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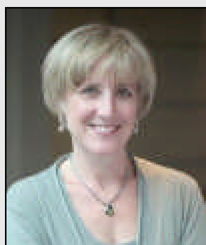

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Limiting Investor Access to Investment Arbitration - A Solution without a Problem?
by L-Y. Tan and A. Bouchenaki

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Limiting Investor Access to Investment Arbitration – A Solution without a Problem?

Liang-Ying Tan - Amal Bouchenaki

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I. Introduction

The investor-state dispute settlement (ISDS) regime has been credited with making a significant contribution to the peaceful – and potentially more economical – settlement of investment disputes. ISDS has succeeded to the more lengthy, cumbersome, and politicized process provided through the law of diplomatic protection.[1] ISDS is also viewed as a potential avenue to "impact the domestic rule of law … as a result of the discipline imposed by the state's international obligations."[2]

However, as treaties and claims proliferate, voices have raised against "an erratic pattern of decisions, with reasoning often impressionistic and displaying a certain disregard for state regulatory prerogatives."[3] With some decisions perceived to infringe upon states' sovereign power to legislate on issues of public policy,[4] or to award unrealistic and unfair damages to claimants with insufficient regard to public interest,[5] national security and other extraordinary extenuating circumstances, the pendulum of public opinion in some sectors has thus swung back in favor of limiting investor access to these arbitration proceedings.

The criticism of the ISDS regime as being investor-biased at the expense of host states goes towards both the interpretation of substantive protections provided for in investment treaties (as it might be more difficult to criticize the provisions on their face given that these were negotiated and agreed upon by states) and, to a lesser extent, the procedural conditions for jurisdiction. As

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1 Susan D. Franck, "The ICSID Effect? Considering Potential Variations in Arbitration Awards" 51(4) VJIL 825 (2010-2011) at 833, hereafter "Franck".

2 Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009) at xxii, hereafter "Douglas."

3 James Crawford, "Foreword" *in* Douglas at xxi.

4 Christopher Ryan, "Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law" 29(3) U. Pa. J. Int'l L. 725 (2008) at 738, hereafter "Ryan", notes that "In addition to creating a two-tiered system, BITs also constrain the extent to which governments can govern. Although international investment law does not prohibit governments from passing laws, enacting regulations, or taking other lawful measures, it may require those governments to pay compensation when their actions adversely affect a foreign investment."

5 For example, *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at paragraph 154, has been criticized for its finding that the Mexican government's refusal to renew the claimant's licence to operate a hazardous waste landfill was a breach of its obligation of fair and equitable treatment. *See* Ryan at 738-740.

Brower and Schill note, both the "hegemonic critique of international investment law… as an attempt by developed countries to impose their power on weaker, developing countries;" and the "more nuanced critique of the perceived unevenness created by a regime that protects property, investment, and foreign investors without sufficient regard to other non-investment-related interests of host states" share "a common core: the criticism that investment treaties unilaterally favor the interests of investors over the host state's competing interests, thus establishing an asymmetric legal regime that is detrimental to state sovereignty."[6]

For example, the Public Statement on the International Investment Regime issued by some 50 academics in 2010 asserts that: "Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law."[7]

But proponents of the system point out that whereas access to non-domestic dispute resolution represents the investor's only real assurance that the host state will honor its commitments, "the host state as a sovereign actor is typically able to react to [opportunistic or reneging conduct by an investor] by unilaterally imposing sanctions on the investor and enforcing them against the assets of the investment project. Consequently, the host state does not depend on a dispute-settlement and compliance mechanism to make the investor comply with its promises."[8] In principle, the ISDS regime thus rights this inherent imbalance by giving both investors and host states similar levels of recourse and risk mitigation.

Furthermore, the empirical evidence available does not support this perceived bias in favor of the rights of protected investors. Susan Franck's empirical study of ICSID awards found no evidence that investment-treaty arbitration is biased in favor of investors: "Based upon existing archival data coding investment treaty awards publicly available prior to 2007, research indicated that of the eighty-two cases in which an award had been rendered, nearly 75% were rendered at ICSID, and the remaining 25.6% were resolved under either SCC or other *ad hoc* rules. For the

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[6] Charles N. Brower and Stephan W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" 9 Chi. J. Int'l L. 471 (2008-2009), hereafter "Brower and Schill", at 474.

[7] Public Statement on the International Investment Regime, 31 August 2010, at para. 5.

[8] Brower and Schill at 482.

fifty-two final awards in that subset of the population, the data refuted the general conception that ITA was biased in favor of investors. The general data showed that, for the fifty-two cases resulting in final awards, (1) states won 57.69% of those cases; (2) investors won 38.46% of those cases; and (3) 3.85% memorialized settlement agreements. That research suggested that there was generally no reliable statistical relationship between the development background of the respondent state and case outcome, whether as a function of winning or losing or the amounts awarded."[9] Franck's study found that there was "no reliable statistical relationship between ICSID and either amounts claimed or substantive outcomes."[10] In other words, ICSID arbitrations at least are not biased towards investor claimants.[11]

Nevertheless, leaving aside some commentators' perception of bias in favor of investors, has access to ISDS become so loose that unmeritorious claims are being admitted? Have the voices now rising in favor of stricter, more consistent, and more predictable access to ISDS translated into a trend of limiting investor access? And if access is to be limited, should it be achieved through the revision of treaty language, or rather through stricter and more consistent decision-making rules?

II. Has there been a discernible trend of limiting investor access through States' approach to treaty drafting?

Implementing a change in access to ISDS through the language of the treaties themselves is, by definition, a slow process. Nevertheless, the evolution of model and actually concluded BITs provides a useful indication as to whether the criticisms of ISDS translate in treaty drafting and in the positions taken by state parties to bilateral or multi-lateral investment treaties. Thus, with particular reference to the US model BITs, Vandevelde identifies three eras in the history of model BITs: the first era, from the end of the 1950s to the end of the 1980s, was driven by developed countries seeking protection for their citizens' foreign investments in developing countries. These model BITs were thus drafted by developed countries for negotiation with developing countries, and it was "during this era that nearly all of the provisions that are

[9] Franck at 851-853.

[10] Franck at 855. Franck found, instead, that "state respondents at ICSID won almost twice as many cases" At 860. The question then is whether some mechanism should be put in place to prevent a portion of these unmeritorious claims from even having survived the jurisdiction/admissibility stage of proceedings. But really just the award of (more than nominal) costs should suffice to deter unmeritorious claims. There was, however, "a difference between non-ICSID cases such that the mean amount claimed against LA respondents was higher than the mean amount claimed against non-LA respondents." At 868. Still, "Given the small number of cases against Latin American respondents in non-ICSID forums, it would be prudent to avoid strong inferences and confirm whether this effect is replicable and an ongoing population parameter." At 870.

[11] ICSID publishes biannual reports on, *inter alia*, the number of cases registered under the ICSID Convention, administered by the ICSID Secretariat, and the outcomes of proceedings. See e.g. "The ICSID Caseload – Statistics," Issue 2013-2, available online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

common to BITs today were adopted and acquired their typical contemporary formulations. This was also a period, however, during which many developing countries were suspicious of foreign investment."[12] The second era, from the end of the 1980s to the end of the century, was characterized by developing countries and transitional economies actively seeking foreign investment as well as beginning to export capital themselves. Thus the substantive protections in model BITs drafted by these developing countries did not vary much from those in the first era. The second era saw "an explosion in the number of BITs concluded. Whereas fewer than 400 BITs had been concluded in the 30 years from 1959 to 1989, more than 2000 BITs were concluded over the next 15 years."[13]

The third and current era, beginning "just after the turn of the new century," was triggered by a growing backlash against economic globalization, particularly the East Asian financial crises; and the sudden increase in the number of claims submitted to investor-state arbitration in the mid-1990s. The soul searching and calls for reform that characterize this era signal investment treaties' coming of age as legal instruments having a significant impact on both developed and developing states, as well as their investors. Vandevelde describes the US response to these factors as "halting all BIT negotiations and commencing an intensive review of its model BIT, resulting in a new 2004 model that differed significantly from prior U.S. models.

Although it was prompted by the submission of claims against the United States, the review presented an opportunity to modify the U.S. model to take account of a variety of considerations. Some of the changes merely reconciled the BITs with the investment chapters of U.S. free trade agreements…. Other changes in the 2004 model reflected reactions to the claims submitted to investor-state arbitration, which had focused the attention of the United States on the uncertain scope of some BIT obligations and consequently on the broad discretion left to arbitral tribunals to interpret those provisions. Many of the changes were controversial, as members of the investor community accused the U.S. government of weakening the BITs while labor and environmental groups argued that the changes were far too modest."[14]

The extreme, and much debated posture for states has been to simply seek to withdraw from ISDS altogether. Whilst the trend started with a few nations seeking to make political statements that went beyond a limited discontent with the availability of ISDS, other, less rebellious countries joined the trend. These States' reluctance to submit to ISDS has prompted a reflection among practitioners, negotiators, and academics as to whether treaty language should evolve towards stricter access to ISDS.

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[12] Kenneth J. Vandevelde, "Model Bilateral Investment Treaties: the Way Forward", 18 Southwestern J. Int'l. L. 307 (2011) at 307.

[13] *Ibid*. at 308.

[14] *Ibid*. at 309-310.

A. A trend towards withdrawal from ISDS?

Perhaps the most visible and dramatic manifestation of the backlash against ISDS is the withdrawal from the system by States. States that have renounced ISDS run the full spectrum of economic development, but they usually do so for similar reasons. Nor is renunciation typically a clean-cut affair. Where such states have multiple investment treaties with different counterparties, the application of an MFN clause and areas of overlap amongst the States parties to more than one treaty (e.g. a BIT and a regional trade/investment agreement) may leave some recourse to ISDS available in the short term.

At the outset, it is helpful to address the three states that have withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) since its entry into force on October 14, 1966, leaving its current membership at 158 signatory States (including 150 States that have deposited instruments of ratification, acceptance or approval).[15] Bolivia notified its withdrawal from the ICSID Convention in 2007,[16] followed by Ecuador in 2009[17] and Venezuela in 2012.[18] All three States pointed to articles in their respective amended Constitutions purporting to prohibit investment arbitration,[19] rather than to specific discontent with ISDS. Thus, while the withdrawals by Bolivia, Ecuador and Venezuela from the ICISD Convention have garnered public attention and may raise complex legal issues concerning the revocation of the "condition predicate" for consent to ICSID jurisdiction even while BITs specifically providing for ICSID arbitration remain in force,[20] these

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[15] ICSID Member States, ICSID website, available online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home

[16] ICSID News Release, "Bolivia Submits a Notice under Article 71 of the ICSID Convention," May 16, 2007, available online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3

[17] Luke Eric Peterson, "Ecuador becomes second state to exit ICSID; approximately two-thirds of Ecuador's BIT claims were ICSID-based," Investment Arbitration Reporter, July 17, 2009, available online at http://www.iareporter.com/articles/EcuadorExit,http://www.iareporter.com/articles/EcuadorExit, reporting that 13 known ICSID, and at least 6 non-ICSID, cases have been brought against Ecuador.

[18] ICSID News Release, "Venezuela Submits a Notice under Article 71 of the ICSID Convention," January 26, 2012, available online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100.

[19] *See* Peterson, *supra* note 22; Elisabeth Eljuri, Ramon Alvins, Gustavo Mata, "Venezuela denounces the ICSID Convention," Norton Rose Fulbright article, January 2012, available online at http://www.nortonrosefulbright.com/knowledge/publications/62427/venezuela-denounces-the-icsid-convention; UNCTAD IIA Issues Note, "Denunciation of the ICSID Convention and BITs: Impact on Investor State Claims," No. 2, December 2010 at 4, available online at http://unctad.org/en/docs/webdiaeia20106_en.pdf.

[20] Ryan at 749-751. See also UNCTAD IIA Issues Note, *ibid*.

withdrawals may be attributed more to domestic politics and ideological disagreement with the international order forming the premise of ISDS, than to serious deficiencies in the ISDS regime.

In contrast to these outliers, we examine below the more noteworthy circumstances in which certain States have had to grapple with the functioning of the ISDS system and consider their continued participation in it. The experiences of the States discussed below are particularly instructive at a time where the inclusion and form of ISDS provisions are very much live and controversial issues. ISDS provisions are thus currently being negotiated between the European Union and its trade and investment partners as well as among the member states of the Trans-Pacific Partnership (TPP). While little has yet transpired of the treatment of ISDS in the TPP, the European Commission is currently working on the balance between investor protection and regulatory space.[21]

Argentina

Argentina's economic crisis provides a telling example of the challenges and, to a significant degree, the efficacy of ISDS. Ryan recounts the beginning of the ongoing Argentinian saga: "beginning in 2004, Argentina began to consider a number of domestic measures that would have limited Argentina's participation in the international investment law system and effectively revived the Calvo Doctrine. In September 2004, the Argentine legislature introduced a bill that would subject all disputes involving the Argentine government to the exclusive jurisdiction of the Argentine courts. … The Argentine judiciary has also taken steps to revive the Calvo Clause."[22] "Argentina has consistently argued that its actions were a necessary exercise of its sovereign right to govern. With one exception, that argument has been rejected."[23]

Reporting in February 2012, the Economist considered that Argentina has "done well at ICSID, winning six of the ten resolved cases. A dozen more claims have been withdrawn. But the awards it has lost amount to $400m."[24] Moreover, unlike Bolivia, Ecuador and Venezuela, Argentina did not threaten to withdraw from the ICSID Convention, although it has paid awards

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[21] European Commission Fact Sheet, "Investment Protection and Investor-to-State Dispute Settlement in EU agreements" November 26, 2013, available online at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf. Among other things, the Fact Sheet states that in order to discourage multiple or frivolous claims, "the EU has agreed provisions to enable tribunals to dismiss such claims quickly and also to require that all litigation costs are borne by the losing party." (at 8.)

[22] Ryan at 747-748.

[23] Ryan at 752, citing *LG&E Energy Corp. v. Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para. 245.

[24] The Economist, "Come and Get Me," February 18, 2012, available online at http://www.economist.com/node/21547836.

in bonds rather than cash.[25] The lack of success of Argentina's necessity defense may explain both its denunciation of ISDS as well as its recent settlement of claims.[26] But Argentina's situation is truly exceptional, and the cumulative enormity of the damages awarded by tribunals to claimants against the Argentine government raises legitimate issues not only in the ISDS context but also in parallel with sovereign debt litigation in New York. Perhaps the only conclusion that can be drawn from Argentina's attitude of ambivalent intent to comply[27] is that the system remains largely functional, albeit far from perfect.

