THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT

Editors
Mark Mangan and Noah Rubins QC

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The Guide to Investment Treaty Protection and Enforcement

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Investment Treaty Protection and Enforcement*.

For newcomers, GAR is the online home for international arbitration specialists. We tell them all they need to know about everything that matters.

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As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Recently it dawned on us that, despite the number of books on investment law, there was nothing focused resolutely on the practical side of those disputes. So we decided to make one.

The book you are reading – *The Guide to Investment Treaty Protection and Enforcement* – is the result. It follows the concept of investment protection through its whole life cycle – from treaty negotiation to conclusion of a dispute. It aims to tell the reader what to do, or think about, at every stage along the way, with an emphasis, for readers who counsel or clients in investment matters, on what 'works'.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, IP disputes, mining, M&A, challenging and enforcing awards, and evidence in the same practical way. We also have a book on the advocacy in arbitration and how to become better at thinking about damages – as well as a handy citation manual (*Universal Citation in International Arbitration*).

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you, all – especially the various arbitrators who supplied boxes for us at short notice. We are in your debt.

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And last, special thanks to our two editors – Mark Mangan and Noah Rubins – who went above and beyond, somehow finding time in their busy lives not only to devise the original concept with us but also to shape it with detailed chapter outlines and personal review of chapters as they were submitted, and to my Law Business Research colleagues in production for creating such a polished work.

David Samuels
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Contents

Table of Arbitration Rules xiii
Table of Cases xvii
Table of Legislation xli
List of Abbreviations lvii
Index to Arbitrators' Comments lxi

Introduction 1
Mark Mangan and Noah Rubins QC
Dechert LLP and Freshfields Bruckhaus Deringer LLP

1 Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective 6
Kristi How and Emily Choo
Attorney-General's Chambers of Singapore

2 Accessing Investment Treaty Protection: The Investor's Perspective 22
Alvin Yeo, Chou Sean Yu and Koh Swee Yen
WongPartnership LLP

3 Initial Stages of a Dispute: The Investor's Perspective 42
Stanley U Nweke-Eze
Templars

4 Initial Stages of a Dispute: The State's Perspective 54
Ziad Obeid, Moiz Mirza Baig, Mollie Lewis and Maria Paschou
Obeid & Partners

5 Managing Counsel 71
Ana María Ordoñez Puentes, Elizabeth Prado López, Giovanny Vega-Barbosa and Yadira Castillo Meneses
Colombia's National Agency for Legal Defence of the State

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6 Financing a Claim or Defence 84
Deborah Ruff, Julia Kalinina Belcher, Charles Golsong and Jenna Lim
Pillsbury Winthrop Shaw Pittman LLP

7 Constitution of the Tribunal 102
Rebeca E Mosquera
Akerman LLP

8 Jurisdiction: Main Elements 122
Stanley U Nweke-Eze
Templars

Interlude: Arbitrators on procedure in investment disputes 135

9 Procedural Issues in an Arbitration: Disclosure 143
Eun Young Park, Sup-Joon Byun, Seokchun Yun and Shul Park
Kim & Chang

10 Ethical Obligations 161
Patricia Nacimiento and Adilbek Tussupov
Herbert Smith Freehills LLP

11 Applicable Law in Investment Treaty Arbitration 171
Stefan Riegler, Dalibor Valinčić and Borna Dejanović
Wolf Theiss

Interlude: Arbitrators on the role and art of advocacy in ISDS 190

12 Substantive Protections: MFN 197
Mark Mangan and Ananya Mitra
Dechert LLP

13 Substantive Protections: Fairness 240
Elodie Dulac and Jia Lin Hoe
King & Spalding LLP

14 Substantive Protections: Expropriation 256
Derek Soller, Rafael T Boza, Kristina Fridman and Roland Reimers
Pillsbury Winthrop Shaw Pittman LLP

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15 Substantive Protections: Obligations 280
Babatunde O Fagbohunlu, SAN and Hamid Abdulkareem
Aluko & Oyebode and Three Crowns LLP

16 Suitability of ISDS for Societal Challenges 302
Amanda Lees, Wilson Antoon, Erin Eckhoff and Jack McNally
King & Wood Mallesons

17 Quantification of ISDS Claims: Theory 334
Mino Han, Konstantin Christie and Charis Tan
Peter & Kim

18 Quantification of ISDS Claims: Specific Issues 355
Boaz Moselle, Ruxandra Ciupagea and Juan Carlos Bisso
Compass Lexecon

19 The Courts 369
Nicholas Lingard and Samantha Tan
Freshfields Bruckhaus Deringer

20 Annulment and Vacatur 387
Vijayendra Pratap Singh and Roopali Singh
AZB & Partners

21 Enforcement and Recovery: Theory 406
Andrew Battisson and Tamlyn Mills
Norton Rose Fulbright

22 Enforcement and Recovery: Practical Steps 428
Mark Bravin, Tiana A Bey, Theresa B Bowman and Albina Gasanbekova
Mitchell Silberberg & Knupp LLP

