THE STATE AS A SHAREHOLDER IN CASES OF REFLECTIVE LOSS DERIVING FROM COMMERCIAL ACTIVITIES IN INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

The purpose of the present thesis is to provide an overview of the legal position of state shareholders in International Investment Arbitration in case of shareholders' claims for reflective loss deriving from commercial investments. The reflective loss principle refers to direct claims brought by shareholders who have suffered a reduction in their shares' value due to actions of the company or a third party. Claims for reflective loss raised by private investors against the host state are often admissible in International Investment Arbitration, although they are generally not accepted under domestic law. The assessment of the treatment of state shareholders' claims for reflective loss under the current investment treaties, with the focus placed on the procedural restrictions, deriving mostly from the ICSID Convention at the arbitration stage, demonstrates an imbalance between private and state shareholders when they both act as claimants. The reasons for the imbalance lie in restrictions for state shareholders originating from: a) the protection scope and aim of International Investment Arbitration, b) the limited amount of fora available to state investors and c) the insufficient protection of state investors under the investment treaties. Based on the existing international investment law and jurisprudence as well as on the domestic law of 10 jurisdictions, the current (international) legal framework on the admissibility of claims for reflective loss made by the state shareholder against the host state is being presented. The potential impact on the host state is considered in relation to the enhancement of the position of the state as a claimant in International Investment Arbitration. In terms of a holistic approach to the issue, the risks that commercial investments made by state entities impose on host states are also being analysed. The identified risks for the host state derive from a) public interest concerns and b) the state shareholder's immunity from execution in case the host state wins the case and needs to enforce the arbitral decision on costs against the state shareholder.

Keywords: *reflective loss; state shareholder; host state; international investment arbitration; ICSID arbitration; state immunity*

ABBREVIATIONS

AAA	American Arbitration Association
AB	Appellate Body
AfAA	African Arbitration Association
AfCFTA	African Continental Free Trade Area
AIC	Arab Investment Court
AU	African Union
BIT	Bilateral Investment Treaty
BW	Dutch Civil Code
CARIFORUM	Caribbean Forum
CCL	Chinese Company Law
CCP	French Code of Civil Procedures for Enforcement
CEN-SAD	Community of Sahel–Saharan States
CEPC	French Civil Enforcement Proceedings Code
CETA	Canada-EU Trade Agreement
CFA	Hong Kong Court of Final Appeal
CHF	Swiss Franc
CIETAC	China International Economic and Trade Arbitration Commission
CPC	Swiss Federal Code of Civil Procedure
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
D-ISA	Draft-Investment Screening Act of Switzerland
DEBA	Federal Debt Enforcement and Bankruptcy Act of Switzerland
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
EAC	East African Community
ECCAS	Economic Community of Central African States

ECOWAS	Economic Community of West African States
ECSI	European Convention on State Immunity
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
ESG	Environment, Social and Governance
EU	European Union
EUSIPA	EU-Singapore Investment Protection Agreement
EUVFTA	EU-Vietnam Free Trade Agreement
EUVIPA	EU-Vietnam Investment Protection Agreement
FAA	US Federal Arbitration Act
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIL	Foreign Investment Law of the People's Republic of China
FINSA	Foreign Investment and National Security Act of the United States
FSIA	Foreign Sovereign Immunities Act of the United States
FSIL	Foreign State Immunity Law of the People's Republic of China
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGAD	Intergovernmental Authority on Development
IIA	International Investment Arbitration
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
IWG	International Working Group
KORUS	South Korea-US Free Trade Agreement
KYI	Know Your Investor

LAS	League of Arab States
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitration Association
MFC	French Monetary and Financial Code
MFN	Most Favoured Nation
MIC	Multilateral Investment Court
MOI	Memorandum of Incorporation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NSIA	National Security and Investment Act (UK)
NSR	National Security Review
N.Y.C.P.L.R.	New York Civil Practice Law and Rules
OECD	Organization for Economic Cooperation and Development
OIC	Organisation of Islamic Cooperation
OR	Swiss Code of Obligations
PAIC	Pan-African Investment Code
PCA	Permanent Court of Arbitration
PIA	Protection of Investment Act of South Africa
PILA	Swiss Federal Act on Private International Law
PRC	People's Republic of China
Rv	Dutch Code of Civil Procedure
SADC	Southern African Development Community
SAFSIA	Foreign States Immunities Act of South Africa
SCC	Stockholm Chamber of Commerce
SCNPC	Standing Committee of the National People's Congress in Hong Kong
SFDIA	Screening of Foreign Direct Investment Act of Sweden
SIAC	Singapore International Arbitration Centre
SIRA	Significant Investment Review Act of Singapore
SOC	State-Owned Company
SOE	State-Owned Enterprise
SSIA	State Immunity Act of Singapore
SWF	Sovereign Wealth Fund
TPP	Trans-Pacific Partnership Agreement

UAE	United Arab Emirates
UKSIA	UK State Immunity Act
UMA	Arab Maghreb Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCSI	United Nations Convention on Jurisdictional Immunities for States and their Property
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
USMCA	United States-Mexico-Canada Agreement
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
Vifo	Dutch Foreign Direct Investment Screening Act
WTO	World Trade Organisation

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CHAPTER 1: INTRODUCTION

1.1 Problem Statement

In a globalised world with a vast amount of international investments, International Investment Arbitration (IIA) and Investor-State Dispute Settlement (ISDS) mechanisms are of extreme importance. In 2023, more than 2,500 international investment agreements have come into force.[1] In recent years, various agreements have been terminated, but the amount of investment disputes is still substantial. ICSID (International Centre for Settlement of Investment Disputes) has reported a total of 933 administered cases as of 30 June 2023.[2] In the field of international dispute resolution, which is designed to resolve international investment disputes amicably, the promotion and protection of investments made by states appears to be more difficult in comparison to those made by private entities.

