The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators

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1. Background

The rapid increase\(^2\) in investment treaty disputes over the last few years has revealed divergences in the findings of arbitral tribunals on key provisions in bilateral investment treaties (BITs). The uncertainty surrounding these obligations has augmented the challenge both treaty negotiators and interpreters face due to the open-textured and broad language traditionally used in BITs.

One such sphere of contention is the assertion of jurisdiction by some investment treaty tribunals over investor claims grounded solely on breaches of contract through their interpretation of ‘broadly drafted’ investor-state dispute resolution and/or ‘umbrella’ clauses commonly found in BITs. This ‘expansion’ in jurisdiction has also raised concerns about forum selection clauses in investor-state contracts, which are often carefully negotiated by states to preserve jurisdiction with local courts or tribunals applying national law. The recent findings of investment treaty tribunals on this issue contain important messages for investment treaty negotiators with respect to the drafting of both treaty provisions and dispute-resolution clauses in investor-state contracts.

This paper discusses the primary ways in which investors have submitted a state’s breaches of a contract before an investment treaty tribunal. An investor’s ability to bring a claim against a state under a BIT does not require an existing contractual relationship between the two. In fact, the unique feature of the investor-state dispute resolution provision in BITs is that it allows investors to bring an arbitration claim against the host state by simply invoking the latter’s consent to arbitrate investment disputes under the treaty without the need for an arbitration agreement in a contract.

From the investor’s perspective, the opportunity to bring contract claims before an investment treaty tribunal provides the potential to circumvent the dispute resolution mechanism of the contract, which in investor-state contracts is usually based around local courts or tribunals applying the national law of the host states. As the discussion below illustrates, the response of investment treaty tribunals has been split between those adopting a ‘broad’ (or ‘expansive’) interpretation of the relevant treaty provisions versus those advocating a narrow (or ‘restrictive’) view. The result is increased uncertainty for states as to the scope of the investment-state dispute settlement process now included in most BITs.

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\(^2\) There are approximately over 250 known investor-state disputes. The UNCTAD paper ‘Investor-State Disputes Arising from Investment Treaties: A Review’ (2006) noted that over two-thirds (69%) of the 229 known treaty-based cases (through the end of the 2005) were filed after 2001.
2. ‘Expanding’ or ‘Stretching’ of the Limits of Investment Treaty-Based Jurisdiction: The Basic Approaches

Investors have advocated that investment treaty tribunals assert jurisdiction over contract claims relating to their investments in the following ways:

A. By pleading that the breach of contract also violates a treaty provision (other than the umbrella clause) in circumstances when both claims arise out of the same ‘factual matrix’: Tribunals have stressed the importance of distinguishing between solely contract claims (those that do not violate a provision of the BIT but only the contract) and treaty claims (those that violate a provision of a BIT but may also have the effect of breaching a contract provision);

B. By using an ‘umbrella’ clause: Tribunals have taken different views on whether an ‘observance of obligations’ type provision in BITs can transform the breach of contract to a breach of the treaty even (when the breach of another treaty provision has not been alleged); and/or

C. By using ‘broadly’ or ‘widely’ drafted investor-state dispute resolution clauses in BITs providing state consent to arbitrate ‘all’ or ‘any’ ‘investment disputes’ or ‘disputes concerning investments’: Tribunals have provided different rulings on whether a state’s consent in these ‘general’ provisions is sufficient to cover the arbitration of contract claims that relate to an investment of the investor.

Each of the above issues is considered in turn below.

A. Contract Claims and Treaty Claims arising out of the same factual matrix

Investment treaty tribunals have stressed the importance of distinguishing between a contract claim and a treaty claim even though they arise out of the same factual matrix\(^3\). This is based on the traditional international law principle that treaty rights exist on the plane of international law, while the contract exists on the plane of national law. In cases where the relationship between the investor and state involves a contract, the investor will usually bring claims relating to both the breach of the contract as well as violations of the treaty. This leads to the critical question of what effect the tribunal’s potential hearing of treaty claims will have on the dispute resolution choice of forum clause in any contract between the investor and state that sets out their agreement on where contract disputes should be heard.

The decision of the Vivendi annulment tribunal has often been cited for its emphasis on the distinction between contract claims and treaty claims even though both arise out of the same factual matrix. The Vivendi annulment tribunal agreed with the finding of the first Vivendi tribunal to assume jurisdiction over the BIT claims, but overturned the latter’s ruling that the contract based claims must be first submitted to the Argentine provincial courts before it could adjudicate the BIT claims. The first Vivendi tribunal had held it had jurisdiction to hear BIT claims that related to Vivendi’s concession contract and an Argentine province as they were not solely claims for breach of contract but grounded on violations of the France-Argentina BIT. However, it decided that Vivendi’s claim be remitted to provincial courts because of the crucial connection between the concession contract (which carried an exclusive jurisdiction clause in favour of the province’s administrative courts) and the alleged BIT violations. According to the first Vivendi tribunal this made it impossible on the facts of the case to separate breaches of contract claims from BIT violations without interpreting and applying the contract, a task which was to be performed by the provincial courts.

The Vivendi annulment tribunal stated as follows:

“A state may breach a treaty without breaching a contract, and vice versa...The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law... In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law- in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract...”

One difficulty lies in distinguishing a contract claim from a treaty claim where the two claims are closely entwined or connected due to the involvement of same parties, state conduct and the subject matter of the dispute. The second difficulty is how to address a breach of contract claim as a treaty claim when the contract itself has a choice of forum clause in it.

The Vivendi annulment tribunal addressed both these issues:

“In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract’... On the to other hand, where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state cannot operate as a bar to the application of the treaty standard. At most, it might be relevant –as municipal law will often be relevant- in assessing whether there has been a breach of treaty.”

In other words, in the view of the Vivendi annulment tribunal the choice of forum clause in a contract “did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16(4) of the Concession Contract did not in terms

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4 For example, it was analysed in Eureko v Poland and SGS v Pakistan
5 Vivendi Universal v Republic of Argentina, ICSID Case No. ARB 97/3. Decision on Jurisdiction and on teh Merits (21 November 2000) (“the first Vivendi decision”).
purpose to exclude the jurisdiction of an international tribunal arising under… BIT; at the very least a clear indication of an intention to exclude that jurisdiction would be required.”