About the Authors 453
The Contributing Arbitrators 483
Contributors' Contact Details 491

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CHAPTER 2

Accessing Investment Treaty Protection: The Investor's Perspective

Alvin Yeo, Chou Sean Yu and Koh Swee Yen[1]

Investment treaty planning

Prior to making an investment in a foreign country, it is important for an investor to ensure that the investment receives the best protections available. It is therefore not uncommon for investors to engage in 'investment treaty planning', which involves a concerted effort by the investor to structure its investment so as to enjoy the benefits under an international investment agreement (IIA) that the investor deems appropriate.[2] To unlock the protections available under an IIA, an investor would need to consider all the jurisdictional requirements as well as important substantive provisions under the IIAs.

Jurisdictional requirements

Investors must first ensure that all of the jurisdictional requirements under the applicable IIAs are met. For IIAs that provide for International Centre for Settlement of Investment Disputes (ICSID) arbitration as a dispute resolution mechanism, investors must also satisfy the jurisdictional requirements under the

1 Alvin Yeo is a senior partner, and Chou Sean Yu and Koh Swee Yen are partners, at WongPartnership LLP. The authors are grateful to their colleagues Lin Chunlong, Charles Tian and Donny Trinh Ba Duong for their considerable assistance with the research and preparation of this chapter.

2 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1208.

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ICSID Convention. In summary, there are three main jurisdictional requirements that investors must satisfy to qualify for protection under an IIA: *ratione personae*, *ratione materiae* and *ratione temporis*.

Ratione personae

The nationality of the investor is one of the fundamental requirements that defines the *ratione personae* scope of application of IIAs.[3] Generally, most bilateral investment treaties (BITs) and multilateral investment treaties specify criteria to establish who is a protected 'investor'. Because the ICSID Convention does not contain a definition of 'nationality',[4] ICSID tribunals usually defer to IIAs and domestic law to define nationality.[5]

For natural persons, IIAs generally define nationality based on the domestic law of the contracting state parties. For instance, in *Soufraki v. United Arab Emirates*, the tribunal referred to Article 1(3) of the Italy–UAE BIT, which defines an 'investor of the other Contracting State' as a 'natural person holding the nationality of that State in accordance with its law'.[6] In some other IIAs, the nationality of an investor is defined in a more limited way by requiring minimum residency. An example is in *Sedelmayer v. Russia*,[7] where the tribunal adopted the nationality requirement under Article 1(1)(c) of the Germany–USSR BIT, which defines an investor as 'a natural person that has the permanent residence, or a legal entity that has its seat in the respective territories to which the Treaty applies, and that has the right to make investments'.

3 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

4 Article 25(1) and 2(a) of the ICSID Convention simply require that a person be 'a national of another Contracting State' on the date on which the parties consented to submit the dispute conciliation or arbitration as well as the date on which the request was registered pursuant to Paragraph (3) of Article 28 or Paragraph (3) of Article 36, but excludes any person who on either date also had the nationality of the contracting state party to the dispute.

5 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1213.

6 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, 7 July 2004, Paragraph 55.

7 *Mr Franz Sedelmayer v. The Russian Federation*, SCC, Award, 7 July 1998.

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With respect to juridical persons, many IIAs only require a company to be validly incorporated in its home state (i.e., a 'pure incorporation test'). On the other hand, certain IIAs require a company to have its seat in its home state, alternatively or cumulatively with the incorporation. Some other treaties combine the incorporation and the seat requirements with the requirement of existence of real business activities in the place of incorporation.[8]

In investment treaty planning, investors may wish to opt for IIAs that provide for a pure incorporation test. As seen in various ICSID arbitrations, it is easier for investors to attract protections under IIAs with a pure incorporation test. These IIAs only require investors to be incorporated under the law of a contracting party to the IIAs (not the host state), without the need to prove that they have an actual office with real business activities there.[9] Conversely, IIAs containing other *ratione personae* jurisdictional requirements, such as existence of real business activities, are less flexible and more burdensome for investors when structuring their investment.[10]

Further, it is generally accepted that both direct and indirect investments are protected under an IIA absent language to the contrary, which means that it is possible for an investor to structure its investment through intermediate companies incorporated outside the host country.[11]

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8 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

9 See, e.g., *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraph 38, where the tribunal considered that 'under the terms of the Ukraine–Lithuania BIT, interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. Thus, the Claimant is an investor of Lithuania under Article 1(2)(b) of the BIT.' See also *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, Paragraphs 97–101; *Saluka Investments bv (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 127–130; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Paragraph 326.

10 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 374.

11 See, e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, Paragraph 137; *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian*

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It also bears mentioning that in addition to permitting claims by foreign incorporated companies, Article 25(2)(b) of the ICSID Convention also provides qualified jurisdiction for foreign-controlled locally incorporated entities (LIEs).[12] A foreign incorporated company is defined as 'any juridical person which had the nationality of a Contracting State other than the State party to the dispute'.