The most successful mechanism concerning international investment disputes is investor-state arbitration, which is a form of ISDS. ISDS refers, in principle, to the relationship between a private investor (from a home state) and a host state. It is allegedly designed to protect investments and investors in their asymmetric relationships with the concerned host states and provides investors with an opportunity to bring investment disputes with a foreign state before an international forum.[3] It grants investors for this purpose, at least partially, international legal personality, which can be derived from either 1) an ad hoc agreement or arbitration clause in the contract between the investor and the host state, 2) a bilateral investment treaty (BIT) between the home state of the investor and the host state of the investment or 3) an ISDS clause in a free trade agreement (FTA) or multilateral investment treaty (MIT).[4] The aforementioned instruments bestow rights on investors which can be enforced through the established mechanisms of for instance the ICSID Convention or New York Convention.[5]

The role of a state claimant in ISDS appears to be a difficult one, given that one of the

[1] https://investmentpolicy.unctad.org/international-investment-agreements.
[2]https://icsid.worldbank.org/sites/default/files/publications/2023.ENG_The_ICSID_Caseload_Statistics_Issue.2_ENG.pdf.
[3] D. Tamada, 'Host States as Claimants. Corruption Allegations', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 103.
[4] J. Christopher Thomas and H.K. Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards', in: *ICSID Review*, Vol. 32, No. 3 (2017), pp. 459–502.
[5] From *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion [1949] ICJ Report 174, four elements of international legal personality for non-state actors can be defined: 1) an independent or autonomous existence; 2) the ability to possess international rights or obligations; 3) the actual possession of those rights and obligations; and 4) the ability to enforce rights on the international plane. Investment agreements and enforcement mechanisms bestow rights on investors accordingly.

objectives of ISDS is to encourage private international investments.[6] If a state is a shareholder in a company which carries out only commercial activities, it might still be treated differently to a private shareholder when it comes to the possibility to commence arbitral proceedings.[7] A private shareholder may then, namely, be able to start Investor-State arbitral proceedings based on a BIT or an ISDS clause in an FTA, whereas a state entity does not always have this option.[8] State entities as shareholders may suffer a reduction in their shares' value due to actions of the company or a third party. The loss they suffer due to the decreased value of their shares is called reflective. In this case, the imbalance between private and state investors is particularly evident on the issue of reflective loss when states are hindered from bringing direct claims for reflective loss against the host state. Although claims for redress due to reflective loss are generally not accepted in domestic law regimes around the world, they are very often admissible in IIA.[9] A lot of BITs ex- or implicitly allow indirect claims for reflective loss by shareholders/indirect investors.[10] An important reason behind this option is that a company operating in a host state might be frustrated or discouraged from initiating legal confrontation with that particular state for a variety of reasons.[11] If the shareholders in such cases cannot initiate arbitral proceedings for reflective loss, there is a risk that the inflicted damage by the host state will never be compensated at all.[12]

The purpose of the present thesis is to examine and analyse the legal position of state investors as shareholders in IIA in case of shareholder claims for reflective loss deriving from commercial investments (*de jure gestionis*). In this framework it seeks an answer to the following central question: *To what extent can and should state shareholders be able to use IIA for the protection of their foreign commercial investments?*

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[6] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 617-618.; M. Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration', in: *ICSID Review*, Vol. 31, No. 1 (2016), p. 25.

[7] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 3.

[8] See e.g. G. Bottini, *The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages* (dissertation), University of Cambridge 2017.

[9] See for instance: L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 17-18.

[10] Bottini wrote in his dissertation about this issue that such claims should be regarded as inadmissible before an arbitration tribunal in order to inter alia avoid the risk of double recovery. See: G. Bottini, *The Admissibility of Shareholder Claims: Standing, Causes of Action, and Damages* (dissertation), University of Cambridge 2017, p. 254-255.

[11] See also: E.C. Demirkol, 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', *ICSID Review* Vol. 30. Nr. 2 (2015), p. 391-413.

[12] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 44-53.

1.2 Subjective Scope of the Thesis

1.2.1 The State Shareholder Claiming Reflective Loss Against the Host State

The subjective scope of this thesis is limited to state shareholders. The reason for this choice is the existing imbalance between private and state shareholders in situations where they both claim damages for reflective loss. Any references made to private shareholders are intended to highlight this imbalance.

The term state shareholder is used to refer only to the state itself or to a state body, either centralised or decentralised.[13] Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States provides that:

> "*A State as a person of international law should possess a permanent population, a defined territory, a government and the capacity to enter into relations with other States*".

When a state is engaging in a commercial activity it will choose some sort of legal entity that will be used for that particular purpose. A state may hold shares in state-owned enterprises (SOEs) or private companies. Since SOEs are commercial entities that are directly or indirectly owned by a state shareholder, they are not considered to be state shareholders. Examples of SOEs are State-Owned Companies (SOCs), in which the state holds shares and Sovereign Wealth Funds (SWFs).[14] As a shareholder in such a SOE, a state may suffer a reflective loss that lies in the cause of indirect damage attributed to a decrease in value of the concerned shares.[15] The legal structure used by the state is relevant to determine to what extent a state (entity) is a protected investor, but also is eligible to initiate arbitral procedures under the rules of the applicable forum.[16]

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[13] There are a few known arbitrations that involve federal entities, such as *Ministry of Land and Property of the Republic of Tatarstan v. Ukraine*, PCA Case No. 2016-15 (9 December 2019), Award on Jurisdiction (not publicly available), in which an UNCITRAL tribunal asserted jurisdiction based on the Russia-Ukraine BIT. See also https://globalarbitrationreview.com/article/second-bit-claim-over-ukrainian-refinery-gets-green-light.

[14] A. Ragoussis and S. Miroudot, "Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds" in: R. Echandi and P. Sauvé (eds.), *Prospects in International Investment Law and Policy*, (Cambridge University Press, 2013), p. 51-52.

[15] J. Hardman, 'Sevilleja v. Marex Financial Ltd: Reflective Loss and the Autonomy of Company Law', Modern Law Review 2022, Vol. 85, No.1, p. 232-233.

[16] C.N. Brower and S.P. Kumar, Investomercial Arbitration: Whence Cometh It? What is it? Wither Goeth It?, *ICSID Review* 2015, Vol. 30, No. 1, p. 51.

1.2.2 Reasons for the Imbalance Between State and Private Investors

The assessment of the treatment of state shareholders' claims for reflective loss under the current investment treaties, with the focus placed on procedural restrictions, deriving mostly from the ICSID Convention at the arbitration stage, demonstrates an imbalance between private and state shareholders when they both act as claimants. The reasons for the imbalance lie in restrictions for state shareholders originating from: a) the protection scope and aim of IIA, b) the limited amount of fora available to state investors and c) the insufficient protection of state investors under the investment treaties.

