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THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT

SECOND EDITION

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Publisher's Note

Global Arbitration Review is delighted to publish the second edition of *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 in their chosen professional niche.

We are perhaps best known for our news. But we also have a growing range of in-depth content, including books such as this one, retrospective regional reviews, conferences with a bit of flair, and time-saving workflow tools such as our database of arbitrators full of information nobody else has and our collection of arbitral awards. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Some time ago 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, telecoms and evidence in the same practical way. We also have a book on 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.

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
Publisher, GAR
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CHAPTER 2

Accessing Investment Treaty Protection: The Investor's Perspective

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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 IIA.

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

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1 Chou Sean Yu, Koh Swee Yen SC, Monica W Y Chong, Joel Quek and Alessa Pang are partners at WongPartnership LLP. The authors are grateful to their colleagues Charles Tian and Donny Trinh Ba Duong for their considerable assistance with the research and preparation of this chapter.

2 Eduardo Zuleta Jaramillo, 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. 1207–56, at p. 1208.

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 determine the definition of a protected 'investor'. Because the ICSID Convention does not contain a definition of 'nationality',[4] ICSID tribunals usually defer to the specific language used in the IIAs, as well as in domestic law, to define nationality[5] (a layer of complexity may be added where there are state succession issues).[6]

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'.[7] In other IIAs, the definition of an investor includes nationals and permanent residents.[8] There are IIAs that also include additional qualifications. An example can be seen in *Sedelmayer v. Russia*,[9] where the tribunal adopted the nationality requirement under Article 1(1)(c) of

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*, Vol. 8, 1 January 2015, pp. 370–99, at p. 373.

4 Articles 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, et al., op. cit., at p. 1213.

6 See, e.g., *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA 57, where the Singapore curial court grappled with the issue of whether Macanese investors could access rights under the PRC–Laos Bilateral Investment Treaty (BIT) (1993) following the handover of Macau to the PRC in 1999.

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

8 See, e.g., Article 1 of the Indonesia–Singapore BIT (2018); Article 1 of the Chile–Hong Kong, China SAR BIT (2016); Article 1 of the Canada–Hong Kong, China SAR BIT (2016).

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

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'.

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').[10] On the other hand, certain IIAs require a company to have its seat in its home state, alternatively or cumulatively with the incorporation.[11] Other treaties combine the incorporation and the seat requirements with the requirement of existence of real business activities in the place of incorporation.[12]

In investment treaty planning, investors may wish to opt for IIAs that provide for a pure incorporation test. As evidenced by decisions issued by various ICSID arbitral tribunals, 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.[13]

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10 The incorporation approach has been adopted by the United Kingdom in its model BIT; see Article 1(d)(i) of the United Kingdom Model BIT (2008). This approach has been used in the majority of the UK BITs; see, e.g., Article 11(2) of the Mexico–United Kingdom BIT (2006) and Article 1(c)(i) of the El Salvador–UK BIT (1999). Similarly, Article 1(2)(b) of the Lithuania–Ukraine BIT (1994) defines a Lithuanian investor as 'any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations', setting a low threshold to meet the nationality requirement.

11 See, e.g., Article 1(2) of the China–Germany BIT, which defines eligible companies as having their 'seat in the territory' of one of the contracting states.

12 Some treaties require the legal person to have carried out 'substantial business activities in the territory of that Contracting Party' or 'real economic activities'; see, e.g., Article 1.2 of the Turkey–Ukraine BIT (2017); Article 1.2 of the Cambodia–Turkey BIT (2018); and Article 1(1)(b) of the Iran–Switzerland BIT (1998). See also Roland Ziadé and Lorenzo Melchionda, op. cit., at p. 373.

13 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 127–30; *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.

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.[14]

Further, in the absence of language to the contrary, it is generally accepted that both direct and indirect investments are protected under an IIA.[15] This means that it is possible for an investor to structure its investment through intermediate companies incorporated outside the host country.[16] For example, in *Deutsche*

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14 Roland Ziadé and Lorenzo Melchionda, op. cit., at p. 374.