On the other hand, a LIE can only file a claim under Article 25(2)(b) if two conditions are met.

First, protections for LIEs under Article 25(2)(b) require consent by the host state through a contract, an IIA or a national law. This consent includes acknowledgement, either explicit or implicit, that the state extends protections to foreign investors controlling its domestic entities.[13]

Second, there must be foreign control over the LIE. Various ICSID tribunals have determined 'control' in terms of legal capacity and percentage of ownership. For example, in *Aguas del Tunari v. Bolivia*, the tribunal considered that 'one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity' and that 'such legal capacity is to be ascertained with reference to the percentage of shares held'. The tribunal concluded that such 'control' exists where an entity 'has both majority shareholdings and ownership of a majority of the voting rights'.[14] In terms of percentage ownership, tribunals have considered an

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Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, Paragraph 165; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, Paragraphs 282–286; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraphs 123–124.

12 Article 25(2)(b) of the ICSID Convention reads:
(2) 'National of another Contracting State' means:
. . . (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

13 See, e.g., *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Paragraph 50, where the tribunal stated that 'ICSID jurisprudence also confirms that the second clause of Article 25(2)(b) should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties'.

14 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 264.

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entity having control over another entity if it owns more than 50 per cent of that entity,[15] whereas control is not constituted with less than 20 per cent ownership.[16]

Ratione materiae

Investors must also ensure that their investment falls within the definition of 'investment' and is thus protected under the selected IIAs. There are various IIAs that define investment as any kind of asset 'invested by the investor in the territory of the other Contracting Party', followed by a non-exhaustive list of covered asset categories.[17] The definition of the investment that is covered under an IIA is a critical consideration in treaty planning, and the broader the definition, the easier it would be for investors to avail themselves of the protections under the IIA.

One example is *Saluka v. Czech Republic*, where the state contended that Saluka's investment only consisted of the short-term holding of shares of a privatised Czech bank with a view of making a quick profit from the sale of the bank's major assets and thus did not fall within the definition of investment under Article 1(1) of the Czech Republic–Netherlands BIT.[18] However, the tribunal rejected the respondent's contentions, and reasoned that 'nothing in Article 1 makes the investor's motivation part of the definition of an "investment"' and that 'nothing in that Article has the effect of importing into the definition of "investment" the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the wellbeing of a company operating within it'.[19]

15 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award, 21 October 1983, Paragraph 76. See also Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1227.

16 *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, Paragraphs 53–54.

17 See, e.g., Article 1 of the Cuba–UK BIT (1995); Article 1(1) of the Korea–UAE BIT (2002); Article 1(2) of the Mauritius–Romania BIT (2000); Article 1(1) of the Italy–Russia BIT (1996); Article 1(2) of the Spain–Costa Rica BIT (1997).

18 Article 1(1) of the Czech Republic–Netherlands BIT provides that the term 'investment' 'shall comprise every kind of asset invested either directly or through an investor of a third State'.

19 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 209 and 211.

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In contrast, some IIAs set forth an exhaustive list of covered assets and adopt more limited definitions of investment.[20] For instance, Article 1139 of the North American Free Trade Agreement (NAFTA) uses the words 'investment means' rather than 'investment includes'. It also contains an exhaustive list of covered investments, which extend to foreign direct investment (an enterprise), portfolio investment (equity securities), partnership and other interests that give the owner a right to share in profits or liquidated assets, and tangible and intangible property acquired in the expectation of, or used for the purpose of, economic benefit. NAFTA also covers loan financing where funds flow within a business group or debt with original maturity of least three years. NAFTA complements its exhaustive list of investment categories with a negative definition establishing certain kinds of property that are not considered investments under the treaty.

Investors ought to be cautious in dealing with treaties that adopt a narrow definition of investment and ensure that their investments are appropriately structured so that they do not fall outside the coverage of the applicable IIAs.

If the applicable IIA provides for ICSID arbitration, the investor will have to satisfy not only the *ratione materiae* requirements under the applicable IIA but also those under Article 25 of the ICSID Convention.[21]

Although the ICSID Convention does not contain a definition of 'investment', academic discussions and arbitral decisions have suggested that an investment under Article 25(1) has certain inherent characteristics.[22] These characteristics are established in *Salini v. Morocco* (commonly referred to as the *Salini* test), and include: (1) a certain duration; (2) generation of regular profits and returns; (3) participation of both parties in risk; (4) substantial commitment of

20 See, e.g., Article G-40 of the Canada–Chile Free Trade Agreement; Article 11.28 of the US–Korea Free Trade Agreement (2012).

21 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, Paragraph 44.

22 See Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, Second edition (Cambridge University Press, 2009), Article 25, Paragraphs 152–174; see also *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Paragraph 43; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Paragraphs 90–96; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraph 116; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 May 2007, Paragraphs 98–100.

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capital; and (5) contribution to the economic development of the host state.[23] To bring a claim under ICSID arbitration, an investor would have to ensure that the investment in question bears the characteristics required under the *Salini* test.