(a) Protection Scope and Aim of IIA

IIA is an important field in international law for the promotion and protection of investments, contributing to the achievement of greater trade and investment liberalisation.[17] It aims at the determination of a reasonable balance between the interests of investors and the interests of the host states, i.e. the receivers of the investments.[18] International investment law and IIA address the relationship between private investors and host states. They were largely developed to protect foreign private investors from potential mistreatment by the host state, and therefore, they focus on the protection of private investors against the host state and not on state investors against the host state. The underlying reason for this choice was that state investors possess full international legal personality under public international law, and they have, in general, more procedural tools to seek recourse compared to private investors.

(b) Limited Fora Available to State Investors

The number of fora available to state claimants is restricted a) because the rules of some fora do not acknowledge states as potential claimants and b) because states have policy/political reasons to avoid certain fora linked to certain jurisdictions. While a private investor has the choice between ICSID and non-ICSID arbitration, depending on the applicable investment agreement, a state investor can only seek redress via non-ICSID proceedings [art. 25(1) of the ICSID Convention and the Broches test] in case of a dispute with a host state. The fact that private

[17] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 45; J.W. Salacuse, *The Law of Investment Treaties* (2nd edition, Oxford University Press 2015), p. 127-129.
[18] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration. Substantive Principles* (second edition, 2017), Oxford University Press, nr. 1.01.

investors have access to more effective procedural tools to pursue a claim for reflective loss (ICSID) creates an imbalance between private and state shareholders in IIA when they act as claimants. The question is whether this imbalance is justified when a state is involved in a commercial dispute deriving from *de jure gestionis* activities which are private in nature.[19]

(c) Insufficient Protection of State Investors under the Investment Treaties

The definitions of "investment" and "investor" under the applicable investment treaties determine the extent to which state shareholders are being protected. Bilateral investment treaties (BITs) and FTAs that apply "the commercial presence" criterion for the definition of protected investments may discriminate between investments made by state entities and investments made by private entities if they do not acknowledge that investments made by state entities qualify as commercial. Moreover, some investment treaties [e.g. optional clause of Article 2 of the SADC (Southern African Development Community) 2012 Model BIT] explicitly exclude public entities from their protection scope as they do not meet the definition of investor.

1.3 Objective Scope of the Thesis

This thesis examines the restrictions on the claim of a state shareholder for reflective loss in IIA, as set out in procedural and substantive law and explores viable alternatives. Shareholders can generally be harmed in two ways.[20] Firstly, they may suffer direct injury to their rights as shareholders, for example if their shares are seized or their declared dividends are interfered with. Secondly, they can be harmed by an indirect injury, i.e. an injury to the company. Reflective loss occurs when shareholders suffer indirect injury because the company itself has been injured.[21] Domestic law generally does not enable shareholders to claim damages for the decreased value of their shares, but sometimes shareholders are allowed to bring a claim on behalf of the company (derivative action) in case of an indirect injury.[22] The difference between international investment

[19] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 542-543.
[20] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS) Shareholder claims and reflective loss. Note by the Secretariat*, A/CN.9/WG.III/WP.170, 9 August 2019, p. 2.
[21] See also: Julian Arato, Kathleen Claussen, Jaemin Lee and Giovanni Zarra, 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper* 2019/9, 17 September 2019.
[22] See also J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52.

law and domestic law is that the former also allows shareholders to bring a claim for reflective loss on their own behalf.[23]

A reflective loss claim is different from the derivative action. The derivative action in IIA was introduced in North American Free Trade Agreement (NAFTA), and even though it is not incorporated in the majority of investment treaties, it is a useful mechanism that is included in a growing amount of agreements.[24] A claim for reflective loss and a derivative action have separate purposes and outcomes. The main purpose of derivative actions is to enable shareholders to bring a claim on behalf of a company that is not able to initiate a suit by itself.[25] A claim for reflective loss is a direct claim of the shareholders for their loss resulting from direct harm caused to the company.[26] Furthermore, a derivative action enables shareholders to take legal action on behalf of the company.[27]

A question that arises in practice is whether derivative actions can entirely substitute reflective loss claims in IIA. Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) is examining options to reform ISDS. UNCITRAL was established by the General Assembly in 1966 by Resolution 2205(XXI).[28] Its mandate is to remove legal obstacles in international trade law through modernisation and harmonisation.[29] One of the potential recommendations of Working Group III is for states to include restrictions on the availability of reflective loss claims in investment treaties because of the company's separate legal personality, the potential risk of multiple proceedings and its inconsistency with domestic corporate law principles and customary international law.[30] It is recommended that

[23] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) Shareholder claims and reflective loss. Note by the Secretariat, A/CN.9/WG.III/WP.170, 9 August 2019, p. 3.
[24] See e.g. *Free Trade Agreement between the Republic of Chile and Mexico*, signed on 17 April 1998, entered into force on 1 August 1999, Article 9; *Agreement between Chile and Japan for Strategic Economic Partnership*, signed on 27 March 2007, entered into force on 3 September 2007, Article 89(b); Article 8.23 Canada-EU Trade Agreement (CETA).
[25] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 125.
[26] A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3, p. 595-596.
[27] *GAMI Investments, Inc v. Government of the United Mexican States*, North American Free Trade Agreement Chapter 11 Arbitral Tribunal, Final Award (15 November 2004).
[28] United Nations General Assembly (UNGA) Establishment of the United Nations Commission on International Trade Law (1966) UN Doc A/RES/2205(XXI), p. 99-100.
[29] United Nations General Assembly (UNGA) Establishment of the United Nations Commission on International Trade Law (1966) UN Doc A/RES/2205(XXI), p. 99.
[30] A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3, p. 596; L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 125. See more detailed on the pros and cons of reflective loss claims in chapter IV.

reflective loss claims only remain available in case of direct expropriation of the company's assets.[31] In all other cases, the derivative claim is proposed as a viable alternative.[32]