15 However, there have been cases where tribunals have denied protections to an indirect investor even though the applicable IIA does not expressly state that indirect investments are not covered. For example, the UK–Tanzania BIT broadly defines an 'investment' as 'every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes: (i) moveable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or any performance under contract having a financial value'. In *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, the tribunal found (at paragraphs 257 and 270) that 'protection of the UK–Tanzania BIT requires an investment made by, not simply held by, an investor' and 'it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK–Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities.' In other cases where the BIT contained a broader definition of investment covering 'every kind of asset' and included 'rights derived from shares, bonds and other kinds of interests in companies and joint ventures' (see Article 1(a) of the Netherlands–Venezuela BIT) or where investment is defined as 'every kind of investment . . . controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes . . . (ii) a company or shares of stock or other interests in a company or interests in the assets thereof' (Article 1(a)(ii) of the Argentina–US BIT), the tribunal found that indirect investments are protected; see, e.g., *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Venezuela*, ARB/08/15, Decision on Jurisdiction, 30 December 2010; see also *CMS Gas Transmission Company v. Argentina*, ARB/01/8, Decision on Jurisdiction, 17 July 2003.

16 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 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 282–86; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paragraphs 123–24.

Telekom AG v. The Republic of India,[17] India unsuccessfully resisted enforcement of an investment treaty arbitration award by arguing that Deutsche Telekom's investment did not fall within Article 2 of the India–Netherlands BIT as it was Deutsche Telekom's subsidiary, a Singapore company, that acquired the shares in question. The Singapore International Commercial Court rejected India's argument, noting (at paragraph 101 of the judgment) that 'nothing in the wording of Article 2 of the BIT, or of Article 1(b) under which "investment" and "investor" are in turn defined, limits investors to those making direct investments as opposed to indirect investments through wholly-owned subsidiaries incorporated in a third country', and there was therefore 'no basis for reading such a limitation into the plain words of Article 1(b) in the absence of such words to that effect'.[18]

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).[19] 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'.

17 *Deutsche Telekom AG v. The Republic of India* [2023] SGHC (I) 7. This matter is pending appeal.

18 Article 1(b) of the India–Netherlands BIT defines 'investment' as 'every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made and, in particular, though not exclusively, includes: (i) movable and immovable property as well as other rights such as mortgages, liens, or pledges; (ii) shares in, and stock and debentures of, a company, and any other forms of such interests in a company; (iii) right to money or to any performance under contract having a financial value; (iv) intellectual property rights, including patents, copyrights, registered designs, trade marks, trade names, technical processes, know-bow and goodwill in accordance with the relevant laws of the respective Contracting Party; (v) business concessions conferred by law or under contract, including concessions for mining and oil exploration'.

19 Article 25(2)(b) of the ICSID Convention provides that: '"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.'

A LIE can only file a claim under Article 25(2)(b) if two conditions are met.

First, extending protections to LIEs under Article 25(2)(b) requires consent by the host state through a contract, an IIA or a national law.[20] This consent includes acknowledgement, either explicit or implicit, that the host state extends protections to foreign investors controlling its domestic entities.[21]

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'.[22] In terms of percentage ownership, tribunals have considered an entity having control over another entity if it owns more than 50 per cent of that entity,[23] whereas control is not constituted with less than 20 per cent ownership.[24]

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

20 See S W Schill, 'Article 25', in S W Schill, et al. (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edition, Cambridge University Press, 2021), paragraphs 1270–77.

21 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'.

22 *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.

23 *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, et al., op. cit., at p. 1227.

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

asset categories.[25] The definition of the investment that is covered under an IIA is a critical consideration in treaty planning. 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 to 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.[26] However, the tribunal rejected the state'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'.[27]

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25 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); and Article 1(2) of the Spain–Costa Rica BIT (1997).

26 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'.