Following the Vivendi annulment test, investors that ‘dress’ their contract claims as treaty claims to circumvent the dispute resolution mechanism in the contract will be subject to scrutiny by tribunals to assess whether the essential basis of the claim is a breach of contract or treaty. If they find that it is the former, then the dispute resolution mechanism of the contract will apply. On the other hand if the fundamental basis of the claim is a breach of the treaty, then the existence of an exclusive jurisdiction clause in the contract will not bar the application of the treaty tribunal’s jurisdiction. The tribunal in Joy Mining v Egypt noted the distinction between a contractual and treaty claim “A purely contractual claim, however, will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction.” This highlights the importance of pleading the claim as a BIT violation, a task which can usually be accomplished with relative ease by experts because of the broad language used in BIT provisions.

The Message for treaty negotiators

The ‘pleading’ or ‘dressing’ of contract claims as treaty claims arising out of the same facts by investors to avoid exclusive jurisdiction clauses in the actual investment contracts has frequently arisen before investment treaty tribunals. If the essential basis of the claim is found to be a treaty claim, then the choice of forum in the contract will not bar the tribunal from hearing the claim unless the tribunal is satisfied that the investor has effectively waived its treaty claims. If a state wants to ensure the primacy of the contract’s choice of forum, it should do so by including provisions in the contracts which are effective waivers specifically referring to the possibility of any claims arising under BITs.

An alternative would be to include a provision in a treaty that re-enforces the validity and enforceability of choice of forum clauses in the investment contracts, even if this means not allowing a treaty claim that is closely connected with a contract claim. To date, the author has not seen any such clauses in BITs.

B. The ‘Magic’ of the Umbrella Clause: Transforming a Contract Claim into a Treaty Claim Based on the Contract

A major area of uncertainty in investment treaty arbitration concerns the so-called ‘umbrella clause’. The structure, language and location of an umbrella clause will vary from treaty to treaty; however, it is usually similar to the text:

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6Umbrella style clauses are also are less frequently termed as “mirror effect”, “elevator”, “parallel effect”, “sanctity of contract”, “respect clause” and “pacta sunt servanda” provisions.

7 The SGS v Pakistan tribunal gave importance to location of the umbrella clause towards the end of Swiss-Pakistan BIT stating that this was indicative of an intention on the part of the contracting parties not to provide a substantive obligation. The tribunal considered that had the contracting parties intended to create a substantive obligation through the umbrella clause it would logically have been placed alongside the other so-called “first order” obligations. By contrast, the SGS v Philippines tribunal opined that while the placement of the clause may be “entitled to some weight,” it did not consider this factor as decisive. In this respect, the Tribunal stated “it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location”. Source: OECD Working
'Each Contracting Party shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party.'.

Other similar language may include that a contracting party shall "observe any obligation it may have entered into"; "constantly guarantee the observance of the commitments it has entered into"; "observe any obligation it has assumed", with respect to investments. The term ‘umbrella clause’ is thus applied to BIT provisions that, it is argued, create an international law obligation by requiring a state to observe commitments it may have entered into with the investors of the other contracting state.

Provisions that constitute umbrella clauses require a firm commitment by a state to observe undertakings or obligations, whether they arise under contract or local law, to investors with respect to their investments. Investors have argued that the violation of the contract by the state therefore breaches the “observance of obligations clause” in the BIT and becomes a legitimate treaty claim, irrespective of whether there is another provision of a treaty that is breached or not. This is the key difference between an umbrella clause claim and a claim that a breach of contract also constitutes a breach of other treaty provisions, as discussed in the previous section.

The sparseness of the umbrella clause, at barely a sentence long, is beguiling. At first glance the umbrella clause appears to be a simple affirmation of a state’s duty to observe its commitments to foreign investors, which can explain its popularity in BITs since the first BIT was signed in 1959.

It is estimated that out of the 2500 or more BITs in the world today, 40% include umbrella clauses. However, the treaty practice of states with respect to umbrella clause is still not uniform. As a critical example, the Energy Charter Treaty provision with respect to the umbrella clause is accompanied by a derogation provision included in the Annex IA. This provision allows the contracting parties to remove the umbrella clause (Article 10(1) of the Treaty) from the scope of the dispute settlement process by not permitting their investors to submit a dispute concerning this provision to international arbitration.

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Paper. This is important as state practice with respect to the location of umbrella clauses varies, for example, while India usually places them towards the end of the treaty, others like the UK place them with the treatment provisions in front.


11 The Energy Charter Treaty in the final sentence of Article 10(1) requires that: “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”. This is however accompanied by a derogation provision included in the Annex IA. This provision allows the contracting parties to opt out of the final sentence of Article 10(1) by not permitting their investors to submit a dispute concerning this provision to international arbitration. The ECT contracting parties have chosen to apply this derogation include Australia, Hungary and Norway.
The first BIT ever to be signed between Pakistan and Germany in 1959 contained an umbrella clause. Coincidently, the first arbitral decision on the effect of an umbrella clause was in *SGS v Pakistan* (2003) which took a “prudential approach”. In this case, the investor, SGS, relied on the umbrella clause provision in the Swiss-Pakistan BIT, which appeared towards the end of the treaty as Article 11:

‘Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party’.

SGS claimed that the breaches of its pre-inspection shipping agreement with Pakistan amounted to a violation of the Swiss-Pakistan BIT under the umbrella clause, in addition to breaches of other treaty standards. SGS had also asserted that if the breaches of its agreement with Pakistan were not ‘elevated’ to the level of treaty breaches due to the operation of the umbrella clause, and remained contract breaches, the tribunal could claim jurisdiction under the broadly drafted investor-state arbitration clause in the BIT (which is discussed further below).

The *SGS v Pakistan* tribunal ruled that it did not have jurisdiction to hear claims that relied on the breach of the umbrella clause, thus rejecting SGS’s argument that the umbrella clause automatically transformed contract breaches into treaty claims. It did, however, confirm its jurisdiction to hear claims based on the breach of other independent treaty provisions in the fashion discussed in the previous section. It held that the umbrella clause did not provide it with jurisdiction to hear contract claims and emphasised the distinction between the two types of claims, i.e. contract and treaty quoting the *Vivendi Annulment decision*.

