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The Guide to Construction Arbitration - Sixth Edition

Investment treaty arbitration in the construction sector

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Investment treaty arbitration in the construction sector

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Summary

INTRODUCTION
INVESTMENT TREATIES
WHO CAN BE AN INVESTOR?
AGAINST WHOM CAN PROTECTIONS BE ENFORCED?
TYPES OF PROTECTION AND CLAIMS
DENIAL OF JUSTICE
NON-DISCRIMINATION
REMEDIES
CONCLUSION

INTRODUCTION

Modern construction projects are frequently cross-border in nature. Complex infrastructure and building projects, particularly in rapidly expanding and developing economies, draw on the expertise of international contractors and subcontractors from around the world. Funding comes from a range of domestic and international investors.

The complexity of these projects means that they run for many months or years, during which time they will be exposed to many risks. One area of risk for international players in the construction sector is that projects will be adversely affected by actions taken by the state in which the project is being, or has been, built, whether through legislative, executive or potentially judicial action. These concerns can arise both where the state is a party to the project and where it is not. Construction projects, by their nature, cannot be relocated if the local environment becomes unfriendly.

Contractors and investors in these cases can feel particularly exposed to the risk that the state will favour its own interests and those of its nationals over those of foreign parties. Since the state is sovereign within its own territory, and levels of judicial independence can vary, there may also be concerns that a foreign contractor or investor will not be able to obtain adequate relief against harms that it suffers.

Protections may be found for such contractors and investors in the form of investment treaties, entered into between states for the purpose of promoting and protecting foreign investment. Under the provisions of these treaties, foreign investors who qualify for protection may be able to seek redress against the state by bringing claims to an independent international arbitration tribunal, whose awards can order compensation or other remedies for investors who have been harmed.

That these protections are relevant to the construction sector is reflected in the current abundance of international arbitration cases registered in connection with construction disputes. Statistics published by the International Centre for the Settlement of Investment Disputes (ICSID) show that disputes in the construction sector have represented 10 per cent of the total number of international investment arbitration cases registered by that institution since its commencement in 1966.[1] Statistics published by the United Nations Conference on Trade and Development similarly indicate that some 12 per cent of all known treaty-based investment disputes have been in the construction sector.[2]

This chapter provides an introduction to investment treaties for actors in the construction sector, explaining what investment treaties are; what a person or entity must do to take advantage of their protections; what protections they potentially offer; and against whom they can be enforced. It does not aim to provide a comprehensive analysis of each element discussed; instead, it aims to give a general overview of the main issues that parties in the construction sector should bear in mind when entering into international projects or when investments in foreign projects encounter difficulties.

INVESTMENT TREATIES

In broad terms, investment treaties are agreements made between states, under which each signatory state makes commitments with respect to the treatment of investments made by individuals or companies that are nationals of the other signatory state or states. They can be stand-alone treaties or they can be part of broader free trade agreements. Generally,

their intention is to promote cross-border investment by, among other things, providing protections for international investments and reassurance against political risk. They come in broadly two forms: bilateral investment treaties, entered into between two states (BITs), and multilateral investment treaties, negotiated and agreed between more than two states (MITs).[3]

Examples of MITs include:

- the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, a free trade agreement concluded between 11 Member States around the Pacific Rim;
- the United States–Mexico–Canada Agreement (which, in 2020, replaced the North American Free Trade Agreement (NAFTA));
- the Energy Charter Treaty (ECT), which has 44 members and 53 observers[4] and which aims to promote 'energy security through the operation of more open and competitive energy markets';[5] and
- the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, signed by the 10 ASEAN Member States and aiming to promote investment among them.[6]

BITs are comparatively much more numerous and are one of the most important sources of international law. Germany, the Netherlands, Egypt, the United Kingdom and China have each concluded more than 100 BITs with other states,[7] and in total there are some 2,221 BITs currently in force worldwide.[8] Although the terms of these BITs vary and each must be considered individually, BITs are frequently based on models established by a particular state and so contain similar provisions as to the protections offered and the criteria for determining who qualifies for those protections.