27 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraphs 209 and 211. Conversely, in *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, where the claimant's investment was limited to only the holding of loans, securities and other financial claims, the tribunal concluded that the Tanzania–United Kingdom BIT only protected investments that the investor had made in some active way, rather than held based on passive ownership. Accordingly, the tribunal found that it did not have jurisdiction over the dispute. In the subsequent case of *Kim v. Republic of Uzbekistan*, however, the tribunal found that the term 'made' as in 'investments (made) by investors' in the BIT does not necessarily entail a requirement that claimants must have an ongoing 'active' role in the investment; see *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, paragraph 310. Similarly, the tribunal in *Orascom v. Algeria* rejected the respondent's argument that the BIT excludes from its protection the 'simple holding of an indirect share' and held that '[n]o "active" involvement is required under the BIT, which protects both "minority or indirect" shareholding'; see *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, paragraph 384.

In contrast, some IIAs set forth an exhaustive list of covered assets and adopt more limited definitions of investment.[28] 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. There are also IIAs that add further qualifications; for example, by requiring an asset to be linked to an 'enterprise' to qualify for protection (enterprise-based definition).[29] As a further example, Article 1 of the Morocco–Nigeria BIT (2016) expressly requires an 'investment' to have 'a commitment of capital or other similar resources, pending profit, risk-taking and certain duration'. The rest of the provision even stipulates what would not meet the requirement of an 'investment':

> *Investment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets:*
>
> *a) Shares, stocks, debentures and other instruments of the enterprise or another enterprise;*
> *b) A debt security of another enterprise;*
> *c) Loans to an enterprise;*
> *d) Movable or immovable property and other property rights such as mortgages, liens or pledges;*
> *e) Claims to money or to any performance under contract having a financial value;*

28 See, e.g., Article G-40 of the Canada–Chile Free Trade Agreement (FTA); Article 1 of the Canada–Hong Kong, China SAR BIT (2016); Article 1.7 of the India–Mexico BIT (2007); Article 11.28 of the US–Korea FTA (2012); and Article 1.5 of the Mexico Model BIT (2008).

29 See also, e.g., Article 1.4 of the Belarus–India BIT (2018); Article 1.4 of the India–Kyrgyzstan BIT (2019); and Article 2.4 of the Brazil–India BIT (2020).

> f) *Copyrights and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State;*
>
> g) *Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources;*
>
> *For greater certainty, Investment does not include:*
>
> a) *Debt securities issued by a government or loans to a government*
>
> b) *Portfolio investments*
>
> c) *Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of another party, or the extension of credit in connection with a commercial transaction, or any claims to money that do not involve interest set out in sub paragraphs (a) and (g) above.*
>
> d) *letters of bank credit; and*
>
> e) *claims to money with maturities less than three years.*

Investors ought to be cautious when faced 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 scope of the applicable IIAs.

Further, if the applicable IIA provides for ICSID arbitration, the investor will have to satisfy not only the *ratione materiae* requirements under the applicable IIA that is said to have been breached (or the applicable domestic legislation in the host state that is said to contain the state's offer to arbitrate) but also those under Article 25 of the ICSID Convention.[30] Referred to as a 'dual test' or the 'double-barrelled test', the activity, transaction or question must (1) qualify as an investment under the instrument containing the parties' consent, and (2) satisfy the objective notion of investment in Article 25 of the ICSID Convention, which establishes the subject-matter jurisdiction of ICSID.[31]

Although the ICSID Convention does not contain a definition of 'investment', academic discussions and decisions issued by ICSID arbitral tribunals have suggested that an investment under Article 25(1) has certain inherent

30 *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.

31 S W Schill, op. cit., paragraph 177.

characteristics,[32] which can be objectively determined.[33] The objective meaning of an 'investment' would have to be satisfied for ICSID's jurisdiction to be invoked.[34] The objective characteristics of an investment were articulated 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 capital; and (5) contribution to the economic development of the host state.[35] The *Salini* test has since been frequently applied by arbitral tribunals, although it is merely considered as a starting point of analysis to determine the existence of an investment under Article 25 of the ICSID Convention.

