International Arbitration Focus: Investor-State Arbitration

Spring 2020

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Contents

Welcome

We are pleased to bring you the next issue of Reed Smith's newsletter on international arbitration, this one focused on investor-State disputes.

Investor-State disputes have been the subject of much attention. The resolution of some disputes has given rise to significant controversy and political pushback, affecting awards and prompting the implementation of new systems for the resolution of such disputes. Any field of law undergoing such significant changes gives rise to interesting and important issues.

The subject is especially topical in the midst of the COVID-19 crisis, given that measures taken by States to deal with the crisis are affecting investments directly and significantly and could give rise to substantial claims.

This newsletter is part of the firm's efforts to contribute to our clients' knowledge on issues affecting their international arbitration rights.

Given the proliferation of newsletters covering arbitration generally, we have opted to focus each issue of our newsletter on a single theme pertinent to our clients, be that geographically, by virtue of their industries, or because it involves a specialized type of arbitration, such as, on this occasion, investor-State disputes. This narrower focus allows us to treat the subject in greater depth.

We hope that, through this concentration, we can enhance the newsletter's value to you. We would welcome your views and suggestions as to any topics that would be of interest to you for coverage in future newsletters.

José Astigarraga
Global Chair – International Arbitration
Miami
+1 786 747 0202
jia@reedsmith.com

Note from the Editors

Welcome to the second issue of *International Arbitration Focus*. This issue focuses on investor-State arbitration, with pieces on a broad range of hot topics and emerging issues, including those arising out of the COVID-19 global pandemic. We had been working on this investor-State issue when the pandemic showed us what a small community this really is, and accordingly we included articles addressing that topic as well.

Foreign investments enjoy international legal protection through some 3,000 or more bilateral and multilateral investment treaties. Investment treaties are concluded between two or more States and contain reciprocal State-level undertakings for the promotion and protection of foreign investment. A central feature of investment treaties is their dispute resolution mechanisms. These mechanisms allow protected foreign investors to sue States directly by submitting claims to international arbitration rather than to the national courts. Investor-State dispute settlement (ISDS) is regulated by various institutional and ad hoc rules, and the disputes generated have given rise to a growing body of jurisprudence.

In this issue, we look at some of the challenges facing ISDS, as well as opportunities and areas of potential future growth, while providing practical advice on how investors can take proactive steps to protect foreign investment.

Editor Ed Mullins, Guest Co-editor Ben Love, and Danny Avila start with a piece of general application addressing how parties can manage the risks of remote arbitration during the COVID-19 era. The authors consider the current remote capabilities available in international arbitration and the procedural concerns of conducting purely remote proceedings, summarizing recent guidelines issued from international arbitration institutions and domestic courts globally on how to manage remote proceedings during the COVID-19 outbreak.

Remaining on the subject of COVID-19, Ben Love discusses issues of State responsibility under investment treaties for measures taken in response to the pandemic. The article draws on jurisprudence arising from situations of crisis, in particular the Argentine economic crisis, to discuss liability issues (including rules precluding responsibility and wrongfulness) that States and investors alike should consider when weighing the implications of responsive measures to address COVID-19.

Ana Atallah then considers the Paris Court of Appeal decision in *Alstom et al. v. Alexander Brothers* as an example of how the French Courts may treat allegations of corruption made by an investor in the context of its procurement of a contract or concession with a State.

Marine de Bailleul and Corina Lefter move on to examine the proposed amendments to the International Centre for Settlement of Investment Disputes (ICSID) Rules. These revisions come 14 years after the last update to the ICSID Rules and are intended to amend the procedural framework to enhance transparency and procedural efficiency. The authors look at some of the key changes proposed, and their likely implications for users of ICSID arbitration.

Danny Avila next takes an in-depth look at the United States-Mexico-Canada Agreement (USMCA) which will replace the North American Free Trade Agreement (NAFTA), the first regional trade treaty between the United States, Mexico, and Canada, which has been in force since 1994. Danny highlights some of the key differences between NAFTA and the USMCA, focusing on the decreased level of protection afforded to investors under the latter, before concluding with some practical advice as to how investors may be able to mitigate the loss of these protections through restructuring their investment holdings.

Clément Fouchard considers some of the emerging trends and recent ISDS initiatives coming out of Africa, which are setting new standards in investment law and principles. In particular, Clément looks at three emerging trends in the standards of protection afforded to investors under African investment instruments, as well as various recent procedural innovations made with a view to rebalancing ISDS for investments on the African continent.

Finally, Sub-editor Lucy Winnington-Ingram considers whether investors should look to future-proof against the end of intra-EU BITs in light of the recent crystallization of the EU's efforts to end ISDS within the Union. Lucy starts by setting out a brief history of the measures employed by the EU, before considering their likely effect on European investors holding investments in other EU Member States. The piece concludes by exploring some of the ways that investors can look to protect their investments, including by taking advantage of investment structuring opportunities that may arise from Brexit.

On behalf of the editorial board of *International Arbitration Focus*, we hope you enjoy our issue on investor-State arbitration. Please send us your comments and anything you would like to see in future issues. (We would say we are all in this together, but with social distancing, is that really true? Stay safe.)

Edward Mullins, Editor
Partner
Miami
+1 786 747 0203
emullins@reedsmith.com

Ben Love, Guest Co-editor,
Counsel
New York
+1 212 549 4189
blove@reedsmith.com

Lucy Winnington-Ingram,
Sub-editor
Associate
London
+44 (0)20 3116 3891
lwinnington-ingram@reedsmith.com

Managing the risks of remote arbitrations during the COVID-19 era

At the time of writing this article, the world is navigating the effects of an ongoing pandemic of a novel coronavirus disease (COVID-19), and the arbitration community is adjusting to purely remote proceedings. This complete reliance on technology, however, is not a novel subject in international arbitration.[1]

Technology has long assisted in making proceedings more efficient and expeditious, while simultaneously overcoming the logistics of gathering parties from different countries and languages in the same room. Indeed, approximately 60 percent of the hearings and sessions organized by the International Centre for Settlement of Investment Disputes (ICSID) in 2019 were held by videoconference.[2]

This article (1) assesses the current remote capabilities of international arbitration proceedings, (2) examines the procedural concerns of conducting purely remote proceedings, and (3) summarizes recent guidelines issued from international arbitration institutions and domestic courts globally on how to manage remote arbitration during the outbreak of COVID-19.

Current remote capabilities in international arbitration

Generally, technology has been used in international arbitration as a cost-saving tool to expedite proceedings and reduce travel expenses for parties, arbitrators, and witnesses located in different parts of the globe. Several aspects of international arbitration proceedings are conducted remotely in most cases today, including:

- Transmitting messages and files through email or secure file transmission platforms.
- Meeting by telephone or videoconference.
- Handling documents digitally, including storing documents in cloud-based platforms.
- Managing cases (tracking deadlines, allocating work, etc.) through electronic calendars and tracking systems.
- Presenting arguments and facts through virtual presentations and video.

The outbreak of COVID-19 may only expedite the current movement to more remote arbitrations to reduce costs and time in international arbitration.[3] Considering arbitration is a quasi-judicial process, however, its need to comply with procedural guarantees imposes certain constraints on the process.[4] Thus, shifting to purely virtual arbitration may raise concerns that such arbitrations will jeopardize procedural rights, raise ethical concerns, and create potential grounds for complications including the annulment of arbitration awards.

Potential procedural concerns of conducting purely remote proceedings

Due process concerns with the enforceability of an award

Under article V(1)(b) of the New York Convention, recognition and enforcement of an arbitral award may be refused if the party against whom the award is made was "unable to present his case."[5] Several international arbitration institutions provide for a procedural right to present evidence before the tribunal.[6] In the context of remote proceedings, if a party is truly restricted from presenting evidence, submitting arguments, or there are other gross inequalities in the use of the technology by the tribunal, a party may later allege a violation of article V(1)(b) in the enforcement proceedings.[7]

Some commentators have considered issues of equal treatment of the parties when one party has higher technological capabilities than the opposing party does in presenting their case.[8]

Moreover, an award issued following a purely remote proceeding may be subject to public policy concerns if a court in the seat of the arbitration finds that the use of purely remote proceedings violated the public policy of its country under article V(2)(b) of the New York Convention.[9] Thus, the parties should agree on the remote procedure in advance to help control expectations throughout the proceeding and to avoid such arguments after an award is rendered.[10] The losing party will often look for any reason to overturn an award and thus addressing that issue at the outset will best serve the parties.

The authentication of an award issued in a virtual arbitration raises another issue. Authentication of the award is a consideration for the enforcement of the award. Under article IV of the New York Convention, at the time of the application for enforcement, a petitioner must supply "[t]he duly authenticated original award or a duly certified copy."[11] Some jurisdictions require formalistic authentication procedures, such as apostilization, to satisfy article IV of the New York Convention.[12] Consequently, with the issuance of more "e-awards" following a purely remote arbitration, enforcement courts will likely become more flexible with requiring a petitioner to provide an authenticated award in enforcement proceedings – absent a dispute that the award itself exists and was rendered, "it would be a hollow formality to require the claimant to prove the – undisputed – existence and authenticity of the arbitral award."[13]

Virtual witness examination

Although virtual examination of witnesses located in different parts of the world may save exponentially in travel expenses, it may become a pitfall in remote proceedings. Personal presence and direct cognition by arbitrators has been the cornerstone of taking evidence, making best use of the various nonverbal communication skills available, whether consciously or not.[14] Integrity risks also may exist when a witness may have access to live information either behind the computer or by earpiece that may alter their live testimony during examinations. All participants in an arbitration therefore must be mindful of their ethical duties when presenting evidence through both direct and cross-examination.[15] It is important to try to create an environment where a witness is unable to obtain outside information or assistance.[16] Some service providers offer rotating cameras, which can allow arbitrators to assess the witness's physical environment and address concerns of witness coaching or behind-the-scenes collusion.[17] Providing the witness the exhibits via email (during the deposition) or in a sealed envelope in advance may help prevent a "sneak peek" of the exhibits.[18]

The Seoul Protocol on Video Conferencing in International Arbitration (the Seoul Protocol), a guide for arbitrators to adopt when conducting video conferencing proceedings, provides certain measures to help maintain witness testimony credibility.[19]
For example, section 1.2 provides that the video conferencing system "shall allow a reasonable part of the interior of the room in which the Witness is located to be shown on the screen, while retaining sufficient proximity to clearly depict the Witness."[20] Section 1.3 also provides that the witness "shall give testimony sitting at an empty desk, or standing at a lectern, and the Witness's face shall be clearly visible."[21]

Logistical considerations in presenting evidence virtually

Although seasoned practitioners may have presented evidence and arguments in several in-person hearings and trials, presenting evidence in a virtual setting presents new obstacles that should be considered. Such obstacles may include how to manage a virtual hearing with participants in different time zones. They may also include deciding who will be shown on the screen at any given time, and how the evidence will be presented on the monitor. For example, if documents are displayed on the same screen as the speakers, it may be difficult to see the witness and the examining attorney.

Managing interjections from the arbitrators and opposing counsel can also present logistical difficulties, such as "reading a room," that may exceed the difficulties experienced during in-person proceedings. Arbitrators will also have a more difficult time discerning body language, facial expressions, or tonal changes.[22] It is important to master how technology will be used well in advance of a hearing rather than assume there will be no technological speed bumps along the way. Consideration of virtual breakout rooms for private deliberations and strategy meetings during breaks will be needed,[23] although it may be more efficient to hold conference calls without videos to ensure the parties are on a private and secure line.

Arbitral institutions are well-aware of these challenges and some have presented solutions to address them. ICSID's platform, for example, allows for hearings of any size – from a handful to hundreds of participants.[24] All participants have the ability to share audio and video, as well as content such as PowerPoint presentations.[25] A virtual chat function allows participants to communicate individually amongst each other or with the entire group.[26] Arbitrators also have the power to simply mute participants to control the efficiency of the proceedings.[27]

Remote transcriptions and translations

Obtaining a court reporter for the virtual hearing is important to ensure that the record is preserved throughout the virtual proceedings. Virtual room companies provide live transcriptions to the parties in real time. Subtitles may also be included to make it easier for court reporters to follow the witness testimony or oral argument. An additional issue for a court reporter to consider will be how to identify interjections from multiple people without being able to see where the sound is coming from.

Securing a translator for the virtual hearing may be necessary when witnesses are from different countries and speak different languages. The parties should decide whether the translation will be simultaneous or concurrent. Considering that the host could mute a witness, simultaneous translations may be more effective virtually than they are in person.[28] Zoom, for example, allows the host to assign to certain participants the role of "interpreters." Those assigned as interpreters will see a different interface, intended to make switching channels easier. However, ensuring the accuracy of the translation will be difficult if the witness is muted. Thus, it may be vital to have a third party monitor the ongoing translation as well.

Security and confidentiality in remote arbitration

In addition to technological breakdowns, risks with remote arbitration include data breaches, message interception, authentication and non-repudiation, and viruses and malware entering participants' computers. Ensuring that only authorized people attend the arbitration hearings is also important for security and confidentiality reasons. Several arbitration institutions supply virtual conference rooms that can monitor who is viewing the live content.[29]

The Seoul Protocol provides that "[e]ach party shall provide the identities of every individual in the room to the other party/parties and the Tribunal prior to the video conference and the Tribunal shall take steps to verify the identity of each individual present at the start of the video conference."[30] "Remote Venues," supplied by arbitral institutions or private third parties, with capabilities to prevent screen recording, also may assist in preserving confidentiality concerns in remote arbitration.[31]

Current responses to virtual proceedings

International arbitration institutions and State guidance

Leading arbitral institutions, as well as State and federal judiciaries around the world, have been quick to implement purely digital requirements in response to COVID-19. ICSID, for example, "requires only an electronic copy of a request for arbitration or post-award application."[32] ICSID also released a "brief guide to online hearings" providing information as to its video-conferencing platform, and encouraging "parties and tribunals to discuss the options for online hearings in more detail with their ICSID Secretary."[33]

The table below provides the recent measures taken by ICSID, the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), and the London Court of International Arbitration (LCIA):

Arbitration Institution	COVID-19 Response
International Centre for Settlement of Investment Disputes (ICSID)[34]	"ICSID requires only an electronic copy of a request for arbitration or post-award application (i.e. a request for a supplementary decision or rectification, or an application for interpretation, revision or annulment) and any accompanying documents." "ICSID encourages parties to submit all written submissions, and any supporting documentation, including witness statements and expert reports, electronically. Arbitrators, conciliators and ad-hoc Committee members are also encouraged to use electronic copies of case-related documents."
International Chamber of Commerce (ICC)[35]	The ICC "strongly advises" that all communication with the Secretariat of the ICC Court/ICC ADR Centre be conducted via email. "Requests for arbitration, applications for emergency arbitrators, and requests in other ADR proceedings should be filed at arb@iccwbo.org. Hearings and other meetings scheduled at the ICC Centre in Paris […] have been cancelled or postponed."
International Centre for Dispute Resolution (AAA-ICDR)[36]	"While the AAA-ICDR remains active and operational, no hearings will take place in AAA-ICDR hearing facilities until at least June 1, 2020." The AAA-ICDR "strongly encourage[s] all parties and their representatives to proceed in filing their arbitration and mediation cases – but to file them online to reduce the amount of paper necessary for handling and to help facilitate the recommended social distancing." "The AAA-ICDR can assist with alternative hearing arrangements, including the use of video teleconferencing that will allow for remote participation in hearings. Online video, teleconferencing, internet communication and means other than in-person can facilitate a full and equal opportunity for all parties to present evidence in a hearing."
London Court of International Arbitration (LCIA)[37]	"Parties should file requests through the LCIA's online filing system or by email." Parties should notify the LCIA at casework@lcia.org if they intend to make an application under LCIA article 9. Parties and arbitrators should send all other questions, documents, and correspondence to casework@lcia.org or accounts@lcia.org. Only in exceptional cases will the LCIA receive telephone calls.

The Chartered Institute of Arbitrators recently issued a guidance note on remote proceedings.[38] The guide provides several considerations relating to technology and logistical matters, legal matters and procedural arrangements, and institutional and ad hoc proceedings. The guide provides a helpful checklist to consider when organizing a remote arbitration, including whether:

- Relevant institutional guidelines on remote proceedings have been consulted.
- Domestic laws and regulations regarding the validity and enforceability of remote dispute resolution outcomes have been considered.
- A record of the parties' affirmative agreement to use remote proceedings has been made.
- Relevant scheduling amendments to facilitate remote proceedings have been agreed to by both parties and a record made.
- A neutral(s) has been selected that has practical familiarity with remote proceedings and the required technology.
- Cybersecurity requirements have been considered, agreed by the parties and a record made.
- Technical support for all participants to the remote proceeding has been arranged.
- A platform and procedure for transfer and storage of documentation has been agreed by the parties and arranged.
- A list of attendees to the remote proceeding has been circulated and agreed by the parties.
- A list of documents to be presented by each party as well as electronic bundles for use in presentation and in cross examination have been prepared and timely distributed.
- Attendees' physical rooms can be made visible to all participants to the extent necessary to show that no individual or recording device is present that was not agreed to.
- A procedure for virtual breakout rooms and for deliberations and private caucusing has been agreed by the parties and arranged.
- All software for screen sharing as well as telephone and internet connections have been tested beforehand and are of sufficient audio-visual quality.