Most existing MITs and BITs also provide a mechanism for any disputes between investors and states to be resolved. Referred to as investor-state dispute settlement (ISDS), these mechanisms often require a period of negotiation followed by international arbitration. The precise form of international arbitration required depends on the investment treaty in question, but most treaties provide for arbitration either under the auspices of ICSID, established in accordance with the ICSID Convention, to which there are currently 165 signatory and contracting states,[9] or in accordance with the rules of the United Nations Commission for International Trade Law.[10]

However, the embrace of MITs and BITs or of international arbitration to resolve investment disputes is not universal. Several states have avoided concluding international treaties that provide for any form of investor-state dispute resolution. Brazil is a notable example, whose preferred approach to investment agreements in recent years has instead been to agree cooperation and facilitation investment agreements,[11] which neither provide for the protection of investments nor include any ISDS provisions but rather focus on state-to-state measures for facilitating investment in accordance with certain standards.[12]

Increasingly in recent years, questions have been raised, particularly within the European Union, about the continued use of investment treaties and, in particular, ISDS. Since 2018, the Commission of the European Union has taken the position that all BITs between EU Member States should be terminated and no longer regarded as a source of law,[13] with the aim of promoting the exclusive application of EU law instead.[14] Case law from the Court of Justice of the European Union (CJEU), particularly in the 2018 ***Achmea*** decision,

has held that references to arbitration in intra-EU BITs are incompatible with EU law.[15] In its 2021 *Komstroy* decision, the CJEU expanded this approach and determined that intra-EU disputes under the ECT (an important MIT, whose signatory states currently include both EU Member States and non-Member States) are similarly incompatible with EU law.[16] In 2020, the European Union proposed an agreement under which all EU Member States would be required to terminate their intra-EU BITs.[17] At the time of writing, 23 EU Member States have signed that agreement, although a number of intra-EU BITs remain to be terminated.[18]

The European Union's policy of seeking to terminate intra-EU BITs and MITs has created uncertainty and has led to substantial litigation in national courts disputing whether awards from investor-state arbitration tribunals appointed under intra-EU investment treaties can be enforced.[19] The decisions reached by these courts have been conflicting: courts in a number of EU Member States have set aside intra-EU awards in arbitrations where the tribunals were seated in the European Union; by contrast, the courts in the United States, England, Australia and Switzerland have permitted the enforcement of intra-EU awards.[20] For their part, arbitral tribunals appointed under intra-EU BITs or MITs have generally rejected objections to their jurisdiction advanced on the basis of the *Achmea* or *Komstroy* decisions,-[21] but some tribunals have considered and upheld such objections.[22]

In a similar vein, in recent years, questions have also been raised about the future of the ECT. After an initial drive by the European Union to negotiate a modernisation of the ECT, ostensibly seeking to align it with the climate goals of the Paris Agreement,[23] in 2022 and 2023 several EU Member States announced their intention to withdraw from the ECT. This ultimately led the European Union itself to announce that it was recommending a coordinated withdrawal from the ECT,[24] with further EU Member States[25] and the United Kingdom also notifying their intention to leave the Treaty.[26] The modernised ECT, however, remains in force between the Member States that have not notified their intention to leave the Treaty, and sunset provisions in the Treaty mean that existing investors in departing signatory states will continue to benefit from rights and protections during the relevant sunset periods.

These difficulties notwithstanding, there remains in place an extensive network of BITs and MITs across the world; however, in the current environment, careful consideration must be given to any treaty under which an investor might seek protection. A party wishing to obtain the protection of a treaty must consider not only whether a relevant MIT or BIT exists, but whether it has come into force, whether it remains in force and whether there are any foreseeable circumstances under which it might cease to have effect.

If an investment treaty offering protections is available, the following questions arise:

- Who is entitled to the benefit of those protections; who is an 'investor'?
- Against whom can the protections be enforced?
- What protections are available?

WHO CAN BE AN INVESTOR?

An investment treaty offers protections to investors.[27] To determine who is an investor, the text of the relevant MIT or BIT must be considered. Typically, however, the test has two requirements: that the individual or entity be a national of one of the state parties, and that it has made an investment into the other state party. If the treaty provides for disputes to be resolved through ICSID arbitration, the requirements of Article 25 of the ICSID Convention

must also be satisfied. The person or entity claiming to be an investor bears the burden of proving its entitlement.

NATIONALITY

When discussing nationality, it is important to distinguish between the state party into which the investment was made, referred to here as the host state, and the state party from which the investment was made, referred to here as the home state. Investment treaties typically only offer protections to investors from the home state and exclude nationals of the host state (who are left instead with domestic remedies against their own state). In international construction projects, where it is common to find joint ventures between nationals of both the home state and the host state, this can lead to some investors in the project being protected while others are not.[28]

For natural persons, the nationality requirement is usually that the person is a national of the home state. If a person holds more than one nationality, that person is generally entitled to rely on any of those nationalities to satisfy the criteria. Some BITs, however, disqualify an individual from being an investor if the individual is a national of both the home state and the host state. Article 25(2)(a) of the ICSID Convention, for example, expressly disqualifies an individual from being an investor if they are a national of both state parties.[29] Other cases may require consideration of the 'dominant and effective' nationality of the party.[30]

For legal persons, nationality is typically determined by the place of incorporation. In many cases, this requirement can be satisfied simply by having a holding company incorporated within the relevant jurisdiction. Singapore's BITs, for example, do not impose any requirement beyond that a corporation is incorporated in Singapore, with no requirement that the corporation have any real economic presence or any staff, nor that it act as any form of administrative headquarters – a 'letter-box' corporation will generally suffice.[31] Other treaties, by contrast, require that the corporation be involved in real economic activity before it can invoke the treaty protections – Switzerland, for example, does not recognise 'letter-box' companies for its BITs.[32] How much economic activity is required in each case depends on the terms of the particular BIT.