Furthermore, in *Alicia Grace et al. v. Mexico*, a UNCITRAL proceeding administered by ICSID, the tribunal declined jurisdiction on reflective loss claims in a case under NAFTA despite the fact Article 1139 of NAFTA includes direct and indirect shareholding as an investment.[33] The tribunal followed the position of all three parties to NAFTA and decided that Article 1116 of NAFTA (allowing for claims by an investor on its own behalf) does not apply to claims for reflective loss by shareholders.[34] An important argument for the tribunal is that NAFTA has the derivative action framework of Article 1117 allowing investors to claim for indirect losses on behalf of the company.[35] This argument was also raised by the US in their Article 1128 Submission to this proceeding.[36]

This approach is criticised because it fails to consider the fact that the availability of derivative actions and claims for reflective loss for shareholders does not always overlap.[37] In the submission of the United States in the *GAMI* case, it is emphasised that shareholders do not need to have suffered direct loss or damage in order to bring derivative actions on behalf of the company.[38] Claims for reflective loss would not be available in such a case because there is no separate cause of action for the shareholders. On the other hand, if shareholders from a home state own shares in a company that is incorporated in the host state, they may be able to claim damages for reflective loss under the applicable investment treaty. The company itself would be regarded as a domestic company, which bars the option to bring a derivative claim on behalf of the company for the shareholders.[39] An additional problem for minority shareholders is that the

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[31] OECD, Comments and reform proposals with regard to Draft provision 10 (Shareholder claims) of UNCITRAL Secretariat note on Possible reform of Investor-State dispute settlement (ISDS): Draft provisions on procedural and crosscutting issues, A/CN.9/WG.III/WP.231. *Individual Investor/Shareholder Claims and Derivative Claims on behalf of an Enterprise in ISDS.* January 2024, p. 10.

[32] OECD, Comments and reform proposals with regard to Draft provision 10 (Shareholder claims) of UNCITRAL Secretariat note on Possible reform of Investor-State dispute settlement (ISDS): Draft provisions on procedural and crosscutting issues, A/CN.9/WG.III/WP.231. *Individual Investor/Shareholder Claims and Derivative Claims on behalf of an Enterprise in ISDS.* January 2024, p. 10.

[33] *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024.

[34] *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024, para. 536.

[35] *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024, para. 540-545.

[36] *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Submission of the United States of America, 24 August 2021, para. 13-29.

[37] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 126.

[38] *GAMI Investments Inc. v. The Government of the United Mexican States*, UNCITRAL Submission of the United States of America (30 June 2003), para. 11-12.

[39] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 126-127.

derivative action mechanism in international investment treaties is largely based, according to Article 1117 NAFTA, on direct or indirect control of the shareholder who brings a derivative claim.[40] Since minority shareholders who do not have control over the company are not entitled to derivative actions, the only viable option for them is to bring a direct claim for reflective loss under an applicable investment treaty.

1.4 Thesis Objective

The issue of reflective loss has been thoroughly researched in the field of international investment law and domestic law. [41] One of the major studies on the topic of reflective loss is the 2020 monograph entitled "*Shareholders' Claims for Reflective Loss in International Investment Law*" by L. Vanhonnaeker. The studies on reflective loss have dealt with the topic in a general sense. As previously explained, the subjective scope of this thesis is limited to state shareholders. By demonstrating that claims for reflective loss brought by private investors against the host state are often admissible under the international investment agreement, the present thesis seeks to highlight the apparent imbalance between private and state shareholders when they both act as claimants. In this context, it aims at providing an overview of the legal position of state investors in IIA, including potential enhancement options in case of shareholder claims for reflective loss deriving from commercial investments. Based on the existing international investment law and jurisprudence, as well as the available literature, the current international legal framework on the admissibility of claims for reflective loss made by the state shareholder against the host state will be explored and analysed. The examination of options to enhance the position of the state as a claimant in IIA considers the potential impact on the host state (defendant). In terms of a holistic

[40] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 129-130.

[41] J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52; B.J. de Jong, "Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis", *European Business Organization Law Review* 2013/4, Vol. 14(1); E.C. Demirkol, 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', *ICSID Review* Vol. 30. Nr. 2 (2015); J. Hardman, 'Sevilleja v. Marex Financial Ltd: Reflective Loss and the Autonomy of Company Law', *Modern Law Review* (2022), Vol. 85, No.1, p. 232-246; V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* (2018), No. 40, p. 189-254; J.S. McLennan, 'Companies, Shareholders and 'Reflective Losses'', *South African Mercantile Law Journal* (2015), No.17; A. Rahmani, 'No Reflective Loss: The English Approach Reconsidered', *Journal of Corporate and Commercial Law and Practice* (2020), Vol. 6, No. 2; A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3; United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) Shareholder claims and reflective loss. Note by the Secretariat, A/CN.9/WG.III/WP.170, 9 August 2019.

approach to the issue, a) the reasons for the imbalance between private and state shareholders as claimants, on the one hand, and b) the risks that commercial investments made by state entities impose on host states, on the other hand, will be presented. The identified risks for the host state derive from a) public interest concerns and b) the state shareholder's immunity from execution in case the host state wins the case and needs to enforce the arbitral decision on costs against the state shareholder and losing party. When foreign public entities are undertaking commercial investments, the host state may have valid public interest concerns, especially if the investments in the territory of the host state are made in the field of national security, public health, the environment or human rights, but also in the various public utilities sectors.

1.5 Methodology

The objective of this thesis is to find the most appropriate method to restore the balance between private shareholders and state shareholders in case of reflective loss deriving from commercial activities. The research is primarily doctrinal in nature. To achieve the above-mentioned objective the present research employed the teleological interpretation of the investment treaties and the comparative law method. The teleological method employs the legislative purpose as an interpretative tool.[42] The interpretation of a treaty in light of its object and purpose is one of the three main rules of treaty interpretation according to article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT).[43] To define the purpose of a treaty one needs to look at the text of the treaty and the intentions of the state parties to it.[44] As intentions of the state parties are regarded not only the direct wishes of the parties but also more abstract goals that they set for the whole treaty.[45] Teleological interpretation needs to be evolutionary which means that it needs to take into account that the object of the treaty may develop and change over time.[46] Tribunals often resort to teleological interpretation of an investment treaty[47]