Australia

Australia's attitude towards ISDS is no less dominated by domestic politics. Even as the Australia-Malaysia FTA 2012, "the first trade agreement with a developing country without ISDS provisions" [28] consistent with the Gillard labor government's recent policy restricting the inclusion of ISDS provisions in FTAs and investment treaties, entered into force in January 2013, Australia was already reconsidering its position on investment arbitration.

In April 2011, the Australian government announced that it would no longer pursue investor-state arbitration provisions in future international economic agreements with developing

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[25] *Ibid.* With respect to Argentina's "leftist counterparts," The Economist considers that "Multinationals had written off Ecuador, Bolivia and Venezuela long before they left ICSID." As a "medium-sized [country] with middling political risk," however, Argentina is "most likely to miss [the system] if it falls apart."

[26] Ken Parks, "Argentina Reaches $677m Investment Dispute Settlement – Government," Wall Street Journal, October 18, 2013, available online at http://online.wsj.com/article/BT-CO-20131018-705467.html

[27] In the latter context, Argentina has stated that it will refuse to comply with any judgment against it issued by the U.S. federal courts in New York: see e.g. "The Noose Tightens", The Economist Americas View blog, November 23, 2012, available online at http://www.economist.com/blogs/americasview/2012/11/argentinas-debt-default

[28] Donald Robertson, Leon Chung and Jamie Stollery, "Australia-Korea FTA: How Will Investor-State Disputes be Dealt with?" Herbert Smith Freehills Legal Briefing, November 1, 2013, available online at http://www.herbertsmithfreehills.com/insights/legal-briefings/australia-korea-fta-how-will-investor-state-disputes-be-dealt-with.http://www.herbertsmithfreehills.com/insights/legal-briefings/australia-korea-fta-how-will-investor-state-disputes-be-dealt-with. This Briefing further notes that "only four of Australia's seven FTAs contain ISDS provisions. The parties to these four FTAs do, however, include a number of Australia's major trading partners, particularly in Asia. In particular, the ASEAN parties to the ASEAN-Australia-New Zealand FTA are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam." So Malaysian investors could presumably avail themselves of ISDS under the ASEAN-Australia-New Zealand FTA (and presumably so could New Zealanders), but not the Malaysia-Australia FTA. Finally, the Briefing suggests that based on the most recent FTAs concluded by both Korea and Australia, if the Australia-Korea FTA does provide for ISDS, these provisions will likely provide for: (i) initial consultation and negotiation to seek to resolve the dispute; (ii) the claimant to give 90 days' notice of the intent to submit a claim; (iii) a period of at least six months from the date of request for consultation or negotiation, or from the events giving rise to the claim; and (iv) the investor to choose between ICSID (or ICSID Additional Facility Rules) or UNCITRAL arbitration.

countries.[29] While affirming the principle of national treatment, the Trade Policy Statement stated that Australia "does not support provisions that would confer greater legal rights on foreign business than those available to domestic businesses;" nor would it accept constraints on its ability to regulate public policy matters.[30] Reactions to the announcement ranged from concern that "such a radical shift in policy has been announced without broad consultation," and that the policy "seems out of step with the approach of many of our trading partners," to views of the policy as encouraging.[31]

In a recent twist, however, Australia has been reported to have agreed to re-institute ISDS for its FTA with Korea. According to reports, the Australia-South Korea FTA is now "'exceedingly close' [to conclusion] after a sticking point was removed by the Abbott government."[32] The Abbott government is reportedly "taking a different approach" and will "deal with the issue… on a case-by-case basis."[33] Australia's new Foreign Minister Julie Bishop has also been quoted as saying that "ISDS is quite a high priority for (the Koreans) . . . they see that as essential. I think we can accommodate their concerns while maintaining our public health standards. We have to be more pragmatic."[34] This may provide a precedent for the Australia-Japan FTA, which has

[29] "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity," Australian Government Department of Foreign Affairs and Trade, April 2011, available online at http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspxhttp://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx at 14: "In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries."

[30] *Ibid.*; Luke Peterson, "In Policy Switch, Australia Disavows need for Investor-State Arbitration Provisions in Trade and Investment Agreement" Investment Arbitration Reporter, April 14, 2011, http://www.iareporter.com/articles/20110414;http://www.iareporter.com/articles/20110414; see also Douglas Thomson, "The economic case against investment treaties," Global Arbitration Review, November 7, 2013, http://globalarbitrationreview.com/news/article/32032/the-economic-case-against-investment-treaties/.

[31] Sebastian Perry, "Australia to scrap investor-state provisions," Global Arbitration Review, April 18, 2011, http://globalarbitrationreview.com/news/article/29405/australia-scrap-investor-state-provisions/.

[32] Rowan Callick, "Korea Ready to Talk Turkey after FTA Hurdle Removed," The Australian, 1 November 2013, http://www.theaustralian.com.au/business/economics/korea-ready-to-talk-turkey-after-fta-hurdle-removed/story-e6frg926-1226750841630#

[33] *Ibid.*

[34] *Ibid.* As Ms. Bishop has also written in an Australian e-journal, "The reason for the Gillard government's intransigence on [the ISDS] issue is reported to be a fear that companies will use such provisions to take the government to court over its decision to mandate plain packaging for tobacco, for example. This is unacceptable as the government is putting its political fortunes ahead of the interests of exporters and their employees. The Coalition would, as a matter of course, put ISDS clauses on the negotiating table and then negotiate ISDS provisions on a case-by-case basis. Julie Bishop, "Free Trade Focus," On Line Opinion, March 28, 2013, http://www.onlineopinion.com.au/view.asp?article=14855&page=0

been delayed for the same reason,[35] as well as signal a departure from Australia's attitude towards ISDS under its previous government. Of course, it remains to be seen both to what extent ISDS access is in fact reinstituted in the Korea and Japan BITs,[36] as well as whether Australia embraces this "more pragmatic" approach vis-à-vis the "developing" countries referred to by the Gillard administration, which Korea and Japan are not.

South Africa

In the wake of issuing cancellation notices to its European BIT partners including Belgium, Luxembourg, Spain, the Netherlands, Germany and Switzerland and announcing that new protections would be codified in domestic law,[37] South Africa published its draft Promotion and Protection of Investment Bill 2013 in the Government Gazette on November 1, 2013 for public comment. As anticipated, the draft Bill "contains a narrower definition of expropriation than is found in most South African BITs and omits any provisions for investors to take disputes to international arbitration."[38] Instead, the draft bill provides for domestic litigation, domestic arbitration under South Africa's 1965 Arbitration Act, or mediation at the South African Department of Trade and Industry. The draft bill also excludes from the definition of expropriation any "measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security".[39] South Africa's rationales for terminating its BITs and withdrawing consent to ISDS are reportedly that (i) foreign direct investment is not dependent on BITs, and (ii) ISDS is unpredictable, with arbitrators "tend[ing] to be more biased towards investors" and "unsympathetic towards public interest arguments often propounded by states."[40] While it has been pointed out that investors are specifically not precluded from "approaching any… competent, independent tribunal... for the resolution of a dispute relating to an investment,"[41] such recourse would require South Africa's

[35] Rowan Callick, "Korea Deal Will Set the Pattern," The Australian, 31 October 2013, http://www.theaustralian.com.au/business/opinion/korean-deal-will-set-the-pattern/story-e6frg9fo-1226750000241#.

[36] Douglas Thomson, "Australia agrees to investor-state provisions in Korea FTA," Global Arbitration Review, December 9, 2013, available online at http://globalarbitrationreview.com/news/article/32110/australia-agrees-investor-state-provisions-korea-fta/.

[37] South Africa Pushes Phase-out of Early Bilateral Investment Treaties after at least Two Separate Brushes with Investor-State Arbitration, Investment Arbitration Reporter, September 23, 2012, available online at http://www.iareporter.com/articles/20120924_1

[38] Leo Szolnoki, "South Africa Unveils Draft Investment Law," Global Arbitration Review, November 6, 2013, available online at http://globalarbitrationreview.com/news/article/32031/south-africa-unveils-draft-investment-law/?utm_medium=email&utm_source=Law+Business+Research&utm_campaign=3294061_GAR+Briefing&dm_i=1KSF,1YLPP,9GPI7T,71SCH,1

[39] Draft Promotion and Protection of Investment Bill, Section 8(2)(a).

[40] *Ibid.*

[41] *Ibid.*, Sections 8(2)(a) and 11(4).

consent in each individual case, which is precisely the situation sought to be avoided by arbitration clauses in BITs.

Other States

The consequences of moving provisions granting investor access to ISDS to domestic legal provisions are amply illustrated by the trend, attributed by some to Egypt's legislative reform in the late 1980s[42] and recently continued by Georgia, Kazakhstan, El Salvador and Uzbekistan,[43] of amending domestic laws to require specific consent to arbitration. This is easier to do than the amendment of BITs, since it is a unilateral change within the state's sovereign power and does not require the agreement of a treaty partner. Where treaty commitments to arbitration are already in place, however, the amendment of domestic laws will be of limited effect. Given however that several major capital exporters into Uzbekistan, including the United States and Russia, do not have investment treaties that are in force,[44] the effect of Uzbekistan's domestic legislative reform is to limit investor access to ISDS.

Another, less recent, return to State-to-State arbitration proceedings is the 2006 Japan-Philippines Economic Partnership Agreement 2006. This treaty provides for investment arbitration only with the express consent of the States parties. Ryan considers that the Philippines' "reluctance to allow for international arbitration is not surprising in light of its experience with prior investment-related disputes. The fact that this reluctance has led to the signing of an investment treaty that does not provide investors with access to any international dispute-resolution forum, however, is quite remarkable."[45] The Japan-Philippines Economic Partnership Agreement leaves investors of both states "little better off than they were before the signing of the Agreement" by providing for domestic remedies or diplomatic protection (unless the host state expressly consents to arbitration), neither of which is "particularly attractive to foreign investors."[46]

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[42] Luke Eric Peterson, "Growing Number of Governments are Amending Domestic Investment Laws so as to Preclude Unilateral Recourse by Investors to International Arbitration," Investment Arbitration Reporter, September 10, 2013, available online at http://www.iareporter.com/articles/20130910_2.http://www.iareporter.com/articles/20130910_2. Peterson reports that this "phenomenon can be traced to at least the late 1980s when the Arab Republic of Egypt passed a new investment law that replaced earlier legislation dating to 1974. Notably, Egypt had been sued at least twice pursuant to the 1974 Egyptian Law No. 43 and arbitrators in the first of these cases, SPP v. Egypt, famously upheld jurisdiction over a claim brought pursuant to an arbitration provision in the 1974 law."

[43] *Ibid.*

[44] *Ibid.*

[45] Ryan at 754.

[46] *Ibid.*

Moreover, where investor access is preserved, States may devise other means to increase their participation in (if not control of) ISDS. Most recently, Colombia's National Infrastructure Agency was reported to have asked potential investors in a US$26 billion road infrastructure project to waive their right to bring investment treaty claims and submit disputes to ICDR arbitration in Bogotá instead.[47] Within three weeks of this report, however, the agency reportedly stated that it had removed the waiver provision "following 'significant feedback from the investor community' that the provision was 'inconvenient for the interests of both investors and states.'"[48] Despite this apparent capitulation, however, the agency has reportedly retained another criticized provision allowing Colombia's attorney general's office and national legal defense agency to intervene in international arbitrations and enjoy the same procedural rights as the parties.[49]

B. Evolution of investment treaty language – customizing and curtailing investor access

1. Exclusion of substantive claims

The recent evolution of the US Model BIT evidences a conscious effort to delimit the parameters of ISDS, which the US appears largely satisfied with to date. Vandevelde categorizes the 2004 US Model BIT amendments in four groups, including new exceptions to host state BIT obligations such as Article 20(1) on prudential measures relating to financial services, and Article 20(2) on measures taken for monetary, credit and exchange rate policies. A second group of changes "sought to limit the impact of investor-state arbitration": first, by elaborating on the meaning of several key provisions including those on fair and equitable treatment and indirect expropriation, to reduce the discretion of investor-state arbitral tribunals; second, by excluding from arbitration "any issue involving the interpretation of the treaty or the application of the annexes;"[50] and third, by discouraging the use of investor-state arbitration."[51]

Commentators have also noted that the US and Canada have made efforts in recent treaties around 2009 to "minimize the likelihood that arbitrators would deem legitimate public welfare

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[47] Sebastian Perry, "Colombia Asks Investors to Waive Treaty Rights," Global Arbitration Review, November 21, 2013, available online at http://globalarbitrationreview.com/news/article/32068/colombia-asks-investors-waive-treaty-rights/.

[48] Sebastian Perry, "Colombia Drops Treaty Claim Waiver Provision," Global Arbitration Review, December 13, 2013, available online at http://globalarbitrationreview.com/news/article/32122/colombia-drops-treaty-claim-waiver-provision/.

[49] *Ibid.*

[50] *Ibid.* at 310, citing Articles 30(3) and 31 of the 2004 US Model BIT.

[51] *Ibid.* at 310.

regulations to constitute a compensable expropriation," for instance by clarifying that legitimate public welfare measures may be deemed an indirect expropriation only in rare circumstances.[52]

Similarly, Ryan observes that BITs between developed and developing countries in the 1990s were concluded against the backdrop of investment flowing largely from the former to the latter, but that in the past decade the US has had multiple investment disputes brought against it and has found itself "subject to the same broad scope of investor protections that led Bolivia to withdraw from ICSID. In 2004, in response to its new-found role as a respondent, the United States created a new model BIT that contains far more detailed provisions on certain procedural matters and certain substantive protections accorded to investors. In particular, the 2004 Model BIT amended the provisions governing the minimum standard of treatment (Article 5 and Annex A) and the applicable standard for expropriation (Article 6 and Annex B)."[53] In contrast, the 2004 Model BIT provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation." Given this controversy, it is perhaps not entirely surprising that the 2004 Model BIT has been called an "exercise in the regressive development of international law."[54]

In keeping with these changes, however, the 2012 US Model BIT has been described as "indicating the US's continued satisfaction with both its undefeated record as a respondent state in investor-state arbitrations, and the protection its investment treaties have given to US investors abroad. The rather few changes that have been made appear to reflect efforts to address concerns triggered by relatively recent developments such as the growth of investment into and from China and the global financial crisis, as well as more persistent issues regarding whether and how to reconcile investment treaties with national and international policies on environmental and labor standards."[55] Johnson notes that, in comparison to the innovations made in the 2004 BIT, "the 2012 Model BIT is relatively unchanged from its previous form, maintaining the balance that the 2004 text struck among investor, state, and other stakeholders' rights and interests. This continued endorsement of the 2004 Model is notable because when that version was adopted, it departed in significant respects from the previous versions. Changes that were made in the 2004 version primarily (though not exclusively) included those that were made to be

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[52] Luke Peterson, "Analysis: Closer Look at Substantive and Procedural Features of New Canadian BITs with Czech Republic, Romania and Latvia," Investment Arbitration Reporter, May 11, 2009, available online at http://www.iareporter.com/articles/20090914_4.

