ICS – largely inspired by the World Trade Organization (WTO) Dispute Settlement System – would create a semi-permanent, two-tier, court-like system, which significantly moves 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, party autonomy, which is one of the hallmarks of arbitration, would be effectively eliminated. This obviously shifts the balance to the advantage of States.

In particular, it is not difficult to anticipate that States will appoint members whom 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 of the Body's members; this has effectively paralysed the Appellate Body and prevents it from carrying out its functions. As a consequence thereof, the EU – rather ironically – has proposed arbitration as a solution to overcome the current paralysis of the WTO Appellate Body.

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 length of 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.

Despite the initial success of the EU in introducing the ICS in its FTAs, it ought to be noted that Japan did not accept the ICS in its FTA with the EU, while the European Commission has not even put the ICS on the table in its FTA negotiations with Australia and New Zealand; nor is the ICS part of the recently concluded FTA between the EU and Mercosur.

Meanwhile, the ratification of CETA and the other EU FTAs is meeting significant opposition in many EU Member States because national parliaments are still not convinced that the ICS sufficiently addresses their concerns regarding the current ISDS system generally.

Therefore, if and when the ICS under the various EU FTAs will actually become operational remains questionable.

Towards a Multilateral Investment Court

In 2017, the European Commission, together with Canada and Mauritius, convinced UNCITRAL to set up a Working Group with a broadly formulated mandate to identify and examine any of the perceived shortcomings of the current ISDS system and to propose possible solutions. The discussions began in late 2017 and have since then made significant progress. In these discussions, the European Commission, Canada, Mauritius and several South American States have repeatedly referred to the MIC as the panacea that would solve most, if not all, of the perceived shortcomings of the current ISDS system.

The MIC would be based on the ICS as contained in the EU's recent FTAs. However, many States are not convinced that creating a new international court would be the appropriate solution. In particular, Chile, Israel, Japan, Russia, the US and some Asian States are not yet convinced and instead consider reforming or modifying the existing rules and institutions, such as, for instance, the International Centre for Settlement of Investment Disputes (ICSID) Convention or the Permanent Court of Arbitration (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 1,000 ISDS disputes have been initiated, much to the general satisfaction of the users. Indeed, according to statistics provided by the United Nations Conference on Trade and Development (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 and FTAs with ISDS provisions. Meanwhile, the first results of the negotiations have been achieved.

First, as requested by UNCITRAL Working Group III, a draft Code of Conduct for Adjudicators has been jointly submitted by the Secretariats of ICSID and UNCITRAL. The second draft has been discussed and met with broad support, and its approval can be expected soon.

Second, the Working Group agreed that third-party funding (TPF) should be regulated more tightly, in particular by requiring users of TPF to be more transparent with regard to the identity and content of the TPF agreement.

Third, the Working Group agreed to establish an Advisory Centre for International Investment Law that mirrors the Advisory Centre at the WTO, which provides legal assistance to developing countries involved in WTO disputes.

The first round of discussions have taken place and the first contours of the Advisory Centre for International Investment Law have become visible. There is broad agreement that it should provide legal assistance to developing countries in investment disputes and that it should provide a forum for the avoidance of disputes by offering mediation and other Alternative Dispute Resolution (ADR) mechanisms. In addition, this Advisory Centre should also provide training and outreach activities for government lawyers of developing countries.

However, some details regarding the Advisory Centre still need to be worked out, for example: what is its institutional relationship with the envisaged MIC; how and by whom will it be financed; and whether SMEs may be allowed to use the services of the Centre as well.

While the discussions and negotiations will be intensified in the next years, it is too early to say whether the MIC proposal will gain sufficient traction and support from all the major economies, investors and the arbitration community generally. Possibly, parties might agree to adopt an incremental and flexible approach by taking several intermediate steps rather than going immediately for a full-blown, two-tier permanent court, which would require many more years of negotiations. Thus, the parties could agree to first establish only an Appeal Court for disputes brought under specified investment treaties, which could later be further developed into an Appeal Court with universal jurisdiction for all investment disputes.

In any event, the UNCITRAL parties have agreed that the Working Group III on ISDS reform must conclude its work by the end of 2026. Accordingly, concrete results can be expected in the near future.

Outlook

Over the past decade, the EU has become an active driver in shaping international investment law and arbitration. The impact of EU law on ISDS is particularly noticeable regarding intra-EU BITs after the CJEU determined in *Achmea* that the relevant ISDS provision is incompatible with EU law. The recently signed Termination Agreement will largely eliminate intra-EU BIT disputes. Besides, the impact of EU law is becoming increasingly visible regarding the use of the ISDS provisions of the ECT in intra-EU disputes. The CJEU is playing a decisive role in this context. Moreover, the currently ongoing modernisation process of the ECT provides an opportunity for the EU and its Member States to implement their reform agenda. All this will inevitably lower the level of investment and investor protection within the EU, which will force investors and their advisors to consider viable alternative solutions.

At the international level, while the ICS has been included in several EU FTAs, it has not yet become operational due to the resistance to the ratification process within EU Member States. However, if and when the ICS is put into operation, this could potentially have far-reaching consequences for investment treaty arbitration generally. This 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 over the coming years. Indeed, it seems that the EU and its Member States have artificially been creating a permanent conflict between EU law and international investment law, which was absent until recently.

Consequently, the arbitration community must think creatively of solutions that would effectively resolve or at least reduce the tension between EU law and international investment law in a mutually respective way.

Prof. Dr. Nikos Lavranos, LL.M. is the first Secretary General of the European Federation for Investment Law and Arbitration (EFILA). He studied law at the J.W. Goethe University, Frankfurt am Main, Germany. He obtained his LL.M. (*cum laude*) and Ph.D. law degrees from Maastricht University, the Netherlands.
In 2017, he set up NL-Investmentconsulting, a high-quality, boutique consultancy firm, which advises on all issues of investment law and arbitration.
He is listed as an arbitrator and mediator at the Vienna International Arbitration Centre (VIAC), arbitrator at the China International Economic and Trade Arbitration Commission (CIETAC), mediator at the Asian International Arbitration Centre (AIAC) and mediator for the Energy Community.
He acts as an independent external legal advisor and legal expert for several international law firms and sits as an arbitrator and mediator in investment treaty arbitrations.
He is a guest professor for "International Investment Law" at the Free University Brussels – Brussels Diplomatic Academy, and an adjunct professor at various other universities worldwide.
He is also Co-Editor-in-Chief of the *European Investment Law and Arbitration Review* and a permanent contributor to the *Kluwer Arbitration Blog*, *Borderlex*, the EFILA blog and the *Practical Law Arbitration* blog.

European Federation for Investment Law
and Arbitration (EFILA)
Avenue Marnix 23, 5th floor
1000 Brussels
Belgium

Tel: +31 6 2524 9493
Email: n.lavranos@efila.org
URL: www.efila.org

Since the European Federation for Investment Law and Arbitration (EFILA) was established in Brussels in 2014, it has developed into a highly regarded think-tank which specifically focuses on the EU's investment law and arbitration policy.
EFILA is unique in that it brings together arbitration practitioners, academics and policymakers who 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 its Annual Conference and Annual Lecture, have established themselves as key events of the investment arbitration community.
EFILA regularly submits its views to public consultations organised by the EU and ICSID, as well as to the UNCITRAL Working Group III. All its submissions are published on its website.
EFILA also publishes – together with Queen Mary University of London – the *European Investment Law and Arbitration Review*.

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State of Play of EU Investment Protection

Prof. Dr. Gerard Meijer

Kirstin Schwedt

Xavier Taton

Linklaters LLP

1 Introduction

The European Union ("**EU**") is a political and economic union of 27 Member States based on two fundamental treaties: the 2007 Treaty on European Union ("**TEU**", originally signed in Maastricht in 1992); and the 2009 Treaty on the Functioning of the European Union ("**TFEU**", successor of the 1957 Treaty of Rome). But it is more than the sum of its parts: the EU has a separate legal personality from its Member States and can conclude international treaties. It functions with a complex network of seven core institutions (namely the European Parliament, the European Council, the Council of the European Union, the European Commission ("**Commission**"), the Court of Justice of the European Union ("**CJEU**"), the European Central Bank and the Court of Auditors), specialised bodies, offices and agencies, some of which have a separate legal personality. While the implementation of most of the policies adopted at EU level is left to the Member States, EU law rules relevant to investment protection are usually directly applicable and have precedence over domestic law.

The CJEU shall ensure the correct and coherent interpretation and application of EU law through: (i) preliminary ruling references made by domestic courts; (ii) infringement proceedings for breach of EU law lodged by the Commission or a Member State against another Member State; and (iii) actions for annulment or failure to act against the EU institutions.

Investment protection in the EU has gone – and is still going – through turbulent times. The regimes for investment treaties concluded by the EU with third countries ("extra-EU investment protection"; section 2) and for investment treaties concluded by EU Member States amongst themselves ("intra-EU investment protection"; section 3) are drifting apart, while both are undergoing significant changes. The Commission is also reviewing the substantive and procedural protections offered to investors under EU law (section 4). Finally, this contribution sets out a few key developments influencing the future relationship between investment protection and EU law (section 5). The Commission's review of investment protection under EU law, efforts to modernise the Energy Charter Treaty ("**ECT**") while the EU is facing its first ever ECT claim and plans for a Multilateral Investment Court ("**MIC**") are only a few of the developments to watch.

2 Extra-EU Investment Protection

2.1 Overview of EU trade and investment agreements with third States

The EU currently has over 40 trade agreements covering more than 70 non-EU countries. In 2009, the Lisbon Treaty gave the EU the competence to regulate foreign direct investment. Since then, the EU has been negotiating agreements on investment protection and trade liberalisation with third countries.[1] However, whilst free trade agreements ("**FTAs**") covering solely foreign direct investment fall under the Union's exclusive competence, *mixed* agreements – which also include investment chapters with investor-State dispute settlement ("**ISDS**") provisions – also require the consent of Member States.[2] Thus, mixed agreements only enter into force once the third country, the EU and all Member States have approved the agreement.

Before the Lisbon Treaty, trade agreements involving the EU were generally more narrow in scope, primarily facilitating the movement of goods, services and capital, but leaving the protection of investments mainly to bilateral investment treaties ("**BITs**"). The new generation of EU FTAs, however, does generally include investment protection provisions and corresponding dispute resolution mechanisms. Thus, while older EU FTAs do not include investment chapters or investment protection provisions, these are common features in the most recent ones such as those with Canada, Singapore and Vietnam, all of which establish an Investment Court System ("**ICS**").[3] The investment protection provisions in the aforementioned EU FTAs will come into force once all EU Member States have ratified them according to their own national procedures (while the sections relating to trade have already come into force).

While some agreements are currently being renegotiated and modernised, including those with Azerbaijan, Chile and Mexico and five Eastern and Southern Africa trading partners (Comoros, Madagascar, Mauritius, Seychelles and Zimbabwe), the EU is also currently negotiating new FTAs with Australia, Indonesia, New Zealand and the Philippines. Additionally, the EU has concluded other "agreements in principle" that are in the process of being reviewed, adopted or ratified, such as that with the Mercosur States (Argentina, Brazil, Paraguay and Uruguay).

Also of importance is EU Regulation No. 1219/2012 of 12 December 2012, in relation to transitional arrangements regarding the more than 1,400 BITs still in force between EU Member States and third countries that were signed by Member States before the entry into force of the Lisbon Treaty, or before their date of accession to the EU. The Regulation aims at ensuring consistency between those BITs, EU law and EU investment policy, and sets out how the EU Commission and the Member States will cooperate in relation to the operation of the BITs, including their dispute settlement mechanisms.[4] Although the EU has considered it appropriate to maintain in force these agreements and to authorise Member States to negotiate and conclude new BITs, the EU's ultimate goal is to progressively replace them with investment agreements of the Union.[5]

2.2 CJEU's *Opinion 1/17 v. Achmea*: ISDS possible in extra-EU matters

Making reference to the CJEU's finding in *Slovak Republic v Achmea BV*[6] ("***Achmea***") that arbitration clauses contained in intra-EU BITs are incompatible with EU law (see section 3.1), Belgium requested the CJEU clarify its position on the compatibility of the ICS prescribed by the EU-Canada Comprehensive Economic and Trade Agreement ("**CETA**") with EU law. In its *Opinion 1/17* of April 2019, the CJEU found that the ICS provided for by CETA is compatible with EU law.

Recognising that the CETA Tribunal may need to apply EU law in assessing the effects of measures adopted by Member States or by the Union, the CJEU found that the treaty confines the CETA Tribunal to examining EU law as a matter of fact. Thus, the CETA Tribunal would not be able to interpret EU law and would be obliged to follow its prevailing interpretation. Consequently, the CJEU was satisfied that the CETA Tribunal would not adversely affect the exclusive jurisdiction of the CJEU concerning the interpretation of EU law.

According to the CJEU, these findings distinguish the CETA Tribunal from tribunals constituted under intra-EU BITs (as in *Achmea*), since the latter may have to interpret EU law.

How exactly the CETA Tribunal is to examine EU law purely as a matter of fact is unclear. Nevertheless, despite the controversy that it has generated, the CJEU's *Opinion 1/17* cleared the path for the EU to continue to include ICS mechanisms in its trade agreements, with a view to eventually implementing a MIC (see section 5.3).

2.3 Overview of extra-EU disputes and brief analysis of the most prominent new EU FTAs

The most frequently relied upon instrument for extra-EU disputes is the ECT.[7] This is not only true in cases where (i) EU investors bring claims against a non-EU country, but also where (ii) non-EU investors bring claims against an EU Member State. In addition, BITs between EU Member States and third countries have also been invoked on numerous occasions, but almost invariably by EU investors.

BITs, as well as the ECT, largely represent traditional models of investment protection, which prioritise investors' interests over the host States' right to regulate. These agreements most often provide for investor-friendly definitions of covered investments and protected investors.

The current trend in EU FTAs, however, shows a different approach. The scope of covered investments has been clarified to provide additional certainty and the definition of protected investors has been qualified by adding a "substantial business activity" requirement, preventing certain categories of companies from benefitting from the respective protections. Furthermore, the new EU FTAs have: narrowed the scope of certain standards of protection such as fair and equitable treatment ("**FET**") and full protection and security; highlighted the importance of sustainable development; and enhanced the parties' powers to regulate in areas of legitimate public interest (thus addressing what has been referred to as a "chilling effect" of ISDS on States' regulatory powers).

Recent EU FTAs have also kept some of the procedural traits seen in the older generation of BITs. For example, the agreements with Canada, Vietnam, and Singapore all include sunset clauses (i.e. provisions for the continued application of a BIT for often 10 to 20 years after its termination). Additionally, these agreements all incorporate cooling-off periods, requiring the investor to allow for a possible amicable settlement before resorting to arbitration. Certainly, the most salient procedural difference in the new EU FTAs is the inclusion of an ICS with a standing pool of judges (appointed by the States) and an appellate tribunal.

Interestingly, while departing from certain fundamental traits of ISDS, the EU seeks to preserve a substantial part of the structure of traditional ISDS. Institutions such as the International Centre for Settlement of Investment Disputes ("**ICSID**") and the Permanent Court of Arbitration shall still play a role within the new ICS framework proposed by the EU. Under the CETA and the EU FTAs with Vietnam and Singapore, for example, proceedings before the ICS tribunals would likely be administered by such institutions under rules traditionally used in ISDS proceedings.

Equally interesting is the potential enforcement of decisions rendered by ICS tribunals under the new EU FTAs. The agreements frame such decisions as awards enforceable under the ICSID Convention or the New York Convention. However, enforceability under these instruments is not guaranteed. Although enforcement under the New York Convention (due to its wording and ample scope) seems possible, enforcement under the ICSID Convention is uncertain.

2.4 Unified investment agreement with China

In December 2020, the EU and China concluded, in principle, the negotiations for a Comprehensive Agreement on Investment[8] ("**CAI**").

Through the CAI, China has agreed to grant EU investors an enhanced level of access to the Chinese market. Before the conclusion of this agreement, market access constituted the largest impediment to EU investment in China. The agreement addresses issues such as: transparency in relation to subsidies as well as legal certainty regarding licences and authorisations; lays down rules on state-owned enterprises; and contains provisions that forbid forced technology transfers.

Importantly, this is the first time that China has agreed to provisions relating to sustainable development with a trading partner, including environmental and labour commitments (such as the implementation of the Paris Agreement and steps towards the ratification and implementation of the fundamental conventions of the International Labour Organization, in relation to the abolition of forced labour).

The CAI also contains a commitment by both the EU and China to try to complete the negotiations on investment protection within two years of the signing of the agreement. If fully concluded, the CAI will be the EU's first-ever stand-alone investment agreement covering both market access and investment protection.

Once in force, the CAI would replace 25 existing BITs currently in force between China and EU Member States. The EU and China are yet to agree on how investor-State disputes are to be settled, but have committed to work towards a dispute settlement mechanism that incorporates modernised standards of protection and the latest structural reforms of the current

ISDS system, as are currently being discussed under the auspices of the United Nations Commission on International Trade Law ("**UNCITRAL**")[9] (see section 5.3 below). However, on 20 May 2021, the European Parliament passed a resolution to freeze the ratification of the CAI in response to Chinese sanctions on European individuals.

2.5 EU-UK Trade and Cooperation Agreement

The EU and the UK concluded the Trade and Cooperation Agreement ("**TCA**") on 24 December 2020 to regulate their relationship after the end of the transition period on 31 December 2020. It forms a basis for an evolving relationship between the parties and may further change, depending on scrutiny by the European Parliament or upon review by the parties.

It contains limited substantive protections for the parties' investors, mostly focused on market access and national/most favoured nation ("**MFN**") treatment. The TCA includes neither a FET provision nor a clause protecting investors against expropriation.

As a striking move away from other recent treaties concluded by the EU with third States (see section 2.3 above), the TCA does not provide for an investor-State enforcement mechanism and cannot be directly invoked before domestic courts. Its dispute resolution mechanism is limited to "WTO-like" State-to-State arbitration.

The fate of the BITs concluded by the UK with certain EU Member States before their accession to the EU remains uncertain. The same is true for the recognition and enforcement of intra-EU BIT/ECT awards in the UK. One consequence might, therefore, be that the UK, as a third State, would find itself in a more favourable position than EU Member States to attract investors wishing to invest in the EU Member States as long as the UK still has those BITs.

3 Intra-EU Investment Protection

3.1 The CJEU's *Achmea* decision

In March 2018, the CJEU in *Achmea* found the arbitration provision in the BIT between the Netherlands and Slovakia to be incompatible with EU law. The CJEU held that the provision had an adverse effect on the autonomy of EU law, e.g. under Article 344 TFEU. An arbitral tribunal might have to interpret or apply EU law but cannot not make preliminary references to the CJEU pursuant to Article 267 TFEU. Furthermore, any BIT arbitral award would not be subject to review by a Member State's court to ensure compatibility with EU law. The CJEU argued that this system of judicial review, including the "keystone" preliminary ruling procedure, was essential to ensure consistency and uniformity in the interpretation of EU law and with the fundamental principles of mutual trust and sincere cooperation enshrined in the EU Treaties.[10]

3.2 Termination of intra-EU BITs

To comply with their obligations under EU law, the majority of EU Member States signed an Agreement for the termination of Bilateral Investment Treaties Between the Member States of the European Union[11] ("**Termination Agreement**") in May 2020. At the time of writing, Austria, Finland, Ireland and Sweden have not signed the Termination Agreement. Austria and Sweden have committed to terminating their BITs bilaterally, and Ireland is not party to any active BITs.

Under the Termination Agreement, all remaining intra-EU BITs, including any sunset clauses, are terminated, with different legal consequences for intra-EU arbitrations depending on whether they qualify as "Concluded Arbitration Proceedings", "Pending Arbitration Proceedings" or "New Arbitration Proceedings". The first remain unaffected, whereas in case of the latter two, the Member States concerned shall inform arbitral tribunals that there would be no valid basis to arbitrate. Where a signatory Member State is a party to judicial proceedings concerning such an arbitral award, it shall ask the competent national court to set the arbitral award aside, annul it or refrain from recognising and enforcing it.

The Termination Agreement, in its Article 9, contains a novel "structured dialogue" for the settlement of ongoing disputes with the help of an impartial facilitator to be chosen by joint agreement between the investor and the respondent State. The first known reference to this mechanism appears to have been made by the claimant in the ICSID arbitration *Donatas Aleksandravicius v. Kingdom of Denmark* (ICSID Case No. ARB/20/30), but no details as to the progress of this attempt are known as at the time of writing.

In addition, the Termination Agreement reopens access to judicial remedies under national or EU law, even if national time limits for bringing such actions have expired (Article 10).

3.3 The CJEU's *Komstroy* decision and claims under the ECT

On 2 September 2021, the CJEU extended its *Achmea* reasoning to intra-EU claims under the multilateral ECT in *Komstroy v Moldova* (Case C-741/19).[12] As with BIT arbitral tribunals, the CJEU found that ECT arbitral tribunals do not guarantee the effectiveness and autonomy of EU law – because arbitral tribunals cannot refer prejudicial questions to the CJEU and because their decisions are subject to limited grounds for annulment when under review by courts in EU Member States.

The Termination Agreement did not pre-empt the judgment by proposing a solution for the EU and its Member States to deal with the multilateral ECT. Its signatories had stated that they "*will deal with this matter at a later stage*".[13] This need has become more pressing following the CJEU's ruling in *Komstroy v Moldova*.

Even before the CJEU's ruling, the Netherlands brought proceedings in the German courts, asking to find inadmissible two ICSID arbitrations under the ECT by the German energy companies RWE and Uniper in relation to the Netherlands' exit from coal.[14] These proceedings are pending at the time of writing.

In parallel, negotiations on the modernisation of the ECT remain ongoing (see section 5.1 below).

3.4 Future of intra-EU investment treaty arbitrations

After the CJEU's *Achmea* judgment, arbitral tribunals have not been convinced by States' *Achmea*-based defences and their attempts to challenge jurisdiction on this basis. Tribunals relied on, for example, the primacy of the ICSID Convention and the Vienna Convention on the Law of Treaties ("**VCLT**") to reject the States' arguments.[15]

So far, the Termination Agreement has had little effect on pending arbitrations. For example, in *PNB Banka et al. v Latvia* (ICSID Case No. ARB/17/47),[16] the tribunal decided that the Termination Agreement did not have import as a matter of international law and only focused on compliance with EU law. However, the underlying UK-Latvia BIT in that case was not subject to termination under the Agreement, the UK having left the EU. In *Fynerdale Holding B.V. v. Czech Republic* (PCA Case No. 2018-18), the award was rendered before the Agreement entered into force.[17] In pending (or future) cases where BITs have been terminated before an award is rendered, the Termination Agreement, as a newer instrument of public international law between the same parties who signed the BIT in question, will highly likely influence tribunals' decision-making – according to Article 54(b) VCLT, "*[t]he termination of a treaty or the withdrawal of a party may take place* […] *at any time by consent of all the parties after consultation with the other contracting States*". Whether arbitral tribunals will develop novel ways to give weight to investors' expectations and acquired rights of being protected under intra-EU BITs and their sunset clauses remains to be seen.

As shown by the Commission's response to the ICSID award obtained by the Swedish Micula brothers against Romania,[18] the EU might also bring into play State aid considerations if Member States pay compensation based on intra-EU awards.[19]

4 Investment Protection Under EU Law

4.1 Substantive protections

The EU, which was initially built as an economic area, grants several strong protections to investors, especially to investors of one Member State investing in other Member States.

The internal market of the EU is based on four fundamental freedoms – the free movement of: goods; persons; capital; and services (which includes the freedom of establishment). State measures jeopardising an investment often constitute an illegal hindrance to these freedoms, in particular to the free movement of capital and services. Pursuant to the CJEU's case law,[20] national measures liable to hinder, or make less attractive, the exercise of fundamental freedoms guaranteed by the Treaty must (i) be justified by imperative requirements in the general interest, (ii) be necessary and proportionate to these requirements, and (iii) be compatible with the general principles of EU law and fundamental rights, in particular the Charter of Fundamental Rights of the European Union ("**EU Charter**") and the European Convention on Human Rights ("**ECHR**").

The general principles of EU law, the EU Charter and the ECHR offer a number of protections to investors, including the right to property, the principle of non-discrimination, the rights to an effective remedy and to a fair trial, the principle of good administration, the principle of legal certainty and the respect of investors' legitimate expectations.

Moreover, given the supremacy of EU law over domestic law, investors may directly benefit from harmonisation rules contained in sector-specific EU legislation, covering areas such as financial services, transport, media, energy, telecommunications, public procurement, professional qualifications, intellectual property and company law.

Finally, a selective advantage to certain companies over other investors, if granted by a State or from State resources, may be prohibited under EU State aid rules if they distort or threaten to distort competition and affect trade between Member States.

4.2 Enforcement and remedies

EU law prevails over the Member States' domestic laws and can be invoked by investors, regardless of their nationality, before domestic courts.

Since investors do not have direct standing to challenge a Member State's measures before the CJEU, they may face difficulties in effectively enforcing their rights granted by EU law in case there is no remedy available at the domestic level or if domestic courts are perceived as partial. In such cases, investors will need to convince either the Commission to take on their case (infringement proceedings; section 4.2.1), or a domestic court to refer the case to the CJEU (preliminary reference procedure; section 4.2.2).

By contrast, when challenging acts adopted by EU institutions (or their absence), investors have standing before the CJEU provided they are affected by said (absence of) acts (section 4.2.3).

4.2.1 Infringement proceedings

In a situation in which a Member State has failed to fulfil its obligations under the Treaties, the Commission or, in theory, another Member State may bring the matter before the CJEU under Articles 258 and 269 TFEU. Member States generally prefer to ask the Commission to file a complaint against another Member State rather than starting proceedings themselves. Only four infringement proceedings were brought before the CJEU by one Member State against another.[21]

Article 108 TFEU, as implemented by Council Regulation 2015/1589 of 13 July 2015, provides for a specific procedure under State aid law, mostly designed to (i) reinforce the powers of the Commission (Member States cannot initiate this procedure), and (ii) offer more rights to interested parties, such as the investor concerned.

Investors may complain to the Commission or, in theory, to another Member State, requesting them to take on their case. If they refuse to do so, this decision cannot be challenged (except in State aid matters).

If the CJEU concludes that a Member State has breached EU law, that State must take the necessary measures to comply with such decision. However, the Court can neither award direct compensation to the prejudiced investor, nor impose specific measures (except under State aid law). Still, such a ruling will constitute a precedent for a possible claim for damages against this Member State (and, under State aid law, against an aid beneficiary) before domestic courts.

4.2.2 Preliminary ruling references

Under Article 267 TFEU, a domestic court may (or must, for a court of last resort) ask the CJEU for a preliminary ruling on a question concerning the interpretation of EU law or the validity and interpretation of acts of EU institutions if it believes that it cannot render a decision without the question being decided. As a general rule, arbitrators are not regarded as a "court or tribunal of a Member State" and therefore are barred from referring a case for preliminary ruling to the CJEU.[22]

In principle, the CJEU has no jurisdiction to rule on the compatibility of national rules with EU law. However, in practice, the CJEU indicates to the referring court that EU law precludes domestic legislations "such as" that at issue in the main proceedings. The domestic court is bound by the CJEU's decision and must apply it to the specific circumstances of the case (including by disregarding a national measure, or one of its interpretations, which would be contrary to EU law). Such a ruling will also constitute a precedent for a possible claim for damages against the Member State before domestic courts.

4.2.3 Actions for annulment or failure to act

Investors have only direct legal standing before the CJEU when challenging the legality of the acts adopted (or failed to be adopted) by the EU institutions. Any natural or legal person, regardless of their nationality, may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Successful actions for annulment and for failure to act lead, respectively, to a decision declaring the contested act of an EU institution void or that the institution failed to act. The CJEU cannot render direct orders aiming at eliminating the consequences arising from the infringement of EU law. However, the relevant EU institution is under a duty to eliminate any such consequences, including financial ones.

In addition, a procedurally independent action for damages may be brought before the CJEU, since the EU is liable for damages caused by its institutions and servants in the performance of their duties.

5 Outlook

5.1 Proposal to modernise the ECT

On 27 May 2020, the Commission published a proposal to modernise the ECT.[23] The proposal is intended to align the provisions with the agreements recently concluded by the EU and its Member States, e.g. the agreements with Canada, Vietnam and Singapore (see section 2.3), and with the EU's work in the UNCITRAL reform process. Another key aspect of the modernised ECT is the consideration of climate change and energy transition goals to meet the objectives of the Paris Agreement. In its current form, the proposal[24] contains a detailed FET standard, a reaffirmation of the States' right to regulate and a ban on punitive damages. The new FET regulation now explicitly sanctions a denial of justice in legal proceedings, a fundamental breach of due process, manifest arbitrariness, targeted discrimination and abusive treatment. The right to regulate includes setting up sustainable development policies and priorities recognised by each contracting party. The EU has presented a proposal to phase out the investment protection of fossil fuels from the ECT.[25] As talks between the ECT's 50-plus Contracting Parties are still ongoing, changes to the proposal are to be expected.

These talks come at a time when the EU is no longer dealing with investment protection claims only from a regulatory standpoint. In a historic first, an investment protection case based on the ECT remains underway against the EU as a party, brought by Nord Stream 2 AG in relation to the Nord Stream 2 pipeline.

5.2 Commission's review of investment protection under EU law

In light of the vast sums of money which will be required by the EU's strategic priorities (such as the European Green Deal and the Digital Single Market) and the "*momentum created by the termination of the intra-EU BITs*",[26] the Commission is working towards a comprehensive policy on intra-EU investments with the aim of better protecting and facilitating EU cross-border investments. Following a 2020 public consultation, the Commission is considering making a new legislative proposal concerning the intra-EU investment system in Q4 2021. The Commission contemplates, among others, setting up an intra-EU investment court (similar to the EU's proposal for a MIC currently discussed at UNCITRAL (see section 5.3)) and extending and improving the "Solvit" mediation mechanism.[27]

5.3 Multilateral Investment Court

Over the past few years, the EU has sought to reform the current ISDS system by establishing a MIC as a permanent body to decide investment disputes. The MIC would replace bilateral ICS provisions included in the various EU trade agreements, as described in section 2.1.

Since July 2017, ISDS reform negotiations have been taking place under the auspices of the UNCITRAL Working Group III.[28] A standing first instance and appeal investment court was proposed by the EU and its Member States[29] and is one of the alternatives currently under consideration.[30] This MIC, as currently envisaged, would be open to all States wishing to move the resolution of investor-State disputes away from the traditional ISDS system.

Besides an appeal mechanism, one of the most important differences between the traditional ISDS system and the proposed MIC is that disputes would be decided by tenured judges, appointed by the States and serving for fixed terms, instead of arbitrators appointed for each specific dispute. The proposed appointment mechanism aims at providing for appropriate regional and gender representation. While the change towards judges has been welcomed by EU officials as allowing for more "independent" adjudicators, it has also been criticised for favouring States.

Recently, in an initial draft open for comment, the UNCITRAL Working Group III considered the selection and appointment of ISDS tribunal members, with a focus on how these procedures would work in the context of a standing multilateral mechanism, such as the MIC. The note contains draft provisions on issues such as: the jurisdiction, composition and number of members of the tribunal; the nomination, selection and appointment of tribunal members; and their terms of office, renewal and replacement, among others.[31]

It is still unclear how decisions rendered by the MIC would be enforced. The EU proposal calls for a self-contained enforcement regime established through a multilateral instrument, similar to the one provided by the ICSID Convention, while maintaining that decisions could also be enforced under the New York Convention. However, based on the latest draft note of the UNCITRAL Working Group III, it is expected that the question of recognition and enforcement of decisions made under a mechanism such as the MIC will be addressed in an upcoming working paper.[32]

As to the relationship between the MIC and the ICSID Convention, incorporating the MIC within the ICSID regime has been suggested[33] but is currently not one of the three main options for ISDS reform under discussion in the UNCITRAL Working Group III.

Although it currently seems that a multilateral treaty is the most viable option for establishing a MIC, it remains to be seen whether it will obtain a sufficient degree of international and political traction.

Endnotes

1. For further information on the EU's investment policy and several relevant EU regulations (including: Regulation (EU) No. 2019/452 on the framework for the screening of foreign direct investments; Regulation (EU) No. 1219/2012 on transitional arrangements for BITs between Member States and third countries; and Regulation (EU) No. 912/2014 on the financial responsibility linked to investor-to-State dispute settlement under international agreements to which the EU is party), visit the EU Commission's website https://ec.europa.eu/trade/policy/accessing-markets/investment/, last accessed on 20 September 2021.
2. See CJEU Opinion 2/15 of 16 May 2017 regarding the EU-Singapore FTA.
3. The exception is the EU-Japan FTA, in respect of which a separate investment protection agreement is currently being negotiated because Japan, while agreeing to the substantive provisions, has still not accepted the ICS proposed by the EU.

4. Under Regulation (EU) No. 1219/2012, Member States are obliged to inform and cooperate with the Commission should they receive a request for consultation or notice of claim under a BIT covered by the Regulation.
5. See Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (April 2020). Given that mixed agreements require approval of all EU Member States, it may take decades to fully replace the investment protection framework provided by the 1,400 aforementioned BITs by agreements concluded by the EU.
6. CJEU, Judgment of 6 March 2018*, Slovak Republic v Achmea BV*, C-284/16, ECLI:EU:C:2018:158.
7. This information is available through the "Investment Dispute Settlement Navigator" tool, available at: https://investmentpolicy.unctad.org/, last accessed on 20 September 2021.
8. See the European Commission' News Archive at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233, last accessed on 20 September 2021.
9. See the European Commission' News Archive at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233 and additional information on the agreement at https://ec.europa.eu/trade/policy/in-focus/eu-china-agreement/agreement-explained/, last accessed on 20 September 2021.
10. *Achmea*'s impact is also discussed in the respective country chapters in this Guide, and in the chapter "The Impact of EU Law on ISDS".
11. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01), last accessed on 20 September 2021.
12. Available at: http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-741/19&jur=C, last accessed 20 September 2021.
13. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, Recitals.
14. *Kamerbrief over start anti-arbitrageprocedures bij Duitse rechter door Staat tegen RWE en Uniper*, available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2021/05/17/kamerbrief-over-start-anti-arbitrageprocedures-bij-duitse-rechter-door-staat-tegen-rwe-en-uniper, last accessed on 20 September 2021.
15. ICSID, Decision of 31 August 2018, *Vattenfall AB and others v. Federal Republic of Germany*, Case No. ARB/12/12; ICSID, Decision of 3 March 2016, *UP and C.D Holding Internationale v. Hungary*, Case No. ARB/13/35.
16. *PNB Banka et al. v Latvia* (ICSID Case No. ARB/17/47), Decision on the intra-EU objection dated 14 May 2021, para. 579.
17. *Fynderdale Holdings B.V. v Czech Republic* (PCA Case No. 2018-18), Award dated 29 April 2021, para. 295.
18. ICSID, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* [I], Case No. ARB/05/20.
19. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013 (notified under document C(2015) 2112), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470, last accessed 20 September 2021.
20. CJEU, Judgment of 18 June 1991, C-260/89, ECLI:EU:C:1991:254; CJEU, Judgment of 11 July 1974, *Dassonville*, C-8/74, ECLI:EU:C:1974:82; CJEU, Judgment of 1 July 2014, C-573/12, ECLI:EU:C:2014:2037; CJEU, Judgment of 20 February 1979, *Cassis de Dijon*, C-120/78, ECLI:EU:C:1979:42.
21. CJEU, Judgment of 4 October 1979, *French Republic v United Kingdom of Great Britain and Northern Ireland*, C-141/78, ECLI:EU:C:1979:225; CJEU, Judgment of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain*, C-388/95, ECLI:EU:C:2000:244; CJEU, Judgment of 12 September 2006, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, C-145/04, ECLI:EU:C:2006:543; CJEU, Judgment of 16 October 2010, *Hungary v Slovak Republic*, C-364/10, ECLI:EU:C:2012:630.
22. CJEU, Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, para. 49. However, the CJEU has held admissible preliminary questions referred to it by an arbitral tribunal, where that tribunal had been established by law, whose decisions were binding on the parties and whose jurisdiction did not depend on their agreement (e.g. CJEU, Judgment of 13 February 2014, *Merck Canada Inc. v Accord Healthcare Ltd and others*, C-555/13, ECLI:EU:C:2014:92, para. 18). The arbitration panel competent for disputes between the EU and the UK arising under the UK/EU Withdrawal Agreement (in case of failure of prior consultations in the Joint Committee) must refer questions of interpretation of EU law to the CJEU (Article 174(1) of the UK/EU Withdrawal Agreement).
23. EU text proposal for the modernisation of the ECT, available at: https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf, last accessed on 20 September 2021. Additional information can be found in the European Commission press release of 14 May 2019, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2017&title=Energy-Charter-Treaty-modernisation-European-Commission-presents-draft-negotiating-directives, last accessed on 20 September 2021.
24. The EU's proposal to modernise the ECT, available at: https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf, last accessed on 20 September 2021.
25. See the European Commission's News Archive at https://trade.ec.europa.eu/doclib/press/index.cfm?id=2248, last accessed on 20 September 2021.
26. Public Consultation Document – An Intra-EU Investment Protection and Facilitation Initiative, p. 5, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf, last accessed on 20 September 2020.
27. Commissioner Mairead McGuinness' EuroCommerce Policy Talk on "Finance and investment: driving green recovery and investment", available at: https://ec.europa.eu/commission/commissioners/2019-2024/mcguinness/announcements/eurocommerce-policy-talk-finance-and-investment-driving-green-recovery-and-investment_en. Currently, the Solvit mechanism is a largely consumer-focused online dispute resolution system which provides assistance "*when a public authority in another EU country is not doing what it is required to do under EU law*". For an overview of the current Solvit mechanism, see: https://ec.europa.eu/solvit/what-is-solvit/index_en.htm, last accessed on 20 September 2021.
28. See the Note by the Secretariat, dated 30 July 2019, on possible reform of investor-State dispute settlement, discussed at the 38th session of the UNCITRAL Working Group III (A/CN.9/WG.III/WP.166), *cf.* https://uncitral.un.org/en/working_groups/3/investor-state, last accessed on 20 September 2021.

29. See the Submission from the European Union and its Member States, dated 24 January 2019, on possible reform of investor-State dispute settlement, at the 37th session of the UNCITRAL Working Group III (A/CN.9/WG.III/WP.159/Add.1), *cf.* https://uncitral.un.org/en/working_groups/3/investor-state, last accessed on 20 September 2021.
30. Other options include a multilateral advisory centre and a stand-alone review or appellate mechanism.
31. See Note by the Secretariat, "Possible reform of investor-State dispute settlement (ISDS) Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters" (open for comments by delegations until 15 November 2021), available at https://uncitral.un.org/en/draftworkingpapers, last accessed on 15 September 2021.
32. See Note by the Secretariat, "Possible reform of investor-State dispute settlement (ISDS) Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters" (open for comments by delegations until 15 November 2021), para. 2, available at https://uncitral.un.org/en/draftworkingpapers, last accessed on 20 September 2021.
33. See Calamita, *ICSID Review*, Vol. 32, No. 3 (2017), pp 611–624.

Prof. Dr. Gerard Meijer is a partner in the Dispute Resolution Team in Amsterdam. He is widely recognised as one of the leading arbitration practitioners in the Netherlands. He has extensive experience acting as counsel to Dutch, international and multinational corporations and to governments and governmental bodies in high-value matters in a wide range of disputes. His work covers both commercial arbitration and investment arbitration.

Gerard is also Professor of International Arbitration at the Erasmus University (Rotterdam) and President of the Netherlands Arbitration Institute. He has led various innovative initiatives in the international arbitration field and regularly writes about arbitration for leading publications.