[42] C.W. Canaris and K. Larenz, *Methodenlehre der Rechtswissenschaft*, Springer 2025, p. 149 and 153.
[43] S. Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights', *Fordham International Law Journal* (2018), Volume 42, Issue 3, p.765 et seq.
[44] S. Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights', *Fordham International Law Journal* (2018), Volume 42, Issue 3, p.790.
[45] S. Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights', *Fordham International Law Journal* (2018), Volume 42, Issue 3, p.790.
[46] S. Dothan, 'Judicial Tactics in the European Court of Human Rights', *Chinese Journal of International Law* (2011), Vol. 12, No. 115, p. 131.
[47] See for example *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction) (3 August 2004), para. 81: "*The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of*

and base their approach on the standard goal of investment treaties which lies in the protection and promotion of foreign investments.[48]

Regarding the role of comparative law in international arbitration it is said that "not many fields of law use comparative law as extensively as international arbitration".[49] The use of comparative law as an interpretation method within investment treaty arbitration is increasing due to the similar wording of investment treaties and the analogies that international investment law often presents with national laws.[50]

The comparative legal analysis refers to the domestic laws of the selected legal orders. References to domestic law are frequently explicitly and/or implicitly included in investment treaties.[51] Explicit references are usually related – among others – to the requirement that investments made in the host state must comply with its laws and regulations or to the applicable law of the treaty itself .[52] This is why the scope of the attempted comparison covers the domestic substantive law regarding shareholders' claims for reflective loss and restrictions on foreign direct investments (FDIs). In terms of domestic procedural law, the present comparative research covers the relevant domestic arbitral laws of the jurisdictions mentioned below in the context of ad hoc and non-ICSID arbitration. In addition, domestic laws on execution mechanisms, such as freezing orders, are being analysed. These mechanisms ensure that the losing party complies with the arbitral award.

This thesis presents an overview of the domestic law of 10 jurisdictions: (China, England & Wales, France, Hong Kong, The Netherlands, Singapore, South Africa, Sweden, Switzerland, United States) on the following issues: substantiation of shareholders' claims for reflective loss, arbitral laws of the seat, restrictions on FDI, bank guarantees and freezing orders as mechanisms to support enforcement against the losing party.

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creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative".

[48] S. Djajic, 'Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration', *International Review of Law*, Vol. 2016, No. 3, p.20-21.

[49] V. Valentina, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration', *Denver Journal of International Law and Policy* (2010), Vol. 39, p. 68.

[50] V. Valentina, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration', *Denver Journal of International Law and Policy* (2010), Vol. 39, p. 87-88.

[51] E. De Brabandere, Y. Chernykh, D. Dagbanja, A. Florou, G. Lentner, D. Peat, F. Perez Aznar. 'The Role of Domestic Law in Investment Dispute Settlement', Academic Forum on ISDS Concept Paper 2024/1, 27 March 2024, p.3.

[52] E. De Brabandere, Y. Chernykh, D. Dagbanja, A. Florou, G. Lentner, D. Peat, F. Perez Aznar. 'The Role of Domestic Law in Investment Dispute Settlement', Academic Forum on ISDS Concept Paper 2024/1, 27 March 2024, p.3-4.

The selection of these jurisdictions is primarily a combination of the law of the most preferred seats and it is based on an international arbitration survey, published by Queen Mary University in 2021. According to it, the eight most preferred seats for arbitration are located in England (London), Singapore, Hong Kong, France (Paris), Switzerland (Geneva), the United States (New York), China (Beijing and Shanghai) and Sweden (Stockholm).[53] South Africa was added to this list due to its growing importance for African and global arbitration.[54] Furthermore, the inclusion of South Africa provides an African perspective on ISDS. A further addition to the list was the Netherlands as it is the candidate's home country and the host of the Permanent Court of Arbitration (PCA).

The selected legal orders fit perfectly within the classification of laws chosen for this study. As is aptly argued in the theory, the way of classifying the laws is a matter of expediency and each researcher, depending on the objectives he pursues, should be free to select and categorize the laws to be examined as best serves his purposes.[55] The chosen classification in this study is based on an attempt to classify the above mentioned legal orders, the prevailing doctrine of the grouping of laws into families (*Rechtskreislehre*) was chosen. This doctrine focuses on the type and style of each legal order and uses multiple criteria for classification: the historical origin and development of a legal order, the dominant and characteristic way of thinking on legal issues, the particular legal institutions, the type of legal sources and the methods of interpretation of legal rules and ideological factors.[56]

The product of this classification is the bilateral distinction between continental (civil) law and common law. Within the family of continental law there are three sub-families: the Roman law (e.g. France), the Germanic law (e.g. Switzerland) and the Scandinavian law family (e.g. Sweden).[57] The Netherlands is a mixed continental law jurisdiction that contains elements of both Roman and Germanic civil law.[58] The common law family includes England and Wales,

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[53] Queen Mary University of London and White and Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, p. 6 Available via: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

[54] https://practiceguides.chambers.com/practice-guides/international-arbitration-2024/south-africa/trends-and-developments.

[55] H. Kötz, Abschied von der Rechtskreislehre? Zeitschrift für europäisches Privatrecht 1998, p. 494; K. Zweigert and H. Kötz H., Einführung in die Rechtsvergleichung, Mohr Siebeck 1996, p. 72.

[56] K. Zweigert and H. Kötz H., Einführung in die Rechtsvergleichung, Mohr Siebeck 1996, p. 68 et seq.

[57] See M. Siems, *Comparative Law*, Cambridge University Press 2018, Table 4.1, p. 89 for a schematic illustration of the Zweigert/Kötz categorisation and in more detail see K. Zweigert and H. Kötz H., Einführung in die Rechtsvergleichung, Mohr Siebeck 1996, p. 73-76.

[58] J. Janssen, 'Der Blaue Engel und die Grüne Reihe: Die Rolle des Kommentars in der niederländischen privatrechtlichen Publikationskultur', in: D. Kästle-Lamparter, N. Jansen and R. Zimmermann, *Juristische Kommentare: Ein internationaler Vergleich*, Mohr Siebeck (2020), p. 89-90.

the United States, Singapore and Hong Kong.[59] The theory also refers to another category, that of mixed legal systems, which have been strongly influenced by both the continental and common law families.[60] South Africa is a traditional example of a mixed legal system.[61] China belongs to a special category of mixed legal systems with elements that go beyond those resulting from the combination of continental law and common law.[62]

This categorisation highlights that the selected legal orders represent different law families and as a result they provide a global overview of the issues examined in the context of this study.