Ratione temporis

The last main jurisdictional requirement is the temporal requirement (*ratione temporis*). IIAs generally impose temporal limits on jurisdiction. In *Phoenix v. Czech Republic*, the tribunal clarified that the IIA must be applicable at the 'relevant time'.[36] Subsequent tribunals have understood 'relevant time' to mean that

32 See id., paragraphs 226–69; 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.

33 S W Schill, op. cit., paragraphs 178–79.

34 ibid.

35 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, et al., *Investor-State Arbitration* (2nd edition, Oxford University Press, 2019), pp. 335–66, 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 294–96.

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

the IIA must have been applicable to both the state and the investor when the violation occurred.[37]

IIAs typically cover investments made after the enactment of the treaty. Importantly, an IIA only comes into effect after being ratified and not after it is signed.[38] Depending on the precise wording of the IIA, an investor that made an investment before the IIA's effective date may not necessarily be protected by the IIA. However, some IIAs expressly provide for protection of investments made before the IIAs' effective date. For example, the tribunal in *Ioannis Kardassopoulos v. Georgia* referred 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'.[39] Another example is Article 45 of the Energy Charter Treaty (ECT),[40] which provides for

37 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.').

38 Eduardo Zuleta Jaramillo, et al., op. cit., at p. 1240.

39 *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, paragraphs 49, 232–38; *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.

40 On 7 July 2023, the European Commission formally proposed that the EU and its Member States withdraw from the Energy Charter Treaty (ECT) in a 'coordinated and orderly manner', citing the view that the ECT is no longer compatible with the EU's enhanced climate ambition under the European Green Deal and the Paris Agreement; see https://energy.ec.europa.eu/system/files/2023-07/COM_2023_447_1_EN_ACT_part1_v1.pdf. The European Commission submitted legal proposals to the Council of the EU, and 'informal' discussions will now occur prior to a formal vote at the Council, where a qualified majority vote will be needed to approve the withdrawal. However, in the event of withdrawal, Article 47(3) of the ECT contains a sunset clause, which states that '[t]he provisions of [the ECT] shall continue to apply to Investments made in the Area of a Contracting Party . . . as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date'.

provisional application as of December 1994, when the parties signed the treaty, although the ECT only came into effect in April 1998.[41]

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.

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, tribunals have found that MFN clauses permit investors to benefit from better jurisdictional clauses in other treaties, therefore being able to invoke 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'.[42]

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41 See also Article 12 of the Russia–Ukraine BIT (1998); Article XII of the Estonia–United States of America BIT (1994); Article 2.1(b) of the Argentina–United Arab Emirates BIT (2018); and Article 2(1) of the India Model BIT (2015).

42 *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; see also *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, paragraph 103; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, paragraph 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, paragraph 55. 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 most-favoured nation (MFN) clauses could not provide investors access to dispute settlement options in other treaties unless there is a clear consent by state parties; see also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, paragraphs 116–18; *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, paragraphs 90–101.

The language of the MFN clause is of critical importance, and 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 only to specific 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).[43]

FET 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.[44] Traditionally, FET provisions are worded broadly.[45] 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.[46]

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 by ascribing specific content to the

43 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.'

44 Borzu Sabahi, et al., op. cit., paragraph 19.03.

45 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).

46 Borzu Sabahi, et al., op. cit., paragraph 19.03.

FET standard.[47] This often includes 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, by specifying measures that would constitute a breach of an FET obligation.[48] This new model BIT was adopted by the Dutch government on 19 October 2018.[49] The same approach has also been adopted in other significant IIAs, such as the New Zealand–United Kingdom Free Trade Agreement 2022,[50] the Regional Comprehensive Economic Partnership 2020,[51] the Comprehensive Economic and Trade Agreement between the EU and Canada,[52] the EU–Singapore Investment Protection Agreement[53] and the EU–Vietnam Investment Protection Agreement.[54]

47 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, Vol. 20 (International Council for Commercial Arbitration/Kluwer Law International, 2019), pp. 198–225, at p. 218.