U.S. Domestic Courts

U.S. courts also have begun to move towards virtual proceedings. Several U.S. Courts of Appeal have begun scheduling oral arguments via teleconference platforms.[39]

The Texas Supreme Court has issued several orders prohibiting in-person hearings and encouraging hearings via Zoom.[40] The state has procured Zoom licenses for every judge in the state, which allow judges to publish hearings on YouTube to comply with the Texas Constitution's open hearing policy. The Supreme Court of Texas has also issued an emergency order that requires Texas courts to "[c]onsider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means."[41] On March 18, 2020, Nueces County, Texas adopted a resolution prohibiting a party from quashing a deposition noticed to be taken remotely, when the only basis of the motion is an inability to attend in person.[42]

New York courts have also begun holding video arrangements for defendants who have tested positive for COVID-19 and has begun hearing family court cases online.[43]

Governmental Responses

The Ministry of Justice of China issued a guideline on March 3, 2020, calling for the accelerated development of China's "internet arbitration systems."[44] The guideline emphasizes the importance of online dispute resolution (ODR) to help get the country's economy back on track while still maintaining control over the spread of COVID-19. China also set up "internet courts" with capabilities to handle entire proceedings online in its major cities, including Hangzhou, Bejing, and Guangzhou.[45]

Arbitration in Place in Canada recently has started offering Arbitration in Place Virtual, an e-hearing dispute resolution format. Australia's Disputes Centre has also begun offering a similar service. These institutions provide software and hardware videoconference capabilities, live document display and sharing, transcription services, and technological support.

Virtual Arbitration in Practice

Although several international arbitration proceedings and domestic courts may have been suspended temporarily due to COVID-19, they are already adapting to virtual proceedings to continue the resolution of disputes. Several institutions provide the obligation to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[46] An arbitral tribunal "may adopt such procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties."[47]

Many active tribunals have begun to do so. In Brazil, the ICC administered a two-week arbitration with seventy participants from around the world, and arbitrators from Spain and Brazil.[48] Participants reported that it ran smoothly and the arbitrator was able to mute people if they began talking over each other.[49] In England, members of our London office attended a five-day trial before the London High Court virtually, over a complex US$530+ million multi-jurisdiction enforcement dispute, which also ran smoothly.[50] The Vis East Moot, the largest global international commercial arbitration moot court competition, completed its entire competition virtually with success.[51]

Conclusion

Economic recovery is assisted by the resolution of commercial disputes, and arbitration is uniquely suited to shoulder this responsibility because, unlike most courts, arbitration has been practicing remote procedures for several years now.[52] Thus, remote arbitration in the COVID-19 era may only be an acceleration of a trend that was already in place. As we shift to remote proceedings, practitioners, arbitrators, and institutions must now handle the procedural, security, and presentational hurdles that come with remote proceedings to provide the most efficient resolutions possible.

Authors:

Edward Mullins
Partner
Miami
+1 786 747 0203
emullins@reedsmith.com

Ben Love
Counsel
New York
+1 212 549 4189
blove@reedsmith.com

Danny Avila II
Associate
Houston
+1 713 469 3896
davila@reedsmith.com

Consideration of State responsibility for investment treaty violations during the COVID-19 pandemic

On January 30, 2020, the World Health Organization declared that COVID-19 constitutes a Public Health Emergency of International Concern,[53] and on March 11, 2020, declared COVID-19 a pandemic.[54] On April 23, 2020, António Guterres, the Secretary-General of the United Nations, stated that the COVID-19 pandemic is far more than a public health emergency: "It is an economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis."[55]

Numerous governments have likewise declared that the COVID-19 pandemic constitutes not only a public health emergency, but also a national emergency.[56] In reliance on their emergency powers, governments across the globe have taken responsive measures that include nationalizations, export restrictions, price controls, and State aid.[57] Given the ongoing pandemic, along with the severe drop in oil prices, further measures are on the horizon.

Many of these measures will have a significant and, in some cases, disproportionate impact on foreign investors. Little if any attempt may have been made to consult those investors before the measures were implemented. In this context, States and foreign investors alike would be prudent to assess their respective rights and obligations under applicable treaties for investment protection, which provide covered foreign investors with the opportunity to bring arbitration claims directly against host States for conduct alleged to breach those treaties.

Investment treaty arbitration, like international law more generally, has weathered and developed through crisis. It has thus unsurprisingly yielded jurisprudence addressing responsibility for State conduct in such situations. In the short time between the filing of the first investment treaty claim with the World Bank's International Centre for Settlement of Investment Disputes in 1987, nearly 1,000 investment treaty disputes have been submitted to arbitration.[58] Many of those disputes arose out of difficult societal circumstances such as the Argentine financial crisis in the early 2000s or the Arab Spring in the early 2010s. The potential relevance of this jurisprudence for conduct during the COVID-19 pandemic is addressed in the sections that follow.

Potential grounds of investment treaty liability

The primary rules of responsibility in investment treaty arbitration are contained in the applicable treaty and, in some cases, general rules of public international law. The most common causes of action fall under the following treaty standards, which generally are reflected in customary international law:

- Requirement that direct or indirect expropriation be accompanied by compensation, conducted with due process of law, and carried out on a non-discriminatory basis.
- Requirements to afford fair and equitable treatment and full protection and security.
- Protection from measures that are arbitrary or unreasonable.
- Prohibition of discriminatory measures vis-à-vis nationals of the host State (national treatment) or nationals of a third State (most-favored nation treatment).
- Obligation to refrain from discrimination when compensating or indemnifying domestic and foreign investors during periods of national emergency.
- Requirement to observe undertakings entered into with regard to investment (also known as an umbrella clause).
- Requirement to permit the payment, conversion, and repatriation of amounts relating to an investment.

Although some divergences remain, the corpus of investment treaty jurisprudence has gradually converged to provide definition to these broadly worded standards. More recently-concluded investment treaties have further specified the circumstances in which these various standards apply, an exercise that generally has reduced the level of protection afforded to foreign investment.

The types of State conduct found to offend these standards have varied, but many of the most common measures underpinning findings of breach (including for claims arising in exceptional circumstances) do not appear unfamiliar when considering the array of recent government measures and ongoing policy discussions. They include: (i) nationalization or expropriation of foreign investment;[59] (ii) currency manipulation;[60] (iii) domestic price interference;[61] (iv) export price interference;[62] (v) export restrictions;[63] (vi) export taxes;[64] (vii) rollbacks of incentives to investment;[65] (viii) discriminatory conferral of State aid and other benefits based on nationality;[66] and (ix) breach of or interference with legal or contractual obligations by the State.[67]

Assuming jurisdiction can be established under an applicable treaty, these and other types of measures taken in response to the COVID-19 pandemic could attract arbitration claims for State responsibility under investment treaties. Both investors and States will therefore want to review relevant jurisprudence when assessing potential liability and risk in their particular circumstances. To the extent claims brought by investors are successful as a matter of liability, States will look for defenses under both the applicable treaty and customary international law to absolve them of responsibility. Both types of defenses are discussed in the following sections.

Emergency clauses in investment treaties

The starting point for States looking to defend against findings of liability (or at least potential findings of liability in the alternative) is the applicable investment treaty. Although most investment treaties do not address situations of necessity or emergency, many of them do. For instance, certain investment treaties concluded by parties such as the United States, Germany, India, Mexico, and the Belgium-Luxembourg Economic Union, among others, contain provisions designed to address measures deemed necessary to protect essential security interests.[68]

Article XI of the U.S.-Argentina bilateral investment treaty (BIT) contains the most heavily litigated essential security clause. It provides:

"This Treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."[69]

Argentina invoked this provision in numerous cases to defend measures taken in response to its financial crisis. The central question for tribunals examining this clause thus concerned whether Argentina's measures were necessary to protect an essential security interest. The general consensus, with only temporary exceptions from a minority of tribunals, was that an array of measures (e.g., price interference, export restrictions, etc.) were not necessary to protect an essential security interest.[70]

It remains to be seen if this and similar provisions would preclude liability for measures in response to the COVID-19 pandemic. The central issue, however, as with the Argentine financial crisis, would likely concern the interpretation and application of "necessary," although in certain cases whether public order, international peace and security, and/or essential security interests are at stake, could be a debatable question.

It should be noted that in exceptional circumstances, some investment treaties also afford additional protections for protected foreign investment. Article IV(3) of the U.S.-Argentina BIT is an example of such a clause and provides:

"Nationals or companies of either party whose investments suffer losses in the territory of the other party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."[71]

These provisions arguably grant protections to foreign investors in circumstances (e.g., a state of national emergency) where customary international law might not. In particular, this type of provision provides that, even in such extraordinary circumstances, the measures States take must not discriminate on the basis of nationality. In other words, even if the responsive measures in question are otherwise excused due to an exceptional situation, they remain subject to the national treatment and most-favored nation requirements.

Customary international law rules precluding wrongfulness

If State liability is established and the applicable investment treaty does not provide an express defense (or if that defense is not available), the inquiry does not end there. Chapter V of the Draft articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles) identifies six circumstances precluding the wrongfulness of conduct that would otherwise breach a State's international obligations.

Although other defenses in chapter V of the ILC Articles might prove relevant (in particular *force majeure* (article 23) and distress (article 24)) to defending against claims based on measures responding to COVID-19, the jurisprudence thus far has mainly concerned States' invocation of: (a) countermeasures in respect of an internationally wrongful act (ILC article 22); (b) necessity (ILC article 25); and (c) the consequences of successfully invoking circumstances precluding wrongfulness (ILC article 27). The analysis below thus focuses on those three defenses.

Countermeasures

ILC article 22 addresses the circumstance in which countermeasures to an internationally wrongful act may be precluded from wrongfulness. It provides:

"The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three."[72]

States have invoked this provision to attempt to excuse conduct alleged to breach investment treaty obligations in only a handful of cases and never successfully. Two of the tribunals in those matters – in *Corn Products v. Mexico* and *Cargill v. Mexico* – considered that countermeasures responding to wrongful conduct of another State are not available as a circumstance precluding wrongfulness under the applicable investment protection regime.[73] A third tribunal, in *Archer Daniels v. Mexico*, considered that countermeasures could, in principle, constitute an available defense to a breach of investment treaty obligations, but rejected such a defense in that case on the merits.[74]

The availability of countermeasures as a defense in investment treaty arbitration remains a question that tribunals have yet to resolve definitively, in part because it rests on competing views about the character of the rights investment treaties contain (i.e., whether they belong to investors or States), as well as the scope of an investment treaty tribunal's jurisdiction to decide incidental questions of international law.[75] Given the global nature of the pandemic, however, it is possible that States will seek to defend certain conduct as a countermeasure to the wrongful act of another State. Whether such a defense could succeed will turn on each tribunal's position on the legal issues addressed in the cases above and, if the defense is deemed available in theory, the specific facts of each case.

State of Necessity

ILC article 25 circumscribes a narrow set of circumstances in which a State may rely on a situation of necessity to preclude the wrongfulness of conduct in breach of its international obligations:

> *"1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> > *(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
> >
> > *(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> > *(a) the international obligation in question excludes the possibility of invoking necessity; or*
> >
> > *(b) the State has contributed to the situation of necessity."*[76]

This provision has been invoked as a circumstance precluding wrongfulness in several cases, but only rarely with success. This reflects the ILC's commentary that the provision addresses "exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency."[77]

In cases arising out of the Argentine financial crisis, tribunals generally found that the financial crisis itself constituted a "grave and imminent peril" and that it threatened an "essential interest" of the State.[78] One of Argentina's two central difficulties, however, was to establish that the measures it took constituted the "only way" to respond to the crisis. With the exception of tribunals which found that Argentina had met this standard for a brief period following the onset of the crisis (namely by defining "only way" less strictly than other tribunals),[79] tribunals generally found that Argentina's measures were not the "only way" to safeguard its essential interests.[80]

Even had those tribunals found that Argentina satisfied these requirements under ILC article 25(1)(a), Argentina faced the additional difficulty of having to prove under ILC article 25(2)(b) that it did not contribute to its financial crisis (i.e., "the situation of necessity"). With few exceptions,[81] tribunals found that Argentina's conduct in the years preceding the crisis (and in some cases in responding to the crisis) contributed to the financial difficulties it faced.[82]

States invoking necessity for measures in response to the COVID-19 pandemic – including its political, economic, and social implications – will likewise need to show that (i) those measures were necessary to address a grave and imminent peril to an essential security interest, and (ii) they did not contribute to the situation of necessity. The latter requirement may prove more difficult for some States than others, as responses to the pandemic have differed between governments, and it may be argued that some of those measures exacerbated the crisis. Investors may also seek to argue that some States contributed to the crisis through lack of preparation for a foreseeable event.

One potentially key difference between the current situation and the Argentine financial crisis is that the COVID-19 pandemic is, by definition, global rather than national. Tribunals thus might be called to decide under ILC article 25(2)(a) whether a particular measure "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole." This issue of first impression appears likely to arise in a situation where serving the essential interests of one State (e.g., through export restrictions of vital medicines or other goods) might negatively impact the essential interests of other States or the international community more generally.

Consequences of Invoking a Circumstance Precluding Wrongfulness

If a State effectively invokes one of the circumstances precluding wrongfulness discussed above, tribunals will need to determine whether the State or the investor will bear the costs of any loss arising from the measures in question. In this regard, ILC article 27 provides:

> *"The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:*
>
> > *(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;*
> >
> > *(b) the question of compensation for any material loss caused by the act in question."*

ILC article 27(a) addresses the duration of a circumstance precluding wrongfulness. It provides that a State may only rely on such a circumstance through the end of the period in which that circumstance exists. This reflects that, by definition, exceptional circumstances precluding wrongfulness are temporally limited.[83] The tribunal in *LG&E v. Argentina* interpreted this provision to indicate that

> *"[O]nce the situation [of emergency] has been overcome, i.e. a certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."*[84]

The tribunal then applied that reasoning to exempt Argentina from international responsibility for actions taken before and after the period in which it found a state of necessity to exist.[85] The concept behind this principle is straightforward, but its application will raise potentially difficult factual questions about when the situation of necessity began and when it ended. Public representations by States on these matters may prove relevant to the resolution of disputes in which a State successfully invokes necessity or another circumstance precluding wrongfulness.

ILC article 27(b) states that a finding of a circumstance precluding wrongfulness (e.g., necessity or *force majeure*) is "without prejudice to" the allocation of question of compensation for damage caused by the act in question. Tribunals have differed in their interpretation of this provision, ranging between awarding no compensation at all during periods of necessity and holding that compensation would remain due (in full or in reduced form) during such periods.[86]

Investors and States alike will want to pay careful attention to this competing jurisprudence on the consequences of successfully invoking necessity or any other circumstance precluding wrongfulness. It is not unforeseeable that some States may be able to invoke such a defense with success. It will therefore be critical for tribunals to decide, in such a circumstance, how to allocate the burdens of responsive measures between host States and foreign investors that otherwise would have received compensation under an applicable investment treaty.

Conclusion

Investment treaty jurisprudence and the rules of State responsibility it concerns will undoubtedly bear upon the resolution of investor-State disputes arising out of the COVID-19 pandemic. Investment treaties generally afford States latitude to take reasonable measures in response to such an exceptional situation, but that latitude is not unfettered. States accordingly will likely plead, at least in the alternative, that their measures were justified by treaty provisions addressing exceptional situations or by one or more circumstances precluding wrongfulness under customary international law.

States accordingly will want to consider how their conduct (e.g., through legal measures and public statements) might appear under the lens of scrutiny that investment treaties provide, as well as whether their conduct meets the conditions for invoking available defenses to breaches of investment treaty standards. Investors likewise will want to weigh that same State conduct against these standards, both to improve negotiating positions and to prepare for investor-State arbitration should that be necessary.

The mixed jurisprudence in this field, as well as the factual complexity of the ongoing COVID-19 pandemic, will not render such an exercise straightforward. Rather, to mitigate risk and minimize unnecessary loss of value, it will be important for both States and investors to consult specialist counsel in investor-State disputes to consider carefully how applicable standards and defenses apply to the particular facts of each case.

Author:

Ben Love
Counsel
New York
+1 212 549 4189
blove@reedsmith.com

One of the many faces of corruption in the field of international arbitration: a few comments on the *Alstom* case

Corruption has become a trendy topic in international arbitration, giving rise to voluminous academic commentary and numerous claims.

These claims can be grouped into two broad categories. The first is where an investor seeks to reclaim payments made with a view to procuring a contract or concession with a State. The second relates to the increasingly oft raised defense by a host State that an investor's claim against it should be dismissed on the basis that the investment was procured, or performed, by corrupt means.

Both scenarios give rise to serious questions of fairness in the investor-State dispute settlement system. Tensions arise in the first scenario because the investor initially agreed to make the payment with a view to obtaining the contract, and arise in the second because the State necessarily sought, or chose to accept, payment in exchange for granting the contract to the investor or because the defense itself has no basis in reality.

This article addresses the first category of cases: corruption alleged by the investor. Often, the contract underlying this type of disputes is a "consultancy contract" entered into with an intermediary in exchange for assistance in procuring the principal contract with the State. A dispute may arise in circumstances where the investor seeks to recoup payments made, or to avoid paying the balance due, to the intermediary under the impugned consultancy contract.

Invoking an intermediary's corruption to escape an adverse arbitral award: *Société Alstom Transport et al. v. Alexander Brothers*

The decision of the Paris Court of Appeal in *Société Alstom Transport et al. v. Alexander Brothers* provides a notable example of an investor seeking to avoid payment under its contractual obligations by invoking its own participation in corruption to overturn an adverse arbitral award.[87] In order to assess the reasoning of the Paris Court of Appeal, this article begins by setting out a brief summary of the underlying dispute.