1.6 Data Collection

Due to confidentiality and transparency issues in ISDS both primary and secondary sources have been used for this study. The legal research conducted is based on various international investment agreements (bilateral investment treaties, multilateral investment treaties and investment chapters in FTAs), arbitral awards and decisions of other international tribunals and the International Court of Justice (ICJ), books and journals on international investment law and the analysed domestic jurisdictions (see bibliography). These sources were gathered from *inter alia* the library repositories of the University of Cape Town and Leiden University and databases and platforms such as Italaw, Jus Mundi, Kluwer Arbitration IAReporter, Global Arbitration Review and UNCTAD (United Nations Conference on Trade and Development) Investment Policy Hub.

1.7 Thesis Structure

The chosen structure is based primarily on the substance-procedural distinction. On this basis the substantive law issues are examined in chapters 2-4. Chapter 2 focuses on the definition of investment according to the existing international investment treaties and the inclusion of shares made by public entities within their scope. Chapter 3 examines the qualification of a state shareholder as a shareholder under the current investment treaties. Chapter 4 deals with the substantiation of reflective loss claims in IIA from a claimant's point of view. In this regard, a comparison is made between proceedings before national courts and proceedings before arbitral

[59] K. Zweigert and H. Kötz H., Einführung in die Rechtsvergleichung, Mohr Siebeck 1996, p. 177 et seq
[60] M. Siems, *Comparative Law*, Cambridge University Press (2018), p. 101 with further references.
[61] M. Siems, *Comparative Law*, Cambridge University Press (2018), p. 101.
[62] M. Siems, *Comparative Law*, Cambridge University Press (2018), p. 103.

tribunals to point out the concluding differences. Subsequently, the pros and cons of reflective loss claims are presented.

The procedural law issues are explored in chapter 5 considers the procedural restrictions for claims made by state shareholders deriving from the different arbitral fora in IIA and their way of asserting jurisdiction. The focus here is placed on state shareholders bringing a claim for reflective loss against a host state (state-to-state arbitration), which is not possible under the ICSID Convention. The impact of the potential admissibility of a state shareholder's claim for reflective loss in IIA on the host state's public policy (=problem) and its mitigation through investment screening (=solution) are being analysed in chapters 6 and 7. Chapter 6 considers the public interest concerns for the host state, arising from the nature of the investment and its influence on vital sectors within the host state's economy. In particular, the application of the abuse of rights doctrine will be explored regarding cases in which a state uses private investments to achieve public goals. Chapter 7 elaborates on the issue of investment screening, which is a useful instrument for the host state to investigate the nature of the investment and conduct of the investor and how it acts as a counterbalance mechanism mitigating the public interest concerns for the host state.

Chapter 8 seeks effective alternative dispute settlement options for state shareholders. Chapter 9 presents the risks for both the state shareholder (claimant) and the host state (defendant) originating from the principle of state immunity, and particularly the impact of immunity from execution on the follow-on proceedings. In this context, mechanisms to enhance enforcement against both state entities (state shareholder and host state) that benefit from the state immunity principle are being sought. Due to the relatively high compliance rates of host states with arbitral awards, the immunity of the state shareholders poses a higher risk for the host state in case it wins the dispute on reflective loss and is entitled to the arbitration costs.[63] Finally, chapter 10 provides a summary of the conclusions and recommendations of the present thesis.

[63] N. Strain et al, 'Compliance politics and international investment disputes: a new dataset', *Journal of International Economic Law* (2024), Vol. 27, Issue 1, p. 70-71. See Chapter 9.

CHAPTER 2: THE PROTECTION OF SHARES UNDER THE EXISTING INVESTMENT TREATIES

2.1 Introduction

This chapter will focus on the definition of investment in IIA. The jurisdiction of an investment arbitration tribunal is determined by the subject matter of the dispute (*ratione materiae*), the parties involved to the dispute (*ratione personae*) and the time at which the dispute arises (*ratione temporis*).[64] The subject matter of the dispute must fall within the jurisdiction of an arbitral tribunal.[65] Investment arbitration tribunals have jurisdiction *ratione materiae* over investment disputes.[66] As the definition of investment under IIA is provided by international investment law, the aim is to determine to what extent commercial activities and state activities are considered to be protected investments under the various investment treaties which are currently into force.[67] In particular this chapter seeks an answer to the question whether holding shares in a certain company in the host state or in a company that makes a potential investment in the host state can be qualified as an investment.[68] In general there are two specific types of investment treaties: bilateral investment treaties (BITs) and FTAs.[69] Based on the model BITs and actual investment treaties various definitions of investment will be analysed. The purpose of this exercise is to find out a) to what extent state activities can be qualified as an investment and b) if shares ordinarily enjoy protection under the applicable investment treaties.

2.2 The Definition of Investment

In order to answer the question whether state shareholders receive the same treatment as private investors it needs to be crystallised first what exactly is considered to be an investment

[64] https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-personae.
[65] https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-materiae.
[66] See also L.J.E. Timmer, 'The Meaning of Investment as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre', *Journal of International Arbitration* (2012), Vol. 29, Issue 4, p. 363-373.
[67] A selection will be made here since there are currently more than 2,500 International Investment Agreements into force. See e.g.: S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 44; https://www.jus.uio.no/pluricourts/english/projects/copiid/index.html.
[68] Please note that investments need to be protected under an applicable investment treaty in order for a tribunal to assert jurisdiction in an international arbitral procedure. See e.g.: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.30-8.46.
[69] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 211-214.

in IIA and to what extent investments made by states are protected in terms of the provisions of an investment treaty.[70] The applicable investment treaty usually contains a definition of an "investment". The examples of investment treaties in this section are selected to show general trends over time and across the globe. A selection has been made based on geographical and temporal spreading. It is important to bear in mind that only foreign investments are covered by the applicable investment treaty.[71] The wording of the treaty is the most important factor to determine what types of investments are covered. This paragraph aims at providing a general overview of the types of definitions of the term investment in international investment arbitration.