The *SGS v. Pakistan* tribunal recognised it was the first investment treaty tribunal to rule on this issue and expressed concerns that if the umbrella clause had the effect of converting all contract claims into treaty claims this could negate the effect of the dispute resolution choice of forum clause in investor-state contracts. The agreement between the Government of Pakistan and SGS contained a forum selection clause which provided that disputes were to be resolved by arbitration under Pakistani law in Pakistan. The tribunal noted that a state’s breach of a contract with an investor was not in itself a violation of international law. Instead, it saw an umbrella clause as a “commitment to enact implementing rules to give effect to the host state’s contractual commitments”. The Tribunal concluded it had jurisdiction over the other treaty claims only and not the contract claims notwithstanding presence of the umbrella clause.

The *SGS v Pakistan* decision has attracted criticism in investment treaty cases and writing as being unnecessarily restrictive. It is worth noting that after the publication

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12 The first ICSID case that noted the umbrella clause was *Fedax NV v. Republic of Venezuela*, Award 9 March 1998, based on the BIT between the Netherlands and the Republic of Venezuela). In this case, the tribunal did not carry out any in-depth examination of the umbrella clause or its application. Source: The OECD Working paper


14 Phrase used by the SGS v Pakistan tribunal in its decision on jurisdiction, supra 13

15 *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (Decision on Annulment) ICSID Case No. ARB/97/3 (ICSID, 2000)

16 For example, the tribunal in *Eureko v. Poland* found it ‘less convincing’ than the reasoning in SGS v Philippines.
of the decision, the Swiss authorities explained in a letter their intention when entering into the Switzerland-Pakistan BIT as follows:

"...the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions....With regard to the meaning behind provisions such as Article 11 the following can be said:...they are intended to cover commitments that a host State has entered into with regard specific investments of an investor or investment of a specific investor, which played a significant role in the investor's decision to invest or to substantially change an existing investment, i.e. commitments which were of such a nature that the investor could rely on them...It is furthermore the view of the Swiss authorities that a violation of a commitment of the kind described above should be subject to the dispute settlement procedures of the BIT”

The SGS v Pakistan decision was immediately followed by the SGS v Philippines (2004) case, which involved the interpretation of a similarly framed umbrella clause in the Swiss-Philippines BIT, but took a different view on its impact. SGS brought claims for sums due under a comprehensive import supervision services agreement (the "CISS Agreement") with the Philippines. Article X(2) of the Switzerland-Philippines BIT provided:

".. each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

SGS argued that the "umbrella clause" elevated contract claims into treaty claims. The tribunal ruled that from "...interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed ...". Disagreeing with the finding in SGS v. Pakistan, it ruled that an umbrella clause could bring specific obligations of the host state towards an investor contained in a contract within the framework of the BIT and held there was no need to read the provision restrictively. Instead, the provision should be read in the light of its ordinary meaning.

However, and critically, the SGS v Philippines tribunal added that even though it did have jurisdiction to hear the contract claims, this did not mean that the parties' express choice of forum in the contract was negated. Rather, the tribunal stated that 'a binding exclusive jurisdiction clause in contract should be respected unless overridden by valid provision'. Thus, and contrary to the line of reasoning in the Vivendi Annulment decision, the majority tribunal view was that although it had jurisdiction to hear the contract breaches due to the umbrella clause violation, the claim was inadmissible as

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18 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Objections to Jurisdiction) ICSID Case No ARB/02/6 (ICSID, 2004); January 29, 2004.
the general provisions of the BIT did not override the forum selection clause in the contract. The dissenting opinion\textsuperscript{19} on this particular finding noted that the BIT came into force after the contract and gave an important right to investors to choose between different forms of dispute resolution.

The differences in the two SGS findings on the interpretation of the umbrella clause have evolved into the so-called two approaches to umbrella clauses— the ‘expansive’ or ‘wide’ view launched by the SGS v Philippines and the ‘narrow’ or restrictive reading championed by SGS v Pakistan. Subsequent decisions have augmented this divergence of views.

\textit{The Narrow View}

The decisions thought generally to be in line with the narrow approach to umbrella clauses espoused by SGS v Pakistan are Salini v Jordan, Joy Mining v Egypt\textsuperscript{20} and El Paso v Argentina\textsuperscript{21}.

\textit{The Joy Mining v. Egypt} tribunal noted that both the SGS decisions had considered the effect of umbrella clauses but added that:

\ldots it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here."

The tribunal concluded that even if there was an investment in this case, the absence of a treaty-based claim, and the evidence that, on the contrary, all claims were contractual, justified the finding that it lacked jurisdiction. Essentially, the view the \textit{Joy Mining} tribunal took was that in the circumstances of the case which involved purely commercial elements, the umbrella clause did not assist the investor.

So far the discussion has focussed on clauses framed in the language traditionally associated with an umbrella clause, i.e. the ‘observance of obligations or commitments’. However, the tribunal in \textit{Salini v. Jordan}\textsuperscript{22}, ruled upon a provision which in its opinion was not an umbrella clause because it was drafted in terms that were “appreciably different” from the ones that have appeared in recent arbitral awards. The investor had advanced Article 2(4) of the Italy-Jordan BIT as an umbrella clause,

\textsuperscript{19} In a dissenting Declaration the arbitrator, Professor A. Crivellaro, expressed the opinion that the ICSID tribunal had jurisdiction over all aspects of the contractual claims, including the extent or content of the contract obligations, since: “... the right to select, amongst the attractive forums made available by the BIT, the forum that the investor deems the most suitable to him... the really innovating contribution of a BIT is given by the investor’s privilege to choose a preferential forum amongst those offered by the host state...”

\textsuperscript{20} Joy Mining Machinery Limited v. The Arab Republic of Egypt (Jurisdiction) ICSID Case No. ARB/03/11 (ICSID, 2004). Article 2(2) of the Egypt-UK BIT provided “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party”


\textsuperscript{22} Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan (Jurisdiction) ICSID Case No. ARB/02/13 (ICSID, 2004.) (“Salini v. Jordan”)
which stated: “each contracting Party shall maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith of all undertakings assumed with regards to each specific investor”. Rejecting the investor’s argument, the tribunal found that this language did not constitute a treaty-based commitment to observe the obligations entered into with the investor, commonly termed as an umbrella clause.