Linklaters LLP
Zuidplein 180
1077 XV Amsterdam
Netherlands

Tel: +31 20 799 6242
Email: gerard.meijer@linklaters.com
URL: www.linklaters.com

Kirstin Schwedt is a partner in the Dispute Resolution practice in Frankfurt. She has specialised experience in handling complex and high-value matters in international arbitration, litigation and alternative dispute resolution, including expert determination and mediation.

She represents clients particularly in the context of investment, post-M&A, joint venture and commercial disputes as well as D&O liability, corporate litigation and cartel damage litigation.

Kirstin has advised clients in *ad hoc* and institutional arbitration matters under the rules of the International Court of Arbitration ("**ICC**"), the German Arbitration Institute ("**DIS**", including its Supplementary Rules for Corporate Law Disputes, "**DIS-SRCoLD**"), Vienna International Arbitral Centre ("**VIAC**"), UNCITRAL, Waren-Verein der Hamburger Börse and ICSID/ECT. She regularly sits as arbitrator and is a member of the Linklaters Digital Economy Group.

Linklaters LLP
Taunusanlage 8
60329 Frankfurt am Main
Germany

Tel: +49 69 7100 3466
Email: kirstin.schwedt@linklaters.com
URL: www.linklaters.com

Xavier Taton is a partner in the Dispute Resolution practice in Brussels. An expert in procedure, Xavier has specialised experience in litigation and regulatory investigations, including in invoking EU law before EU institutions and domestic courts to protect investors against harmful State legislation across Europe. He is the author of many publications pertaining to his practice, including an 80-page contribution on the judicial protection of investors in the European Union (with Guillaume Croisant, Managing Associate in his team).

Linklaters LLP
Rue Brederode 13
1000 Bruxelles
Belgium

Tel: +32 2 5019472
Email: xavier.taton@linklaters.com
URL: www.linklaters.com

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Australia

Nastasja Suhadolnik

Joshua Paffey

Corrs Chambers Westgarth

1 Treaties: Current Status and Future Developments

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

Currently, Australia has 15 bilateral investment treaties (**BITs**) in force with the following countries: Argentina; China; the Czech Republic; Egypt; Hungary; Laos; Lithuania; Pakistan; Papua New Guinea; the Philippines; Poland; Romania; Sri Lanka; Turkey; and Uruguay.

Australia has entered into bilateral free trade agreements (**FTAs**) with the following countries: Chile; China; Hong Kong; Indonesia; Japan; Korea; Malaysia; New Zealand; Peru; Singapore; Thailand; and the USA.

It is also party to the ASEAN–Australia–New Zealand Free Trade Agreement (**AANZFTA**) (with: Brunei; Burma; Cambodia; Indonesia; Laos; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and Vietnam), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam), and the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**) (with: Cook Islands; Kiribati; New Zealand; Niue; Samoa; Solomon Islands; and Tonga – Nauru, Tuvalu and Vanuatu have signed the agreement, but have not yet ratified it).

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

On 15 November 2020, Australia and 14 Indo-Pacific countries signed the Regional Comprehensive Economic Partnership (**RCEP**) Agreement, a comprehensive FTA covering a range of matters including trade, investment and competition. Ratification by Australia is expected to occur in late 2021 after legislation was introduced into Parliament on 1 September 2021. The RCEP will enter into force 60 days after six ASEAN Member States and three non-ASEAN Member States have ratified the Agreement. The RCEP Investment Chapter contains many of the usual substantive provisions but does not provide for an investor-State dispute settlement (**ISDS**) mechanism, which will be the subject of future negotiations.

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–Egypt IPPA, the Australia–Uruguay IPPA and the Australia–Lithuania IPPA.

The Australian Government is conducting a review of its older BITs to align them with its modern treaties. The Government is considering a range of options in respect of each of its existing treaties including a full renegotiation, an amendment, the issue of unilateral or joint interpretative notes, and the replacement of the BIT with an FTA chapter. A new model BIT may also be considered.

1.4 Does your jurisdiction 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 jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is a party to the New York Convention, the Washington Convention, and the Mauritius Convention.

Australia ratified the Mauritius Convention on 17 September 2020 and it came into force on 17 March 2021.

In October 2018, the *International Arbitration Act 1974* (Cth) was amended by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) to implement aspects of the Mauritius Convention. Specifically, s. 22(3) of the Act carves out prohibitions on the disclosure of confidential information where the *United Nations Commission on International Trade Law* (**UNCITRAL**) *Rules on Transparency in Treaty-based Investor-State Arbitration* (**Transparency Rules**) apply to an arbitration. The parties to arbitral proceedings and the arbitral tribunal itself are no longer precluded from disclosing confidential information in relation to an arbitration subject to the Transparency Rules.

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

The foreign investment legislative framework in Australia comprises 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).

Effective on 1 January 2021, Australia's foreign investment regime was amended by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) and *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (Cth). The changes affect companies seeking foreign investment approval, including for investments in a "national security business" (such as a business involved in or connected with a "critical infrastructure asset").

Consistent with the balance of the investment 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 2001* with regard to: insider trading; market manipulation; disclosure of shareholdings; takeovers; acquisitions; and capital raisings.

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

2.3 Does your jurisdiction 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 that 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) or a foreign government holds a substantial 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, banking, or business investments, and now investments impacting upon Australia's national security.

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 that are contrary to the national interest (FATA, s. 67). The Policy is instructive as regards 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.

As of January 2021, notification and review is mandatory regarding certain investments that may concern national security.

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 approach of Australia's courts to treaty interpretation is, subject to contrary legislation, generally consistent with the approach in international law reflected by arts 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* (**VCLT**).

In *Macoun v. Commissioner of Taxation* (2015) 257 CLR 519, the High Court of Australia determined that the *Convention on the Privileges and Immunities of the Specialized Agencies* did not require Australia to refrain from taxing the pension entitlements of former employees of certain specialised international agencies. Consistent with the VCLT, the Court first examined the ordinary meaning of the relevant words, then considered the *travaux préparatoires*, and finally considered the practice of parties to the Convention as reflected in international jurisprudence (paragraphs [76]–[82]). The Court's review of state practices was a significant factor in its decision. In this way, the High Court proved to be more receptive to extrinsic materials in aid of treaty interpretation than it had been previously, when it had found that subsequent materials (although relevant under the VCLT) cannot alter the meaning ascertained under the ordinary principles of Australian statutory interpretation (*Maloney v R* (2013) 252 CLR 168, 198–9 (Hayne J)).

Further notable cases include:

- *Tech Mahindra Limited v. Commissioner of Taxation* [2015] FCA 1082: when interpreting the *Indian Double Taxation Agreement*, the Full Federal Court noted that India was not a party to the VCLT, but held that, as the VCLT is reflective of customary international law, 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 that Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).
- *Maloney v R* (2013) 252 CLR 168: the High Court of Australia interpreted a provision in the *Racial Discrimination Act 1975*

(Cth) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (to which the Act gives effect), which excludes "special measures" from the definition of "racial discrimination". In determining what constitutes a "special measure", the High Court adopted a strict textual interpretation. Despite the operation of art. 31(3) of the VCLT, extrinsic materials (such as the recommendations of the Committee on the Elimination of Racial Discrimination or the provisions of the UN Declaration on the Rights of Indigenous Peoples) were not to be elevated over the text of the Convention.

- *Minister for Home Affairs v. Zentai* (2012) 246 CLR 213: the High Court 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*, which had been incorporated into domestic law. Having ascertained the object and purpose of the treaty, 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, which require treaties to be construed "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation" (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.
- *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18: a majority of the High Court confirmed the relevance of customary international law in treaty interpretation (paragraphs [91]–[93]).

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

The current Australian Government's policy is to consider ISDS provisions on a case-by-case basis. Recent trade deals reflect a policy position in favour of such a mechanism as ISDS provisions were included in the Australia–Hong Kong FTA, the Indonesia–Australia CEPA and the Peru–Australia FTA.

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

None of Australia's current treaties contain anti-corruption provisions save for the CPTPP, which contains provisions that 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;
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the MFN clause;
- protect assets owned or controlled "directly or indirectly" by an investor of a party; and
- provide for minimum standards of transparency requiring prompt publication of laws, regulations, procedures and rulings relating to matters covered by the treaty.

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

No (other than where replaced by new treaties); 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 jurisdiction been involved in?

Australia has only been a party to one reported investor-State case. A second case against Australia was not pursued.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong–Australia BIT. 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 related 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 could not bring a dispute under the AUSFTA because, *inter alia*, the treaty does not provide for investor-State arbitration. APR Energy has not progressed the claim. Around the same time, NuCoal asserted a claim under the AUSFTA in relation to cancellation of a licence arising from corruption allegations. For the same reason (the treaty does not provide for investor-State arbitration), it seems that the matter is being continued by diplomatic negotiations.

In terms of Australian claimants, since 2010, a number of arbitrations were registered by investors whose home country is Australia. Known arbitrations were brought against the Dominican Republic, Egypt, Georgia, India, Indonesia, Mongolia, Pakistan, Poland, and Thailand. Several proceedings remain pending. Two disputes have been decided in favour of the investor and one in favour of the host State.

4.2 What attitude has your jurisdiction 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 jurisdiction 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 involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against States. This is discussed in question 7.3 below.

5 Funding

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

In Victoria, New South Wales, South Australia and the Australian Capital Territory, third-party funding has been legalised. The High Court of Australia in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least where maintenance and champerty had been abolished by statute). This decision is applicable to third-party funding of other dispute resolution proceedings, including arbitral proceedings.

The position in Queensland, Western Australia, Northern Territory and Tasmania is not as clear as maintenance and champerty have not been abolished in these states. However, the Queensland Court of Appeal's recent decision in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* (2020) 384 ALR 725 provides some guidance as to how these jurisdictions might consider the torts. At first instance, in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255, the Supreme Court of Queensland held that in order for a third-party funding agreement to be champertous, it must not only provide for a percentage interest in the proceeds of the litigation as a condition on the provision of funds, but also an entitlement of the funder to control the litigation by selecting and appointing counsel. Having regard to the historical evolution of the tort of maintenance, the Court of Appeal held that unless an aspect of public policy renders the third-party funding improper, the law of maintaining has now been subsumed in the law of abuse of process (paragraph [82]). The Court observed that a degree of control maintained by litigation funders in expensive and complex litigation is inevitable, and found that as long as the solicitor/client relationship is preserved and the funding is not contrary to public policy, the funding will be allowed.

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

There is no case law directly relating to the funding of investor-State claims.

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

The Australian litigation funding market, measured by revenue, was $141.2 million in 2020, compared to Australia's $23 billion legal services market (Jason Geisker and Dirk Luff, *The Third Party Litigation Funding Law Review*, The Law Reviews, 4th edition, 2021). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims. Funding claims referred to arbitration in Australia is occurring more frequently, albeit still less often than litigation funding.

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 FTAs. 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?

International arbitrations in Australia are governed by the *International Arbitration Act 1974* (Cth) (**IAA**), which gives effect to the UNCITRAL Model Law on International Commercial Arbitration. Where the Model Law applies, national court intervention is limited to matters permitted by the Model Law (art 5). Permissible court interventions include the usual matters such as assistance with the appointment of an arbitral tribunal, providing parties with interim measures of protection, assistance in the taking of evidence, and determining whether an award can be set aside, recognised and enforced.

In contrast with the Model Law, arbitrations under the Washington Convention are self-contained; that is, all procedural issues are resolved by the International Centre for Settlement of Investment Disputes (**ICSID**) and the arbitral tribunals 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 order 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).

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?

S. 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?

Under the UNCITRAL Model Law, the principle of party autonomy enables the parties to select party-appointed arbitrators and determine how a tribunal is to be constituted (subject to the requirements of impartiality and independence). No requirement of nationality applies (art. 11(1)).

In respect of ICSID arbitrations, the requirements of the Washington Convention apply:

- arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (art. 39); and
- if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment" (arts 14(1) and 40(2)).

Parties should also be aware of any limits imposed by the relevant agreement.

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

Yes.

Under the IAA, failing agreement, the number of arbitrators shall be three (Model Law, art. 10(2)); each party appoints one arbitrator, and the two thus appointed shall appoint the third (Model Law, art. 11(3)), with courts having the power to assist in the appointment.

In respect of ICSID arbitrations, 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 on 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 (art. 37(2)(b)), or where the tribunal has not been constituted within time (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?

Art. 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) (**FSIA**). 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).

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

Firebird Global Master Fund II Ltd v. Republic of Nauru (2015) 258 CLR 31 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.

In *Lahoud v. The Democratic Republic of Congo* [2017] FCA 982, 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 by ratifying the Washington Convention.

More recently, in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2021) 387 ALR 22, the Full Court of the Federal Court of Australia found that Spain and other Contracting States to the Washington Convention cannot resist "recognition" of awards by pleading foreign State immunity. However, the Full Court did not decide whether foreign States are immune from the subsequent steps of "enforcement" and/or "execution" under art. 55, and its orders (unlike those at first instance) do not grant leave for the applicant to enforce the award. Contracting States may be entitled to rely on foreign State immunity at the steps of enforcement and execution.

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

The FSIA 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 (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 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 FSIA (discussed in question 7.3 above) applies.

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Nastasja Suhadolnik is a Partner at Corrs Chambers Westgarth. She is qualified in New York and Australia and specialises in domestic and international commercial arbitration, investor-State and inter-State dispute resolution. Her experience includes advising and representing private and sovereign entities in dispute resolution proceedings conducted under various arbitration rules, primarily across the construction, renewable energy and natural resources sectors. Nastasja also has specific expertise in public international law and responsible business practices advisory work. She regularly advises States, inter-governmental and non-governmental organisations and corporate entities on the interpretation of, and compliance with, obligations arising under international law instruments and customary international law. Nastasja holds two Master of Laws degrees (from the London School of Economics and the NYU School of Law), and has previously practised at leading international arbitration firms in Paris and at the United Nations Office of Legal Affairs in New York.

Corrs Chambers Westgarth
Level 25, 567 Collins Street
Melbourne, Victoria, 3000
Australia

Tel: +61 3 9672 3176 / +61 405 141 942
Email: nastasja.suhadolnik@corrs.com.au
URL: www.corrs.com.au

Joshua Paffey is the Head of Arbitration at Corrs Chambers Westgarth. He represents clients in domestic and international arbitrations including cross-border investment disputes, and investor/State and bilateral investment treaty disputes. Joshua advises listed companies, governments and government-owned enterprises throughout Asia, Africa, America, the UK and Europe. His clients include energy and resources companies, oil and gas project sponsors and operators, EPC contractors, commodity traders, infrastructure project sponsors and participants. Joshua lectures in international commercial arbitration to university law students, is a director of the Australian Centre for International Commercial Arbitration (ACICA) and Chair of the ACICA Queensland State Committee.

Corrs Chambers Westgarth
Level 42, 111 Eagle Street
Brisbane, Queensland, 4000
Australia

Tel: +61 7 3228 9490
Email: joshua.paffey@corrs.com.au
URL: www.corrs.com.au

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1 Treaties: Current Status and Future Developments

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

According to the statistics provided by the United Nations Conference on Trade and Development (UNCTAD) (https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china), as of 10 September 2021, China (excluding Hong Kong, Macau and Taiwan) has concluded 145 bilateral investment treaties (BITs) and 24 multilateral treaties or free trade agreements (FTAs) with investment provisions (TIPs). Of the 169 treaties, 107 BITs and 19 TIPs have been ratified and entered into force. The latest BIT ratified by China is the China-Turkey BIT (2015), which was signed on 29 July 2015 and entered into force on 11 November 2020.

China implements a "one country, two systems" policy towards Hong Kong SAR and Macau SAR. Accordingly, Hong Kong and Macau are considered independent jurisdictions with their own systems of law. They are free to join international agreements in investment and trade fields in their own names. Specifically, Hong Kong SAR has concluded 21 BITs and seven TIPs with other states or regions, while Macau SAR has concluded two BITs and three TIPs.

The TIPs mentioned above include the following investment and trade agreements between mainland China and Hong Kong SAR, or Macau SAR:

- the China-Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement (2017);
- the China-Hong Kong CEPA (2003);
- the China-Macau CEPA Investment Agreement (2017); and
- the China-Macau CEPA (2003).

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

According to UNCTAD statistics, amongst the 169 investment and trade agreements signed by China, 19 BITs and five TIPs have not yet been ratified.

The reasons for China not timely ratifying these signed treaties are diverse, and can only be examined on a case-by-case basis. These potential reasons may include, for instance, ideology divergencies, breakdown or deterioration of diplomatic relations, geopolitical tension, economic or trade sanctions, or the need to go through a domestic ratification process.

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

China has one of the most extensive BIT networks in the world, but it does not have its own model BIT. China's BITs can be roughly divided into four generations, as described below.

The first generation refers to BITs signed between 1982–1989. The typical features of first-generation BITs include, for instance, only an *ad hoc* arbitration clause, and the disputes allowed for arbitration were those relating to the "amount of compensation for expropriation", which from time to time gave rise to conflicting explanations in terms of its application. *Cf.* Article 13 of the China-Sri Lanka BIT (1986); Article 7 of the China-United Kingdom BIT (1985).

The second generation refers to BITs signed between 1990–1997, thanks to China's accession to the International Centre for Settlement of Investment Disputes (ICSID) Convention in February 1990. The second-generation BITs incorporated both ICSID arbitration and *ad hoc* arbitration as available options, and also liberalised the scope of disputes that could be submitted to arbitration. *Cf.* Article 8 of the China-Peru BIT (1994); Article 9 of the China-South Africa BIT (1997).

The third generation refers to BITs signed from 1998 until present, represented by the China-Canada BIT talks and others. The third-generation BITs incorporated many modern provisions that secured much broader investor protection, such as full protection and security (FPS), fair and equitable treatment (FET) and most-favoured-nation (MFN) treatment. *Cf.* Canada-China BIT (2012) and the China-Turkey BIT (2015).

Moreover, the fourth generation of Chinese model BIT is emerging and serving as the guiding text in treaty negotiations with the EU and the US. The fourth generation is expected to adopt a more balanced paradigm that aims to enhance treaty protection of Chinese investments made overseas as a capital-exporting economy, and at the same time preserve China's regulatory sovereignty. *Cf.* the China-EU Comprehensive Agreement on Investment (CAI) and the China-US BIT.

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

Yes. China keeps good record of diplomatic notes exchanged with other states concerning its treaties. The Ministry of Foreign Affairs of the People's Republic of China (MFA) has established a Chinese treaties database (https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/) to promote the effective utilisation of treaties concluded with other states.

In case a specific diplomatic note cannot be found, it is possible to visit and consult the Diplomatic Archives of the MFA (http://dag.fmprc.gov.cn/chn/dakf/) or follow the *Guidelines for the MFA's Government Information Disclosure* (https://www.fmprc.gov.cn/web/wjb_673085/zfxxgk_674865/gkzn/) to apply for disclosure.

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

The Chinese government does not usually publish official commentaries concerning the intended meaning of a treaty or a trade agreement. However, during the negotiation and ratification process, the Ministry of Commerce of the People's Republic of China (MOFCOM) occasionally holds press conferences in the form of Q&As to provide official answers to enquiries.

More generally, on 28 June 2021, MOFCOM published the *Reference Guide for Enterprises on Utilizing the Investment Agreements* with a view to helping Chinese enterprises to better understand the relevant provisions of Chinese investment treaties and the goals they intend to achieve. Nevertheless, MOFCOM cautioned that under no circumstance should this *Reference Guide* be deemed the Chinese government's official interpretation of any investment agreement or relevant provisions thereof, nor should it be taken as or otherwise influence the views and stances of the Chinese government on any relevant issue.

2 Legal Frameworks

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

China is a Contracting State to the 1958 New York Convention. China acceded to the Convention on 22 January 1987, which then entered into force in China on 22 April 1987. When acceding to the New York Convention, China made two reservations, which include the reciprocity reservation and the commercial reservation. Upon the resumption of sovereignty over Hong Kong and Macau, China extended the territorial application of the New York Convention to Hong Kong and Macau SARs, respectively, in 1997 and 2005.

China is also a Contracting Party to the Washington Convention (also known as the ICSID Convention). China signed the Washington Convention on 9 February 1990 and deposited the ratification on 7 January 1993. The Washington Convention entered into force in China on 6 February 1993. On 7 January 1993, according to Article 25(4) of the Washington Convention, China notified the ICSID that the Chinese government would only consider submitting to the ICSID jurisdiction disputes over compensation resulting from expropriation and nationalisation. However, it should be noted that the limitation imposed by the notice of China's consent to the ICSID jurisdiction should be deemed lifted if China agrees to broaden the scope of disputes submitted to the ICSID arbitration through a subsequent BIT or multilateral treaty.

China is not yet a Contracting Party to the Mauritius Convention.

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

Yes. China promulgated a new Foreign Investment Law (FIL) on 15 March 2019. Since its entry into force on 1 January 2020, the FIL has replaced the previous three old laws governing foreign investment, i.e., the Chinese-Foreign Equity Joint Venture Law, the Chinese-Foreign Cooperative Joint Venture Law, and the Wholly Foreign Owned Enterprise Law. To effectively implement the FIL, the State Council of China promulgated the Implementing Regulations on the FIL (IR) on 26 December 2019, and the instrument came into force on 1 January 2020.

The important substantive provisions and dispute resolution provisions in the FIL and IR are summarised below.

Key substantive provisions

- Foreign investors have the right to make comments and recommendations on legislation, regulations, and rules relating to foreign investment. The unpublished regulatory documents cannot serve as the basis for administration and regulation (Article 10 FIL, Article 7 IR).
- Foreign investors and foreign-invested enterprises may be accorded with preferential treatment in certain industries, fields, and regions (Article 14 FIL).
- Foreign-invested enterprises enjoy the formal right to national treatment. They must not be discriminated against in any form in the government procurement process (Article 16 FIL, Article 15 IR).
- The FIL and IR strengthen the protection of IP rights by strictly prohibiting the mandatory transfer of technology by administrative measures, and by protecting the trade secrets of foreign investors and foreign-invested enterprises (Articles 22–23 FIL, Articles 24–25 IR).
- China shall not expropriate investments made by foreign investors except under specific circumstances where the public interest is at stake. In the case of expropriation or requisition, fair and reasonable compensation shall be made in the due course of law. The amount of compensation is determined as per the market value of the investment concerned (Article 20 FIL, Article 21 IR).
- Chinese local governments shall perform the policy commitments made to and various contracts concluded with foreign investors and foreign-invested enterprises (Article 25 FIL, Articles 27–28 IR).

Dispute resolution

- A working mechanism for complaints made by foreign-invested enterprises is incorporated with a view to timely handle problems raised by foreign-invested enterprises or their investors (Article 26 FIL).
- A swift collaborative protection mechanism is established to ensure the effective protection of IP rights in China (Article 23 IR).
- Litigation proceedings before Chinese People's Courts. The Supreme People's Court (SPC) in China promulgated a judicial interpretation titled *The SPC Interpretations on Several Issues Concerning the Application of the Foreign Investment Law* on 26 December 2019, which entered into force on 1 January 2020. In 2021, the SPC enacted another judicial explanation titled *The SPC Provisions on Several Issues in Adjudicating the Cases Concerning Foreign-Invested Enterprise Disputes* on 29 December 2020, which entered into force on 1 January 2021.
- Arbitration proceedings. The FIL and IR are silent on this issue. It is regulated by the Arbitration Law and Civil Procedural Law.

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

According to Article 4 of the FIL, China applies the "pre-establishment national treatment plus Negative List" regime to the administration of foreign investment. Such regime has replaced the previous more restrictive "positive list" approach. This means that all previous restrictions on foreign investors in fields outside the "Negative List" are cancelled.

More specifically, foreign investors cannot make investments in prohibited fields in the Negative List annually published by the National Development and Reform Commission (NDRC) and MOFCOM. When investing in a restricted field covered by the Negative List, the foreign investor shall satisfy the restrictive requirements set forth in the Negative List (Article 28(2) FIL). According to Article 33 of the IR, when making an investment in a field restricted under the Negative List, the foreign investor shall comply with the special administrative measures on restrictive admission, such as those relating to equity ratios and appointment of senior executives, etc. Where the foreign investments are made in fields outside the Negative List, no formal admission is required and they are subject to protection of national treatment (Article 28(3) FIL), although with caveats: all foreign investments are subject to the information-reporting system and national security review under the FIL.

The current restrictive requirements on the admission of foreign investment are contained in the *Special Administrative Measures (Negative List) for Foreign Investment Admission* (2020) and the *Free Trade Zones Special Administrative Measures (Negative List) for Foreign Investment Admission* (2020). On 17 June 2021, the spokesman for the NDRC indicated that the Chinese government is in the process of formulating the Negative List 2021, in which the number of restricted fields will be further reduced.

3 Recent Significant Changes and Discussions

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

China-related investor-state arbitration cases have contributed abundantly to treaty interpretation jurisprudence in China. Among these, two concluded cases are worthy of mentioning here: *Tza Yap Shum v. Peru* (ICSID Case No. ARB/07/6); and *Sanum Investments Ltd v. Laos* (Permanent Court of Arbitration (PCA) Case No. 2013-13).

The tribunals in these two cases both held that a Hong Kong/Macau investor was covered by BITs signed by mainland China. However, contrary to the tribunals' expansive reading, China adopted a narrow policy-based treaty interpretation approach, according to which investors from Hong Kong and Macau are precluded from benefitting from China's BITs unless China expressly states otherwise.

This controversial question is expected to be assessed again before the tribunal in *Alpene Ltd v. Republic of Malta* (ICSID Case No. ARB/21/36), registered on 2 July 2021, in which a Hong Kong investor relied upon a Chinese BIT to initiate ICSID proceedings.

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

China has been active in participating in and expressing contemporary policy views on reforms of investor-state dispute settlement (ISDS) at the global level. On 18 July 2019, the Chinese government made submissions to the UNCITRAL Working Group III, setting forth China's policies and views relating to investor-state arbitration. These submissions are recorded in the UNCITRAL Secretariat Note (A/CN.9/WG.III/WP.177, accessible here: https://undocs.org/en/A/CN.9/WG.III/WP.177).

According to these submissions, firstly, China believes that the investor-state arbitration "helps to build the rule of law into international investment governance and to avoid economic disputes between investors and host countries escalating into political conflicts between nations". In general, the ISDS mechanism has the basic functions "to interpret and apply treaties and determine the responsibility of States" in investment disputes with foreign investors. Therefore, the existing ISDS mechanism, including investor-state arbitration, should be maintained.

Secondly, China identified some key problems of the current ISDS mechanism that have impaired its functions in resolving investor-state disputes. These issues are: (1) arbitral awards lack an appropriate error-correcting mechanism; (2) arbitral awards lack stability and predictability; (3) arbitrators' professionalism and independence are questioned; (4) third-party funding affects the balance between parties' rights; and (5) time frames are overly long and costs overly high.

On such basis, China made several proposals for improving the existing ISDS mechanism, including but not limited to the following areas: (1) establishing a permanent appellate mechanism; (2) retaining the parties' right to appoint arbitrators; (3) improving the rules relating to arbitrators, such as the relevant codes of conduct, rules for selection and disqualification of arbitrators to increase transparency and reasonableness, etc.; (4) including a pre-arbitration consultation procedure; and (5) stipulating a transparency discipline for third-party funding.

Although the Chinese government has not officially published or explicitly indicated its policies with regard to Chinese investors' utilisation of investor-state arbitration, such policy considerations can be inferred from the *Reference Guide for Enterprises on Utilizing the Investment Agreements* published by MOFCOM on 28 June 2021. In the *Reference Guide*, MOFCOM recommends that enterprises suffering from the host state's violation of its treaty obligation on investment protection rely on the applicable investment treaty to initiate investor-state arbitration, in order to preserve their legitimate interests.

Taking into consideration China's coherent policy of incorporating investor-state arbitration into its BITs and TIPs, as well as its response to contemporary issues, it appears that China is a conservative supporter and an incremental reformer of investor-state arbitration, believing that significant reform will be made to the current ISDS mechanism.

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

Spanning four different time periods (1982–1989; 1990–1997; 1998–present; post-2020), the four generations of Chinese BITs and TIPs contain differing clauses addressing foreign investment-related issues.

Chinese BITs and TIPs provide for MFN clauses. Through an expansive interpretation of the asset-based definition of "investment" in old generations of BITs, most Chinese treaties extend protection to indirect investment, such as: Article 1(1) of the China-Sweden BIT (1982); Article 1(1) of the China-Cambodia BIT (1996); and Article 1(1)(d) of the ASEAN-China Investment Agreement. Some post-2009 treaties begin to expressly cover both direct and indirect investment, such as Article 9.1(d) of the Australia-China FTA (2015).

China has been endeavouring to upgrade investment treaties to address challenges arising from new issues, such as climate change, transparency, and corruption, etc. For example, in the most eye-catching China-EU CAI, the preamble and provisions of the CAI text published by the European Commission on 22 January 2021 specifically deal with new issues of transparency and anti-corruption (Section III Subsections I and II), sustainable development (Section IV), environment and climate change (Section IV Subsection 2 Article 6), corporate social responsibility (Section IV Subsection I Article 2), and labour protection (Section IV Subsection 3), etc.

Regretfully, although the CAI will become a comprehensive international instrument through which China will deal with emerging issues of corruption, sustainable development, environment protection and climate change, etc., it now appears difficult for the European Parliament to eventually endorse the CAI, mainly due to geopolitical tensions.

Another example is Article 15.11 of the China-Japan-Korea Trilateral Investment Agreement (2012), which introduces a time-bar for arbitration providing that no claim may be submitted to arbitration if more than three years have elapsed from the date on which the disputing investor first acquired, or should have first acquired – whichever is the earlier – knowledge that the disputing investor had incurred the loss or damage. The time-bar provision has proven to be useful in urging the disputing investor to initiate arbitration in a timely manner, thus providing certain predictability of swift dispute resolution.

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

There is no record of China giving unilateral notice to terminate any BITs or similar agreements. According to UNCTAD statistics, of the 145 BITs and 24 TIPs ratified by China, only 19 BITs have been terminated. Three of these were denounced unilaterally by treaty partners, i.e., India, Indonesia, and Ecuador, due to policy changes with regard to the ISDS mechanism. The others were terminated as they were replaced by new treaties.

4 Case Trends

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

Based on the information available online (e.g.: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china; https://icsid.worldbank.org/cases/case-database; https://www.italaw.com/search/site), there are eight investor-state arbitration cases in which China has been named as the Respondent State.

Pending cases

- *AsiaPhos Limited v. China* (ICSID Case No. ADM/21/1) (2020).
- *Jason Yu Song v. China* (PAC Case No. 2019-39) (2019).
- *Surfeit Harvest Investment Holding Pte Ltd v. China (Taiwan)* (UNCITRAL *ad hoc* arbitration) (2017).
- *Hela Schwarz GmbH v. China* (ICSID Case No. ARB/17/19) (2017).

Concluded cases

- *Goh Chin Soon v. China* (ICSID Case No. ARB/20/34) (2020).
- *Macro Trading Co., Ltd. v. China* (ICSID Case No. ARB/20/22) (2020).
- *Ansung Housing Co., Ltd. v. China* (ICSID Case No. ARB/14/25) (2014).
- *Ekran Berhad v. China* (ICSID Case No. ARB/11/15) (2011).

There are 14 investor-state arbitration cases in which the investors relied upon a Chinese BIT or TIP:

Pending cases

- *Qiong Ye and Jianping Yang v. Cambodia* (ICSID Case No. ARB/21/42) (2021).
- *Alpene Ltd v. Malta* (ICSID Case No. ARB/21/36) (2021).
- *Beijing Everyway Traffic and Lighting Tech Co Ltd v. Ghana* (UNCITRAL *ad hoc* arbitration) (2021).
- *Shift Energy and others v. Japan* (UNCITRAL arbitration) (2020).
- *Fengzhen Min v. Korea* (ICSID Case No. ARB/20/26) (2020).
- *Wang and others v. Ukraine* (UNCITRAL arbitration) (2020).
- *Jetion and T-Hertz v. Greece* (UNCITRAL *ad hoc* arbitration) (2019).
- *Sanum Investments Limited v. Laos* (ICSID Case No. ADHOC/17/1) (2017).

Concluded cases

- *Beijing Urban Construction Group Co. Ltd. v. Yemen* (ICSID Case No. ARB/14/30) (2014).
- *Sanum Investments Ltd. v. Laos* (PCA Case No. 2013-13) (2013).
- *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Belgium* (ICSID Case No. ARB/12/29) (2012).
- *Philip Morris Asia Limited v. Australia* (PCA Case No. 2012-12) (2011).
- *Beijing Shougang and others v. Mongolia* (PCA Case No. 2010-20) (2010).
- *Tza Yap Shum v. Peru* (ICSID Case No. ARB/07/6) (2007).

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

At the time of writing, there has been no investor-state award on the merits rendered against China that would require China's execution; thus, China's attitude towards the enforcement of awards made against it is still uncertain.

China, as a Contracting Party to the Washington Convention, is obliged under Article 54 of the Washington Convention to enforce an ICSID award as if "it were a final judgment" of a Chinese court. Theoretically, China may rely on Article 55 of the Washington Convention to argue that it is immune from execution given its absolute immunity legal position. In *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA 41, the Hong Kong Court of Final Appeal, following the interpretation given by the Standing Committee of the National People's Congress of the PRC which stated that absolute immunity is a consistent and principled position taken by China, held that absolute sovereign immunity applies in Hong Kong as well.

Nevertheless, it is highly likely that China will opt to voluntarily comply with an award in order to keep a credible tracking record. This can be seen from the proposal made by deputies to the National People's Congress in May 2020 (http://www.xinhuanet.com/2020-05/26/c_1126035895.htm) stating that China should enact the Foreign States Immunities Law, shifting from its absolute immunity doctrine to a restrictive approach to state immunity, in order to provide stable expectations for foreign investors.

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

No, China 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 been no enforcement made against China, and thus no satellite litigation arising from enforcement. With respect to substantive claims, in *Hela v. China*, the ICSID arbitration escalated from domestic administrative lawsuits in relation to China's alleged expropriation of the investor's right to use the land of Hela's local subsidiary in China.

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 following are common trends identifiable from the cases brought by Chinese investors or initiated against China:

- Chinese investors often initiate investment arbitration based on an expropriation claim or violation of FET claim on the ground that their contracts, licences or permits were unlawfully cancelled by the host states. *Cf. Beijing Shougang and others v. Mongolia; Qiong Ye and Jianping Yang v. Cambodia.*
- Whether China's BITs extend to Hong Kong and Macau: in *Tza Yap Shum v. Peru* and *Sanum v. Laos*, both tribunals held that a Hong Kong/Macau investor was covered by BITs signed by mainland China, although these decisions were inconsistent with China's policy on this issue.
- Whether a state-owned enterprise (SOE) is a qualified investor: in *Beijing Urban Construction v. Yemen*, the tribunal held that the SOE shall be regarded as a qualified national of another Contracting State unless it is assuming a governmental function.

5 Funding

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

Chinese law does not explicitly provide for the third-party funding of litigation or arbitration. That said, the practice of third-party funding is also not prohibited in China. The international investment arbitration rules of China's two most prominent arbitration institutions, i.e., the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC), effective as of 1 October 2017 and 1 October 2019, respectively, have expressly provided for third-party funding. In practice, some Chinese companies are set up to provide third-party funding services in China, such as Shenzhen Qianhai DS Legal Capital Co. Ltd (http://www.dslegalcapital.com/eng/index.aspx).

Pursuant to the Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance and the Code of Practice for Third Party Funding of Arbitration, common law offences and torts of maintenance and champerty do not apply in relation to third-party funding of arbitration, and third-party funding of arbitration by lawyers is permitted if not acting for any party to the proceedings. As of 1 February 2019, the Ordinance allowing third-party funding of arbitration in Hong Kong came into full effect.

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

There has been none in mainland China.

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

There are no available statistics on the number of funded litigation/arbitration disputes in China, but a number of funders, especially domestic institutions, have gradually mushroomed in China and are actively involved in the funding industry. As third-party funding continues to develop, corresponding laws and regulations are expected to be gradually enacted and optimised in the future so as to give better guidance on litigation/arbitration-funding activities.

6 The Relationship Between International Tribunals and Domestic Courts

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

Chinese BITs do not mention whether a tribunal is empowered to review criminal investigations and judgments of domestic courts. In principle, criminal investigations and judgments of domestic courts can be considered as evidence or part of facts to be considered by the tribunal.

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

Yes. The existing Arbitration Law (which is currently under significant amendment) regulates commercial arbitration procedures and may be extended to regulate investment arbitrations taking place in China, although there has been no precedent so far.

Under the existing Arbitration Law, Chinese courts have the jurisdiction to (i) enforce the arbitration agreement and arbitration awards, and (ii) provide judicial assistance to the arbitration.

Chinese courts have the exclusive jurisdiction to render interim measures (including property and evidence preservation measures, and act preservations) concerning arbitration seated in mainland China (Articles 28, 46 and 68 of the Arbitration Law, and Article 272 of the Civil Procedure Law (CPL)). During the arbitration, the applications for interim measures shall be transmitted to Chinese courts through the arbitration institution.

Parties to arbitration proceedings administered by designated arbitration institutions in Hong Kong would be able to apply to courts in mainland China for interim measures, according to the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* signed by the SPC and the Department of Justice of Hong Kong in April 2019.

6.3 What legislation governs the enforcement of arbitration proceedings?

The enforcement of arbitration proceedings seated in mainland China is governed by the Arbitration Law (amended in 2017), *The SPC Interpretations on Certain Issues Concerning the Application of the Arbitration Law* (effective from 8 September 2006 and amended in 2008), the CPL and the *SPC Interpretations on the CPL* (amended in 2020 and effective from 1 January 2021). Note that the SPC's judicial interpretations are not laws but, in practice, are considered to have the same effect as laws, and shall be binding upon all courts.

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

There is no immunity provision for arbitrators under the Arbitration Law, nor does it appear in any arbitration rule promulgated by Chinese arbitration institutions. Instead, the Chinese Criminal Law has incorporated a criminal provision; i.e., Article 399(I), called "*Wangfa Zhongcai Zui*", in its Amendment VI in 2006. It stipulates that an arbitrator who renders an unlawful arbitration award in gross disregard of facts and laws shall be subject to criminal imprisonment.

Moreover, pursuant to Article 38 of China's existing Arbitration Law, if an arbitrator's conduct falls within any of the following circumstances, he/she shall bear legal liability according to law:

- an arbitrator has a private meeting with the concerned parties or counsel, or accepts invitations to entertainment or gifts from the parties or counsel, which bears certain seriousness; or
- an arbitrator accepts bribes, asks for bribes, or abuses his power and perverts the law.

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

The existing Arbitration Law contains strict requirements on arbitrator qualifications and requires arbitration institutions to maintain their own panels of arbitrators, indicating that parties should select arbitrators from such panels (Article 13).

In practice, the requirement that parties must appoint arbitrators from the panels is relaxed. For instance, the arbitration rules of major prominent arbitration institutions such as the CIETAC, BAC and Shenzhen Court of International Arbitration (SCIA) all allow parties to appoint arbitrators from outside the panel of arbitrators.

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

The parties can freely agree on the composition of the tribunal and the procedure of appointment. Article 32 of the Arbitration Law provides that, if the parties fail to agree on the method of formation of the arbitration tribunal or to select arbitrators within the time limit specified in the rules of arbitration, the arbitrators shall be appointed by the chairman of the arbitration commission.

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

Domestic courts do not have the power to intervene in the selection of arbitrators.

7 Recognition and Enforcement

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

Chinese law is silent on the legal requirements of an investor-state award for enforcement purposes.