It is also usually the case that neither the identity of the shareholders of a corporation nor the place where majority control is exercised make any difference to its nationality;[33] however, some investment treaties include provisions that disqualify a company from being an investor when its shareholders are all nationals of the host state. Conversely, it is possible for BITs to permit an entity incorporated in the host state to be an investor if it is under the control of nationals of the home state,[34] as expressly recognised in Article 25(2)(b) of the ICSID Convention.[35]

A question arises regarding when the relevant corporation must have been incorporated within the home state and, in particular, whether it is acceptable for a new corporation to be created and interposed into an existing investment holding structure in order to benefit from a BIT. Generally, this is an acceptable practice. Corporations may restructure their holdings for the purpose of benefiting from treaty protections, and this is a step that all parties involved in large international construction projects should consider.

However, this freedom is generally subject to requirements that, at the time of the restructuring, there is no foreseeable dispute between the investor and the host state, and, accordingly, the investor is not seeking to create a BIT claim in abuse of rights or in bad faith.-[36] Although restructuring to take advantage of a treaty for future purposes is a legitimate

goal, a restructuring that takes place after a dispute has arisen, for the purpose of taking advantage of a BIT that would not otherwise apply, is regarded as 'an abusive manipulation of the system of international investment protection'.[37]

INVESTMENT

If an investor meets the nationality requirement, the next question is whether the investor has made a qualifying investment in the host state.

The main criteria for this assessment will be found in the relevant MIT or BIT. Investment treaties typically contain lists of the types of investments that will be protected by the host state. These lists tend to be broadly drawn and investments can be either tangible or intangible property. Under the US Model BIT, for example, an '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:
>
> 1. an enterprise;
> 2. shares, stock, and other forms of equity participation in an enterprise;
> 3. bonds, debentures, other debt instruments, and loans;
> 4. futures, options, and other derivatives;
> 5. turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
> 6. intellectual property rights;
> 7. licences, authorisations, permits, and similar rights conferred pursuant to domestic law; and
> 8. other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[38]

Where a BIT refers disputes to ICSID arbitration, Article 25 of the ICSID Convention has been interpreted by tribunals as requiring that an investment must also meet additional objective criteria; however, the extent of these additional criteria is a matter of some debate.

The first award fully to consider the meaning of 'investment' was ***Fedax NV v. Republic of Venezuela***,[39] which was considered and applied subsequently in the construction context in ***Salini Costruttori SpA v. Kingdom of Morocco***,[40] a dispute arising out of the construction of part of the Rabat–Fez highway in Morocco. Finding that the contractors' commitment to construct the highway was sufficient to constitute an investment, the ***Salini*** tribunal concluded that:

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction . . . In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the

> investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally.[41]

This decision has come to be referred to as the '*Salini* test', and has been noted in many subsequent awards; however, there is some debate about its status. Where it has been applied, the tendency has not necessarily been to follow it in its entirety, but rather to regard the *Salini* criteria as indicative of the general characteristics that an investment will have.[42] In other cases, the *Salini* decision has been criticised as being too narrow[43] and tribunals have declined to follow it,[44] even going as far as to say that its importance is 'very doubtful'.-[45] What does appear clear, however, is that to the extent the *Salini* test is not followed, the tendency is for a lower set of criteria to be applied.

In the construction sphere, there has been some debate about whether a contract to build something in a host state can legitimately be regarded as an investment. Critics note that, generally, contractors provide only materials and services in return for a fixed sum, including profit, with no ongoing commitment to the host state once the construction is complete;-[46] however, it now appears to be fairly settled that, at least where the construction project involves the contribution by the contractor of large sums, know-how and personnel over a significant amount of time,[47] that will often be sufficient to constitute an investment in the host state.[48]

Arbitral tribunals have accordingly found that the following construction projects amounted to an investment:

- dredging a canal;[49]
- constructing a highway;[50]
- constructing bridges;[51]
- constructing an airport;[52]
- building and launching satellites;[53]
- building a golf course;[54]
- constructing power plants powered by renewable sources;[55]
- constructing and operating blood plasma fractionation facilities;[56]
- constructing roads;[57]
- constructing infrastructure and services required for gold and copper mining exploitation;[58]
- building a hazardous waste landfill site;[59]
- constructing a hotel;[60]
- building a self-sufficient satellite city;[61]
- constructing a real estate development,[62] and
- reconstructing or renovating a hotel.[63]

AGAINST WHOM CAN PROTECTIONS BE ENFORCED?