48 See Article 9.2 of the Netherlands new Model Investment Agreement, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download. See also Article 3 of the Indian BIT, Model Text (2015), available at www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf; and Article 5 of the US Model Bilateral Investment Treaty (2012), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

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

50 See Chapter 14: 'Investment', Article 14.11(2)(a) of the New Zealand–United Kingdom FTA 2022, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6406/download.

51 See Chapter 10: 'Investment', Article 10.5(2) of the Regional Comprehensive Economic Partnership 2020, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6031/download.

52 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/.

53 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.

54 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. See also, e.g., Article 2 of the Hungary–Oman BIT (2022); Article 2(3) of the Israel–United Arab Emirates BIT (2020); Article 2(3) of the Hungary–Kyrgyzstan BIT (2020); and Article 4(1) of the Brazil–India BIT (2020).

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 (assuming the IIA contains one) 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.[55]

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 (1) they are owned or controlled by non-protected investors and have no substantial business activities in the country of incorporation,[56] (2) they are owned by a national of a state that does not have diplomatic relations with the host state,[57] or (3) they are owned by nationals of the host state.[58] The first and second scenarios target shell claimants owned or controlled by nationals of a third state, ensuring that treaty protection is only conferred on nationals of one of the contracting states to the treaty. Because treaty obligations are not binding on third states without their consent, a national of a third state cannot claim treaty protection when there is no reciprocal arrangement for nationals of the contracting states to claim the same protection from that third state. The third scenario also targets shell claimants owned by nationals of the host state and ensures that a national cannot attempt to invoke treaty protection against its own state. IIAs cannot transform domestic disputes, which ought to be adjudicated in domestic forums, into international

55 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 100–04; *Sergei Paushok*, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paragraphs 570–72.

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

57 See, e.g., Article 17 of the 2012 US Model BIT; Article 12 of the Iran–Japan BIT (2016); and Article 17 of the Rwanda–US BIT (2008).

58 See, e.g., Article 11 of the Azerbaijan–San Marino BIT (2015); Article 113 of the China–Peru FTA; and Article 11 of the Gambia–Turkey BIT (2013).

disputes.[59] Investors ought to look out for denial of benefits clauses and consider the scope of these clauses when considering IIAs, to avoid the risk of being deprived of treaty protection.

Depending on the terms of the denial of benefits clause in the applicable IIA, it appears that one way of avoiding the risk of being deprived of treaty protection in the first scenario is to show 'substantial business activity' in the country of incorporation. Tribunals have previously considered that pure holding companies (i.e., shell companies that merely hold shares of other companies) cannot satisfy this requirement.[60]

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.[61] 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.[62]

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, which 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.[63]

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59 Jean Ho, 'Passive Investments', in *ICSID Review - Foreign Investment Law Journal* (2020), Vol. 35, Issue 3, pp. 523–39, at p. 527.

60 Roland Ziadé and Lorenzo Melchionda, op. cit., at p. 398.

61 *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.

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

63 Roland Ziadé and Lorenzo Melchionda, op. cit., at p. 370.

While it is generally accepted that investors are entitled to structure their investment to maximise treaty protection,[64] 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, particularly 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'.[65]

It is generally accepted that a restructuring of an investment to gain access to investment treaty protection is legitimate when it is done prior to the onset of those facts giving rise to the dispute.[66] 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'.[67]

64 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 example, 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.

65 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 127–30 ('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.').

66 Eduardo Zuleta Jaramillo, et al., op. cit., at p. 1249.

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

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.*[68]

The restructuring of an investment prior to the dispute is usually acceptable unless the applicable IIA 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, it 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.[69]

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, a tribunal may conclude that the investor does not qualify for protection.[70] Additionally, the tribunal may not accept jurisdiction over a dispute arising before the investor was a treaty beneficiary.[71]

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.[72]

68 id., at paragraph 93.