Regretfully, the New York Convention cannot be invoked as a legal basis for recognition and enforcement in China of an investor-state arbitral award (e.g., a UNCITRAL *ad hoc* award) made in the territory of another Contracting State. On 10 April 1987, the SPC issued a judicial interpretation on implementing the New York Convention, which states that the commercial reservation made by China excludes disputes between foreign investors and the host state.

As regards the enforcement of ICSID awards, a party seeking enforcement may invoke Article 283 of the CPL, which provides that an Intermediate People's Court located in the place where the requested party is domiciled or where its property is located shall handle the enforcement application in accordance with the international treaties concluded or acceded to by China. Therefore, in combination with Article 260 of the CPL (stating that an international treaty generally prevails over Chinese domestic law), a competent Intermediate People's Court shall treat the enforcement of ICSID awards just like a final judgment of the Chinese courts, according to Article 54 of the Washington Convention.

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

Chinese law does not provide for any separate statutory basis for resisting recognition and enforcement of an ICSID award outside the enforcement/annulment framework under the Washington Convention. According to Article 54(3) of the Washington Convention and the above analysis, execution of an ICSID award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought. Therefore, reference can be made to relevant provisions in the CPL and its judicial interpretations concerning the recognition and enforcement of judgments, with a view to ascertaining the bases for resisting recognition and enforcement of an ICSID award. Of course, execution of the ICSID award is also subject to the state immunity principle held by China, as discussed earlier.

For non-ICSID investment arbitration awards made in foreign countries, the New York Convention cannot be invoked before a Chinese court as a basis of resisting recognition and enforcement due to China's commercial reservation. Instead, Article 283 of the CPL applies. The Chinese court may review the awards according to the international treaties that China has concluded, or in accordance with the principle of reciprocity.

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

One notable case is *Lan Jie v. Ma Teng, Consulate General of the Netherlands in Guangzhou and others*, heard before the People's Court of Tianhe District, Guangzhou (Tianhe District Court), concerning disputes relating to motor vehicle traffic accidents. This case has been reported to the SPC level by level, seeking for the SPC's instructions on Tianhe District Court's jurisdiction of this case. In this regard, the SPC responded that, among others, "according to the principle of absolute state immunity that China has always adhered to, the Netherlands, as the sending State of the consulate, cannot be regarded as a defendant in this case" ((2012) Min Si Ta Zi No.31). Furthermore, as has been shown in the case adjudicated by the Hong Kong Court of Final Appeal in *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, the Chinese top legislative body and Chinese government uphold the absolute immunity doctrine on the issue of enforcement against the state and its sovereign assets.

Nowadays, there is much discussion on the appropriateness of the doctrine, with a call for adoption of the restrictive immunity doctrine instead. Whether the attitude of the relevant authorities will change is yet to be seen.

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

This specific issue has not arisen before mainland Chinese courts.

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Shengchang Wang is a senior consultant at Hui Zhong Law Firm and advisory member of the ICCA. He is a former Vice Chairman and Secretary General of CIETAC. Mr. Wang specialises in arbitration and mediation. He has rich experience in arbitration under the rules of CIETAC, the ICC, SCC, SIAC, HKIAC, LMAA and UNCITRAL. He also advises clients in investor-state arbitration and sports-related arbitration. His representative publications include *International Arbitration in the People's Republic Of China – Commentary, Cases and Materials* (Butterworths, 2000), and *Arbitration in China: A Practical Guide* (Sweet & Maxwell, 2004).

Hui Zhong Law Firm
Suite 1228, South Tower Beijing Kerry Centre
1 Guanghua Road, Chaoyang District
Beijing 100020
People's Republic of China

Tel: +86 10 5639 9688
Email: wang.shengchang@huizhonglaw.com
URL: www.huizhonglaw.com

Ning Fei is the managing partner of Hui Zhong Law Firm. He has represented both Chinese and foreign clients in hundreds of commercial arbitration and litigation cases before domestic and overseas arbitral tribunals and PRC courts, and has been ranked as a Band 1 lawyer in the fields of arbitration and general dispute resolution in China by *Chambers and Partners Asia-Pacific* since 2006. He is one of the few lawyers with practical experience of investment arbitration disputes in China, and is currently representing multiple investors in ICSID proceedings. Mr. Fei is also an arbitrator at leading Chinese and international arbitration institutions.

Hui Zhong Law Firm
Suite 1228, South Tower Beijing Kerry Centre
1 Guanghua Road, Chaoyang District
Beijing 100020
People's Republic of China

Tel: +86 10 5639 9588
Email: fei.ning@huizhonglaw.com
URL: www.huizhonglaw.com

Xueyu Yang is a partner at Hui Zhong Law Firm and a skilled arbitration and litigation advocate. She has handled hundreds of cases and has particular expertise in handling complex matters involving multiple jurisdictions. She has advised both domestic and foreign clients in a broad range of sectors such as real estate, construction, IT, biotechnology, hi-tech, and automobiles in proceedings conducted at the ICSID, PCA, ICC, HKIAC, SIAC, CIEATC, BAC and different levels of domestic courts, including the Supreme People's Court of China. She is currently handling investment treaty cases on behalf of investors, and has also lectured at the National University of Singapore on investment treaty topics.

Hui Zhong Law Firm
Suite 1228, South Tower Beijing Kerry Centre
1 Guanghua Road, Chaoyang District
Beijing 100020
People's Republic of China

Tel: +86 10 5639 9660
Email: yang.xueyu@huizhonglaw.com
URL: www.huizhonglaw.com

Mariana Zhong is a partner of Hui Zhong based in Beijing. Before joining Hui Zhong, she was a national partner of the international arbitration department at Dechert LLP. She has over 13 years' experience working on international arbitration and dispute resolution matters. She has worked on several dozens of international arbitration cases before institutions including the ICC, LCIA, HKIAC, SIAC, CIETAC, BAC, SHIAC, and SCIA, as well as *ad hoc* tribunals under the UNCITRAL Rules. She also handles investment arbitration; she is currently representing two Chinese investors against a state in Southeast Asia, and has previously been involved in two ICSID arbitration cases.

Hui Zhong Law Firm
Suite 1228, South Tower Beijing Kerry Centre
1 Guanghua Road, Chaoyang District
Beijing 100020
People's Republic of China

Tel: +86 10 5639 9618
Email: mariana.zhong@huizhonglaw.com
URL: www.huizhonglaw.com

Founded in June 2013, Hui Zhong Law Firm ("Hui Zhong") is a Chinese boutique law firm specialising in domestic and international dispute resolution. Hui Zhong offers legal services to clients from offices in Beijing, Shanghai, Shenzhen and Hong Kong.

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Hui Zhong has been highly ranked by *GAR 100* (2016 through 2021), *Chambers and Partners Global* and *Asia-Pacific*, *The Lawyer*, *Legalband*, *The Legal 500* and *China Business Law Journal*.

www.huizhonglaw.com

HUI ZHONG LAW FIRM
汇仲律师事务所

France


Julie Spinelli


Yann Dehaudt-Delville

Le 16 Law

1 Treaties: Current Status and Future Developments

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

First, regarding international organisations and multilateral treaties:

- France, along with 26 other Member States, is a member of the European Union (EU). Subject to certain conditions and restrictions, the free circulation of people, services, capital and goods across the EU constitutes one of its core principles.
- France and the EU, along with 162 other entities, are members of the World Trade Organization, whose purpose is to facilitate the circulation of goods and services across the world.
- France and the EU, along with 51 other members, are parties to the Energy Charter Treaty (ECT). This instrument aims at providing a multilateral framework for energy cooperation, designed to promote energy security through the operation of more open and competitive energy markets.
- France, along with 181 other members, is a member of the Multilateral Investment Guarantee Agency, whose purpose is to promote cross-border investment in its 157 developing Member States by providing guarantees (political risk insurance and credit enhancement) to investors and lenders.

Second, multilateral or bilateral trade agreements with non-EU countries are negotiated and concluded at the EU level.

However, if such trade agreement encompasses areas where the EU Member States retain competence, such agreement can only be fully concluded after the EU Member States ratify and sign it (Articles 3, 4, 207 and 216 of the Treaty on the Functioning of the European Union (TFEU)).

The European Commission classifies trade agreements into three main categories (namely: (i) custom unions; (ii) association, stabilisation, and free trade agreements; and (iii) partnership and cooperation agreements). It further sets out an exhaustive list of trade agreements in force or under negotiation on its website (see: https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/).

The following agreements count amongst the latest trade agreements that have been concluded by the EU:

- the EU–Vietnam Free Trade Agreement, ratified by the European Parliament on 12 February 2020;
- the EU–Singapore Free Trade Agreement, which entered into force on 21 November 2019;
- the Japan–EU Economic Partnership Agreement, which entered into force on 1 February 2019; and
- the EU-UK Trade and Cooperation Agreement to organise cooperation after Brexit, which provisionally entered into force on 1 January 2021 and is yet to be approved by the European Parliament.

In addition, it is noteworthy that, on 28 June 2019, the EU reached an agreement in principle with the Mercosur States (Argentina, Brazil, Paraguay and Uruguay) regarding the conclusion of an association agreement.

Finally, as reported by the United Nations Commission for Trade, 85 bilateral investment treaties (BITs) have been concluded by France with foreign States and are currently in force.

The latest BIT concluded by France which has entered into force is with Colombia, signed on 10 July 2014 and in force since 14 October 2020.

France has signed seven other BITs, which have not yet entered into force. Among those seven treaties, three have been ratified by France:

- the BIT with Angola, ratified on 2 March 2010;
- the BIT with Ghana, ratified on 30 January 2001; and
- the BIT with Brazil, ratified on 26 March 1996.

It should also be stressed that, on 6 March 2018, in a landmark decision in the *Achmea v Slovak Republic* case, the Court of Justice of the European Union (CJEU) held that the arbitration clause contained in the BIT concluded between the former Czechoslovakia and the Netherlands was not compatible with EU law. After that decision, the European Commission urged EU Member States to terminate all intra-EU BITs.

In response to these events, 23 EU Member States, including France, concluded the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" on 29 May 2020. The Agreement entered into force in France on 28 August 2021. It resulted in the termination of 10 out of the 12 intra-EU BITs concluded by France; the BITs concluded with Romania and the Czech Republic, respectively, will remain in force until these States ratify the Agreement.

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

Regarding non-trade multilateral treaties, France signed the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration on 17 March 2015, but has not yet ratified it. To date, only five of the 23 signatories of said Convention have ratified it.

Regarding trade agreements with non-EU countries:

- In late 2019 and mid-2020, trade agreements concluded by the EU with Singapore and Vietnam, respectively, entered into force. Each of these trade agreements include an investment protection agreement, which must be ratified not only by the European Parliament, but also by EU Member States according to their own national procedures (see question 1.1 above). These agreements have not yet been ratified by the French Parliament, but there is no specific reason underlying such delay beyond the fact that the parliamentary process takes time.
- The Comprehensive Economic and Trade Agreement (CETA) between Canada, on the one hand, and the EU and its Member States, on the other hand, has been ratified by the Council of the EU and the European Parliament. The treaty entered into force provisionally on 21 September 2017. However, due to the fact that the CETA includes provisions relating to the protection of investments, the agreement will enter into force fully and definitively only after all EU Member States have ratified it according to their national procedures. With regard to France, the National Assembly gave its consent to the ratification on 23 July 2019. Since then, the draft law has been under scrutiny by the French Senate.

Regarding BITs, the following agreements have not yet been ratified by the French Parliament:

- the BIT with Mauritius, signed on 8 March 2010;
- the BIT with the Syrian Arab Republic, signed on 12 May 2009;
- the BIT with Zimbabwe, signed on 4 May 2001; and
- the BIT with Belarus, signed on 28 October 1993.

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

France indeed possesses a model BIT. The French model BIT, entitled "*Draft agreement between the Government of the French Republic and the Government of the Republic of* (…) *on the reciprocal promotion and protection of investments*", was issued in 2006.

The model BIT contains 12 standard clauses, namely:

- definitions (Article 1);
- scope of the agreement (Article 2);
- promotion and admission of investments (Article 3);
- fair and equitable treatment (Article 4);
- national treatment and most favoured nation (MFN) treatment (Article 5);
- dispossession and indemnification (Article 6);
- free transfer (Article 7);
- settlement of disputes between an investor and a contracting party (Article 8);
- guarantee and subrogation (Article 9);
- special commitment (Article 10);
- settlement of disputes between contracting parties (Article 11); and
- entry into force and termination (Article 12).

The English version of the French model BIT is available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download.

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

France keeps record of the diplomatic notes exchanged with other States concerning its treaties. Such notes can generally be consulted at the reading rooms of the services of the Diplomatic Archives in La Courneuve, located 30 minutes north of Paris, and in Nantes, in Brittany. The reading rooms are accessible to the public upon presentation of a valid ID. Further information on the services of the Diplomatic Archives are available at: https://www.diplomatie.gouv.fr/fr/archives-diplomatiques/. To get access to the diplomatic notes pertaining to certain recent treaties, a reading authorisation, requiring the showing of a specific research interest, may have to be obtained.

However, such notes are not available on the online database "Base Doc", where electronic copies of treaties concluded by France can be consulted. The following link allows access to this database: https://basedoc.diplomatie.gouv.fr/exl-php/cadcgp.php?CMD=CHERCHE&QUERY=1&MODELE=vues/mae_internet___traites/home.html&VUE=mae_internet___traites.

It should be noted that the President of the French Republic occasionally issues decrees containing diplomatic notes relating to the denunciation of BITs. For instance, Decree No. 2018-469 issued on 11 June 2018, and Decree No. 2020-13 issued on 8 January 2020, report on the exchange of notes relating to the denunciation of the BITs concluded by France with Ecuador and Poland, respectively. Such decrees are accessible at: https://www.legifrance.gouv.fr/.

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

The Government does not usually issue such commentaries. However, in the context of the ratification process before the French Parliament, the Government may provide observations, explanatory commentaries and/or official answers, published as part of the public parliamentary works. These are accessible on the website of the French Parliament, at the following links:

- for the French National Assembly: http://www.assemblee-nationale.fr/dyn/documents-parlementaires; and
- for the French Senate: http://www.senat.fr/somtravaux.html.

2 Legal Frameworks

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

France has been a contracting party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) since 26 June 1959.

France has been a contracting party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States since 21 August 1967.

France signed the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration on 17 March 2015, but has not yet ratified it.

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

Both French and EU law contain provisions regulating foreign investments.

First, regarding French law, since 1966, a general principle affirms that financial relations between France and foreign countries should be unrestricted (Article L. 151-1 of the French

Monetary and Financial Code (MFC)). In other words, there is no systematic screening of foreign investment under French law. Further, in order to promote foreign investments on the French territory, a public institution called Business France accompanies foreign investors on their investment projects.

Until 2017, foreign investors had to submit an administrative declaration when investing in France. However, that provision has been repealed. Nowadays, only certain investments exceeding €15 million are subject to a declaration for statistical purposes (Article R. 152-3 of the MFC). However, investments in certain economic sectors require formal admission by the Ministry of Economy (see question 2.3 below).

Investments made by French investors in foreign countries must be reported to the French Central Bank if they exceed a certain value (Article R. 152-1 of the MFC). For certain investment projects in foreign countries, French companies may benefit from a public guarantee granted by the Ministry of Economy, which covers certain risks (Article L. 432-1 of the French Insurance Code).

Second, regarding EU law, the principles contained in the TFEU must be respected in relation to investments between EU Member States. The CJEU may sanction a Member State if the free circulation of people, services, capital and goods, as well as the free establishment of companies, are not guaranteed by its national law. In principle, the Court considers that declarative obligations, as opposed to formal admission processes, are compatible with EU law.

Regarding financial relations between EU Member States and non-EU countries, the Treaty of Lisbon concluded in 2009 allows the EU to regulate foreign direct investment (FDI) coming from outside the EU and putting at risk public order or security.

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

French law provides that the Government may impose certain regulatory measures on foreign investments (*e.g.* impose prior administrative declaration or approval) so as to ensure the protection of national interests (Article L. 151-2 of the MFC).

In addition, Article L. 151-3 I° of the MFC provides that the prior approval of the Ministry of Economy should compulsorily be sought in relation to investments that pertain to the exercise of public authority or that relate to one of the following activities:

- activities likely to jeopardise public order, public safety or national defence interests; and
- research, production or marketing of arms, ammunition, explosive powders or substances.

Articles R. 151-1 and R. 151-2 of the MFC define the notions of "*foreign investor*" and "*investment*" within the meaning of Article L. 151-3 of the MFC. Article R. 151-3 of the MFC further lists 23 different activities covered by the above formal admission process, notably relating to the security of information technology, energy and water supply, telecommunication networks, public security services and healthcare. The approval granted by the Minister of Economy may contain specific conditions that aim to ensure that the investment will not jeopardise the national interests mentioned in Article L. 151-3 II° of the MFC.

Pursuant to Article R. 151-4 of the MFC, before seeking authorisation for an investment, the investor may consult the Ministry of Economy to verify whether the contemplated investment should be subject to prior approval, and the latter should reply within two months. Once the investor has sought the authorisation of an investment, the Minister of Economy normally replies within 30 business days. The absence of any reply means that the request has been rejected (Article R. 151-6 of the MFC).

If an investment covered by the admission process is made without prior approval, pursuant to Article L. 151-3 III° of the MFC, the Minister of Economy may take a series of measures, such as injunctions or fines, in order to ensure that the law is respected. In particular, the Minister may enjoin the investor not to proceed with its investment or restore the *status quo ante*, at its own cost.

3 Recent Significant Changes and Discussions

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

Recently, French courts have ruled on treaty interpretation in several high-profile cases.

First, the Paris Court of Appeal construed the terms of the Spain–Venezuela BIT in the context of annulment proceedings commenced by the Bolivarian Republic of Venezuela against an arbitral award rendered in favour of dual Spanish–Venezuelan citizens Mr. Serafin Garcia and Ms. Karina Garcia on 15 December 2014, in Paris, under the United Nations Commission on International Trade Law (UNCITRAL) Rules.

On 25 April 2017, the Court ruled that, to be afforded protection under the Spain–Venezuela BIT, investors were required to hold Spanish citizenship at the time of the investment – which was Venezuela's position – rather than at the time of the alleged breach of the treaty. On the basis of this finding, the Paris Court of Appeal upheld the arbitral tribunal's jurisdiction *rationae personae vis-à-vis* Mr. Serafin Garcia and Ms. Karina Garcia, but partially annulled the arbitral award for lack of jurisdiction *rationae materiae* (CA Paris, 25 April 2017, No. 15/01040).

On 13 February 2019, the French Supreme Court quashed the Paris Court of Appeal's decision, holding that the jurisdiction depends on the fulfillment of all conditions required by the treaty, the condition on the nationality of the investor and the existence of an investment, so that the Court of Appeal could not proceed to a partial annulment of said arbitral award (Cass. civ. 1, 13 February 2009, No. 17-25.851). The Supreme Court remanded the case to the Paris Court of Appeal. Accordingly, on 3 June 2020, the Paris Court of Appeal annulled the arbitral award in its entirety (CA Paris, 3 June 2020, No. 19/03588).

Second, French courts interpreted the terms of another BIT concluded by the Bolivarian Republic of Venezuela, the Canada–Venezuela BIT, in the context of annulment proceedings brought by Venezuela against an arbitral award rendered in favour of Canadian company Rusoro Mining Limited on 22 August 2016, in Paris, under the International Centre for Settlement of Investment Disputes (ICSID) Additional Facility Rules.

Venezuela was arguing, in particular, that the *ratione temporis* scope of the underlying BIT did not allow for part of the compensation that had been awarded by the arbitral tribunal to Rusoro. Venezuela contended that the arbitral tribunal was thus deprived of jurisdiction to rule on – and award – such compensation. In turn, Rusoro posited that, during the arbitration proceedings, Venezuela challenged the valuation method presented by Rusoro without alleging, at that time, that the arbitral tribunal would lack jurisdiction in this respect. Rusoro added that the disputed valuation of its compensation was an issue covered by the merits provisions of the BIT and was not an issue covered by clauses relating to the arbitral tribunal's jurisdiction.

On 29 January 2019, the Paris Court of Appeal rendered a decision where, following lengthy developments, it ruled that Venezuela's argument that the arbitral tribunal wrongly upheld jurisdiction under the BIT was well grounded. The Paris Court of Appeal partially annulled the award, writing off $966,500,000 from the compensation awarded by the arbitral tribunal to Rusoro, holding that it lacked jurisdiction *ratione temporis* to do so (CA Paris, 29 January 2019, No. 16/20822).

On 31 March 2021, the French Supreme Court quashed the Paris Court of Appeal's decision, holding that the issue at stake did not pertain to the arbitral tribunal's jurisdiction (which can be reviewed by French courts when ruling on set-aside applications) but rather to the admissibility of the claim (which cannot be reviewed by French courts, as the issue of admissibility does not fall within the limited grounds for annulment provided by Article 1520 of the French Code of Civil Procedure (CCP)) (Cass. civ. 1, 31 March 2021, No. 19-11.551).

Third, the Paris Court of Appeal construed the terms of the USA–Poland BIT in the context of annulment proceedings brought by Schooner Capital LLC *et al.* against an arbitral award rendered in favour of the Republic of Poland on 17 November 2015, in Paris, under the ICSID Additional Facility Rules. In their petition against said award, Schooner Capital LLC *et al.* were contending that the arbitral tribunal wrongly declined jurisdiction under the USA–Poland BIT, as it ruled that the subject matter of the dispute pertained to "*tax issues*", which were excluded from the scope of the BIT. On 2 April 2019, the Paris Court of Appeal rendered a decision rejecting the petition of Schooner *et al.*, correlatively upholding the award, after exhaustive developments as regards its interpretation of the underlying BIT (CA Paris, 2 April 2019, No. 16/24358).

It is noteworthy that the Paris Court of Appeal's decision in the *Schooner* case was later quashed by the French Supreme Court, although not in relation to treaty interpretation but on procedural grounds; the Court decided that, when it comes to the review of the arbitral tribunal's jurisdiction, the parties must not be deprived of the right to raise new pleas and arguments and to adduce new evidence – which had not been presented to the arbitral tribunal – before the court (see: Cass. civ. 1, 2 December 2020, No. 19-15.396).

Fourth, the Paris Court of Appeal ruled on the interpretation of the Ukraine–Russia BIT in the context of a set-aside application filed by Russia on 19 February 2019 against an arbitral award rendered in favour of Ukrainian bank JSC Oschadbank, in Paris, under the aegis of the Permanent Court of Arbitration (PCA).

The dispute related to the annexation of Crimea in 2014 and the subsequent order issued by the Bank of Russia to JSC Oschadbank (having its subsidiary in Crimea) to cease all its activities in the Crimean Peninsula. In this case, the Russian Federation contended, *inter alia*, that the BIT was not applicable *ratione temporis* as the Crimean Branch of JSC Oschadbank was established before 1 January 1992 – the date from which the BIT is applicable. The Russian Federation contended that Article 12 of the BIT should be interpreted as meaning that, if an investment is made before that date, it cannot benefit from the protection granted by the BIT. Conversely, JSC Oschadbank argued that only the date on which the assets had fulfilled the characteristics of an investment within the meaning of the BIT (here, the date of the annexation of Crimea by the Russian Federation) was relevant for the purposes of establishing jurisdiction.

The Court of Appeal found that Article 12 provided that the BIT was applicable to all investments made by investors of a contracting party in the territory of the other contracting party as from 1 January 1992. The Court of Appeal thus considered that only the date on which the investment has been made had to be considered for the determination of the temporal application of the BIT. According to the Court, the date of registration of JSC Oschadbank's branch in Crimea could not be characterised as the date of the investment within the meaning of the BIT, given that JSC Oschadbank's banking activities in Crimea had started earlier. Accordingly, the Paris Court of Appeal held that the *rationae temporis* requirement of Article 12 of the BIT was not fulfilled in that case and ruled that that the arbitral tribunal wrongly upheld jurisdiction (CA Paris, 30 March 2021, No. 19/04161).

Fifth, the Paris Court of Appeal ruled on the interpretation of the Organisation of Islamic Cooperation (OIC)'s Investment Agreement in the context of a set-aside application brought by the State of Libya against a partial award rendered in Paris.

The partial award was rendered in a dispute opposing Libya, respondent, to UAE-incorporated company DS Construction, claimant. On the basis of the 2010 UNCITRAL arbitration rules and Article 17 of the OIC Investment Agreement, DS Construction appointed a co-arbitrator and requested that the Secretary-General of the PCA appoint a co-arbitrator for Libya (who had refused to appoint a co-arbitrator, as it considered that Article 17 of the abovementioned agreement did not constitute a valid offer to submit said dispute to arbitration). Libya objected to DS Construction's request to the Secretary-General of the PCA, arguing that the latter was not vested with the power to appoint an arbitrator in this dispute given that the parties had not agreed to the application of the UNCITRAL arbitration rules. DS Construction replied, arguing that Libya's consent to the UNCITRAL arbitration rules could be imported from its BIT with Austria, by application of the most favoured nation clause (MFN clause) stipulated at Article 8 of the OIC Investment Agreement. The Secretary-General of the PCA designated an appointing authority who appointed a co-arbitrator for Libya, and the two co-arbitrators appointed the chairman of the arbitral tribunal. Libya maintained its objections regarding the constitution of the arbitral tribunal, but the latter rendered a partial award dismissing them.

Libya therefore applied to set aside the partial award before the Paris Court of Appeal contending, *inter alia*, that Article 17 of the OIC Investment Agreement did not provide for UNCITRAL arbitration, and that Article 8 of the Agreement did not constitute an MFN clause and did not allow for the importation of procedural terms of other treaties concluded by Libya.

The Paris Court of Appeal found that (i) Article 17 of the OIC Investment Agreement did not provide for UNCITRAL arbitration, and (ii) Article 8 of the Agreement did not allow for the importation of the dispute resolution terms of other treaties concluded by Libya. In addition, the Court observed that although DS Construction claimed that it was unlikely to convince a domestic judge to assist with the constitution of the arbitral tribunal, the company had not taken any steps for that purpose. Accordingly, the Court considered that the arbitral tribunal had been improperly constituted and annulled its partial award (CA Paris, 23 March 2021, No. 18/05756).

Sixth, the Paris Court of Appeal ruled on the interpretation of the Turkey–Libya BIT in the context of a set-aside application filed by the State of Libya against an arbitral award rendered in favour of Turkish company Cengiz Insaat Sanayi ve Ticaret A.S., in Paris, under the aegis of the International Chamber of Commerce (ICC).

In support of its petition to set aside the award, Libya argued, *inter alia*, that the arbitral tribunal did not enjoy jurisdiction given that (i) Cengiz's investments had been made through fraud and corruption, (ii) Cengiz had not abided by the cooling-off period provided by the BIT, and (iii) Cengiz's disputed construction contracts could not be characterised as "investments" within the meaning of the BIT and customary international law.

The Paris Court of Appeal dismissed Libya's arguments and upheld the award, ruling that, in particular: (i) whether the investment was fraudulent or corrupt pertained to the merits of the dispute and did not affect the arbitral tribunal's jurisdiction under the BIT (notably, the Court held that the standing offer for arbitration contained in a BIT is autonomous and independent from the validity of the transaction which gives rise to or supports an investment, so that the acceptance of arbitration resulting from the notification of the request for arbitration is sufficient to justify the jurisdiction of the arbitral tribunal to rule on the lawfulness of the investment and the related claim for compensation); (ii) whether Cengiz had respected the cooling-off period provided by the BIT before bringing its claims did not pertain to the arbitral tribunal's jurisdiction, but rather to the admissibility of said claims (which cannot be reviewed by French courts); and (iii) Cengiz's contracts constituted investments within the meaning of the BIT (after having construed the terms of the BIT and excluded Libya's customary international law arguments) (CA Paris, 25 May 2021, No. 18/27648).

Seventh and, finally, the Paris Court of Appeal also ruled on the interpretation of the Turkey–Libya BIT in the context of a set-aside application filed by the State of Libya against a partial arbitral award rendered in favour of Turkish company Nurol Insaat ve Ticaret A.S., in Paris, under the aegis of the ICC.

In support of its petition to set aside the partial award, Libya argued, *inter alia*, that the arbitral tribunal did not enjoy jurisdiction, given that: (i) the Turkey–Libya BIT had never entered into force; (ii) Nurol's investments had been made through fraud and corruption; (iii) Nurol's disputed construction contracts could not be characterised as "investments" within the meaning of the BIT and customary international law; and (iv) in any event, the BIT only covers investments made before its entry into force when the related dispute between the parties arose after said entry into force, which was not the case here.

The Paris Court of Appeal dismissed Libya's arguments and upheld the arbitral award, ruling that, in particular: (i) the BIT had indeed entered into force as the conditions in this respect had been fulfilled and its application had been acknowledged by Libya in other proceedings (*cf.* the abovementioned *Cengiz* case); (ii) whether the investment was fraudulent or corrupt pertained to the merits of the dispute and did not affect the arbitral tribunal's jurisdiction under the BIT (reaffirming its *Cengiz* holding); (iii) Nurol's contracts constituted investments within the meaning of the BIT (after having construed the terms of the BIT and excluded Libya's arguments pertaining to customary international law); and (iv) the arbitral tribunal had validly ruled on its own jurisdiction under the BIT *ratione temporis*, by upholding jurisdiction in relation to disputes that had arisen after the BIT's entry into force (and correlatively declining jurisdiction in relation to disputes that had arisen before said entry into force) (CA Paris, 28 September 2021, No. 19/19834).

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

Regarding its extra-EU trade policy, France has officially indicated that, following its proposals, the EU is currently promoting an ambitious reform of the dispute settlement mechanism between investors and States.

France has expressly stated that the new model for the settlement of investment disputes, which has been championed by the EU in all of its latest trade negotiations, has been shaped on the basis of reform proposals formulated by France, in response to criticism of the now-stalled Transatlantic Partnership negotiations with the United States.

In short, the said new model is presented by France as ensuring a better protection of States' right to regulate through the establishment of the Investment Court System (ICS). The ICS, which has been accepted by Canada, Vietnam and Singapore in the respective trade agreements concluded with the EU, includes a court of first instance and an appellate body composed of permanent judges designated and remunerated by the Member States.

France has also formulated proposals as part of an Action Plan dated 25 October 2017 accompanying the provisional entry into force of the CETA, which aim at defining the operating modalities of the bilateral investment court with a view to ensure the protection of the EU's and its Member States' right to regulate.

Ultimately, as an EU Member State, France defends the establishment of a Multilateral Investment Court, as part of works initiated in 2017 within the framework of the UNCITRAL.

France's position on the above points can be found on the website of the Ministry of Economy, at the following link: https://www.tresor.economie.gouv.fr/services-aux-entreprises/les-accords-de-protection-des-investissements.

Regarding the settlement of disputes between EU investors and EU Member States, on 6 March 2018, in its landmark decision in the *Achmea v Slovak Republic* case, the CJEU held that the arbitration clause contained in the BIT concluded between the former Czechoslovakia and the Netherlands was not compatible with EU law. Furthermore, following the European Commission's recommendation to terminate intra-EU BITs, 23 Member States, including France, concluded the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" (see question 1.1 above).

Finally, on 2 September 2021, the CJEU rendered another key decision in the *Komstroy v. Moldova* case, following a referral from the Paris Court of Appeal (CA Paris, 24 September 2019, n° 18/14721). The origin of the case lies in the definition of the notion of "investment" under the ECT.

Even though the CJEU noted that it does not, in principle, have jurisdiction to interpret an international agreement regarding its application to disputes that are not covered by EU law, the Court upheld jurisdiction in that case, stating that: (i) it is clearly in the interest of the EU, in order to forestall future differences in interpretation, that these provisions be interpreted uniformly; and (ii) the parties to the dispute in the main proceedings chose to establish the seat of the arbitration in Paris, making French law applicable to the dispute as the *lex fori* and, by extension, EU law (as EU law forms part of the law in force in every Member State).

Clarifying the relationship between EU law and the ECT, the Court ruled that the "intra-European" application of the ECT's investor-state arbitration clause does not comply with EU law, pointing out that it is incompatible with the autonomy of the EU's legal order following the *Achmea* decision.

In the same decision, the Court also ruled that the acquisition of a claim arising from a contract for the supply of electricity, which is not connected to an investment, does not constitute an "investment" within the meaning of the provisions of Articles 1(6) and 26(1) of the ECT.

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

Generally speaking, such issues are not specifically addressed in BITs concluded by France. It should nonetheless be noted that such treaties generally: (i) exclusively cover investments that are made "*in accordance with the legislation*" of the host country; (ii) encompass indirect investments; and (iii) contain broadly worded MFN clauses.

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

France has not proactively terminated BITs concluded with non-EU States, except when such BITs have been replaced by new treaties.

Accordingly, BITs concluded with China, Morocco, the Philippines, Romania and Tunisia have been terminated in order to be replaced.

BITs concluded by France with Bolivia, Ecuador, India, Indonesia, Poland and South Africa, which are now terminated, have been denounced by these respective States.

Regarding the BIT with Israel, which has also been terminated, we could not find information regarding the denunciation.

Regarding intra-EU BITs, as mentioned above, 10 out of 12 intra-EU BITs concluded by France were terminated on 28 August 2021 after France ratified the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" (see question 1.1 above).

4 Case Trends

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

Based on public records, France has only been involved in two investment arbitrations to date.

The first of these was registered before the PCA, in The Hague, on 17 December 2003 under the 1986 "Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link". The arbitration proceedings were seated in Brussels, Belgium.

The Channel Tunnel Group Ltd. and France Manche S.A., two entities belonging to the Eurotunnel group, which had concluded a concession agreement with France and the United Kingdom, claimed, *inter alia*, that: (i) both France and the United Kingdom failed to protect the Channel Tunnel, following their investment, from the intrusion of illegal migrants coming from the Sangatte Retention Centre into the Coquelles Tunnel terminal, in France; and (ii) the two governments had inequitably treated the investors by granting substantial subventions to SeaFrance (a French-based company which operated ferry boats between France and the United Kingdom).

On 30 January 2007, the arbitral tribunal rendered a partial award, dismissing the claim made in relation to subventions granted to SeaFrance but finding that the investors were entitled to compensation as the respondents had failed to maintain conditions of normal security and public order in and around the Coquelles terminal. The partial award is available, both in French and English, on the PCA's website. The amount of the compensation due to the claimants was to be established in a second phase of the arbitration; however, no documents have been made public in this respect.

The second investor-State arbitration brought against France was registered on 10 September 2013 before the ICSID. The only information available on the ICSID's website is that this arbitration was initiated by Erbil Serter, a Turkish ship designer and architect, in connection with the design of a ship hull (ICSID Case No. ARB/13/22). The case was discontinued on 2 March 2018.

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

This does not apply to France as there has been no investor-State arbitration award enforced against France to date.

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

France has not sought annulment proceedings under the aegis of the ICSID, as there has been no ICSID arbitration award rendered against France to date.

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

There has been no such satellite litigation concerning France in relation to substantive claims or to enforcement, as there has been no investor-State arbitration award enforced against France to date.

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 does not apply to France as there has been no investor-State arbitration award enforced against France to date.

5 Funding

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

Yes, third-party funding of investor-State claims is permitted in France.

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

Since a landmark decision of the Versailles Court of Appeal that characterised the third-party funding agreement as a *sui generis* contract (CA Versailles, 1 June 2006, No. 05/01038), there has been no significant case law related to third-party funding rendered by French courts to date.

As noted by the Paris Bar Council in a report entitled "*The Financing of Arbitration by Third Parties*", issued on 21 February 2017, "*practices for the financing of legal procedures by third-party funders are developing significantly, which is especially remarkable in international arbitration* […] *paradoxically third-party funding is scarcely regulated* […] *and third party funding is not subjected to any specific statutory or administrative regulation in France*" (pp 2–3; see also pp 7–8).

The Paris Bar Council considers that the central issue raised by third-party funding pertains to who, between the funder or the funded party, should be identified as the attorney's client (p. 3).

In this respect, the Paris Bar Council emphasises in said report, as well as in a Council resolution adopted the same day, that the attorney who represents a party who is funded by a third party is exclusively bound to ethical obligations *vis-à-vis* his/her only client, the funded party (p. 1).

The Paris Bar Council report is accessible via the following link: http://www.avocatparis.org/system/files/publications/rapport_et_projet_resolution_tpf_0.pdf.

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

In France, litigation funding, unlike arbitration funding, remains relatively marginal for the time being.

Over the past years, arbitration funding has genuinely blossomed, and the funding offer has dramatically widened. A number of funds are now looking for investment opportunities in international arbitration claims and the proposed financing solutions have become increasingly sophisticated and diversified.

6 The Relationship Between International Tribunals and Domestic Courts

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

Under French law, an arbitral award that would conduct a judicial review of a French criminal investigation or a French domestic judgment – or a foreign judgment that has already been recognised in France – would probably be regarded as infringing French international public policy. Such award would hence be set aside and/or remain unenforceable in France. Indeed, under French law, an arbitral award the findings of which are irreconcilable with those of another judicial decision that is vested with *res judicata* and has already been recognised in France cannot be recognised and enforced, given that such recognition and correlative enforcement would infringe French international public policy (see *e.g.*: CA Paris, 29 May 2018, No. 15/23187; CA Paris, 10 May 2016, No. 14/20486; CA Paris, 17 January 2012, No. 10/21349; CA Paris, 4 December 2012, No. 11/07800; and Cass. civ. 1, 28 March 2013, Nos 11-23.801 and 11-25.123. See also Ch. Seraglini and J. Ortscheidt, *Droit de l'Arbitrage Interne et International*, 2nd ed., LGDJ, 2019, § 1001; Th. Clay, *Code de l'Arbitrage Commenté*, Lexis Nexis, 2015, obs. No. 34 under Article 1520, p. 224; and J-B. Racine, *Droit de l'Arbitrage*, PUF, 2016, § 959). Finally, it should be emphasised that in France, criminal law falls within the exclusive jurisdiction of the State and, as such, cannot be arbitrated.

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

For the sake of clarity, as this chapter deals with investor-State arbitration, the present and following answers only address the French legal regime applicable to "*international arbitration proceedings*" seated in France (*i.e.* "*proceedings that concern the interests of international commerce*" under Article 1504 of the French CCP, as opposed to domestic arbitration proceedings) or foreign arbitration proceedings and arbitral awards ensuing from these proceedings. International arbitration proceedings are governed by Articles 1504 to 1527 of the CCP. In addition, some of the provisions applicable to domestic arbitration – governed by Articles 1442 to 1503 of the CCP – are rendered applicable to international arbitration by virtue of Article 1506 of the CCP.

In France, a dedicated judge, titled the "*juge d'appui*", is empowered to deal with procedural issues arising out of arbitration proceedings, and in particular:

- to assist the parties in the constitution of the arbitral tribunal (Articles 1451 to 1455 of the CCP);
- to hear challenges brought against the arbitrators (Article 1456 of the CCP);
- to rule on whether an arbitrator may resign during the course of the proceedings (Article 1457 of the CCP); and
- to order the production of evidence held by third parties (Article 1469 of the CCP).

The *juge d'appui* can be seized through expedited proceedings by either a party to the arbitration proceedings, the arbitral tribunal or a member of the arbitral tribunal (Article 1460 of the CCP).

In the context of international arbitration proceedings, the *juge d'appui* is, unless otherwise agreed by the parties, the President of the Judiciary Tribunal of Paris when either (Article 1505 of the CCP):

- the arbitration proceedings are seated in France;
- the arbitration proceedings are governed by French procedural law;
- the parties have agreed to grant exclusive jurisdiction to French courts to deal with disputes regarding the arbitral proceedings; or
- one of the parties is facing a risk of a denial of justice.