[53] Ryan at 756.

[54] Stephen Schwebel, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law," 3 Transnat'l Disp. Mgmt. 1, 4 (2006).

[55] Lise Johnson, "The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest about Future Investment Treaties," Political Risk Insurance Newsletter, Vol. VII, Iss. 2, November 2012.

more, rather than less, protective of governments' regulatory authority and discretion. The modifications included those that:

- clarified and narrowed the definition of covered investments;
- changed and added language to explain and constrain the meaning of the "minimum standard of treatment" and expropriation obligations and closely guide arbitral tribunals' interpretations of those provisions;
- provided for exceptions to the agreements' prohibitions on performance requirements;
- codified the stance adopted by the US government in other areas of international law and some earlier investment
- treaties by expressly declaring that the essential security exception is self-judging;
- added language to protect host-state authority to take measures relating to financial services; and
- modified some aspects of investor-state dispute settlement, such as adding a statute of limitations, and giving state parties to the treaty additional or clearer authority to determine issues of treaty interpretation and application that would be binding on investor-state tribunals."[56]

"Nevertheless, the 2012 US Model BIT does contain some new features falling into three broad categories: modifications that impose additional burdens and restrictions on host states in order to facilitate and protect foreign investment; provisions that add slight protections for government authority in the area of financial services regulation; and new language on environmental and labor issues that may better address and help avoid some of the possible negative effects that can be associated with foreign investment."[57]

Of particular interest for present purposes are the provisions clarifying protections for the State's financial services regulation, as well as strengthened provisions on environmental and labor rights protection. With respect to the former category, Johnson notes a procedural change allowing respondent states to seek from tribunals an early determination of whether challenged measures are covered by specific exceptions relating to regulation of financial services and monetary policy,[58] and another clarifying that the treaty "should not be construed to prevent state

[56] Johnson at 2.

[57] *Ibid.*

[58] 2012 US Model BIT, Article 20.

parties from adopting or enforcing certain measures relating to financial institutions, including those that are necessary to prevent deceptive and fraudulent practices in financial services."[59] Johnson comments however that "these changes from the 2004 Model are rather modest," suggesting that "the US Government believes its current investment treaties (with their self-judging essential security exceptions) reserve to it sufficient authority to regulate financial services and develop and implement monetary policies."[60] It is interesting to juxtapose the high degree of continuity in the U.S. across domestic political change (at least in this regard), with the vacillations in the Australian government's position discussed above.

Conforming to neither extreme, a comparison of two recent Chinese BITs, one with Canada and the other with Switzerland, provides a less linear example than the evolution of the US model BIT, and demonstrates the specific bargains that can be struck with different treaty counterparts depending on a State's particular priorities.

Under the China-Canada BIT, negotiations for which began in 1994,[61] financial-sector investors are more restricted in terms of arbitration claims, being allowed to bring claims only in respect of expropriation or restrictions on transfers. In addition, government decisions to approve or deny new investments are excluded from arbitration. Tax and environmental measures are in large part exempted, as are cultural industries.[62]

Noting that the China-Canada BIT, like recent Canadian investment treaties, features "highly-detailed investor-state arbitration provisions [which] may be most notable for [the investor-state mechanism] being carefully circumscribed in a wide variety of ways,"[63] Peterson considers however that "Canada has fallen short of its ambitions in some areas, most notably" in securing only MFN rather than national treatment with respect to the establishment or acquisition of new investments.[64] Further, in "an unusual departure for recent Canadian treaties, the agreement also

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59 Johnson at 3.

60 *Ibid.*

61 Luke Eric Peterson, "China-Canada Bilateral Investment Treaty Unveiled: a First Look at the Provisions of Long-Delayed Pact," Investment Arbitration Reporter, September 26, 2012, available online at http://www.iareporter.com/articles/20120927_2.

62 *Ibid.*

63 Luke Eric Peterson, "Settlement Provisions of the China-Canada Investment Treaty, including its State-to-State Mechanism," Investment Arbitration Reporter, September 26, 2012, available online at http://www.iareporter.com/articles/20120927_1.

64 Luke Eric Peterson, "China-Canada Bilateral Investment Treaty Unveiled: a First Look at the Provisions of Long-Delayed Pact," Investment Arbitration Reporter, September 26, 2012, available online at http://www.iareporter.com/articles/20120927_2.

contains no restrictions on so-called performance requirements" in addition to the parties' TRIMs commitments.[65]

With respect to dispute resolution, the China-Canada BIT is perhaps most noteworthy for provisions that limit the powers of an arbitral tribunal to make certain findings and orders. First, with regard to prudential measures such as measures taken by a State to maintain the integrity of the financial system,[66] the States parties may draft a report on the validity of such a "prudential measures" defense, which would be binding on the arbitral tribunal. Failing agreement by the States parties on the validity of the defense, the matter may be referred to an inter-State arbitration tribunal comprising financial services experts, and the investor-state tribunal would similarly be bound by this latter tribunal's determination.[67] Moreover, state-to-state arbitration may also be invoked for the interpretation or application of the agreement, and an award rendered by such a tribunal could potentially include damages.[68] Finally, Article 16 of the China-Canada BIT provides for the denial of benefits, including after arbitration has been instituted.

These dispute resolution provisions of the China-Canada BIT present an interesting contrast with the China-Switzerland BIT, which was signed in 2009 and entered into force in April 2010, replacing a "more circumscribed 1986 treaty."[69] It has been suggested that a provision in the protocol clarifying that the treaty's dispute settlement provision prevails over any other international agreement regarding dispute settlement entered into by a State party should have the effect of overriding China's notification to ICSID in the early 1990s limiting its consent to arbitration of "disputes over compensation resulting from expropriation and nationalization."[70]

Substantively, key features of the BIT include guarantees of fair and equitable treatment, full protection and security and non-impairment of investments, without reference to the minimum standard of treatment under customary international law. The BIT also contains an umbrella clause and provides for national treatment and most-favored-nation treatment at the post-establishment phase. These "rather liberal" features of the Chinese-Swiss BIT are balanced by a restriction of benefits under the BIT to investors having their "seat, together with real economic activities" in the purported home State – which is consistent with most of Switzerland's

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[65] See also "Canada Announces Conclusion of Investment Treaty with China, but there's an Asterisk," February 16, 2012, available online at http://www.iareporter.com/articles/20120216.

[66] A similar exception is provided for in the China-Japan-Republic of Korea investment agreement.

[67] Peterson, "Settlement Provisions of the China-Canada Investment Treaty, including its State-to-State Mechanism," *supra* note 61.

[68] *Ibid.*

[69] Luke Eric Peterson, "New Chinese Treaty with Switzerland Replaces 1986 Pact," Investment Arbitration Reporter, October 20, 2010, available online at http://www.iareporter.com/articles/20101023_8.

[70] *Ibid.*

treaties.[71] In addition, a protocol to the BIT excepts "existing non-conforming measures" from the requirements of national treatment.[72] The BIT also provides for market-value compensation for expropriation, and notably does not contain language clarifying that legitimate welfare regulations are not to be deemed expropriative.[73]

The balance struck in each of the China-Canada and China-Switzerland BITs can only in part be attributed to China's unique bargaining position as the largest developing economy. For example, while both BITs provide primarily for MFN rather than national treatment, the denial of benefits clause in the China-Switzerland BIT is in line with Swiss rather than Chinese practice, just as the denial of benefits provision in Article 16 of the China-Canada BIT has been compared to the Canada-Jordan BIT,[74] and Canada's BITs with Latvia and Romania also contain denial of benefits provisions, albeit subject to prior consultation and notification by the host State.[75] While it also remains to be seen how China reacts once it finds itself in the position of respondent to arbitration claims under this BIT, for now the BIT's consistency with other recent Chinese BITs providing for a broad consent to arbitrate all "disputes with respect to investment" under ICSID or ad-hoc rules provides a significant indication of China's endorsement of investor access within the framework of the current ISDS regime.

Similarly, while some recent BITs have sought to reduce the subject-matter scope for ISDS claims,[76] the experience of conservative BITs involving socialist states in the 1980s and early 1990s has on the contrary been that of liberalization. These BITs, particularly by China and

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[71] *Ibid.*

[72] *Ibid.*

[73] *Ibid.*

[74] Luke Eric Peterson, "Settlement Provisions of the China-Canada Investment Treaty, including its State-to-State Mechanism," Investment Arbitration Reporter, September 26, 2012, http://www.iareporter.com/articles/20120927_1.

[75] Luke Eric Peterson, "Analysis: Multitude of Safeguards and Exceptions Make for Baroque Canadian BITs with Romania, Latvia, Czech Republic," Investment Arbitration Reporter, September 14, 2009, available online at http://www.iareporter.com/articles/20090914_5. See also Luke Eric Peterson, "Canada's New BITs with Several EU Member-States Reflect EU Requirements and Canadian Reform Agenda," Investment Arbitration Reporter, September 14, 2009, available online at http://www.iareporter.com/articles/20090914_3, noting that "a number of exceptions, limitations and safeguards – including in relation to sensitive economic sectors, and certain government functions – have been introduced into the re-negotiated treaties."

[76] The UNCTAD Issues Note "Reform of Investor-State Dispute Settlement: in Search of a Roadmap" lists the following examples: by excluding certain types of claims from the scope of arbitral review (claims relating to real estate (Cameroon-Turkey BIT); claims concerning financial institutions (Canada-Jordan BIT; claims relating to intellectual property rights and to prudential measures regarding financial services (China-Japan-Republic of Korea investment agreement); claims relating to establishment and acquisition of investments (Japan-Mexico Free Trade Agreement); claims concerning specific treaty obligations such as national treatment and performance requirements (Malaysia-Pakistan Closer Economic Partnership Agreement); and claims arising out of measures to protect national security interests (India-Malaysia Comprehensive Economic Cooperation Agreement).

Eastern European countries, provided investors access to international arbitration only with respect to disputes relating to the amount of compensation following an investment expropriation.[77] Specifically, the Singapore-China BIT has been described by Gordon Smith as the "first generation of Chinese BITs" which may be subject to expanded protections by virtue of its MFN clause: "As China has entered into some 115 BITs, often providing for substantive protection of investments in different terms, there is ample scope for investors to seek wider protection in third-party treaties, including provisions giving unrestricted rights to refer disputes to international arbitration."[78] The conclusion to be drawn from these examples seems to be that treaty negotiation priorities evolve differently for different states, depending on their economic ideology and their self-perception as an investment importer or exporter.

Recently negotiated BITs reflect individual States' policy choices and political/social priorities to the extent that they are in a bargaining position to translate these priorities to the final text of the treaty, e.g. the exemption of cultural industries and exceptions with respect to the regulation of financial institutions and taxation measures in Canada's BITs with Latvia, Romania and the Czech Republic.[79] Perhaps we will see more customization rather than trends with as uniformly far-reaching influence as the popularity of BITs in Vandevelde's second era, but the nuances of each BIT show that States are not collectively going through a knee-jerk reaction to try to bar claims.

2. Restricting the range of investors who qualify to benefit from the treaty

Clarifying the definitions of "investor" and "investment" provides a greater degree of certainty around the limits to investor access to ISDS. In this regard, different treaties take different approaches, leaving questions of interpretation to be decided on case-specific facts and arguments. For example, while the ICSID Convention does not define an "investor" or "investment", NAFTA includes a broad but exhaustive list (specifically of "investments") in Article 1139 of Chapter 11. ICSID cases thus look to the BIT in question, but have also seen the development of certain criteria, such as "'*the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*'. … Article 10.1 of the Free Trade Agreement between Chile and the Republic of Korea illustrates that approach…."[80] A greater degree of specificity is possible and indeed demonstrated in various BITs. An UNCTAD report

[77] For example, Albania-China (1993), Bulgaria-China (1989), Belgium-Poland BIT (1987)). Source: UNCTAD.

[78] Gordon Smith, "Chinese Bilateral Investment Treaties: Restrictions on International Arbitration" 76 Arbitration 58 (2010) at 63.

[79] Luke Peterson, "Analysis: Multitude of Safeguards and Exceptions Make for Baroque Canadian BITs with Romania, Latvia, Czech Republic," Investment Arbitration Reporter, September 14, 2009, available online at http://www.iareporter.com/articles/20090914_5.

[80] UNCTAD, "Impact of Investor-State Dispute Settlement Experience on Investment Rulemaking," 2007 at p. 73, available online at http://unctad.org/en/Docs/iteiia20073_en.pdf.

notes that in "the last decade, the 'closed-list' definition of 'investment' has also begun to be used in the context of BIT negotiations. In 2004, Canada abandoned the asset-based definition of 'investment' in its foreign investment protection and promotion agreements and opted to incorporate into its new Canadian BIT model a relatively detailed 'closed-list' definition of 'investment'."[81] Moreover, "countries are eager – as Article 96 of the Japan-Mexico FTA shows – to include clarifications and additional language to make the definition of 'investment' more precise."[82]

Likewise, NAFTA Articles 1116 and 1117 address the issue of admissibility of a treaty claim introduced by either the allegedly harmed company (Article 1116), or by a controlling shareholder of the investor (Article 1117). Thus, NAFTA does appear to open ISDS to minority shareholders of the investor. Moreover, the NAFTA State parties have consistently argued that NAFTA Articles 1116 and 1117 preclude simultaneous claims by the investor and a shareholder of the investor for the shareholder's alleged reflective/derivative loss resulting from the acts of the host state, although tribunals have not taken a uniform position on the issue. Thus amendments to the treaty definitions of investment and investor are among the routes considered in order to prevent multiple claims by shareholders arising out of a single alleged injury to the investment.

As part of the OECD's Working Papers on International Investment, David Gaukrodger issued an analysis of the consistency, or lack thereof, between general principles of corporate law, and shareholders' claims in investment arbitration.[83] He concludes, in particular with regard to shareholder treaty claims in respect of reflective/derivative losses, that most investment treaties do not pose limits as to the ability of shareholders to claim for reflective losses. On that basis, Gaukrodger notes, BIT tribunals have allowed for such claims to proceed, thereby creating a system that is not consistent with principles of corporate law as applied in a vast majority of both the common law and civil law jurisdictions.[84]

In addition to restricting the definitions of investments and investors in investment treaties, denial of benefits clauses constitute another possible way of containing investors' access to ISDS. Denial of benefits clauses authorize States to deny treaty protection to investors who do not have substantial business activities in their alleged home State and who are owned and/or controlled by nationals or entities of the denying State or of a State who is not a party to the

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[81] *Ibid.*

[82] *Ibid.*

[83] David Gaukrodger, "Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis." OECD Working Papers on International Investment, No. 2013/3 (November 2013), OECD Investment Division, available online at www.oecd.org/investment/working-papers.htm.