More recently, the tribunal in El Paso v. Argentina23 (2006) rejected the investor’s arguments which would have permitted contractual breaches to be considered as breaches of the US-Argentina BIT under the treaty’s ‘umbrella clause’ provision in Article II (2) (c). This provision provided that “each Party shall observe any obligation it may have entered into with regard to investments.” The tribunal focussed on the view taken by earlier arbitral tribunals and in particular the one in SGS v. Philippines, which had ruled that ambiguities in investment treaty terms should be resolved in favour of foreign investors. The El Paso tribunal proposed a balanced approach to investment treaty interpretation which takes into account “both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow”. It rejected a wide interpretation of the clause concluding that “an umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims.”

The rationale behind the El Paso decision included the tribunal’s concern that the umbrella clause refers to ‘any obligation’ and not merely to contractual commitments, applying it literally would lead to an overly broad application24. The tribunal went on to say that applying such an obligation literally would render “useless all substantive standards of protection” of the BIT. It also emphasised that while states can agree to make violations of any obligation a violation of the treaty, they must do so “clearly and unambiguously”. Further, it mentioned its concern that investors “will not use appropriate restraint – why should they? – if the ICSID Tribunals offer them unexpected remedies. This responsibility for showing appropriate restraint rests rather in the hands of the ICSID Tribunals”.

Thus, the El Paso tribunal concluded that it was possible for a contract claim to be a treaty claim only if such claims rely on a violation of the standards of protection in the BIT. However, it appeared to need clearer language confirming state intentions to allow the transformation of contractual breaches into treaty breaches through the operation of an umbrella clause type provision. This narrow reading is not, however, consistent with other recent decisions.

The Broad View

The broad interpretation taken by the SGS v Philippines tribunal, which ruled that an umbrella clause had the effect of providing jurisdiction over purely contractual

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24 The tribunal stated that the broad interpretation of the so-called umbrella clauses would have “far reaching consequences, quite destructive of the distinction between national legal orders and the international legal order”.

breaches, is also reflected in recent awards. The Partial Award in Eureko v. Poland concluded that Article 3.5 of the Netherlands-Poland BIT, which stated that each contracting party “shall observe any obligations it may have entered into with the investments of investors” of the other contracting party, should be interpreted in accordance with its ‘ordinary meaning’ in the proper context:

“…the plain meaning – the ‘ordinary’ meaning – of a provision prescribing that a State ‘shall observe any obligations it may have entered into’ with regard to certain foreign investments is not obscure. The phrase ‘shall observe’ is imperative and categorical. ‘Any’ obligations is capacious; it means not only obligations of a certain type, but ‘any’ – that is to say, all obligations entered into with regards to investments of investors of the other Contracting Party”.

The tribunal was convinced by the reasoning in SGS v Philippines on the effect of an umbrella clause in transforming contractual claims into treaty breaches. However, having found that it had the jurisdiction to hear the contract claims due to the operation of the umbrella clause, it did not exercise its discretion to suspend the proceedings pending a determination by the courts having jurisdiction as per the investment contract as was done by the SGS v Philippines tribunal. The contractual claims in Eureko v. Poland case arose out of a share purchase agreement which provided Polish courts with exclusive jurisdiction.

The tribunal in Noble Ventures, Inc v. Romania also ruled on the question of whether contractual obligations amounted to international obligations by virtue of the umbrella clause in the US-Romania BIT. The tribunal took note of the previous decisions on this issue, and ruled that Article II (2)(c) of the BIT intended to create obligations and “obviously obligations beyond those specified in other provisions of the BIT itself”. By doing so it referred clearly to investment contracts.

It then added that by the negotiation of a BIT, two states may create an exception to the general separation of states’ obligations under municipal and under international law: “in the interest of achieving the objects and goals of the treaty, the host state may incur international responsibility by reason of a breach of its contractual obligation….the breach of contract being thus ‘internationalised’, i.e. assimilated to a breach of a treaty”.

Similarly, the LG&E v. Argentina tribunal also characterised the umbrella clause in the US-Argentina BIT as one which “creates a requirement by the host State to meet its obligations towards foreign investors, including those that derive from a contract; hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty”. However, it did not limit the obligations to those of a contractual nature, but decided that the abrogation of certain guarantees under the statutory framework (Gas Law) violated Argentina’s obligations to LG&E’s investments. It ruled that the provisions of the Gas Law obligations were not legal obligations of a general nature but were very specific in relation to LG&E’s investment in Argentina. It stated that “these laws and regulations became obligations …. that gave rise to liability under the umbrella clause.”

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26 E. Gaillard, Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses, New York Law Journal Volume 234, 06 October 2005
27 Noble Ventures Inc. v Romania, ICSID Case No. ARB/01/11, Award on Jurisdiction of 12 October 2005
28 Source: OECD Working Paper
of the treaty. Such an interpretation effectively makes an investment treaty tribunal a forum to adjudicate governmental compliance with local laws.

The state of affairs on umbrella clauses

International investment treaty tribunals are not bound by precedent; however they do take note of the decisions of other tribunals on similar issues. The above analysis reveals the “divergent” interpretations on the effect of an umbrella clause in the recent awards. The broader view, espoused by decisions such as those in SGS v Philippines, Eureko v Poland and Noble Ventures v Romania, is that an umbrella clause can have the effect of transforming purely contractual breaches into treaty breaches.

SGS v Pakistan and El Paso v. Argentina have taken a different view, that is the traditionally styled umbrella clause which calls for the observance of obligations by a state is not sufficient to convert contractual breaches into treaty breaches. The latter approach argues that clearer state intention in the language of the treaty would be required to give it such an expansive reading.

There is also the danger of even further expansion if investors can incorporate umbrella clauses into BITs that do not contain these by relying on the Most Favoured Nation (MFN) provision. This argument was advanced in Impregilo v Pakistan,30 but the issue was not decided in that case. Future cases may reveal the success with which investors are able to use the MFN provision to incorporate umbrella clauses in BITs.