In addition, under French law, a broad range of interim relief may be sought by a party from domestic courts. In principle, such measures may be requested only prior to the constitution of the arbitral tribunal and provided that the request is urgent. They can be sought from the President of the Judiciary Tribunal or the President of the Tribunal of Commerce ruling through expedited proceedings, known as "*juge des référés*" (Article 1449 of the CCP). Once the arbitral tribunal has been constituted, interim measures may only be sought from the arbitral tribunal itself, save for conservatory attachments or judicial security (which may only be sought from domestic courts, according to Article 1468 of the CCP).

6.3 What legislation governs the enforcement of arbitration proceedings?

French law is very arbitration-friendly and, accordingly, French courts adopt a particularly deferential attitude towards arbitration agreements, favouring the enforcement of arbitration proceedings.

Under French law, as a general rule, the arbitral tribunal itself rules on its jurisdiction (Article 1465 of the CCP), a principle known as "competence-competence".

Correlatively, when French courts are confronted with an arbitration agreement, Article 1448 of the CCP applies, providing as follows: "*When a dispute subject to an arbitration agreement is brought before a court, the latter shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly inapplicable.*" This is known as the "negative effect of competence-competence".

On this basis: (i) if the arbitral tribunal has already been seized, French courts are simply barred from upholding jurisdiction; and (ii) if the arbitral tribunal has not yet been seized, French courts may only uphold jurisdiction in the event that the arbitration agreement is "*manifestly void or manifestly inapplicable*" (which is rare in practice, especially given that French courts construe this notion narrowly).

Once it is constituted, the arbitral tribunal enjoys broad powers under French law, including to order "*any type of conservatory or interim measures that it deems appropriate*" (save for conservatory attachments or judicial security, as explained at question 6.2 above).

Finally, it should be emphasised that, under French law, arbitral awards cannot be reviewed on the merits, and challenges against them and/or their recognition and enforcement are limited (see question 7.2 below).

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

Under French law, arbitrators enjoy immunity from civil liability regarding the decisions they render.

Such immunity is not provided for by statute, having been coined by case law. In a landmark decision dated 15 January 2014, the French Supreme Court unequivocally held that an arbitrator "*enjoys, in his capacity as a judge, jurisdictional immunity so that he can only be found liable for his personal negligence which, for his liability to be sought, must amount to wilful misconduct, constituting a fraud, gross negligence or a denial of justice*" (Cass. civ. 1, 15 January 2014, No. 11-17.196).

It must be emphasised that such jurisdictional immunity only covers the arbitrators' civil liability as regards the decisions they render, and not their potential contractual liability for breaches that are not directly pertaining to the merits of their decisions (for instance, if an arbitral award is set aside by a court because of a procedural defect caused by the arbitral tribunal – see Cass. civ. 1, 6 December 2005, No. 03-13.116; or, if an arbitrator breaches his obligation to remain loyal and impartial or breaches his obligation of efficiency and diligence in failing to render an award within the agreed timeline – see CA Paris, 2 April 2019, No. 16/00136).

In this respect, it should be emphasised that French courts will uphold jurisdiction to rule on arbitrators' liability when the parties have chosen France as the seat of their arbitration proceedings, regardless of where the arbitral hearing and the tribunal's deliberations have actually taken place (CA Paris, 22 June 2021, No. 21/07623).

It is noteworthy that, under French law, contractual liability may be validly limited by the parties (*e.g.* subjected to conditions, capped or even excluded; see Article 1231-3 of the French Civil Code). The arbitrators' contractual liability may therefore be validly limited, provided that said limitation is expressly set out in the parties' arbitration agreement, the rules of arbitration, the terms of reference or an agreement concluded between the parties and the arbitrators. However, under French law, clauses limiting a person's contractual liability are deemed inapplicable if said liability ensues from wilful misconduct, gross negligence or from the failure by a party to perform its essential obligation under the contract (Articles 1231–3 and 1170 of the French Civil Code; see *e.g.* CA Paris, 22 January 2009, No. 07/19.492 and CA Paris, 23 March 2021, No. 18/14817, with respect to the International Court of Arbitration (ICC)'s exclusion of its contractual liability).

Finally, under French law, arbitrators are fully liable if they commit criminal offences in relation to arbitration proceedings, and do not enjoy any immunity from criminal prosecution in France.

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

In the context of international arbitration proceedings, under French law, the choice of the parties – either directly or by reference to arbitration rules – is entirely free, subject to the sole condition that arbitrators be and remain independent and impartial (Articles 1456 and 1508 of the CCP).

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

As mentioned at question 6.2 above, in France, a dedicated judge, known as the "*juge d'appui*", is empowered to assist the parties in the constitution of the arbitral tribunal and to hear challenges brought against the arbitrators. This is particularly helpful in *ad hoc* arbitration proceedings where no institution or appointing authority has been designated by the parties.

In the event that a dispute must be heard by a sole arbitrator, should the parties fail to agree on the appointment of that arbitrator, the latter should be appointed either by the institution/appointing authority or by the *juge d'appui* (Article 1452 1° of the CCP).

In the event that the dispute must be heard by three arbitrators, Article 1451 2° of the CCP provides for a default procedure as regards the constitution of the tribunal. It provides that each party must appoint one arbitrator and that the two co-arbitrators appoint the third one. In the event that a party fails to appoint a co-arbitrator, or that the co-arbitrators cannot agree on the name of the third one, then the institution/appointing authority or the *juge d'appui* must appoint such arbitrator (Article 1452 1° of the CCP).

Finally, in the event of multiparty arbitration, Article 1452 of the CCP provides that when the parties cannot agree on the composition of the arbitral tribunal, the entity in charge of administrating the arbitration or, failing that, the *juge d'appui* must designate the arbitrators (Article 1453 of the CCP).

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

Please refer to questions 6.2 and 6.6 above.

7 Recognition and Enforcement

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

First, unlike domestic arbitral awards, for an international arbitral award rendered in France to be valid and enforceable, the CCP does not impose any formal requirement.

It should be emphasised that, in the context of international arbitration proceedings, absent an agreement otherwise by the parties, if no majority prevails in the arbitral tribunal, the president of the tribunal may rule alone; and if the other arbitrators refuse to sign, the president may sign the award alone and indicate it in the award (Article 1513 of the CCP).

In order to be recognised and enforced in France, international arbitral awards rendered in France and foreign arbitral awards are subject to the same legal regime.

Pursuant to Article 1516 of the CCP, the party seeking the recognition and enforcement of a French international award or of a foreign arbitral award must apply for a judicial order granting leave to enforce the award, known as an "*exequatur* order" ("*ordonnance d'exequatur*").

Such *exequatur* order must be requested from the President of the Paris Judiciary Tribunal (for foreign awards) or of the Judiciary Tribunal of the place where the award was rendered (for international awards rendered in France). If annulment proceedings are pending against the award in France, the president – or the judge in charge of the management of the matter – at the competent Court of Appeal will have jurisdiction to grant the *exequatur* order (Article 1521 of the CCP).

In the context of the *exequatur* procedure, the applicant must establish the existence of said arbitral award, and the judge may only deny the *exequatur* order if the award is manifestly contrary to French international public policy (Article 1514 of the CCP). In support of its petition, the applicant must provide the court with the originals or duly authenticated copies of the arbitral award and arbitration agreement (and provide translations of these documents, if not in French) (Article 1516 of the CCP).

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

The debtor under an international award rendered in France or a foreign arbitral award may seek that the award be set aside or denied recognition in France by invoking one or several of the grounds exhaustively set forth in Article 1520 of the CCP, namely:

(1) the arbitral tribunal wrongly upheld or declined jurisdiction;
(2) the arbitral tribunal was irregularly constituted;
(3) the arbitral tribunal violated the mandate it was vested with;
(4) due process was infringed; and
(5) the recognition or enforcement of the award would be contrary to French international public policy.

With respect to international arbitration awards rendered in France, it should be emphasised that the parties can waive their right to seek the annulment of the award; although, in this case, they retain the right to appeal the *exequatur* order allowing the enforcement of such award (Article 1522 of the CCP).

Pursuant to Article 1526 § 1 of the CCP, as a general rule, international arbitral awards rendered in France or foreign arbitral awards are enforceable immediately after the *exequatur* order has been granted, even where an action to set aside the award has been initiated or the *exequatur* order has been challenged. Article 1526 § 2 of the CCP nonetheless provides that the court may stay the enforcement of an arbitral award at the award-debtor's request, if the latter's rights would be "*severely prejudiced*" as a consequence of enforcement, which is difficult to demonstrate.

With respect to international awards rendered in France, the award-debtor may also bring a revision application ("*recours en révision*") if it can demonstrate that the award was affected by fraud. An application for the revision of the award "*shall be made to the arbitral tribunal*" (Article 1502 of the CCP). In the event that the arbitral tribunal cannot be reconvened, some prominent academics consider that a new arbitral tribunal must be constituted to deal with said application (see *e.g.*: Ch. Seraglini and J. Ortscheidt, *Droit de l'Arbitrage Interne et International*, 2nd ed., LGDJ, 2019, § 967; Th. Clay, *Code de l'Arbitrage Commenté*, Lexis Nexis, 2015, obs. under Article 1502, p. 165; J-B. Racine, *Droit de l'Arbitrage*, PUF, 2016, § 1002; and E. Loquin, *L'Arbitrage du Commerce International, Pratique des Affaires*, Joly, 2015, § 477).

It is noteworthy that, with respect to foreign arbitral awards, in a decision dated 25 April 2017, the Paris First Instance Court found that the *exequatur* order allowing their enforcement in France could be subject to opposition by third parties whose rights have been affected by the findings of such awards, so as to afford them "*an effective right to be heard by a judge and to a fair trial*" (TGI Paris, 25 April 2017, No. 15/17869). However, the findings of this decision should be taken with caution, as: (i) it has remained isolated to date; (ii) such recourse is not provided for by the CCP (which can even be read as having willingly excluded third-party opposition concerning international and foreign awards); (iii) prominent academics consider that foreign awards cannot be subject to third-party opposition (see Ch. Seraglini and J. Ortscheidt, *Droit de l'Arbitrage Interne et International*, 2nd ed., LGDJ, 2019, § 955; see also, regarding international awards: Th. Clay, *Code de l'Arbitrage Commenté*, Lexis Nexis, 2015, obs. under Article 1501, p. 163; J-B. Racine, *Droit de l'Arbitrage*, PUF, 2016, § 997; and E. Loquin, *L'Arbitrage du Commerce International, Pratique des Affaires*, Joly, 2015, § 467); and (iv) the recognition of such recourse for foreign awards only, as suggested by the Paris First Instance Court, could arguably be regarded as a violation of Article III of the New York Convention (as it would result in treating an arbitral award rendered abroad less favourably than a French award rendered in the context of international arbitration proceedings).

Finally, if the award-creditor has not sought the enforcement of the award within 10 years of having obtained an *exequatur* order, the award-debtor may resist enforcement on the basis of the statute of limitations contained at Article L. 111-4 of the French Code of Civil Enforcement Procedures (CCEP).

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

Article L. 111-1-1 of the CCEP provides that a judicial authorisation must be obtained so as to carry out any conservatory or final enforcement measures over assets owned by States in France.

In this respect, pursuant to Article L. 111-1-2 § 1 of the CCEP, such judicial authorisation may only be granted to the State creditor on the basis that:

- the State has waived its sovereign immunity from enforcement (by expressly consenting to enforcement or earmarking specific assets for the satisfaction of its debts); or
- the targeted assets are not specifically in use or intended for use by the State for non-commercial public utility purposes and have a connection with the entity against which the legal proceedings that gave rise to the debt were directed.

Article L. 111-1-2 § 2 of the CCEP enumerates a non-exhaustive list of assets that are considered to be "*specifically used or intended for use by States for non-commercial public utility purposes*", namely:

- assets, including any bank accounts, that are in use or intended for the performance of the functions of the States' diplomatic mission or consular posts, special missions, missions to international organisations, or delegations to organs of an international organisation or international conferences;
- assets of a military character or used or intended for the performance of military functions;
- assets forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
- assets forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale; and
- tax debts or social security debts of the State.

States also enjoy diplomatic immunity from enforcement in France, which is autonomous from their general sovereign immunity from enforcement. Diplomatic immunity from enforcement is provided under Article L. 111-1-3 of the CCEP, which requires that a waiver to such immunity must be explicit and specific in order to be effective.

Finally, in addition to the above protections, certain specific sovereign assets also enjoy additional shielding by virtue of discrete statutory provisions, such as:

- assets of States that benefit from the Official Development Assistance granted by the Organisation for Economic Co-operation and Development, which are insulated from enforcement by speculative creditors, such as hedge funds, under specific conditions (Article 60 of Law No. 2016-1691 of 9 December 2016);
- foreign cultural assets on loan for public exhibitions in France, which are "*unseizable*" (Article 61 of Law No. 94-679 of 8 August 1994); and
- certain assets held by foreign central banks, which are "*unseizable*" (Article L. 153-1 of the MFC).

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

To answer the question of whether the creditor of a State-owned entity may pursue enforcement on the State's assets (if the State itself was not a party to the dispute) or, to the contrary, whether the creditor of a State may pursue enforcement on the assets of State-owned entities (which were not parties to the dispute), such creditor will be required to show that the relevant State-owned entity constitutes a mere "*emanation*" (alter ego) of the State (*e.g.* Cass. civ. 1, 21 July 1987, No. 85-14.843).

For a State-owned entity to be regarded as an "*emanation*" of the State, French courts require a showing of both:

- the lack of functional independence of the entity from the State; and
- the absence of a distinct estate (*i.e.*: lack of its separate asset base from that of the State) (*e.g.* CA Versailles, 14 January 2021, No. 19/06572; CA Paris, 27 June 2017, Nos 16/08522 and 16/01314; Cass. civ. 1, 14 November 2007, No. 04-15.388; and Cass. civ. 1, 6 February 2007, Nos 04-13108 and 04-16889).

If the State-owned entity is found to constitute an emanation of the State, it will then benefit from the States' enforcement immunities (J-B Donnier, "Immunités d'exécution – Droit International", *JCL Voies d'Exécution*, LexisNexis, 2017, § 36; D Cholet, "Exécution des jugements et des actes", *Répertoire de procédure civile*, Dalloz, 2015, § 150; and B Moreau, "Arbitrage International", *Répertoire de droit commercial*, Dalloz, 2016, § 91), and the legal regime described at question 7.2 above will apply.

Julie Spinelli enjoys strong and recognised expertise in international arbitration. She acts as Counsel in domestic and international arbitration proceedings, *ad hoc* or institutional (ICC, LCIA, ICSID, SCC, CMAP and UNCITRAL), for States as well as French and foreign companies in disputes in the sectors of energy, construction and engineering, aeronautical, chemicals, pharmaceuticals and hospitality.
She also represents clients in annulment, enforcement and arbitration-related court proceedings before French courts.
Julie regularly acts as an arbitrator.
From 2018 onwards, *Who's Who Legal* ranked Julie Spinelli among the Most Highly Regarded Future Leaders in Europe in the Partners category and identified her as a future leader in international arbitration, highlighting that Julie is "*truly excellent*" and "*is quickly becoming one of the biggest stars of the Parisian arbitration bar*".
In addition, in December 2019, *Décideurs Magazine (Leaders League)* listed Julie Spinelli amongst the 30 rising stars of the Paris Bar for the year 2020 (in all fields of business law), describing her as a "*fighter*".

Le 16 Law
Rue de l'Elysée
75008 Paris
France

Tel: +33 1 86 95 57 90
Email: julie.spinelli@le16law.com
URL: www.le16law.com

Yann Dehaudt-Delville is an *Avocat à la Cour* in Paris and an Attorney-at-Law in New York. Yann joined Le 16 Law in 2019 after having worked for five years at Freshfields Bruckhaus Deringer and Dechert in Paris.
Yann has acted as Counsel in both commercial and investor-State arbitration proceedings, conducted under various arbitration rules as well as *ad hoc*. In addition, Yann has also been involved in annulment, enforcement and other arbitration-related proceedings, as well as in commercial litigation and conciliation proceedings.
Yann has represented clients from a wide array of industries, such as the energy, construction and engineering, telecommunications, aeronautical, express freight and logistics, chemicals, pharmaceuticals, hospitality and luxury distribution sectors.
Yann has also authored numerous articles on arbitration and has co-taught several seminars in the field.
During his legal studies, Yann also served as a legal research assistant to Dr. Eduardo Valencia-Ospina, in relation to Dr. Valencia-Ospina's mandate at the International Law Commission of the United Nations as the Special Rapporteur on the issue of the Protection of Persons in the Event of Disasters.

Le 16 Law
Rue de l'Elysée
75008 Paris
France

Tel: +33 1 86 95 57 90
Email: yann.dehaudt-delville@le16law.com
URL: www.le16law.com

Le 16 Law was initially founded in 2017 as a spin-off of Freshfields' dispute resolution department in Paris. During the past three years, the team has grown from five to 15 lawyers. This makes Le 16 Law one of the largest, fully independent, boutique law firms dedicated to dispute resolution in Paris.
Today, the firm displays a full-service dispute resolution practice. Its six partners maintain distinct areas of specialisation and are responsible for different practices, namely: (i) arbitration and alternative dispute resolution; (ii) commercial and corporate litigation; (iii) insolvency, regulatory and sanctions; (iv) white-collar crime and para-criminal proceedings (internal investigations, in particular); (v) real estate litigation; and (vi) enforcement proceedings (involving private parties or States).
The size of the firm and the complementary expertise of its members allow Le 16 Law to build bespoke case teams based on the characteristics and needs of a case.
In addition, its total independence allows the firm to team up with the best practitioners and experts in foreign jurisdictions.

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le16 LAW

Germany

Dr. Gebhard Bücheler

Gustav Flecke-Giammarco

Seven Summits Arbitration

Dr. Martina Magnarelli

1 Treaties: Current Status and Future Developments

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

Germany currently has 117 bilateral investment treaties (**BITs**) in force, concluded during the last 60 years with states spanning all geographical areas: Europe; the Middle East; South-East Asia; Latin America; and the Caribbean. These treaties typically offer strong investment protection, in line with Germany's outward-oriented, post-WWII economy, and its desire to protect German investments abroad. Germany has been a member of the Energy Charter Treaty (**ECT**) since 1994 and, as a Member State of the European Union (**EU**), enjoys preferential trade relations with countries across the globe.

The EU has concluded numerous free trade agreements and partnership agreements in which the parties agreed on investment liberalisation and committed to further negotiations, including with respect to investment protection and dispute settlement. Since 2009, the EU has the competence to conclude treaties covering foreign direct investment. While the EU has already negotiated several of such treaties, no EU treaty with provisions on investment protection has entered into force so far.

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

Germany has signed six bilateral trade and/or investment agreements that are not yet in force. Five of these treaties (namely the BITs with Brazil, Congo, Israel, Pakistan, and Timor-Leste) were signed before or on 1 December 2009. On that date, the Lisbon Treaty entered into force and established the competence of the EU for foreign direct investment. Thereafter, EU Regulation 1219/2012 of 12 December 2012 obliged EU Member States to notify the Commission of all BITs with third countries signed before 1 December 2009 that they wished to permit to enter into force. Apparently, the EU has not yet decided on the fate of these five German BITs. In 2010, Germany and Iraq signed (but have not ratified) a treaty which has since been arguably superseded by a partnership and cooperation agreement between the EU and Iraq, which was signed in 2012 and entered into force in 2018.

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

Germany bases its BITs on a Model BIT. The 2008 Model BIT replaced the 1998 Model BIT and contains the following standard BIT protections:

- fair and equitable treatment (Article 2);
- full protection and security (Article 2);
- national treatment (**NT**) and most-favoured-nation (**MFN**) treatment (Article 3 – with the caveat that measures to be taken for reasons of public security and order shall not be deemed less favourable treatment);
- protection against unlawful expropriation (Article 4);
- free transfer of payments (Article 5); and
- an umbrella clause (Article 7.2).

Article 8 of the 2008 Model BIT extends the application of the treaty to investments made prior to the entry into force of the relevant treaty.

The 2008 Model BIT provides for both state-to-state (Article 9) and investor-state dispute settlement (Article 10).

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

The practice of publishing diplomatic notes has not been consistent throughout the history of Germany's BITs. For example, Germany published diplomatic notes in respect of the 1959 BIT with Pakistan regarding the interpretation of the term "investment". In the protocol to the 2005 Afghanistan–Germany BIT, the parties made clarifications regarding the determination of the nationality of the investor. In several protocols to BITs, the parties have specified that "activities in connection with the investment" enjoying NT and MFN treatment include "management, maintenance, use and enjoyment of an investment" (e.g., as in the 1991 Argentina–Germany BIT, the 2000 Germany–Sri Lanka BIT, and the 2001 Germany–Morocco BIT). On other occasions, however – such as in 2007, when it concluded the

Egypt–Germany BIT and the Germany–Oman BIT – Germany published neither protocols nor diplomatic 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 by the German Government concerning the intended meaning of treaty clauses.

2 Legal Frameworks

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

Germany is a party to the New York Convention and International Centre for Settlement of Investment Disputes (**ICSID**) Convention; it has signed but not yet ratified the Mauritius Convention.

(1) Germany signed the New York Convention on 10 June 1958 and ratified it (subject to a reciprocity reservation) on 30 June 1961.
(2) Germany signed the ICSID Convention on 27 January 1966 and ratified it on 18 April 1969 (the Convention entered into force for Germany on 18 May 1969).
(3) Germany signed the Mauritius Convention on 17 March 2015, but has not yet ratified it.

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

Germany has no investment law providing for substantive standards of protection or investor-state dispute settlement. Article 14 of the German Constitution (*Grundgesetz* – **GG**) guarantees property rights and sets out the prerequisites for lawful expropriation. The German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* – **AWG**) and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* – **AWV**) of the German Federal Ministry of Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie* – **BMWi**) set forth conditions for the admission of certain categories of foreign investment and provide for sector-specific and cross-sectoral investment reviews (see the answer to question 2.3).

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

Germany has a liberal foreign direct investment regime and there is no general requirement for the formal admission of a foreign investment. However, there is a screening system in place through which certain foreign investments can be blocked or restricted for public order or security reasons (sections 55 *et seq.* AWV).

In the context of the so-called "cross-sectoral examination", the BMWi can investigate whether a foreign investor's acquisition of a certain percentage of the voting rights in a domestic company constitutes a "threat to the public order or security". The relevant threshold that may trigger BMWi investigations can be as low as 10%, e.g. when the company operates critical infrastructure, develops and modifies software used for operating critical infrastructure, or provides cloud computing services (sections 55a(1), numbers 1–7, and 56(1) number 1 AWV). Other relevant thresholds are 20% (for companies with business activities listed in sections 55(a) numbers 8–27, 56(1) number 2 AWV) and 25% (for all other companies, as set out in section 56(1) number 3 AWV). On 20 May 2020, during the coronavirus crisis, the German Government added domestic companies that develop, manufacture or produce vaccines, medicines, protective medical equipment, or other medical goods for the treatment of highly infectious diseases to the list of companies for which an intended 20% stake by a foreign investor can trigger BMWi investigations (section 55a(1), numbers 9–11 AWV). On 1 May 2021, the German Government added further domestic companies to this 20% list, in particular companies that operate in the satellite and semiconductors industry, or develop or manufacture certain artificial intelligence applications, certain self-driving devices or robots (section 55a(1), numbers 12–27 AWV).

In the context of the so-called "sector-specific examination", the BMWi can examine whether the acquisition of at least 10% of the voting rights in a domestic company operating in the military or security sector endangers the "essential security interests of Germany" (sections 60 and 60a AWV).

On the EU level, Regulation 2019/452 of 19 March 2019, which entered into force on 11 October 2020, establishes a European screening mechanism for foreign direct investment. While each Member State may continue maintaining, amending or adopting mechanisms to screen foreign direct investment in its territory on the grounds of security or public order, Regulation 2019/452 seeks to establish a common framework – *inter alia*, through cooperation obligations and setting out the factors that EU Member States must take into account in their decisions.

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 31 October 2018, the German Federal Supreme Court (*Bundesgerichtshof* – **BGH**) implemented the preliminary ruling it had requested from the Court of Justice of the European Union (**CJEU**) in *Achmea v. Slovakia* (***Achmea***) and annulled the underlying arbitral award.

Subsequently, Achmea filed a complaint for infringement of its right to be heard (*Anhörungsrüge*) against the BGH's 2018 decision, on the grounds that the BGH: (i) did not adequately address Achmea's arguments regarding its right to effective legal protection (*effektiver Rechtsschutz*); (ii) did not sufficiently address its submission on state immunity, according to which German courts may not nullify a treaty between the Netherlands and Slovakia; and (iii) ignored its submission that the German Constitutional Court (*Bundesverfassungsgericht* – **BVerfG**) should be seized with the matter, as it involved the question of whether investment treaties constitute customary international law.

The BGH ruled on the complaint in January 2019 and dismissed it on all three grounds. Regarding point (i), the BGH stated that it had found in its 2018 decision that Achmea may still seek legal protection before Slovakian courts and that the BGH did not have to explicitly address all other arguments raised by Achmea regarding its right to effective legal protection. As to point (ii), the BGH stressed that its 2018 decision concerned the validity of an arbitral award, not of the Netherlands–Slovakia BIT, and that arguments on sovereign immunity were therefore irrelevant. Regarding point (iii), the BGH held that EU law takes precedence over any contrary rule of customary international law that may be relevant. (See also the answer to question 4.4.)

On 11 February 2021, the Higher Regional Court of Frankfurt (***OLG Frankfurt***) held – upon an application by Croatia under § 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung* – **ZPO**) – that an arbitration initiated by Raiffeisen under the Austria–Croatia BIT was inadmissible because of the *Achmea* jurisprudence of the CJEU (OLG Frankfurt – 26 SchH 2/20).

On 11 May 2021, the Dutch Government filed an application under the same provision before the Higher Regional Court of Colone (***OLG Köln***) regarding an ICSID arbitration initiated by German investors RWE and Uniper against the Netherlands on the basis of the ECT on 2 February and 30 April 2021, respectively (see the answer to question 4.1). This application is still pending, and it remains to be seen what the OLG Köln will decide, especially after the decision of the CJEU of 2 September 2021 in Case C-741/19 regarding the applicability of *Achmea* to intra-EU disputes under the ECT.

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

Germany is a party to a large number of BITs and has been supportive towards the protection of foreign investment. It is one of the largest capital exporters in the world and concluded the first ever BIT. Germany's 2008 Model BIT provides for strong investment protection, generally to a greater extent than, for example, the 2012 US Model BIT and the 2014 Canada Model BIT (and their 2004 predecessors), which were drafted against the background of these countries' experience with North American Free Trade Agreement (**NAFTA**) Chapter 11 jurisprudence.

The German Government supported the negotiations over (i) the Transatlantic Trade and Investment Partnership with the United States of America (**TTIP**, which eventually failed), as well as (ii) the Comprehensive Economic and Trade Agreement (**CETA**) with Canada. Regarding future treaties, Germany supports the EU Commission's proposal for establishing a permanent Multilateral Investment Court, which seeks to replace the current system of *ad hoc* tribunals.

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

German BITs traditionally did not explicitly address issues such as corruption, transparency, or climate change in the treaty text. Provisions that explicitly limited investment protection for certain public policy objectives were also rare. This does not mean that disputes arising under such treaties automatically disadvantage the host state, but it is left to the rules on treaty interpretation to provide for the relevant answers. The investment treaties negotiated (and to be negotiated) by the EU (will) contain more explicit provisions on these issues. The 2019 EU–Vietnam Investment Protection Agreement (which is not yet in force), for example, explicitly bars claims regarding investments made through fraudulent misrepresentations or corruption from being submitted to arbitration (Article 3.27). Article 3.46 incorporates by reference the United Nations Commission on International Trade Law (**UNCITRAL**) Rules on Transparency in Treaty-based Investor-State Arbitration (**Rules on Transparency**). In a similar vein, the 2018 EU–Singapore Investment Protection Agreement (which is not yet in force) includes, under Annex 8, Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions.

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

As a result of the CJEU's *Achmea* decision of 6 March 2018, Germany and 22 other EU Member States have signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (**Termination Agreement**). Germany deposited its instrument of ratification with the Council of the European Union on 10 May 2021, and the Termination Agreement entered into force for Germany on 9 June 2021 (Article 16(2)). Pursuant to Articles 2(1) and 4(2) of the Termination Agreement, the BITs of Germany with the following States are no longer in force: Bulgaria; Croatia; Estonia; Hungary; Latvia; Malta; Slovakia; and Slovenia.

4 Case Trends

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

Germany has been the respondent in five publicly known cases: *Ashok Sancheti v. Germany* (discontinued); *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Germany (I)* (settled); *Vattenfall AB and others v. Germany (II)* (settled); *Erste Nordsee-Offshore Holding GmbH, Strabag SE, Zweite Nordsee-Offshore Holding GmbH v. Germany* (pending); and *Mainstream Renewable Power Ltd and others v. Germany* (pending).

According to the United Nations Conference on Trade and Development (**UNCTAD**), German investors initiated 73 publicly known investor-state cases up until 31 December 2020. At least three additional cases were brought in 2021, all under the ECT; two of these cases arose from regulatory action regarding the decommission of coal-fired power plants in the Netherlands (*RWE AG and RWE Eemshaven Holding v. the Netherlands*; *Uniper SE et al. v. the Netherlands*), and the third case, *TS Villalba GmbH v. Spain*, is another case against Spain in the renewable energy sector.

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

There is no record of Germany not having complied with an investment arbitral award so far. Out of the five publicly known cases brought against Germany, one was discontinued, two were settled (*Vattenfall I* and *II*), and two are still pending.

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

Since no ICSID award has been rendered against Germany so far, there has been no occasion in which Germany could have sought annulment under Article 52 ICSID Convention.

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

Yes, two decisions issued by the BVerfG deserve particular attention.

First, in 2012, in parallel to its investment dispute, Vattenfall (see the answer to question 4.1) filed a complaint before the BVerfG against the Thirteenth Law Amending the Atomic Energy Act (**13th AtG Amendment**) of 31 July 2011, under which nuclear power plants had to be phased out earlier than provided for under prior legislation.

In its decision of 6 December 2016, the BVerfG emphasised that the state enjoys broad regulatory powers and can interfere with private property rights for public purposes if the relevant measure is proportionate. However, the BVerfG found the 13th AtG Amendment to be unconstitutional in parts, as it did not provide for the compensation of investors whose legitimate expectations were frustrated. Following this decision, Germany reached a settlement with the investors which was made public on 5 March 2021 (see the answer to question 4.2).

Second, on 3 February 2021, the BVerfG dismissed Achmea's request for a temporary injunction aimed at preventing the entry into force of the Termination Agreement in Germany (see the answer to question 3.4). The BVerfG rejected the claim that the ratification would seriously disadvantage the applicant in relation to the still-pending constitutional complaint it raised in 2019 (BvR 557/19) against the CJEU's decision of 6 March 2018 (*Achmea*), where the applicant argues that *Achmea* was *ultra vires* and in violation of Germany's constitutional identity (see also the answer to question 3.1). In its decision of 3 February 2021, the BVerfG found that the applicant failed to explain the reason why the Termination Agreement would violate its rights.

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?

Most cases brought by German investors or initiated against Germany during the last 10 years concern the energy sector, especially the renewable energy industry. The ECT has become the most frequently invoked treaty.

5 Funding

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

The German legal framework is open to third-party funding. There are no equivalents in the German legal system to the doctrines of champerty and maintenance, which sometimes pose obstacles to third-party funding in common law jurisdictions.

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

There is no record of case law of German courts on third-party funding in investor-state disputes.

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

Germany has become an attractive market for third-party funders. FORIS AG was the first in the 1990s to offer specialised financing solutions for dispute resolution. Today, both continental and Anglo-Saxon third-party funders operate in Germany, and insurance companies are providing litigation funding services as well.

6 The Relationship Between International Tribunals and Domestic Courts

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

German BITs do not contain specific language on whether investment tribunals enjoy the power to review criminal investigations or judgments of domestic courts. But, in principle, criminal investigations and judgments of domestic courts can be part of the facts to be considered by an arbitral tribunal constituted under a German BIT.

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

In line with the UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model Law**), German courts have only limited powers regarding arbitration proceedings. Most of these powers aim at facilitating arbitral proceedings.

German courts' assistance varies depending on whether *ad hoc* or institutional arbitration proceedings are concerned. Overall, possible actions of German courts include:

- establishing the arbitral tribunal;
- referring to arbitration claims brought before courts in violation of the arbitration agreement;
- issuing declaratory judgments on the validity of an arbitration agreement;
- ordering interim relief;
- granting leave for enforcement of preliminary orders; and
- supporting the arbitral tribunal in the taking of evidence.

6.3 What legislation governs the enforcement of arbitration proceedings?

The enforcement of arbitration proceedings is governed by the 10th Book of the ZPO. Under section 1032 ZPO, German courts have the power to refer the parties in court proceedings to arbitration if the respondent raises a timely objection to the court's jurisdiction and the arbitration agreement is not null and void. Arbitral tribunals enjoy the power to decide over their own jurisdiction (*Kompetenz-Kompetenz* principle – section 1040 ZPO). Both provisions were inserted into the ZPO as part of the 1998 reform and are largely based on the 1985 UNCITRAL Model Law.

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

German statutory law contains no explicit provision on the immunity of arbitrators. However, Article 45 2018 DIS (German Arbitration Institute) Arbitration Rules, for example, limits the arbitrators' liability to an intentional breach of duty with respect to their decision-making, and to gross negligence regarding all other acts or omissions in connection with the arbitration (such as the failure to disclose circumstances giving rise to lack of independence and impartiality). In *ad hoc* arbitrations, similar rules on the liability of arbitrators are usually agreed with the parties. In the absence of such an explicit agreement, there is some (albeit not settled) case law that arbitrators, like judges, are liable only for deliberately misapplying the law.

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

The procedure chosen by the parties to select arbitrators must comply with basic requirements of procedural fairness.

If the agreed procedure puts one of the parties at a disadvantage, this party may – as set out in section 1034(2) ZPO – petition a court to appoint the arbitrator(s) in derogation of the parties' agreement.

Some commentators consider section 1034(2) ZPO to also apply to multi-party arbitrations by analogy. However, institutional rules usually provide for default procedures for the appointment of arbitrators in multi-party arbitration proceedings with three-member arbitral tribunals. If several claimant-parties or respondent-parties cannot agree on a joint nomination of "their" co-arbitrator due to conflicting interests among the parties in the same camp, the arbitral institution may decide to appoint all three arbitrators and any prior party nomination may be deemed void (see, e.g., Articles 20.2–20.5 2018 DIS Arbitration Rules).

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

Section 1035 ZPO regulates the selection of arbitrators without distinguishing between *ad hoc* and institutional arbitration. Institutional rules usually contain detailed provisions. Section 1035 ZPO fills the gaps if the parties do not agree on the procedure or need assistance.

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

Domestic courts have the power to intervene in the selection of arbitrators, in accordance with section 1035(3)–(4) ZPO, if:

(i) the parties fail to jointly nominate the sole arbitrator;
(ii) a party fails to nominate a co-arbitrator;
(iii) the co-arbitrators fail to jointly nominate the presiding arbitrator; or
(iv) section 1034(2) applies (see the answer to question 6.5).

7 Recognition and Enforcement

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

The New York Convention and section 1061 ZPO govern the recognition and enforcement of foreign arbitral awards.

An application for recognition and enforcement must comply with the requirements set forth under section 1061 ZPO and the admissibility requirements of court proceedings.

The decision must be considered:

- an award;
- foreign; and
- final.

The applicant must have a legal interest in a declaration of enforceability.

Under section 1064 ZPO, it is sufficient that the award or a certified copy thereof is attached to the application for recognition and enforcement. A translation is not mandatory but may be provided out of courtesy, or courts may request it pursuant to section 142(3) ZPO.

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

Germany endorses the pro-recognition and enforcement approach of the New York Convention. German courts can decline recognition and enforcement of foreign awards if the party opposing recognition and enforcement invokes and establishes the existence of one of the grounds of Article V New York Convention. The scrutiny of German courts does not go beyond this assessment.

For ICSID awards, Articles 53–55 ICSID Convention apply.

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

German courts apply the principles regarding sovereign immunity that are part of customary international law as a matter of Article 25 GG, which means that they are part of the federal law and that they prevail over statutory laws. In addition, German courts apply the European Convention on State Immunity of 16 May 1972 (**Convention on State Immunity**), ratified by Germany in 1990. The Convention on State Immunity has the force of federal law.

As a general rule, enforcement may be sought only against state assets that serve a commercial purpose, as opposed to a sovereign one. This means, for example, that enforcement is not possible against embassy property. Furthermore, under German case law, currency reserves of foreign states at the German Central Bank are considered to serve sovereign purposes. Scientific institutions and trade missions may potentially be protected by sovereign immunity as well.

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

German courts pierce the corporate veil only in exceptional circumstances. There is no identifiable line of jurisprudence regarding the piercing of the corporate veil in relation to enforcement against sovereign assets.

Dr. Gebhard Bücheler, qualified to practise law in New York and Germany, has advised a broad range of public and private clients across many industries, including energy & natural resources, healthcare & pharmaceuticals, manufacturing, and financial services. In addition, Gebhard has sat as arbitrator in international commercial arbitrations and served as a tribunal assistant in large investor-state arbitrations. Having more than a decade of experience in international arbitration, Gebhard worked for an international law firm in Paris and a German dispute resolution boutique in Munich before co-founding 7SA.

Gebhard teaches international law at Ludwig Maximilian University (**LMU**) Munich, and regularly guest lectures at the University of St. Gallen. His publications include the monograph *Proportionality in Investor-State Arbitration* (Oxford University Press), and he holds law degrees from Columbia Law School and LMU Munich, including a Ph.D. in international investment law with the highest academic honours, supervised by Judge Bruno Simma.

Seven Summits Arbitration
Blütenstr. 1
80799 Munich
Germany

Tel: +49 89 413 264 281
Email: gmb@7summits.law
URL: www.7summits.law

Gustav Flecke-Giammarco acts as counsel and arbitrator in multi-faceted domestic and international arbitrations, involving a wide array of matters under many different laws. His institutional track record includes cases under the International Chamber of Commerce (**ICC**), German Arbitration Institute (**DIS**), Vienna International Arbitral Centre (**VIAC**), Stockholm Chamber of Commerce (**SCC**), Finland Arbitration Institute (**FAI**) and Swiss Chambers' Arbitration Institution (**SCAI**) Rules. He has extensive experience with *ad hoc* arbitrations (domestic and UNCITRAL Arbitration Rules), and sits as chair, co-arbitrator, sole arbitrator and emergency arbitrator at various seats throughout Europe. Gustav's main areas of expertise include construction and engineering, post-M&A, international sales, licensing, distribution, energy (including oil & gas) and infrastructure projects.

Before founding 7SA, Gustav practised with the litigation and arbitration group of an international law firm in Düsseldorf and headed the case management team responsible for arbitrations seated in Germany, Switzerland, Austria, Benelux and the Nordic countries at the ICC International Court of Arbitration in Paris. During his tenure at the ICC Secretariat, Gustav supervised over 850 proceedings, including investment treaty and emergency arbitrator cases, and was involved in the scrutiny of 450 awards. Gustav also served on the drafting committee for the 2018 DIS Arbitration Rules and co-edited *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International).