Ratione temporis

The last main jurisdictional requirement is temporal requirements (*ratione temporis*). IIAs generally impose temporal limitations on jurisdiction. In *Phoenix v. Czech Republic*, the tribunal clarified that the IIA must be applicable at the 'relevant time'.[24] Subsequent tribunals have understood 'relevant time' to mean that the IIA must have been applicable to both the state and the investor when the violation occurred.[25]

IIAs typically cover investments made after the enactment of the treaty. Importantly, an IIA only comes into effect after being ratified and not after the signing.[26] Depending on the precise wording of the IIA, an investor who made investment before the IIA's effective date may not necessarily be protected by the IIA. Some IIAs expressly provide for protection of investments made before the IIAs' effective date. For example, the tribunal in *Ioannis Kardassopoulos v.*

23 See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, Paragraphs 52–58. See also 'X. Notion of Investment', in Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), pp. 335–366, at Paragraph 10.28; several tribunals, however, have questioned whether the contribution to economic development is a useful factor and some have dismissed it. Overall, most tribunals agree that elements of contribution, duration and risk should be present in an economic activity for it to qualify as an investment. See, e.g., *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Paragraph 5.43; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, Paragraph 285; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, Paragraphs 294–296.

24 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 57.

25 See, e.g., *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Paragraph 105 ('the treaty violation falling under the Tribunal's jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant Contracting Party.').

26 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1240.

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Georgia made reference to Article 12 of the applicable Georgia–Greece BIT, which provides that '[t]his Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation'.[27] Another example is Article 45 of the Energy Charter Treaty (ECT), which provides for provisional application as of December 1994, when the parties signed the treaty, although the ECT only came into effect in April 1998.

Therefore, investors should be mindful that if they wish to seek protection under a signed but unratified IIA, the IIA in question must provide for protection of investments made prior to that IIA's effective date and the investor should be reasonably certain that the treaty will eventually be ratified. Investors should nevertheless note the following.

Substantive provisions

Most-favoured nation clause

A most-favoured nation (MFN) clause enables an investor to access more favourable protections in other IIAs to which the host state is a party. In treaty planning, the investor should check whether an IIA contains an MFN clause, which may expand the array of available protections.

In theory, an investor may rely on an MFN clause to import better substantive protections from another IIA into the applicable IIA and (potentially) obtain access to the dispute resolution clauses in the other IIA. In some cases, the tribunals have found that MFN clauses permit investors to benefit from better jurisdictional clauses in other treaties, therefore getting jurisdiction where their own treaty prevents it. For example, in *Maffezini v. Spain*, the tribunal held that the MFN clause included in the Argentina–Spain BIT 'embraces the dispute settlement provisions' and therefore the investor may rely 'on the more favorable arrangements contained in the Chile-Spain BIT'.[28]

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27 *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraphs 49, 232–238; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Paragraph 167; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, Paragraph 68; *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, Paragraph 177.

28 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Paragraph 64; conversely, the tribunal in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, Paragraphs 190–227 considered that MFN

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The language of the MFN clause is of critical importance, and the investors should consider whether the wording of the MFN clause enables them to import the substantive protections or procedural rights in other IIAs generally or whether the MFN clauses are limited to only certain protections. For example, in *Renta v. Russia*, the tribunal found that the MFN clause in the applicable Russia–Spain BIT is limited to only fair and equitable treatment (FET).[29]

Fair and equitable treatment standard

The FET standard is found in an overwhelming majority of IIAs. In practice, FET has become the substantive protection that investors most frequently invoke in investment arbitration.[30] Traditionally, FET provisions are worded broadly.[31] While investors generally seek to apply FET provisions literally and broadly, respondent states often attempt to narrow the scope of protection as much as possible.[32]

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clauses could not provide investors access to dispute settlement options in other treaties unless there is a clear consent by state parties.

29 See *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009. In this case, Article 5 of the BIT provided that '(1) Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party, (2) The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State . . .'. The tribunal considered that Article 5(2) is limited to the substantive protections provided in Article 5(1) because it referred exclusively to the 'treatment referred to in paragraph (1)'. Paragraph (1) guaranteed fair and equitable treatment to the investor. The tribunal found that 'the Spanish BIT does not contain an MFN clause entitling investors to avail themselves in generic terms of more favourable conditions found "in all matters covered" by other treaties. Instead it establishes the right to enjoy a no less favorable FET'.

30 Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), Paragraph 19.03.

31 A typical example of the traditional BIT is Article 3.1 of the terminated BIT between the Netherlands and Poland (1992), which simply provides that: 'Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.' See also, e.g., Article 3.1 of the Czech Republic–Netherlands BIT (1991), Article III of the Lithuania–Norway BIT (1992) and Article 2(2) of the Argentina–United Kingdom BIT (1990).

32 Borzu Sabahi, Noah Rubins, et al., *Investor-State Arbitration*, Second Edition (Oxford University Press, 2019), Paragraph 19.03.