Investment treaty protections do not apply to commercial disputes between two private parties. A claim under a BIT or MIT can only be brought against a host state, or against an entity that is an emanation or organ of the state, whose acts can be attributed to the state. Furthermore, only an action taken in exercise of the sovereign authority of the state is sufficient to constitute a breach of the protections offered by an investment treaty.[64] A mere contractual breach that does not involve any exercise of state authority, which equally could be committed by a non-state contracting party, will not be enough.

With respect to attributing acts of entities to a state, the host state will typically be liable where an action has been taken by an entity under the effective control of the state, or where the state has significant involvement in the commission of the act. In *Jan de Nul NV v. Egypt*, the tribunal developed a two-limbed test for determining effective control: the state should have general control over the person or entity; and the state should have specific control over the act in question.[65] In addition, in certain cases, particularly claims that the host state has breached a duty to provide full protection and security, the state may be liable for failure to prevent acts by third parties even if those third parties are not themselves necessarily attributable to the state.[66]

In the construction context, claims under investment treaties are most likely to arise where the owner or employer is a state or a state emanation, or in circumstances where the state is independent of the construction contract but has taken actions that negatively affect the project.

TYPES OF PROTECTION AND CLAIMS

The precise protections available to investors vary from treaty to treaty; however, many treaties include the same or similar protections, the most common of which are discussed briefly in turn below.

EXPROPRIATION

Expropriation is the act of a state taking property from its owner. Under international law, expropriation is not unlawful or wrongful ***per se***. Consistent with the principle of territorial sovereignty, host states have the right to expropriate property for economic, political, social or other reasons. Importantly, however, any expropriation must be carried out on a lawful basis.[67]

An expropriation is only lawful, from an international law perspective, if:

- it serves a public purpose;
- it is not arbitrary or discriminatory;
- the procedure follows principles of due process; and
- it is accompanied by prompt, adequate and effective compensation.[68]

Most investment treaties prohibit expropriations that do not meet these criteria.

A wrongful expropriation can be direct or indirect. Direct expropriation is relatively easy to recognise but is also relatively rare. The central element of direct expropriation is deprivation of property by the state.[69] It arises, for example, when 'governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control'.[70] This can be the result of any action by a state body or authority to seize, or otherwise to deprive the investor of, or exclude it from, its property.[71]

Indirect expropriation is more subtle, requiring not a single seizure, but a series of actions over time that result in a substantial deprivation that renders the investor's property rights useless.[72] The test is whether the effect of the state's actions is to deprive the investor 'in whole, or in significant part, of the use or reasonably-to-be-expected economic benefit of property'.[73] This can arise, for example, through gradual increases in regulation that substantially deprive the investor of the ability to use its property.[74]

In the construction context, expropriation can arise through the direct taking of land, premises or machinery; through arbitrary revocation of necessary permits, licences or agreements;[75] or through the removal or effective termination of contractual rights.[76]

FAIR AND EQUITABLE TREATMENT

The fair and equitable treatment (FET) standard is one of the most common treaty protections.[77] FET is not a term of art and does not have a set definition, and the extent of an FET obligation must be determined through interpretation of the relevant BIT or MIT. However, generally the FET standard is applied to protect the legitimate expectations of investors against unfair actions by the state. As such, it can apply in a broad range of circumstances.[78] Examples from previous cases of conduct that has been found to be in breach of the FET standard include acts by the host state unexpectedly to change its legislation in a manner detrimental to the investor;[79] acts by the state to coerce the investor into agreeing to an unfavourable settlement agreement;[80] failure by the state to ensure that a contract signed by the state with an investor would be compatible with local laws;[81] or failures by the state to process applications for necessary permits in a manner that complied with legitimate expectations of a fair and predictable legal process.[82] The FET standard could also potentially be engaged where a contract has been terminated as a result of the host state's unwillingness or inability to pay to complete the project; where the state has applied unfair or improper financial penalties; or where it has not administered a contract in good faith.[83]

DENIAL OF JUSTICE

A particular form of FET claim concerns denial of justice, which occurs when the host state fails to provide 'adequate judicial protection for the rights of aliens'.[84] It can arise where the host state's courts refuse to entertain a legitimate claim, subject it to unnecessary delays, or administer justice in a seriously inadequate way, including through the malicious misapplication of the law.[85] A denial of justice can occur in both civil and criminal legal proceedings.[86] What constitutes a denial of justice in any given case is fact-specific, but the principles of what may constitute a denial of justice have been generally recognised.[87]