Pursuant to three consultancy contracts (the Consultancy Contracts), Société Alstom Transport (Alstom) was assisted by a Hong Kong-based intermediary, Alexander Brothers, with its tender submissions for certain railway contracts with the Chinese State. Alstom was awarded three of these railway contracts. Having paid Alexander Brothers the initial installments due under the Consultancy Contracts, Alstom sought to avoid payment of the balance, purportedly on the basis that Alexander Brothers had failed to substantiate the services rendered.

Alexander Brothers submitted the dispute to International Chamber of Commerce (ICC) arbitration in Switzerland, and the ICC tribunal rejected Alstom's allegations of corruption and ordered it to pay the balance due to Alexander Brothers under the Consultancy Contracts (the ICC Award).[88] Alstom challenged the ICC Award before the Paris Court of Appeal, arguing that it was rendered in breach of the ethical and compliance rules stipulated in the Consultancy Contracts, which were specifically included to prevent corrupt practices. Alstom further alleged that the payment of any remuneration to Alexander Brothers as intermediary conflicted with the overriding objective of preventing corruption and, consequently, violated international public policy. Alstom also submitted that the sole purpose of the Consultancy Contracts was to circumvent existing anti-corruption regulations, and thus that the Consultancy Contracts could not be the basis of any payment order.

In line with the prevailing approach first adopted by the Paris Court of Appeal in the Belokon case in 2017,[89] the Court reiterated that, in analyzing questions of corruption, it was not limited to assessing the reasoning of the tribunal in the underlying award, nor bound by the examination of the arbitrators, but rather was empowered to undertake its own detailed examination of the underlying evidence and factual elements in determining whether the recognition or enforcement of an arbitral award violated international public policy in a manifest, effective and tangible manner.[90]

A summary of the parties' respective submissions in this regard is set out below.

Alstom argued that Alexander Brothers, without its knowledge, had resorted to corrupt practices vis-à-vis a certain number of Chinese public decision-makers, noting in particular, that:

- The documents supporting the invoices submitted to Alstom were very brief and lacked comments.
- The services reported were not proportionate to the remuneration claimed.
- There was no evidence that Alexander Brothers had more than one employee, nor that it had any proper business premises other than that employee's home.
- The accounts were not in order because expenses were paid using the shareholders' personal bank cards and no invoices were issued.
- Convictions for corruption had been handed down in China against the Minister of Railways and a chief engineer of that Ministry, both of whom held these positions at the time of the tenders.
- Alstom had acknowledged in front of U.S. judicial authorities that it had without its knowledge found itself involved in corrupt practices with public officials in other countries.[91]

Alexander Brothers submitted that:

- The subject matter of the Consultancy Contracts was lawful and the Consultancy Contracts themselves expressly included a prohibition against corrupt practices.
- Alstom failed to properly articulate its allegations of corruption, instead relying on inference and thus depriving Alexander Brothers of the right to defend itself.
- Numerous documents submitted during the hearing clearly established Alexander Brothers' actual performance of the Consultancy Contracts.
- The parties favored telephone exchanges over e-mails or other written forms of communication.
- Alstom had paid the initial installments on the basis of invoices and supporting documents issued by Alexander Brothers without questioning them, leading Alexander Brothers to conclude that its supporting documents were satisfactory.
- The deployed material and human resources were sufficient.
- The remuneration was proportionate to the services performed.
- The setting of the remuneration as a percentage was irrelevant and not indicative of corruption.
- Their accounts were complete and in good order.
- Since 2000, the Chinese government had launched an extensive anti-corruption program, with which neither of the parties had previously expressed any concerns.
- In accordance with the maxim *"nemo auditur propriam turpitudinem allegans,"*[92] Alstom could not rely on the fact that it had found itself engaged in corrupt practices on several occasions.

The Court recalled that the enforcing judge (*juge d'exequatur*) is not concerned with verifying whether a contract has been properly performed, but rather their role is to ensure that the recognition or enforcement of an award does not result in a manifest, effective, and tangible violation of international public policy.[93] Further, enforcement of an award cannot give rise to payments which would result in the financing of corruption or influence peddling.[94]

In this regard, the Court declared in unequivocal terms:

> *"The prohibition of the corruption of foreign public officials is one of the principles whose violation the French legal order cannot support even in an international context. It is therefore a matter of international public policy.*
>
> *The fight against corruption is an objective pursued, in particular, by the OECD Anti-Bribery Convention of December 17, 1997, which came into force on February 15, 1999, and by the United Nations Convention against Corruption signed in Merida on December 9, 2003, which came into force on December 14, 2005.*
>
> *According to the international consensus expressed in these texts, bribery of foreign public officials consists of directly or indirectly offering them or another person or entity an undue advantage in exchange for performing or refraining from performing an act in the exercise of their official functions, in order to obtain or retain a contract or other undue advantage in connection with international business activities.*
>
> *While both the French Republic and the People's Republic of China have criminal laws that address corruption, it is not within the mission of this court, dealing with an appeal against an order for the enforcement of an international award, to investigate whether a party to the arbitration may be found guilty of a corruption offence under the criminal provisions of a national legal order. Rather, the Court's duty is only to investigate whether the recognition or enforcement of the award would be inconsistent with the objective of combating corruption because the award would have the effect of financing or remunerating a corrupt activity. In this respect, the possible bad faith on the part of the award debtor is irrelevant, as long as the only issue at stake is the refusal of the French legal system to provide legal remedies for the payment of sums for an illicit reason."* [95]

By way of further explanation on the limitations of their mandate, the Court of Appeal judges recalled that the purpose of the proceedings was not to impose criminal penalties and, as such, the Court's concern was not with a positive finding of corruption, but instead with whether the evidence of corruption submitted is admissible and sufficiently serious, precise, and consistent (i.e., the "red-flag method").[96] In particular, the Court noted the following uncontested facts:

- The ICC tribunal was not clearly seized with the allegation that the Consultancy Contracts were obtained through corruption.
- By contrast, in the instant proceedings before the Court, Alstom no longer confined itself to alleging contractual breaches of the Consultancy Contracts. Instead, it now asserted that payments made, or due, under the Consultancy Contracts were intended for the payment of bribes to Chinese officials, without the knowledge of Alstom, and with the aim of procuring contracts under the relevant tenders.[97]

By reference to the "red-flag method," the Court attributed weight to the following facts and matters:

i. The date upon which Alexander Brothers was incorporated.

ii. The nature of previous business activity (if any).

iii. The number of employees.

iv. Alexander Brothers' business premises (if any).

v. The contemporaneous time of the services and of the facts.

vi. Any out-of-the-ordinary expenses (e.g., works of art or expensive furniture not included in the assets).

vii. The considerable compensation payable under the Consultancy Contracts to a company with no prior history of providing similar services.

viii. That such remunerations constituted the intermediary's sole source of revenue.

ix. That Mr. Liu Z., Minister of Railways from 2003 to 2011 and the intermediary's interlocutor, was sentenced in 2013 to life imprisonment for having received approximately 65 million yuan (approximately EUR 8.6 million) in bribes between 1986 and 2011.

x. That Mr. Z. Shuguang, deputy chief engineer of that Ministry, received the same sentence for having received 47 million yuan (approximately EUR 6.2 million) in bribes between 2000 and 2011.[98]

The Court also paid attention to Alstom's admissions that it had previously engaged in corrupt practices through the bribery of foreign public officials, including through “consultants”. Alstom formally acknowledged this corruption pursuant to agreements acknowledged by the U.S. Department of Justice in 2013 and 2014 and relating to incidents in Indonesia, Saudi Arabia, Egypt, and the Bahamas. The Court reasoned that this remained relevant and admissible, notwithstanding the fact that Alstom invoked it for its own benefit,[99] since the refusal to give force to a contract tainted by corruption necessarily transcends the interests of the parties.[100]

The Court concluded that “these elements, when taken together, provide serious, precise, and consistent indications that the sums paid by the investor to the intermediary financed and remunerated activities of corruption of public officials.”[101] Therefore, recognition or enforcement of the arbitral award ordering the investor to pay sums intended to finance or remunerate corrupt activities is contrary to international public policy.[102]

This decision, which is now the subject of a final appeal before the *Cour de Cassation*, is just one of many in this long-running dispute, with the case far from over. On April 6, 2020, the English Commercial Court rendered a decision allowing Alstom to file expert evidence on French criminal law in its challenge to the enforcement of the ICC Award in that jurisdiction.[103]

Conclusion

Faced with the investor’s admission and detailed explanations on bribery, the court had very little leeway but to set aside the exequatur of the award in France. The Court of Appeal’s decision in *Alstom*, raises a number of interesting questions, among which is the extent to which a domestic court should go behind the findings of an arbitral tribunal when considering attempts to resist the enforcement of an award. The decision raises further questions around the proper standard of proof to be applied when assessing evidence of corruption and whether the courts should adopt different methods of examining compliance with international public policy in cases involving allegations of corruption by investors (rather than by a State).

Author:

Ana Atallah
Partner
Paris
+33 (0) 176 704 000
aatallah@reedsmith.com

ICSID 4.0: What the new decade holds for ICSID arbitration

The time is ripe for the modernization of the procedural framework of the International Centre for Settlement of Investment Disputes (ICSID), the world's leading institution for investor-State dispute settlement (ISDS). Given the extensive scrutiny of ISDS in recent years, the need for meaningful reform has been discussed in various fora, including the United Nations Commission on International Trade Law (UNCITRAL), the International Court of Arbitration of the International Chamber of Commerce (ICC), and the International Bar Association (IBA). Collaboration and cross-pollination between these and other organizations have been at the core of ISDS reform efforts across the board.[104]

This article focuses on ICSID's proposed amendments to its current Arbitration Rules (Current Arbitration Rules), which have been described by ICSID Secretary-General Meg Kinnear as the "most extensive review of the rules to date."[105] ICSID's objective in amending its rules is to "modernize, streamline, make more user friendly, address new and systemic issues in ISDS, and reflect best practices."[106] The revisions come 14 years after the last update to the Arbitration Rules in 2006, leveraging lessons from hundreds of cases in ICSID's 50-year history.

The process to amend the Current Arbitration Rules requires ICSID to (i) invite Member States and the public to suggest topics to be considered as part of the review,[107] (ii) engage in a dialogue with Member States and public stakeholders, as examined below, and (iii) attain approval of the proposed amendments from two-thirds of the Member States of the Administrative Council.[108] The proposed amendments must remain consistent with the ICSID Convention, which is not presently subject to the amendment process.

ICSID has issued four working papers on its proposed amendments since August 2018.[109] Working Paper 4, issued in February 2020, contains fewer proposed changes compared to earlier drafts, reflecting the developing consensus arising from a dynamic consultation process in several series with Member States, the ICSID Secretariat, and the public (legal practitioners, academics, NGOs) – a true collective effort.[110]

Working Paper 4 may be the final iteration of proposed amendments before a vote on their enactment, as ICSID has now asked its Member States whether further consultation is necessary.[111] Yet, it remains possible that the current proposals may be subject to further change before a vote by the Members States.[112] ICSID had aimed to put the amendments to vote in the latter half of 2020 (with a view towards their final adoption in early 2021),[113] but the recent COVID-19 pandemic, among other factors, may delay that planned course of action.

As discussed in more detail below, the key focus of ICSID's proposed amendments to its Current Arbitration Rules (Proposed Arbitration Rules) is on achieving (1) enhanced transparency, and (2) procedural efficiency.

Enhanced transparency

Costa Rica rightly observed in its comments to ICSID that the "amendment of the Rules is an appropriate opportunity to include additional transparency elements that can strengthen the legitimacy of ISDS."[114] ICSID's Proposed Arbitration Rules seek to increase the transparency of arbitration proceedings by addressing, among other things: (a) the publicity of hearings; (b) the publication of awards, orders, and other decisions; (c) more stringent arbitrator and expert disclosure requirements; and (d) rules addressing the disclosure of third-party funding relationships.

Publicity of hearings

Under Current Arbitration Rule 32(2), "unless either party objects" and after consultation with ICSID's Secretary-General, arbitral tribunals may allow third parties to attend or observe all or part of the hearings. Working Paper 4 proposes that arbitral tribunals shall allow third parties to observe hearings, but it removes the need for tribunals to first consult with the Secretary-General, while maintaining the parties' veto rights regarding publicity of hearings ("unless either party objects").[115]

As under the Current Arbitration Rules, Working Paper 4 provides that when tribunals hold open hearings, they must establish procedures to prevent the disclosure of confidential or protected information to persons from the public observing hearings.[116] Working Paper 4 also proposes that ICSID shall publish recordings and transcripts of hearings, unless the other party objects,[117] a practice not contemplated under the Current Arbitration Rules.

Armenia had suggested a "compromise solution" between a party's veto and the tribunal's power to allow public hearings.[118] The above shows that Working Paper 4 reflects this recommendation.

Practically speaking, this means that if the Proposed Arbitration Rules are adopted, parties to ICSID arbitration will still be able to make their hearings accessible to the public if they so wish, but that will happen even more easily: the tribunal will no longer have to first consult with the Secretary-General on a request for publicity of a hearing. The new possibility offered to participants in ICSID arbitration to publish hearing transcripts and recordings, again if they so wish, will ensure even more transparency and legitimacy to the issues discussed at the hearing.

Publication of awards, orders, and decisions

The Current Arbitration Rules forbid ICSID from publishing the award without the consent of the parties.[119] Under the Proposed Arbitration Rules, consent to publication of an award in full is "deemed" to be given unless a party objects in writing within 60 days after the dispatch of the award.[120] By adding the "deemed consent" language, Working Paper 4 seeks to ensure that this approach is consistent with the ICSID Convention (which requires consent at article 48(5)),[121] and reflects comments from Member States, including Australia, that such provision should be reinstated for transparency reasons.[122]

Costa Rica also viewed the publication of awards as an important element of transparency.[123] The proposed amendments in Working Paper 4 reflect this position, as ICSID may publish excerpts of awards through a specific procedure and timeline, even if a party objects. Under the new proposal, ICSID must propose excerpts within 60 days from the date of the objection, the parties must comment on the excerpts within 60 days, and ICSID must then consider the comments and publish the excerpts within 30 days.[124] This is a change from the Current Arbitration Rules, which simply stipulate that, while ICSID "shall not publish the award without the consent of the parties," ICSID "shall, however, promptly include in its publication excerpts of the legal reasoning of the Tribunal".[125]

Further, Working Paper 4 proposes that ICSID shall publish redacted versions of orders and decisions subject to a specific procedure.[126] If redactions are not agreed by the parties, the tribunal will decide any disagreement over disputed redactions. Working Paper 4 protects the parties by requiring that "the Tribunal shall ensure that publication does not disclose any confidential or protected information," a category defined in detail elsewhere in the Proposed Arbitration Rules.[127] These are new additions to the Current Arbitration Rules.

Enhanced declarations of impartiality and independence for arbitrators and tribunal-appointed experts

When constituting an ICSID tribunal, each arbitrator must sign a declaration in the form provided in Current Arbitration Rule 6(2) by the end of the first session. The declaration provides, inter alia, that there should be no reason why the arbitrator should not serve on the arbitral tribunal, and that the arbitrator should commit to the confidentiality of the proceedings.[128] More specifically, the arbitrator "shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the [ICSID Convention]" and, importantly, the arbitrator shall disclose his or her "past and present professional, business and other relationships (if any) with the parties" as well as "any other circumstance that might cause [his or her] reliability for independent judgment to be questioned by a party."[129] This is a continuing obligation, as the arbitrator shall promptly notify ICSID's Secretary-General of any such relationship or circumstance as and when they arise during the proceeding.[130]

The draft amendments propose that arbitrators provide an enhanced declaration of independence and impartiality[131] that would include: (i) changes of circumstances relevant to the declaration made; and (ii) significant relationships within the preceding five years with the parties, the parties' counsel, tribunal members, or third-party funders.[132] In parallel, the ICSID and UNCITRAL Secretariats have been working on a binding code of conduct for arbitrators, aimed at ensuring consistency of ethical requirements across all the major sets of rules used for ISDS.[133] These collective steps aim to prevent conflicts of interest more effectively during the appointment process.

Working Paper 4 also proposes that tribunal-appointed experts sign a declaration of impartiality and independence,[134] a requirement not contained in the Current Arbitration Rules. Practitioners have questioned the impact of tribunal-appointed experts for the overall efficiency of proceedings. Such experts are not accountable to clients in the way party-appointed experts are, even though the parties pay for that work, and their appointment often increases the length and cost of proceedings and raises issues not advanced for decision by the parties. Reflecting these concerns, Korea commented that extensive use of tribunal-appointed experts might undermine the adversarial system and substantially increase the time and costs of proceedings.[135] Korea therefore proposed that party agreement be required for tribunals to appoint experts,[136] but that suggestion is not reflected in Working Paper 4.