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Due to the uncertainties surrounding the application of the FET standard in investment treaties, in recent years various states have attempted to redraft the FET standard to limit the scope of FET provisions, in particular, by ascribing specific content to the FET standard.[33] This will often include a list of measures that constitute a breach of the FET obligation. For example, in May 2018, the Netherlands published a new draft investment treaty, which seeks to circumscribe the scope of the FET standard with a much more granular definition of the FET obligation.[34] This new model BIT was adopted by the Dutch government on 19 October 2018.[35] The same approach has also been adopted in other significant IIAs, such as the Comprehensive Economic and Trade Agreement between the EU and Canada,[36] the EU–Singapore Investment Protection Agreement[37] and the EU–Vietnam Investment Protection Agreement.[38]

From the investors' perspective, IIAs containing broad FET provisions are more favourable than those that ascribe specific and limited content to the FET definition, which will constrain an arbitral tribunal's ability to adopt a wide interpretation of the substantive obligation.

However, even for the IIAs with a more limited FET definition, investors may still rely on the MFN clause to access 'better' FET protection than under other IIAs as long as the MFN clause is sufficiently broad and does not provide any limitation in terms of the FET. This has been accepted by arbitral tribunals in investment arbitration practice.[39]

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33 Christophe Bondy, 'Fair and Equitable Treatment – Ten Years On', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (International Council for Commercial Arbitration/Kluwer Law International, 2019), pp. 198–225, at p. 218.

34 See Article 9.2 of the Netherlands new Model Investment Agreement, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

35 See https://riskandcompliance.freshfields.com/post/102f5tp/dutch-government-adopts-new-model-bilateral-investment-treaty.

36 See Chapter 8: 'Investment', Article 8.10(2) of the EU–Canada Comprehensive Economic and Trade Agreement, available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

37 See Article 2.4 of the EU–Singapore Investment Protection Agreement (2018), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.

38 See Article 2.5 of the EU–Vietnam Investment Protection Agreement (2019), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5868/download.

39 See, e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, Paragraphs 100–104; *Sergei Paushok*, *CJSC Golden*

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Denial of benefits clause

Some IIAs contain a 'denial of benefits clause', which allows the host state to reserve the right to deny the benefits of the applicable IIA to companies if, inter alia, they are owned or controlled by non-protected investors and have no substantial business activities in the country of incorporation.[40] Investors ought to look out for denial of benefits clauses when considering IIAs to avoid the risk of being deprived of treaty protection.

It would appear that one way of avoiding the risk of being deprived of treaty protection as a result of a denial of benefits clause is to show 'substantial business activity' in the country of incorporation. Previous tribunals had considered that pure holding companies (i.e., shell companies that merely hold shares of other companies) cannot satisfy this requirement.[41]

However, in *Pac Rim v. El Salvador*, the tribunal held that a holding company may be considered to have substantial business activities if it holds and manages shares in other companies and has a continuous and substantial physical presence in the country of incorporation, a functioning board of directors and a bank account. A purely passive, nominal holder of shares with no real physical presence in the place of incorporation does not possess these features and thus cannot be deemed to have substantial business activities.[42] In *Amto v. Ukraine*, however, the tribunal found that 'substantial' in this context does not mean 'large' but 'of substance, and not merely of form', and 'the materiality not the magnitude of the business activity is the decisive question'. Therefore, the tribunal was satisfied that the investor had substantial business activity on the basis of its investment-related activities conducted from a real office with a small but permanent staff.[43]

East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, Paragraphs 570–572.

40 See, e.g., Article 17 of the ECT; Article 17 of the 2012 US Model BIT. Investment treaties entered into by the United States routinely contain a denial of benefits clause.

41 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 398.

42 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, Paragraphs 4.72–4.75.

43 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, Paragraph 69.

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Preserving protection when investing

The need to avoid abuses of process in restructuring investments

To ensure protection under the IIAs, treaty planning should be carried out ahead of making the investment so that the investment can be appropriately structured from the outset. Sometimes, an investor may 'restructure' the investment after it is made, and this may take place through the reorganisation of the ownership structure of the investment; for example, by inserting an intermediate company that is protected by one of the host state's IIAs.[44]

While it is generally accepted that investors are entitled to structure their investment to maximise treaty protection,[45] it is less straightforward in cases where an investor seeks to achieve this through a restructuring of the investment. Whether or not the restructuring is considered effective under an IIA depends on various factors, including the timing of the restructuring. In carrying out treaty planning, investors ought to be mindful of conduct that may be deemed as destructive or disruptive, which is sometimes described as 'treaty shopping'.[46]

44 Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 370.

45 See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 330(d) ('it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT'); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 Decision on Jurisdiction, 7 July 2004, Paragraph 83; *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award, 23 May 2011, Paragraph 103.

46 See, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Paragraph 63 ('a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand'); *Saluka Investments bv (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraphs 127–130 ('The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of forum shopping.').