69 Eduardo Zuleta Jaramillo, et al., op. cit., at p. 1250.

70 *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.

71 Eduardo Zuleta Jaramillo, et al., op. cit., at p. 1251.

72 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*, Vol. 10, Issue 1, March 2019, pp. 23–41, at p. 24.

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.[73]

A number of tribunals and legal scholars have considered that treaty claims are assignable.[74] 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 ICSID claims'.[75] 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.[76]

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 grounds that *nemo dat quod non habet* (i.e., no one could give what they do not have).[77] The original investor is not in a position to assign

73 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, op. cit., at p. 24.

74 See, e.g., *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012. See also Anastasios Lafaras, 'The Assignment of Investment Treaty Claims: Doctrinal and Policy Perspectives', *The Journal of World Investment & Trade* (2023), 217–55, at pp. 254–55.

75 *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.

76 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).

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

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.[78]

Maintaining investment treaty protection in the face of termination

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 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.[79]

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. After the expiry of that term, either party can terminate the BIT at any time by giving notice to the other party.

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78 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, op. cit., at p. 373.

79 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.'

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).[80]

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.*

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[81] and Uruguay,[82] 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 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

80 A typical example of a fixed-term termination clause is Article 22 of the US Model BIT: '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. 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.'

81 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.

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

exchanged side letters with Mexico,[83] Peru[84] and Vietnam[85] 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[86] have signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. The Agreement 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.[87]

Protection of investor rights

Unilateral terminations

In the case of unilateral termination (i.e., where a contracting state exercises its right under a tacit renewal or fixed-term termination clauses to terminate the BIT), 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

83 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.

84 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.

85 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.

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

87 *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.

still remain bound by its provisions vis-à-vis investments made prior to the treaty's termination'.[88] An example of the survival clause is Article 26.3 of the 2019 Dutch Model BIT:[89]

> *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.*

Notably, between 2016 and 2021, India relied on a fixed-term termination clause to terminate BITs with 76 countries. Nevertheless, these treaties remain relevant as the investments made before termination of the treaties remain protected under the survival clauses contained in the treaties (which is typically 10 to 15 years).[90]

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 with immediate effect.[91] 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.[92]

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88 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.

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

90 See Sanjeev Kapoor, Kartikey Mahajan, Prerna Jain, Jatan Rodrigues and Aayushi Singh, 'India' in *Investment Treaty Arbitration* (Global Arbitration Review, August 2023), available at https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/india. For example, in unilaterally terminating the Argentina–India BIT (1999), India invoked Article 15(1), which provides that: 'This Agreement shall remain in force for a period of ten years and thereafter it shall be deemed to have been automatically extended unless either Contracting Party gives to the other Contracting Party a written notice of its intention to terminate the Agreement. The Agreement shall stand terminated one year from the date on receipt of such written notice.'

91 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), Vol. 13, Issue 6, pp. 928–50, at p. 935.

92 For example, in the *Marco Gavazzi and Stefano Gavazzi v. Romania* case (ICSID Case No. ARB/12/25), investors initiated arbitration under the Italy–Romania BIT in 2012, even though the treaty had been terminated in 2010. Similarly, in April 2019, a Dutch investor filed an ICSID claim against Tanzania six months after the termination of the Tanzania–Netherlands BIT; see *Ayoub-Farid Michel Saab v. United Republic of Tanzania*, ICSID Case No. ARB/19/8.

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.

Termination by mutual consent

The situation may be 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.[93]

However, looking at the nature and terms of BITs and 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.[94]

93 James Harrison, op. cit., at pp. 942–43.

94 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.'

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 Agreement 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.[95]

That said, these are only tentative arguments that investors may put forward. 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 if the IIA had been unilaterally terminated, and may similarly gain benefit from survival clauses.

95 James Harrison, op. cit., at p. 947.