It would be premature to say which view the law is likely to settle on by counting the decisions pro and contra the effect of the umbrella clause, particularly because of the frequency of the umbrella clause in BITs, there are likely to be more decisions on this issue. Due to the different language used in the observance of obligations commitments, the interpretation will also hinge on the wording and factual context as illustrated by the Salini v Jordan decision (discussed above). A few commentators have noted that arbitral tribunals, in their majority, when faced with a ‘proper’ umbrella clause, i.e. one drafted in broad and inclusive terms, seem to be adopting a fairly consistent interpretation which covers all state obligations, including contractual ones.31 At the same time, prudence requires the recognition that no conclusions can be drawn with respect the interpretation of the clause since jurisprudence is constantly evolving.32 At present, however, it is clear that a tribunal determination on this issue depends as much as anything else on the predilections of the tribunal members.

Messages for treaty negotiators

The recent decisions of investment treaty tribunals highlight the importance of the umbrella clauses in BITs. The inclusion of a provision in which a state undertakes to observe obligations or commitments with respect to investments can have the effect

30 Impregilo S.p.A v Islamic Republic of Pakistan (Jurisdiction) ICSID Case No ARB/03/3 (ICSID, 2005) April 22, 2005
31 OECD Working Paper and J. Gaffney and J. Loftis among others
32 OECD Working paper
of providing an investment treaty tribunal jurisdiction to hear contract breaches, or even pure breach of domestic law claims, if that tribunal takes a broad view.

In view of the above, if negotiators wish to avoid the expansive interpretation tribunals have given to such observance of obligations clauses, they need to ensure that such clauses are either avoided altogether or drafted in a manner that explicitly reveals their intention to either include or exclude contract or breach of law claims from appearing before a treaty-based tribunal. General or sparse language can give discretion to tribunals to reach a broad or narrow interpretation in accordance with the line of reasoning they find most convincing.

It may be noted here that the recent US Model BIT (2004) provides an example of a state explicitly including contract claims within the jurisdiction of an investment treaty tribunal rather than relying on umbrella clauses. Umbrella clauses which appeared traditionally in US BITs are not found in the recent texts, which feature expansive dispute resolution clauses that explicitly cover contract claims. This is returned to below.

One option for states that wish to reign in the expansive effect of the umbrella clause is to avoid the language associated with this provision altogether. For example the bulk of the BITs, approximately 60%, as well as the US-Canada-Mexico NAFTA Chapter 11 on investment, do not include such a provision. A second alternative, is to exclude the umbrella clause provision from the scope of the dispute settlement process, as is allowed under the Energy Charter Treaty for the states that wished to exercise this option.

States that want to retain this type of undertaking need to precisely declare the intended effect of the clause. For example, if the intention is to clearly cover contract breaches by converting them into treaty breaches and allow them access to the investor-state dispute mechanism in the treaty, then this should be expressly stated.

States parties to BITs or other investment treaties may also consider issuing an interpretive statement regarding the effect of umbrella clauses in existing treaties. This can be done, however, care must be exercised not to initiate negotiations with treaty partners that could lead to an entrenchment of divergent views.

Additionally, states should be clear on whether an umbrella clause, if included, should be understood to override or yield to a contractually agreed dispute resolution mechanism. For example, the India-Germany BIT (1995) explicitly provides in Article 13(2) that

“Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party, with disputes arising from such obligations being only redressed under the terms of the contracts underlying the obligations”.

33 An umbrella clause per se is not present in the 2004 US Model BIT, rather the investor-state dispute resolution clause found in Article 24 (1) of the model BIT expressly covers claims not just arising from breach of treaty obligations but also those grounded on the breach of an ‘investment agreement’ and investment authorisation.

34 Umbrella clauses are contained in 34 of the 41 US BITs. For example: “Each Party shall observe any obligation it may have entered into with regard to investments”. Source: OECD Working Paper
The UK-India BIT (1994) in Article 3(2) requires that:

“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.”

Waiver of Treaty claims by Investors

An ancillary issue that arises here, and which is noted for the sake of completeness, is the possibility of investors waiving their treaty rights through the investment contract or authorization process, either with respect to a contract-based dispute or in total. A number of arbitral awards have ruled that a contractual forum selection clause will not deprive a treaty-based tribunal over a treaty claim unless such a provision constitutes an explicit waiver by the investor of its rights to an international treaty-based arbitration in respect of its treaty claim. This is because, treaty claims are juridically distinct from contract claims as is emphasised above.

With respect to the application of forum selection clauses to contract based treaty claims before an investment treaty tribunal, guidance is provided by the SGS v Philippines decision which ruled that the existence of an exclusive forum selection clause made the claim inadmissible. The dissenting arbitrator on this issue in SGS v Philippines believed that the investor should have the choice of the fora provided under the BIT and the contract noting that the former was concluded after the latter. On the other hand, the tribunal in Eureko v Poland decided to hear the contract-based treaty claims in the under the umbrella clause even though there was an exclusive jurisdiction clause in the investor-state contract in favour of the Polish courts. It remains to seen what future tribunals will rule on this issue.

Therefore, states may wish to consider requiring investors to waive their rights to bring contract-based treaty claims in the investor-state contracts. In principle, this can be done by explicitly referring to any claims they may eventually have under investment treaties. The message from recent decisions such as the Agua del Tunari v Bolivia35 and Azurix v Argentina36 is that waivers in investor-state contracts should deal expressly and comprehensively with treaty claims. In Azurix v Argentina, the respondent state argued that the existence of the waiver in the investor-state contract in addition to the forum selection clause distinguished it from other cases where tribunals have held that a forum selection clause did not preclude the jurisdiction of an investment treaty tribunal over treaty claims (e.g. Vivendi annulment decision). The tribunal held that the waiver in this case as drafted only applied to the contractual claims and did not exclude jurisdiction over treaty claims. It would appear from the ruling in Agua del Tunari v Republic of Bolivia37 that there would need to be an explicit waiver of the investor’s right to arbitration under the treaty, and not merely an exclusive jurisdiction clause, to constitute a waiver with respect to treaty claims.

35 Agua del Tunari, S.A. v Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005
36 Azurix Corp v. the Argentine Republic (Case No. ARB/01/12) (December 8, 2003) is that waiver in investor-state contracts should clear expressly and comprehensively with treaty claims.
37 Agua del Tunari, S.A. v Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005
Further, it should be noted that where the contract is with a state entity rather than the state itself, this may not bind the investor with respect to any claims it may have against the state itself.38

C. Broad Dispute Resolution Clauses

The other means used by investors to advance contract claims before investment treaty tribunals are broadly drafted investor-state arbitration clauses, which provide a state’s consent in general terms to arbitrate ‘any’ or ‘all’ disputes ‘with respect’, ‘relating to’ or ‘concerning’ investments between the contracting party to the treaty and the investor of the other contracting party. Thus, arbitral tribunals have had to decide whether their jurisdiction pursuant to such a general clause extends to breaches of an investment contract or that it is limited only to deciding the violations of the substantive provisions of the treaty itself.