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It is generally accepted that a restructuring of an investment in order to access investment treaty protection is legitimate when done prior to the onset of those facts giving rise to the damages and the dispute.[47] This underscores the importance of early treaty planning. In *Phoenix v. Czech Republic*, the tribunal noted that 'an international investor cannot modify downstream the protection granted to its investment by the host state, once the acts which the investor considers are causing damages to its investment have already been committed'.[48] The tribunal further held that:

> *The ICSID Convention/BIT system is not deemed to protect economic transactions undertaken and performed with the sole purpose of taking advantage of the rights contained in such instruments, without any significant economic activity, which is the fundamental prerequisite of any investor's protection. Such transactions must be considered as an abuse of the system.*[49]

The restructuring of an investment prior to the dispute is usually acceptable unless the applicable treaty provides otherwise. Hence, if an investor from a non-party state to the IIA plans to access the protection under that IIA through an intermediate entity incorporated in a protected state, he or she should (1) ensure that the IIA does not explicitly require the investor to have 'substantial business activities' in the place of incorporation (or, if it does, that the requirement can be satisfied); (2) not engage in fraud or other egregious violations of local or international law; and (3) avoid signalling that the structure was purely to take advantage of the treaty.[50]

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47 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1249.

48 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, Paragraph 95.

49 id. at Paragraph 93.

50 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1250.

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If an investor seeks to gain the protection of an investment treaty through the restructuring of an investment after the host state's breach occurs, the tribunal may conclude that the investor does not qualify for protection.[51] Additionally, the tribunal may not accept jurisdiction over a dispute arising before the investor was a treaty beneficiary.[52]

Assignment of treaty claims

Assignment of treaty claims can be considered as a form of restructuring. An assignment may occur in various situations; for instance, where an original investor intends to divest its stake in the investment to an arm's-length buyer while having a claim against the host state. Other scenarios include where a liquidator sells and assigns a potential treaty claim to increase the asset pool for creditors of the estate, to raise funds for the estate or to obtain funding to pursue a meritorious claim.[53] A company may also assign a claim to its affiliate as part of a group restructuring that may involve a succession and merger. In the case of a merger – for example, where a claimant party is extinguished by the operation of that merger – the successor company may have been protected if the initial claimant had satisfied the jurisdictional requirements at the time of the consent.[54]

A number of tribunals and legal scholars have considered that treaty claims are assignable. In *Daimler v. Argentina*, the tribunal accepted that 'most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived' and 'no rule of general or customary international law . . . would prohibit a similar result from obtaining for

51 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, Paragraph 588.

52 Eduardo Zuleta Jaramillo, Andrea Saldarriaga, et al., 'Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting', in Miguel Angel Fernandez-Ballester and David Arias Lozano (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), pp. 1207–1256, at p. 1251.

53 See, e.g., *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5; *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34. See also Nelson Goh, 'The Assignment of Investment Treaty Claims: Mapping the Principles', *Journal of International Dispute Settlement*, Volume 10, Issue 1, March 2019, pp. 23–41, at p. 24.

54 See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/3; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3. See also Nelson Goh, 'The Assignment of Investment Treaty Claims: Mapping the Principles', *Journal of International Dispute Settlement*, Volume 10, Issue 1, March 2019, pp. 23–41, at p. 24.

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ICSID claims'.[55] When the host state breaches a private investor's rights under an investment treaty, the separate right to recover damages for that breach is really a property right vested in the claimant, which is plainly assignable.[56]

A treaty claim, however, cannot be created from an assignment. For example, a non-protected investor cannot create a claim by transferring its rights to a protected entity on the ground that *nemo dat quod non habet* (i.e., no one could give what he or she does not have).[57] Indeed, the original investor is not in a position to assign a treaty claim that it does not possess to begin with. However, the assignment of the claim can be made from a protected investor to another equally protected investor.[58]

Maintaining investment treaty protection in terminations

Forms of termination of investment treaties

An investment treaty can be terminated in two ways: unilateral termination and termination by mutual consent.

Unilateral termination

In general, a BIT can be unilaterally terminated by one contracting party without the consent of the other party through a tacit renewal clause or a fixed-term clause.

A tacit renewal termination clause is typically contained in a BIT that has a specified effective term, and at the end of that term, the BIT is automatically renewed for an additional term, unless either party terminates the BIT within the limited window of time provided under the clause (often six months) before

55 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, Paragraph 144; see also *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, Paragraphs 29–32.

56 Matthew S Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes', 36 *George Washington International Law Review* (2004), pp. 783–815, at p. 808, cited footnote in Patrick Dumberry, *A Guide to State Succession in International Investment Law* (Elgar Publications, 2018).

57 *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, Paragraph 24.

58 See, e.g., *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Award on objections to jurisdiction and admissibility, 29 July 2008. See also Roland Ziadé and Lorenzo Melchionda, 'Structuring and Restructuring of Investment in Investment Treaty Arbitration', in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Volume 8, 1 January 2015, pp. 370–399, at p. 373.