[84] *Ibid.* at 60.

treaty. The interpretations of these definitions and clauses will be discussed in the context of arbitral awards examined below.

3. Preconditions to international arbitration e.g. exhaustion of local remedies

In contrast with customary international law on diplomatic protection, which requires the exhaustion of local remedies as a precondition to the espousal of claims by the injured individual's state of nationality,[85] it is a cornerstone of ISDS that investment arbitration constitutes the only forum in international investment law in which investor claimants need to seek redress. As Schwebel and Wetter explain, "Article 26 [of the ICSID Convention] is believed to constitute the first conventional expression of what appears to be the trend of customary international law: that, where a state and an alien agree in a contract to arbitrate disputes relating to that contract, in terms indicating that arbitration is the exclusive remedy, then that remedy only must be exhausted before an international claim may be maintained. This trend is a plausible one, whose principle would appear, prima facie, to be sound. However, both the principle and the practice have their refinements – refinements which indicate that the exclusion of other remedies is and ought not to be absolute."[86]

Similarly, Schreuer argues that the absence of a requirement of exhaustion of local remedies is an advantage of investment arbitration over diplomatic protection; and that this requirement has been done away with for good reasons and should not be allowed to creep back in.[87] Citing the awards of ICSID and non-ICSID tribunals, Schreuer argues that arbitral practice "confirms that the exhaustion of local remedies is not required in contemporary investment arbitration."[88] Under Article 26 of the ICSID Convention, however, host states may "insist on the exhaustion of local remedies when consenting to international arbitration."[89] Furthermore, similar requirements in other guises still persist: (i) requirements to use domestic remedies for a certain amount of time, though in practice this generally functions as a cooling-off period, a "half-hearted revival of the local remedies rule" that "does not seem to serve any useful purpose"; (ii)

[85] See e.g. Article 14 of the 2001 ILC Draft Articles on State Responsibility.

[86] Stephen M. Schwebel and J. Gillis Wetter, "Arbitration and the Exhaustion of Local Remedies" 60 Am. J. Int'l L. 484 (1966). Article 26 of the ICSID Convention provides: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

[87] Christoph Schreuer, "Calvo's Grandchildren: the Return of Local Remedies in Investment Arbitration", 4 Law & Practice of Int'l Courts and Tribunals 1 (2005).

[88] *Ibid.*

[89] Schreuer, *ibid.* at 2.

domestic forum selection clauses in contracts; (iii) resort to domestic courts as a substantive requirement of international standards, namely denial of justice claims.[90]

Schreuer observes that the "relationship between international arbitration and adjudication by domestic courts" is addressed in a variety of BIT provisions, ranging from silence to allowing for international arbitration after the exhaustion of local remedies or provided that no domestic decision has been rendered.[91] Instead of the exhaustion of local remedies, fork-in-the-road provisions typically provide the investor with a choice between litigation in the host State's courts and international arbitration.[92] Moreover, as the tribunal in *Maffezini v. Spain*[93] reasoned: "if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road… this stipulation cannot be bypassed by invoking the [MFN] clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy." Waiver provisions such as NAFTA Article 1121 have a similar effect, requiring investor-claimants to waive their right to any domestic proceedings as a precondition to arbitration.[94]

III. Arbitral awards as the principal vector for limiting or expanding investor access to ISDS

Amending treaty language is the most obvious mechanism to limit or expand investor access to systems of international treaty protection and dispute resolution. It is also a necessary mechanism to effect any desired change in the scope and access to treaty protection. But it is, by definition, a slow and long-term process. Moreover, treaty language, even when it seeks to achieve stricter conditions to access treaty protections and dispute resolution, must comport an inherent degree of generality. Because of these constraints in achieving change in access to ISDS through modifications in treaty language, arbitral awards remain the main instruments for shaping the contours of investors' access to the systems of investment treaty protection and dispute resolution.

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[90] Schreuer cites *Yaung Chi Oo v. Myanmar*, Award of 31 March 2003 at para 40, holding that domestic remedies need not be exhausted as the investment agreement in question did not require such exhaustion of local remedies and this was not a diplomatic protection case.

[91] Christoph Schreuer, "Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road" 5(2) Journal of World Investment & Trade 231 (2004) at 239.

[92] *Ibid.*

[93] *Maffezini v. Spain*, Decision on Jurisdiction of 25 January 2000 at para 63.

[94] Catherine Yannaca-Small, "Improving the System of Investor-State Dispute Settlement: an Overview," OECD International Investment Perspectives, 2006 at 205, available online at http://www.oecd.org/investment/internationalinvestmentagreements/40079647.pdf

Tribunals have affirmed investor access to international jurisdiction as a fundamental facet of investor protection. For example, in *Maffezini v. Spain* the tribunal opined that "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors," just as consular jurisdiction was in the past "considered essential for the protection of rights of traders and, hence, regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee."[95]

In *Plama v. Bulgaria*, the tribunal underscored the importance of both protecting investor access to independent dispute resolution, and respecting the parameters of States' ex ante consent to such arbitration:

> With the advent of bilateral and multilateral investment treaties since the 1980s (today estimated to be more than 1,500), the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against host states. Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.[96]

With respect to the need for policing the distinction between foreign investors of the counterparty State's nationality, the tribunal in *Gallo v. Canada* explained that "justice is not to grant everyone the same, but *suum cuique tribuere*. Foreigners are more exposed than domestic investors to the sovereign risk attached to the investment and to arbitrary actions of the host State, and may thus, as a matter of legitimate policy, be granted a wider scope of protection."[97] However, "the same policy reasons [that justify the differential treatment of conferring rights to foreign investors which are unavailable to nationals of the host country also] mandate that the

[95] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 at para 54.

[96] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 at paragraph 198.

[97] *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), 15 September 2011 at para 335.

boundaries between foreign and domestic investors be respected, and that the privileged rights conferred to the former are not abused by the latter, in violation of the stated objectives of the international treaty."[98] Under NAFTA Article 1117, accordingly, the claimant must prove that it is a protected foreign investor who owned or controlled the investment at the relevant time.

With these policy considerations in mind, the interpretation and application of treaty provisions by tribunals illustrates five primary means by which investor access is regulated: (i) the definition of a qualifying investment or investor; (ii) denial of benefits clauses; (iii) preconditions to arbitration and bars to substantive claims, particularly the requirement to exhaust local remedies; (iv) the (non-application of MFN clauses to dispute resolution; and (v) the interpretation of umbrella clauses.

A. Defining "*investor*" and "*investment*"

While the ICSID Convention deliberately does not define what constitutes an "investment",[99] certain criteria have been articulated in arbitral jurisprudence, most influentially the *Salini v. Morocco*[100] elements of an investment: a) duration, b) a contribution on the part of the investor, c) contribution to the development of the host state, and d) some risk-taking. The definition of "investment" thus depends at least equally on the terms of the individual investment treaty in question. In this regard, recent examples of tribunal determinations that the claimants lacked standing as protected investors demonstrate thoughtful reasoning that defies criticism of undue laxness or restrictiveness as regards investor access.

In *KT Asia v. Kazakhstan*,[101] which has been reported as the third time Kazakhstan has "successfully fended off" a claim in less than 18 months,[102] the tribunal found that while the claimant, a Dutch shell company, fell within the definition of an investor in the BIT, its shares in a Kazakh bank did not amount to an investment. The tribunal addressed Kazakhstan's arguments on the lack of foreignness of (i) the investor ("opposability of nationality") and (ii) the

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98 *Ibid.* at para 331.

99 Omar Garcia-Bolivar, "Defining an ICSID Investment – Why Economic Development Should be the Core Element" April 13, 2012, available online at http://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/

100 *Salini v. Morocco*, (ICSID Case No. ARB/00/4) Decision on Jurisdiction of July 23, 2001.

101 *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, (ICSID Case No. ARB/09/8) Award of October 17, 2013, hereafter "*KT Asia*".

102 Global Arbitration Review, "Kazakhstan wins again on jurisdiction," 23 October 2013, http://globalarbitrationreview.com/news/article/31991/kazakhstan-wins-again-jurisdiction/. See also Jarrod Hepburn, "ICSID Tribunal in KT Asia v. Kazakhstan Case Finds that Investment Acquired for Nominal Price Fails to Meet BIT's Definition," Investment Arbitration Reporter, November 6, 2013, available online at http://www.iareporter.com/articles/20131106_1.

investment.[103] On the first argument, the tribunal rejected Kazakhstan's argument that the "principle of real and effective nationality sets requirements that go beyond" the definition of a national of a contracting State as "legal persons constituted under the law of that Contracting Party".[104] The tribunal declined to adopt the position of Professor Prosper Weil in his dissenting opinion in *Tokio Tokeles v. Ukraine*, that the ICSID Convention restricts its application to cases involving the transborder flux of capital, thereby setting "limitations which the States cannot alter by agreeing a definition of investor or nationality in a BIT that ignores the control or ownership of a legal entity incorporated in a given State."[105] Instead, the tribunal held that "while the ICSID Convention sets objective outer limits to jurisdiction by requiring nationality, it does not specify the test for nationality [in this context]. Hence, the Contracting States are free to set the parameters of nationality within these outer limits."[106]

With respect to the definition of "investment," however, the tribunal followed the cases pointing to the objective, ordinary meaning of "investment" pursuant to the rule of interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties: "an inherent meaning entailing a contribution that extends over a certain period of time and that involves some risk."[107] The tribunal further reasoned:

> The assets listed in Article 1(1)(a) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT. Since the BIT does not add further requirements to the inherent meaning of investment as it arises from the objective definition, the decisive test for the existence of an investment is the same under the BIT and the ICSID Convention. In fact, the Parties have not argued otherwise.[108]

The tribunal thus concluded that the "objective definition of investment under the ICSID Convention and the BIT comprises the elements of a contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return."[109] Given that KT Asia never paid even the nominal price for its shares in the BTA bank, the Tribunal concluded that it had made no contribution with respect to its alleged

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[103] *KT Asia* at para 110.

[104] *Ibid.* at paras 114-119.

[105] *Ibid.* at para 121; see further discussion of *Tokios Tokeles* at paras 135-138.

[106] *Ibid.* at para 121.

[107] *Ibid.* at para 165, citing *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280.

[108] *Ibid.* at para 166.

[109] *Ibid.* at para 173.

investment, nor was there any evidence that it had the intention or ability to do so in future.[110] Consequently, there was no investment under the ICSID Convention and the BIT.[111] The Tribunal also considered and concluded, for completeness, that the other elements of duration and risk had not been met.[112]

In the context of NAFTA, which does define "investment" exhaustively though broadly, the tribunal in *Apotex Holdings Inc. v. United States of America*[113] recently held that it lacked jurisdiction over the claims of a Canadian company in respect of its efforts to bring new generic drugs to market in the U.S. The U.S. submitted that Apotex had no relevant presence or activity in the U.S., developing and manufacturing its generic drugs outside the US and only then exporting them to U.S.-based distributors; accordingly Apotex was no more than an exporter without any "investment" activity as contemplated by NAFTA Chapter Eleven.

Apotex argued that Article 1139 defines "investment" broadly, that it invested millions of dollars in developing its products and preparing its U.S. regulatory filings in order to attain an economic benefit in the U.S., and that the sole purpose of Apotex's development and submission of its new drug applications was to obtain FDA approval to commercialize its new drugs in the U.S., which applications constituted "property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Apotex pointed to its capital and other commitments to this economic activity including the purchase of raw materials from U.S. suppliers; its designation of its U.S. affiliate and distributor Apotex Corp. as its U.S. Agent for FDA regulatory purposes and submissions as required under U.S. law; and its designation of an agent for service of process in the U.S.[114]

The tribunal found that "none of Apotex's characterisations of its alleged '*investment*' meet the requirements of NAFTA Article 1139."[115] The first category, the development and manufacture of products for sale in the US, did not qualify "for the simple reason that all the activities relied upon … occur in Canada, not in the territory of the United States,"[116] and Apotex did not have a place of business or an enterprise in the U.S.[117] As for the regulatory filings, the tribunal noted

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[110] *Ibid.* at para 206.

[111] *Ibid.* at para 206.

[112] *Ibid.* at paras 216, 221.

[113] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award on Jurisdiction and Admissibility of June 14, 2013, hereafter "*Apotex*".

[114] *Apotex* at para. 148.

[115] *Ibid.* at para. 158.

[116] *Ibid.* at para. 160.

[117] *Ibid.* at paras. 165-166. The tribunal did not consider Apotex Corp. such an enterprise, noting at paragraph 173 that it was "simply described as a U.S.-based distributor."

that these filings had to be made by both investors and exporters, and thus did not indicate *per se* that Apotex was an investor. Moreover, it was “clear that the actual sale of these products in the United States was always to be conducted by parties other than Apotex itself.”[118] Conducting litigation in the U.S. and establishing an agent in the country to assist with FDA submissions constituted an ordinary part of doing business and did not amount to an investment; similarly, Apotex’s designation and use of Apotex Corp. as its U.S. Agent were merely incidental to the regulatory requirements of the US market[119] and “simply the mechanism by which the export and sale is conducted.”[120] The tribunal thus concluded that Apotex was not a qualifying investor and that the tribunal therefore lacked jurisdiction over its claims.[121]

While the tribunal’s reasoning is sound, this award has prompted some debate amongst commentators, principally on whether Apotex should have been considered an investor *seeking to make* an investment in the U.S. Notably, however, Apotex did not advance such an argument.

Overall, tribunals deciding on whether an entity making a claim under an investment treaty have been careful not to conduct too expansive an analysis. With regard to the structuring of the ownership of the protected investment, a few tribunals have resorted to the concept of abuse of right in order to bar access to claims submitted by entities created for the needs of the treaty claim, after the claim arose.[122] But criticisms have arisen as to the admission of claims by shareholders of the protected investors. This is particularly the case with shareholders’ claims for derivative/reflective loss.[123] In his book on Investment claims, Zachary Douglas formulates a rule that he suggests arbitral tribunals should follow in order to limit access of shareholders’ claims for their derivative/reflective loss:[124]

> Rule 49: A claim founded upon an investment treaty obligation which seeks a remedy for the diminution of value of a shareholding in a limited liability company having the nationality of the host contracting state party is admissible if the claimant can establish a *prima facie* case that: (i) the assets of the company have been expropriated by the host contracting state party so that the shareholding has been rendered worthless; (ii) the company is without or has been deprived of

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118 *Ibid.* at para. 189. The tribunal added at paragraph 195 that it was “persuaded… that allowing a mere application for regulatory clearance to export goods into the United States to give rise to an ‘*investment*’ claim under Chapter Eleven would be inconsistent with the core objectives of NAFTA’s investment chapter.”