By contrast, narrow dispute settlement provisions make the scope of the investor-state process specific and limited. For example, Article 26 of the Energy Charter Treaty explicitly limits the investor to making claims against a Contracting Party only in case of a breach of an obligation relating to investment protection in Part 3 of the Treaty.

Broad but vague dispute resolution clauses can have the effect of expanding the right of the investor to bring a claim for matters going beyond breaches of treaty provisions. More recently, however, some states have expressly included contract claims in the treaty dispute resolution clause. For example, the recent US approach has expanded the scope of the dispute resolution clause to expressly include breaches relating to investment agreements and authorizations in addition to treaty violations. Further, the United States has included in some investment treaties an explicit option for the investor to rely on the arbitration rights in some BITs as an alternative to “any applicable previously agreed dispute-settlement mechanism.”39 A sample of an expansive dispute resolution clause of this type is found in Annex 1 of this paper.

In effect, these types of expansive provisions in more recent US investment treaties, most notably, have allowed the US to replace the potential ambiguity of the umbrella clause with specific language that seeks to offer its investors the broadest choice of fora for resolving contract or other legal disputes with a host state. Consistent with this approach, an umbrella clause per se is not present in the 2004 US Model BIT. Rather the investor-state dispute resolution clause found in Article 24 (1) of the model BIT expressly covers claims not just arising from breach of treaty obligations but also those grounded on the breach of an ‘investment agreement’ and investment authorisation.

38 This said, it may be noted that there remains a school of thought that investors cannot waive the rights they receive under investment treaties in private contracts with the state.
39 J.Gaffney and J. Loftis, 2007 quoting Article VI (2) (b) of the Ecuador-United States BIT
40 The US Model BIT, in its Article 1, provides for a detailed definition of an investment agreement: “investment agreement” means a written agreement that takes effect on or after the date of entry into force of this Treaty between a national authority of a Party and a covered investment or an investor of the other Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.”
The US approach, however, is an exception rather than the norm. Most BITs do not explicitly specify that investment contracts or the like are covered. They merely refer to all or any disputes concerning the investment. This type of ’broad’ dispute resolution clause has raised two major issues in recent awards: First, was the intention of the host state to include disputes relating to pure contract breaches or even breaches of local law related to the foreign investor in addition to treaty violations; and second, if so, could such a general right to arbitrate override an express forum selection clause in the investor-state contract. Again, the decisions of tribunals reflect a divergence in interpreting such ’broad’ dispute resolution clauses. Like the umbrella clause, this issue has divided practitioners and legal commentators, and remains unsettled in the international arbitral case law.

The effect of the broadly drafted dispute resolution clause has attracted comparatively less comment to date than the umbrella clauses. For example, Stanimir Alexandrov in his comment noted that in principle a claim which only alleges a breach of contract can fall within the ambit of a BIT dispute resolution clause referring simply to ‘disputes relating to investments’ or the like. He laid particular emphasis on the distinction often found in the investor-state dispute resolution clause and the state-state dispute resolution clause as the latter by contrast often refers to disputes ‘regarding interpretation or application of the provisions of this Agreement.’

E. Gallaird states that there are two main approaches to this issue:

“Under a first approach, a treaty-based arbitral tribunal has jurisdiction over mere contractual claims when the dispute resolution clause is drafted in sufficiently broad language to extend to any disputes, including disputes in relation to the performance of a contract. Under a second, more restrictive, approach, the broad wording of a dispute resolution clause is not sufficient justification for the jurisdiction of a treaty-based tribunal over purely contractual claims.”

One of the first cases to rule on this issue was Salini v Morocco (2001). The treaty in this case contained a broad clause covering ‘all disputes or differences’ concerning an investment. The tribunal held that the terms of this clause were ‘very general’ and that it could not be interpreted to exclude a claim based on contract from the scope of the clause as drafted. Although the Salini v Morocco tribunal held that the clause did extend to contractual claims, it restricted its jurisdiction only to claims breaching a contract that bound the state directly, stating that the ‘the jurisdiction offer contained in Article 8 does not extend, however, to breaches of a contract to which an entity other than the State is a named party.’

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41 For example, SGS v Pakistan and SGS v Philippines
42 E. Gaillard, Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses, New York Law Journal Volume 234, 06 October 2005
43 Stanimir Alexandrov, Breaches of Contract and Breaches of Treaty- The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v Pakistan and SGS v Philippines, 5 J.W.I.T 4, p 556
45 Further the tribunal in Impregilo S.p.A. v Islamic Republic of Pakistan (Jurisdiction) ICSID Case No.ARB/03/3 ICSID 2005 adopted a similar reasoning finding that the treaty’s investor-state arbitration was limited to disputes between the entities or persons concerned, and therefore the question of its jurisdiction over
This issue also divided the tribunals in the two SGS cases. The SGS v Pakistan tribunal took the view that the broad dispute resolution clause was not sufficient to give jurisdiction over ‘purely contractual’ claims. It recognized that:

...“disputes arising from claims grounded on alleged violations of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as ‘disputes with respect to investments,’ the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the case of action asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9...

The more recent case of LESI Depenta v Algeria (2005) referred to the broad language of the dispute resolution clause in the BIT in question and held that the defendant state’s consent does not imply necessarily that it has a general scope and may therefore endow jurisdiction for any violation complained of by the claimant.

By contrast, SGS v Philippines took a less restrictive view and held that in principle a widely drafted dispute resolution clause could provide a treaty based tribunal jurisdiction to hear ‘pure’ or ‘mere’ contract claims. It held that the phrase ‘disputes with respect to investments’ naturally includes contractual disputes. The tribunal’s reasoning considered among other things the factors that there was no express exclusion of contract claims in the BIT dispute resolution clause and that international tribunals can apply the law of the host state. However, as already noted in relation to how they dealt with the umbrella clause, while the tribunal affirmed jurisdiction to hear contractual claims pursuant to the broadly drafted dispute resolution in this case, it noted with respect to the choice of forum clause in the contract:

“there are two different questions here: the interpretation of the general phrase ‘disputes with respect to investments’ in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some contracts the parties stipulate exclusively for different dispute settlement arrangements. ...It is possible for BIT tribunals to give effect to the parties’ contracts while respecting the general language of BIT dispute settlement provisions...”