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the first term expires. Once the BIT is renewed, it cannot be terminated before the second term expires. Accordingly, the BIT is successively and periodically renewed unless either party terminates the treaty within the limited window of time provided before the end of each term.[59]

On the other hand, a fixed-term termination clause is usually found in a BIT that enters into force for an agreed period of time, and after the expiry of that term, either party can terminate the BIT at any time by giving notice to the other party. Termination under a fixed-term clause does not take effect immediately upon notification, but only after a certain period of time has elapsed from the notification (usually one year).[60]

Termination by mutual consent

A treaty may be terminated by mutual consent in accordance with Article 54 of the Vienna Convention on the Law of Treaties (VCLT), which provides that:

> *The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.*

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59 A typical example of a tacit renewal termination clause is Article 26.2 of the 2019 Dutch Model BIT: 'Unless notice of termination has been given by either Contracting Party at least six months before the date of its expiry, the present Agreement shall be extended tacitly for periods of five years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.'

60 A typical example of a tacit renewal termination clause is Article 22 of the US Model BIT:

1. *This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.*
2. *A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.*

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The states' consent to termination may be expressed through a subsequent international treaty. For instance, in early 2019, Australia negotiated new BITs with Hong Kong[61] and Uruguay,[62] both of which terminated and replaced older BITs from 1993 and 2001, respectively.

Mutual termination of BITs with a new replacement treaty also takes place in some instances where the states involved negotiate trade agreements containing investment chapters. The new agreement may serve as the instrument of termination, or the termination may take place through a separate process. For example, Australia exchanged side letters with Mexico,[63] Peru[64] and Vietnam[65] in which the parties agreed to terminate the BITs between them upon the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

State parties to a BIT may also agree to terminate that BIT without entering into a new treaty to replace it. On 29 August 2020, a multilateral treaty concluded by a majority of EU Member States to terminate the intra-EU BITs concluded between them entered into force for the first time. To date, 23 EU Member States[66] have signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. The Agreement

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61 See Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, available at www.dfat.gov.au/trade/agreements/in-force/a-hkfta/Pages/the-investment-agreement-text.

62 See Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, available at https://www.dfat.gov.au/sites/default/files/agreement-between-australia-and-uruguay-on-the-promotion-and-protection-of-investments.pdf.

63 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ildefonso Guajardo Villarreal, Minister of Economy of Mexico, available at www.bilaterals.org/IMG/pdf/86.pdf.

64 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Ana María Sánchez de Ríos, Minister of Foreign Affairs of Peru, available at www.bilaterals.org/IMG/pdf/108.pdf.

65 See Letter from Andrew Robb, Minister for Trade and Investment of Australia to Dr Vu Huy Hoang, Minister of Industry and Trade of Vietnam, available at www.dfat.gov.au/sites/default/files/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF.

66 All current EU Member States, except Austria, Finland, Sweden and Ireland (which are not party to any active BITs), have signed the Agreement.

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followed the Court of Justice of the European Union's 2018 *Achmea* judgment, which had found the arbitration provision of the Netherlands–Slovakia BIT to be incompatible with EU law.[67]

Protections of investor rights

Unilateral terminations

In the case of unilateral termination where a contracting state exercises its right under a tacit renewal or fixed-term termination clauses to terminate the BIT, the investors may still rely on 'survival clauses', which preserve protections of their rights. These types of clauses are a unique BIT feature, allowing for the BIT to continue to have legal effects for a specified period of time after it has been terminated. Thus, 'even though a State may terminate a BIT, it will often still remain bound by its provisions vis-à-vis investments made prior to the treaty's termination'.[68] An example of the survival clause is Article 26.3 of the 2019 Dutch Model BIT:[69]

> *In respect of investments made before the date of the termination of the present Agreement, this Agreement shall continue to be in effect for a further period of fifteen years from that date.*

The survival clause serves to ensure a degree of stability and legal certainty for investors that entered into an investment with the knowledge that certain protections existed at the international level. It also ensures that those protections cannot be peremptorily revoked.[70] Most importantly, the survival clause applies to both substantive provisions and dispute settlement clauses of IIAs. Therefore, an investor would be able to bring a claim under a BIT even after its termination.

67 *Slovak Republic v. Achmea B.V.*, Case C-284/16, at https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057.

68 United Nations Conference on Trade and Development, Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, at p. 3, available at https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf.

69 See also Article 22.3 of the 2004/2012 US Model BIT; Article 47(3) of the ECT.

70 James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties', *The Journal of World Investment & Trade* (2012), Volume 13, Issue 6, pp. 928–950, at p. 935.

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However, investors should note that the legal effects of this clause will typically only apply to investments established in the host state before the IIA was terminated. The BIT does not protect investors that make investments in the host state after the BIT is terminated.