119 *Ibid.* at para. 236.

120 *Ibid.* at para. 237.

121 *Ibid.* at paras. 243, 246.

122 Mobil v. Venezuela.

123 See Gaukrodger's November 2013 report for the OECD, cited in Section II above.

124 Douglas at p. 397.

> a remedy to redress the injury it has suffered; or (iii) the company is without or has been deprived of the capacity to sue either under the *lex societatis* or *de facto*; or the company has been subjected to a denial of justice in the pursuit of a remedy in the system for the administration of justice of the host contracting state party.

Douglas follows with a Rule 50 whereby the tribunal is to "satisfy itself" that the shareholder's claim for derivative/reflective loss causes no issue of unfair exposure of the state to a multiplicity of claims, prejudice to the rights of creditors of the company, or unfair distribution of recovery.[125] Douglas generally laments that some tribunals have mistaken the treaties' wide definition of investment, which grants them jurisdiction to hear shareholders' claims, for a general rule on the admissibility of all shareholders' claims. He also notes the difficulties raised by the admission of such claims at the quantum phase of the arbitration, and the lack of precision and predictability with which such difficulties have been addressed thus far.

B. Tribunal discussions of denial of benefits clauses

Another treaty mechanism through which arbitral tribunals' interpretations have the ability to either limit or expand investors' access to ISDS is that of denial of benefits. We consider three examples: the Energy Charter Treaty ("ECT"), the US-Ecuador BIT and CAFTA. Whether a denial of benefits clause is considered to be a jurisdictional hurdle or a potential filter on the admissibility of claims which can be invoked by the respondent State,[126] its purpose and effect are to exclude claimants that do not meet the substantive criteria of being a national of a party to the BIT in question. While NAFTA contains a denial of benefits clause in Article 1113, there has to date been no arbitral award concerning this provision,[127] only discussed by other tribunals in comparison to the clauses in question in those cases (namely the ECT and CAFTA).

It is clear that the validity of a State's purported denial of benefits is a matter for the tribunal's determination.[128] Notably, while tribunals have interpreted the ECT denial of benefits clause in Article 17(1) to not preclude investor-state arbitration, in contrast to the corresponding provisions under the US-Ecuador BIT and CAFTA, this is explained by the fact that Article

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125 *Id.*

126 *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, para 15.7: "the burden of proof to establish the factual basis of the "third country control", together with the other conditions, falls upon the State as the party invoking the "right to deny" conferred by Article 1(2). This is not, as the Respondent appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State."

127 Luke Eric Peterson, "Investor turns to courts in attempt to challenge a denial of benefits determination in NAFTA dispute," Investment Arbitration Reporter, April 10, 2012, available online at http://www.iareporter.com/articles/20120410_4

128 *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008 at §60.

17(1) applies exclusively to Part III of the ECT on Investment Promotion and Protection, whereas the dispute settlement provisions (Articles 26-28) come under Part V. Neither the US-Ecuador BIT nor CAFTA shares this limited application of its respective denial of benefits provisions: Article 1(2) of the former simply applies to the entire treaty, while both denial of benefits and investor-state dispute resolution are addressed in Chapter 10 of CAFTA. Moreover, the interpretation of each treaty's clause is generally consistent across different tribunals. With respect to the question of whether a State may deny benefits with retrospective effect, however, tribunal interpretations differ on less obvious grounds.

1. Energy Charter Treaty, Article 17(1)

Under the Energy Charter Treaty, Article 17(1) of which provides that States parties may deny benefits to "a legal entity if citizens or nationals of a third state[129] own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized," arbitral jurisprudence is quite consistent. Interpreting "substantial" to mean "of substance, and not merely of form" rather than "large," the tribunal in *Amto v. Ukraine* underscored the purpose of Article 17(1) as being to "exclude from ECT protection investors which have adopted a nationality of convenience."[130]

In *Plama v. Bulgaria*,[131] the tribunal considered that Bulgaria's purported denial of benefits under Part III of the Energy Charter Treaty did not affect the claimant's right to proceed to international arbitration, which was the only means to determine if the claimant had properly been denied benefits. The tribunal reasoned:

> Unlike most modern investment treaties, Article 17(1) does not operate as a denial of all benefits to a covered investor under the treaty but is expressly limited to a denial of the advantages of Part III of the ECT. A Contracting State can only deny these advantages if Article 17(1)'s specific criteria are satisfied; and it cannot validly exercise its right of denial otherwise. … It is notorious that issues as to citizenship, nationality, ownership, control and the scope and location of business activities can raise wide-ranging, complex and highly controversial disputes, as in the present case. In the absence of Article 26 as a remedy available to the covered investor (as the Respondent contends), how are such disputes to be determined

[129] "Third state" has been clarified to mean a State non-party to the ECT. See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 at paras 551-556.

[130] *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008 at §§61, 69. The tribunal there concluded that the claimant had substantial business activity in Latvia, "on the basis of its investment related activities conducted from premises in Latvia, and involving the employment of a small but permanent staff."

[131] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 at paras 148-151.

> between the host state and the covered investor, given that such determination is crucial to both?[132]

Similarly, the tribunal in the related *Hulley Enterprises v. Russia*, *Yukos v. Russia*, and *Veteran Petroleum v. Russia* cases,[133] held that Article 17(1) did not affect investors' access to arbitration because the dispute settlement provision, Article 26, was not found in the part of the ECT in respect of which benefits could be denied. Accordingly, the operation of the denial of benefits clause in each case was a question of the merits, not of jurisdiction:

> Article 17 specifies—as does the title of that Article—that it concerns denial of the advantages of "this Part," i.e., Part III of the ECT. Provision for dispute settlement under the ECT is not found in "this Part" but in Part V of the Treaty. Whether or not Claimant is entitled to the advantages of Part III is a question not of jurisdiction but of the merits. Since Article 17 relates not to the ECT as a whole, or to Part V, but exclusively to Part III, its interpretation for that reason cannot determine whether the Tribunal has jurisdiction to entertain the claims of Claimant.[134]

As for the formal requirements for the State's denial of benefits, the tribunal held that the host State must exercise its right of denial by giving notice to the investor:

> By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed. The Tribunal was referred to Article 1113(2) NAFTA as an example of a term providing for the denial of benefits which provides for a form of prior notification and consultation; and whilst the wording is materially different from Article 17(1) ECT, this term does suggest that the Tribunal's interpretation is not unreasonable as a practical matter.
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> For these reasons, in the Tribunal's view, the interpretation of Article 17(1) ECT under Article 31(1) of the Vienna Convention requires the right of denial to be exercised by the Contracting State. Accordingly, the Tribunal decides in the

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132 *Ibid.* at para 149. The tribunal in *Plama v. Bulgaria* added that Article 26 was "a very important feature" of the Energy Charter Treaty, itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.

133 *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 at paras 497-499.

134 *Ibid.*; see also *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 at paras 441-442; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 at paras 440-441.

> present case that the Respondent was required to exercise its right against the Claimant; and that it did so only on 18 February 2003, more than four years after the Claimant made its investment in Nova Plama. The real point at issue, therefore, is whether that exercise had retrospective effect to 1998 or only prospective effect from 2003, on the Claimant's "advantages" under Part III ECT.[135]

In addition, the (somewhat ambiguous) language,[136] and more importantly the object and purpose of the ECT,[137] led the tribunal to conclude that such exercise of the right of denial should only have prospective effect. The tribunal referred in particular to the legitimate expectations of a putative investor considering whether to make an investment in the host State:

> After an investment is made in the host state, the "hostage-factor" is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express "purpose" under Article 2 ECT is the establishment of "... a legal framework in order to promote long-term co-operation in the energy field ... in accordance with the objectives and principles of the Charter" (emphasis supplied). It is not easy to see how any retrospective effect is consistent with this "long-term" purpose.[138]

In reaching its conclusion, the tribunal paid particular attention to the differences between prospective and retrospective effect from the investor's perspective:

> A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the "long term" for such an effect (if at all); and indeed such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date.[139] …

[135] *Ibid.* at paras 157-158.

[136] *Ibid.* at para 159.

[137] *Ibid.* at paras 160.

[138] *Ibid.* at para 161.

[139] *Ibid.* at para 162.

> For the Investor, the practical difference between prospective and retrospective effect is sharp. The former accords with the good faith interpretation of the relevant wording of Article 17(1) in the light of the ECT's object and purpose; but the latter does not.[140]

This reasoning was followed by the tribunal in *Liman Caspian Oil v. Kazakhstan*, which affirmed that "[a]ccepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT … 'to promote long-term co-operation in the energy field,'" which in turn required that "an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages."[141]

2. US-Ecuador BIT

Similarly, tribunals considering the US-Ecuador BIT's denial of benefits clause have held that it is an issue on the merits. In contrast with ECT jurisprudence, however, it has been held that a State party may deny benefits retroactively.

In *EMELEC v. Ecuador*[142] the tribunal held that the substantive application of the 1993 US-Ecuador BIT's denial of benefits clause was a question for the merits because it turned upon whether the claimant had substantial business activities in the US. Interestingly, the tribunal considered that Ecuador's announcement of such denial of benefits at the stage of making its objections to the tribunal's jurisdiction was timely:

> What Ecuador did was to invoke a clause in the Treaty, by which both the United States and Ecuador reserved "the right to deny to any company the advantages" of the Treaty "if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third

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[140] *Ibid.* at para 164.

[141] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 at para. 225: "With regard to the question of whether the right under Article 17(1) of the ECT can only be exercised prospectively, the Tribunal considers that the above mentioned notification requirement – on which the Parties agree – can only lead to the conclusion that the notification has prospective but no retroactive effect. Accepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as "to promote long-term co-operation in the energy field". Such long-term co-operation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages. Therefore, the Tribunal finds that Article 17(1) of the ECT does not have retroactive effect." See further analysis at Jarrod Hepburn, "In newly-disclosed 2010 Energy Charter ruling, arbitrators rule that treaty's denial of benefits clause operates only prospectively," Investment Arbitration Reporter, June 18, 2013, http://www.iareporter.com/articles/20130618_2.

[142] *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009

> country with which the denying Party does not maintain normal economic relations" (Art. I (2) of the BIT). Since EMELEC is a "company of the other Party," Ecuador has the power to deny it the advantages of the BIT if the company has no substantial business activities in the United States. The Tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction. If the Tribunal should agree to hear the merits of the present case, only then would it be appropriate to examine the substantive requirements for the denial of benefits, i.e. the determination of whether EMELEC has substantial business activities in the territory of the United States.[143]

Put another way by the tribunal in *Ulysseas, Inc. v. Ecuador*, "two cumulative conditions must be met for Respondent to deny Claimant the BIT advantages: a) Claimant must be controlled by third party nationals, and b) either Claimant does not conduct substantial business activities in the United States or Claimant is controlled by nationals of a third country with which Respondent does not maintain normal economic relations."[144] While the tribunal in *Ulysseas* ultimately found that it had jurisdiction as the claimant had proved that it was controlled by a US national,[145] the tribunal departed from the awards on the Energy Charter Treaty, and concluded that under the US-Ecuador BIT benefits could be denied retroactively, specifically to preclude the jurisdiction of such a tribunal under the BIT:

> In the Tribunal's view, since such advantages include BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT. According to the UNCITRAL Rules, a jurisdictional objection must be raised not later than in the statement of defence (Article 21(3)). By exercising the right to deny Claimant the BIT's advantages in the Answer, Respondent has complied with the time limit prescribed by the UNCITRAL Rules. Nothing in Article I(2) of the BIT excludes that the right to deny the BIT's advantages be exercised by the State at the time when such advantages are sought by the investor through a request for arbitration.[146]
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> A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause

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[143] *Ibid.* at para 71.

[144] *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010 (Bernardini, Pryles, Stern) at para 167.

[145] *Ibid.* at para 190.

[146] *Ibid.* at para 172.

> uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.[147]

This juxtaposition with the ECT awards is striking because unlike the scope of application of each treaty's respective denial of benefits provision, the prospective/retrospective effect of a State's invocation of the right of denial is not clearly provided for in the text of either treaty. The *Plama* tribunal recognized as much when it noted that the "language of Article 17(1) ECT is not by itself clear on this important point," and that despite the "slight guidance from Article 17(1) suggesting a prospective effect… the Tribunal would not wish to base its decision on such semantic indications only."[148] In contrast, the *Ulysseas* tribunal stated blithely that it saw "no valid reasons to exclude retrospective effects," and dismissed the claimant's concern based on investors' certainty as to whether they would be protected under the treaty on the same reasoning that was rejected by the tribunal in *Plama v. Bulgaria*. Moreover, reading the apparently consistent awards in *EMELEC* and *Ulysseas* – both tribunals having come to the conclusion that denial of benefits need only be announced within the State's time limit for raising jurisdictional objections – together, it is odd that the validity of denial of benefits should be a question of the merits but that the timing for such denial be limited by reference to the rules for raising jurisdictional objections.

3. CAFTA

These issues have also played out in the first and apparently only award so far to consider the denial of benefits provision in CAFTA, with the tribunal aligning itself with the US-Ecuador BIT awards and finding that it had no jurisdiction in respect of the CAFTA claims. Adopting the analysis of the US-Ecuador BIT's denial of benefits provision, the tribunal in *Pac Rim v. El Salvador* held that benefits could be denied under CAFTA retrospectively, distinguishing the "different wording, context and effect"[149] of the ECT provision. Further, as the tribunal noted, and as the USA and Costa Rica had submitted,[150] there is "no express time-limit in CAFTA for the election by a CAFTA Party to deny benefits under CAFTA Article 10.12.2."[151] This is

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[147] *Ulysseas* at para 173.

[148] *Plama v. Bulgaria* at para 159.

[149] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012 at paras 4.3-4.4.

[150] *Ibid.* at para 4.56. Both the US and Costa Rica further submitted "that a CAFTA Party is not required to invoke denial of benefits under CAFTA Article 10.12.2 before an arbitration commences; and that it may do so as part of a jurisdictional defence after a claim has been submitted to arbitration."