Seven Summits Arbitration
Blütenstr. 1
80799 Munich
Germany

Tel: +49 89 413 264 280
Email: gfg@7summits.law
URL: www.7summits.law

Dr. Martina Magnarelli is an Italian-qualified lawyer and a member of the Munich Bar, with working experience in five jurisdictions across Europe. Before joining 7SA, Martina worked as legal counsel for Siemens in Paris. Martina gained experience in international arbitration at the ICC International Court of Arbitration in Paris and in the international arbitration group of an international law firm in Vienna. During her studies and Bar qualification, Martina also worked for the International Bar Association in London and at the legal department of Siemens in Switzerland.

Martina graduated from LUISS Guido Carli University, Rome, and holds an LL.M. in international and European economic and commercial law as well as a Ph.D. in international investment law from the University of Lausanne. Martina's Ph.D. thesis on *Privity of Contract in International Investment Arbitration* was published by Kluwer Law International in May 2020.

Seven Summits Arbitration
Blütenstr. 1
80799 Munich
Germany

Tel: +49 89 413 264 282
Email: mm@7summits.law
URL: www.7summits.law

Seven Summits Arbitration (**7SA**) is a Munich-based disputes specialist firm dedicated to international arbitration. 7SA combines the expertise and cross-border track record clients expect from a leading international law firm with the flexibility and efficiency of a boutique practice, providing clients with made-to-measure services at competitive rates. The collective experience of its lawyers covers all major industry sectors, including energy & natural resources, financial services, manufacturing, engineering, pharmaceuticals & medical products, and construction & infrastructure projects. The founding partners of 7SA spent their formative professional years in Paris, the heart of international arbitration, and they are familiar with all major arbitral rules.

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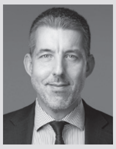

András Nemescsói

David Kohegyi

DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm

1 Treaties: Current Status and Future Developments

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

As of October 1, 2021, Hungary has signed bilateral investment treaties (BITS) 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 (terminated 2020); Bosnia and Herzegovina; the Republic of Bulgaria (terminated 2020); the Republic of Cabo Verde; 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 (terminated 2020); the Republic of Cuba; the Republic of Cyprus (terminated 2020); the Czech Republic (terminated 2020); the Kingdom of Denmark (terminated 2020); the Arab Republic of Egypt; the Republic of Finland (terminated 2021); the French Republic (terminated 2021); the Federal Republic of Germany (terminated 2021); the Hellenic Republic (terminated 2020); 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 Republic of Korea; the Republic of Kosovo; the State of Kuwait; the Kyrgyz Republic (expected to enter into force by the end of 2021); the Republic of Latvia (terminated 2021); 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 (terminated 2021); the Kingdom of Norway; the Republic of Paraguay; the Republic of Poland (terminated 2021); the Portuguese Republic; Romania (terminated 2020); the Russian Federation; the Republic of Serbia; the Republic of Singapore; the Slovak Republic (terminated 2020); the Republic of Slovenia (terminated 2021); the Kingdom of Spain (terminated 2020); the Kingdom of Sweden (terminated 2021); 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, the 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 jurisdiction signed and not yet ratified? Why have they not yet been ratified?

According to publicly available sources of information, Hungary has signed but not ratified its BITs 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, thus the conclusion of new treaties may be announced before the end of 2021.

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 offers 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 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 affords the opportunity to any party 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 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; or (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 series of a measure 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) International Centre for Settlement of Investment Disputes (ICSID) arbitration; (c) *ad hoc* United Nations Commission on International Trade Law (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" enters 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 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 jurisdiction 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 wishing 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 yet published official treaty commentaries.

2 Legal Frameworks

2.1 Is your jurisdiction 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, 2021, Hungary has not signed the Mauritius Convention.

2.2 Does your jurisdiction 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 at "facilitating 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 (or measures having an equivalent effect). It stipulates that any expropriatory measures may only be taken upon the payment of prompt compensation at the actual value of the assets of the foreign investor. Compensation is granted through the competent administrative agencies of the State in the same currency in which the investment was made. In the event of a violation of the law, a competent domestic court can be seized to review the decision of the administrative agency on the issue of compensation.

2.3 Does your jurisdiction 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. 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 some investors, affording domestic courts the opportunity to interpret Hungary's investment treaties.

3.2 Has your jurisdiction 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 BITs it can pride itself on and its voluntary compliance with arbitral awards rendered against it.

Although there is no uniform policy generally advocated 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 Organisation for Economic Co-operation and Development (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 favour 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 jurisdiction'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, publicly accessible treaties are the 2017 BIT with the Republic of Tajikistan and the 2019 BIT with the Republic of Cabo Verde. These treaties are both silent as to the issues of corruption and climate change. A key difference to note is that the BIT with Cabo Verde renders the UNCITRAL Transparency Rules applicable to disputes under it.

Both treaties contain a similarly worded MFN clause and an identical general exception that 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 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: (i) the investor 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 of how Hungary's 2016 Model BIT addresses some of these issues, please refer to question 1.3 above.

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

Hungary has not yet terminated a BIT on its own initiative. In addition to the most recent developments concerning intra-EU BITs, 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).

In addition, given that the Member States of the European Union were bound to draw the necessary consequences from the preliminary ruling of the Court of Justice of the European Union in *Slovak Republic v. Achmea BV* (C-284/16), Hungary joined 27 EU Member States in January 2019 in committing to terminate all intra-EU BITs, and on 5 May 2020 signed the agreement for the termination of intra-EU BITs (the Termination Treaty). The Termination Treaty became effective on 29 August 2020 *vis-à-vis* Hungary.

4 Case Trends

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

Hungary has been involved in a total of 17 investor-State arbitrations to date. Five of these cases have been administered by ICSID, one under the UNCITRAL Rules and one under the International Chamber of Commerce (ICC) Rules.

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

Out of the 17 known investment claims made against Hungary, so far a total of seven have been successful. Hungary has voluntarily complied with three of the awards rendered against it (*ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*; *EDF v. Hungary*; and *Edenred S.A. v. Hungary*). In respect of the four latest awards rendered against it (*Dan Cake (Portugal) S.A. v. Hungary*; *UP and C.D Holding Internationale v. Hungary*; *Sodexo Pass International SAS v. Hungary*; and *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*), given 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), Hungary resorted to extraordinary remedies under the ICSID Convention and certain domestic laws. At the time of writing, some of these cases are pending.

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

Yes. Hungary has sought the annulment of five recent ICSID awards rendered against it. In the case of two recent ICSID awards, in addition to pursuing annulment, Hungary simultaneously sought revision (these cases are *Edenred S.A. v. Hungary* and *Dan Cake (Portugal) S.A. v. Hungary*). As reported in the press, one of the grounds for all of 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 all 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 strictly related to arbitration proceedings against Hungary.

However, in three recent interrelated ICSID cases, the claimants 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.

Also, in one case, the claimant sought the enforcement of an ICSID award that was subject to an annulment action in several jurisdictions.

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 against Hungary 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 concerning 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 related to certain changes in the Hungarian tax laws and rules governing so-called "fringe" benefits.

5 Funding

5.1 Does your jurisdiction 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, under the prevailing sentiment, third-party funding has no legal obstacles.

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

Given the relatively novel nature of the issue of third-party funding on the Hungarian market, we are not familiar with any publicly available Hungarian court decision or arbitral award on this issue.

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

Although the issue enjoys 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 enjoys significant attention, as oftentimes claimants are tempted to try to override decisions of domestic courts by turning to international tribunals. This is particularly true in the investment arbitration context.

This 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 BITs 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, FET or full protection and security. Typically, these treaty protections afford some limited room for tribunals to look at decisions of domestic courts or other bodies. 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 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 arbitration is in Hungary, the Arbitration Act lists specific criteria which prohibit anyone from serving as an arbitrator. These are the following: (i) any person under the age of 24; (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 re-gains a clean criminal record); (iv) any person under guardianship; (v) any person barred from practising 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 in Budapest to appoint 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 is a signatory to the New York Convention as of 1962. When acceding to 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 (imposes an obligation on the debtor); (ii) be final and binding (non-appealable); and (iii) have a deadline for their voluntary performance which 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 in 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 recognise 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 modelled 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 publicly available Hungarian court decisions on these issues.

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

There are no publicly available Hungarian court decisions on these issues in the context of sovereign assets. The known cases deal with the liability of controlling shareholders whose intentional or grossly negligent acts contributed to loss-making operations.

András Nemescsói is a partner at DLA Piper Budapest where he heads the Litigation and Regulatory practice. He graduated from Pázmány Péter Catholic University and Università Cattolica del Sacro Cuore in Milan. András focuses primarily on financial/corporate litigation/arbitration, financial regulatory issues and international investment disputes. He is the Chairman of the Hungarian Investor Protection Fund and a listed arbitrator at the Hungarian Chamber of Commerce. András sits on the ICSID Panel of Arbitrators as of 2020.

DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm
MOMentum Office Building
Csörsz u. 49-51.
Budapest, H-1124
Hungary

Tel: +36 1 510 11 00
Email: andras.nemescsoi@dlapiper.com
URL: www.dlapiper.com

David Kohegyi is a local partner and heads the Compliance and Investigations practice at DLA Piper in Budapest. As a specialist in international dispute settlement and regulatory investigations, he is responsible for the investment arbitration portfolio of the Firm's Budapest office. He is a graduate of the University of Miskolc, Hungary and the University of Michigan Law School. David is dual-qualified, registered as an attorney in both New York State and Budapest. He is the Second Vice President of the American Chamber of Commerce in Hungary. David sits on the ICSID Panel of Arbitrators as of 2020.

DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm
MOMentum Office Building
Csörsz u. 49-51.
Budapest, H-1124
Hungary

Tel: +36 1 510 11 00
Email: david.kohegyi@dlapiper.com
URL: www.dlapiper.com

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Japan

Daniel Allen

Mori Hamada & Matsumoto

Yuko Kanamaru

1 Treaties: Current Status and Future Developments

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

Japan has ratified bilateral and multilateral investment treaties with the following 32 States:

- Armenia.
- Bangladesh.
- Cambodia.
- China.
- Colombia.
- Egypt.
- Hong Kong.
- Iran.
- Iraq.
- Israel.
- Jordan.
- Kazakhstan.
- Kenya.
- Korea (Republic of).
- Kuwait.
- Laos.
- Mongolia.
- Mozambique.
- Myanmar.
- Oman.
- Pakistan.
- Papua New Guinea.
- Peru.
- Russia.
- Saudi Arabia.
- Sri Lanka.
- Turkey.
- Ukraine.
- United Arab Emirates.
- Uruguay.
- Uzbekistan.
- Vietnam.

In addition, Japan ratified a trilateral investment treaty with China and the Republic of Korea in 2014.

Japan has ratified the following additional bilateral and multilateral treaties that include investment protections:

- Energy Charter Treaty.
- Japan–Australia Economic Partnership Agreement (in force since 2015).
- Japan–Brunei Economic Partnership Agreement (in force since 2008).
- Japan–Chile Strategic Economic Partnership (in force since 2007).
- Japan–EU Economic Partnership Agreement (in force since 2018).
- 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 Free Trade and Economic Partnership Agreement (in force since 2009).
- 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") (in force as among Australia, Canada, Japan, Mexico, New Zealand, and Singapore since 30 December 2018, and including Vietnam since 14 January 2019).

It should be noted that the Japan–EU EPA, the Japan–Philippines EPA, and the Japan–Australia EPA do not include investor-State dispute settlement provisions.

Finally, an agreement exists between Japan and Taiwan's respective informal embassies, called the Arrangement between the Association of East Asian Relations and the Interchange Association for the Mutual Cooperation on the Liberalisation, Promotion and Protection of Investment. This entered into force between those two entities in 2012, and contains provisions substantively similar to those of a bilateral investment treaty ("BIT") between two States (including investor-State dispute settlement).

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

Japan has signed but not yet ratified BITs with Argentina, Côte d'Ivoire, Georgia, and Morocco.

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.

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

No, Japan does not publish diplomatic notes concerning its treaties.

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

Japan does not publish official commentaries. However, some Japanese-language materials on the website of Japan's Ministry of Economy, Trade, and Industry address the meaning of some of the language that has been included in Japan's investment treaties.

2 Legal Frameworks

2.1 Is your jurisdiction 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 is not a party to the Mauritius Convention.

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

The Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949, "FEFTA") and related ordinance and regulations stipulate a prior notification system with regard to some sectors of inbound investment into Japan. It does not include specialised dispute resolution provisions.

2.3 Does your jurisdiction 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 a foreign investment. However, as set out in question 2.2 above, Japan requires prior notifications to be filed for some sectors of inbound investment (Article 27 of the FEFTA). From August 2019, the Japanese government increased the sectors for which prior notifications are required, including the telecommunication sector.

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 important recent cases in Japan on the general topic of the interpretation of treaties.

Japan's investment treaties have not often been considered by its courts. That said, two relatively recent Japanese court cases have addressed provisions of the Japan–Hong Kong BIT: (i) Judgment of the Tokyo High Court, 30 August 2011; and (ii) Judgment of the Nagoya High Court, in 2013. However, the findings in those cases are of limited relevance to the questions that might arise during an investor-State arbitration.

No publicly available arbitral awards have addressed the interpretation of any of Japan's BITs. At present, the only completed investor-State arbitration involving one of Japan's BITs is *Nissan Motor Co., Ltd. v. Republic of India* (PCA Case No. 2017-37). These proceedings ultimately settled on terms favourable to the investor, but not before the issuance of a decision on jurisdiction that sets out interpretations of several key provisions of the Japan–India Comprehensive Economic Partnership Agreement, including the tax carve-out (Article 10(1) of the treaty), fork-in-the-road provision (Article 96(6) of the treaty), and umbrella clause (Article 87(2) of the treaty), was made available to the public in September 2019.

In 2020, a Japanese investor filed a claim with the International Centre for Settlement of Investment Disputes ("ICSID") against the People's Republic of China (*Macro Trading Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/20/22)), arising under Japan's 1988 BIT with China (as opposed to the 2014 trilateral investment treaty between Japan, China, and South Korea). However, the proceedings were discontinued in 2021 without any award having been issued.

Looking beyond Japan's BITs, there have been numerous recent awards that have addressed the interpretation of the Energy Charter Treaty, to which Japan is a party (and pursuant to which several Japanese investors have brought claims against other States).

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

The Japanese government has maintained a policy of including investor-State arbitration within its newly negotiated treaties, and has been consistent in its adherence to that policy.

A recent exception to Japan's adherence to this policy was the Japan–EU EPA, where the EU's preference for an investment court system approach left the parties at an impasse – ultimately, the issue of investor-State dispute settlement was tabled, with the remainder of the treaty to become effective in the interim.

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

Japan's investment treaties tend to be negotiated separately and therefore vary in their substantive terms. However, the following general conclusions can reasonably be drawn:

- Japan's investment treaties do not typically include special or notable provisions with respect to corruption.
- Japan's investment treaties do not provide for procedural transparency in investor-State arbitration. A notable exception to this practice is the multilateral CPTPP, which provides for considerable procedural transparency. Some of Japan's recent treaties do provide that the respondent State may publish submissions and other materials generated during the course of arbitral proceedings.
- Some of Japan's recent investment treaties include notes clarifying that most favoured nation ("MFN") clauses are not to be applied to dispute settlement.
- In line with prevailing international practice, Japan's recent investment treaties do not typically exclude coverage for investments held indirectly.

- Japan's recent investment treaties generally have not included special provisions addressing climate change, but have included standard provisions preserving the State's right to engage in environmental regulation in the public interest.

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

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

4 Case Trends

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

In March 2021, a Hong Kong-based investor commenced the first-ever investor-State case against Japan. Little information is known to the public, but it has been reported that the claim arises under the Hong Kong–Japan BIT, is proceeding under the United Nations Commission on International Trade Law ("UNCITRAL") Rules, and relates to the renewable energy sector.

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

No investor-State awards have been issued against Japan.

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

Japan has never been a party to an ICSID case and therefore has never had the opportunity to pursue annulment proceedings.

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

No, there has not.

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, as Japan has only once been a party to an investor-State arbitration, and that case remains in its early stages.

5 Funding

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

There is no official position in Japan with respect to third-party funding. Japan's laws neither prohibit nor affirmatively permit the funding of litigation or arbitration. With respect to investor-State arbitrations seated outside of Japan, it is very unlikely that Japanese law would be considered to restrict Japanese parties or Japanese lawyers from involvement in third-party funding.

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

There is no case law on this issue.

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

The use of litigation/arbitration funding remains rare in Japan. However, in early 2019, press reports confirmed rumours that a small number of Japanese companies have been using third-party funding in arbitrations seated outside of Japan, and that third-party funders have become more active in marketing their services in Japan.

6 The Relationship Between International Tribunals and Domestic Courts

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

Under the Japanese Arbitration Act, to be arbitrable, a dispute must constitute a "civil dispute that may be resolved by settlement between the parties (excluding disputes regarding divorce or separation)" (Article 13.1). Accordingly, a criminal investigation would not qualify as an arbitrable dispute, and an arbitral tribunal would not be permitted to review it. On the other hand, arbitral tribunals are not restricted from reviewing a judgment of a domestic court.

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

No. Once an arbitral tribunal has been constituted, all procedural issues arising during the arbitration are to be handled by the arbitral tribunal, unless otherwise requested by the parties to the arbitration.

6.3 What legislation governs the enforcement of arbitration proceedings?

Chapter 8 of the Arbitration Act governs the recognition and enforcement of arbitral awards.

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

Japanese law does not provide for arbitrator immunity.

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

No. Articles 16 and 17 of the Arbitration Act allow parties full autonomy to select arbitrators.

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

Yes. Article 17.5 of the Arbitration Act provides that, in cases where the parties' agreed method for selecting arbitrators has failed, a party may request that the court select the arbitrators. Article 17.5 of the Arbitration Act then sets out criteria that the court should consider in making the appointment, including: (i) any arbitrator qualifications that the parties had included in their agreed procedure; (ii) independence and impartiality; and (iii) a preference for an arbitrator of a nationality different from that of the parties, when the arbitrator to be appointed would be the sole arbitrator or the third arbitrator appointed.

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

Although the general rule is that a court may not intervene with respect to the composition of the arbitral tribunal, in certain exceptional circumstances it is possible.

As described above, and pursuant to Article 17.5 of the Arbitration Act, a party may make a request to a court to perform an appointment when the method agreed by the parties for the selection of arbitrators has failed. This is the only circumstance in which a court may intervene in the arbitrator selection process itself.

There are two additional situations outside of the arbitrator selection process when a court might have the power to intervene with respect to the composition of the arbitral tribunal.

First, under Article 19.4 of the Arbitration Act, a party may request that a court resolve a challenge to an arbitrator, but only after that challenge has been denied in the arbitration.

Second, under Article 20 of the Arbitration Act, a party may request that a court remove an arbitrator if the arbitrator becomes unable to perform his or her functions, or otherwise is unduly delayed in taking action within the proceedings.

7 Recognition and Enforcement

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

Foreign arbitral awards are automatically recognised in Japan, without any need for recognition proceedings.

There are no requirements as to what form an award must take to be enforceable in Japan. However, as set out below in our response to question 7.2, Article 45.2 of the Arbitration Act sets out several substantive requirements that an award must satisfy, failing which enforcement might be refused.

In terms of procedural requirements, a party seeking to enforce an award should commence enforcement proceedings at the District Court level. With its application for enforcement, the party must submit (i) a certified copy of the arbitral award, and (ii) a translation of the award into Japanese (which need not be certified).

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

Japan is a party to the New York Convention, and the bases upon which a party may resist recognition or enforcement of a foreign arbitral award (set out in Article 45.2(1)–(7) of the Arbitration Act) are accordingly limited, as follows:

a. incapacity of a party to have entered into the arbitration agreement;
b. invalidity of the arbitration agreement under the arbitration agreement's governing law;
c. lack of notice to a party in accordance with the requirements of the laws of the place of arbitration, either during the proceedings or with respect to the appointment of arbitrators;
d. inability of a party to present its case;
e. inclusion in the arbitral award of decisions on matters outside of the scope of the arbitration agreement or the claims giving rise to the arbitration;
f. non-conformity of the composition of the arbitral tribunal with the laws of the place of the arbitration;
g. set-aside of the award in the place of the arbitration or the place providing the governing law of the arbitration;
h. non-arbitrability of the dispute according to the laws of Japan; or
i. contravention of "the public policy or good morals" of Japan.

In practice, the Japanese courts are receptive to the enforcement of foreign arbitral awards, and non-enforcement is rare.

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

Japanese law does not provide for general sovereign immunity. The Act on the Civil Jurisdiction of Japan with respect to a Foreign State (Act No. 24 of 2009) provides that, generally speaking, foreign States and State entities are subject to the Japanese courts' jurisdiction in relation to commercial transactions. However, the consent of the State or State entity would be required in order to enforce an award against a foreign State or State entity within Japan (separately from entering into the arbitration agreement; see Articles 17 and 18 of this Act).

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

There have been no Japanese court cases on this issue.

Daniel Allen is a partner at Mori Hamada & Matsumoto and an international arbitration specialist. He has deep experience in investor-State dispute settlement, having both defended States against investment treaty claims and worked on cases for investors (including Japanese investors) in bringing claims against States. His most notable recent work in the ISDS sector included his involvement in teams representing the Japanese renewable energy company Eurus Energy Holdings Corporation in its Energy Charter Treaty claim against Spain, and representing Vietnam in a complex claim brought against it under the Netherlands–Vietnam BIT. He has also worked on issues relating to investor-State dispute settlement for the Japanese Ministry of Foreign Affairs.

Mori Hamada & Matsumoto
Marunouchi Park Building, 2-6-1 Marunouchi
Chiyoda-ku
Tokyo, 100-8222
Japan

Tel: +81 3 6266 8527
Email: daniel.allen@mhm-global.com
URL: www.mhmjapan.com

Yuko Kanamaru is a partner at Mori Hamada & Matsumoto and is admitted in Japan and New York. Ms. Kanamaru deals with a wide range of domestic and international disputes, especially regarding commercial, transactional and labour-related matters, including litigation and labour tribunal proceedings. Her expertise includes advising international clients on a wide range of corporate matters involving the Companies Act and the Financial Instruments and Exchange Act, data protection, and labour and employment. She is fluent in both Japanese and English.

Mori Hamada & Matsumoto
Marunouchi Park Building, 2-6-1 Marunouchi
Chiyoda-ku
Tokyo, 100-8222
Japan

Tel: +81 3 6266 8542
Email: yuko.kanamaru@mhm-global.com
URL: www.mhmjapan.com

Mori Hamada & Matsumoto is one of Japan's premier law firms, and a leader in dispute resolution throughout Asia. The firm's international disputes practice is second to none in the region, and continues to increase in strength and depth. The team represents both Japanese and international clients in a wide range of international arbitration proceedings, focusing on the most challenging and sensitive disputes. Moreover, with the seasoned advocate Daniel Allen, no other Japanese firm can match its hands-on experience with investor-State dispute settlement.

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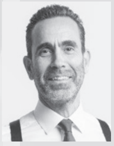

Rui Botica Santos

Luís Moreira Cortez

CRA – Coelho Ribeiro & Partners

1 Treaties: Current Status and Future Developments

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

According to *Direção Geral das Atividades Económicas* (https://www.dgae.gov.pt/servicos/comercio-internacional-e-relacoes-internacionais/acordos-de-protecao-de-investimento.aspx), Portugal has ratified 60 bilateral treaties globally on this matter, 43 of which are currently in force.

As a Member of the European Union, Portugal is also bound by the treaties signed by the Union. It is also party to the Energy Charter Treaty and the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA").

In general, Portugal has very active economical and diplomatic relationships with EU countries and with Portuguese-speaking countries – Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, and Timor-Leste – which is reflected in the bilateral and multilateral treaties entered into by the country.

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

Out of the 60 bilateral and multilateral treaties signed, nine are yet to be ratified by the counterparties (Angola, Brazil, Equatorial Guinea, Morocco, the Russian Federation, São Tomé and Príncipe, and Zimbabwe).

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

Portugal does not have a published bilateral investment treaty ("BIT"), although Portuguese BITs tend to follow a common structure.

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

No, it does not. Most information is, however, available on different official websites.

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

No, there are not. Most information is, however, available on different official websites.

2 Legal Frameworks

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

Portugal ratified the New York Convention on 18 October 1994, which entered into force in January 1995. Pursuant to Article 1(3) of the Convention, Portugal made a reservation stating that the same shall only apply in cases where the arbitral awards were rendered in the territory of states bound by the Convention.

Portugal signed the Washington Convention on 4 August 1983, which entered into force on 1 August 1984.

Portugal is not a party to the Mauritius Convention.

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

Portugal does not have an investment law.

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

Portugal has no foreign capital restrictions and Portuguese law prohibits any discrimination of investment based on nationality.

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 few cases relating to Portuguese BITs, and the outcomes of most of these cases have led to a decision in favour of the Respondent State. At the time of writing, the most relevant cases are: *Dan Cake (Portugal) S.A. vs Hungary*, International Centre for Settlement of Investment Disputes ("ICSID") Case No. ARB/12/9; *PT Ventures, SGPS, S.A. v. Republic of Cabo Verde*, ICSID Case No. ARB/15/12; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/11/26; and *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23.

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

Portugal has not formally indicated its policy with regard to 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 jurisdiction's treaties?

Although Portugal's BITs mainly focus on the protection of indirect investment, the Government has taken significant strides towards making these issues a national policy priority. It can also be inferred that only a few BITs include transparency requirements; Portugal does not have provisions in this respect.

This type of issue is therefore handled, in relation to investments in Portugal, under the general regimes applicable to each area. Portugal has been implementing most EU and Organisation for Economic Co-operation and Development ("OECD") guidelines on corruption and transparency, as well as necessary measures to adjust to the climate change goals established in the applicable international treaties.

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

Portugal has not given notice to terminate any BITs. Two BITs have been terminated unilaterally by the other party (India and Poland).

4 Case Trends

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

To date, Portugal has never been involved in an investor-State arbitration.

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

To date, Portugal has had no awards rendered against it for BITs or multilateral treaties. Nevertheless, Portugal is widely credited with satisfying awards rendered against it in contract-based arbitrations.

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

According to the ICSID database, Portugal has never been involved in an investment dispute.

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

This is not applicable to Portugal.

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 to Portugal.

5 Funding

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

Portuguese law does not prevent the funding of investor-State claims.

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

No recent case law has been identified.

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

We are not aware of any situation of litigation/arbitration funding. Some authors argue that Portuguese law does not allow registered credit and financial institutes to provide third-party funding. However, nothing prevents such funding from being posted or provided by non-resident financial entities.

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 criminal investigations/court decisions. Arbitral tribunals may decide disputes concerning interests of a non-material nature, provided that the parties can conclude a settlement on the matter – Article 1 of Law No. 63/2011 (the "Arbitration Act").

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

State courts have jurisdiction to deal with procedural issues arising out of an arbitration when the Arbitration Act so provides. State courts have jurisdiction to deal with the following matters: (a) to issue provisional measures between the parties before and/or during the arbitration proceedings and to enforce them; (b) to appoint arbitrators in case a party fails to appoint its arbitrator, or the co-arbitrators fail to appoint the president of the panel, or the parties fail to appoint the sole arbitrator; (c) to hear requests from the parties for the production of documents if certain requirements are met; (d) to decide challenges of arbitrators after such challenges have been dismissed by the remaining arbitrators; (e) to remove an arbitrator whose capacity to handle the arbitration has been impaired in case the arbitrator refuses to step down; and (f) to decide any request from a party that challenges the amount of the arbitrators' fees and expenses.

State courts also have jurisdiction to: (a) recognise and enforce awards in Portugal; (b) review domestic arbitral awards if the parties allow for such review; and (c) set aside arbitral awards.

According to Article 59 of the Arbitration Law, the competent State court will be, depending on the matter in dispute, the Court of Appeal or the Central Administrative Court.

6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitration proceedings are governed by the Arbitration Act. As per Article 5 of the Arbitration Act (which is in line with Article 2.3 of the New York Convention and Article 8 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration), in a matter which is the subject of an arbitration agreement, a State court before which a claim is filed shall, if so requested by a party, refer the parties to arbitration unless it finds the arbitration agreement manifestly null and void, inoperative or incapable of being performed. Anti-suit injunctions are not permitted in Portugal (as per Article 5.4 of the Arbitration Act). These legal issues may be further discussed before the State court during the challenging of the arbitral award.

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

Article 9 of the Arbitration Act states that arbitrators may not be held liable for damages arising out of their decisions, except for situations in which State court judges may be held liable. Liability may only arise for the parties. State court judges benefit from broad immunity against civil, criminal and disciplinary claims arising out of the performance of their professional duties.

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

The parties have wide autonomy in the selection of their arbitrator, as per the free choice of arbitrator principle. The requirements for the appointment of arbitrators are set out in Article 9 of the Arbitration Act, which stipulates that arbitrators must be natural persons and fully capable, and must also perform their duties with independence and impartiality. Provisions relating to suspicion and impediment of judges (provided in Articles 115–129 of the Code of Civil Procedure) also apply to arbitrators.

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

The subsidiary process for the appointment of arbitrators is regulated by Article 10 of the Arbitration Act. In the absence of an agreement, the appointment shall be made by recourse to the competent State court, and the applicable procedure shall be the one provided in the Code of Civil Procedure.

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

Please see our response to question 6.2. Under Article 10.6 of the Arbitration Act, State courts may intervene in the appointment and/or challenge of arbitrators. In appointing an arbitrator, the State court must take into consideration the arbitrator's experience and qualifications in resolving the dispute in question, as well as his or her impartiality and independence. In the case of international arbitration, it is equally important to take into consideration the nationality of the arbitrator to ensure the arbitrator's impartiality and independence.

7 Recognition and Enforcement

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

According to Article 42 of the Arbitration Act, the award shall be written and signed by the arbitrators. It must mention the date it was made and the place of arbitration. The award shall also be reasoned, except when the parties waive this requirement or in the case of a decision made based on the parties' agreement. Once the award is issued, it shall be notified to the parties by sending a copy to each of them. Once sent, the award is fully valid.

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

An arbitral award may be set aside and will be unenforceable if a party establishes the: (a) incapacity of one of the parties; (b) invalidity of the arbitration agreement; (c) violation of fundamental principles with influence on the final decision; (d) disregard for the arbitration agreement; (e) wrong composition of the arbitral tribunal; (f) non-compliance with the arbitration process; (g) award in a higher amount or object different from the request; (h) knowledge of issues that could not be known; or (i) failure to pronounce on issues that should have been taken into account. A domestic award may also be set aside and considered unenforceable if it is established that: (a) the subject matter of the dispute is non-arbitrable under Portuguese law; or (b) the content of the award breaches the principles of the international public order of Portugal.

The right to request the annulment of the arbitral award is unwaivable. As a general rule, it can only be made within 60 days of the date on which the party seeking annulment received notification of the award.

If the arbitration award is made abroad, it must be recognised in Portugal. This recognition will be refused if a party establishes: (a) the incapacity of one of the parties; (b) the invalidity of the arbitration agreement; (c) that the party was not duly informed of the arbitrator appointment or the arbitration proceedings or the reason for it; (d) a ruling on a dispute not covered by the agreement; (e) the failure to comply with the constitution of the court or the arbitration proceedings established in the agreement; or (f) that the award has not yet become binding or has been annulled or suspended. The court may also find that the subject matter of the dispute is not capable of being decided by arbitration in accordance with Portuguese law, or that the recognition of such award leads to a result which is incompatible with the international public order of the Portuguese State. Therefore, the recognition and enforcement of such award will be refused.

These rules only apply when the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 does not imperatively provide for a different regime, as well as other treaties or conventions binding the Portuguese State.

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

There is no specific legislation on sovereign immunity and recovery against State assets. State courts have applied rules and principles of international law in this matter – see Case No. 2079/15.1T8CBR.C1 of the Coimbra Court of Appeal.

Sovereign jurisdictional immunity is an international law rule. Nowadays, it is codified under Article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Property: "*A State shall enjoy immunity in respect of itself and its property from the jurisdiction of the courts of another State.*"

The reasoning is clear: in a conflict between sovereign States, the courts of one of them would not offer guarantees of impartiality and independence.

This immunity is not, however, absolute. It is only restricted to acts that the State performs in the exercise of its sovereign power (*ius imperii*), and does not apply when the acts are performed on an equal footing with private individuals (*ius gestionis*). Therefore, it is only when a State acts without *jus imperium* that it can be held responsible in another State and subjected to its jurisdiction. This relative immunity is imposed by the increasing recourse to private law by States, which means that disputes arising from commercial contracts, employment contracts, personal injuries, damages or matters relating to property involving a State as a party do not fall within the scope of immunity from jurisdiction. Adopting this position, the Portuguese Supreme Court of Lisbon ruled in Case No. 2079/15.1T8CBR.C1.S1 (http://www.dgsi.pt/jstj.nsf/-/08B9289A992DC7C7802580820052539F).

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

Sovereign immunity from execution is understood more broadly than jurisdiction immunity, as described in question 7.3. Public domain assets are presumed, by their public nature, to be exclusively for public utility purposes, and therefore cannot be executed. The State's private domain assets, used for public utility purposes, also cannot be executed, as provided by Article 737.1 of the Code of Civil Procedure. See, for example, Case No. 1845/05-2 of the Évora Court of Appeal (http://www.dgsi.pt/jtre.nsf/-/1BD81E3FF37BCEC080257DE100574876).

Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that "*property (…) specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum*" will not be immune from execution, "*provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed*".

Rui Botica Santos is a licensed lawyer in Brazil, Macau, Portugal and Timor-Leste. Rui is a Partner at CRA – Coelho Ribeiro & Partners (Portugal), Founder of CRA Timor (Timor-Leste), an international Partner at Nuno Simões/Jurismac (Macau), and Senior Associate at Murray Advogados (Brazil). Rui is an arbitrator and mediator at the Court of Arbitration for Sport, arbitrator at CBMA (Brazil), arbitrator at the Qatar Sports Arbitration Tribunal, and President of the International Tribunal of the Federation Internationale de l'Automobile ("FIA"). He is also a judge at the FIA International Court of Appeal and an arbitrator at the Commercial Arbitration Center (Portugal).
Rui has been awarded with an honorary doctorate by the Higher Institute of Law and Economics (ISDE), Madrid. He has been ranked for the past 13 years as one of the leading international arbitration practitioners in Portugal and in Timor-Leste, where he assists relevant oil & gas companies in disputes with the Timor-Leste State. He has also spoken at various international seminars. Rui is the author of several articles on arbitration and mediation.

CRA – Coelho Ribeiro & Partners
Av. Eng. Duarte Pacheco, Torre 2 – 13 A
1099-042 Lisboa
Portugal

Tel: +351 91 979 41 29
Email: rui.santos@cralaw.com
URL: www.cralaw.com

Luís Moreira Cortez is a Partner at Coelho Ribeiro & Associados with a career spanning over 20 years, practising in corporate and commercial law, mining and natural resources, litigation and arbitration and sports law.
Luis is licensed as a lawyer in both Portugal and Timor-Leste.

CRA – Coelho Ribeiro & Partners
Av. Eng. Duarte Pacheco, Torre 2 – 13 A
1099-042 Lisboa
Portugal

Tel: +351 21 383 90 60
Email: luis.cortez@cralaw.com
URL: www.cralaw.com

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1 Treaties: Current Status and Future Developments

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

A bilateral treaty is an agreement between two states which set outs and governs the obligations they are to perform, and the rights accorded to them. A multilateral treaty is a similar agreement to the aforesaid, but is made among three or more states. Trade agreements are made between two or more states to strengthen economic relations by facilitating the flow of trade and investment.

Singapore has ratified a variety of bilateral and multilateral treaties and trade agreements; for example, bilateral investment treaties ("**BITs**") and free trade agreements ("**FTAs**") with investment chapters ("**FTA Investment Chapters**").

According to Singapore's Ministry of Trade and Industry, BITs "*promote greater investment flows between two signatory countries and set out standards of protection for investments made in one country by investors from the other country*". Similarly, FTA Investment Chapters seek to promote investment by, for example, lowering the barriers to entry for Singapore investors to invest in Singapore's FTA partners and allowing Singapore investors to enjoy preferential investment commitments from Singapore's FTA partners.

To date, there are 43 BITs and 21 FTA Investment Chapters in force. See, for example, the Singapore-Myanmar BIT (2020) which was entered into on account of the warm economic relations shared between the states. Its purpose is to "*create a more facilitative environment for investors from both [the] countries, and increase the level of protection for bilateral investments*". See also, for example, the Singapore-Indonesia BIT (2021), one of the most recent BITs entered into force. It will "*offer greater protection for Singapore investors venturing into the Indonesian market, and vice versa, [be for the purpose of] safeguarding investments and boosting investors' confidence*".

Please see the following references:

(1) https://www.enterprisesg.gov.sg/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/investment;
(2) https://www.mti.gov.sg/Improving-Trade/International-Investment-Agreements;
(3) https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2019/09/SINGAPORE-AND-MYANMAR-SIGN-BILATERAL-INVESTMENT-TREATY-AT-THE-7TH-SINGAPOREMYANMAR-JOINT-MINISTERIAL.pdf; and
(4) https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2021/03/Press-Release-on-the-EIF-of-the-Singapore-Indonesia-BIT.pdf.

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

To date, Singapore has signed BITs which have not yet come into force with the following countries:

(1) Burkina Faso (2016).
(2) Colombia (2013).
(3) Côte d'Ivoire (2014).
(4) Kazakhstan (2018).
(5) Kenya (2018).
(6) Mozambique (2016).
(7) Myanmar (2019).
(8) Nigeria (2016).
(9) Rwanda (2018).
(10) Zimbabwe (2000).

In addition, to date, Singapore has signed the following Treaties with Investment Provisions which have not yet come into force:

(1) Singapore-United Kingdom FTA (2020).
(2) Regional Comprehensive Economic Partnership Agreement (RCEP) (2020).
(3) Armenia-Singapore Agreement on Trade in Services and Investment (2019).
(4) EU-Singapore Investment Protection Agreement (2018).
(5) Trans-Pacific Partnership (TPP) (2016).
(6) ASEAN-India Investment Agreement (2014).

There have been no official reasons published by the Government as to why the aforementioned treaties have not yet come into force.

Please see the following reference: https://investmentpolicy.unctad.org/international-investment-agreements/countries/190/singapore.

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

Singapore does not base its BITs on a model BIT. Notwithstanding, most of Singapore's BITs adopt a generally similar format and language. To this end, there are certain clauses which commonly feature in most of Singapore's BITs; for example, clauses pertaining to fair and equitable treatment ("**FET**"), expropriation, subrogation and compensation for loss after war or other armed conflict.

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

If there are diplomatic notes, they usually accompany the text of the treaties – see, for example, the Germany-Singapore BIT (1975) and the Canada/Singapore Bilateral Agreement, Foreign Investment Insurance (1971).

Please see the following reference: https://www.mti.gov.sg/Improving-Trade/International-Investment-Agreements.

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

No, the Government does not publish official commentaries concerning the intended meaning of treaty or trade agreement clauses. However, information relating to the purpose and benefits of having treaties and trade agreements in place is accessible for viewing on the websites of selected Government agencies – see, for example, Singapore's Ministry of Trade, and Industry and Enterprise Singapore.

2 Legal Frameworks

2.1 Is your jurisdiction 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 is not a party to the Mauritius Convention.

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

Singapore does not have separate laws specifically enacted to govern foreign investment. It has been noted that although Singapore is recognised to be the most successful Association of Southeast Asian Nations ("**ASEAN**") country in attracting foreign investment, its approach is consistent with the fact that most developed countries do not have investment laws. Instead, Singapore governs foreign investment through its general laws and sector-specific rules and regulations (see Jonathan Bonnitcha, "*Investment Laws of ASEAN Countries: A comparative review*" (International Institute for Sustainable Development, 2017)).

Please see the following reference: https://www.iisd.org/publications/investment-laws-asean-countries-comparative-review.