Typically, a denial of justice claim may only be brought under a MIT or BIT if the investor has first exhausted all local remedies in the courts of the host state. As said in ***Loewen***, a case that arose under NAFTA:

> No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court when there was available an effective and adequate appeal within the State's legal system.[88]

Only once all possible avenues of appeal against an unfair court judgment have been pursued can a denial of justice claim under an investment treaty be considered.[89]

FULL PROTECTION AND SECURITY

A 'full protection and security' obligation typically is concerned with a requirement for the state to exercise due diligence to protect the investor from property damage, physical violence or harassment, whether by state actors or by third parties. This obligation is not a guarantee of constant and complete security, but rather a commitment to provide reasonable and proportionate security for investors.[90] As such, this is a standard that is of potential relevance to construction projects in jurisdictions where there may be civil unrest or another significant security risk.

The full protection and security standard has been considered in three prominent cases. In *AAPL v. Sri Lanka*, the local state security forces destroyed an investment in the course of a counter-insurgency operation. The tribunal held that these actions were attributable to the state, excessive and, therefore, the investor was entitled to compensation.[91] In *Wena Hotels v. Egypt*, the tribunal found the host state liable under the full protection and security standard because a state entity had seized the investor's hotel. The police authorities had been made aware of the seizure but had not acted to protect the investor either before or after the seizure, and the tribunal considered this a breach of the standard.[92] In *AMT v. Zaire*, the host state was held liable under a protection and security clause in the applicable BIT after looting incidents by armed forces for which the state was responsible.[93]

UMBRELLA CLAUSES

An umbrella clause is a provision in an investment treaty that guarantees the host state will perform any obligations it has assumed to the investor, including obligations assumed under a contract.[94] It potentially has the effect of elevating a breach of contract to the level of a breach of the relevant treaty.[95] For potential treaty claims in the construction context, umbrella clauses will therefore be particularly relevant to parties contracting directly with the host state.

However, the effect of turning a contract breach into a treaty breach is controversial. Some tribunals considering umbrella clauses have declined to find that a 'mere' contractual breach can be elevated to a treaty breach in this way, unless there is very clear language in the relevant investment treaty to that effect.[96]

Across a range of cases, tribunals have taken various approaches, finding that:

- an umbrella clause can elevate a contract breach to a treaty breach, but only where the contractual breach arises out of sovereign acts or the exercising of sovereign authority by the host state;
- the umbrella clause transforms contractual obligations into treaty obligations, subjecting them to international law and the jurisdiction of investment arbitral tribunals; or
- an umbrella clause will confer jurisdiction on a treaty tribunal, but that the clause does not change the parties or the proper law of the contract.[97]

The extent of the protections offered by umbrella clauses, therefore, is not settled. In cases involving a host state directly as a party to any construction contracts, however, they are likely to remain an important protection that investors would be well advised to seek out.

STABILISATION CLAUSES

A stabilisation clause is a provision in a contract between an investor and the host state by which the state agrees not to take certain actions that would negatively affect the investor. Although not themselves provisions of any treaty, they can be important in the investment treaty context, as they may give an investor a basis to argue that the host state has breached the FET standard or has breached an umbrella clause. They can appear in the form of freezing clauses, economic equilibrium clauses and hybrid clauses.

A freezing clause, as the name suggests, requires the host state not to change certain legislation that affects the investor. Frequently, these clauses relate to tax or royalty legislation, and often take the form of a commitment by the state to ensure that new legislation will not apply to the investor, unless otherwise agreed.[98]

An economic equilibrium clause usually does not prohibit the host state from changing its legislation, but provides that the state will indemnify the investor against the costs associated with complying with new laws, so ensuring compensation for the investor to the extent that new legislation negatively affects the investment.

A hybrid clause is a combination of both the freezing and economic equilibrium clauses. Under such a clause, foreign investors may be exempt, but are not automatically granted an exemption from the new laws. Hybrid clauses may also provide for compensation of costs associated with compliance with new laws by the investor.

Stabilisation clauses are potentially important in the construction context where the relevant contract is with the host state or one of its organs, as a means of protecting the investor against the political risk that arises from the fact that the host state can, in principle, change its legislation at any time. The potential power of the protection offered to the investor by such clauses has been confirmed in several cases.[99]

NON-DISCRIMINATION

BITs often prohibit discrimination by the host state against investors from the home state. These provisions generally require the host state to treat the foreign investors no less favourably than its own nationals.