Disclosure of third-party funding

Interestingly, while the Current Arbitration Rules are silent on third-party funding, the Proposed Arbitration Rules require that parties disclose if they have third-party funding, and if so, further disclose the name and the address of the third-party funder, as soon as a claim is commenced or a third-party funding arrangement is concluded.[137] This obligation would continue throughout the proceedings[138] and, as added in Working Paper 4, would extend to any non-party from whom a party has "directly or indirectly" received funds for the pursuit or defense of the proceedings.[139]

Working Paper 4 defines third-party funding as the provision of "funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding."[140] The disclosed information would be provided to potential arbitrators prior to their appointment, to avoid conflicts of interest and to assist arbitrators with completing their enhanced disclosure declarations discussed above (including any relationship arbitrators might have with funders).[141]

Crucially, the Proposed Arbitration Rules do not require the disclosure of the third-party funding agreement or its contents, which may be legally privileged and commercially sensitive. That said, following suggestions from several States, including Panama, Colombia, and Chile,[142] Working Paper 4 introduces a new provision enabling tribunals to order disclosure of further information regarding the third-party funding agreement (or the third-party funder) at any stage of the proceeding, if deemed necessary.[143] The tribunal may do so pursuant to its general power to call upon a party to produce documents or other evidence, contemplated elsewhere in the Proposed Arbitration Rules.[144]

In light of the above, compared with previous Working Papers, the latest amendments proposed in Working Paper 4 have therefore broadened the scope of disclosure of third-party funding relationships.

Stakeholders have adopted diverse points of view on the proposed amendments related to, and the new regulation of, third-party funding. Singapore considered the necessity to strike a balance between the need for all ISDS actors to have access to information, which avoids hidden conflicts of interest, and to preserve confidential commercial arrangements between a party and its funder.[145] Luxembourg noted that imposing heavy and irrelevant disclosure requirements might prevent small and medium-sized enterprises (SMEs) from accessing ICSID arbitration, as SMEs often need to rely on third-party funding to initiate arbitration proceedings.[146] The European Union and its Member States considered that the main features of third-party funding arrangements should be disclosed "where warranted and upon request, provided that the protection of confidential business or strategic information is ensured."[147]

Having funded a number of ICSID cases, Woodsford Litigation Funding (Woodsford) and Burford Capital (Burford) also provided comments to ICSID. Woodsford supported the existing position under the Current Arbitration Rules, which do not seek to "regulate" third-party funding directly, but allow tribunals the discretion to order disclosure of funding as appropriate.[148]

Woodsford stated that it is "not averse" to disclosure of the existence of funding or of Woodsford's identity, as contemplated under the proposed amendments,[149] but considered that "mandatory disclosure potentially has significant disadvantages for funded parties."[150] Disadvantages include increased costs in complying with this obligation and distracting satellite disputes by defendants, who strategize to attack the third-party funding arrangements or seek unwarranted security for costs, rather than focusing on the dispute in hand. Accordingly, Woodsford took the position that disclosure of third-party funding should be made to the tribunal and ICSID only (not directly to respondents), and be limited to the existence and identity of the funder.[151] It appears that Working Paper 4 does not adopt this position; instead, as discussed above, it proposes to broaden the scope of disclosure of third-party funding.

Burford endorsed the same view.[152] They added that disclosure of a funder's identity is not necessary to address potential arbitrator conflicts: there is no known ICSID arbitration in which an arbitrator was disqualified, or an award was challenged, due to conflicts of interest involving a third-party funder.[153] Vannin Capital (Vannin) noted that this is unsurprising, given that third-party funders have a system of conflict checks in place that stores information relating to arbitrators appointed in the cases they fund.[154] Vannin further noted that for commercial and reputational reasons, a party relying on third-party funding may not want to publicise its reliance on funding, a decision that should be analysed on a case-by-case basis.[155]

Procedural efficiency

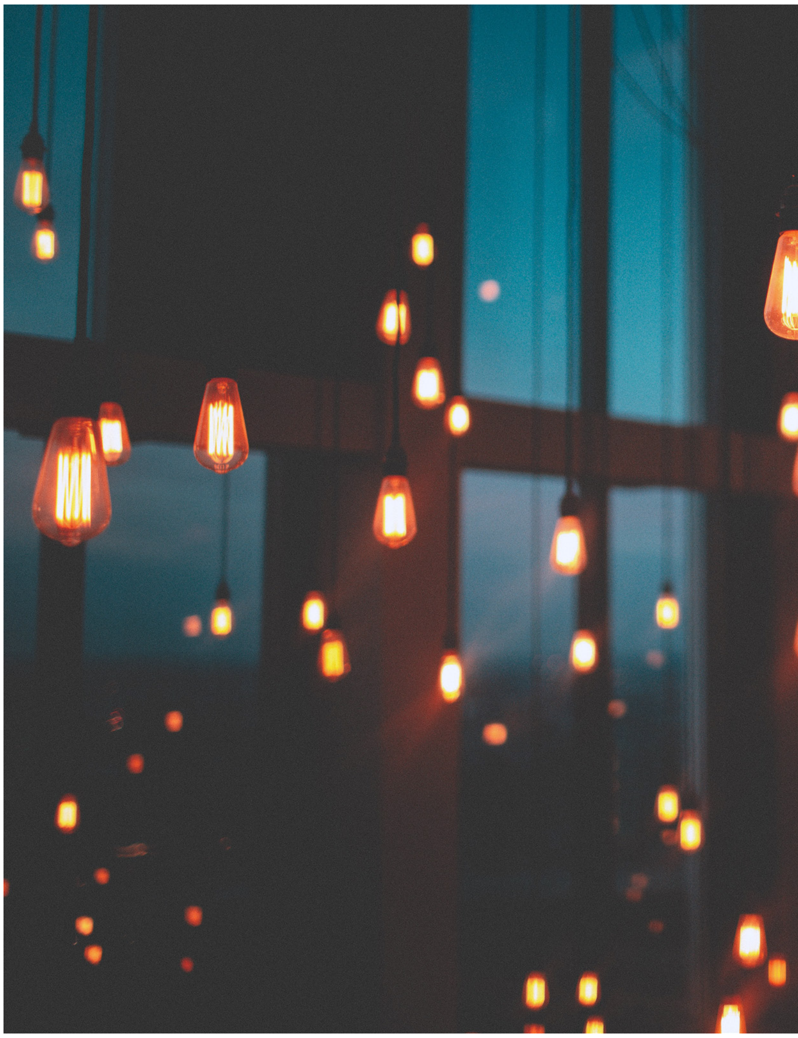
A persistent criticism of ISDS is that investor-State arbitrations have become unnecessarily protracted and costly.[156] According to statistics analysing decisions published since the end of 2012, the average period from the notice of arbitration to the award can be up to four years.[157] The average costs are also significant: US$6 million for claimant investors and US$4.8 million for respondent States.[158] The average claim is now US$720 million, and the average award ranges between US$110 and US$150 million.[159]

To counter this trend, the Proposed Arbitration Rules intend to boost cost-efficient, flexible, and (where desired by parties) expedited proceedings from start to finish. These include amendments addressing: (a) the constitution of tribunals and disqualification of arbitrators; (b) the scope and requirements for "special procedures," such as preliminary objections, bifurcation, and consolidation or coordination of arbitrations; (c) security for costs; (d) rules for expedited arbitration; (e) the tribunal's case-management powers; and (f) time requirements for issuing awards, orders, and other decisions.

Constitution of the tribunal and disqualification of arbitrators

Critics of ISDS have questioned the standard for removal of arbitrators, the practice of leaving disqualification verdicts in the hands of unchallenged arbitrators,[160] and the delays that parties sometimes achieve through unmeritorious arbitrator challenges.[161]

Under Current Arbitration Rule 9, a party must file an arbitrator challenge "promptly and in any event



before the proceeding is declared closed." The challenged arbitrator may then furnish explanations "without delay." The recent working papers propose a more comprehensive time schedule.[162] Under the Proposed Arbitration Rules, parties would be required to challenge an arbitrator within 21 days after the later of (i) the constitution of the tribunal[163] or (ii) the date on which they first knew or should have known the facts relevant to the disqualification.[164] A response by the other party would then follow within 21 days from the date of the challenge, and the challenged arbitrator would further be able to file a statement within five days of receiving the other party's response.[165] Thereafter, each party could file final written submissions within seven days.[166] The timeframe for the decision by the unchallenged arbitrators on the proposal to disqualify the arbitrator would remain the same as in Current Arbitration Rule 9(5), namely 30 days from the parties' final written submissions. The unchallenged arbitrators would be required to use their "best efforts" to meet the timeframe to render their decision on the arbitrator challenge.[167]

Still, criticism of ICSID's proposed amendments to the arbitrator challenge process remains a live issue. Commentators have argued that the proposed amendments do not sanction successive challenges by the same party to the same arbitrator, but ICSID considered this was unnecessary as tribunals already have discretion to award costs in relation to abusive conduct.[168] Canada suggested that it would be more productive to include reference to emerging codes of conduct applicable to arbitrators and other relevant guidelines on conflicts of interests,[169] but ICSID's working papers have not adopted this suggestion.

Some commentators also continue to voice concerns that the proposals fail to address the lack of diversity on arbitration panels, the repeat appointments from largely the same pool of arbitrators, and the perceived issues of "double-hatting" by arbitrators who also act as counsel in ISDS disputes.[170] Others argue that prohibiting double-hatting would "narrow the pool of qualified arbitrators and produce other unintended consequences that would outweigh any potential benefits of such an approach."[171] For now, ICSID's position is that the grounds for disqualification of arbitrators are contained in the Convention (not the Rules); hence, such considerations should be raised when discussing amendments to the ICSID Convention, a process not currently underway.[172]

Special procedures: manifest lack of legal merit, bifurcation, preliminary objections, and consolidation or coordination of arbitrations

Working Papers 3 and 4 envisage streamlining proceedings through the introduction of separate rules on early dismissals for manifest lack of merit, requests for bifurcation, early filings of preliminary objections, and specific procedures for preliminary objections with or without a request for bifurcation.[173] Current Arbitration Rule 41 contains a corresponding provision, but this only relates to the filing of preliminary objections generally. Current Arbitration Rule 41 thus lacks the structured separation of all types of special procedures, which have now been reflected in the recent proposals. One noteworthy addition to the Proposed Arbitration Rules relates to the factors governing a request for bifurcation. In this regard, ICSID has proposed a list of non-exhaustive considerations for tribunals that reflects the development of ICSID jurisprudence, namely: (i) whether bifurcation would materially reduce the time and cost of proceedings; (ii) whether it would dispose of all or a substantial portion of the dispute; and (iii) whether the preliminary objection and merits are so intertwined as to make bifurcation impractical.[174]

Another notable addition is the proposal that, on a motion to dismiss for manifest lack of legal merit, a presumption arises that "the loser pays" (i.e., the prevailing party should be awarded the costs of submitting or objecting to the motion). This would be the default position unless the circumstances would justify a different costs allocation.[175] There is no such presumption under Current Arbitration Rule 28 and the tribunal retains a wide discretion as to how to allocate costs, often resulting in the adoption of a middle-ground mitigated costs follow the event approach.

The Proposed Arbitration Rules also introduce novel procedures by which parties to two or more pending ICSID arbitrations could consolidate or coordinate related arbitrations.[176] Consolidation involves joining all aspects of the arbitrations involving the same contracting State with the result of one award; whereas coordination involves aligning specific procedural aspects of pending arbitrations, with those arbitrations remaining separate proceedings resulting in separate awards. The rules have been revised further for greater clarity in Working Paper 4, to expressly state that the terms of consolidation or coordination must be agreed by the parties before the ICSID Secretariat forwards them to the relevant tribunals.[177] These procedures are a welcome addition as they seek to address the increasingly complex nature of ISDS disputes, which often yield inefficiencies due to the lack of mechanisms to coordinate multiple parties and related proceedings in the same dispute.

Security for costs

The Proposed Arbitration Rules provide express guidance to tribunals on ordering security for costs, a feature not contained in the Current Arbitration Rules. Current Arbitration Rule 39 only allows parties to request "provisional measures" in broad terms. Although tribunals generally accept that this provision confers the power to order security for costs, in practice tribunals are reluctant to do so, applying a high threshold to the circumstances warranting such an order.[178] The Proposed Arbitration Rules now set out a non-exhaustive list of factors for tribunals to consider when making such an order. These factors include a party's ability and willingness to comply with an adverse costs decision, the effect of an order on a party's ability to pursue its claim or counter-claim, and the parties' conduct.[179]

The Proposed Arbitration Rules add that "the existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs."[180] This means that the mere existence of a third-party funding relationship is not an automatic ground justifying a security for costs order,[181] but it would be taken as evidence relating to a circumstance required to obtain an order for security for costs. This is consistent with views expressed by States such as Canada, Costa Rica, and Luxembourg, which had raised concerns about creating unreasonable impediments to accessing ICSID arbitration, particularly for SMEs.[182] In this regard, ICSID aims to attain a balance between investors and States by providing that security for costs will be available to "any party asserting a claim or counterclaim" (emphasis added).[183]

Expedited arbitration procedure

Another innovation of ICSID's proposed amendments consists of a completely novel set of rules providing for expedited arbitration.[184] This framework, which is subject to the parties' consent, includes accelerated deadlines for written submissions, page limits for memorials and counter-memorials (200 pages) and for replies and rejoinders (100 pages), and a maximum time limit for issuing awards (120 days after the hearing, with a possible 30-day grace period).[185]

Flexibility is a key feature of this proposal: parties may not only opt-in but also opt-out of expedited arbitration. This would occur either through the parties' joint notification to the tribunal or, in case only one party would wish to opt-out (a situation flagged by Jamaica),[186] the tribunal would be empowered to make an order after considering the complexity of issues, the stage of proceedings, and other relevant circumstances. Given the opt-in nature of the expedited system, practitioners expressed hesitation about the practicality of the framework. In particular, they asked how realistic it is that States, which may have incentives to delay proceedings and payment of awards, would ever agree to expedited arbitration.[187]

Interestingly, Armenia suggested that expedited arbitration should automatically apply to “low value claims,” using a “floor and ceiling” in terms of financial value.[188] The ICSID Secretariat has not echoed this proposal in Working Paper 4, thus accentuating the consensual nature of the expedited arbitration procedure.

Despite the above, the European Union and its Member States expressed regret over the lack of specific rules addressing the particular interests of SMEs (which are evidently different from the interests of States or large investor corporations) and making ICSID arbitration more accessible to SMEs.[189]

Electronic filings and increased case-management powers

Outside the expedited procedure, ICSID has proposed other new rules encouraging efficiency. One such proposal is the requirement for documents to only be filed electronically, unless the tribunal orders otherwise in special circumstances. This is in contrast to the present requirement for filings of signed originals and additional copies.[190]

Further, the first session on procedural matters would be held, either in person or remotely, within 60 days of establishing the tribunal.[191] While this time limit is replicated from Current Arbitration Rule 13, Working Paper 4 aims to streamline the process of holding the first session further: if the first session is not held within 60 days, the tribunal may decide to hold the session (i) among the members of the tribunal on the basis of parties’ written submissions or (ii) between the parties and the President of the tribunal alone.[192] The tribunal would then be required to issue a first procedural order within 15 days after the session.[193]

Lastly, ICSID’s proposals impose an express duty on the tribunal to conduct the arbitration in an expeditious and cost-effective manner. Relatedly, they empower the tribunal to convene one or more case-management conferences to identify uncontested facts, clarify and narrow the issues in dispute, or address any other procedural or substantive issue related to the resolution of the dispute.[194]

Deliberations and timing of decisions, orders, and awards

The length of ISDS proceedings has been a target of frequent criticism. Statistics show that the average length of tribunal deliberations in proceedings on jurisdiction and merits has reached 414 days.[195]

Working Papers 3 and 4 address this concern by proposing that tribunals render awards, orders, and decisions as soon as possible, and no later than: (i) 60 days after the last submission on an application for manifest lack of legal merit; (ii) 180 days after the last submission on a preliminary objection if it has been bifurcated; or (iii) 240 days after the last submission on all other matters.[196] The Current Arbitration Rules only require that tribunals render awards within 120 days after the closure of the proceedings (with a further possibility for an extension of 60 days).[197]

Moreover, in contrast to the lack of specification in the Current Arbitration Rules, the Proposed Arbitration Rules require tribunals to use their best efforts[198] to meet time limits to render orders, decisions, and awards; otherwise, they must advise parties of the “special circumstances” justifying the delay.[199] The meaning of “special circumstances” remains undefined in order to provide flexibility to arbitrators. In this regard, the European Union and its Member States recommended increasing the financial consequences of tribunals’ unjustified failures to meet the time limits for rendering decisions.[200] ICSID took this suggestion on board and confirmed in its clarification notes that it would track arbitrators’ non-compliance with deadlines on its website, and would postpone payment of arbitrators’ invoices if an order, decision, or award were not timely rendered.[201]

Finally, Working Paper 4 reflects Chile’s proposal for an express acknowledgment that the tribunal secretary may attend deliberations, and if any other person is to attend, then the tribunal must render a decision in this sense and notify the parties.[202] This position differs from the Current Arbitration Rules, which expressly state that only members of the tribunal shall take part in deliberations and no other person shall be admitted unless the tribunal decides otherwise.[203]

Conclusion: ICSID arbitration going into the new decade

In the context of heavy public scrutiny and numerous ISDS reform movements, users of investor-State arbitration may wonder how the future of ICSID arbitration will take shape. Some stakeholders and commentators have questioned whether ICSID's proposed amendments suffice to address the criticisms of ICSID as an institution and of ISDS more generally.[204] It is, however, clear that ICSID's reform efforts have sought to address the evolving interests and needs of ISDS and its various stakeholders through a collaborative process that considered the views of all interested parties. ICSID's plans for reform, particularly the modernization of its Arbitration Rules, constitute a noteworthy and encouraging development in the field of investor-State arbitration.

Users of ICSID arbitration – corporations, businesses, investors, States, State entities and the like – should bear these reforms in mind when entering the new decade of ISDS. In particular, they should be alert to the number of new opportunities (or roadblocks) ahead. Assuming that the amendments are enacted in a form that reflects the proposals made in ICSID's working papers, participants in ICSID arbitration should expect a significant change in the status quo – namely, through the development of tools that achieve more transparent and streamlined arbitration proceedings.