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

Whether the formal admission of a foreign investment is required in Singapore depends on various factors, which include:

(1) It being subject to the terms of Singapore's BITs; the requirements may differ from state to state. For example, certain of Singapore's BITs stipulate a requirement for investments to be specifically approved in writing by the Government of Singapore or a statutory board such as the Singapore Economic Development Board. See, for example, the Singapore-Indonesia BIT (2021), Singapore-Kuwait BIT (2013) and Singapore-Jordan BIT (2005).

(2) In addition, if investors intend to set up foreign companies in Singapore, the registration and licensing of such companies is governed by the Accounting and Corporate Regulatory Authority.

(3) For certain sectors, additional consent or approval may be required from the relevant regulators or governing agencies. It should also be noted that foreign investment is restricted in certain sectors such as banking and finance, telecommunications, and news media.

Please see the following reference: https://www.mti.gov.sg/Improving-Trade/International-Investment-Agreements.

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 two significant decisions pronounced by the Singapore Court of Appeal in recent years relating to treaty interpretation, namely *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("***Sanum***") **and *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho*** [2019] 1 SLR 263 ("***Swissbourgh***"). In the aforesaid decisions, the Singapore Court of Appeal recognised that the applicable rules of treaty interpretation were those encapsulated within Articles 31 and 32 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) ("**VCLT**").

Essentially, the Singapore Court of Appeal in *Swissbourgh* held that the court is obliged to interpret a treaty in accordance with the ordinary meaning of the terms of the treaty, having regard to the context of the treaty and in the light of its object and purpose (Article 31(1) VCLT). When considering the context of the treaty, the court may have regard to the text of the treaty (including its preamble and annexes) together with any instrument or agreement that was made in connection with the conclusion of the treaty (Article 31(2) VCLT). The court is also permitted to consider any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes such an agreement, or any relevant rules of international law (Article 31(3) VCLT). Finally, Article 32 of VCLT allows the court to have regard to supplementary means of interpretation, including the *travaux préparatoires* of the relevant treaty, to either confirm the meaning of a treaty term obtained from the exercise under Article 31 of the VCLT, or to clarify the meaning of a term that might remain ambiguous or obscure or where its plain meaning would be manifestly absurd or unreasonable.

Beyond the aforesaid principles of treaty interpretation which have been recognised to reflect customary international law, the Singapore Court of Appeal in *Swissbourgh* (at [61]) also mentioned, especially in the international investment law context, that investment treaties "*should be interpreted neither liberally nor restrictively*". Further, the Singapore Court of Appeal in *Swissbourgh* also highlighted (at [63]) that since an investment treaty reflects the balance that has been struck between investor protection and the state's interests (generally following a considered period of negotiations between two or more states), neither an unequivocally pro-investor nor pro-state approach should be adopted in interpreting the provisions of an investment treaty.

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

In a written answer by Singapore's Minister for Law, Mr. K. Shanmugam, to a parliamentary question on proposed reforms to Singapore's investor-state arbitration regime, it was stated that the "*Ministry of Law works closely together with [Singapore's] partners in* *the legal industry to steer Singapore's overall development and growth as a hub for international dispute resolution, including in the area of investment arbitration*".

To this end, Singapore has sought to address in its recent trade and investment treaties concerns such as the independence of arbitrators and the lack of a mechanism to dismiss unfounded claims early. Singapore has also been actively participating in international dialogues on the structural reform of the current investor-state dispute settlement framework.

In addition, the Singapore International Arbitration Centre ("**SIAC**") has positioned itself as one of the prominent global institutions administering investor-state arbitration involving direct state parties and commercial parties. In 2017, SIAC evinced its clear intention to move into the space of investment arbitration by promulgating the first edition of its Investment Arbitration Rules.

Please see the following references:

(1) https://www.mlaw.gov.sg/news/parliamentary-speeches/written-answer-by-minister-for-law--k-shanmugam--to-parliamentar9.

(2) https://www.mlaw.gov.sg/news/speeches/opening-address-by-minister-shanmugam-for-siac-investment-arbitration-conference.

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

In most Singapore investment agreements, it is common to find most favoured nation ("**MFN**") and FET clauses.

MFN clauses are usually worded to cover establishment and post-establishment phases and to require that a contracting state accord investors of the other contracting state with treatment no less favourable than the treatment it accords, in like circumstances, to investors of other states. Also, they generally include exceptions to their operation with respect to matters relating to customs, economic union, monetary union, or taxation – see, for example, Article 4 of the Singapore-Kuwait BIT (2013).

FET clauses are typically worded to require that investments be accorded "*fair and equitable treatment*" and shall "*enjoy full protection and security*".

Transparency clauses exist in a few of Singapore's investment agreements. See, for example, Article 16 of the Singapore-Jordan BIT (2005), which requires each contracting state to "*ensure that its laws, regulations and administrative rulings of general application respecting any matter cover by the [Singapore-Jordan BIT] are promptly published or otherwise made available in such a manner as to enable interested persons or the other contracting state to become acquainted with them*"; see also, for example, Article 27 of the Singapore-Myanmar BIT (2020).

Additionally, an example of a clause dealing with measures against corruption may be seen in the recently replaced investment agreement between Singapore and Indonesia (2021). Article 13 therein reaffirms parties' recognition of the detrimental effect that corruption can have on investment activities and preserves parties' rights to undertake measures to "*prevent and combat bribery and other forms of corruption in any investment activities within its territory, provided that such measures are not inconsistent with [the investment agreement]*".

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

To date, Singapore 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 jurisdiction been involved in?

Sanum and *Swissbourgh* are two significant decisions which have contributed to Singapore's jurisprudence in respect of investor-state cases in recent years. In *Sanum*, disputes arose between a Macanese investor, Sanum Investments Limited ("**SIL**"), and the Lao Government which concerned claims that, amongst others, the Lao Government had deprived SIL of the benefits to be derived from its capital investment through the imposition of unfair and discriminatory taxes. This culminated in SIL commencing arbitral proceedings against the Lao Government under the BIT between the People's Republic of China ("**PRC**") and the Lao People's Democratic Republic ("**Laos**") (the "**PRC-Laos BIT**"). One of the issues that arose before the Singapore Court of Appeal was whether the PRC-Laos BIT applied to Macau notwithstanding the fact that the PRC-Laos BIT had been entered into before the PRC resumed sovereignty over Macau; this had an impact on whether the arbitral tribunal had jurisdiction to hear the dispute. The Singapore Court of Appeal reaffirmed the arbitral tribunal's ruling that the arbitral tribunal had the jurisdiction to hear the dispute because the PRC-Laos BIT was applicable in the circumstances presented.

Particularly, the underlying dispute in *Sanum* has spawned multiple decisions by the Singapore courts. See, for example, a recent decision pronounced in September 2021 by the Singapore International Commercial Court ("**SICC**") in ***Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter*** [2021] SGHC(I) 10, which was the SICC's first hearing on investor-state disputes. The SICC was required to decide on, amongst other issues, whether an arbitral award made under the PRC-Laos BIT could be set aside on grounds that, amongst others: (a) the arbitral tribunal exceeded its jurisdiction and dealt with matters beyond the express scope of the parties' submission to arbitration; and (b) the arbitral procedure in the arbitration conducted was not in accordance with the parties' express agreement.

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

To date, there has been no reported investor-state award made against Singapore.

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

To date, in relation to International Convention on the Settlement of Investment Disputes between States and Nationals of other States ("**ICSID**") cases, Singapore has not sought annulment proceedings.

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

To date, there has been no satellite litigation arising in relation to an investor-state arbitration wherein Singapore was a respondent state.

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?

It can be seen that notwithstanding the complexity of issues arising in investor-state cases, the Singapore courts have demonstrated their willingness and technical expertise to take on the same. Singapore's competence in this respect is further enhanced by the establishment of the SICC. As alluded to in question 4.1 above, the SICC most recently heard its first investor-state dispute.

5 Funding

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

Yes. In 2017, the Civil Law (Amendment) Act and the Civil Law (Third-Party Funding) Regulations 2017 were passed to facilitate third-party funding for international arbitrations and court and mediation proceedings related to them. In its amended form, the Civil Law Act ("**CLA**") abolished maintenance and champerty as torts, while preserving these doctrines as grounds for vitiation of a contract as being contrary to public policy or otherwise illegal.

In tandem with the aforesaid, bodies such as the Singapore Institute of Arbitrators, the Law Society of Singapore, and SIAC have also issued their respective guidelines related to the use and practice of third-party funding for reference amongst arbitrators, legal practitioners, third-party funders and other interested parties.

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

In the specific context of funding of investor-state claims, this issue has yet to be brought before the Singapore courts for consideration to date.

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

There are no official figures published by the Government in respect of the number of litigation or arbitration cases that have received third-party funding,

However, there are reported decisions in Singapore pertaining to third-party funding in an insolvency context – see, for example: ***Re Vanguard Energy Pte Ltd*** [2015] 4 SLR 597 ("***Re Vanguard***"); ***Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd*** [2018] 5 SLR 1337 ("***Solvadis***"); and ***Re Fan Kow Hin*** [2019] 3 SLR 861 ("***Re Fan***").

In *Re Vanguard* and *Solvadis*, both cases concerned litigation-funding agreements which the Singapore courts approved of; specifically, arrangements whereby a liquidator assigned the causes of action (see *Solvadis*) or the fruits of a cause of action (see *Re Vanguard*) of a company undergoing liquidation to a third-party litigation funder. Notably, the Singapore courts recognised that the liquidator's statutory power of sale was a statutory exception to the doctrine of maintenance and champerty. Indeed, such funding arrangements allowed insolvent companies to pursue meritorious claims and did not prejudice creditors.

Of further significance was the holding in *Re Fan* that the 2017 amendments to the CLA, in permitting third-party funding for international arbitrations and related proceedings, were not to be understood as limiting the development of the law on champerty and maintenance. On the contrary, the Singapore courts were not precluded from developing the law as needed, and Parliament had left the issue of the extent to which the rule against champerty and maintenance continued to operate to the Singapore courts.

In addition, in a press release by the Ministry of Law in June 2021, it was recognised that businesses have an increasing appetite for additional options of financing litigation. In view of the positive responses received from funders and the business, legal and arbitration communities after the introduction of the framework for third-party financing in 2017, commencing from 28 June 2021, Singapore's third-party framework was extended to cover domestic arbitration proceedings, certain proceedings in the SICC, and related mediation proceedings. This further strengthens Singapore's position as an international commercial dispute resolution hub.

Please see the following reference: https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-preceedings-in-singapore#fn1.

6 The Relationship Between International Tribunals and Domestic Courts

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

To date, there have been no reported decisions made by the Singapore courts pertaining to this issue.

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

The policy of minimal curial intervention in arbitration proceedings is the mainstay of the Model Law and the International Arbitration Act ("**IAA**") (see ***AKN and another v ALC and others and other appeals*** [2015] 3 SLR 488 at [37] and ***BBA and others v BAZ and another appeal*** at [41]). As such, the Singapore courts do not usually intervene to deal with procedural issues arising out of an arbitration. It is only in limited circumstances as specified in the IAA that the Singapore courts may do so. See, for example, section 12A of the IAA, which provides for court-ordered interim measures in aid of arbitration upon an application by a party; such court orders include the preservation of evidence or assets and securing the amount in dispute in cases of urgency, or when the arbitral tribunal has no power or is unable for the time being to act effectively.

6.3 What legislation governs the enforcement of arbitration proceedings?

In Singapore, the IAA gave effect to the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration (the "**Model Law**") (save for Chapter VIII thereof and albeit with certain modifications) and governs the enforcement of proceedings for international arbitration. Section 6 of the IAA mandates a stay of court proceedings in favour of arbitration for any matter which is the subject of an international arbitration agreement.

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

Pursuant to section 25 of the IAA, an arbitrator shall not be liable for: (a) negligence in respect of anything done or omitted to be done in the capacity of arbitrator; and (b) any mistake in law, fact or procedure made in the course of arbitral proceedings or in the making of an arbitral award. Pursuant to section 25A of the IAA, a similar form of immunity is also extended to the appointing authority, or an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator.

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

Under Articles 10(1) and 11(2) of the Model Law, parties are free to determine the number of arbitrators and the procedure of appointing the arbitrator or arbitrators.

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

Yes, there is a default procedure provided for under Article 11(4) of the Model Law read with section 8 of the IAA. This procedure allows any party to request the General Division of the High Court in Singapore, the President of the Court of Arbitration of SIAC or any other person appointed by the Chief Justice to exercise the powers of the President of the Court of Arbitration of SIAC to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

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

Yes. Singapore has adopted the challenge procedure pursuant to Article 13 of the Model Law. Parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, a party who intends to challenge an arbitrator can refer his challenge to the arbitral tribunal for a decision. If there is an unsuccessful challenge under any procedure agreed upon by the parties or upon a decision of the arbitral tribunal, the challenging party may request that the General Division of the High Court decide on the challenge.

7 Recognition and Enforcement

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

Singapore's Arbitration (International Investment Disputes) Act ("**AIIDA**") gives effect to the ICSID. Pursuant to section 2(1) of the AIIDA, an "award" is defined as any decision interpreting, reversing or annulling an award, being a decision pursuant to the ICSID, and any decisions as to costs which under the ICSID is to form part of the award. Pursuant to section 4(1) of the AIIDA, any person seeking recognition or enforcement of an award rendered pursuant to the ICSID shall be entitled to have the award registered in the General Division of the High Court, subject to proof of any matters that may be prescribed and to the other provisions of the AIIDA.

Non-ICSID international arbitration awards are governed by the IAA. Pursuant to section 2(1) of the IAA, an "award" is defined as the decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award, but excludes any orders or directions made by the arbitral tribunal with the powers granted to them under section 12 of the IAA. Other formal requirements of an award, such as it having to be made in writing, are provided for in Article 31 of the Model Law. Pursuant to section 19 of the IAA, an award on an arbitration agreement may, by leave of the General Division of the High Court, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

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

For ICSID awards, the AIIDA does not prescribe any provisions that modify or replace section 6 of the ICSID, which provides the procedure for recognition and enforcement of an award.

Non-ICSID awards are governed by the IAA. Specifically, arbitral awards made in a Singapore-seated arbitration may be set aside on grounds specified under Article 34(2) of the Model Law, namely if:

(a) a party to the arbitration agreement was 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 state;
(b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
(c) the award deals 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 so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
(d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Model Law; or
(e) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the state or the award is in conflict with the public policy of the state.

Further, pursuant to section 24 of the IAA, the General Division of the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if: (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

As for arbitral awards made in arbitrations seated in foreign countries that are contracting states to the New York Convention (i.e., a foreign award), the grounds for refusal of enforcement under the IAA are similar to those in such Convention.

In this regard, pursuant to section 31(2) of the IAA, a court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that:

(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 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) he 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; or
(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.

Further, pursuant to section 31(4) of the IAA, the court may refuse to enforce the foreign award if it finds that:
(a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or
(b) enforcement of the award would be contrary to the public policy of Singapore.

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

To date, there have been no reported decisions by the Singapore courts pertaining to this issue.

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

To date, the Singapore courts have yet to consider this issue, since it has not arisen in any disputes brought before them.

Ramesh Bharani Nagaratnam was called to the Singapore Bar in May 2006 and has been in practice for the last 15 years. He has appeared at all levels of the courts in Singapore. His current areas of practice are arbitration and litigation, with clients mainly from the energy, construction and maritime industries.

Prior to reading law at the University of Liverpool, Ramesh obtained his Accountancy and Finance degree with a double major in Accounting and Finance from the University of Western Australia. Following this, he worked as an auditor in a renowned local accounting firm, where he gained a wealth of experience in auditing, forensics and investigatory work.

Ramesh has represented commercial entities and individuals in complex and high-stake arbitrations. He has appeared in arbitrations administered by the Singapore International Arbitration Centre, American Arbitration Association and London Court of International Arbitration.

Ramesh is a Fellow of the Singapore Institute of Arbitrators. He is also a Certified Practising Accountant.

RBN Chambers LLC
20 Cecil Street, #04-02 PLUS
Singapore 049705

Tel: +65 6532 2236
Email: ramesh@rbn-chambers.com.sg
URL: www.rbn-chambers.com.sg

Wong Teck Ming began his legal career as a litigator and, in his starting years, practised with the litigation and dispute resolution teams at leading Singapore law firms operating in Formal Law Alliances with top-tiered international law firms. His expertise spans across multiple industry sectors, with a specialised focus on commercial, shipping and admiralty disputes. He has appeared as counsel at all court levels, representing private individuals, small and medium-sized enterprises and global conglomerates in a broad and diverse range of matters – from carriage of goods and charterparties claims to general contractual, shareholder and employment disputes. In addition, Teck Ming has assisted in local arbitration proceedings conducted under the auspices of the Singapore International Arbitration Centre and Singapore Chamber of Maritime Arbitration, as well as international arbitration proceedings administered by the Thai Arbitration Institute.

RBN Chambers LLC
20 Cecil Street, #04-02 PLUS
Singapore 049705

Tel: +65 6532 2236
Email: teckming@rbn-chambers.com.sg
URL: www.rbn-chambers.com.sg

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1 Treaties: Current Status and Future Developments

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

As of 29th September 2021, Spain has 65 bilateral investment treaties (BITs) in force. Moreover, Spain is a party to the multilateral Energy Chapter Treaty and, additionally, as an European Union (EU) Member State, is bound by EU regulations and EU treaties on investment provisions (59 in force as of 29th September 2021).

In August 2020, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU entered into force. Spain is provisionally applying this Agreement, with ratification pending.

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

The only BITs not yet in force are those with: Angola; Congo; Ethiopia; Gambia; Ghana; Haiti; and Yemen, according to the United Nations Conference on Trade and Development (UNCTAD). All of these have yet to be ratified by Spain, except for the BIT with Ghana, which was ratified by Spain in 2008; however, as the Parliament of Ghana has not ratified it, it is not yet in force.

In March 2021, the Spanish Council of Ministers ordered the referral of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU to the Spanish *Cortes Generales*, in order for it to be finally ratified.

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

BITs ratified by Spain do follow a pattern. They are based on two BIT models prepared by an independent group of experts and the Organisation for Economic Co-operation and Development (OECD) back in 1959 and 1967. These models have been used ever since, and, consequently, their usage and application have given rise to a basic sort of BIT scheme.

As a practical example, one may look at the BITs between Spain and Latin American countries, which do have a very analogous skeleton. In those BITs, the general key provisions to be found are:

- promotion and admission of investments;
- fair treatment (absolute perspective);
- most favoured nation (MFN) principle (relative perspective);
- prohibition of expropriation;
- free movement/transfer of benefits;
- protection of the concession contract; and
- dispute resolution mechanism between the host State and the investor.

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

The verbal notes exchanged between the States are not published. Only when the negotiations come to an end and a treaty is enacted will it be duly published within the *Boletín Oficial del Estado*.

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 Government of Spain.

2 Legal Frameworks

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

Spain is party to the New York Convention and the Washington Convention. Spain has not signed the Mauritius Convention.

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

Yes, Law 18/1992 of 1st July 1992 regulates the general investment scheme in Spain. This law emanates from CEE Council Directive 88/361/CEE of 1988, which deals with the free movement of capital between the residents of Member States. The Royal Decree 664/1999 of 23rd April 1999 further establishes a system for foreign investment in Spain.

The dispute resolution provisions can be found in the BITs ratified by Spain. The parties have the opportunity to bring any dispute to arbitration after a "*cooling-off*" period. The International Centre for Settlement of Investment Disputes (ICSID) and *ad hoc* tribunals under United Nations Commission on International

Trade Law (UNCITRAL) Rules are the most common options. However, there are also referrals to the International Chamber of Commerce (ICC) International Court of Arbitration in addition to the possibility of bringing the dispute to the Stockholm Chamber of Commerce (SCC), under the Energy Charter Treaty.

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

Spain suspended the Foreign Direct Investment (FDI) liberalisation regime, pursuant to Royal Decree-Law 34/2020, as the pandemic was deemed to threaten both listed and unlisted Spanish companies, including some in strategic sectors. Governmental authorisation is now required for a foreign acquisition of 10 per cent or more of stock in certain sectors, including critical infrastructure, critical technologies, media and food retailers. These restrictions were initially foreseen to be applicable until 30th June 2020, but such application has been extended until 31st December 2021.

The existing legal framework for foreign investors is regulated under Law 18/1992 of 1st July 1992 (as previously mentioned), which establishes rules on foreign investment in Spain. It provides restrictions for non-EU residents in the following sectors: national defence-related activities; gambling; television; radio; and air transportation. For EU residents, the only sectors with a specific regime are the manufacture and trade of weapons, or national defence-related activities.

The types of corporations which may be constituted in Spain are aligned with those at the OECD, which Spain is party to. The flexibility of the legal and corporate framework does allow for any kind of solution, since there are plenty of options to cater to the needs of potential investments into Spain.

Furthermore, and in order to analyse how investments are catalysed in Spain, it should be noted that according to the 2021 *World Investment Report* published by UNCTAD, in 2020 Spain received USD 8,928 million in FDI. Additionally, and looking at the 2020 *Doing Business* report from the World Bank, Spain still holds 30th position out of 190 with regard to the ease of doing business.

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 2013, almost all disputes Spain faces, before both arbitration courts and the ICSID, are related to renewable energy issues. There have been only two awards concluded in favour of Spain, whereas the other disputes were concluded in favour of the investors. The *Nextera* case is of relevance here, which amounted to EUR 290 million. There are around 31 investment arbitration disputes still to be settled. The issue of the cuts related to renewable energy in Spain has its roots in 2008 and then in 2013; claims have arisen ever since, the last one of which was registered on 16th September 2021 before the ICSID (as of 29th September 2021).

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

Due to the modified regulations for investors in renewable energies, Spain has one of the largest number of ongoing claims related to investment disputes. Since the Spanish Government currently denies payment to investors despite the investors holding a favourable decision, they are attempting to execute their awards outside of Spain (US/Australia).

Additionally, the new scenario opened by *Achmea* may allow for the challenging of awards, request for annulment and opposition to recognition and enforcement, at least before EU courts. However, the uncertainty about the way in which ICSID tribunals will react and the limitations of States in opposing the awards rendered against them, especially when enforcement is requested in a non-EU Member State, constitute important aspects that prevent an accurate assessment of the effects a Court of Justice of the European Union decision will have on the procedures facing Spain.

Regarding national jurisprudence, since 2014, due to the large number of investment disputes related to the cutbacks on renewable energy, the activity of the Spanish Supreme Court and the Constitutional Court has increased in relation to investor-State arbitration. Both Courts have ruled in favour of Spain and declined compensation to investors.

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

Spain is party to international treaties which condemn issues related to **corruption**. As a member of the OECD, Spain fights against corruption in the context of cross-border business activities and has ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Furthermore, Spain has also ratified the United Nations Convention against Corruption.

With reference to the MFN principle, Spain, as a member of the World Trade Organization (WTO), agrees to accord such status to the other members, as the purpose of such principle is to avoid discrimination and to ensure members treat each other equally. Further, the MFN principle is recurrent in the BITs ratified by Spain with other States.

As per **climate change**, Spain is a signatory, *inter alia*, to the Paris Agreement and the Kyoto Protocol. Furthermore, Spain's energy sector leads global innovation in the area of renewable energies.

With regard to the **indirect investment** that may arrive in Spain, in general terms, Spanish legislation imposes the same requirements as for direct investments. For instance, the stock market Spanish authority *Comisión Nacional de Mercado de Valores* (CNMV) must authorise the acquisition of a direct or indirect holding, which can represent one, five, or 10, etc., per cent of the voting rights.

In line with the above-mentioned topics, Spain has established some requirements to be met in order to comply with anti-money laundering regulation. The main obligations applicable in Spain are established in Law 10/2010, of 28th April 2010, which is the result of the transposition of Directive 2005/60/EC. The legislation applies to a situation in which a party seeks to carry out in Spain procedures such as the opening of a current account, execution of a public deed or acquisition of real estate. The relevant persons dealing with the transaction must perform certain formalities to identify their customers and the origin of their funds.

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

Due to the *Achmea* case, all investor-State arbitration clauses contained in BITs concluded between Member States are contrary to EU law and are thus inapplicable. As such, Spain became a party to a declaration of the legal consequences of the *Achmea* judgment with other Member States and agreed to terminate its intra-EU BITs without undue delay.

4 Case Trends

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

Spain has been involved in a total of 53 investor-State arbitrations to date. Thirty-nine of these cases have been administered by the ICSID, nine by SCC Rules, four by the PCA and one under an *ad hoc* tribunal under UNCITRAL Rules. Most of these cases are currently pending.

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

The very first ICSID award made against Spain was *Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7); Spain recognised this award. However, Spain has not yet accepted awards issued after 2017 involving disputes related to the renewable energy sector under the Energy Charter Treaty. To date, only before the ICSID, since 2011 Spain has lost 16 of these disputes. Spain has decided not to comply voluntarily with these awards and is seeking their annulment, according to the ICSID Convention or Swedish law.

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

As of 29th September 2021, Spain has sought the annulment of around 15 ICSID awards. Spain's main reasons for annulment are based on the tribunal's failure to comply with the applicable EU law, the hierarchical supremacy of EU law and the illegality of the intra-EU BIT. On 30th July 2021, the tribunal rendered the first award regarding pending annulment procedures in Arb/13/31, rejecting fully the Spanish request for annulment.

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 specifically to arbitration proceedings against Spain. Notwithstanding, the *Achmea* decision has had an important influence on Spanish strategy, not only on arbitration but also on the enforcement proceedings of several awards, bringing investors to enforce and execute the tribunals' decisions before Australian or US courts.

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?

Fifty-two of the 53 investor-State arbitrations against Spain, many of them still pending, are related to subsidy cutbacks for renewables undertaken by the Spanish Government between 2010 and 2014. Apart from the challenge of almost all ICSID awards, Spain has also sought to set aside two SCC awards in the Svea Court of Appeals. The trend is for challenging the next awards rendered in these disputes raised under the Energy Charter Treaty. Post-award litigation has become increasingly necessary to compel State compliance with investment awards. Spain is a recent example of a State avoiding payment to investors that seek to annul investment awards issued against them.

Furthermore, the Spanish Government launched an offer two years ago to the entire investment community in which it established that the plants affected by the 2013 cut would keep their annual remuneration of 7.39 per cent intact until 2031, as long as they renounced the initiation of legal actions against the State.

5 Funding

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

This area has yet to be specifically regulated under Spanish law. However, in the absence of specific laws dealing with such aspect, article 1,255 of the Spanish Civil Code shall apply. This article refers to the principle of freedom of contract and states that, should the agreement between the parties not be against the law, moral or public order, the agreement will be valid. Therefore, and in conjunction with the Supreme Court sentence dated 4th November 2008 (see question 5.2), third-party funding (TPF) agreements shall be based on this position.

Additionally, there is no regulation under EU law, with only a few references to certain issues related to TPF, such as the duty to disclose the existence of financing agreements in BITs requested under article 8.26 of the Comprehensive Economic and Trade Agreement (CETA).

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

In recent years, there have been no remarkable judgments referring to TPF. However, we shall point out the landmark decision of 4th November 2008, issued by the Supreme Court, which is very relevant to Spanish jurisprudence. In such judgment, the tribunal allowed the usage of the "*no win, no fee*" agreement, which had been prohibited from the time of Roman law. This interpretation triggered an eye-opening reaction in the Spanish legal fraternity, since the sentence left an open door for the financing of disputes by third parties.

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

TPF has become much trendier in arbitration in Spain, as it is in constant development. The advent of TPF in Spain is a reality which may be a consequence of the sharp increase of TPF in the UK from 2009 to 2015. However, TPF has yet to become as popular in Spain as in common law jurisdictions.

Parties have started to consider the TPF alternative more frequently, studying the advantages of bringing an external funder before proceeding with their disputes. Thus, in recent disputes and due to the high initial arbitration costs, parties have been more receptive to bringing TPF to disputes.

Under Spanish courts, the practice of TPF is not as common as in arbitration. There are a few reasons that may explain why TPF is not that developed to litigate:

- Length of national courts to deliver a judgment. Proceedings may last long enough to try the funder's patience.
- Costs related to access to justice are more affordable than in other jurisdictions. It is possible for a party to submit

its claim for a "reasonable cost" or even to get free access to justice, whilst in other jurisdictions fees are so high that the parties may not proceed or shall gather to proceed under class actions. It is indeed under class actions, widely famous in common law jurisdictions, that TPF plays an important role.

6 The Relationship Between International Tribunals and Domestic Courts

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

This depends on the international instrument from which the tribunal derives its jurisdiction. Most of the Spanish BITs provide jurisdiction to international tribunals to decide claims of treaty protection, such as MFN, national treatment or fair and equitable treatment. Therefore, criminal investigations and local judgments could be subject to review under these standards of protection, in limited cases and only for pecuniary compensation purposes. According to the Spanish law, tribunals cannot vary their decisions once they are issued, as a general rule, and final judgments are *iure imperii*. Finally, as Spain is a Member State of the Council of Europe, the European Court of Human Rights has the jurisdiction to overturn final judgments in Spain.

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

According to the Spanish Arbitration Act (SAA), domestic courts shall not intervene in an arbitration, except in cases where it is expressly foreseen (article 7) for: the appointment or challenge of arbitrators; the taking of evidence; application for interim measures; and challenge of the validity of the award or its enforcement.

6.3 What legislation governs the enforcement of arbitration proceedings?

The SAA (Ley 60/2003) entered into force on 23rd December 2003 and is based on the UNCITRAL Model Law on International Commercial Arbitration. Nevertheless, according to the principle of party autonomy, arbitration proceedings seated in Spain are first governed by the law set up in the arbitration agreement.

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

In Spain, arbitrators are not immune from liability. Pursuant to article 21 of the SAA, arbitrators may incur liability in cases of bad faith, gross recklessness or wilful default. Consequently, the Spanish Supreme Court has established that arbitrators will only incur liability in those cases where damages are intentionally caused or where they have acted with gross negligence (STS 5722/2009).

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

Any person in full possession of their civil rights may be an arbitrator, unless prevented therefrom by his or her professional rules (article 13 of the SAA). Nationality shall not be an impediment, unless otherwise agreed by the parties. Notwithstanding, for arbitration proceedings in which only one arbitrator is appointed, the arbitrator shall be a jurist (except where parties have agreed otherwise or *ex aequo et bono*), and when arbitration is to be conducted by three or more arbitrators, at least one of them shall be a jurist (article 15 of the SAA).

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

If arbitrators cannot be appointed under the procedure agreed to by the parties, any party may apply to the competent Commercial and Criminal Branch of the High Court of Justice to appoint the arbitrators or to adopt the necessary measures therefor (articles 8 and 15.3 of the SAA).

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

The competent Civil and Penal Branch of the High Court of Justice will draw up a list of three names for each arbitrator to be appointed. When drawing up the list, the court will give due regard to the requirements established by the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. The arbitrators will be appointed by lot.

7 Recognition and Enforcement

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

According to the SAA (article 46), the *exequatur* of foreign awards is governed by the New York Convention, save for any other more favourable international convention. The ICSID awards and domestic awards are directly executable by Courts of First Instance. In all cases, the Civil Procedure Rules govern the execution procedure and provide very limited grounds for opposition.

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

In general, Spanish courts have a favourable attitude towards the recognition and enforcement of foreign awards. The grounds for refusing the recognition and enforcement of non-ICSID awards are the same as those foreseen in article V of the New York Convention, which Spain signed without reservations. The High Courts of the Autonomous Communities generally grant the *exequatur* in a short period of time, according to the requirements of the New York Convention; after that, the parties must seek the enforcement of the award before the Courts of First Instance (articles 8 and 46 of the SAA).

ICSID awards have been established through practice (*Pey Casado v. Republic of Chile*) that is directly executable by the Court of First Instance. However, according to article 54 (2) of the ICSID Convention, the Kingdom of Spain should formally notify the ICSID Secretary of this designation. Spain is the only Contracting State in its environment that has not complied with this obligation.

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

Spain has been a Member State of the United Nations Convention on Jurisdictional Immunities of States and Their Property since

21st September 2011. Based on this Convention and case law, in 2015 Spain introduced two new Acts: one on Sovereign Immunity (Organic Law 16/2015); and the other on International Legal Cooperation (Law 29/2015). As a general rule, assets that are part of the State's commercial activities lack sovereign immunity, while those intended for *acta iure imperii* are immune. Notwithstanding this, the new legislation in matters of international legal cooperation and sovereign immunity establish the intervention of the Ministry of Foreign Affairs and Cooperation when a foreign State is sued in Spanish courts. The practice has shown that the content of the Ministry's reports often reveals a position close to the doctrine of absolute immunity, leading to a greater review of the award by the court, to refute the Ministry's positions; or it may imply a shift of jurisprudence towards positions closer to absolute immunity.

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

There are no public Spanish court decisions in the context of sovereign assets. Nonetheless, in *Commercial Bank Guinea Ecuatorial v. Guinea Ecuatorial*, when enforcing an Organisation for the Harmonization of Business Law in Africa (OHADA) award against Equatorial Guinea in Spain, the petitioner obtained the *exequatur* of the award and achieved the attachment of the plane owned by Ceiba Intercontinental S.A., the flagship airline company in Equatorial Guinea.

Javier Íscar is the founding partner of Íscar Arbitraje, Madrid. He has been involved in international arbitration for more than 20 years. Mr. Íscar has acted as counsel and arbitrator in over 25 international arbitrations, in different countries and jurisdictions and under the major arbitration rules. His professional expertise, *inter alia*, includes international engineering, procurement and construction (EPC) contracts for chemical and industrial plants, franchising, and construction and engineering projects. In addition, Mr. Íscar regularly publishes on arbitration matters.

Mr. Íscar received his LL.B. from Universidad CEU Madrid in 1992 and completed his Master's Degree (MBA) at the Know How Business College. He has been the current General Secretary of the European Arbitration Association since 2000, General Secretary of the Iberoamerican Arbitration Center (CIAR) since 2015 and is the President of the Spanish Moroccan Court of Arbitration. Mr. Íscar is also the Co-Director of the Commercial Arbitration and Mediation Degree at the National University of Distance Education (UNED).

Mr. Íscar is a Former Member of the Board (number 3) of the Madrid Bar (2013–2017), a correspondent member of the Colombian Academy of Jurisprudence and Legislation (2017) and a member of the Argentinian Arbitration Committee (CARAT, 2017).

Íscar Arbitraje
Calle de Velázquez, 22
Madrid 28001
Spain

Tel: +34 687 877 994
Email: jiscar@iscarbitraje.com
URL: www.iscarbitraje.com

Dr. Gonzalo Stampa is the founding partner of Stampa Abogados, Madrid. He has been involved in international arbitration for 30 years. Dr. Stampa advises both States and companies in arbitration proceedings and has acted as counsel and arbitrator in over 160 international arbitrations, in different countries and jurisdictions, under the major arbitration rules as well as in *ad hoc* proceedings. His professional expertise, *inter alia*, includes international EPC contracts for chemical and industrial plants, construction and engineering projects and the protection of FDI. Dr. Stampa publishes regularly on arbitration matters.

Dr. Stampa has been recommended as a recognised expert in arbitration in: *Chambers and Partners* (2008–2021); *Best Lawyers* (2008–2021); *Leader's League* (2020, 2021); *WWL* (2021); and *Expert Guides* (2015–2021).

Dr. Stampa received his LL.B. from the Universidad Complutense of Madrid in 1991 and his Master's Degree (LL.M.) from the University of London in 1993, and holds a Ph.D. from the Universidad Complutense of Madrid (2010). Dr. Stampa is an appointee of the Kingdom of Spain as Conciliator at the Panel of Arbitrators, and Conciliator of the International Centre for Settlement of Investment Disputes of the World Bank (2020–2026). He is a correspondent member of the Royal Academy of Jurisprudence and Legislation (2013).

Stampa Abogados
Calle de Ayala, 4
Madrid 28001
Spain

Tel: +34 915 618 477
Email: g.stampa@stampaabogados.com
URL: www.stampaabogados.com

Located in Madrid, Íscar Arbitraje has become a firm of professional arbitrators, founded by Javier Íscar in 2015 and specialising in commercial arbitration. Íscar Arbitraje has important experience in domestic and international arbitration. Since 2019, the firm has focused on exercising its work exclusively as arbitrators. To date, we have been involved in over 25 arbitration proceedings. As arbitrators – appointed either by the parties or by the institutions – we have taken part in *ad hoc* proceedings and in arbitrations administered under the regulations of the most relevant institutions, such as the: International Court of Arbitration of the International Chamber of Commerce (ICC); *Corte de Arbitraje de Madrid* (CAM); *Corte Española de Arbitraje* (CEA); and *Corte de Arbitraje del Colegio de Abogados de Madrid* (ICAM).

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Located in Madrid, Stampa Abogados provides its clients with assistance and legal counsel in resolving conflicts related to business law through both the judiciary and the arbitration systems. Stampa Abogados boasts broad experience in domestic and international arbitration. To date, we have been involved in over 135 arbitration proceedings, which have been held before the leading international and domestic arbitration institutions in European, American and Asian seats, both as counsel and as arbitrators. As arbitrators – appointed either by the parties or by institutions – we have taken part in *ad hoc* proceedings and in arbitrations administered under the regulations of the most relevant institutions, such as the: International Court of Arbitration of the International Chamber of Commerce (ICC); London Court of International Arbitration (LCIA); *Corte Civil y Mercantil de Arbitraje* (CIMA) in Madrid; *Corte de Arbitraje de Madrid* (CAM); *Corte Española de Arbitraje* (CEA); *Corte de Arbitraje del Colegio de Abogados de Madrid* (ICAM); and the *Tribunal Arbitral de Barcelona* (TAB).

www.stampaabogados.com

Sweden


Ylli Dautaj


Rolf Åbjörnsson

DER Legal
Advokat Rolf Åbjörnsson AB

1 Treaties: Current Status and Future Developments

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

Sweden has signed 73 bilateral investment treaties ("BITs"). As a Member State of the European Union ("EU"), Sweden has indirectly taken part in the signing of 78 multilateral investment treaties ("MITs") and free trade agreements ("FTAs") with investment chapters. As of today, 66 BITs and 57 MITs/FTAs are effectively in force (*see* question 1.2 below). These international agreements are collectively referred to as international investment agreements ("IIAs"). Since the publication of last year's Sweden chapter for this guide, the EU has signed a Trade and Cooperation agreement with the United Kingdom due to Brexit. It has not yet entered into force. For more information, *see* the Investment Policy Hub's country report on Sweden (https://investmentpolicy.unctad.org/international-investment-agreements/countries/202/sweden?type=tips).

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

Nine BITs have been terminated (with consideration and reservation for any applicable sunset provision) and three BITs have yet to enter into force (but most likely will not). Three MITs/FTAs have been terminated and 18 are yet to enter into force.

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

A Model BIT was adopted in 2002. Most BITs in force are, in one way or another, reflections of the Model BIT. The language is typical for its time. With this in mind, the definitions of "investor" and "investment" allow for broad interpretation. Furthermore, with the benefit of hindsight and given the unfolding of investor-state dispute settlement in the last decade or so, the key substantive provisions have proved to be fair and equitable treatment, most favoured nation treatment, and protection against indirect expropriation. From a procedural standpoint, the key provision would be that investors can pursue investor-state dispute settlement (i.e. international arbitration pursuant to IIAs between investors and states). The two leading arbitration options are the International Centre for Settlement of Investment Disputes ("ICSID") arbitration or *ad hoc* arbitration pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Rules.

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

This is not applicable.

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

This is not applicable.