REMEDIES

Awards issued by tribunals in international investment arbitration are final and binding on all parties to the dispute. The remedies ordered are usually damages, intended to compensate the investor for the losses that it can prove it has suffered as a result of the breach of the relevant treaty. Primacy is given in many investment treaties to damages, often to the exclusion of other remedies. Article 1135 of NAFTA, for example, limits the remedies that a tribunal may award to monetary damages or the restitution of property, and even in the latter case the state concerned may elect to pay monetary damages in lieu of restitution.-[100] Similarly, Article 26(8) of the ECT provides that an award concerning an action of a sub-national government or authority shall provide that the state may pay monetary damages in lieu of any other remedy granted.[101]

Some cases have found that non-compensatory or moral damages may be available where the state's actions are found to be particularly wrongful.[102] Where not expressly prohibited by the relevant investment treaty, it is also thought possible in principle for tribunals to award non-pecuniary relief, such as orders requiring states to do, or refrain from doing, particular

things.[103] In practice, however, most investors seek only pecuniary relief, and questions may be raised as to whether non-pecuniary relief could effectively be enforced against a state.

An arbitral award will generally be enforceable against any assets of the host state in a large number of jurisdictions around the world. For example, Article 54(1) of the ICSID Convention provides:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.-[104]

Similarly, arbitral awards issued by non-ICSID tribunals can generally be enforced in any 'arbitration friendly' jurisdiction.

CONCLUSION

Investment treaties are an important part of the international legal framework. By offering protection to parties that meet the necessary nationality and investment criteria, they provide reassurance for investors engaged in cross-border projects and protect against political risk. The ability to bring arbitration proceedings against a state that breaches the protections is an important potential tool for any investor, bringing the advantages that such claims will not be barred by any time limitation provisions; that the proceedings will be public, which may affect the actions of the parties; and it may give an investor a viable claim in circumstances where a contractual claim under domestic law would be frustrated.[105]

In modern construction projects, which involve very significant investments of time and money, contractors and subcontractors drawn from across the world, and exposure to risks from the actions of the host state even when the state is not itself a party to the project, mean that parties in the construction sector would be well advised to consider whether investment protection may be available, and to take steps to structure their investments appropriately.

ENDNOTES

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[11] In 2015, Brazil signed cooperation and facilitation investment agreements with Angola, Chile, Columbia, Malawi, Mexico and Mozambique. See 'The Cooperation and Facilitation Investment Agreement', GOV.BR, www.gov.br/mdic/pt-br/arquivos/CFIA-Presentation-EN.pdf (accessed 3 June 2025).

[12] ibid.; Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, Martin Dietrich Brauch,' Brazil's Innovative Approach to International Investment Law', International Institute for Sustainable Development (15 September 2015), www.iisd.org/library/brazils-innovative-approach-international-investment-law (accessed 3 June 2025).

[13] Press release, 'Capital Markets Union: Commission provides guidance on protection of cross-border EU investments', European Commission (19 July 2018), www.ec.europa.eu/commission/presscorner/detail/en/ip_18_4528 (accessed 3 June 2025).

[14] Frédéric Gillion and Leonardo Carpentieri, 'Construction Arbitration and BITs: Is There Still a Future for Intra-EU Investment Arbitration?' *International Construction Law Review* (2018), pp. 167–81, p. 168.

[15] *Slovak Republic v. Achmea B.V.*, Case C-284/16, Judgment of the Grand Chamber, 6 March 2018, paragraphs 58–59. See also Gillion and Carpentieri (see footnote 14), p. 173.

[16] *Moldovan Republic v. Komstroy L.L.C.*, Case C-741/19, Judgment of the Grand Chamber, 2 September 2021, paragraphs 40–66

[17] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union.

[18] The ratification details can be tracked at the following webpage: webpage, 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union', European Council, www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en (accessed 3 June 2025).

[19] See, e.g., the various proceedings commenced in an attempt to enforce the award given in ***Micula and others v. Romania*** (ICSID Case No. ARB/05/20).

[20] With respect to decisions in EU Member State courts, see Andrea Carlevaris, 'The CJEU's Case Law on Intra-EU Investment Arbitration and the Importance of the Place of Arbitration', in Axel Calissendorff and Patrik Schöldström (eds), ***Stockholm Arbitration Yearbook 2022*** (Kluwer Law International, 2023), at 84. Contrast this with the approach in the English court in ***Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. v. Kingdom of Spain*** [2023] EWHC 1226 (Comm); in Australia in ***Kingdom of Spain v. Infrastructure Services Luxembourg S.A.R.L. and anor*** [2023] HCA 11; in the United States in ***NextEra Energy Global Holdings B.V. v. Kingdom of Spain***, No. 23-7031, 2024 WL 3837484 (D.C. Cir. Aug. 16, 2024); and in Switzerland in Judgment of the Swiss Federal Tribunal Decision 4A_244/2023, 3 April 2024.