The tribunal concluded that while it had jurisdiction pursuant to the dispute resolution clause, the exercise of the parallel contractual mechanism was an admissibility requirement before the contract claim could be submitted to the treaty based tribunal under the BIT.

contractual claims depended on the precise status of the state-owned utility the investor had entered into contracts with. In this case, the tribunal found that Pakistan’s Water and Power Development Authority (WAPDA) was an autonomous body distinct from the state of Pakistan, and therefore Pakistan’s offer to arbitrate did not cover the claims based on the contract between the investor and WAPDA.

46 Consortium Groupement L.E.S.I-Dipenta v. Algeria ICSID Case No.ARB/03/8, 10 January 2005
As E. Gaillard describes it: “The key difference in the two approaches described above is whether the investor must allege, in order to establish the jurisdiction of the treaty-based tribunal over its contractual claims, that the substantive standards of the treaty under which it is initiating the arbitration against the host state were violated”. He notes that the argument in favour of the more extensive approach could be supported by the fact that some treaties expressly limit the jurisdiction of treaty based tribunals to breaches of the treaty itself, and therefore the broader language may suggest that other contractual breaches are also covered. On the other hand, in the absence of an express provision a phrase such as any or all disputes relating to investments cannot of itself provide a basis for the jurisdiction of a treaty based tribunal over purely contractual claims. This can be further bolstered by the fact that some treaties such as the recent US Model expressly cover breaches of investment contracts.

The analysis above illustrates the unsettled nature of arbitral reasoning on this issue. Again, it would be premature to say which approach is likely to gain wider acceptance as more decisions are handed down by arbitral tribunals on similar provisions. What is clear, however, is that specific language in an investment treaty will generate tribunal decisions consistent with that language. The US Model BIT and recent investment dispute settlement texts, noted above, provide examples of how expansive the jurisdiction of the tribunals can be made in these agreements.

It also remains to be seen if investors will use the MFN clause to broaden the scope of narrowly drafted dispute resolution clauses by relying on broadly drafted dispute resolution clauses in other BITs. The application of the MFN clause to procedural as opposed to substantive provisions as advocated by the tribunal in Maffezini v Spain\(^47\) is itself an issue of debate in international investment law. However, it should be noted that recently, the tribunal in Plama v Bulgaria\(^48\) rejected an investor’s argument that sought to use an MFN clause to broaden the investor-state dispute resolution clause in one treaty by relying on broader provisions found in other treaties concluded by the defendant state. Again, more arbitral reasoning in decisions will be required to clarify the MFN clause’s impact on the dispute resolution provisions.

Messages for treaty negotiators

The above analysis reveals the dangers in drafting dispute resolution clauses in BITs couched in very general terms, or in specific and expansive terms. Therefore, it is imperative to draft dispute resolution clauses in BITs in a manner that reflects state intent on precisely the type of disputes it wants its consent to arbitrate under the BIT to cover. General language in such provisions can easily lead to the assumption by an international tribunal of jurisdiction over basic contract claims, and other domestic law claims for compliance by governments with domestic law, relevant to the investment.

Further, where such broad or general dispute resolution clauses exist in BITs, investor-state contracts should be drafted precisely, keeping in mind that an investment treaty tribunal may be able to hear contract claims based on a widely

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\(^{47}\) Emilio Agustin Maffezini v. The Kingdom of Spain (decision of the tribunal on objections to jurisdiction) ICSID Case no. ARB/97/7 (ICSID, 2000) Date of decision: January 25, 2000

\(^{48}\) Plama Consortium Limited v. Republic of Bulgaria (Jurisdiction) ICSID Case No. ARB/03/24 (ICSID, 2005) 8 February 2005
drafted dispute resolution provision. Therefore, if the contractual dispute resolution forum is to be preserved, the investor state contract will need to have specific waivers explicitly dealing with the operation of treaty-based jurisdiction as discussed above.

3. Conclusion

While the text of each BIT may differ, the umbrella clause and broad dispute resolution clauses have to some extent become ‘stock’ provisions found frequently in treaties. The tendency to copy standard language in these clauses is revealed by the repetition of common language in BITs with respect to these provisions. Usually umbrella and broad dispute resolution clauses are drafted in very general terms, which allow tribunals discretion to interpret the state intentions leading to uncertain (and often conflicting) results as to the effect to be given to these provisions. This is particularly important in view of the unsettled nature of the law on the effect the umbrella clause and the broad dispute resolution provision in BITs on the jurisdiction of treaty based tribunals to hear contract claims. At present, there are decisions supporting both a wide and narrow interpretation, however, there appears to be a tendency among commentators to favour the former approach which is seen as being in line with the ordinary and effective meaning provided to the treaty text.

Therefore, if states want certainty with respect to the effect of such clauses in their existing BITs, they should consider issuing an interpretative statement clarifying their intention in including such a provision (if both parties are in agreement). Future treaty provisions should be drafted keeping in mind the current state of play on broad dispute resolution clauses and umbrella clauses. At the same time, a state should include language in its investor-state contracts that is effective in curtailing an investor’s right to bring claims under the treaty specifically if it wishes to preserve the exclusive jurisdiction of the forum selection clause in the investor-state contract.

It is important to note while the debate on the effect of the more traditional style umbrella clauses and broad dispute resolution provisions rages, some capital exporting states are revising their texts to avoid room for uncertainty. For example, the US Model and more recently the investor-state dispute resolution provisions in the US-Peru FTA contain language that explicitly expand jurisdiction of the treaty tribunal to hear claims arising from investment contracts and authorizations as well as violations of the treaty provisions.