Authors:

Marine de Bailleul
Associate
London
+44 (0)20 3116 2768
mdebailleul@reedsmith.com

Corina Lefter
Associate
London
+44 (0)20 3116 373
clefter@reedsmith.com

Implementing the USMCA in the COVID-19 era: is your foreign investment adequately protected?

The United States Trade Representative, Robert Lighthizer, notified Congress on April 24, 2020, that Canada and Mexico have taken measures necessary to comply with their commitments under the United States-Mexico-Canada Agreement (USMCA), and that the USMCA will enter into force on July 1, 2020. The USMCA will replace the North American Free Trade Agreement (NAFTA) after more than 25 years of existence. Importantly, the USMCA removed several investor protections with respect to investor-State dispute settlement (ISDS).

The most significant change in the USMCA was Canada's withdrawal from ISDS completely. Investors in the region must now re-evaluate whether their investments are adequately protected and decide whether treaty shopping is necessary to ensure their investments are safe from indirect expropriation and afforded other common investment treaty protections. This article provides a brief background on the significant investor protections NAFTA provided, then compares the same protections under the USMCA.

Outgoing Mexican President Enrique Peña Nieto, U.S. President Donald Trump, and Canadian Prime Minister Justin Trudeau sign the agreement during the G20 summit in Buenos Aires, Argentina, on November 30, 2018.

Background

On November 30, 2018, the United States, Canada, and Mexico signed the USMCA.[205] The USMCA succeeds NAFTA – the first regional trade treaty between the United States, Mexico, and Canada,[206] which entered into force on January 1, 1994. Since the signing of NAFTA, trade between the three parties more than tripled, amounting to over a trillion dollars of trade in 2019 alone.[207]

NAFTA was the first regional trade agreement that included an extensive investor-State dispute chapter (Chapter 11) – something normally only found in bilateral investment treaties. Investors have initiated nearly 70 international arbitrations under the protections of NAFTA against the signatory parties.[208] NAFTA slowly removed the protectionist regime that Mexico once had toward foreign investments and paved the way for a reform in the Mexican hydrocarbon sector, which had seen a monopoly of Petróleos Mexicanos (PEMEX) for 75 years.[209] On August 11, 2014, Mexican President Peña Nieto signed into law the 21 component parts of a comprehensive energy reform in its hydrocarbon and electricity sectors,[210] which opened the door to an agglomeration of foreign investments into the country by multinational corporations, many of which are protected by NAFTA's regime.

NAFTA's Chapter 11 investor-State dispute mechanism helps ensure that the billions of dollars invested in these three countries will not end in investor-State disputes in the host country's courts, but rather in front of independent arbitrators experienced in investor-State disputes. Chapter 11 of NAFTA contains several investor protections, including a prohibition against expropriation without compensation, unfair and inequitable treatment, and discriminatory treatment.[211]

Although the USMCA also includes an investment chapter (Chapter 14), some commentators seem to suggest the modified USMCA provisions remove or limit an investor from bringing specific claims it could have brought under NAFTA. The most notable change is that Canada completely opted out of international arbitration as a dispute resolution forum under the USMCA.[212] Investors can only bring USMCA claims against Canada in its local courts.[213]

Investor protections under the USMCA

Similar to NAFTA, the USMCA contains several protections for foreign investments made in the region, including:

- Under article 14.4 of the USMCA, "Each party shall accord to investors of another party treatment no less favorable than that it accords, in like circumstances, to its own investors…"[214]
- Under article 14.5 of the USMCA, "Each party shall accord to investors of another party treatment no less favorable than the treatment it accords, in like circumstances, to investors of any other party or of any non-party…"[215]
- Under article 14.6, "Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[216]
- Under article 14.8, the USMCA also provides, "No party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation)…"[217]

However, as explained below, bringing these claims to international arbitration may now be more limited under the USMCA.

Limits to international arbitration

No investor-State arbitration for claims against Canada

As noted, the most significant change under the USMCA is Canada's withdrawal from investor-State arbitration, whether by Canadian nationals or by U.S. or Mexican nationals against Canada.[218] Under the USMCA, although an investor may bring a claim against Canada for violating the USMCA in the local courts of Canada, an investor may not initiate an international arbitration case against Canada for breaching a provision under the treaty.[219] This severely limits the rights of an investor, including being able to nominate an independent arbitrator experienced in the specific industry where the dispute arose, rather than a judge of the host State whose liability is under review. Instead, Canada, after being a respondent in 28 claims under NAFTA – the most of the three parties – opted out of investor-State arbitration under the USMCA completely.[220]

Importantly, this creates uncertainty around how Canadian courts will interpret the investor protections provided under the USMCA. For example, in Canada (Attorney General) v. S.D. Myers Inc., a federal court in Canada, Judge Michael A. Kelen presiding, noted the "Canadian jurisprudence that examines the limited jurisdiction for judicial review of a NAFTA Chapter 11 arbitration" consisted of two previous Canadian court decisions, which relied on Canadian principles of interpretation.[221] Notably, the Canadian court did not rely on any decisions or awards issued in an investor-State arbitration.

That said, the Canadian courts often resort to the Vienna Convention on the Law of Treaties (the VCLT) to interpret Canadian treaty obligations in cases interpreting international tax treaties,[222] extradition,[223] human rights,[224] and investment treaties.[225] At least two Canadian decisions applied the international law on treaty interpretation over domestic interpretive rules.[226] Given the limited jurisprudence on the merits of an investor-State dispute in the Canadian courts, however, it is uncertain whether a Canadian court will follow, as persuasive authority, previously issued awards or decisions in treaty arbitration to determine the extent of the treaty protections; or whether a Canadian court will avoid analyzing sensitive measures taken by the State under a variation of a sovereign immunity doctrine.[227] Thus, any degree of predictability an investor previously had under NAFTA arbitration may be limited by submitting its case to the Canadian courts.

No investor-State arbitration for certain claims against the United States and Mexico

With respect to investments in the United States or Mexico by nationals of the other country, investors may initiate international arbitration if (i) the investment is a "covered government contract" in a "covered sector" as defined in the USMCA; or (ii) the investment is not a "covered government contract" in a "covered sector" but it is alleged that the respondent State breached (a) article 14.4 (national treatment), (b) article 14.5 (most-favored nation treatment), or (c) if it is alleged that there has been a breach of the prohibition on direct expropriation without compensation under article 14.8 (expropriation and compensation).[228]

This may contrast with the protections offered under NAFTA, which permit covered investors to bring claims for any violation under section A of Chapter 11 to investor-State arbitration.[229] For instance, unlike an investor protected by NAFTA, a covered investor under the USMCA may (with certain exceptions discussed below) be limited in bringing a claim under the most common causes of action in investor-State arbitration – that is, that a respondent State treated its investment unfairly or inequitably, failed to provide full protection and security, or indirectly expropriated its investment without compensation.[230]

Mexico-United States disputes related to covered government contracts

Under Annex 14-E of the USMCA, investors from the United States or Mexico who are a party to a "government contract" or "engaged in activities in the same covered sector" may initiate an international arbitration related to a breach of any provision in the USMCA.[231]

The USMCA lists "covered sector[s]" to include: (i) activities with respect to oil and natural gas that a national authority of an Annex party controls, such as exploration, extraction, refining, transportation, distribution, or sale; (ii) the supply of power generation services to the public on behalf of an Annex party;

(iii) the supply of telecommunications services to the public on behalf of an Annex party; (iv) the supply of transportation services to the public on behalf of an Annex party; or (v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex party.[232] Consequently, although the USMCA may limit certain claims from being submitted to investor-State arbitration (as explained above), several contracts signed with the government in the sectors listed above may still be submitted to investor-State arbitration under the USMCA.

Exhaustion of remedies and statute of limitations

Another contrast to NAFTA is the USMCA's 30-month period for the exhaustion of local remedies before an investor can seek international arbitration for treaty violations.[233] Under article 14.D.5 (Conditions and Limitations on Consent), "No claim shall be submitted to arbitration under [the USMCA] unless: (a) the claimant […] first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to measures alleged to constitute a breach […]" or "(b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding [initiated before a competent court or administrative tribunal of the respondent] was initiated."[234] Article 14.D.5 also provides a four-year limitation to commence a claim under the USMCA on which the claimant knew or should have known of the alleged breach.[235] Aside from delaying the submission of a dispute to international arbitration, an exhaustion of remedies clause, such as 14.D.5, may impose a financial burden on claimants to incur thousands if not millions of dollars in costs arising out of domestic court proceedings before having to do the same in investor-State arbitration.

Importantly, footnote 25 of Chapter 14 of the USMCA provides that "[t]he provisions in subparagraphs (a) and (b) [of article 14.D.5, which relate to the exhaustion of remedies] do not apply to the extent recourse to domestic remedies was obviously futile."[236] What constitutes "obviously futile" may be an issue international tribunals will have to consider in the near future.

More definitions

Unlike NAFTA, the USMCA defines terms within treaty protections, such as "like circumstances" under the most-favored nation treatment and national treatment clauses;[237] "fair and equitable treatment"[238] and "full protection and security" under the minimum standard of treatment clause;[239] as well as dedicating a full annex to describing what is "direct" and "indirect" expropriation.[240] The USMCA also defines "governments or authorities" to mean the organs of a party, "consistent with the principles of attribution under customary international law."[241]

Similarly, in comparison to the definition of "investment" in NAFTA,[242] under the USMCA, "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[243] The USMCA also provides that a natural person who is a dual citizen is to be deemed exclusively a national of the State of his or her "dominant and effective citizenship."[244] A permanent resident of a party is "exclusively a national of the party of which that natural person is a citizen."[245] NAFTA did not contain these restrictions.

Depending on whether these definitions are consistent with how international arbitration tribunals have interpreted these provisions, an investor's protection under these clauses may deviate from its protections under NAFTA.

Procedural changes: expedited and transparent proceedings

Procedurally, the USMCA is much more detailed than NAFTA, providing specific procedures for the selection of arbitrators (14.D.6); the conduct of the arbitration (14.D.7); and providing specific deadlines to encourage an expedited proceeding.[246] For example, article 14.D.7(11) provides that if the disputing parties fail to take any steps in the proceeding for more than 150 days, or such period as they may agree with the approval of the tribunal, the tribunal shall notify the disputing parties that they shall be deemed to have discontinued the proceedings if the parties fail to take steps within 30 days after the notice is received.[247]

The USMCA also expressly demands transparency, requiring respondent States to make (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party; (d) minutes or transcripts of the hearings of the tribunal, if available; (e) orders, awards, and decisions of the tribunal all available to the public in a prompt manner.[248] The USMCA also expressly requires that hearings be open to the public.[249] Chapter 11 of NAFTA does not include several of these procedures and express obligations for transparency in proceedings, which are generally enumerated by the arbitration institution selected by the parties.[250]

Investments currently covered by NAFTA

Investors currently covered under NAFTA will be able to commence arbitration under its terms for a legacy period of three years from the date NAFTA is terminated and the USMCA enters into force.[251] Given these impending changes to the levels of protection offered to intra-North American investment, however, investors must be mindful of whether their investments will benefit from this three-year sunset period or whether they should look for alternative methods of reducing investment risk.

Structuring for investment protection

Investors originally looking to protect their foreign investments under NAFTA must assess the risks with potentially losing several protections under the USMCA, which can be accessed through proper investment structuring. Each country has signed several bilateral investment treaties (BITs), as well as free trade agreements (FTAs) with investment chapters, each containing several of the protections afforded under NAFTA.[252]

When considering how to structure the investment, companies should consider the number of treaties signed by the country, the tax implications of structuring in the country, the ease of business and requirements to own an investment in the country, the political risks related to investing in the country, and the treaty protections afforded under the BIT or FTA.

The World Bank issues “ease of doing business” rankings[253] each year, evaluating several key considerations, including the ease of starting a business in the country, registering property, obtaining credit, protecting minority investors, taxes, trading across borders, enforcing contracts, and resolving insolvency.[254] Moreover, investors should also consider any limitations to arbitration under the target treaty such as “fork in the road”[255] and “denial of benefits”[256] clauses.

Conclusion

The termination of NAFTA was a major goal of President Trump since his campaign trail for the 2016 elections. Although it may be debatable whether the USMCA is a more favorable agreement for the United States in other aspects, one thing is clear: investors once protected under NAFTA will be afforded more limited protection under the USMCA. Accordingly, investors otherwise covered under NAFTA should consider measures now to ensure the continued protection under the USMCA, including through structuring (or restructuring) their investments to ensure protection under another treaty signed by the relevant host State.

Author:

Danny Avila II
Associate
Houston
+1 713 469 3896
davila@reedsmith.com

What if the future of international investment law lay in Africa?

According to the World Investment Report released by the United Nations Conference on Trade and Development (UNCTAD) in 2019, Africa has managed to escape the global decline in foreign direct investment (FDI) for three consecutive years. In addition, the continent's investment inflows rose to US$46 billion in 2018, an increase of 11 percent from the previous year.[257] The report stresses that while FDI flows were small by global standards, the ratio of FDI to gross domestic product was high, signalling the importance of FDI to the continent's economic growth. The general interest of investors in the African continent is beyond doubt. One need only look, for instance, at the steady increase of China's investment outflows over the last decade or the multiplication of projects not only in the extractive and commodities sectors (where FDI has been traditionally focused), but also in the manufacturing and services sectors (in particular the sale and distribution of electricity, gas, and water).

Since the advent of globalization, international investment law has been shaped to facilitate capital flows from capital-exporting countries to capital-importing ones. This objective was achieved through an ever-increasing effort to provide guarantees and protections to investors through bilateral and multilateral investment treaties (BITs and MITs). In achieving this objective, international investment law has developed a certain number of protection standards, including obligations to provide fair and equitable treatment (FET), and refraining from discrimination vis-à-vis host State (national treatment) or third State nationals (most-favored nation treatment). These substantive principles are enforced through procedural remedies in the form of investor-State dispute settlement (ISDS), which consists predominantly of international arbitration. For years now, ISDS has been criticized by States and non-governmental organizations on the grounds of perceived lack of legitimacy, lack of transparency, and, more broadly, lack of democratic representation and accountability (related developments include the denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals (the Washington Convention) by some Latin America countries).[258]

The responses to such criticisms levelled against international investment law and ISDS have been multiple and varied. As an illustration, the European Commission has launched a project to set up an investment court system with an appellate mechanism composed of publicly appointed judges.[259] This new system is designed to replace international investment arbitral tribunals and is already included in the European Union's Comprehensive Economic and Trade Agreement (CETA) with Canada and the EU-Vietnam Free Trade Agreement.[260]

Another example is the amendment of the arbitration rules of the International Center for Settlement of Investment Disputes (ICSID), which is currently underway, and which aims to: (i) modernize the rules; (ii) make the process increasingly time- and cost-effective while maintaining due process and a balance between investors' and States' interests and rights; and (iii) make the procedure less paper-intensive, with greater use of technology for transmission of documents and case procedures.[261]

A last illustration of the attempt to reform ISDS is the establishment of the United Nations Commission on International Trade Law (UNCITRAL) Working Group

III on ISDS Reform.[262] The group was established in late 2017, and given a broad mandate to identify concerns regarding ISDS procedure (rather than the substantive protections) and develop recommended solutions for UNCITRAL. It started work on certain key areas of concern, notably the cost and duration of ISDS proceedings, third-party funding, and transparency, before moving to more specific solution-oriented questions. These include a potential appellate mechanism for ISDS, a standing multilateral investment court, alternative dispute resolution, treaty interpretation by States, security for costs, means to address frivolous claims, multiple proceedings, counter-claims, and reflective loss and shareholder claims. While it is still too early to establish what consensus, if any, will be reached following the group's multilateral discussions involving high-level input from all participating governments, this initiative is a striking reminder of the perception, on a global level, of the need for ISDS reform.

On the African continent, often considered a continent of "rule takers" (i.e. African countries tend to conclude BITs following pre-drafted treaty models from their capital-exporting partners) rather than "rule makers," several innovative solutions and initiatives have come to life over recent years. In light of such initiatives, one wonders if the future of ISDS, and of international investment law more generally, lies in Africa. Our presentation and analysis of the initiatives coming out of Africa is divided into two parts: (1) examining the substantive standards of protection; and (2) addressing the enforcement of such substantive protections through ISDS mechanisms.

Setting a new paradigm for investment protection standards

Reflecting an alternative vision of the future of international investment law, the African initiatives take the form of new investment instruments at the national, bilateral, regional, and continental levels.

It should be noted at the very outset that the protection of foreign investments at the regional level raises an additional level of complexity in Africa, given the numerous regional economic communities that co-exist. Some African States retain either dual (28 States), triple (20 States), or (in the case of the Democratic Republic of Congo) quadruple membership in different regional economic communities.

While it is difficult to navigate the web of binding and non-binding instruments – not to mention that those instruments may also overlap with each other or with national laws – three basic trends can be distinguished when looking at the substantive protection of investment law: (a) the notion of sustainable development, (b) the rise of obligations upon investors; and (c) the limitation of the concept of fair and equitable treatment.

Sustainable development

Together with protecting foreign investors, host State development has been one of the stated objectives of international investment law. However, under the pressure of the climate crisis and in light of the general move towards non-economic indicators to measure national wellbeing, sustainable development is a new paradigm in which all the other standards and protections are being reassessed.