[21] See Lisa Bohmer, 'Analysis: First Investor-State Tribunal to Dismiss Case Based on Intra-EU Objection Finds that EU Law Applies to its Jurisdiction (in a Non-ICSID Case Seated in the EU) and Prevails over the ECT', IA Reporter (22 June 2022), www.iareporter.com/articles/analysis-first-investor-state-tribunal-to-dismiss-case-based-on-intra-eu-objection-finds-that-eu-law-applies-to-its-jurisdiction-in-a-non-icsid-case-seated-in-the-eu-and-prevails-over-the-ect (accessed 3 June 2025).

[22] See ***Sapec, S.A. v. Spain***, ICSID Case No. ARB/19/23, Award, 11 October 2024; ***European Solar Farms v. Spain***, ICSID Case No. ARB/18/45, Award, 11 October 2024.

[23] Decision of the Energy Charter Conference, 'Public Communication explaining the main changes contained in the agreement in principle', Document CCDEC 2022 10 GEN, Energy Charter Secretariat (24 June 2022), www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf (accessed 3 June 2025).

[24] 'LEAK: Exit from Energy Charter Treaty "unavoidable", EU Commission says', Euractiv (8 February 2023), www.euractiv.com/section/energy/news/exit-from-energy-charter-treaty-unavoidable-eu-commission-says (accessed 3 June 2025).

[25] Press release, 'Written notification of withdrawal from the Energy Charter Treaty', Energy Charter (17 May 2024), www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-3 (accessed 3 June 2025).

[26] Parliamentary statement by Graham Stuart, 'UK withdrawal from the Energy Charter Treaty', Statement UIN HCWS279 (22 February 2024) (- https://questions-statements.parliament.uk/written-statements/detail/2024-02-22/hcws279 (accessed 3 June 2025).

[27] McLachlan KC, Shore and Weiniger KC, (see footnote 3), paragraph 5.01.

[28] *Tulip Real Estate and Development (Netherlands) BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, in which a Dutch investor was protected under the Netherlands–Turkey bilateral investment treaty (BIT), but its Turkish joint venture partners were not.

[29] ICSID Convention, Article 25(2).

[30] See, e.g., *Carrizosa and others v. Colombia*, PCA, Award (7 May 2021); *Garcia Armas and others v. Venezuela*, PCA, Award on Jurisdiction, 13 December 2019.

[31] Gillion and Carpentieri (see footnote 14), p. 180.

[32] ibid.

[33] See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, paragraph 69; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 29 June 1999; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paragraph 222 (this case was dismissed for want of jurisdiction because the investor did not have a qualifying investment).

[34] For example, the Netherlands–Kuwait BIT (2002).

[35] ICSID Convention, Article 25(2)(b).

[36] McLachlan KC, Shore and Weiniger KC (see footnote 3), paragraph 5.198.

[37] *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paragraph 205, citing *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paragraph 144.

[38] 2012 US Model Bilateral Investment Treaty, Article 1.

[39] *Fedax NV v. Republic of Venezuela* (Jurisdiction) 5 ICSID Rep 183 (ICSID 1997).

[40] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (Jurisdiction) 6 ICSID Rep 398 (ICSID 2001) (*Salini*).

[41] *Salini* (see footnote 40), paragraph 52.

[42] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

[43] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paragraph 110, in which the tribunal considered the only necessary criteria were a contribution, a certain duration and an element of risk.

[44] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paragraphs 82–86.

[45] *Philip Morris Brands Sàrl, Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paragraph 204.

[46] Kathigamar V S K Nathan, 'Submissions to the International Centre for the Settlement of Investment Disputes in Breach of the Convention', *Journal of International Arbitration* (1995) 12(1) 27.

[47] *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (*Jan de Nul NV*), considered that 23 months was a sufficiently long contract duration to constitute an 'investment'.

[48] *Bayindir Insaat Turizm Ticaret Ve Sanayi, AS v. Islamic Republic of Pakistan*, ICSID Case No. Arb/03/29, Decision on Jurisdiction, 14 November 2005.

[49] *Jan de Nul NV* (see footnote 47).

[50] *Salini* (see footnote 40).

[51] *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016.

[52] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017. See also *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

[53] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017.

[54] *Ansung Housing Co. Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25, 9 March 2017.

[55] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.

[56] *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014.

[57] *Desert Line projects LLC v. the Republic of Yemen*, ICSID Case No. ARB/05/17, 6 February 2008.

[58] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award, 22 September 2014.

[59] *Metalclad Corporation v. the United Mexican States*, Case No. ARB(AF)/97/1, Award, 30 August 2000 (*Metalclad v. United Mexican States*)

[60] *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009.

[61] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Case No. ARB/01/7, Award, 25 May 2004.

[62] *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 Mar 2014.

[63] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (*Alpha Projektholding)*.