[151] *Ibid.* at para 4.83.

reminiscent of the *EMELEC* tribunal's conclusion that Ecuador's denial of benefits at the stage of objections to jurisdiction in the arbitration proceedings was timely. The tribunal considered that as El Salvador would have needed time to consider whether to be the first CAFTA State to exercise its right of denial and had not sought or gained any advantage by delaying the denial of benefits,[152] and that in any event El Salvador had raised its objection within the time limit provided for in the ICSID rules.[153]

On the question of the validity of El Salvador's denial of benefits, the tribunal considered:

> that the meaning and application of CAFTA Article 10.12.2, interpreted in accordance with its object and purpose under international law, require the Respondent to establish two conditions in the present case: (i) that the Claimant has no substantial business activities in the territory of the USA (beyond mere form) and (ii) either (a) that the Claimant is owned by persons of a non- CAFTA Party (here Canada) or (b) that the Claimant is controlled by persons of a non-CAFTA Party (here also Canada, or at least persons not of the USA or the Respondent as CAFTA Parties).[154]

While the tribunal did not go so far as to hold "that a traditional holding company could never meet the first condition in CAFTA Article 10.12.2 as to 'substantial business activities'," [155] it found that "the Claimant's case fails the simple factual test of distinguishing between its geographical activities before and after the change of nationality in December 2007."[156] The tribunal thus concluded "that the Claimant was and is not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities."[157]

In contrast to the ECT tribunals' analysis from the point of view of a "putative investor", the *Pac Rim* tribunal showed considerable empathy for El Salvador:

> As regards ICSID Article 25(1), the Tribunal accepts the Respondent's submission to the effect that the Respondent's consent to ICSID Arbitration in CAFTA Article 10.16.3(a) is necessarily qualified from the outset by CAFTA Article 10.12.2. Accordingly, a CAFTA Party's denial of benefits invoked after

[152] *Ibid.* at para 4.84.

[153] *Ibid.* at para 4.85.

[154] *Ibid.* at para 4.61.

[155] *Ibid.* at para 4.72.

[156] *Ibid.* at para 4.73.

[157] *Ibid.* at para 4.75.

> the commencement of an ICSID arbitration cannot be treated as the unilateral withdrawal of that Party's consent to ICSID arbitration under [and contrary to] ICSID Article 25(1).[158]

The tribunal thus concluded that El Salvador had "established under CAFTA to the required standard and burden of proof, as a matter of fact and international law, that the Claimant as an investor and its investments in El Salvador can receive no benefits from Part 10 of CAFTA upon which the Claimant's CAFTA claims necessarily depend; and accordingly that the Centre (ICSID) and this Tribunal can have no jurisdiction or other competence in respect of any such CAFTA claims."[159]

The divergence in reasoning and conclusions between the cases under the ECT on the one hand and the US-Ecuador BIT and CAFTA on the other is noteworthy because the different structure of the ECT can only explain this divergence to a limited extent. While none of the clauses considered contains an express notification requirement, the *Plama* tribunal implied one into the ECT on the basis that Article 17(1) was by itself "at best only half a notice" and investors deserved full clarity on their entitlement to rely on the treaty's benefits. On the other hand, the non-ECT tribunals apparently agree with the *Ulysseas* tribunal's matter-of-fact pronouncement that the "protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State." This reflects a fundamental difference in outlook, specifically on where to strike the balance between States' and investors' rights, in spite of the common object and purpose of all three treaties (indeed, of all investment treaties) to promote and protect bona fide long-term investment and to limit opportunism to the greatest extent possible. Just as neither position can be easily dismissed out of hand, we would be equally slow to infer on the basis of the above discussion (even while noting that the ECT awards pre-date the other awards discussed) any concerted recent effort to limit investor access.

C. Preconditions to arbitration and bars to substantive claims

1. Requirement to exhaust local remedies as a bar to denial of justice claims

In the context of a denial of justice claim, as opposed to other substantive claims under investment treaties, the exhaustion of local remedies is an element of the claim. As Paulsson explains, "the very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion…. To take one step further: denial of justice is by definition to be distinguished from situations where international

[158] *Ibid.* at para 4.90.

[159] *Ibid.* at para 4.92.

wrongs materialize before exhaustion of local remedies."[160] It should be noted, however, that only reasonable local remedies have to be exhausted. In this regard, the *Loewen* case is perhaps the most controversial case on exhaustion of local remedies, given the tribunal's finding that Loewen had failed to discharge its burden of proving that settlement was the only reasonable option in the face of its options of posting a $625 million bond to appeal a manifestly problematic trial judgment, filing for bankruptcy, or trying to bring a case before the U.S. Supreme Court. The tribunal concluded that Loewen had not exhausted exhaustion of local remedies, and that the claim of denial of justice thus could not be sustained.[161] This debate[162] is beyond the scope of the present article; rather, this section discusses the requirement of exhaustion of local remedies as a procedural prerequisite to international arbitration.

As noted above, however, outside the context of diplomatic protection (and claims for denial of justice), there is no customary international law requirement of exhaustion of local remedies as a precondition to investor-state arbitration. For example, in *Arif v. Moldova* the tribunal affirmed that "there is no general requirement to exhaust local remedies for a treaty claim to exist, unless such a claim is for denial of justice. In a claim for denial of justice, the conduct of the whole judicial system is relevant, while in a claim for expropriation, it is the individual action of an organ of the State that is decisive."[163] Nor is a refusal to read in an implied requirement of exhaustion of local remedies remarkable: for example, the tribunal in *Mitchell v. DRC* held that

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[160] Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005) at 111. Paulsson qualifies this at note 35, however, referring *inter alia* to *Metalclad v. Mexico*, Award, 30 August 2003: "It is possible that the actions of a lower court may breach international obligations under a treaty. … 'State responsibility for acts of the Judiciary does not exhaust itself in the concept of denial of justice'…. For example… a treaty may be held to contain promises of 'transparency' the breach of which is consummated by a lower court."

[161] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Case No. ARB(AF)/98/3, Award of June 26, 2003. The tribunal reasoned at para 162: "It would be strange indeed if *sub silentio* the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law."

[162] For a concise critique of this aspect of the *Loewen* saga, see Paulsson, *Denial of Justice* at pp 120-126.

[163] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 at para 345. The tribunal also clarified that "The fact that the alleged wrongful acts mainly relate to acts of the judiciary does not necessarily mean that local remedies should be exhausted before an international claim can arise. A court may violate a BIT standard directly and this breach will be attributable to the respondent State without there being any requirement to exhaust local remedies, unless it is a breach for denial of justice." (at para 334.)

under Article III(3) of the DRC-US BIT,[164] the claimant was not required to exhaust local remedies. "[T]he recourse to state authorities is a right, but not an obligation of the investor, who is free to have direct recourse to the mechanism provided for in Article VII of the BIT for the settlement of disputes."[165]

Rather, States that wish to insist on such a precondition have to specifically provide for it in their treaties, and this appears to be rare.[166] The consequences of a failure to exhaust local remedies may be that the claim is dismissed for inadmissibility, but usually without prejudice to the claimant's right to start new proceedings once the "obstacle to admissibility has been removed (e.g., through exhaustion of local remedies)."[167] Perhaps the most notorious of "Calvo's grandchildren" today, then, is the kind of provision requiring resort to domestic remedies for a certain amount of time – which functions effectively as a waiting period before arbitration proceedings may be commenced.

2. Waiting periods – mandatory recourse to domestic courts for a specified period of time

Waiting period provisions can take a range of forms, including provisions that the investor must attempt negotiation or consultation, or have recourse to domestic courts for a certain period of time, before it may resort to international arbitration. Because the fulfillment of such requirements is determined not by the outcome or any qualitative assessment of the parties' conduct of such pre-arbitration efforts, but purely by the passage of the requisite amount of time, these provisions are considered collectively as waiting period requirements, though the duration they specify may vary from three months to two years.[168] The question here, as Schreuer phrases it, is "whether failure to comply with a waiting period is a bar to jurisdiction or whether the

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[164] Article III(3) provides: "Subject to the dispute settlement provisions set forth in this Treaty, a national or company of either Party asserting that its investment was expropriated by the other Party shall have the right to prompt review by the appropriate judicial or administrative authorities of such other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefor conform to the principles of international law." *Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment*, Signed August 3, 1984, http://unctad.org/sections/dite/iia/docs/bits/us_demo_rep_congo.pdf

[165] *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/3, Excerpts of Award, 9 February 2004 at para 33.

[166] Schreuer, "Calvo's Grandchildren," at 2, adds that such clauses "are found mostly in BITs of older vintage."

[167] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, at para 171.

[168] Schreuer, "Calvo's Grandchildren," at 3. Schreuer comments at 4 that "[t]he shorter periods look quite unrealistic and make one wonder if the drafters seriously expected that a settlement might be achieved in this way. Even the longer periods are somewhat optimistic and look more like a cooling off period than a serious attempt to settle the dispute domestically." The result is that "the investor is essentially forced to use both [domestic and international remedies], one after the other" – unless, of course, the investor abandons the option of international arbitration.

waiting period is a procedural requirement that may be dispensed with where appropriate. In particular, where there is no real prospect of reaching a negotiated settlement, one may ask whether it makes sense to insist on the observance of the waiting period."[169] If this question is answered in the negative, then, are waiting period provisions obsolete?

The weight of arbitral jurisprudence appears to be in agreement that waiting period provisions are jurisdictional prerequisites. In *Philip Morris v. Uruguay* the tribunal noted that "ICSID tribunals have applied the same rules regarding the six-month waiting period. In *Enron v. Argentina*, the relevant BIT required the parties to initially seek a resolution of the dispute through consultation and negotiation, this requirement being, in the tribunal's view, "very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction".[170]

Similarly, in *Urbaser v. Argentina*, the tribunal held that Argentina did not offer any viable forum in which the claimants could have their dispute adjudicated in 18 months. Despite this conclusion, the tribunal "took seriously the insistence by Argentina that the 18 months clause was a jurisdictional requirement, and a mandatory one that could not be discarded or modified by the tribunal at its discretion."[171] The tribunal's finding as to a lack of viable forum for the resolution of the dispute within 18 months resonates somewhat with the "'effective means' trend" where tribunals have undertaken, in the context of 18-month clauses, "a *macro-assessment* as to whether the relevant local courts are capable of resolving investment disputes in an average of 18 months."[172]

As regards the consequences of non-compliance with a (binding) waiting period provision, the *Abaclat v. Argentina* tribunal majority is thus in the minority in holding that even though recourse to domestic courts for 18 months was mandatory under the Italy-Argentina BIT, non-

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[169] Schreuer, "Travelling the BIT Route," at 232.

[170] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction of July 2, 2013 at para 37. The tribunal continued at para 38: "ICSID tribunals have held that the requirement of litigation is a jurisdictional condition. In Wintershall v. Argentina the tribunal held that this requirement 'is an essential preliminary step to the institution of ICSID arbitration under the Argentina-Germany BIT; it constitutes an integral part of the 'standing offer' ('consent') of the Host State that must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration….The requirement of recourse to local courts…. is fundamentally a jurisdictional clause'."

[171] Luke Peterson, "ICSID Tribunal Weighs in with Unanimous Reading of Local Litigation Requirement Found in Argentine Bilateral Investment Treaty," Investment Arbitration Reporter, March 17, 2013, available online at http://www.iareporter.com/articles/20130317_1, reporting on *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Jurisdiction of December 19, 2012.

[172] *Ibid.*

compliance should only render a claim inadmissible in cases where it "unduly deprived the Host State of a fair opportunity to address the issue through its domestic legal system."[173]

Interestingly, while waiting period provisions are decidedly not exhaustion of local remedies provisions, tribunals interpreting the former have borrowed liberally from the rationale and logic underpinning the operation of the latter. For example, the tribunal in *Ambiente Ufficio v. Argentina* discussed the "strong structural parallels between" exhaustion of local remedies clauses and clauses requiring resort to domestic courts, specifically the "binding precondition for access to international arbitration" in Article 8(2) and (3) of the Argentina-Italy BIT.[174] Referring *inter alia* to *Plama v. Bulgaria* and scholarship including Schreuer's "Calvo's Grandchildren", the tribunal stated that it was:

> not convinced by the concerns and criticism raised vis-à-vis clauses 'provid[ing] for a mandatory attempt at settling the dispute in the host State's domestic courts for a certain period of time' inasmuch as this has prompted investment arbitral tribunals or distinguished scholars in the field to challenge the binding character of such clauses. The Tribunal cannot ignore the fact that such clauses are commonly found in investment treaties and that they are typically drafted in a manner that manifests their binding nature. These characteristics are clear indications that the Contracting Parties of the respective BIT intended to give such clauses some effect. Treaty provisions should not be construed in a way that takes away from them all useful effect (*ut res magis valeat quam pereat*). It is thus necessary for a tribunal called to interpret such a clause to duly acknowledge its binding character and to identify which purposes it may serve in the context of the applicable BIT. This also holds true in the present case.[175]

The tribunal thus declined to adopt such criticism, or to follow the majority reasoning in *Abaclat*.[176] However, the tribunal found that "an interpretation of BIT clauses such as Art. 8(3) of the Argentina-Italy BIT… results in admitting a futility exception also in respect to such

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[173] See Luke Eric Peterson, "Arbitrators Take Lenient Approach to Need for Prior Consultation and Domestic Litigation in Argentine Bond Case," Investment Arbitration Reporter, August 19, 2011, available online at http://www.iareporter.com/articles/20110819_4.

[174] *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 at para 589. The tribunal explained further at para 591: "the further possibility (in Spanish: 'podrá'; in Italian: 'potrà'; in English: 'may') to submit the dispute to international arbitration is conditioned by the twofold obligation (a) to previously have recourse to the host State's courts and (b) to notify the commencement of these national proceedings. As a consequence, the *possibility* to proceed to international arbitration is at the disposal of the investor only when not having failed to satisfy the *obligation* of having recourse to domestic courts."

[175] *Ibid.* at para 593.

[176] *Ibid.* at paras 595-596.

clauses, on the model of the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection."[177] In this regard, the tribunal further considered it appropriate to draw on the work of the International Law Commission on diplomatic protection as regarded the *threshold* for this "futility exception": to wit, "Local remedies do not need to be exhausted where […] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress […]".[178] The tribunal further pointed out, "that since the present case only regards a requirement to have temporary recourse to domestic courts, as opposed to a fully-fledged exhaustion of local remedies requirement, the threshold to be met for the futility exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; on the contrary, it is arguably rather lower."[179]

In *Kilic v. Turkmenistan*,[180] the tribunal was split. The majority concluded that "neither it, nor the Centre, has jurisdiction over this arbitration, due to the Claimant's failure to comply with the mandatory requirement of prior submission of the dispute to Turkmenistan's courts under Article VII.2 of the BIT. In the absence of jurisdiction, the Tribunal has no power to suspend these proceedings even if it was minded to do so."[181]

The claimant in *Kilic* was a Turkish construction company that had operated in Turkmenistan since around November 1994, and the tribunal assumed its standing as an "investor" for the purposes of determining the single jurisdictional question before it.[182] When issues arose in the course of several construction projects entered into with various Turkmen municipal authorities, the claimant "wrote a number of letters to municipal and state officials… seeking to resolve"[183] those issues. Considering its concerns not resolved, the claimant then filed, within the year, its request for arbitration with ICSID.[184] Article VII.2 of the Turkey-Turkmenistan BIT provided that only if an investor had submitted its dispute to the courts of the host State, and had not received a final award within one year from the date of submission of the case to the local courts,

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177 *Ibid.* at para 607.