On the national level, the Egyptian Investment Law No. 72 of 2017 provides that foreign or domestic investment must contribute to Egypt's sustainable development and abide by responsible business conduct standards.[263] On the bilateral level, the 2016 Nigeria-Morocco BIT is the perfect example of a new generation BIT where sustainable development is set as an overreaching objective: in order to be protected, an investment must contribute to the host State's sustainable development (article 1).[264] This requirement takes the condition of the *Salini* test of contribution to the economic development of the host State to a whole new level.[265]

On the regional level, article 3 of the 2018 Common Investment Code of the Economic Community of Western African States (ECOWAS) (which has not yet entered into force) expressly states as an objective "the promotion of investment that supports the sustainable development of the region."[266] Similarly, article 2.2 of the 2006 Protocol on Finance and Investment of the Southern African Development Community (SADC) (in force) states that its objective is "to achieve sustainable economic development and growth and eradication of poverty."[267] The SADC has also developed its Model BIT – a non-binding instrument that Member States can use to negotiate and conclude BITs.[268] In 2017, the updated Model BIT made multiple references to the notion of sustainable development throughout its preamble and other provisions.

On the continental level, an interesting initiative is the 2015 Pan-African Investment Code (PAIC),[269] which was drafted under the auspices of the African Union.[270] The PAIC, which constitutes an important step in Africa's structural transformation, provides for the adoption of an investment policy framework that promotes FDI while protecting the interests of African countries. Its non-binding character calls for influencing the content of other regional instruments to achieve greater impact. The PAIC is also the platform that forms the basis for discussion for a future investment protocol to the African Continental Free Trade Area. The PAIC puts the long-term goal of securing sustainable development at its core (see section 8 of the preamble).

Obligations on investors

The second trend is the development of a series of vertical and horizontal obligations that fall upon investors. Given that the main objective of international investment law has traditionally been the protection of the investor, investment treaty obligations tended to apply to the host State rather than the investor (except, of course, obligations regarding compliance with national law and, in particular, anti-corruption). Several African instruments have changed tack on this issue, requiring investors to abide by a wide range of rules, principles, and regulations.

The 2017 Egyptian Investment Law, for example, requires that investors have to invest a percentage of their profits in social development systems outside their project, such as environment protection, healthcare, social care, cultural care, and technical education.[271] The 2016 Nigeria-Morocco BIT provides for obligations on new investors in both the pre-establishment and the post-establishment phase, including, for instance, the performance of environmental assessment screening and of social impact assessment (article 14), the application of the precautionary principle (article 14), and the compliance with environmental, labor, and human rights standards (article 15 and article 18).[272]

On the regional level, in 2017 the Common Market of Eastern and Southern Africa (COMESA) issued its revised Common Investment Agreement (yet to enter into force), setting a wide range of obligations in relation to environmental, social, and human rights standards.[273] The 2018 ECOWAS Common Investment Code followed the same pattern.[274] Similarly, the 2017 SADC Model BIT lists a series of obligations to comply with national and international standards relating to corruption, transparency, environment and social impact, human rights, and corporate governance. Finally, the PAIC stipulates obligations regarding issues such as corruption, corporate governance, corporate social responsibility, business ethics, human rights, and natural resources (articles 19 to 24).[275]

Fair and equitable treatment

The precise content of FET has been debated in international investment law. Claimants routinely invoke FET in ISDS proceedings, often in parallel with other provisions, as a catch-all protection. This practice has seen its fair rate of success. The frequent application of the FET standard has revealed its protective value for foreign investors, but has also exposed uncertainties and risks. First, many tribunals have interpreted the FET standard broadly to include a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, to ensure due process in decision-making, and to respect investors' legitimate expectations. This extensive list of obligations is perceived as especially demanding for developing States. The second issue concerns the appropriate threshold of liability, that is, how grave or manifest a State's misbehavior must be to become FET-inconsistent. Thirdly, the application of FET provisions has generated what some perceive as a need to balance investment protection with competing policy objectives of the host State and, in particular, with its right to regulate in the public interest.

Some States and tribunals have argued that the FET standard is an expression of the minimum standard of treatment of aliens under customary international law.[276] However, where the FET obligation is not expressly linked textually to the minimum standard of treatment, many arbitral tribunals have interpreted it as an autonomous, or self-standing concept affording protection beyond the customary minimum standard.[277]

This informs the trend, especially in emerging and developing economies, to limit the scope of protection of investors and curb in particular what they perceive as a broad interpretation of FET. African States have pursued this goal through several means. The first and most radical approach has been to abandon completely the FET clause. This was the choice taken by the 2018 ECOWAS Common Investment Code, the annex of the SADC Protocol on Finance and Investment (revised in 2016), and the PAIC. A second approach has been to swap the FET standard for the standard of "fair administrative treatment," which was perceived to be lower. This is the path taken by the South African Protection Investment Act of 2015,[278] the 2017 updated SADC Model BIT and the 2017 revised COMESA Common Investment Agreement. The third and final approach has been to subject the definition of FET to strict conditions. The Rwanda-United Arab Emirates BIT (2017), for instance, provides a list of measures that would constitute a breach of the FET obligation (e.g., denial of justice in criminal, civil, or administrative proceedings; fundamental breach of due process in judicial proceedings; abusive treatment; etc.).[279]

Innovations in Africa regarding ISDS

On a procedural level, the new African instruments have also brought innovations aimed at rebalancing ISDS. It should be noted, however, that the lack of consensus among African States is considerably more striking in this area compared to the substantive standards discussed above. An example of the current tension between States can be found in the 2017 updated SADC Model BIT, which includes no ISDS mechanism in its main body, but adds (at the request of certain Member States) a provision on ISDS in an annex. The innovations tend, roughly, to follow two trends: either (a) excluding ISDS completely or (b) imposing restrictive conditions to its application.

No ISDS clause or 'Africanized' ISDS clause

Traditionally, ISDS provisions provide for international arbitration under one or several of the internationally recognized sets of procedures, such as the arbitration rules of ICSID (including the ICSID Additional Facility Rules, which concern disputes that are investment disputes between parties, one of which is not an ICSID Member State or a national of an ICSID Member State) or the UNCITRAL Arbitration Rules.

However, a certain number of recent African investment instruments have chosen not to provide for such an arbitral mechanism. One such example is the annex of the SADC Protocol on Finance and Investment (revised in 2016), which bars ISDS through international arbitration and provides for settlement of investor-State disputes through domestic courts or tribunals of the host State.[280]

While the PAIC does not bar ISDS through arbitration, article 42(d) expressly favors the choice of a public or private African arbitral institution to supervise the arbitration.[281] In this respect, it is noteworthy that the Organization for the Harmonization of Corporate Law in Africa (OHADA from the French "*Organisation pour l'harmonisation en Afrique du droit des affaires*")[282] has recently reformed its arbitration law to refer expressly to investment disputes.[283] Likewise, the revised COMESA Common Investment Agreement, issued in 2017, stipulates that disputes brought by investors from a COMESA Member State may be submitted to the COMESA Court of Justice or a tribunal constituted under such Court, provided that local remedies have been exhausted.

Restrictive conditions to ISDS

Other instruments, while refusing to go so far as to abandon ISDS through arbitration completely, have elected to impose additional barriers to accessing ISDS. For example, on a bilateral level, the 2016 Nigeria-Morocco BIT States that investor-State arbitration is available only if the dispute cannot be settled within six months by the Joint Committee, the main (political) body established under the BIT (article 1(3) and article 18).[284] Similarly, the 2002 China-Ivory Coast BIT requires the exhaustion of local remedies before going to arbitration.[285]

On a regional level, the revised 2017 COMESA Common Investment Agreement provides a far more uncommon approach; setting a three-year period during which investors should have recourse to domestic courts before submitting the dispute to arbitration (article 36.4).

Conclusion

To conclude, it is undeniable that we are currently witnessing an unprecedented surge of innovation across the African continent in relation to new investment law standards and principles. There is, of course, still a long way to go before the various instruments, the majority of which are not yet in force, become binding upon foreign investors. However, the fact that innovations are actually taking place in Africa tends to show that the continent will have a strong voice in the debate over the future of international investment law.

Author:

Clément Fouchard
Partner
Paris
+33 (0)1 76 70 40 40
cfouchard@reedsmith.com

Is it time to future-proof against the end of intra-EU BITs?

The EU has adopted an increasingly hostile stance towards investor-State dispute settlement (ISDS) between its Member States. This article sets out a brief history of the EU's recent efforts to end ISDS within the union, before considering their likely effect on European investors holding investments in other EU Member States. The article concludes by setting out some of the ways that European investors can look to protect their existing investments and examining how Brexit may represent an opportunity for the United Kingdom to further differentiate itself as a hub for protecting foreign investment.

The crystallization of the EU's efforts to terminate intra-EU BITs

On March 6, 2018, the Court of Justice of the European Union (CJEU) published its preliminary ruling in Slovak Republic v. Achmea BV (Achmea Ruling), which held that the application of the investor-State dispute settlement provision at article 8 of the Netherlands-Slovakia bilateral investment treaty (BIT) was incompatible with EU law.[286] In particular, the CJEU held that articles 267 and 344 of the Treaty of the Functioning of the European Union must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one Member State may bring proceedings against another Member State before an arbitral tribunal.[287]

Thereafter, the European Commission issued a communication to the European Parliament and Council on the "protection of intra-EU investments" on July 19, 2018 (Communication).[288] With reference to the Achmea Ruling, the Communication notes that the CJEU has "confirmed that investor-State arbitration clauses in intra-EU BITs are unlawful." This finding was stated to be consistent with the CJEU's view that "intra-EU BITs are incompatible with Union law."[289]

On January 17, 2019, the European Commission website published declarations from all 28 EU Member States in which each committed to terminating its intra-EU BITs by December 6, 2019 in order to comply with the Achmea Ruling.[290] The days preceding this saw three separate variations of declarations from Member States on the legal consequences arising out of the Achmea Ruling (together, January Declarations).[291]

On October 24, 2019, the European Commission announced that the EU Member States had reached agreement on a plurilateral treaty for the termination of intra-EU BITs (Plurilateral Termination Treaty).[292] The text of a draft of the Plurilateral Termination Treaty, which was subsequently leaked, states simply that intra-EU BITs are terminated.[293]

The Plurilateral Termination Treaty has not yet entered into force, though the text of the draft suggests that it will only require ratification by two Member States to become effective (as between them and others that eventually ratify the treaty).[294] Furthermore, the draft provides for the provisional application of the Plurilateral Termination Treaty to any BIT by agreement of the State Parties to the BIT in question.[295]

The draft text of the Plurilateral Termination Treaty mirrors the treatment of sunset clauses in the January Declarations,[296] noting that the same "shall not produce legal effects."[297] Moreover, the draft holds that a BIT will cease to serve as a legal basis for arbitration proceedings as from the date on which the last of its signatories became a Member State of the European Union.[298] Whilst investment treaty arbitration tribunals have been bullish in rejecting objections made in reliance on the Achmea Ruling,[299] it remains to be seen whether tribunals will give effect to these provisions as a matter of public international law.[300] Notably, claims under the Energy Charter Treaty (ECT) are specifically carved out of the draft Plurilateral Termination Treaty, with the draft text noting that "[t]he Union and its Member States will deal with this matter at a later stage."[301] The ECT will accordingly remain in force for intra-EU claims pending the resolution of that issue by the EU and its Member States.

The Achmea Ruling, January Declarations, and inevitable future ratification of the Plurilateral Termination Treaty increase the enforcement risk for awards rendered under intra-EU treaties. The draft Plurilateral Termination Treaty implicitly includes ongoing enforcement proceedings within its definition of "Pending Arbitration Proceedings," and requires signatories to "ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it."[302] Whether non-EU countries will grant such a request remains to be seen.

Future-proofing through the investment structure

The Plurilateral Termination Treaty marks the culmination of the EU's long-running efforts to put an end to intra-EU BITs. Whilst claims remain possible, at least pending actual termination of intra-EU BITs and even thereafter dependent on the effect given to the Plurilateral Termination Treaty by international tribunals, obstacles to enforcement will impair the enforceability of awards resulting from such claims, at least in the EU. As a safeguard, European investors in other EU Member States will be well-advised to consider alternative means of investment protection (ideally prior to making an investment), including incorporating (or reincorporating) their investment vehicle in a non-EU jurisdiction that has applicable investment treaties with EU host States.

In determining the suitability of a jurisdiction for incorporation, investors should be mindful that to qualify for treaty protection, the investor will need to demonstrate that the tribunal has jurisdiction under the applicable treaty to determine the dispute.

A foreign investor seeking treaty protection must first comply with a nationality requirement that the investor be a national of the State party to the investment treaty that is not the host State. Certain investment treaties go further to exclude shell or mailbox companies from treaty protection through the use of so-called "denial of benefits" clauses which permit the host State to deny the benefits of the treaty to a company which does not have an economic connection to the State on whose nationality it relies.[303] Other treaties include within the definition of "investor" a requirement that the investor's corporate seat be within the territory of the State that is not the host State.[304]

Secondly, foreign investors must have made a qualifying investment in the host State. The term "investment" is broadly defined in investment treaties, generally covering "every type of asset" or "every form of investment," and has been held to include shares or other forms of participation in local companies, real and contractual property rights, intellectual property rights, bonds and concession contracts, for instance, for the exploitation of mineral or hydrocarbon resources. Some tribunals, in particular in ICSID arbitrations, have also held that an investment must satisfy certain criteria in order to be a qualifying investment. These include: (i) a contribution or commitment by the investor; (ii) performance of the project for a certain duration; (iii) the existence of a risk for the investor; (iv) a significant contribution to the economic development of the host State; and (v) regularity of profit and return.[305]

Potential investors should consider how to structure their investment to ensure that these criteria will be deemed satisfied should a dispute arise. For example, certain tribunals have previously declined jurisdiction in circumstances where an investment is structured through a chain of subsidiaries and the claimant entity itself has not made any direct economic contribution to the project,[306] while others have permitted such claims by indirect shareholders in spite of such "remoteness" defences.[307]

So-called "denial of benefits" clauses variously contained in investment treaties also seek to prevent forum shopping, typically requiring that: (i) the investor is controlled by a national of the State where it is incorporated; and (ii) that the investor has "substantial business activities" in that State. Where these conditions are not met, investment treaty tribunals have previously declined jurisdiction to determine the dispute or, in the alternative, held that the claims are inadmissible.

EU investors already involved in projects attracting investment treaty protection in other EU Member States may also wish to consider restructuring so as to take advantage of treaties between the host State and an extra-EU State. It should be noted however that previous tribunals have dismissed claims on the basis that restructuring undertaken solely for the purpose of gaining treaty protection **where a claim is already foreseeable** is an abuse of process.[308] Other tribunals have permitted restructuring for investment protection so long as the measures in question have not been implemented.[309] It will therefore be important to analyse and assess any potential risk that might arise from restructuring an investment to ensure treaty protection.

As a final point, investors who wish to reserve their right to resort to investment treaty arbitration should not delay. As some tribunals have held, investors may accept a State's offer in a treaty to arbitrate a dispute by providing consent through a notice of dispute. Ensuring that this is done in respect of any disputes that may have arisen before a treaty ceases to have effect can make the difference between enjoying investment protection or not.

Brexit as a potential new opportunity for the United Kingdom

The list of BITs to be terminated pursuant to the Plurilateral Termination Treaty, contained at Annex A to the draft, include all of the United Kingdom's BITs with EU Member States. Notwithstanding this, the United Kingdom left the EU on January 31, 2020 without ratifying the Plurilateral Termination Treaty. Furthermore, the United Kingdom is no longer automatically bound by the Achmea Ruling and subsequent EU declarations. Whether the United Kingdom intends to honour the January Declarations will no doubt be the subject of negotiations with the EU during the transition period, but any decision not to terminate its BITs could represent a unique opportunity for the UK to further differentiate itself as a hub for foreign investment.

Whilst the precise effects of the Plurilateral Termination Treaty remain uncertain and will no doubt be the subject of scrutiny and further interpretation by international tribunals, domestic courts, and the European Commission alike, it is clear that the landscape for claims under intra-EU BITs will be increasingly challenging. Prudent investors will no doubt be taking stock and considering structuring and restructuring investments to include companies incorporated outside of the EU (including potentially in the United Kingdom) in their holding structure so as to take (or continue to take) advantage of treaty protections to include recourse to investment treaty arbitration.

Author:

Lucy Winnington-Ingram
Associate
London
+44 (0)20 3116 3891
lwinnington-ingram@reedsmith.com

Endnotes

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2 International Centre for Settlement of Investment Disputes, *A Brief Guide to Online Hearings at ICSID*, 2020, available at www.icsid.worldbank.org.

3 *See* Caroline Simon, *Coronavirus May Hasten Arbitration Technology Boom*, available at www.law360.com.

4 *See* Kaufmann-Kohler *infra* note 1, p. 5.

5 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), article V(1)(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."); *see also* Kaufmann-Kohler *infra* note 1, p. 38.

6 *See* ICSID Arbitration Rule 35 ("Witnesses and experts **shall** be examined before the Tribunal by the parties under the control of its President.") (emphasis added); *see also* LCIA Arbitration Rule 19.1 ("Any party has the right to a hearing before the Arbitral Tribunal on the parties' dispute at any appropriate stage of the arbitration (as decided by the Arbitral Tribunal), unless the parties have agreed in writing upon a documents-only arbitration. For this purpose, a hearing may consist of several part-hearings (as decided by the Arbitral Tribunal)."); *see also* SIAC Arbitration Rule 24.1 ("Unless the parties have agreed on a documents-only arbitration or as otherwise provided in these Rules, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including any issue as to jurisdiction.").