Terminations by mutual consent

The situation is more complicated in the case of termination by consent. Some commentators take the view that termination by mutual consent pursuant to Article 54(b) of the VCLT would not be limited by the terms of the minimum period of application provided in many BITs or the terms of a survival clause. In other words, the parties to a BIT may agree to terminate the treaty with immediate effect. Accordingly, investors will not be able to preserve any protection after the mutual termination.[71]

However, looking at the nature and terms of BITs or IIAs in general, investors may still rely on certain features to argue that the IIAs are intended to limit the ability of states to revoke the rights of investors, even in the case of termination by consent.

First, the general nature of IIAs supports the proposition that the drafters intended to establish a stable legal framework for investors that could not be peremptorily revoked through termination either unilaterally or by mutual consent. The objective of promoting 'favourable conditions' found in most IIAs can be seen as demonstrating the acknowledgement of states of the need for a certain degree of legal stability for investors that make their investment with an expectation that protection will be in place at the international level. In contrast, if states are allowed to completely withdraw investors' rights through mutual agreement without notice, it would not promote favourable conditions for investors, thus seriously undermining the IIAs' object and purpose. When the preamble to the IIAs expressly refers to a stable investment environment, this argument is further reinforced.[72]

71 id. at pp. 942–943.

72 See, e.g., Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment (Japan–Uzbekistan BIT), 15 August 2008 preamble: 'Intending to further create stable, equitable, favorable and transparent conditions for greater investment by investors of one country in the Area of the other country.'

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Second, the language of various IIAs also suggests that investors' rights under the IIAs cannot be withdrawn immediately without notice. For instance, the language of some survival clauses prima facie makes them applicable to both unilateral termination and termination by mutual consent. A good example is the survival clause in the UK–Korea BIT, which stipulates that:

> *Provided that in respect of investments made whilst the Agreements is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.*
>
> *Such broad language may be considered to support the view that the parties intended there to be some limits to their ability to terminate the treaty, even by mutual consent.*[73]

That said, these are only tentative arguments that investors may put forward and, to succeed, an investor must demonstrate that the state parties' intent in drafting the relevant IIA was to limit the states' ability to terminate the IIAs even by mutual consent. The determination of the states' intent in this regard can only be undertaken on a treaty-by-treaty basis. If the tribunal accepts these arguments, however, the investor would be in the same position as unilateral termination and may similarly gain benefit from survival clauses.

73 James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties', *The Journal of World Investment & Trade* (2012), Volume 13, Issue 6, pp. 928–950, at p. 947.

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APPENDIX 1

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Alvin Yeo, Senior Counsel, is the chairman of, and a senior partner at, WongPartnership LLP. He was appointed Senior Counsel of the Supreme Court of Singapore in 2000 at the age of 37, the youngest ever person to be so appointed. His main areas of practice are litigation and arbitration in banking, corporate/ commercial and infrastructure disputes.

Alvin is a member of the Court of the Singapore International Arbitration Centre and the International Chamber of Commerce Commission, a fellow of the Asian Institute of Alternative Dispute Resolution, the Singapore Institute of Arbitrators and the Singapore Institute of Directors, and a former member of the London Court of International Arbitration and the International Bar Association Arbitration Committee. He is also on the panel of arbitrators in the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution, the Korean Commercial Arbitration Board, the South China International Economic Trade Arbitration Commission and the Singapore Institute of Arbitrators' Panel for Sports in Singapore.

Alvin is a member of the Disciplinary Tribunal chairman panel of both the Singapore Medical Council and the Supreme Court and of the Appeals Advisory Panel of the Monetary Authority of Singapore, as well as the Governing Board of the Centre for International Law at the National University of Singapore.

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Sean Yu is a fellow of the Chartered Institute of Arbitrators and past chair of the board of its Singapore branch. He is on the panel of arbitrators of the Singapore International Arbitration Centre, the Asian International Arbitration Centre, the Korean Commercial Arbitration Board, the Maldives International Arbitration Centre, the Japan Commercial Arbitration Association, the Hainan International Arbitration Court and the Russian Arbitration Centre at the Russian Institute of Modern Arbitration.

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She has an active practice as counsel, with a particular focus on complex, high-value and cross-border disputes across a wide spectrum of matters in the commercial, energy, international sales, trade, transport, technology and investment sectors. She regularly appears before the High Court and Court of Appeal and in international arbitrations under the major institutional rules, including those of the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, the International Centre for Dispute Resolution, the London Court of International Arbitration, the Singapore International Arbitration Centre and the United Nations Commission on International Trade Law.

Swee Yen is highly recommended for her expertise in resolving complex international disputes, and is named in various legal publications, including *The Legal 500*, *Chambers Global* and *Who's Who Legal: Arbitration 2021*. Described as being 'in a league of her own', with a 'very deep understanding of the law' and 'razor-sharp' in her advocacy, she is regarded as the 'go-to disputes lawyer in Singapore'.

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The *GAR Guide to Investment Treaty Protection and Enforcement* is a new guide on the practical side of investor–state disputes. It tracks the concept of investment protection throughout its life cycle – from negotiation of the treaty to enforcement of an award and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute, focusing on what works. The content is further enriched with a series of contributions from arbitrators, on topics du jour.

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