178 *Ibid.* at para 608.

179 *Ibid.* at para 611.

180 *Kilic Insaat Ithalat Ihracat Sanayi Ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award of July 2, 2013.

181 *Ibid.* at para 6.6.1.

182 *Ibid.* at paras 2.2.2-2.2.3.

183 *Ibid.* at para 2.2.6.

184 *Ibid.* at para 2.2.7.

could it institute arbitration proceedings in one of the fora in the manner permitted by Article VII.2.[185]

Given the scope of the Award to determine "the single jurisdictional question… of Claimant's failure to comply with the requirement for recourse by it to the courts of Turkmenistan before instituting these arbitration proceedings,"[186] the relevant questions were whether: a) Turkmen courts were available; and b) whether particular failings by those courts would have made the claimant's case futile. The claimant argued that Turkmenistan lacked an independent judiciary and had a poor track record of respecting human rights. However, in the tribunal's view, these allegations missed the point. In the tribunal's words, the claimant had "apparently not taken a single procedural step [to initiate proceedings in Turkmenistan's courts] prior to submitting this dispute to ICSID,"[187] nor had it offered evidence to suggest that it had even investigated its options. Consequently, the tribunal determined that the claimant had failed to prove the futility of pursuing domestic litigation in Turkmenistan.[188]

In his Separate Opinion, Professor William Park countered that "To construe the proviso as a jurisdictional precondition creates anything but such a 'stable framework' for investment. If arbitration begins before litigation… the claim is dismissed. Yet if litigation precedes arbitration, the claim can be defeated by a swift judgment, since the deemed jurisdictional precondition, the court's failure to reach decision in a year, cannot be satisfied due to the judgment having arrived before the twelfth month."[189] Professor Park thus argued that the tribunal should have suspended its proceedings to allow time for the claimant to file a case domestically, rather than decline jurisdiction, returning the parties back to where they started, three years later.

It has been commented that *Kilic* "draws a line under one of a series of international claims brought by different Turkish contractors against Turkmenistan in an effort to air longstanding contractual grievances, including allegations of non-payment by Turkmen authorities for construction works. In principle, the tribunal's reading of the Turkey-Turkmenistan BIT could cast a cloud over other pending cases where claimants seeking to use the same treaty have not begun by pursuing remedies in Turkmenistan."[190] Whether this will happen remains to be seen,

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[185] *Ibid.* at para 1.2.52(c).

[186] *Ibid.* at para 1.1.1.

[187] *Ibid.* at para 8.1.8.

[188] *Ibid.* at para 8.1.21.

[189] Separate Opinion of William Park at para. 21.

[190] Luke Eric Peterson, "Claimant's Failure to Pursue Local Remedies for 12 Months Derails $300 million Claim against Turkmenistan; Use of Local Courts not Proven to be Futile," Investment Arbitration Reporter, July 5, 2013, available online at http://www.iareporter.com/articles/20130705_1

but it seems that the more important criticism of the majority's opinion is not so much its restrictive effect on investor access but, as Professor Park pointed out, its resulting in increased costs and delay for both investors and the host State, only to return them to square one.

Waiting period provisions are therefore probably not the optimal means of limiting investor access. The analogies to the rule of exhaustion of local remedies may foreshadow the inevitable conclusion that waiting period provisions equally have no useful application in ISDS, but this is a debate for States to resolve at the stage of treaty negotiation, rather than for tribunals to avoid waste and delay by circumventing the plain language of waiting period provisions, regardless of greater commonsensical appeal of the *Abaclat*-Park position. As undesirable and artificial as such provisions may be, the preservation of States' freedom to insist on the exhaustion of local remedies under Article 26 of ICSID (notwithstanding the customary international law default that such exhaustion is not required for non-diplomatic protection claims), supports the *Kilic* majority's conclusion, in line with the tribunals in *Urbaser* and *Philip Morris*, that an investor may not unilaterally alter the conditions of the host State's offer to arbitrate.[191]

D. Non-application of MFN to dispute resolution provisions

The debate over the applicability of MFN clauses to dispute resolution is as summed up by the tribunal in *Gas Natural v. Argentina*: "the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states."[192] The tribunal in that case answered this question in the affirmative, thus justifying MFN application to dispute resolution:

> As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries inter se), a crucial element – indeed perhaps the most crucial element – has been the provision for independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts. Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national. The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for

[191] *Kilic* at para 6.2.2.

[192] *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 at para 29.

> independent international arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or comparable arrangements, and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment.[193]

The tribunal continued:

> This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis set out in paragraphs 28-30 above is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the States parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.[194]

On the other side of the debate, echoing the themes discussed in the sections above, and without denying the importance of investor-state arbitration, the tribunal in *Telenor v. Hungary* observed that "[t]hose who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties."[195]

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[193] *Ibid.*

[194] *Gas Natural SDG, S.A. v. The Argentine Republic* at para 49.

[195] *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 at para 95.

Subsequent awards have demonstrated that the debate remains very much alive, as tribunals seek to balance the interests of investors and states, while also giving effect to both the ordinary and contextual meaning of BIT provisions. In doing so, tribunals appear to increasingly refer also to other BITs and awards, providing further support and justification for – or conversely to distinguish such other treaties and awards from – their interpretations by comparative analysis, particularly by reference to the relevant historical context. Despite the absence of any formal precedential doctrine like *stare decisis* in international investment law, this comparative analysis may serve the useful function of weaving together an ever-developing body of jurisprudence that provides a helpful degree of predictive certainty for States in their subsequent conduct and negotiations. In addition, to the extent that this results in sufficient State practice and *opinio juris* on identifiable norms, awards may both help to create and reflect customary international law, although perhaps not immediately in the MFN context.

Kilic v. Turkmenistan provides a recent example of comparative historical analysis: while the tribunal was split on the consequences of the claimant's failure to pursue local remedies for at least 12 months, it was unanimous in rejecting the application of the MFN provision to circumvent recourse to domestic courts.[196] In particular, the tribunal found that the treaty's structure separated "substantive rights" from "remedial procedures in relation to those rights;"[197] the tribunal considered that this "distinction suggests strongly that the 'treatment' of 'investments' for which MFN rights were granted was intended to refer only to the scope of the substantive rights…."[198] Moreover, the tribunal found that the MFN clauses in other treaties relied upon by the claimant were broader in scope than the MFN clause in the Turkey-Turkmenistan BIT. The tribunal specifically declined to adopt the position taken by other tribunals following the *Maffezini v. Spain* line of cases, noting that when this BIT was signed in 1992, it was unlikely that the negotiators had contemplated that the MFN clause could extend to dispute resolution provisions. By the same reasoning, the 2011 Azerbaijan-Turkey BIT similarly could not be relied upon to illuminate Turkey and Turkmenistan's intent in concluding their 1992 BIT.

Similarly, in *Philip Morris v. Uruguay*, the tribunal invoked the "principle of contemporaneity"[199] to find that "When the BIT was concluded nearly 25 years ago, the Contracting Parties could not have reasonably envisaged that it might apply to dispute settlement. The BIT was signed 12 years before the *Maffezini* tribunal for the very first time

[196] Luke Eric Peterson, "Arbitrators rule that investor can't use MFN clause to detour around "local courts" recourse spelled out in Turkmenistan investment treaty," Investment Arbitration Reporter, July 5, 2013, available online at http://www.iareporter.com/articles/20130705.

[197] *Kilic v. Turkmenistan* Award at para 7.3.9 (p. 79).

[198] *Ibid.*

[199] *Philip Morris v. Uruguay* at para 49.

applied an MFN clause to establish jurisdiction where it did not otherwise exist."[200] It is interesting that the tribunal made this point before adding that, in "stark contrast to the wording of broad MFN clauses in other BITs, Article 3(2) limits the scope of the MFN clause to fair and equitable treatment" and thus did not apply to dispute resolution."[201]

Moreover, even where an MFN clause specifically provides that MFN treatment is to extend to dispute resolution, this added clarity in turn raises further questions of interpretation. *Garanti Koza v. Turkmenistan*[202] appears to be the first case involving the interpretation of an MFN clause that expressly states that it shall apply to the dispute settlement provisions of the relevant treaty, in this case the UK-Turkmenistan BIT. While the tribunal's decision on jurisdiction does not appear to be publicly available yet, it has been reported that the tribunal was split on whether the MFN clause in the UK-Turkmenistan BIT (which provided for default UNCITRAL arbitration)[203] entitled the claimant to rely on another treaty providing for ICSID arbitration. The majority of the tribunal concluded that it did, holding "that the *raison d'être* of this MFN clause was to eliminate or override the specially negotiated provisions of a given treaty in favour of other more favourable terms found elsewhere."[204]

Peterson reports that "the majority ducked another thorny question – whether consent to arbitration can be imported across treaties – by disavowing any need to import consent to arbitration in this case. For the majority, consent was already established in Article 8.1, and all that needed to be brought in via the MFN clause was access to a different mode of arbitration (i.e. ICSID instead of UNCITRAL). In this context, the majority declined to judge whether ICSID arbitration could be viewed as objectively more favourable than UNCITRAL arbitration, and instead held that the mere grant of a choice to other investors was more favourable than the situation presented in Article 8.2 of the UK-Turkmenistan BIT. This was enough for the majority to hold that Garanti Koza should be entitled to the same choice that Turkmenistan offers to investors from certain other countries."[205]

While the application of MFN clauses to substantive protections presumes the obviousness of one treaty's "more favourable" protection to another's, the tribunal's reasoning in *Garanti Koza* reveals a perhaps necessarily subjective reading of "more favourable" in the context of dispute

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[200] *Ibid.*

[201] *Philip Morris v. Uruguay* at para 50.

[202] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction of July 3, 2013.

[203] Luke Eric Peterson, "In New Ruling, Arbitrators Disagree on Interpretation of UK BIT whose MFN Clause Expressly Applies to Dispute Settlement," Investment Arbitration Reporter, July 7, 2013, available online at http://www.iareporter.com/articles/20130708_2.

[204] *Ibid.*

[205] *Ibid.*

resolution – in other words, by virtue of an MFN clause applicable to dispute resolution, the investor claimant may simply pick and choose from the host State's other BITs to find its preferred method of dispute resolution, without having to show that its chosen method is objectively more favourable. Thus the effect of the MFN clause is to provide freedom of choice to rely on a "more preferred" provision, rather than recourse to a universally "more favourable" provision in another treaty because no such provision may exist.

This appears to have troubled the dissenting arbitrator in *Garanti Koza*: Peterson reports that "Turkmenistan's nominee Prof. Boisson de Chazournes expressed concern that arbitrators not engage in 'consent shopping', particularly in light of the need to maintain the confidence among states in international adjudication. Eschewing the majority's decision to view Article 8.1 of the BIT as having established consent to arbitration, Prof. Boisson de Chazournes instead held that that provision merely sets out pre-conditions for arbitration while Article 8.2 offers the express consent of Turkmenistan – and to UNCITRAL arbitration only. Laying emphasis on the express negotiating decision of the UK and Turkmenistan to offer only UNCITRAL arbitration, the dissenting arbitrator held that this choice needed to be given effectiveness by the tribunal. In order for the MFN clause to have any bearing, the claimant must first be in a dispute settlement relationship with Turkmenistan. Given that the claimant has not accepted the only arbitration-offer put forward by Turkmenistan (i.e. UNCITRAL arbitration) the tribunal ought never to have engaged with the MFN clause, much less whether it operates so as to entitle the investor to more favourable dispute settlement terms. On this analysis, the MFN clause is subordinated insofar as it depends upon the prior engagement of Article 8.2 of the treaty."[206]

This difference in opinion on the terms of consent of a State to arbitration is not new, but it is noteworthy that it should persist in producing a split tribunal even in the face of an MFN clause stating that "For the avoidance of doubt it is confirmed that [both national and most-favoured-nation] treatment… shall apply to" inter alia Article 8.[207] For now, it appears that the MFN debate will continue along similar lines to those described in the cases on denial of benefits, particularly whether the tribunal or individual arbitrator adopts the perspective of investor or State.

E. Interpretation of umbrella clauses

Umbrella clauses serve to make a host State's breach of contract with an investor also a breach of the relevant investment treaty without the investor having to prove a violation of any substantive treaty protection, thus increasing investor access to investment arbitration. In the words of the *Eureko v. Poland* tribunal:

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[206] *Ibid.*

[207] Article 3(3) of the Turkmenistan-UK BIT, which entered into force in 1995.

> The provenance of "umbrella clauses" has been traced to proposals of Elihu Lauterpacht in connection with legal advice he gave in 1954 in respect of the Iranian Consortium Agreement, described in detail in an article in Arbitration International by Anthony C. Sinclair. It found expression in Article II of a draft Convention on Investments Abroad ("the Abs-Shawcross Draft") of 1959, which provided: 'Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.' It was officially espoused in Article 2 of the OECD draft Convention on the Protection of Foreign Property of 1967, in whose preparation, Lauterpacht, as a representative of the United Kingdom, played a part. It provided that: "Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party". The commentary to the draft Convention stated that, "Article 2 represents an application of the general principle of pacta sunt servanda – the maintenance of the pledged word" which "also applies to agreements between States and foreign nationals". Commenting on this article in his Hague Academy lectures in 1969, Professor Prosper Weil concluded that: "The intervention of the umbrella treaty transforms contractual obligations into international obligations..." ("*Problèmes relatifs aux contrats passés entre un État et un particulier.*)". The late Dr. F. A. Mann described the umbrella clause as "a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or no such interference amounts to expropriation...". The leading work on bilateral investment treaties states that: "These provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts...". The United Nations Centre on Transnational Corporations, in a 1988 study on BITs, found that an umbrella clause "makes the respect of such contracts [between the host State and the investor]...an obligation under the treaty".[208]

In this regard, tribunal interpretations of umbrella clauses have been quite consistent with this position, since the now-anomalous case of *SGS v. Pakistan*, with a recent case suggesting that a breach of domestic law may also fall within the protection of an umbrella clause.

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[208] *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award and Dissenting Opinion, 19 August 2005 at para 251.