[64] *Toto Costruzioni Generali SPA v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012; *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

[65] *Jan de Nul NV* (see footnote 47), paragraph 173. See also 'Articles on Responsibility of States for Internationally Wrongful Acts', International Law Commission, Chapter II, Articles 4 to 11.

[66] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, paragraphs 33(a), 86; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Award, ICSID Case No. ARB/93/1, Award, 21 February 1997, paragraphs 6.07, 6.13.

[67] Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (2nd ed., 2012, Oxford University Press), p. 99.

[68] ibid.

[69] id. p. 104.

[70] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 100.

[71] In *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, paragraph 129, it was found that Bangladesh had directly expropriated an investor's contractual right through inappropriate interference by the Bangladeshi courts.

[72] *Starrett Housing Corp v. the Government of the Islamic Republic of Iran*, Award No. ITL 32-24-1, 4 Iran–US C.T.R. 162, 1983, p. 115.

[73] *Metalclad v. United Mexican States* (see footnote 59), paragraph 103.

[74] See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 5 ICSID Rep. 153.

[75] See, e.g., *Alpha Projektholding* (see footnote 63).

[76] *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007.

[77] Randall Walker and Jay Randhawa, 'The Resolution of Construction Claims Through Investor-State Dispute Settlement: Alternative Opportunities for Relief for International Contractors', *International Construction Law Review* (2019), pp. 255–83, p. 262.

[78] Schreuer and Dolzer (see footnote 67), p. 130.

[79] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (*MTD*), paragraph 107.

[80] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, IIC 319 (2008), Award, 6 February 2008.

[81] *MTD* (see footnote 79), paragraph 138.

[82] *Metalclad v. United Mexican States* (see footnote 59), paragraph 74 et seq.

[83] Walker and Randhawa (see footnote 77), p. 263.

[84] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), p. 60, citing Alwyn V Freeman, 'The International Responsibility of States for Denial of Justice' (1938) in Schreuer and Dolzer (see footnote 67), pp. 182–83.

[85] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, paragraph 103.

[86] ***Tokios Tokelés v. Ukraine***, ICSID Case No. ARB/02/18, Award, 26 July 2007, paragraph 133.

[87] Alwyn V Freeman, 'The International Responsibility of States for Denial of Justice' (1938) in Schreuer and Dolzer (see footnote 67), p. 180.

[88] ***Loewen Group, Inc. and Raymond L. Loewen v. United States of America***, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, paragraph 154.

[89] Paulsson (see footnote 84), p. 100, citing James Crawford, 'Second Report on State Responsibility', UN Doc. A/CN.4/498, International Law Commission (1999), paragraph 75 ('an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not in itself amount to an unlawful act').

[90] See ***Pantechniki SA Contractors & Engineers (Greece) v. the Republic of Albania***, ICSID Case No. ARB/07/21, Award, 30 July 2009.

[91] ***Asian Agricultural Products Ltd v. Republic of Sri Lanka***, Award, 27 June 1990, paragraphs 45 et seq., 78 et seq.

[92] ***Wena Hotels Ltd. v. Arab Republic of Egypt***, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 84.

[93] ***American Manufacturing & Trading Inc. v. Republic of Zaire***, Award, 21 February 1997, paragraph 6.02 et seq.

[94] ***Plama Consortium Limited v. Republic of Bulgaria***, ICSID Case No. ARB/03/24, Award, 27 August 2008, paragraphs 186–87.

[95] McLachlan KC, Shore and Weiniger KC, (see footnote 3), paragraph 4.132.

[96] See ***SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan***, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paragraph 167; ***SGS Société Générale de Surveillance S.A. v. Republic of the Philippines***, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paragraph 125.

[97] McLachlan KC, Shore and Weiniger KC, (see footnote 3), paragraphs 4.132–4.134.

[98] Schreuer and Dolzer (see footnote 67), p. 82.

[99] See, e.g., ***Parkerings-Compagniet AS v. Republic of Lithuania***, ICSID Case No. ARB/05/8, Award, 11 September 2007, paragraph 332. See also ***EDF (Services) Ltd v. Romania***, ICSID Case No. ARB/05/13, IIC 392, Award, 8 October 2009.

[100] North American Free Trade Agreement, Article 1135.

[101] Energy Charter Treaty, Article 26(8).

[102] ***Desert Line Projects LLC v. The Republic of Yemen***, ICSID Case No. ARB/05/17, IIC 319, Award, 6 February 2008, paragraph 289; McLachlan KC, Shore and Weiniger KC, (see footnote 3), paragraph 9.147.

[103] McLachlan KC, Shore and Weiniger KC, (see footnote 3), paragraph 9.147.

[104] ICSID Convention, Article 54(1).

[105] Walker and Randhawa (see footnote 77), p. 274.

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