7 *See* Kaufmann-Kohler *infra* note 1, p. 38.

8 Erik Schafer, *Virtual Hearings and Remote Evidence*, available at www.youtube.com. In England, a court found that there was no procedural imbalance between one party's witnesses giving evidence in person while the other party's witnesses gave evidence only by video link. *See Hanaro Shipping v. Cofftea Trading* [2015] EWHC 4293 (Comm) ("I am not persuaded that there is such a risk. Perhaps in the early days of video link when the quality of the video link was poor and it was a novelty, perhaps that might have been said, but these days I do not consider that that can be said.").

9 *See* The New York Convention, article V(2)(b) ("The recognition or enforcement of the award would be contrary to the public policy of that country.").

10 *See* The Chartered Institute of Arbitrators, *Guidance Note on Remote Dispute Resolution Proceedings*, available at www.ciarb.org.

11 *See* The New York Convention, Art. IV(a) ("The duly authenticated original award or a duly certified copy thereof.").

12 *See* Gary Born, International Commercial Arbitration, p. 3397 (2d Edition) (2014); *see also* Judgment of February 4, 1993, XIX Y.B. Comm. Arb. 700, 701 (Bologna Corte d'Appello) (1994) (refusing to enforce a final award on the grounds that article IV was not complied with because the petitioner failed to produce an original or certified copy of the interim award (although it did produce an original copy of the final award)); Judgment of July 5, 2002, *Glencore Grain Ltd v. TSS Grain Millers Ltd*, XXXIV Y.B. Comm. Arb. 666, 668 (2009) (Mombasa High Ct.) (refusing enforcement because, *inter alia*, the party's failure to provide a duly certified copy of the award and arbitration agreement); and *Spain*: Tribunal Supremo, Civil Chamber, Plenary Session, April 1, 2003 (*Satico Shipping Co. Ltd. v. Maderas Iglesias*) Yearbook XXXII (2007) pp. 582-590 (Spain no. 57) (the petitioner only supplied uncertified and unauthenticated copies of the award).

13 Judgment of August 17, 2000, XXVI Y.B. Comm. Arb. 771, 772 (German Bundesgerichtshof) (2001); *see also* Born, *infra* note 12, p. 3397.

14 *Id.*

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17 *See* Global Arbitration Review, *Virtual hearings – the new normal*, available at www.globalarbitrationreview.com.

18 *See* Edward Duffy, *Remote Depositions: Coming to Home Office Near You*, available at www.law360.com.

19 *See* the Seoul Protocol. Several institutions have also released guides on video conferencing, including the Chartered Institute of Arbitrators, *Guidelines for Witness Conferencing in International Arbitration* (2019); the Hague Conference, *Draft Guide to Good Practice on the Use of Video-Links under the Evidence Convention* (2019); the ICC Commission, *ICC Report on Information Technology in International Arbitration* (2018); and the 2010 *Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*.

20 *Id.* at section 1.2.

21 *Id.* at section 1.3.

22 *See* Global Arbitration Review, *Virtual hearings – the new normal*, available at www.globalarbitrationreview.com.

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24 ICSID.org, *A Brief Guide to Online Hearings at ICSID*, available at www.icsid.worldbank.org.

25 *Id.*

26 *Id.*

27 *See* Graziella Valenti, Exame, *A pandemia na maior arbitrgem societária do país, a disputa pela Eldorado* (Portuguese), available at examin.abril.com.

28 *See* Peter Hardy, Marine de Bailleul, *Attending a virtual trial before the London High Court: experience and practical tips*, available at www.reedsmith.com (noting sequential interpretation "resulted in the cross-examination of the witness being longer and more onerous, particularly for counsel, as there was little flow to the exchanges.").

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42 *See* CorpusBar.com, *Nueces County Order Regarding Remote Participation in Videoconferenced Depositions and/or Those Telephonically Recorded*, available at www.corpusbar.com; *see also* Duffy, *infra* note 18.

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44 Vincent Chow, *China Pushes for Increase in Online Dispute Resolution as It Reboots Economy*, available at www.law.com; *see also* Ministry of Justice of the People's Republic of China*, Guidelines on Public Legal Services for Epidemic Prevention and Control and Expertise Resumption* (Chinese), available at www.moj.gov.cn.

45 Chow, *infra* note 44.

46 *See* ICC Arbitration Rule, article 22(1).

47 *Id.* article 22(2).

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49 *Id.*

50 *See* Peter Hardy, Marine de Bailleul, *Attending a virtual trial before the London High Court: experience and practical tips*, available at www.reedsmith.com.

51 *See* Vis East Moot Foundation Ltd., *First Ever Vis East Moot Online*, www.cisgmoot.org.

52 *See, e.g.,* ICC Arbitration Rules, article 24 ("Case management conferences may be conducted through a meeting in person or **videoconference, telephone** or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted.") (emphasis added); *see also* LCIA Arbitration Rules, article 19.2 ("As to form, a hearing may take place by **video or telephone conference** or in person (or a combination of all three).") (emphasis added).

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63 *See Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. The Argentine Republic* (ICSID Case No. ARB/04/16) Decision on Jurisdiction and Liability, (April 10 2013) paras 699, 984.

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68 See Katia Yannaca-Small, "Essential Security Interests under International Investment Law", in *International Investment Perspective: Freedom of Investment in a Changing World* (2007), pp. 97-98. See also ibid, Annex 5.A2.

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74 *Archer Daniels Midland Company v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award (November 21 2007) paras 161 et seq.

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78 *See cf Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability (December 27, 2010). paras 223, 345, 483-484.

79 *See*, *e.g.*, *LG&E Energy Corp. Et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability (October 3, 2006), para 257; *Urbaser S.A. et al. v. The Argentine Republic* (ICSID Case No. ARB/07/26) Award (December 8, 2016), para 718.

80 *See*, *e.g.*, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award (May 12, 2005), paras 323-324; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award (December 24, 2007), para 409; *Suez et al. v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability (July 30, 2010), para 238; *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability (December 27, 2010), paras 223, 345, 483; *EDF International S.A. et al. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award (June 11, 2012), para 1172.

81 *See*, *e.g.*, *LG&E Energy Corp. Et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability (October 3, 2006), para 257; *Urbaser S.A. et al. v. The Argentine Republic* (ICSID Case No. ARB/07/26) Award (December 8, 2016), para 710.

82 *See*, *e.g.*, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award (May 12, 2005) para 329; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award (December 24, 2007), para 411; *Suez et al. v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability (July 30, 2010), paras 241-242; *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability (December 27, 2010) para 345; *EDF International S.A. et al. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award (June 11, 2012), para 1173-1176.

83 *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award (May 12, 2005), para 380.

84 *LG&E Energy Corp. Et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability (October 3, 2006), para 261.

85 *LG&E Energy Corp. Et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability (October 3, 2006), paras 263, 265.

86 *See*, *e.g.*, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award (May 12, 2005), para 392; *LG&E Energy Corp. Et al. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability (October 3, 2006), paras 260, 264; *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award (December 24, 2007) para 409; *EDF International S.A. et al. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award (June 11, 2012), para 1178; *South American Silver Limited v. The Plurinational State of Bolivia* (UNCITRAL) Award (November 22, 2018), para 619.

87 *Société Alstom Transport SA et autre v. société Alexander Brothers Ltd.*, C.A. Paris, Pôle 1, Chambre 1 (May 28, 2019), No. 16/11182.

88 *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor*, ICC Case No., Award (January 29, 2016).

89 *Valeriy Belokon v. Republique du Kirghizistan,* C.A. Paris, Pôle 1, Chambre 1 (February 21 2017) No. 15/01650.

90 *Société Alstom Transport SA et autre v. société Alexander Brothers Ltd*., C.A. Paris, Pôle 1, Chambre 1 (April 10 2018) No. 16/11182.

91 *See Alstom Transport v. Alexander Brothers*, p.23 (Alstom noted that without its knowledge, it had engaged in such practices in Indonesia, Saudi Arabia, Egypt and in the Bahamas).

92 This Latin maxim can be translated as "no one can be heard to invoke his own turpitude" or, more simply, "no one shall be heard, who invokes his own guilt."

93 *See Alstom Transport v. Alexander Brothers*, p.4 ("The enforcement judge is not the judge of the contract, but of the incorporation of the award into the national legal order. His role is not to verify that contractual stipulations […] have been performed correctly, but only to ensure that a manifest, effective, and concrete tangible violation of international public policy does not result from the recognition or enforcement of the award.").

94 *Ibid.* ("[I]n this case, [the judge must assure] that the award does not order the payment of sums destined to finance or remunerate an activity of corruption or bribery.").

95 *See Alstom Transport v. Alexander Brothers*, p.4.

96 *Id.*, p.5.

97 *Id.,* p.6.

98 *Id.,* p.11.

99 Contrary to the maxim *nemo auditur propriam turpitudinem allegans* ("no one shall be heard, who invokes his own guilt").

100 *See Alstom Transport v. Alexander Brothers*, p.23.

101 *Ibid.*

102 *Ibid.*

103 *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor* [2020] EWHC 814 (Comm).

104 The Report of the IBA on *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (November 2018) reflects many of the same themes as ICSID's rule amendment efforts*. See also* Meg Kinnear in the McGill Journal of Dispute Resolution, *Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus*, Volume 6 (2018-2019), Number 2, page 49 ("the ICSID and UNCITRAL Secretariats are collaborating on a draft proposed Code of Conduct for arbitrators, which could ultimately be incorporated into the ICSID system in the form of arbitrator or conciliator declarations.").

105 *See* Carole Simson *ICSID's Meg Kinnear On Investor-State Reform, Rule Changes*, Law360, (March 5 2019).

106 *See* ICSID Deputy Secretary-General Martina Polasek, *Overview of Proposed Amendments to the ICSID Rules*, slide two (October 31, 2018).

107 ICSID's website states that, as a first step of the current amendment process, "ICSID invited Member States to suggest topics to be considered as part of the rule amendment, and issued a similar invitation to the public in January 2017."

108 According to Article 6 of the ICSID Convention.

109 Working Paper 1 in August 2018, Working Paper 2 in March 2019, Working Paper 3 in August 2019, and Working Paper 4 in February 2020.

110 Meg Kinnear and Paul Jean Le Cannu in the Special Focus Issue, *Concluding Remarks: ICSID and African States Leading International Investment Law Reform*, ICSID Review, Vol. 0, No. 0 (2020), page 5 ("Thanks to significant and constructive engagement, especially on the part of Member States, much progress has already been accomplished.").

111 See *Updated Backgrounder on Proposals for Amendment of the ICSID Rules*, page 5 (February 28 2020).

112 See Meg Kinnear in the McGill Journal of Dispute Resolution, "*Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus*", Volume 6 (2018-2019), Number 2, page 53 ("My sense from speaking to many Member States is that they feel we have gone in the right direction and that they will be able to support the proposed amendments. But, of course, this is to be determined.").

113 *Ibid*.

114 Member State & Public Comments on Working Paper 2, page 152.

115 Proposed Arbitration Rule 65(1) in Working Paper 4, page 66.

116 Proposed Arbitration Rule 65(2) in Working Paper 4, page 66.

117 Proposed Arbitration Rule 65(3) in Working Paper 4, page 66.

118 Compendium of Comments on Working Paper 3, page 43.

119 Current Arbitration Rule 48(4).

120 Proposed Arbitration Rule 62(3) in Working Paper 4, page 65.

121 *See, e.g.,* Korea and Turkey's comments in Compendium of Comments on Working Paper 3, pages 40-41.

122 Member State & Public Comments on Working Paper 2, page 151 (Australia described itself as a strong supporter of promoting further transparency in arbitration proceedings, subject to the appropriate protection of confidential information).

123 Member State & Public Comments on Working Paper 2, page 152.

124 Proposed Arbitration Rule 62(4) in Working Paper 4, page 65.

125 Current Arbitration Rule 48(4).

126 Proposed Arbitration Rule 63 in Working Paper 4, page 65.

127 Proposed Arbitration Rule 63(3) in Working Paper 4, page 65.

128 Current Arbitration Rule 6(2).

129 *Ibid*.

130 *Ibid*.

131 Proposed Arbitration Rule 19(3)(b) in Working Paper 4, page 39.

132 Proposed Schedule "Arbitrator Declaration" in Working Paper 4, page 241.

133 Meg Kinnear, *Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus*, McGill Journal of Dispute Resolution, Volume 6 (2018-2019), Number 2, page 49.

134 Proposed Arbitration Rule 39(3) in Working Paper 4, page 48; Proposed Schedule "Tribunal-Appointed Expert Declaration" in Working Paper 4, page 243.

135 Compendium of Comments on Working Paper 3, page 30; Member State & Public Comments on Working Paper 2, page 109.

136 Member State & Public Comments on Working Paper 2, page 109.

137 Proposed Arbitration Rules 14(1) and (3) in Working Paper 4, page 37. Working Paper 4 now requires provision of the address, in addition to the name, of the third-party funder. This was not proposed in Working Paper 3.

138 Proposed Arbitration Rule 14(3) in Working Paper 4, page 37.

139 Proposed Arbitration Rule 14(1) in Working Paper 4, page 37. This was not proposed in Working Paper 3.

140 Proposed Arbitration Rule 14(1) in Working Paper 4, page 37.

141 Proposed Arbitration Rule 14(4) in Working Paper 4, page 38.

142 Compendium of Comments on Working Paper 3, pages 18-20. *See also* submission by a group of nine States, including Australia, Canada, and Chile, in Compendium of Comments on Working Paper 3, pages 18-19.

143 Proposed Arbitration Rule 14(5) in Working Paper 4, page 38.

144 Proposed Arbitration Rule 36(3) in Working Paper 4, page 47.

145 Compendium of Comments on Working Paper 3, page 17; Member State & Public Comments on Working Paper 2, pages 71-72.

146 Member State & Public Comments on Working Paper 2, page 71.

147 Member State & Public Comments on Working Paper 2, page 67.

148 Woodsford's "*Response to Proposed Amendments to the ICSID Rules*" (January 2 2019), page 1.

149 Proposed Arbitration Rule 14 in Working Paper 4, page 37.

150 Woodsford's "*Response to Proposed Amendments to the ICSID Rules*" (January 2 2019), page 2.

151 *Ibid*, page 2.

152 Burford's "*Comments on the proposed amendments to the ICSID rules*" (January 2 2019).

153 *Ibid*, page 2.

154 Vannin's "*Comments on Proposals for Amendment of the ICSID Rules on Third party funding*" (January 14 2018) page 2.

155 *Ibid*, page 4.

156 See, for instance, the Report of the IBA on "*Consistency, Efficiency and Transparency in Investment Treaty Arbitration*" (November 2018), pages 36-43.

157 According to the 2017 Allen & Overy study of damages and costs in investment treaty arbitration (second edition) discussed at https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.

158 *Ibid.* https://www.allenovery/

159 *Ibid*. Note that these are average figures excluding figures arising from the *Yukos v. Russia* arbitrations.

160 *See, e.g.,* Turkey's comments in Compendium of Comments on Working Paper 3, pages 25-26. *See also Will proposed ICSID Arbitration Rule 23 put an end to Legitimacy Concerns of Arbitrator Dis-qualifications?* Kluwer Arbitration Blog (October 6 2019).

161 *See, e.g.,* Member State & Public Comments on Working Paper 2, pages 85-91.

162 Proposed Arbitration Rule 22(1)(a)-(e) in Working Paper 4, pages 40-41.

163 Note the use of the new phrase of the "Establishment of the Tribunal" introduced by Working Paper 4 in its heading in Chapter II and Proposed Arbitration Rule 13 (instead of the "Constitution of the Tribunal" in Current Arbitration Rule 6). However, the following Proposed Arbitration Rules 13-21 in Working Paper 4, pages 37-40, continue to use the phrase "Constitution of the Tribunal."

164 Proposed Arbitration Rule 22(1)(a) in Working Paper 4, pages 40-41.

165 Proposed Arbitration Rules 22(1)(c) and (d) in Working Paper 4, page 41.

166 Proposed Arbitration Rule 22(1)(e) in Working Paper 4, page 41.

167 Proposed Arbitration Rule 23 in Working Paper 4, page 41.

168 Clarification note 74 to Rule 22 in the "Rules in track changes" in Working Paper 3.

169 Member State & Public Comments on Working Paper 2, pages 80-81 and 92.

170 *See, e.g.,* Armenia's comments in Compendium of Comments on Working Paper 3, page 24.

171 Compendium of Comments on Working Paper 3, page 17.

172 Member State & Public Comments on Working Paper 2, page 93.

173 Proposed Arbitration Rules 41-45 in Working Paper 4, pages 49-53.

174 Proposed Arbitration Rule 44(2) in Working Paper 4, pages 51-52. For instance, the tribunal in *Tulip Real Estate v. Turkey* had pointed to similar considerations governing bifurcation of jurisdictional issues: "(i) whether it is desirable to bifurcate for reasons of procedural economy; and (ii) whether the preliminary objection is intimately linked to the merits; and (iii) whether a determination of the preliminary objection is capable of resulting either in the dismissal of the entire case or reducing significantly its scope and complexity." (*Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, (ICSID ARB/11/28), Decision on the Respondent's request for bifurcation, November 2, 2012, para. 30).

175 Proposed Arbitration Rule 52(2) in Working Paper 4, pages 57-58.

176 Proposed Arbitration Rule 46 in Working Paper 4, page 54.

177 Clarification notes 101-102 to Proposed Arbitration Rule 46 in the "Rules in track changes" in Working Paper 4, pages 317-318.