The UNCTAD has given an overview of what ordinarily qualifies as an investment in international investment law by referring to the Salini test.[72] In *Salini v. Morocco* the ICSID tribunal has given an interpretation of the term "investment" under Article 25(1) of the ICSID Convention. The Salini test established by the tribunal introduces four criteria that an activity needs to fulfil to be qualified as an investment. According to the tribunal an investment infers (1) a contribution of money or assets, (2) a certain duration of performance of the contract, (3) a participation in the risks of the transaction, and (4) a contribution to the economic development of the host State.[73] The first 3 criteria stem from the Preamble of the ICSID Convention; the condition that an investment needs to contribute to the economic development of the host state was added by the tribunal. The Salini criteria have even been used in other definitions of investment outside the context of ICSID.[74]

In ICSID arbitration the Salini criteria have played an important role in in the interpretation of the definition of investment in the applicable investment treaty.[75] During the first years after *Salini v. Morocco* various ICSID tribunals have used the Salini test to assert jurisdiction over investment disputes The Salini criteria were considered to be the second keyhole in the double-keyhole test in the determination of the existence of an investment, whereby the double-keyhole test means that the concerned investment needs to fulfil both the criteria from Article 25(1) of the ICSID Convention as well as the requirements under the applicable

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[70] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 45; J.W. Salacuse, *The Law of Investment Treaties* (2nd edition, Oxford University Press 2015), p. 94-98.

[71] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.30.

[72] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[73] *Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 52.

[74] See e.g. the definition of investment in the AfCFTA Investment Protocol.

[75] D. Chan and J. Lai, 'Two decades after Salini v. Morocco: the case for retaining the Salini test with modifications', *Arbitration International* (2023), No. 39, p. 63-84.

investment treaty.[76] The Salini criteria aimed to introduce a uniform definition of the term investment under Article 25(1) of the ICSID Convention and became extra prerequisites in order to meet the jurisdiction *ratione materiae* requirement.[77] The criteria were applied in addition to the provisions of the applicable investment treaty and the ICSID Convention. This application of the Salini test has led to substantial controversy over the years.[78] The criteria were introduced by the tribunal in *Fedax N.V. v. Venezuela* and later reworded in *Salini v. Morocco.*[79] Neither the ICSID convention nor the applicable investment treaty contained a provision that an investment needs to be a contribution to the economic development of the host state.[80] Article 31(1) of the VCLT stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The status of the Salini criteria has attenuated because tribunals started to interpret the term investment in accordance with the ordinary meaning of Article 25 of the ICSID Convention.[81] Several ICSID tribunals came to the conclusion that the Salini test contains indicative factors instead of hard criteria for the assertion of jurisdiction and the determination whether there is a protected investment under the applicable investment treaty contemplated by the ICSID Convention.[82]

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[76] The Salini criteria were considered to be the second keyhole in the double-keyhole test in the determination of the existence of an investment. See also: D. Chan and J. Lai, 'Two decades after Salini v. Morocco: the case for retaining the Salini test with modifications', *Arbitration International* (2023), No. 39, p. 67; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) para 107; *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 438.

[77] K. Yannaca-Small and D. Katsikis, 'The Meaning of Investment in Investment Treaty Arbitration', in: K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements* (2nd Edition), Oxford University Press 2018, pp. 266-301.

[78] See for instance J.D. Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law', *Harvard International Law Journal* (2010), Vol. 51, No. 1, pp. 257-318; D. Chan and J. Lai, 'Two decades after Salini v. Morocco: the case for retaining the Salini test with modifications', *Arbitration International* (2023), No. 39, p. 67; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 312; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 197.

[79] The original test contained five criteria: (i) duration; (ii) regularity of profit and return; (iii) assumption of risk; (iv) substantial commitment; and (v) significance for the host State's development. See *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para. 43; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 310.

[80] D. Chan and J. Lai, 'Two decades after Salini v. Morocco: the case for retaining the Salini test with modifications', *Arbitration International* (2023), No. 39, p. 68.

[81] D. Chan and J. Lai, 'Two decades after Salini v. Morocco: the case for retaining the Salini test with modifications', *Arbitration International* (2023), No. 39, p. 70; *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 442 and 470.

[82] *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) para 200; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) para 316-318; *Abaclat and others (formerly Giovanna A. Beccara and*

Ordinarily the definition of investment in an investment treaty tends to be broad and comprehensive.[83] There are roughly three types of definitions, depending on which starting point is being considered. The definition of the term investment can be: asset-based; enterprise-based or; based on the reference to commercial presence.[84]

The broad asset-based definition prevails in many international investment agreements.[85] There are numerous variations of the asset-based definition, but most variants include the reference to "every kind of asset" which typically embraces everything with economic value.[86] The asset-based definition of investment in investment treaties can also include a (non-exhaustive) list of categories that are covered by the treaty.[87] The purpose of such a list is to indicate which types of investments are protected under the treaty. A few examples of these categories are for instance property, (intellectual) property rights, shares, stocks and debentures, claims to money, goodwill, contracts having financial value and business concessions.[88] In some cases an investment treaty contains a closed list of assets, which narrows down the scope of the definition substantially.[89] By incorporating a closed list in the investment treaty only the assets

others) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 364;

[83] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 17-18.

[84] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 21-24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[85] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 95; L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p.24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[86] See for instance Article 1(6) of the Agreement Between the Swiss Federal Council and the Government of the Republic of Indonesia on the Promotion and Reciprocal Protection of Investments, signed on 24 May 2022, entered into force on 1 August 2024. N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.30-8.31.

[87] Article 1 of the Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed on 19 February 2008, entered into force on 1 January 2012; Article 1 of the Agreement Between the Government of the People's Republic of China and the Government of the Republic of Angola Concerning the Promotion and Reciprocal Protection of Investment, signed on 6 December 2023, entered into force on 29 June 2024.

[88] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf. See for instance Article 1 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments, signed on 8 June 1995, entered into force on 9 October 1997; Article 1 of the Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea, signed on 12 July 2003, entered into force on 1 March 2005.

[89] See for instance Article 1(r) of the Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, signed on 28 June 2009, entered into force on 14 December 2009; L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 94.

that are on that list are considered to be a protected investment.[90] The closed list method will be used if states would like to have more clarity upfront on what types of activities are covered by the investment treaty. Hence, if an investment treaty contains a closed list only the types of assets on that list enjoy investment treaty protection.[91]

An enterprise-based definition of the term investment is to be found in some treaties.[92] An investment is considered the establishment or acquisition of a (business) enterprise in a host state, sometimes in conjunction with conditions of ownership or control.[93] The enterprise-based definition of investment may also contain an indicative or closed list.[94] The difference between the asset-based and the enterprise-based definition is that the latter places the focus on the company that carried out the economic activity in the host state and not on the money or assets that constitute part of the investment.