In *SGS v. Pakistan*, the tribunal considered that "commitments" in the umbrella clause did not refer to contractual commitments, but could be "susceptible of almost indefinite expansion [and did] not purport to state that breaches of contract… are automatically 'elevated' to the level of breaches of international treaty law."[209] Schreuer has rightly pointed out that the umbrella clause would extend protection to "not an unlimited number of State contracts but only those that relate to an investment as defined by the BIT." Schreuer also disagrees with the tribunal's opinion that such an interpretation of the umbrella clause would have rendered the BIT's substantive provisions superfluous. "The BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts."[210]

Just months after the *SGS v. Pakistan* decision was released, the tribunal in *SGS v. Philippines* rejected the Respondent's argument that the effect of the umbrella clause was limited to obligations under other international law instruments. It clarified that the umbrella clause did not convert questions of contract law into treaty law or change the proper law of the contract from the host State's domestic law to international law.[211] In the tribunal's view, the proper interpretation of the umbrella clause was "to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection."[212] Schreuer thus considers that the "reasoning of the Tribunal in *SGS v. Philippines* on the umbrella clause is clearly preferable to the one in *SGS v. Pakistan*. It does justice to a clause that is evidently designed to add extra protection for the investor. Under the operation of an umbrella clause, the claim need not fail if the investor is unable to demonstrate a violation of one of the BIT's substantive provisions. … At the same time, an umbrella clause is not unduly burdensome to the host State. It will provide a remedy only if there has been a breach of the host State's legal obligation towards the investor."[213]

Going further, Jarrod Wong has argued that the Philippines tribunal's determination that the claim was not admissible because of the exclusive forum selection clause in the contract, despite determining that it had jurisdiction over SGS's contractual dispute by virtue of the umbrella clause, left investors in no better a position than under *SGS v. Pakistan*, and that the "better interpretation of the umbrella clause allows for its application notwithstanding contractual forum

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[209] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction of August 6, 2003 at para 166.

[210] Schreuer, "Travelling the BIT Route," at 253.

[211] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of January 29, 2004, at para 126.

[212] *Ibid.*

[213] Schreuer, "Travelling the BIT Route," at 255.

selection clauses."[214] Indeed, this position was taken by the majority of the tribunal in *IBM v. Ecuador*,[215] which held that the choice of forum clause in a contract between an investor's investment and the Ecuador government did not preclude the investor from submitting an ICSID claim based on the Ecuador-US BIT.

Finally, the recent case of *Liman Caspian v. Kazakhstan*[216] presents a potential expansion of the application of an umbrella clause. The investor there claimed *inter alia* that Kazakhstan's alleged violation of its domestic investment statute's provision on compensation for any state conduct in breach of Kazakh law constituted a breach of the umbrella clause. The tribunal noted "that the words '*obligation the Respondent has entered into with an investor or an Investment of an Investor of any other Contracting Party*' in ECT Article 10(1), last sentence, rather seem to suggest that a contractual or similar bilateral relationship must exist between the host state and the investor."[217] However, it "acknowledge[d] that in the context of consent to jurisdiction of arbitral tribunals, it is commonplace that the host state's unilateral offer in its national legislation to submit the dispute under certain international arbitration rules to the jurisdiction of an arbitral tribunal, once duly accepted by the claimant, is a sufficient and binding submission to arbitration. This offer can be accepted by the investor by submitting its claim to the arbitration institution or arbitral tribunal. Applying this reasoning to ECT Article 10(1), it could be argued that an abstract unilateral promise by the state in its national legislation and particularly in its laws directed to foreign investors is encompassed by the "umbrella clause"."[218] On the facts, however, the tribunal found no such breach of Kazakh laws.[219]

Schreuer acknowledges that "[p]roblems could still arise if investors were to start using umbrella clauses for trivial disputes. It cannot be the function of an umbrella clause to turn every minor

[214] Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes," 14 Geo. Mason L. Rev. 135 (2006) at 166. Wong continues at 170-171: "such an inquiry, which examines whether a claim is more akin to a contract or a treaty, is not meaningful with respect to claims based on the umbrella clause, which recognizes all contractual breaches as BIT violations, and characterizes them as such. … while claims premised on the umbrella clause are defined by reference to the terms of contract, this act of incorporating the contract does not alter the fact that the claims ultimately *are* BIT claims whose 'nature' is wholly that of treaty claims. … Relevantly, the *ad hoc* Committee in *Vivendi* noted that '[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty.'"

[215] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, at paras 55-59, 62-63, 76.

[216] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award of June 22, 2010; see also Jarrod Hepburn, "Arbitrators hold that failings of Kazakh courts don't rise to level of international law breach; but umbrella clause can cover legislative 'promises'," Investment Arbitration Reporter, June 18, 2013, http://www.iareporter.com/articles/20130618_1.

[217] *Liman Caspian Oil v. Kazakhstan* at para 448.

[218] *Ibid.*

[219] *Ibid.* at para 450.

disagreement on a detail of contract performance into an issue for which international arbitration is available. … It is to be hoped that investors will invoke umbrella clauses with the appropriate restraint. If necessary, the tribunals will have to develop appropriate restraints on their use,"[220] presumably by interpreting the relevant umbrella clauses and contracts in question.

The extension of umbrella clauses to domestic legislative promises by analogy, however, is a different kettle of fish. Such an extension is arguably superfluous as, depending on the factual circumstances of the specific case, a breach of domestic investment law could in principle well constitute a substantive breach of the investment treaty, whether by breach of the minimum standards of treatment (namely failure to provide full protection and security, or fair and equitable treatment if such breach is discriminatory), or even denial of justice should the violative conduct be attributed to the judiciary. Moreover, the implications of extending umbrella clause protection to domestic legislation have not been fully explored. Thus it is hoped that future tribunals will carefully consider the existing, negotiated protections available to investors and not be too quick to adopt the dictum in *Liman Caspian*.

The interpretation of umbrella clauses will also determine whether greater reliance on contracts can serve to effectively limit investor access to ISDS, as the authors of the Public Statement advocate. Based on the current state of arbitral jurisprudence, this does not seem likely. While tribunals have shown some restraint in asserting jurisdiction over contractual claims by virtue of an umbrella clause – even where they find that they do have jurisdiction – issues of whether State conduct is involved, and the effect to be accorded to exclusive forum selection clauses, will ensure further discussion and development in the jurisprudence.

IV. Further piecemeal improvement?

In light of the discussion above, any trend to limit investor access has itself been piecemeal and limited to specific instances. It is evident from the discussion in Part II above that States are continuously evaluating how well the system serves their priorities and responding to the development of the arbitral jurisprudence. It thus appears that excessive investor access is not as serious a problem as the most vocal critics make it out to be. Nevertheless, it is worth considering if there are any other means by which the existing limits can be made more effective while still preserving the values of the system and the system itself. Ryan comments, uncontroversially, that the "long-term legitimacy and credibility of the system will depend on how well and how quickly it can respond to those challenges. That means that all participants will be required to adjust their expectations if the system is to flourish."[221] Moreover, given the varied nuances of different treaties and facts, the system can only flourish if it is able to retain

[220] *Ibid.* at 255.

[221] Ryan, "Meeting Expectations," at 761.

flexibility to resolve disputes on a case-by-case basis while providing for a significant degree of certainty and predictability in upholding the key principles of international investment law. In this regard, we briefly consider two possible "piecemeal improvements," one substantive and the other procedural.

A. Proportionality analysis

An emerging line of analysis based on the general principle of proportionality may provide an additional tool to supplement the existing interpretive apparatus and do justice in specific cases. For example, Brower and Schill cite *Tecmed* as an example of proportionality reasoning[222] that "helps to achieve a balance between the affected property right and the public interest that is to be protected."[223] Indeed, the tribunal in that case stated that it would "consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality."[224]

Similarly, in *Servier v. Poland* [225] it was undisputed that Poland was entitled to exercise regulatory, or "police" powers with regard to matters of public health.[226] The question was whether its denial of marketing authorisations was a valid exercise of such police powers.

As the tribunal noted, the parties also generally agreed on the factors for determining whether the exercise of such police powers was valid: the claimants submitted that "States must demonstrate that the measure in question was (1) reasonable; (2) non-discriminatory; (3) proportionate to the public interest to be protected; and (4) adopted in good faith."[227] Poland agreed on proportionality, non-discrimination and good faith, but submitted that "tribunals generally consider [also] the purpose of the measure;" and that "reasonableness" was "essentially the same as the condition of 'proportionality'."[228] The tribunal held that "a host state's regulatory and/or

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[222] Brower and Schill at 485, citing *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003 ("*Tecmed*") at paras. 119, 122.

[223] *Ibid.* at 486.

[224] *Tecmed* at para 122.

[225] *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award of February 14, 2012 (redacted) ("*Servier*"). See also Jarrod Hepburn, "Poland Discriminated by not Renewing Foreigners' Pharma Marketing Authorizations; BIT Tribunal Asserts Power to Impose 'Punitive' Damages beyond Market Value," Investment Arbitration Reporter, October 24, 2013, http://www.iareporter.com/articles/20131024

[226] *Servier* at para 276.

[227] *Ibid.* at para 277.

[228] *Ibid.* at para 278. In Poland's submission, "the test is simply whether the public purpose is valid, and whether there was a rational, or plausible, link between the measures and the public purpose."

administrative actions must be taken (i) in good faith, (ii) for a public purpose, (iii) in a way proportional to that purpose, and (iv) in a non-discriminatory manner."[229]

The tribunal, while considering that it "must accord due deference to the decisions of specialized Polish administrators", stated that it would also consider "the manner in which those decisions were taken and their effect on the Claimants' investments."[230] As for the burden of proof, the tribunal considered that "it would be unreasonable to demand that Poland 'prove the negative' in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken."[231] The burden thus fell upon the claimants "to show that Poland's regulatory actions were inconsistent with a legitimate exercise of Poland's police powers. If the Claimants produce sufficient evidence for such a showing, the burden shifts to Poland to rebut it."[232] Applying these standards, the tribunal found that Poland's regulatory measures were discriminatory and disproportionate.[233] As has been reported, however, the tribunal's reasoning and analysis remain redacted from the Award.[234]

B. Registration of claims

Finally, another useful check might be some sort of institutional registration process to vet claims, such as the ICSID registration process. The threshold for this must be low, however, and the nature of registration must remain administrative rather than substantive. While it would be difficult to establish a causal link, this could potentially explain Franck's finding that "the perception of enhanced arbitration risk would be more rightly attributed to non-ICSID venues."[235] As explained in *Abaclat*[236] the ICSID Secretary-General's screening power is "conducted principally for the purposes of avoiding unnecessary use of the Centre's resources."[237] But of course this is not the same function as, much less determinative of, a tribunal's finding on jurisdiction and admissibility: "questions relating to the Centre's jurisdiction and the Tribunal's

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229 *Ibid.* at para 569.

230 *Ibid.* at para 568.

231 *Ibid.* at para 583.

232 *Ibid.* at para 584.

233 *Ibid.* at para 575.

234 Jarrod Hepburn, "Poland Discriminated by not Renewing Foreigners' Pharma Marketing Authorizations; BIT Tribunal Asserts Power to Impose 'Punitive' Damages beyond Market Value," Investment Arbitration Reporter, October 24, 2013, available online at http://www.iareporter.com/articles/20131024.

235 Franck at 901; but see also Sergio Puig and Chester W. Brown, "The Secretary-General's Power to Refuse to Register a Request for Arbitration Under the ICSID Convention," ICSID Review—Foreign Investment Law Journal (March 21, 2012) doi: 10.1093/icsidreview/sis003.

236 *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 11, 27 June 2012.

237 *Ibid.* at para 25.

competence are to be resolved by the Tribunal after a request for arbitration has been registered. This basic principle follows, inter alia, from Article 41(2) of the ICSID Convention, which provides that '[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal.'"[238]

V. Conclusion

The answer to the question of whether investor access is excessive and should be limited ultimately is probably twofold. First, access to a neutral system of dispute resolution of investor-state disputes applying international law depends primarily on States' continued willingness to subject themselves to ISDS. Such willingness is more the subject of a political than legal analysis. Second, access to ISDS is dependent on whether tribunals are offering too expansive an interpretation of the language in the investment treaties.

There appears to be a discernible trend or temptation by treaty drafters to either limit or, in some cases, to exclude access to ISDS. However, any change in treaty practice is a long-term exercise, and treaty drafters are constrained by the relative generality of the terms to be used in international treaty. Arbitral awards rendered in investment treaty cases are therefore a central source for any analysis of the regime of investors' access to ISDS. A review of the awards indicates that arbitral tribunal have generally been careful to fend off unmeritorious claimants and claims. It is true that criticism and debates exist as to the precision and validity of tribunals' reasoning regarding certain aspects of investor access to treaty protections and arbitration. But ISDS does appear as an obviously imperfect but nonetheless lively, functioning system involving considerable interaction amongst all key players: States, investors, tribunals and commentators. The evolutions in treaty provisions and arbitral awards alike show that no single actor exerts disproportionate influence over the development of the law at the expense of the others, which cannot be said for all adjudication systems. Thus the response to the existing criticisms of excessive access to ISDS probably lies to an ongoing, combined, work of perfecting treaty language and arbitral practice.

As Franck wisely notes, "recognizing the limitations [of available empirical data analysis] is fundamental to understanding the scope of reasonable inferences that can and should be drawn from the data as they inevitably have implications for the integrity of potential normative reforms."[239] This paper has examined a sampling of cases that may be representative or anecdotal, or something in between, but in this non-exhaustive analysis, it appears that there is no real trend of limiting investor access, nor is investor access too lax to begin with.

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[238] *Ibid.* at para 27.

[239] Franck at 894.

Instead, reform to address unmeritorious claims could take the form of providing for more robust substantive defences and clarifying their interpretation through for example more transparent treaty negotiation – so that parties' intentions are better captured in *travaux preparatoires* to aid in the interpretation of treaty clauses.

Second, in cases that are well reasoned, the outcome is justified by rigorous legal analysis. It is difficult to overstate the importance of policing the distinction between law and policy; tribunals should focus on the former and leave the latter to States in treaty negotiation, and not conflate technical legal analysis with political and economic policy choices. This paper thus concludes that the legal mechanisms are not inadequate; there just has been an evolution in terms of the policy priorities sought to be achieved. As the majority of the tribunal in *Daimler v. Argentina* emphasized, "as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so. "[240]

Of course, this is no easy task, and the experience of Argentina has amply demonstrated that there remain very valid and important concerns with the substance and process of international investment law. But Franck's work has demonstrated the value of truly empirical analysis as well as identified further areas for research. It would be far more fruitful to proceed down that path of "laborious, critical thinking" instead of waving slogans.[241]

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[240] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 at para 164.

[241] Kyriaki Karadelis, "Paulsson on metaphors, maxims and other mischief," Global Arbitration Review, November 8, 2013, available online at http://globalarbitrationreview.com/news/article/32034/paulsson-metaphors-maxims-mischief/.