2 Legal Frameworks

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

(1) Yes.
(2) Yes.
(3) Yes (although it has not been ratified). Moreover, although the Mauritius Convention is not in force, it has nevertheless reformed investor-state dispute settlement in a massive way and is nowadays generally perceived as a manifestation of "soft law". In this light, the Stockholm Chamber of Commerce ("SCC") Rules allow for an "opt-in" to the transparency regime (*see e.g.* Appendix III, Articles 3 and 4).

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

This is not applicable.

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

Previously, Sweden did not have such a screening of foreign investment. In 2018, Sweden started introducing limited supervision of FDI with the so-called "Protective Security Act" (Sw: *Säkerhetsskyddslagen*) and the "Protective Security Ordinance" (Sw: *Säkerhetsskyddsförordningen*) (jointly, "Protective Security Regulation"). However, on 25 March 2020, the European

Commission published its guidance to Member States concerning, *inter alia*, foreign direct investment ("FDI"). The FDI screening regulation will certainly have some impact on admission of foreign investment in Sweden. It remains to be seen to what extent public health and economic vulnerability will be protected, especially since it is cloaked in security and public order sentiments. (*See* "Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)").

To implement the EU FDI Screening Regulation, a new Act on Supplementary Provisions to the EU Regulation on Foreign Direct Investments was introduced (Sw: *Lag med (2020:826) kompletterande bestämmelser till EU:s förordning om utländska direktinvesteringar*) and has taken effect. The Swedish government will soon introduce its own monitoring mechanism, likely by 2022.

3 Recent Significant Changes and Discussions

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

Swedish courts are not that frequently tasked with treaty interpretation. However, the courts are sometimes indirectly tasked with treaty interpretation in the arbitration context; namely, in setting-aside or enforcement procedures. The more interesting (or rather, matters of direct) treaty interpretation before courts in the arbitration context arise where sovereign immunity is invoked as a defence by a respondent state. A more indirect, yet highly important matter, is where the validity of intra-EU arbitration agreements is raised to challenge an arbitral award. Two out of a series of recent and relevant cases would be:

- *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* (Svea Court of Appeal, Case No. Ö 7709-19) (judgment of 17 June 2020) (on sovereign immunity from execution); and
- *The Republic of Poland v. PL Holding S.A.R.L.* (Supreme Court, Case No. T 1569-19) (judgment of 12 December 2019) (referred to the Court of Justice of the European Union ("CJEU") for prejudgment regarding arbitration clauses in intra-EU BITs, focusing on Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU")).

As stated, many of the topical and interesting "treaty interpretation matters" indeed centre around arbitration, in particular on sovereign immunity or the lingering issue of the intra-EU investor-state dispute settlement dilemma (i.e. the argument by Member States that there is/was no valid arbitration agreement between the parties because the arbitration clause is contrary to EU law).

First, on sovereign immunity, it shall be said that with respect to the case of *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al*, the investors have sought a grant of *certiorari* (Sw: *prövningstillstånd*) to appeal the decision, primarily for judicial precedential purposes. More specifically, the investors want the Swedish Supreme Court to determine how customary international law should be applied to assets of commercial purposes, which are used by but not owned by a central bank, for purposes of execution. It is articulated that the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCSI") shall be interpreted in light of the Vienna Convention on the Law of Treaties. The investors allege that there is a lack of precedential guidance in Sweden and abroad on the matter. Thus, we are likely to see an important matter on treaty interpretation touch the Supreme Court very soon (whether or not the court will grant a *certiorari* is supposed to be decided at the time of writing, i.e. week 39 of 2021). For a good account on sovereign immunity in the arbitration context (in Sweden), *see* Ylli Dautaj, "Sovereign Immunity from Execution of Foreign Arbitral Awards: Sweden's Liberal and Pragmatic Contribution" (*Stockholm Arbitration Yearbook 2020*).

Second, the Supreme Court in *The Republic of Poland v. PL Holding S.A.R.L.* case had asked the CJEU for a prejudgment on whether intra-EU disputes can proceed on tacit consent (in contrast to *Achmea*, not through a unilateral arbitration clause) (and therefore, possibly through an investor-state contract or a submissions agreement). Since this request, much has happened with respect to the intra-EU debate; e.g., Advocate General Juliane Kokott rendered her opinion on 22 April 2021 (i.e. that individual arbitration clauses concluded in an intra-EU context that involve application of EU law, directly or indirectly, can only be compatible with EU law if courts of a Member State can "comprehensively review" the result, which is not the case with an arbitral award which can only be "re-heard" on limited procedural grounds or possibly due to an incompatibility with "*ordre public*").

Moreover, on 2 September 2021, the CJEU decision in *Komstroy v. Moldova* (C-741/19) was handed down and has somewhat closed the debate (the CJEU essentially ruled that investor-state dispute settlement provided for in the Energy Charter Treaty ("ECT") is not applicable to intra-EU disputes). For example, it seems rather clear that the arbitration clause in the ECT is invalid for intra-EU disputes (relatedly, *see e.g. The Kingdom of Spain v. Novenergia II – Energy & Environment (SCA) SICAR* before the Svea Court of Appeal, Case No. T 4658-18). In a word, the *Achmea* judgment seems to have extended its reach beyond what some claimed (perhaps hoping) was the case. For a good take on the pending cases in Sweden post-*Achmea* but pre-*Komstroy*, *see* James Hope and Therese Åkerlund, "All Eyes on Sweden: Swedish Challenge Cases Post-*Achmea*" in Crina Baltag and Ana Stanič, *The Future of Investment Treaty Arbitration in the EU: Substance, Process and Policy* (Kluwer International 2020) ("[i]t is to be hoped that, by the end of these Swedish court proceedings, some authoritative guidance will have been provided regarding intra-EU disputes. Meanwhile, all eyes will continue to be on Sweden for the foreseeable future"). As stated, the *Komstroy* case has likely killed most of the intra-EU debate.

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

Sweden's pragmatic and liberal stance on investor-state dispute settlement is manifested in the SCC's Institutional Work and Rules (*see* particularly Appendix III on investment treaty disputes), generally, and in the courts' pro-arbitration judgments, in particular. The Svea Court of Appeal is hesitant to set aside arbitral awards and, therefore, mostly treats a final arbitral award as binding and directly enforceable without further ado.

Moreover, as a neutral seat, Sweden quickly became the venue for East–West arbitration. As a result, the SCC is the institution that administers the second-most investor-state dispute settlement cases (only superseded by the ICSID). Part of the reason for the SCC's success is that the ECT outlines arbitration pursuant to the SCC Rules as one of the dispute resolution methods available to an aggrieved investor.

Another positive development has been Uppsala University's LL.M. programme on Investment Treaty Arbitration, founded by renowned arbitrator, Professor Dr. Kaj Hobér, and now run by Professor Dr. Steffen Hindelang. Stockholm University, too, has recently retained expertise in investor-state dispute settlement by bringing onboard Professor Dr. Crina Baltag to further strengthen its highly reputable International Commercial Arbitration Law LL.M. programme.

Finally, notwithstanding the entrenched pro-arbitration policy, the fact that the respondent in investor-state dispute settlement (arbitration) is always a state renders the otherwise "directly enforceable" element less certain and obvious than between commercial parties. The reason for this is that the concept of "sovereignty" (in the broad sense) represents itself as a politically sensitive device that unfortunately also has inroads on legal interpretation and application. This is no more evident than in the plea of sovereign immunity. In addition, the regime interaction between international investment law and other legal regimes presents various unsolved challenges (*e.g.* the interaction with EU law). For example, the intra-EU investor-state dispute settlement debate in the post-*Achmea* landscape (and now with *Komstroy*) is throwing serious curveballs that will likely affect the categorical and unequivocal pro-enforcement policy.

Another valid concern regarding the fate of many of the current IIAs is the legitimacy crisis of and backlash towards investor-state dispute settlement. The transformative reform proposals have been lodged and may eventually lead to renegotiations or even further terminations of IIAs. Even though Sweden has been rather consistent in generating pro-arbitration jurisprudence, we are not immune to the regressive politics currently sweeping large parts of the world.

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

All of the abovementioned issues are part of a broader debate on investor-state dispute settlement reforms. Given the central role that the SCC plays in the regime and the highly qualified research conducted at, for example, Uppsala University and Stockholm University, it is but natural that Sweden will continue to play a central role in addressing and redressing such concerns (*see* question 3.2 above). That Sweden will be an active participant in pushing for sensible reform is further entrenched by the country's liberal and pragmatic political landscape.

Notably, Sweden has not (on its own) signed a BIT since 2008, well before the ensuing wide backlash that has paved the way for reforms or even a transformation of investor-state dispute settlement (*e.g.* as manifested in the EU's proposal for an investment court system). We must wait and see exactly how Sweden approaches this alarmist and reformist era. It is hoped that some caution will be exercised going forward in order to avoid undercutting neither the fundamental elements of international arbitration, nor those of international investment law. "Hush and rush" is not very often a wise move.

As of today, the Netherlands and India have been active reformists of IIAs. Such reforms may be indicative of where things, including for Sweden, are heading.

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

No, terminated treaties have either been replaced (not accounted for in questions 1.1 and 1.2 above) or unilaterally terminated (as explained in question 1.2 above). Emphasis is added on any applicable sunset provision.

4 Case Trends

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

Sweden has never been a fully fledged respondent in investor-state dispute settlement. This may change soon, however.

On 4 November 2019, Sweden was again put on notice by an Australian mining company, Aura Energy Limited, for having taken measures that allegedly constituted a breach of legitimate expectations, creating an unstable or unpredictable legal framework, violating due process or resulting in a "denial of justice", etc. On 17 March 2020, Sweden responded to this notice by rejecting the allegations in their entirety, claiming that they lack legal merit.

More recently, on 31 December 2020, Sweden was again put on notice by the Chinese investor Huawei Technologies Co., Ltd. for having taken measures that allegedly constituted a breach of the fair and equitable treatment standard, not offering the same treatment as investors of third states, and having either expropriated, nationalised, or taken any other equivalent measure of Huawei's investment in Sweden.

Sweden has been "put on notice" previously, too. This happened, for example, on 23 May 2016, when Ms. Olga Ovchinnikova alleged that measures had constituted expropriation or a breach of the guaranteed fair and equitable treatment, full protection and security, and/or constituted discrimination. So, we will wait to see whether the "Aura" and "Huawei" notice will culminate in more than just that.

Although not perhaps directly relevant, it must be mentioned that Vattenfall AB is wholly owned by Sweden. Vattenfall AB was pursuing an ECT case pursuant to the ICSID arbitration framework against the Federal Republic of Germany for the phase-out of two of its nuclear power plants. Even though it does not implicate the state directly, it still merits attention. The *Vattenfall* case has now settled.

Finally, it must be underscored that until relatively recently, Western European States were not considered the typical investor-state dispute settlement respondents. However, in recent times, EU Member States such as Germany, Spain, and Italy have been forced to defend against investment claims. In addition, just recently, Sweden's neighbours Denmark and Norway had their first known ICSID arbitration filed against them. Tides are changing, especially since investors are increasingly seeing their infrastructure (e.g. "green") investments supposedly being interfered with. However, the recent EU surge against investor-state dispute settlement may have hampered this movement. That may have been an unintended (or not) consequence of the CJEU's recent decisions in *Achmea* and *Komstroy*, but is nevertheless a bittersweet reality.

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

This is not applicable.

4.3 In relation to ICSID cases, has your jurisdiction 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 directly applicable. That said, four "satellite" arbitration-litigation matters with Swedish ties should be highlighted: (1) the intra-EU BIT conundrum that is largely playing out in Sweden due to the ECT, including the SCC as an investor-state dispute settlement alternative; (2) the recent court of appeal's decision on sovereign immunity for central bank assets; (3) the *Vattenfall* saga; and (4) the notice filed by the Chinese investor Huawei against Sweden.

First, the intra-EU BIT conundrum is the main lingering issue *vis-à-vis* the current and future status of the BITs signed with other EU Member States. In the aftermath of the *Achmea* judgment (Case C-284/16 of the CJEU), EU Member States were *de facto* asked to terminate certain (if not all) intra-EU BITs. This was recently followed by the "Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union", which has been signed by 23 out of the 27 Member States. Sweden has abstained from signing it. On 25 April 2019, the Svea Court of Appeal declined to request a preliminary ruling from the CJEU in order to clarify whether the dispute resolution clause in the ECT is compatible with the EU's primary law (*see The Kingdom of Spain v. Novenergia II*, Case No. T 4658-18). However, on 12 December 2019, the Supreme Court referred the question of intra-EU arbitration clauses to the CJEU to determine the validity of arbitration under Articles 267 and 344 of the TFEU (*see The Republic of Poland v. PL Holding S.A.R.L.* Supreme Court, Case No. T 1569-19). In brief, the role of EU law in investor-state dispute settlement remains an obstacle that will continue to generate various nuanced legal issues for the foreseeable future. However, much of the debate seems to have been shut down lately. First, the Advocate General Juliane Kokott rendered her "regressive" opinion *vis-à-vis The Republic of Poland v. PL Holding S.A.R.L.* on 22 April 2021. Secondly, on 2 September 2021, the CJEU seems to have shut down most of the lingering debate with its decision in *Komstroy v. Moldova* case (C-741/19) (*see* question 3.1 above).

Second, the investors in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* have been involved in enforcement proceedings in several jurisdictions (England, Italy, Sweden, US, etc.), where the state has brought about allegations of fraud and sought to protect assets through the plea of sovereign immunity. The scope and extent of the UNCSI, i.e. what constitutes customary international law and what does not, will continue to concern investors as they seek to enforce arbitral awards against defaulting award-debtor states.

Third, Vattenfall claimed compensation from the Federal Republic of Germany due to a phase-out decision *vis-à-vis* two of Vattenfall's nuclear energy plants. The case has now settled, following many years of arbitration and court litigation. The arbitral tribunal had, for example, dismissed the intra-EU jurisdictional objection.

Finally, the matter against Huawei (*see* question 4.1 above) has the potential to be a major satellite case, especially since the defence of "essential security" will likely be invoked in one manifestation or another as an integral defence under customary international law. We will wait and see what happens, and whether and how such a defence can change the landscape of investor-state dispute settlement.

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 jurisdiction allow for the funding of investor-state claims?

Yes, it does.

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?

There is no publicly available information due to the lack of obligation to disclose. Therefore, a comparative exercise is difficult to conduct. However, third-party funding is frequently used and highly sought after (especially since the Bar does not allow its lawyers to work on contingency in any way, shape, or form).

6 The Relationship Between International Tribunals and Domestic Courts

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

No, they cannot.

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

Yes, in the same manner as with respect to international commercial arbitration ("ICA"). The Swedish Arbitration Act ("SAA") applies to all arbitration in Sweden, including investor-state dispute settlement (*see* Section 46 of the SAA). For example, courts can facilitate the appointment or discharging of arbitrators (*see* below), hearing of witnesses under oath, and hearing of requests for interim measures (even though the emergency arbitration regime is meant to decrease the courts' role in this respect), and, ultimately, the Court of Appeals adjudicates the setting-aside procedures.

The debate on court assistance *versus* intervention has been never-ending in arbitration circles. "Intervention" is less of an issue in Sweden. By providing sufficient assistance where need be, the courts are rather accommodating, and therefore play an integral and vital part in re-enforcing the standing of arbitration and the currency of arbitral awards. With respect to interim measures, it should be said that the SCC emergency arbitration mechanism is efficient, and as litigants get used to it, the courts' role *vis-à-vis* interim requests will likely decrease.

6.3 What legislation governs the enforcement of arbitration proceedings?

Effectively, the New York Convention and the ICSID Convention. The New York Convention enforcement framework is provided for in Sections 52–60 of the SAA. The ICSID enforcement regime is provided for in the "Swedish Act on Recognition and Enforcement of Arbitral Awards in Certain International Investment Disputes". ICSID awards are to be recognised as binding and any pecuniary obligation is to be enforced (Article 54 of the ICSID Convention).

An application for enforcement pursuant to the New York Convention enforcement regime is lodged with the Svea Court of Appeals (Section 56 of the SAA). An application for enforcement pursuant to the ICSID enforcement regime is submitted to the Swedish Ministry of Foreign Affairs ("MFA"). The MFA forwards the application to the Swedish Enforcement Agency (Sw: *Kronofogden*).

In principle, both enforcement regimes render investor-state dispute settlement awards final, binding, and directly enforceable. The New York Convention allows for a few grounds to challenge the award, while the ICSID Convention provides for an annulment mechanism (Articles 50–52 of the ICSID Convention). Ultimately, it is the courts that provide justice to the enforcement regimes. The pro-arbitration policy and application in Sweden has mostly been unwavering. Nevertheless, some obstacles do present themselves – some old, some new (*see* question 7.2 below).

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

Arbitrators are not *ipso facto* immune from civil liability. There is no law that provides for arbitrator immunity. However, there is no reported case where an arbitrator has been found liable for malpractice. Illustrative of the Swedish position is Article 52 of the SCC Rules, i.e. the exclusion of liability for, *inter alia*, the arbitral tribunal.

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

Subject to the rules on conflict of interests (the arbitrator must be and remain independent and impartial, and disclose any circumstance that may diminish confidence in them). For a rule of thumb, *see* the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

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

A party who is dissatisfied with a decision may file with the applicable District Court to have the arbitrator removed (Section 10 of the SAA). The parties can also agree to have the District Court appoint arbitrators (Section 12 of the SAA). If the opposing party fails to appoint an arbitrator in time, the District Court shall appoint an arbitrator upon request by the first party (Section 14 of the SAA). The same is true if the other arbitrators (or someone else) fail to appoint the last arbitrator (Section 15 of the SAA). If an arbitrator resigns or is discharged, the District Court shall, upon request, appoint a new arbitrator (Section 16 of the SAA). If a procedure is delayed due to an arbitrator, the District Court shall, upon request, discharge the arbitrator and appoint another (Section 17 of the SAA).

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

Yes (*see* questions 6.2 and 6.6 above).

7 Recognition and Enforcement

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

An award shall be made in writing and signed by the arbitrators; the majority may sign it if provided why, and the Chairman may sign it alone (Section 31 of the SAA). The arbitral award must also be reasoned, which is probably even more strenuous in investor-state dispute settlement than it is in ICA. The award shall include the date and place of delivery.

ICSID awards follow the same logic, but emphasise in addition that the award "shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based", and that any member may attach his/her dissent (Article 48 of the ICSID Convention).

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

First and foremost, the opposing party must be afforded an opportunity to express his/her opinion upon the application to enforce the award (Section 57 of the SAA).

If the award was rendered in Sweden, the respondent state may seek to have the award declared invalid (Section 33 of the SAA) or set the award aside in a challenge procedure (*see* primarily Section 34 of the SAA). If the investor is seeking recognition or enforcement, the respondent state can invoke several grounds to refuse enforcement, such as lack of capacity or invalidity of the arbitration agreement, lack of notice, violation of due process, improper composition of the tribunal, excess of mandate, the award has yet to be binding as it has been set aside or suspended, non-arbitrability, or that it would be incompatible with the basic principles of the Swedish legal system (public policy) to recognise and enforce the award (*see* Sections 54–55, reflecting Article V of the New York Convention).

The ICSID award enforcement, on the other hand, is a bit different. The ICSID is a self-contained system with its own annulment mechanism. ICSID awards must be recognised and enforced in a Member State when the party seeking recognition or enforcement provides a copy of the award (certified by the Secretary-General) to the (in Sweden) MFA. Put simply, an ICSID award is enforced as if it were a domestic court judgment. That said, the jurisdiction may also consider any grant of a stay of enforcement in the ICSID context.

The main obstacle to investor-state dispute settlement award enforcement will likely continue to be the shield of sovereign immunity (*see* question 7.3 below). It is likely that the shield of immunity will be even further invoked as states are emboldened to challenge the ends of the procedure. This is probably a side effect of the fact that the investor-state dispute settlement regime is under threat by legitimacy concerns and a backlash movement. Another challenge to investor-state dispute settlement award enforcement in Sweden will continue to be the *Achmea* doctrine (even though the court has proved rather pragmatic on this issue). The post-*Achmea* landscape has witnessed an increase in challenges. Finally, it is likely that investor-state dispute settlement awards (like ICA or domestic arbitral awards) that have been subject to virtual elements due to COVID-19 will also raise challenges as to their final, binding, and directly enforceable nature.

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

Sovereign immunity still represents a barrier to award enforcement and not merely execution, as dealt with in this question. Sovereign immunity is sometimes surprisingly invoked when investors are seeking to enforce the arbitral award by, for example, the entering of a judgment on the award in the form of a money judgment. But that is a topic for another day: this question focuses strictly on immunity from execution.

Sweden has had a pragmatic stance on sovereign immunity. The Swedish experience has been neither regressive nor silent. That said, a recent decision from the Svea Court of Appeal has presented some deviation from the liberal and pragmatic case law. This decision will hopefully reach the Supreme Court (*see* more in question 3.1 above).

The debate on sovereign immunity from execution of arbitral awards represents a major challenge to award enforcement. In *Sedelmayer v. The Russian Federation* (Case No. Ö 170-10, reported in NJA 2011), the Swedish Supreme Court, *inter alia*, treated parts of the 2004 UNCSI as a codification of customary international law (as the International Court of Justice ("ICJ") also did in *Germany v. Italy: Greece Intervening*, Jurisdictional Immunities of the State, Judgment of 3 February, ICJ Reports 2012). The Supreme Court also treated the purpose test (stemming from the *acta iuree imperii* and *acta iuree gestionis* divide) liberally by reasoning pragmatically on the property of "mixed-use". In this case, Russia was not able to shield its property by invoking sovereign immunity or diplomatic immunity. Following this case, Sweden was seen as a favourable jurisdiction for award enforcement, even when a state invoked sovereign immunity from execution.

Recently, however, the Svea Court of Appeal in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al*, Case No. ÖÄ 7709-19, without proper justification, decided to disregard a discussion on divergent state practice; that is, whether and how (the scope of and extent to which) central bank assets should be treated as *ipso facto* immune. Instead, the Court outright treated Article 21(c) of the UNCSI as customary international law – and thereby protected recovery against state assets.

More on this topic has been published by this author in the 2020 edition of the *Stockholm Arbitration Yearbook*.

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

This is not applicable.

However, if the court in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al*, Case No. ÖÄ 7709-19 would have concluded that the National Bank was not a "Central Bank" or "Other Monetary Authority" of the state, the issue of piercing the corporate veil may have seen the light of day. This may serve as an indication that such issues will be dealt with in the future, especially with the growth of state capitalism.

Ylli Dautaj is a partner at DER Legal. He has experience practising, teaching, and conducting research in various jurisdictions – including India, Sweden, USA, the UK, Turkey, and Ireland. Ylli is an adjunct professor at Penn State Law, teaching International Arbitration. He is also a guest lecturer on Uppsala University's LL.M. programme on Investment Treaty Arbitration and an Assistant Editor on the *Kluwer Arbitration Blog*'s Investment Arbitration team. Moreover, he has taught at three of India's premier law schools, Jindal Global Law School, Nirma University, and Gujarat National Law University.
Ylli has published extensively, including in reputable journals such as: *Brill Research Perspectives*; *Indiana Journal of Global Legal Studies*; *Manchester Journal of International Economic Law*; *Bologna Law Review*; *Stockholm Arbitration Yearbook*; *Cardozo Journal of Conflict Resolution*; and *Dispute Resolution Journal*, *Cornell International Law Journal*, etc.

DER Legal
Lilla Nygatan 14
111 28 Stockholm
Sweden

Tel: +46 709 890 078
Email: ylli.dautaj@derjuridik.se
URL: www.derjuridik.se

Rolf Åbjörnsson has practised law in Sweden since 1972 and is a member of the Swedish Bar Association. His area of expertise is primarily insolvency law.
Other practice areas include corporate reorganisation procedures, liquidations, as well as economic/technical real estate law (wind energy and other intrusions of private ownership such as railways, beach protection and forestry).
Mr. Åbjörnsson has been appointed chairman of the Association of the College of Official Receivers, board member of multiple companies, Member of Parliament for the Christian Democrats in 1994–2002, as well as Vice Chairman of the Legislative Committee of the Parliament.
Mr. Åbjörnsson teaches at Stockholm University and Karlstad University, and is the editor-in-chief of the *Journal of Insolvency Law*.

Advokat Rolf Åbjörnsson AB
Lilla Nygatan 14
111 28 Stockholm
Sweden

Tel: +46 730 251 111
Email: rolf@abjornsson.com
URL: https://abjornsson.com

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https://abjornsson.com

der LEGAL

ADVOKAT Rolf Åbjörnsson

Switzerland


Mariella Orelli


Homburger
Dilber Devitre

1 Treaties: Current Status and Future Developments

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

Switzerland was the first state after Germany to enter into bilateral investment treaties (BITs), beginning in 1961. Since then, Switzerland has concluded more than 120 BITs. An updated status of Switzerland's BITs is available at: https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz/overview-of-bits.html.

Switzerland has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) as well as the Energy Charter Treaty (ECT). It has also been a member of the Organisation for Economic Co-operation and Development (OECD) since 1961.

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

There are no multilateral treaties that Switzerland has signed but refused to ratify. Some bilateral free trade agreements with Switzerland are awaiting ratification. For example, the Comprehensive Economic Partnership Agreement with Indonesia, which Switzerland signed in 2018 together with the other European Free Trade Association (EFTA) Member States, was challenged by referendum. This Agreement was the first free trade agreement to be challenged by referendum in Switzerland, in particular due to sustainability questions concerning the production of palm oil for import. In March 2021, the Swiss population narrowly approved (51.7%) the ratification of this Agreement, which will therefore enter into force on the first day of the third month after at least two EFTA States and Indonesia have deposited their instrument of ratification, acceptance or approval.

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

Switzerland has not published an official model BIT. However, the Swiss State Secretariat for Economic Affairs (SECO), which is responsible for negotiating international investment agreements, maintains a template or working document for internal use in negotiations. This document is not public and is only used as a basis for negotiations.

1.4 Does your jurisdiction 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?

Since 2004, it has been mandatory for investment agreements to be submitted to the Swiss Parliament for approval. The draft is accompanied by explanatory notes, which are public. However, from 1963 to 2004, the Swiss Federal Council had sole authority to negotiate and conclude BITs. Since no parliamentary deliberations or ratifications were necessary, there were no explanatory notes for BITs concluded during this period.

2 Legal Frameworks

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

Yes, Switzerland is a party to all three Conventions.

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

There is no investment law in Switzerland.

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

There is currently no specific investment law requiring formal admission of foreign investment in Switzerland. Foreign investments in Switzerland must comply with the general Swiss law on: contracts; corporate entities; financial reporting; securities; employment; and immigration. In general, Switzerland has a liberal economic system that promotes and supports foreign investment. In certain areas, there are conditions on foreign investments; for example, the necessity to obtain a permit for the acquisition of real estate by foreigners under certain conditions.

In spring 2020, a parliamentary motion (18.3021 *Rieder*) was accepted which tasked the Federal Council with the preparation and presentation to Parliament of a draft bill to serve as the basis for the regulation of foreign direct investment in Swiss companies. The Council is currently in the process of implementing this mandate.

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 is often chosen as the seat of investment treaty arbitrations. As a result, the key cases in recent years relating to investment arbitration have all arisen in the context of setting aside proceedings before the Swiss Federal Supreme Court. To date, the Swiss Federal Supreme Court has rendered 14 decisions on investment treaty awards issued in Switzerland.

In a decision ruling upon the challenge to an investment treaty award, the Swiss Supreme Court rejected the host State's arguments of violation of public policy and reiterated that the general rules of setting aside procedures also applied to challenges against investment treaty awards (4A_157/2017 of December 14, 2017). As such, the Swiss Federal Supreme Court will not second-guess the tribunal's assessment of evidence, its interpretation of treaty clauses or its fact-finding on the merits. Decisions on jurisdiction, however, fall within the purview of the Court as attested by a decision of the Swiss Federal Supreme Court dated March 25, 2020 (4A_306/2019 of March 25, 2020). This is the only case in which the Swiss Federal Supreme Court has annulled an investment treaty award, ruling that the arbitral tribunal wrongly denied its jurisdiction. In a recent decision dated February 7, 2020, the Swiss Federal Supreme Court reviewed the definition of investor and investment under the ECT (4A_80/2018). In another decision on the setting aside of an investment treaty award, the Swiss Federal Supreme Court held that an 'indirect' investment also fell within the purview of the treaty as long as the invested assets were located in the host State (4A_65/2018 of December 11, 2018).

Swiss courts have also been called upon to intervene in the context of the recognition and enforcement of investment treaty awards, particularly with regard to the enforcement of awards against sovereign assets. (See below question 7.3.)

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

Most Swiss BITs prior to 1981 only contained State–State dispute resolution clauses. However, since 1981, Swiss BITs have also contained investor-State dispute resolution clauses. Such clauses typically provide for ICSID or *ad hoc* arbitration (usually under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules). In a report published by SECO on Swiss policy with regard to BITs, the principle of investor-State arbitration was not put into question.

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

Most of these issues are covered in Swiss BITs.

Swiss BITs generally contain a most favoured nation (MFN) clause, with the newer treaties explicitly stating that the MFN clause does not extend to dispute resolution mechanisms provided for in other BITs concluded by the contracting party.

The term 'investor' generally includes natural persons who are citizens of a contracting party, legal entities that are incorporated or duly organised under the laws of a contracting party, as well as legal entities that are controlled by citizens of, or legal entities that are incorporated or duly organised under the laws of, a contracting party. Recent Swiss BITs also require that legal entities have 'real economic activities' in the territory of the contracting party.

Switzerland has ratified the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). Switzerland's latest BIT with Georgia contains a reference to the application of the UNCITRAL Rules on Transparency. Through its ratification of the Mauritius Convention, Switzerland has consented to apply the UNCITRAL Rules on Transparency to all Swiss BITs concluded prior to April 1, 2014.

In 2012, an internal SECO working group suggested adding references to sustainable development, anti-corruption, human rights and corporate social responsibility in the preamble to the BITs concluded by Switzerland. Since 2012, this language has therefore been proposed in all BIT negotiations and was recently included in the Swiss-Georgian BIT that entered into force in April 2015.

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

Switzerland's BITs with India, Ecuador and Bolivia were terminated in 2017, 2018 and 2019, respectively. Prior to that, the Swiss–South African and Swiss–Indonesian BITs were terminated. However, in all these cases, termination was not initiated by Switzerland but by the other contractual party.

4 Case Trends

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

To date, no investment arbitration decision has been rendered against Switzerland. On July 11, 2019, the first investment treaty dispute against Switzerland was registered with the ICSID Secretariat by Human Rights Defenders Inc., a company registered under the laws of Seychelles, under the Hungary–Switzerland BIT. A Notice of Intent was issued to the Swiss government on October 11, 2019. The proceedings in this arbitration are currently stayed for non-payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d).

Swiss investors are also regularly claimants in treaty disputes against States that have entered into investment treaties with Switzerland. To date, 37 proceedings have been initiated by Swiss investors under BITs concluded with Switzerland.

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

There are no known treaty awards made against Switzerland.

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

There are no ICSID awards made against Switzerland.

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

There are no known treaty awards made against Switzerland. Hence, there are no such proceedings.

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 known treaty awards made against Switzerland.

5 Funding

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

There is no specific regulation concerning third-party funding in Switzerland. However, it is generally admitted that Swiss law does not prohibit third-party funding. Litigation funding has been permitted in Switzerland since the Swiss Federal Supreme Court's decision of December 10, 2004 (DTF 131 I 223), wherein the Court struck down a draft law proposed by the Cantonal Council of Zurich that prohibited parties from resorting to third-party funding. The Court held that a general ban on third-party funding would violate the principle of freedom of commerce guaranteed by the Swiss Constitution. There is no reason why the same reasoning could not apply to third-party funding of arbitration claims. In another case, the Swiss Federal Supreme Court also suggested that lawyers are under a duty to advise their clients regarding the availability of third-party funding and to represent them when entering into a funding agreement (2C_814/2014 of January 22, 2015, c. 4.3.1).

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

See question 5.1.

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

Third-party funding is still a relatively new phenomenon in the Swiss market, although it is on the rise. Estimates suggest that around 30–50 cases annually are funded through third parties, although there are no official statistics for the same. Several international third-party funders are now operating on the Swiss market.

6 The Relationship Between International Tribunals and Domestic Courts

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

Investment arbitration tribunals cannot sit in appeal of criminal investigations and judgments of the domestic courts. They can, however, review such decisions with regard to the State's international obligations, in particular where allegations of a violation of fair and equitable treatment and/or expropriation are raised with regard to such investigations/judgments.

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

National courts have the jurisdiction to deal with procedural issues to the extent granted by Chapter 12 of the Swiss Private International Law Act (PILA). The PILA specifically entitles the State judge to assist the tribunal/parties with the taking of evidence (article 184, PILA) or with the enforcement of provisional and conservatory measures (article 185, PILA). In general, the national courts at the place of arbitration may be called upon to assist the tribunal in dealing with procedural issues (article 185, PILA). Likewise, absent a specific agreement between the parties, the State courts may also intervene in the appointment of arbitrators (article 179, PILA) and challenges to arbitrators (article 180, PILA). A recent amendment to the PILA has also facilitated the enforcement of interim relief ordered by an arbitral tribunal seated outside of Switzerland as well as the taking of evidence in support of foreign arbitration proceedings, by granting arbitral tribunals and parties involved in foreign-seated arbitrations direct access to Swiss State courts at the place where enforcement or evidence is sought.

6.3 What legislation governs the enforcement of arbitration proceedings?

Chapter 12 of the PILA governs the enforcement of arbitration proceedings. In compliance with Switzerland's obligations under the New York Convention, Swiss courts regularly enforce and apply arbitration agreements. The case law of the Swiss Federal Supreme Court is particularly pro-arbitration and respectful of the parties' intention to submit their dispute to arbitration.

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

The PILA does not address the issue of arbitrator immunity. However, according to Swiss case law and legal doctrine, arbitrators are under the obligation to fulfil their duties with due care and may be held liable in the event of a breach. Due to the specific nature of an arbitrator's role, it is generally accepted that liability should be limited to gross negligence and/or wilful misconduct. This is also the rule under the Swiss Rules of International Arbitration (article 45, Swiss Rules).

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

Under the PILA, parties have full autonomy to select their arbitrators, subject only to the limits of the arbitrator's independence and impartiality.

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

If the parties' chosen method for selecting arbitrators fails, the arbitrators can be appointed by the courts at the place of arbitration (article 179, PILA).

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

A domestic court may intervene in the selection of arbitrators if the parties have reached no agreement on the selection process or if the selection process fails (article 179, PILA).

7 Recognition and Enforcement

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

The enforcement of a foreign arbitral award in Switzerland is governed by the New York Convention. Pursuant to article IV(1) of the New York Convention, a party seeking recognition or enforcement must provide the court with a duly authenticated or duly certified copy of the award and the arbitration agreement. If the award is not in one of Switzerland's official languages (German, French, Italian or Romansh), a translation into one of these languages must be provided. Generally speaking, Swiss courts do not apply the formal requirements set out in article IV of the New York Convention very strictly and often dispense with a translation of the award (e.g. if it has been rendered in English).

Swiss awards (both domestic and international) are automatically enforceable as a matter of law under the Swiss Code of Civil Procedure.

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

A party may resist the recognition and enforcement of a foreign arbitral award in Switzerland only on the basis of the grounds set out in article V of the New York Convention. An international arbitration award rendered in Switzerland can be challenged within 30 days from its notification on the basis of the restrictive grounds set out in article 190(2) of the PILA. In addition, as a member of the ICSID Convention, Switzerland has agreed that ICSID awards are final and binding subject only to the remedies set out in the Convention and that such awards shall be enforced as if they were a final judgment of a court in Switzerland.

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

Switzerland has adopted a restrictive concept of State immunity. Accordingly, a distinction is made between cases where the foreign State acts in its sovereign capacity (*acte jure imperii*) and cases where the foreign State acts in a private capacity (*acte jure gestionis*). With respect to the former, State immunity applies. With respect to the latter, cases may be brought before a Swiss court if the transaction out of which the claim against the foreign State arises has a sufficient connection to Switzerland.

As per the latest jurisprudence of the Swiss Federal Supreme Court, State assets are not immune from execution if: i) the foreign State acted in a private capacity; ii) the matter had a sufficient connection to Switzerland; and iii) the assets were not assigned to tasks incumbent upon the foreign State in the exercise of its sovereign authority (5A_942/2017 of September 7, 2018).

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

The case law of the Swiss Federal Supreme Court has confirmed the application, albeit restrictive, of the theory of piercing the corporate veil in cases involving foreign States and related entities. However, in such cases, exceptional circumstances are required. There must exist an economic identity between the State and the related entity. In addition, the condition of bad faith or abuse of law must also be fulfilled; i.e., the independence of the related entity must be invoked by the State in bad faith (5A_205/2016 of June 7, 2016).

Mariella Orelli is a partner in Homburger's Litigation and Arbitration teams. Her practice focuses on international commercial arbitration. She regularly acts as party counsel and arbitrator in institutional and *ad hoc* proceedings relating to disputes governed by a variety of substantive laws. She has extensive experience in large international proceedings before State courts, in particular in the Commercial Courts.
She is familiar with a number of industries, including financial markets, pharma, energy and construction and a wide range of M&A disputes. Her advisory practice also includes assisting clients in regulatory matters in the energy sector.
Mariella is a member of the Zurich and Swiss Bar Associations, the IBA, the Swiss Arbitration Association and other professional associations. She is a co-author of the *Commentary on Swiss Federal Act on Jurisdiction and Enforcement* and of the *Practitioners' Guide to Arbitration in Switzerland*, and has published various articles. She is fluent in Italian, German, English and French.

Homburger
Hardstrasse 201
CH-8005 Zurich
Switzerland

Tel: +41 43 222 10 00
Email: mariella.orelli@homburger.ch
URL: www.homburger.ch

Dilber Devitre is an associate in Homburger's Litigation and Arbitration teams. Her practice focuses on international arbitration. She acts as counsel in complex commercial and investment arbitrations and has frequently acted as a secretary to arbitral tribunals.
She is a member of several below-40 arbitration groups (ASA below 40, DIS 40, YAWP, Young MCIA, Young ICCA, AIJA). She is admitted to practise law in France. She regularly speaks at international conferences and publishes on topics related to arbitration. She is fluent in English, French and Hindi.

Homburger
Hardstrasse 201
CH-8005 Zurich
Switzerland

Tel: +41 43 222 10 00
Email: dilber.devitre@homburger.ch
URL: www.homburger.ch

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Homburger

United Kingdom

Jiries Saadeh

Fietta LLP

Miglena Angelova

1 Treaties: Current Status and Future Developments

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

The United Kingdom (UK) has ratified over 14,000 treaties. Following the UK's withdrawal from the European Union (EU), the UK started negotiating free trade agreements that seek to reproduce the effects of agreements that previously applied to it as an EU Member State. To date, the UK has ratified "trade continuity agreements" with over 30 countries.

On 30 December 2020, the EU and the UK signed the Trade and Cooperation Agreement (TCA), setting out their future economic and trading relationship, including with regards to investment protection. The TCA entered into force on 1 May 2021.

The UK has ratified a large number of bilateral investment treaties (BITs), with more than 90 BITs currently in force. The UK is also a party to the Energy Charter Treaty (ECT), which entered into force on 16 April 1998.

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

The UK has signed but not yet ratified BITs with: Angola; Brazil; Costa Rica; Ethiopia; Gambia; Kuwait; Libya; Qatar; Vanuatu; Zambia; and Zimbabwe. There is no publicly available information as to why they have not yet been ratified. Since 1 January 2021, the UK has signed "trade continuity agreements" with over 60 countries, some of which have not yet been ratified. As mentioned above, the majority of these agreements seek to reproduce the effects of trade agreements that previously applied to the UK as an EU Member State. The UK signed an "agreement in principle" with Australia on 16 June 2021, but a final agreement on trade is still pending.