178 According to the *2019 Empirical study: provisional measures in investor-state arbitration*, British Institute of International and Comparative Law and White Case, page 14, security for costs has so far only been granted in 12.5% of cases and only in the "most extreme circumstances." No tribunal had ever granted security for costs before 2014.

179 Proposed Arbitration Rule 53 in Working Paper 4, pages 58-59.

180 Proposed Arbitration Rule 53(4) in Working Paper 4, pages 58-59.

181 This is ICSID's position despite a proposal by Indonesia that security for costs should be ordered automatically where a claimant is receiving outside funding. *See* Member State & Public Comments on Working Paper 2, page 135.

182 Member State & Public Comments on Working Paper 2, pages 132-133, 138. *See also*, submission by a group of nine States, including Australia, Canada, and Chile, in Compendium of Comments on Working Paper 3, page 36.

183 Proposed Arbitration Rule 53(1) in Working Paper 4, pages 58-59.

184 Proposed Arbitration Rules 75-86 in Working Paper 4, pages 74-80.

185 Proposed Arbitration Rules 81(1) and (3) in Working Paper 4, pages 77-78.

186 Member State & Public Comments on Working Paper 2, page 174.

187 Guy Blackwood QC in *ICSID Arbitration in the age of populism: a case for reform*, Quadrant Chambers panel discussion on (November 12 2019).

188 Compendium of Comments on Working Paper 3, page 47.

189 Member State & Public Comments on Working Paper 2, page 169.

190 Proposed Arbitration Rule 4 in Working Paper 4, page 33, by contrast to Current Arbitration Rule 23.

191 Proposed Arbitration Rule 29(5) in Working Paper 4, pages 43-44.

192 Proposed Arbitration Rule 29(3) in Working Paper 4, pages 43-44.

193 Proposed Arbitration Rule 29(4) in Working Paper 4, pages 43-44.

194 Proposed Arbitration Rule 31 in Working Paper 4, page 54. By contrast, Current Arbitration Rule 21 provides for a pre-hearing conference to be held for the purpose of exchange of information or stipulation of uncontested facts (if initiated at the request of the Secretary-General or at the discretion of the President of the tribunal), or for the consideration of issues in dispute with a view of reaching amicable settlement (if requested by the parties).

195 Proposed Schedule "Addressing Time and Cost in ICSID Arbitration" in Working Paper 1, page 904.

196 Proposed Arbitration Rule 58(1) in Working Paper 4, pages 61-62.

197 Current Arbitration Rule 46.

198 Note that Chile and Costa Rica proposed the deletion of the phrase "best efforts" from Proposed Arbitration Rule 12 to accentuate the tribunal's duty to render awards in a timely manner. However, the ICSID Secretariat rejected this proposal for not providing the needed flexibility (in case of circumstances outside a tribunal's control) and being potentially counter-productive. *See* Costa Rica's comments in Compendium of Comments on Working Paper 3, page 16, and ICSID's clarification notes 43-44 to Proposed Arbitration Rule 12 in the "Rules in track changes" in Working Paper 4, pages 292-293.

199 Proposed Arbitration Rule 12 in Working Paper 4, pages 36-37.

200 Member State & Public Comments on Working Paper 2, page 60.

201 Clarification note 44 to Proposed Arbitration Rule 12 in the "Rules in track changes" in Working Paper 4, page 293.

202 Proposed Arbitration Rule 34 in Working Paper 4, page 46.

203 Current Arbitration Rule 15.

204 Nicolette Butler, *Treating the symptoms rather than the cause: a critique of ICSID's 2018 rules amendment proposals*, Int. T.L.R. 2019, 25(2), 117-136.

205 All three countries have ratified the USMCA, but the treaty does not come into force until all three countries have adjusted their internal rules and regulations to align with the text of the agreement. *See* Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada, paragraph 3.

206 Although this is the first multilateral free trade agreement between the United States, Mexico, and Canada, the United States and Canada previously signed a BIT which was suspended by NAFTA.

207 *See* U.S. International Trade Commission, Interactive Tariff and Trade Data Web, http://dataweb.usitc.gov.

208 Since the signing of NAFTA, there have been 67 cases brought under the treaty to date. Mexico has been a respondent for 22 cases (five decided against it); the United States has been a respondent for 17 cases (has not received an award against it); and Canada has been a respondent for 28 cases (five decided against it) *See* Investment Policy UNCTAD.org, Investment Dispute Settlement Navigator, available at www.investmentpolicy.unctad.org.

209 *See generally* United States International Trade Commission, *Potential Impact on the U.S. Economy and Selected Industries of the North American Free-Trade Agreement* (January 1993).

210 *See* Diana Villers Negroponte, *Mexico's Energy Reforms Become Law*, available at www.brookings.edu.

211 *See* NAFTA, Chapter 11.

212 *See* USMCA Annex 14-D.1, Mexico-United States Investment Disputes ("Annex party means Mexico or the United States").

213 *Id.*

214 *Compare* USMCA, article 14.4 *with* NAFTA, article 1102 ("Each party shall accord to investors of another party treatment no less favorable than it accords, in like circumstances, to its own investors…").

215 *Compare* USMCA, article 14.5 *with* NAFTA, article 1103 ("Each party shall accord to investors of another party treatment no less favorable than it accords, in like circumstances, to investors of any other party or of a non-party…").

216 *Compare* USMCA, article 14.5 *with* NAFTA, article 1105 ("Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security.").

217 *Compare* USMCA, article 14.8 (emphasis added) *with* NAFTA, article 1110 ("No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation")…").

218 *See* USMCA Annex 14-D.1, Mexico-United States Investment Disputes ("Annex party means Mexico or the United States").

219 *Id.*

220 *See* Investment Policy UNCTAD.org, Investment Dispute Settlement Navigator, available at www.investmentpolicy.unctad.org.

221 *Canada (Attorney General) v. S.D. Myers, Inc.* 2004 FC 38 (FCTD) (citing *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285 (B.C. S.C.), and *United Mexican States v. Karpa* [2003 CarswellOnt 5208 (Ont. S.C.J.)] (December 8 2003), Ottawa 03-CV-23500, (unreported)).

222 *See, e.g.*, *MIL (Investments) S.A. v. Canada* 2006 TCC 460 (TCC); *Beame v. Canada* 2004 FCA 51 (Fed. CA); *Edwards v. The Queen* [2002] 4 CTC 2202 (TCC); *CUDD Pressure Control Inc. v. Canada* [1999] 1 CTC 1 (Fed. CA).

223 *See, e.g., R. v. Parisien* [1988] 1 SCR 950.

224 *See, e.g., Bouzari v. Iran* [2002] OJ no. 1624 (Ont. SCJ), *affirmed* (2004) 71 O.R. (3d) 675 (Ont. CA); *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003) 228 DLR (4th) 63 (Que. CA). 61.

225 *See, e.g., S.D. Myers, Inc.* 2004 FC 38.

226 *See* David Sloss, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, (Cambridge University Press, October 12 2009) (citing *Gladden v. The Queen*, [1985] 1 CTC 163 (FCTD) and *Re Regina and Palacios*, (1984) 45 OR (2d) 269 (Ont. CA)).

227 The Supreme Court of Canada, in *Nevsun Resources Ltd. v. Araya*, found "the act of state doctrine has played no role in Canadian law and is not part of Canadian common law." 2020 SCC 5 (2019). "Canadian courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law." *Id.*

228 *See* USMCA, Annex 14-E and Annex 14-D.

229 *See* Investment Policy UNCTAD.org, Breaches of IIA Provisions Alleged and Found, available at www.investmentpolicy.unctad.org.

230 *See* Investment Policy UNCTAD.org, Breaches of IIA Provisions Alleged and Found, available at www.investmentpolicy.unctad.org.

231 *See* USMCA, Annex 14-E. Under Annex 14-E, a "covered government contract" means a "written agreement between a national authority of an Annex party [United States or Mexico] and a covered investment or investor of the other Annex party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector…" Put differently, a "covered government contract" is an agreement between an investor and Mexico or the United States that seeks to obtain an investment outside of the contract itself (i.e., a contract to produce oil and gas).

232 *See* USMCA, Annex 14-E(6)(a)-(b).

233 *See* USMCA, article 14.D.5.

234 *See* USMCA, article 14.D.5 (1).

235 *See* USMCA, article 14.D.5 (1)(a).

236 *See id.*, n. 25.

237 *See id.* article 14.4 (4); *see also* article 14.5 (4) ("For greater certainty, whether treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives").

238 *See id.* article 14.6 (2)(a) ('"fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world").

239 *See id.* article 14.6 (2)(b) ("'full protection and security' requires each party to provide the level of police protection required under customary international law").

240 *See id.*, Annex 14-B.

241 *See id.*, article 14.2, n. 4.

242 *See* NAFTA, 1139.

243 *See id.*, article 14.1.

244 *See id.*, article 14.1.

245 *See id.*

246 The USMCA also expressly adopts the IBA Rules of Conflicts of Interests when appointing arbitrators, as well as Customary International Law. *See* Annex 14-D, article 14.D.6 and Annex 14-A.

247 Article 14.D.7(11).

248 *See* Annex 14-D, article 14.D.8.

249 Article 14.D.8 (2).

250 *See generally*, NAFTA, Chapter 11.

251 USMCA, Annex 14-C (3).

252 Canada has 54 treaties with which include ISDS provisions with countries including Poland, Russia, Argentina, Trinidad and Tobago, Barbados, Panama, Uruguay, and Costa Rica. The United States has 89 treaties with investment chapters with countries including Argentina, Colombia, Uruguay, and Switzerland. Mexico has 44 treaties with investment chapters with countries including the United Arab Emirates, China, Spain, the United Kingdom, the Netherlands, Argentina, and Switzerland. A database with a copy of these treaties is available at Investment Policy UNCTAD.org, International Investment Agreements Navigator, available at www.investmentpolicy.unctad.org.

253 Economy Rankings, The World Bank, www.doingbusiness.org. In 2019, the report ranked New Zealand among the best with respect to ease of business and Venezuela among the worst. *See id.*

254 *Id.*

255 *See, e.g.,* Mexico-Spain BIT (2006), Appendix, Title II(2) ("An investor who initiates proceedings before any

judicial or administrative tribunal in connection with a measure alleged to be in violation of this Agreement, may not make any claim pursuant to this Appendix").

256 *See, e.g.,* Central America – Mexico FTA, article 11.13 (Spanish). The full text of article 11.13 provides:

Article 11.13: Denial of Benefits

Subject to prior notice and consultation, a party may deny the benefits of this Chapter to:

(a) an investor of the other party and its investments, if the investor is a company owned or controlled by persons of a State not party and said company does not maintain substantive commercial operations in the territory of the other party; or

(b) an investor of the other party and its investments, if the investor is a company owned or controlled by persons of the denying party and said company does not maintain substantive commercial operations in the territory of the other party.

257 UNUCTAD, *World Investment Report 2019,* available at https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2109.

258 ICSID, see note to the *List of Contracting States and Other Signatories of the Convention* (as of April 12 2019).

259 European Commission Conceptual Paper, *Investment in TTIP and beyond – the path for reform*.

260 Available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

261 *See* ICSID fourth working paper on proposals for rule amendments (August 16 2019), available at https://icsid.worldbank.org/en/amendments.

262 *See* https://uncitral.un.org/en/working_groups/3/investor-state.

263 Available in English at https://www.gafi.gov.eg/English/eServices/Documents/LAw72-english.pdf (see article 1 (definition of Investment) and article 2 (Investment Goals and Principles)).

264 Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016-.

265 The Salini test is the leading test employed by arbitral tribunals to define the term "investment" in article 25(1) of the ICSID Convention. Established by the tribunal in *Salini v. Morocco*, it requires that the alleged investment satisfy four criteria to be considered an "investment" under article 25(1): (1) a contribution, (2) a certain duration, (3) a risk, and (4) a contribution to the economic development of the host State. This fourth element is subject to debate and controversies in the arbitral case law and doctrine.

266 ECOWAS Member States are Benin, Burkina Faso, Cape Verde, Ghana, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

267 SADC Member States are Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.

268 Available at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

269 *See* https://au.int/en/documents/20161231/pan-african-investment-code-paic.

270 All United Nations Member States based in Africa and on African waters are members of the African Union, including the disputed Sahrawi Arab Democratic Republic, totaling 55 Member States.

271 *See* note 262 (see article 15 (The Social Responsibility of the Investor)).

272 *See* note 263.

273 COMESA Member States are Djibouti, Eritrea, Ethiopia, Somalia, Egypt, Libya, Sudan, Tunisia, Comoros, Madagascar, Mauritius, Seychelles, Burundi, Kenya, Malawi, Rwanda, Uganda, Eswatini, Zambia, Zimbabwe, and the Democratic Republic of the Congo.

274 Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments.

275 *See* note 269.

276 *See Waste Management Inc v. Mexico* (NAFTA) (ICSID Case No ARB(AF)/00/3), Award of 30 April 2004, at paragraphs 91-96; and *Pope and Talbot v. Canada*, Award on Damages, May 31, 2002, at paragraphs 17-69.

277 *See, e.g.*, *Glamis Gold Ltd v. USA* (UNCITRAL) (NAFTA), Award, June 8, 2009.

278 For a decade now, South Africa has chosen to unilaterally terminate its old-generation BITs and enact its own national investment law.

279 Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3801/rwanda---united-arab-emirates-bit-2017- (article 4).

280 Available at https://www.sadc.int/documents-publications/show/4999.

281 *See* note 269.

282 OHADA is a system of corporate law and implementing institutions adopted by 17 West and Central African nations (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Ivory Coast, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of the Congo, Senegal, and Togo).

283 The revised OHADA *Uniform Act on Arbitration* and revised *Rules on Arbitration of the Common Court of Justice and Arbitration* entered into force on March 15, 2018.

284 *See* note 263.

285 Available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/50/c-te-d-ivoire (Article 9.3 (Settlement of disputes between investors and one contracting party)).

286 *Slovak Republic v. Achmea B.V*. (Case C-284/16), Judgment of the Court (Grand Chamber) of March 6, 2018.

287 *Id*., paragraphs 31 to 60.

288 Brussels, 19.7.2018, COM(2018) 547 final.

289 *Id*., page 2.

290 https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

291 *Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (January 15 2019); *Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (January 16 2019); and *Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (January 16 2019).

292 https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en.

293 Article 2.1 of the draft Plurilateral Termination Treaty. Note that the specific BITs to be terminated pursuant to the Plurilateral Termination Treaty are listed at Annex A of the draft.

294 *See* Article 16.1 of the draft Plurilateral Termination Treaty: "This Agreement shall enter into force 30 calendar days after the date on which the Depositary receives the second instrument of ratification, approval or acceptance."

295 Article 17.2 of the draft Plurilateral Termination Treaty provides: "When both Parties to a Bilateral Investment Treaty have decided to provisionally apply this Agreement, the provisions of this Agreement shall apply in respect of that Treaty 30 calendar days from the date of the later decision on provisional application."

296 Sunset clauses typically hold that the protections contained within the treaty will continue to apply to investments made prior to the termination of the treaty for a specified period of time following termination (typically between 10 and 20 years). In relation to the sunset provisions, the January Declarations state: "As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses)."

297 Article 2.2 of the draft Plurilateral Termination Treaty.

298 *Id.*, article 4.1.

299 *See, e.g., Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), Decision on the Achmea Issue (August 31 2018); *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), Procedural Order No. 12 regarding the European Commission's Application (August 27 2018); *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), Decision on Termination Request and Intra-EU Objection (May 7 2019); and *Rockhopper Italia S.P.A., Rockhopper Mediterranean LTD, and Rockhopper Exploration PLC v. Italian Republic* (ICSID Case No. ARB/17/14), Decision on the Intra-EU Jurisdictional Objection (June 29 2019).

300 *See* Noah Rubins and Ben Love, Chapter 31: Ratione Temporis, in *A Revolution in the International Rule of Law: Essays in Honor of Don Wallace, Jr.* (2014), page 415.

301 Recital X of the draft Plurilateral Termination Treaty.

302 Article 7(b) of the draft Plurilateral Termination Treaty.

303 Denial of benefits clauses typically allow the host State to deny the protections of the treaty to companies which: (i) are not controlled by nationals of the other State; and (ii) do not have substantial business activities in that State. *See, e.g., Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* (n 11) (signed November 14, 1991, entered into force October 20, 1994) article I(2).

304 *See, e.g., Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments* (signed July 21, 2005, entered into force November 5, 2008) article 3(b).

305 These criteria were first applied in *Salini v Morocco* (ICSID Case No Arb/00/04), Decision on Jurisdiction (July 23 2001). The *Salini* test has been applied, with varying degrees of rigidity, by a number of subsequent tribunals, including, for example, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction (June 17 2006), paragraph 91; and *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2), Decision on Jurisdiction (September 27 2012).

306 *See, e.g., Caratube v. Kazakhstan*, (ICSID Case No ARB/08/12), Award (June 5 2012); *Standard Chartered Bank v. Tanzania* (ICSID Case No. ARB/10/12), Award (November 2 2012); and *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award (July 14 2010).

307 *See, e.g., Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction (December 8 2003) (emphasis added).

308 *See, e.g.*, *Philip Morris Asia Ltd v. The Commonwealth of Australia* (PCA Case No. 2012-12) Award on Jurisdiction and Admissibility.

309 *See, e.g.*, *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction (June 10 2010).

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reedsmith.com

Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London