Ultimately, developing countries must now determine the proper sphere of an investment treaty tribunal’s jurisdiction they wish to submit to under BITs, recognising that expansive jurisdictions can lead to the frustration of previous and future investment contract provisions that call for local court jurisdiction over specified disputes. Substantive provisions such as umbrella clauses and procedural provisions concerning the scope of dispute settlement process must be drafted keeping in view the often conflicting findings of recent arbitral tribunals.
Annex 1: US-Peru FTA \(^{49}\)

Chapter 10 (Investment): Section B-Investor-State Dispute Settlement and Section C-Definitions

The key provisions of relevance to this paper are Articles 10.15, 10.16, 10.17, 10.18 and 10.22 of Section B and Section C- Definitions.

Section B: Investor-State Dispute Settlement

Article 10.15: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 10.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

   (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

   (i) that the respondent has breached

   (A) an obligation under Section A, 10.10

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\(^{49}\) The United States – Peru Trade Promotion Agreement was signed on April 12, 2006. It is pending US congressional approval, Source: www.ustr.gov
(B) an investment authorization, or

(C) an investment agreement,

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

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(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or
(b) the claimant’s written consent for the Secretary-General to appoint that arbitrator.

Article 10.17: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an “agreement in writing,” and

(c) Article I of the Inter-American Convention for an “agreement.”

Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement, and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may
initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.  

4. (a) No claim may be submitted to arbitration:

(i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.

(b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.

Article 10.19: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

9 In an action for interim injunctive relief described in paragraph 3 (including an action seeking to preserve evidence or property during the pendency of a dispute submitted to arbitration), a judicial or administrative tribunal of the Party that is the respondent in a dispute submitted to arbitration under Section B may apply the law of that Party, including its rules on the conflict of laws, and such rules of international law as may be applicable.
4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 10.16.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 10.16.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 10.20: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.

3. The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party. Each submission shall identify the author and any person or entity that has provided, or will provide, any financial or other assistance in preparing the submission.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.\(^9\)

\(^9\) For greater certainty, with respect to a claim submitted under Article 10.16.1(a)(C) or 10.16.1(b)(C), an objection that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 may include, where applicable, an objection provided for under the law of the respondent.
(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.
8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10 or Annex 10-D.

10. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

Article 10.21: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;

(d) minutes or transcripts of hearings of the tribunal, where available; and
(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 22.2 (Essential Security) or Article 22.4 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

   (a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (9);

   (b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

   (c) a disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and

   (d) the tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal’s determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.
Article 10.22: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(B)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree, or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws,\(^{11}\) and

(ii) such rules of international law as may be applicable.

3. A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 20.1.3 (Free Trade Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

Article 10.23: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Commission on the issue. The Commission shall submit in writing any decision declaring its interpretation under Article 20.1.3 (Free Trade Commission) to the tribunal within 60 days of delivery of the request.

2. A decision issued by the Commission under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Commission fails to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 10.24: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in

\(^{11}\) The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

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writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 10.25: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 10.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

   (a) the names and addresses of all the disputing parties sought to be covered by the order;

   (b) the nature of the order sought; and

   (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

   (a) one arbitrator appointed by agreement of the claimants;

   (b) one arbitrator appointed by the respondent; and

   (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of any Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party; and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of a Party of the claimants.
6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 10.19 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 10.16.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 10.19 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.
10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 10.19 be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 10.26: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

   (a) monetary damages and any applicable interest, and

   (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney’s fees in accordance with this Section and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 10.16.1(b):

   (a) an award of restitution of property shall provide that restitution be made to the enterprise;

   (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise, and

   (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

   (a) in the case of a final award made under the ICSID Convention,

      (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

      (ii) revision or annulment proceedings have been completed; and

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(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 10.16.3(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the Party of the claimant, a panel shall be established under Article 21.6 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) in accordance with Article 21.13 (Initial Report), a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention, or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention and Article 1 of the Inter-American Convention.

**Article 10.27: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 10-C.

**Section C: Definitions**

**Article 10.28: Definitions**

For purposes of this Chapter:
Centref means the International Centre for Settlement of Investment Disputes ("ICSID")
established by the ICSID Convention;

claimant means an investor of a Party that is a party to an investment dispute with another Party;

disputing parties means the claimant and the respondent;

disputing party means either the claimant or the respondent;

enterprise means an enterprise as defined in Article 1.3 (Definitions of General Application),
and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and
a branch located in the territory of a Party and carrying out business activities there;

freely usable currency means "freely usable currency" as determined by the International
Monetary Fund under its Articles of Agreement;

ICSID Additional Facility Rules means the Rules Governing the Additional Facility for the
Administration of Proceedings by the Secretary of the International Centre for Settlement of
Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between
States and Nationals of Other States, done at Washington, March 18, 1965;

Inter-American Convention means the Inter-American Convention on International
Commercial Arbitration, done at Panama, January 30, 1975;

investment means every asset that an investor owns or controls, directly or indirectly, that has
the characteristics of an investment, including such characteristics as the commitment of capital
or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an
investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;\footnote{Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of
an investment, while other forms of debt, such as claims to payment that are immediately due and result from the
sale of goods or services, are less likely to have such characteristics.}
\footnote{Loans issued by one Party to another Party are not investments.}

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(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;14-16 and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

investment agreement means a written agreement16 between a national authority17 of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(c) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications, or

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14 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

15 The term “investment” does not include an order or judgment entered in a judicial or administrative action.

16 “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.2.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone, and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

17 For purposes of this definition, “national authority” means an authority at the central level of government.
(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

Investment authorization means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party. ¹⁸, ¹⁹

Investor of a non-Party means, with respect to a Party, an investor that attempts through concrete action to make, is making, or has made an investment in the territory of that Party, that is not an investor of a Party.

Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party, provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

National means a natural person who has the nationality of a Party according to Annex 1.3 (Country-Specific Definitions).

Negotiated restructuring means the restructuring or rescheduling of a debt instrument that has been effected through (i) a modification or amendment of such debt instrument, as provided for under its terms, or (ii) a comprehensive debt exchange or other similar process in which the holders of no less than 75 percent of the aggregate principal amount of the outstanding debt under such debt instrument have consented to such debt exchange or other process.


Non-disputing Party means a Party that is not a party to an investment dispute.

Protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.

Respondent means the Party that is a party to an investment dispute.

Secretary-General means the Secretary-General of ICSID, and

¹⁸ For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

¹⁹ The Parties recognize that no Party has a foreign investment authority that grants investment authorizations, as of the date this Agreement enters into force.