In addition, the UK has signed but not yet ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (known as the Mauritius Convention), which entered into force on 18 October 2017.

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

The UK Model BIT was adopted in 1991 and updated in 2008. The 2008 Model BIT includes the standard provisions common in most BITs, namely protection against expropriation, fair and equitable treatment (FET), full protection and security, national treatment and most favoured nation treatment (MFN), free transfer of payments and non-impairment. The Model BIT includes two alternative dispute resolution provisions. The first alternative is a reference to the International Centre for Settlement of Investment Disputes (ICSID) for settlement of investment disputes by conciliation or arbitration. The second alternative provides for disputes to be referred to one of the following three options: (i) ICSID; (ii) the Court of Arbitration of the International Chamber of Commerce (ICC); or (iii) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). Most of the UK's BITs include the second alternative.

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

The UK publishes diplomatic notes exchanged with other states concerning its treaties. Such notes may be used to make a new treaty or to modify, amend, terminate or extend an existing one. Exchanges of notes are often used to bring bilateral treaties into force.

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

The Foreign, Commonwealth & Development Office (FCDO) publishes Explanatory Memoranda which include commentaries on the intended meaning and purpose of treaties and trade agreements.

2 Legal Frameworks

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

The UK signed and ratified the New York Convention on 24 September 1975 (subject to the so-called reciprocity reservation). The New York Convention entered into force on 23 December 1975. The UK has also extended the territorial application of the Convention to its Crown dependencies (Guernsey, Jersey and the Isle of Man) and certain British Overseas Territories (Bermuda, the Cayman Islands and Gibraltar).

The UK signed the ICSID Convention (also referred to as the Washington Convention) on 26 May 1965 and ratified it on 19 December 1966. The ICSID Convention entered into force on 18 January 1967.

The UK signed the Mauritius Convention on 17 March 2015. The Convention entered into force on 18 October 2017, but the UK has not yet ratified it.

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

The UK does not have an investment law. There are a number of ways, however, in which the UK Government can intervene to review transactions. For example, under the Enterprise Act 2002, the UK Government can intervene to review merger transactions which raise public interest issues.

On 28 April 2021, the UK Parliament adopted the National Security & Investment Act (NSI Act). It will come into force on 4 January 2022. The NSI Act creates a new, self-standing UK investment review regime, which expands the UK Government's powers to review transactions deemed to be a threat to national security.

2.3 Does your jurisdiction 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 a foreign investment as it makes no distinction between foreign and domestic investments. As mentioned above, the UK Government can intervene to review transactions in order to protect public interest (and soon will also be able to do so for national security reasons). Some sectors of the economy are also subject to licensing or authorisation requirements, which apply to both domestic and foreign investments.

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 most recent ruling relating to treaty interpretation is the Supreme Court judgment in *Ioan Micula & Others v Romania* [2020] UKSC 5. In this case, the Supreme Court found that the duty of sincere cooperation under EU law does not preclude enforcement of an ICSID award against Romania and, as a result, lifted a stay on the enforcement of the award. In reaching its decision, the Supreme Court examined at length the *travaux préparatoires* of the Convention and related commentary. It noted that it was "not bound by EU law" in its interpretation of the ICSID Convention and that "the proper interpretation of the Convention is given by principles of international law". The Supreme Court ultimately concluded that it was obliged to give effect to the ICSID award.

Other key cases in recent years relating to treaty interpretation in the English courts include: *GPF GP S.à.r.l. v Republic of Poland* [2018] EWHC 409 (Comm) and *OAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), where the English Commercial Court found that it had authority to interpret the applicable BITs in accordance with international law.

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

The UK is generally favourable towards investor-state arbitration, as evidenced by its large number of BITs and its ratification of other investment-related instruments, including the ICSID Convention and the New York Convention. In its response to the House of Commons International Trade Committee's Seventh Report of Session 2017–19, "UK investment policy" (24 July 2019), the UK Government confirmed that it "supports the use of arbitration as a means of dispute settlement, which provides an impartial process in which both parties can have confidence".

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

While the UK's BITs do not contain specific provisions on corruption and transparency, some of the UK's most recent trade agreements address or intend to address those issues. For example, the UK and Australia commit to best-practice transparency and anti-corruption provisions in their "agreement in principle". The EU-UK TCA also contains extensive provisions on transparency.

All of the UK's BITs, including the 2008 UK Model BIT, include national treatment and MFN clauses. Some of the UK's BITs create carve outs to the national treatment and MFN obligations.

Most of the UK's BITs make no specific reference to indirect investment. The 2008 UK Model BIT, however, expressly provides that "investment" covers investments made both directly and indirectly, as do some more recent BITs (e.g., with Colombia).

The UK-Colombia BIT also preserves the parties' right to take non-discriminatory measures for reasons of environmental protection but does not specifically address the issue of climate change, and nor do the UK's other BITs. In contrast, the recent EU-UK TCA contains a set of commitments on climate change. The Preamble to the TCA reaffirms the parties' commitment to the fight against climate change as one of the bases for cooperation, alongside democracy, the rule of law and human rights.

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

The UK has not given notice to terminate any BITs or similar agreements. Only a limited number of the UK BITs have been terminated at the election of the counterparty. On 5 May 2020, 23 EU Member States signed an agreement for the termination of intra-EU BITs (Termination Agreement). The Termination Agreement follows the 2018 judgment of the European Court of Justice (ECJ) in the *Achmea* case, which found investor-state arbitration clauses in intra-EU BITs incompatible with EU law. The UK decided not to sign the Termination Agreement and, following the UK's withdrawal from the EU, the UK's intra-EU BITs fall outside the scope of the *Achmea* judgment.

4 Case Trends

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

The UK has been involved in only one publicly known investment treaty arbitration as the respondent state, in the case of

Ashok Sancheti v. United Kingdom. The claim was brought by an Indian individual pursuant to the UK-India BIT. The claimant claimed that he had suffered discrimination and other forms of mistreatment by the UK in relation to a dispute over the lease of commercial premises in London. The arbitration was formally terminated by the tribunal on 25 July 2009. The reason for the termination is unknown.

There has been no publicly known investment treaty award rendered against the UK to date. There are, however, a large number of investor-state arbitrations brought by UK investors pursuant to UK BITs. The most recent claims were brought in ICSID proceedings against Albania, Azerbaijan, Colombia, Tanzania and Venezuela, all of which are pending.

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

There are no publicly known investment treaty awards rendered against the UK to date.

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

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?

Parallel proceedings were commenced in the Court of Appeal in connection to the only known investment treaty claim against the UK in the case of *City of London v. Ashok Sancheti*. Mr Sancheti sought a stay of domestic proceedings initiated by the Corporation of London against him for the payment of rent. Mr Sancheti argued that the court action should be stayed pursuant to the UK Arbitration Act 1996 (1996 Act) pending resolution of the BIT arbitration initiated by him against the UK. The Court of Appeal ruled that the 1996 Act did not allow for such a stay.

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?

Given that only one publicly known investment case has been initiated against the UK to date, no trends or themes are identifiable.

5 Funding

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

The UK allows for the funding of investor-state claims and the UK is a major centre for litigation funding generally. At present, there is no legislation governing third-party funding. The Association of Litigation Funders (ALF) is an independent body appointed by the Ministry of Justice to deliver self-regulation of litigation funding in England and Wales. The current legal framework consists of a voluntary Code of Conduct for Litigation Funders, its supervision by the ALF and periodic judicial oversight of funding arrangements and agreements.

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

In its recent judgment in *Progas Energy Limited and Ors v. Pakistan* [2018] EWHC 209 (Comm), the English Commercial Court considered the impact of third-party funding in the context of a challenge to an investment treaty award. The Court ordered security for costs against the claimants despite the fact that their claim was funded by a third-party funder. The Court found, in particular, 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 funder to pay.

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

The UK, alongside the US, is currently dominating the funding market. The UK is believed to be home to more specialist litigation funders than any other jurisdiction in the world.

6 The Relationship Between International Tribunals and Domestic Courts

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

Tribunals cannot review criminal investigations and judgments of the domestic courts. Tribunals can, however, address allegations of criminal conduct (such as bribery, corruption, or fraud) raised in the context of arbitration proceedings. For example, in the case of *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain and The French State* [2015] EWCA Civ 333, the Court of Appeal found that an arbitrator has jurisdiction to find facts which constitute a criminal offence or that a criminal offence has been committed, but that "it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction".

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

Section 1 of the 1996 Act provides that national courts should not intervene in arbitral proceedings except as provided by the Act. National courts can be called to intervene to assist arbitration proceedings in certain circumstances. For example, the court can make an order requiring a party to comply with a peremptory (i.e., final) order made by the tribunal (Section 42). A party to arbitration can use the same procedures as are available in court proceedings to secure the attendance of witnesses to give oral evidence at a hearing, provided that the witness is in the UK and the arbitration is being conducted in England and Wales (or Northern Ireland) (Section 43). Section 44 of the 1996 Act sets out further court powers which are exercisable in support of arbitration proceedings. These include, among others, powers relating to the taking of evidence of witnesses, the preservation of evidence, and the granting of an interim injunction or the appointment of a receiver. The parties can agree to exclude the court's powers under Sections 42 and 44 but not those under Section 43. Note that the 1996 Act does not apply to Scotland, where a separate regime is applicable.

6.3 What legislation governs the enforcement of arbitration proceedings?

Arbitration proceedings seated in England and Wales or Northern Ireland are governed by the 1996 Act. Section 66 of the 1996 Act deals with the enforcement of arbitral awards.

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

Under Section 29 of the 1996 Act, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. The immunity applies to an employee or agent of an arbitrator. It does not, however, apply 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 parties are free to select their arbitrators. Pursuant to Section 24 of the 1996 Act, a party may, upon notice to the other parties, to the arbitrator concerned and to any other arbitrator, apply to the court to remove an arbitrator if: (i) circumstances exist that give rise to justifiable doubts as to his impartiality; (ii) the arbitrator does not possess the qualifications required by the arbitration agreement; (iii) the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; (iv) the arbitrator has refused or failed to (a) properly conduct the proceedings, or (b) use all reasonable despatch in conducting the proceedings or making an award, and substantial injustice has been or will be caused to the applicant.

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

Section 16 of the 1996 Act sets out the procedure for the appointment of arbitrators. As noted above, the parties are free to agree on the procedure for appointing arbitrators, including the procedure for appointing any chairman or umpire, and any default procedure. If or to the extent that there is no such agreement, the following procedure applies:

- If the tribunal is to consist of a sole arbitrator, the parties should jointly appoint the arbitrator not later than 28 days after service of a request in writing.
- If the tribunal is to consist of two arbitrators, each party should appoint one arbitrator not later than 14 days after service of a request in writing.
- If the tribunal is to consist of three arbitrators: (i) each party should appoint one arbitrator not later than 14 days after service of a request in writing; and (ii) the two so appointed should forthwith appoint a third arbitrator as the chairman of the tribunal.

If the tribunal is to consist of two arbitrators and an umpire: (i) each party should appoint one arbitrator not later than 14 days after service of a request in writing; and (ii) the two so appointed may appoint an umpire at any time after they themselves are appointed and should do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration.

If necessary, the courts can also intervene as a default procedure (see question 6.7 below).

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

Under Section 18 of the 1996 Act, courts can intervene in the selection of arbitrators in the event of a failure of the procedure for the appointment of an arbitrator. In such cases, a court has the powers to: (i) give directions as to the making of any necessary appointments; (ii) direct that the tribunal be constituted by such appointments (or any one or more of them) as have been made; (iii) revoke any appointments already made; and (iv) make any necessary appointments itself. An appointment made by the court will have effect as if made with the agreement of the parties.

7 Recognition and Enforcement

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

The UK has ratified the New York Convention, its predecessor the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention), and the ICSID Convention.

The 1996 Act governs the recognition and enforcement of arbitral awards in England, Wales and Northern Ireland. Section 66 of the 1996 Act applies to arbitrations seated both inside and outside England and Wales or Northern Ireland. It provides that an award made by a 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.

Part III of the 1996 Act contains provisions for the recognition and enforcement of foreign awards. Section 101(1) provides that a New York Convention award made outside the UK should 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. Pursuant to Section 101(2), a New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

Under Section 102 of the 1996 Act, a party seeking the recognition or enforcement of a New York Convention award must produce: (i) the duly authenticated original award or a duly certified copy of it; and (ii) the original arbitration agreement or a duly certified copy of it. If the award or agreement is in a foreign language, the party must also produce a certified translation.

The recognition and enforcement of ICSID awards is governed by the Arbitration (International Disputes) Act 1966 (1966 Act). Part II of the Arbitration Act 1950 deals with the enforcement of Geneva Convention awards that are not New York Convention awards.

Foreign awards that do not fall within any of the above categories may be enforced under legislation applicable to the registration of foreign judgments if the award has become enforceable in the same manner as a judgment in the place where it was made.

The recent decision of the Supreme Court in *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22 confirmed that, in proceedings to enforce an arbitral award against a state, Section 12 of the State Immunity Act 1978 (SIA) requires service of the arbitration claim form or the enforcement order via the FCDO, and that this formal service procedure cannot be dispensed with (absent consent by the state to an alternative means of service).

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

An award may be challenged before the English courts on the grounds of lack of substantive jurisdiction (Section 67 of the 1996 Act) or serious irregularity (Section 68) or by way of appeal on a point of law (Section 69). The first two provisions are mandatory; the right of appeal pursuant to Section 69 may be excluded by agreement.

If recognition or enforcement is sought of a foreign award under Section 101 of the 1996 Act, the grounds for refusal mirror those set out in Article V of the New York Convention. Pursuant to Section 103 of the 1996 Act, recognition or enforcement of a New York Convention award may be refused in the following cases:

- If the person against whom it is invoked proves that: (i) a party to the arbitration agreement was under some incapacity; (ii) the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; (iii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; or (v) 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, it was made.
- If the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

Like the 1996 Act, the Arbitration Act 1950 contains a limited number of grounds on which a party may resist recognition or enforcement of a Geneva Convention award.

The 1966 Act, governing the recognition and enforcement of ICSID awards, provides no substantive statutory grounds on which courts may refuse registration of an ICSID award.

The English courts consistently take a "pro-enforcement approach". This is illustrated by the recent ruling in *Ioan Micula & Others v Romania* [2020] UKSC 5, in which the Supreme Court emphasised the courts' duty to give effect to arbitral awards under the ICSID Convention and highlighted that enforcement may be refused only in exceptional circumstances.

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

Sovereign immunity and recovery against State assets are governed by the SIA. Section 9(1) of the SIA provides that, if 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. This immunity does not, however, extend to execution measures, for which a separate, explicit waiver of immunity is required.

Section 13(2) of the SIA provides that relief may not be given against a state by way of an injunction or order for specific performance or for the recovery of land or other property, and that the property of a state should 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 two exceptions to this rule: (i) the state may expressly agree in writing to waive its immunity from execution or injunctive relief (Section 13(3)); or (ii) enforcement proceedings (but not injunctive relief) are permitted in respect of property belonging to the state if the relevant property is "in use or intended for use for commercial purposes" (Section 13(4)).

The Supreme Court clarified the scope of the "commercial purposes" exception in *SerVaas Incorporated v. Rafidain Bank* [2012] UKSC 40. The Supreme Court in this case considered whether debts owed to Iraq by an insolvent state-controlled bank fell within the commercial purposes exception because they had arisen from commercial transactions. The Court held that the commercial purposes exception does not take into account the origin of the property and, in the absence of any proof that the debts were to be applied for a commercial purpose, the debts were held to be immune from execution.

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

The corporate veil issue was considered by the Privy Council in *Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC* [2012] UKPC 27. The Privy Council held that where a state had formed a "separate juridical entity" for commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that the entity and the State should not have to bear each other's liabilities. The Privy Council noted that this presumption would be displaced only in "quite extreme circumstances", where the affairs of the entity and the state are "so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa".

Jiries Saadeh is a Partner at Fietta LLP. He is an English-qualified lawyer and Solicitor-Advocate (Higher Courts Civil Proceedings). *The Legal 500* has consistently recognised Jiries as one of the "Next Generation" of leading public international law practitioners, describing him as "truly an exceptional talent in PIL", "one of the most skilled lawyers around", "among the best three of his generation – definitely a name to note" and "simply fantastic". He was included in the inaugural Lawdragon *Global Litigation 500* in February 2021 for his expertise in public international law. Clients have praised him as a "highly skilled lawyer of vast experience". Alongside his experience in private practice, Jiries has worked as a Legal Officer at the United Nations in New York, where he litigated before the United Nations Dispute and Appeals Tribunals.

Fietta LLP
1 Fitzroy Square
London W1T 5HF
United Kingdom

Tel: +44 20 3889 9792
Email: jiries.saadeh@fiettalaw.com
URL: www.fiettalaw.com

Miglena Angelova is an Associate at Fietta LLP. Miglena has worked on a wide range of international disputes, including investment treaty and commercial arbitration cases under ICC, ICSID, UNCITRAL and SCC Rules. Recent highlights of Miglena's practice include working on ICSID and SCC investment treaty arbitrations involving parties from Eastern Europe and the CIS region, and advising in connection with enforcement proceedings against Egypt. Miglena has also worked on *pro bono* matters, including on a case before the Grand Chamber of the European Court of Human Rights.

Fietta LLP
1 Fitzroy Square
London W1T 5HF
United Kingdom

Tel: +44 20 3889 9807
Email: miglena.angelova@fiettalaw.com
URL: www.fiettalaw.com

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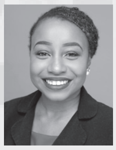

Udodilim Nnamdi

Foley Hoag LLP

1 Treaties: Current Status and Future Developments

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

The United States has bilateral investment treaties (BITs) in force with 39 countries, namely: Albania; Argentina; Armenia; Azerbaijan; Bahrain; Bangladesh; Bulgaria; Cameroon; Congo; Croatia; Czech Republic; Democratic Republic of the Congo; Egypt; Estonia; Georgia; Grenada; Honduras; Jamaica; Jordan; Kazakhstan; Kyrgyzstan; Latvia; Lithuania; Moldova; Mongolia; Morocco; Mozambique; Panama; Poland; Romania; Rwanda; Senegal; Slovakia; Sri Lanka; Trinidad & Tobago; Tunisia; Turkey; Ukraine; and Uruguay. Its BITs with Bolivia and Ecuador were terminated in 2012 and 2018, respectively, but both continue to apply to investments in existence on the dates of termination for an additional 10 years.

The United States has free trade agreements (FTAs) in force with 20 countries. These include: Australia; Bahrain; Canada; Chile; Colombia; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Israel; Jordan; Korea; Mexico; Morocco; Nicaragua; Oman; Panama; Peru; and Singapore. The United States-Mexico-Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA), entered into force on 1 July 2020. Most recently, in October 2020, the United States entered into a Trade and Investment Agreement with Fiji.

In addition, the United States has adopted 33 Investment Related Instruments at multilateral, regional, and national levels, including the New York Convention, the International Centre for Settlement of Investment Disputes (ICSID) Convention, the Convention Establishing the Multilateral Investment Guarantee Agency, and the Pacific Basin Investment Charter.

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

The United States has currently signed but not ratified BITs with six countries: Belarus; El Salvador; Uzbekistan; Haiti; Nicaragua; and Russia. The BITs with the first three countries are pending exchange of ratification instruments, while the remaining three await domestic ratification by one or both parties. The United States has also signed the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, and the United Nations Convention on International Settlement Agreements Resulting from Mediation, but ratification awaits Senate consent.

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

Yes, the United States negotiates BITs based on a model text. The current version was published in 2012. That version, which followed a lengthy public consultation process, did not significantly change the previous Model BIT published in 2004. Key provisions of the 2012 Model BIT are noted below.

Definition of investment: Whereas NAFTA had a closed definition of investment, the 2012 Model BIT adopts an open-ended definition of investment with explanatory footnotes.

Substantive investment protections: The 2012 Model BIT provides substantive protections related to national treatment, most-favoured-nation treatment, minimum standard of treatment (including fair and equitable treatment, full protection and security, and no denial of justice), expropriation, transferability of payments, performance requirements, composition of senior management and boards of directors, and publication of investment measures. The Model BIT is notable for its explicit approach to interpreting fair and equitable treatment, full protection and security, and denial of justice in accordance with customary international law (CIL), as well as its inclusion of an annex explaining the parties’ shared understanding of CIL. An additional annex explains the meaning and correct approach to determining the existence of indirect expropriation, noting further that “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations”.

Financial services: The 2012 Model BIT provides protections for States regulating financial services. For example, States in investor-State arbitrations may ask tribunals for an early determination of whether challenged measures are covered by specific exceptions relating to regulation of financial services and monetary policy. Moreover, the Model BIT establishes that State parties should not be prevented from adopting or enforcing certain measures relating to financial institutions, including those necessary to prevent deceptive and fraudulent practices in financial services.

Environmental and labour obligations: The 2012 Model BIT expanded the scope of labour and environmental obligations of State parties by imposing an affirmative obligation to “ensure” that they do not waive or derogate from domestic labour and environmental laws and requesting parties to “effectively enforce” such laws. These obligations are enforceable only through State–State consultation.

Transparency of arbitral proceedings: The 2012 Model BIT maintains the strong transparency obligations introduced in the 2004 version. For example, key documents related to the arbitration must be publicly available, tribunal hearings must be open to the public, and tribunals are authorised to accept and consider *amicus curiae* submissions. Among the few innovations of the 2012 Model BIT is the requirement that parties consult periodically on how to improve transparency as well as transparency requirements related to proposing and adopting regulations.

Corruption: The US Model BIT does not address corruption.

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

The United States does not systematically publish diplomatic notes exchanged with other States concerning its treaties, although occasionally certain such notes become available in the public domain.

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 compiles and publishes the texts of treaties and international agreements to which the United States is a party within 180 days after the date on which they enter into force, but does not include references to the meaning intended for particular clauses. The publication is known as the *Treaties and International Acts Series*. The US agency with oversight of a subject matter covered by any given treaty might occasionally issue guidance on interpretation of provisions relating to the subject of its oversight.

Nevertheless, the United States regularly offers its views on the interpretation of certain investment treaties to which it is a party through non-disputing party submissions in ongoing investment arbitrations.

2 Legal Frameworks

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

(1) The United States has been a party to the New York Convention since 30 September 1970, when it acceded to the treaty.
(2) The United States has been a party to the Washington Convention since 10 June 1966, when it ratified the treaty.
(3) The United States signed the Mauritius Convention on 17 March 2015, but is yet to ratify it.

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

No, the United States does not have a domestic investment law.

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

No, the United States does not generally require formal admission of foreign investment. The United States has sought to make foreign investment within its borders simple and attractive, as demonstrated by President Joe Biden's statement reiterating the current administration's commitment to open investment.

Nevertheless, the United States has national security and sector-specific review regimes applicable to foreign investment in industries such as: shipping; aviation; banking; communications; and energy. The Committee on Foreign Investment in the United States (CFIUS) reviews acquisitions of potential control by foreign persons of US businesses and addresses any national security concerns posed. CFIUS can refer a transaction to the President recommending that he or she block it entirely if national security concerns cannot otherwise be addressed. A transaction subject to CFIUS jurisdiction that is not voluntarily notified and cleared is subject to potentially significant remedial action.

Historically, CFIUS was a voluntary filing and only applied to a specific set of industries and technologies involving national security. But, in 2018, the Foreign Investment Risk Review Modernisation Act (FIRRMA) was introduced to strengthen the authority of CFIUS. Notably, FIRRMA created special rules applicable to investment in businesses involving US critical infrastructure, critical technology, or sensitive personal data, including mandatory notification requirements for specific investments within those businesses. FIRRMA also expanded CFIUS jurisdiction to include real estate acquisitions near sensitive facilities. Throughout 2020, the US Department of Treasury issued a series of regulations implementing FIRRMA, including a Final Rule mandating filing for certain transactions involving US businesses that produce, design, test, manufacture, fabricate, or develop critical technologies.

3 Recent Significant Changes and Discussions

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

***BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014)**

This US Supreme Court case concerned the arbitration clause of an investment treaty between the UK and Argentina. The provision required that the parties first attempt to resolve their disputes before a "competent tribunal" in Argentina for at least 18 months or, instead, agree to proceed directly to arbitration. The question presented was whether US courts, in reviewing an arbitration award made under the treaty, should interpret whether a precondition to arbitration had been satisfied. The Court held that the task of interpreting the treaty's local litigation provision fell to the arbitrator, and courts should give deference to the arbitrator's findings. In so doing, the Court reasoned that the treaty's text contained no evidence that the parties intended to bypass ordinary contract presumptions about who should decide threshold issues. The Court further held that whether a party has satisfied a precondition to arbitration is a procedural matter left for arbitrators, and thus the arbitrator's determination that the local litigation provision did not act as a bar to arbitration was within their interpretative authority.

The principle of interpreting arbitration clauses in *BG Group* has been further implemented by lower courts. The Second Circuit in *Beijing Shougang Mining Inv. Co. v. Mongolia* recently denied a petition to set aside an arbitral award issued under a BIT between Mongolia and the People's Republic of China. While the treaty did not specifically empower the tribunal to decide issues of arbitrability, the Second Circuit concluded that, by agreeing to submit jurisdictional issues to the tribunal in the first instance and proceeding to argue their case before the arbitrators, the parties' conduct demonstrated a clear intent to do so. For more on this issue, please see question 6.2.

***Republic of Marshall Islands v. United States*, 865 F.3d 1187 (9th Cir. 2017)**

The Ninth Circuit provided guidance on sources for treaty interpretation and declined to adjudicate a treaty provision that it found to be non-self-executing. The Court affirmed the district court's dismissal of a suit brought by the Republic of the Marshall Islands seeking a declaration that the United States breached its treaty obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, and asking the court to order that the United States engage in good-faith negotiations. The Court held that Article VI was non-self-executing. Since 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.

***GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637 (2020)**

In *Outokumpu*, the Supreme Court unanimously determined that the New York Convention, as implemented in the United States via the Federal Arbitration Act (FAA), does not conflict with the enforcement of arbitration agreements by non-signatories under domestic contract law doctrines. After analysing the text and drafting history of the Convention, the Court observed that Article II was silent on the issue of non-signatory enforcement and found that nothing precludes the use of domestic doctrines such as equitable estoppel to fill any gaps in the Convention. While it remains to be seen how *Outokumpu* will be applied by lower courts, the Ninth Circuit recently clarified in *Setty v. Shrinivas Sugandhalaya LLP* that a non-signatory may compel arbitration under the doctrine of equitable estoppel provided that its claims are clearly "intertwined" with the contract containing the arbitration clause.

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

The United States has indicated its policy through its Model BIT and its efforts to include investor-State arbitration in recent BITs and FTAs. The current website of the Office of the United States Trade Representative notes that the United States perceives investor-State arbitration as one of the "core benefits" of its BIT programme.

Nevertheless, it should be noted that the USMCA sharply curtails investor-State arbitration, compared to NAFTA. In particular, it eliminates investor-State arbitration by Canadian investors in the United States and Mexico, and by US and Mexican investors in Canada, thereby limiting investor-State arbitration under the treaty to US investors in Mexico and Mexican investors in the United States.

Moreover, the procedural requirements for arbitration and the substantive protections available under the USMCA vary depending on whether their dispute arises from a "covered government contract" in a "covered sector". Annex 14-E establishes that "covered sectors" include oil and gas, power generation, telecommunications, transportation, and other infrastructure. While investors with covered government contracts enjoy protection similar to investors under NAFTA, those without such contracts must pursue domestic remedies in the host State before submitting their arbitration claim. Pursuant to Article 14.D.5 of the USMCA, investors without covered government contracts can only commence arbitration after obtaining a final decision from a court of last resort of the host State or after 30 months from the date initiating the domestic court proceeding, unless they can show that recourse to domestic remedies is "obviously futile". Moreover, such claimants may only challenge government measures in breach of national treatment, most-favoured-nation treatment, and expropriation. Claims for breach of minimum standard of treatment, full protection and security, and indirect expropriation are excluded.

Pursuant to Annex 14-C, any pending claims which have already been filed under NAFTA will not be affected by the USMCA, and new claims can be brought for three years following the termination of NAFTA. As one such legacy NAFTA claim, TC Energy Corporation filed a notice of intent in 2021 against the United States based on President Biden's revocation of TC Energy's Keystone XL Pipeline permit.

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

Please see our response to question 1.3 above explaining the extent to which these issues are addressed in the US Model BIT.

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

No, the United States has not given notice to terminate any BITs. As indicated in response to questions 1.1 and 3.2 above, the United States did renegotiate NAFTA. The USMCA, its replacement, entered into force on 1 July 2020. In May 2021, the United States advanced its first dispute settlement panel under the USMCA to challenge Canada's allocation of import quotas on certain dairy products.

4 Case Trends

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

There have been 17 investor-State arbitrations filed against the United States under NAFTA. The United States has prevailed in all of these arbitrations. There has been no publicly known investment treaty award rendered against the United States to date. There is currently one case listed as "pending" with ICSID, *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v. United States of America*. The case involves Ukrainian nationals claiming that the United States, by attempts to seize their real estate through civil forfeiture, engaged in expropriation and breached the obligation of fair and equitable treatment in violation of the U.S.-Ukraine BIT.

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

Please see question 4.1.

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

Please see question 4.1.

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

Please see question 4.1.

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?

One closely watched development involves the interpretation of 28 U.S.C. § 1782, which enables US district courts to compel discovery for use in a proceeding in a foreign or international tribunal. Since the Supreme Court's 2004 decision in *Intel Corporation v. Advanced Micro Devices*, lower courts have diverged on whether an international arbitral tribunal constitutes a "foreign or international tribunal" for purposes of § 1782. Earlier this year, the Supreme Court was scheduled to hear the matter in the case of *Servotronics Inc. v. Rolls-Royce PLC*, and the US Department of Justice submitted an amicus brief arguing that § 1782 should not extend to international arbitral tribunals, whether commercial or investment. The case came to an abrupt end, however, when Servotronics withdrew its petition, thus leaving the issue unsettled.

5 Funding

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

The United States has historically prohibited third-party litigation funding pursuant to the doctrine of champerty. In recent years, however, the trend has been towards limiting the doctrine's reach. There is currently no explicit prohibition of third-party funding of investor-State arbitration claims.

In light of the above developments, proposals such as the Litigation Funding Transparency Act of 2019 bill and the 2020 American Bar Association Best Practices for Third-Party Litigation Funding have been introduced in favour of greater disclosure of third-party financing. In 2018, Wisconsin became the first US state to pass legislation requiring parties to disclose third-party funding agreements, regardless of whether the agreement is sought in discovery or not. Moreover, six federal courts of appeal and 24 federal district courts have rules requiring the identification of third-party funders. In June 2021, a district court in New Jersey went further and adopted a local rule requiring (i) the identity of the third-party funder, (ii) the scope of the funder's rights to approve decisions or settlement decisions, and (iii) a description of the funder's financial interest in the litigation.

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

Most case law in the United States involving third-party litigation funding involves challenges based on champerty law, with varying results in different states. For example, in *Maslowski v. Prospect Funding Partners LLC*, the Supreme Court of Minnesota overturned the Minnesota Court of Appeal's decision invalidating a litigation funding agreement on the basis that it was champertous. Most recently, in *ELM 3DS Innovations LLC v. Samsung Elecs. Co.*, the federal court of Delaware found that communications with funders after the litigation began are protected from discovery by the work product doctrine.

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

Although the litigation/arbitration funding market is little more than a decade old, some estimate that it has already raised over US$2.3 billion. A 2019 study by Burford Capital found that 84.1% of US law firms and organisations saw an increase in their use of outside funding over the past two years. In 2020, six leading funders created the International Legal Finance Association in Washington, D.C., suggesting the growing popularity of third-party funding in the United States.

6 The Relationship Between International Tribunals and Domestic Courts

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

Generally, tribunals cannot review US criminal investigations, since the United States has the primary jurisdiction and power to investigate and prosecute crimes that arise within its territory.

In addition, tribunals typically have no authority to review the judgments of US domestic courts, unless a treaty's terms provide for the review of judicial decisions by a tribunal. For example, the provisions of NAFTA provide that tribunals may hear challenges to American, Canadian, or Mexican court judgments. Any US, Canadian or Mexican business claiming it has been treated unjustly by the judicial system of another member country may invoke review by a three-person tribunal, comprising judges and former judges. The tribunal decisions are binding as to the particular matter addressed. The USMCA limits challenges to domestic court judgments to disputes between the United States and Mexico.

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

Yes, national courts have jurisdiction to deal with certain procedural issues arising out of an arbitration. For example, under Section 206 of the FAA, "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States".

The question of whether the court or the arbitrator decides on the arbitrability of a dispute remains unresolved. The Supreme Court has not yet confirmed whether reference in the arbitration agreement to arbitration rules within *kompetenz-kompetenz* provisions is sufficient to show that the parties have "clearly and unmistakably" delegated the question of arbitrability to the arbitrator. By dismissing its initial writ of *certiorari* as improvidently granted in *Henry Schein Inc. v. Archer and White Sales Inc.*, the Court turned down the opportunity to address the circuit split over this question.

6.3 What legislation governs the enforcement of arbitration proceedings?

The FAA enforces arbitration agreements. Section 3 requires US district courts that deem a dispute falls within the scope of the arbitration agreement to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement".

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 parties' selection.

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

Where 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. Under Section 5 of the FAA, a court may intervene if: the arbitration agreement fails to specify a method; a party does not follow the specified method; or there is a "lapse in the naming of an arbitrator". Such court-appointed arbitrators act with the "same force and effect as party appointed arbitrators".

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

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?

Section 207 of the FAA allows parties to international arbitration to apply to a US district court for confirmation of the arbitration award within three years of its issuance. Section 9 requires that the party seeking enforcement give notice to the other party of its enforcement action.

For enforcement of an international award covered by the New York Convention, Article IV of the 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.

Article 54(2) of the ICSID Convention requires that an ICSID award be recognised upon furnishing of a copy of the award certified by the ICSID Secretary-General.

Recently, in *Compañia de Inversiones Mecnatiles S.A. (CIMSA) v. Grupo Cementos de Chihuaua S.A.B. De C.V. (GCC)*, the Tenth Circuit provided clarity on the nature of contacts with the United States sufficient to establish jurisdiction necessary to enforce an arbitral award. Concluding it was reasonable for the lower court to assert jurisdiction over the foreign respondent, the Tenth Circuit observed a federal policy favouring arbitral resolution of disputes in the field of international commerce, among other considerations.

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

Under the FAA, an award may be vacated if: "[I]t was procured by corruption, fraud, or undue means; there was evident partiality or corruption on the part of the arbitrators; the arbitrators were guilty of misconduct." Article V of the New York Convention establishes the grounds upon which a US court may refuse recognition of an international arbitration award covered by the Convention:

(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 beyond the scope of the arbitration agreement;
(d) the arbitral tribunal was improperly constituted;
(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;
(f) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(g) the recognition or enforcement of the award would be contrary to the public policy of that country.

For ICSID awards, US courts apply Article 54 of the ICSID Convention, requiring all State parties to enforce such award "as if it were a final judgment of a court in that State".

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

The US Supreme Court has held that the Foreign Sovereign Immunities Act (FSIA) is the "sole basis for obtaining jurisdiction over a foreign State in our courts", *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Pursuant to Sections 1609 and 1610(a)(6) of the FSIA, a sovereign State's property is "immune from attachment, arrest and execution", even where the judgment is based on an order confirming an arbitral award against the foreign state, except where the property is "used for commercial activity in the United States". The FSIA defines "commercial property" as either "a regular course of commercial conduct or a particular commercial transaction or act". Under Section 1611, property of a foreign central bank or monetary authority for its own account, as well as military property, is deemed immune from execution even if it would otherwise qualify for one of the exceptions to immunity.

Recent case law has focused on the issue of corruption in the enforcement of arbitral awards. In *Vantage Deepwater Company v. Petrobras America Inc.*, the Fifth Circuit found no violation of public policy for enforcing an award based on a contract allegedly obtained through corruption, since the contract was ratified when the party already knew of the bribery and both parties engaged in the same fraudulent activities. In *Compañia de Inversiones Mecnatiles S.A. (CIMSA) v. Grupo Cementos de Chihuaua S.A.B. De C.V. (GCC)*, the Tenth Circuit also rejected application of the narrow public policy exception to allegations of corruption within the Bolivian judiciary by refusing to vacate an award that had been annulled at the seat of arbitration. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela* demonstrates that US courts remain unpersuaded by Venezuela's arguments that attachment of its US-based assets would undermine efforts to mitigate its humanitarian crisis, restore democracy, and pay creditors. In another case, *Koch Minerals SARL v. Bolivarian Republic of Venezuela*, an enforcement action for a US$140.25 million ICSID award was allowed to proceed on the merits despite the Venezuelan government's failure to appear after motioning to annul the award.

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

Please see question 7.3.

Tafadzwa Pasipanodya is a partner in Foley Hoag LLP's International Litigation and Arbitration Department and chair of its Africa practice. She has represented sovereign States from all over the world before international courts and arbitral tribunals in State-to-State and investor-State disputes concerning mining, hydrocarbons, the environment, human rights, infrastructure, the law of the sea, and territorial boundaries. She also represents foreign States in U.S. federal court proceedings.

Tafadzwa was named to Africa's 30 Arbitration Powerlist by Africa Arbitration Academy, Africa Arbitration and the Association of Young Arbitrators, and has been ranked by *Latinvex* as one of the top female lawyers working on Latin American matters. She is also recognised by *Who's Who Legal: Arbitration* and *The Legal 500: USA* and *Latin America*.

Tafadzwa currently serves as a member of the International Chamber of Commerce (ICC) Court of Arbitration, Vice President of the African Society of International Law, and a member of the American Society of International Law Executive Council. She understands English, Shona, Spanish, French, German, and Portuguese.

Foley Hoag LLP
1717 K Street, N.W. Washington, D.C.
US 20006-5350
USA

Tel: +1 202 261 7358
Email: tpasipanodya@foleyhoag.com
URL: https://foleyhoag.com/

Karim M'ziani is an international lawyer in Foley Hoag LLP's International Litigation and Arbitration Department in Washington, D.C. Originally trained in France, he specialises in representing sovereign States in international disputes against other States and foreign investors before the world's principal dispute resolution bodies, including the ICJ, ICSID, and PCA. Prior to joining Foley Hoag LLP, Karim served as an alternative dispute resolution extern at the Dispute Settlement Center in Carrboro, N.C., and as an international litigation and arbitration intern at two major international law firms in Paris, France.

Foley Hoag LLP
1717 K Street , N.W. Washington, D.C.
US 20006-5350
USA

Tel: +1 202 223 1200
Email: kmziani@foleyhoag.com
URL: https://foleyhoag.com/

Sun Young Hwang is an associate in Foley Hoag LLP's Washington, D.C. office and a member of the International Litigation and Arbitration Department. She specialises in representing sovereign States and State entities in matters of international investment law and public international law.

Foley Hoag LLP
1717 K Street , N.W. Washington, D.C.
US 20006-5350
USA

Tel: +1 202 261 7428
Email: syhwang@foleyhoag.com
URL: https://foleyhoag.com/

Udodilim Nnamdi is an associate in Foley Hoag LLP's Washington, D.C. office and a member of the International Litigation and Arbitration Department. She specialises in representing sovereign States and State entities in matters of international investment law and public international law.

Foley Hoag LLP
1717 K Street , N.W. Washington, D.C.
US 20006-5350
USA

Tel: +1 202 261 7419
Email: unnamdi@foleyhoag.com
URL: https://foleyhoag.com/

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