Some investment treaties include an even narrower scope by defining an investment based on commercial presence.[95] In these cases a legal entity must have been established by an investor in the host state. This entity may also be a branch or representative office.[96] In general the types of treaties that contain such a definition are not primarily focused on the substantive protection of FDIs, but rather on the phenomenon of market access and market access opportunities.[97] The European Union's (EU's) trade agreements sometimes include such references, as will be discussed in the next paragraph.

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[90] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 95-96.

[91] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.

[92] See for instance Article 1 of the Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments, signed on 12 June 2018, entered into force on 23 August 2018.

[93] This approach was for instance adopted in the North American Free Trade Agreement, signed on 17 December 1992, entered into force on 1 January 1994, Article 1139; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 22, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[94] See for instance Article 1 of the Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, signed on 9 January 2013, entered into force on 12 May 2014 (indicative list) and Article 1 of the Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, signed on 14 November 2006, entered into force on 20 June 2007 (closed list).

[95] See for instance the ECONOMIC PARTNERSHIP AGREEMENT between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJEU L 289/I/3; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 23, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[96] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 23, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[97] W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', *The Law and Practice of International Courts and Tribunals,* Vol. 9, 2010, p. 19-20.

2.3 Shares as a Form of Investment

2.3.1 Shares as Protected Investments in International Investment Treaties

A share is often described as the proprietary interest that a person holds in a company.[98] A share issued by a company is regarded as movable property which is transferrable in any manner provided by the applicable law.[99] Regardless of the used definition it can be concluded that shares in a company in the host state held by a foreign investor in general will be considered as a foreign investment under the applicable investment treaty.[100] Sometimes, however, specific types of investments are excluded from treaty protection.[101] These are usually indirect investments, whereby the investor remains passive and does not control the management of the investment.[102] This means that merely holding shares in a company that is established in the host state will not always be sufficient to qualify as an investment that is protected by the applicable investment treaty.[103]

In this framework commercial contracts for the sale of a good or service are sometimes excluded from treaty protection, whereby only certain activities that follow from the contracts are regarded as an investment.[104] In some cases certain loan and debt securities may be excepted from the definition of investment.[105] This approach has for instance been chosen in Canada's model BIT.[106] Similarly, public debt securities are occasionally excluded from treaty protection because this would limit the possibility for the host state to interfere with debt restructuring or

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[98] R. Jooste and J. Yeats, ´Shares, Securities and Transfer´, in: F.Hl. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev and J. Yeats, *Contemporary Company Law*, Juta Law (2012), p. 163.
[99] R. Jooste and J. Yeats, ´Shares, Securities and Transfer´, in: F.Hl. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev and J. Yeats, *Contemporary Company Law*, Juta Law (2012), p. 163-164.
[100] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 98.
[101] OECD, *Business and Finance Outlook 2016*, 'The Impact of Investment Treaties on Companies, Shareholders and Creditors', p. 234.
[102] See for instance Article 2 of the Framework Agreement on the Association of South-east Asian Nations (ASEAN) Investment Area (1998); OECD, *Business and Finance Outlook 2016*, 'The Impact of Investment Treaties on Companies, Shareholders and Creditors', p. 233-234.
[103] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.34. See for instance Article 1(3)of the Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed on 3 December 2016, not into force yet. The investment needs to be made in good faith and requires a certain duration and a contribution to the sustainable development of a contracting party.
[104] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.46.
[105] W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', *The Law and Practice of International Courts and Tribunals,* Vol. 9, 2010, p. 20.
[106] Canada 2021 Model BIT, Article 1.

rescheduling in case of financial difficulties.[107] Lastly, certain assets which are not used for business purposes can be excluded from the applicable investment treaty.[108] Here the aim of the investment becomes relevant.[109] In *Phoenix Action Ltd v. Czech Republic* the tribunal considered that there was no covered investment under the BIT between Czech Republic and Israel because the investment was made for the sole purpose of being covered under ICSID protection. In this case the claimant had fled to Israel to register a new Israeli company (Phoenix Action Limited) to take over his activities in Czech Republic after facing criminal investigations regarding tax and custom duty evasions. The tribunal concluded that the investment was not made in good faith.[110]

2.3.2 The Asset-Based Approach in (Model) Investment Treaties

The dominant definition of investment in treaty practice is the asset-based definition.[111] The tendency in international investment law and in investment treaties is to have a rather wide scope when it comes to the question what qualifies as an investment.[112] In various Model BITs the broad asset-based principle is used to define an investment.[113] Ordinarily shares can be classified as assets if an investment treaty contains an asset-based definition of the term investment. The U.S. Model BIT states for instance the following in Article 1:

> "*"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*

[107] See e.g.: *Canada-Colombia Free Trade Agreement*, signed on 21 November 2008, entered into force on 15 August 2011, Article 838.
[108] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 29-30, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[109] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 97-98.
[110] *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 117-147; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 33, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf..
[111] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 5, 21, 24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[112] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 94-95; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 113, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[113] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 17-18.

assumption of risk. Forms that an investment may take include: […] *(b) shares, stock, and other forms of equity participation in an enterprise*;".[114]

The definition as included in the U.S. Model BIT is a clear example of a broad asset-based approach. It qualifies every kind of asset as an investment, and it may include a specific list of assets to specify what type of assets are included by all means. The Netherlands Model BIT includes a variation of the same approach with the following definition of investment in Article 1:

"*"investment" means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. Forms that an investment may take include:* […] *(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures."*[115]

In practice variations of this asset-based approach with a non-exhaustive list are implemented in various BITs.[116] The same approach has for instance been chosen in the UK-Colombia BIT, albeit that the investment needs to be made in accordance with the law of the host state, whereby the term of investment is defined in Article 1(2)(a) as:

"*every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party in the territory of the other Contracting Party, in accordance with the law of the latter, including in particular, but not exclusively,* […] *(ii) shares* […]".[117]

The China-Netherlands BIT defines the term "investment" as every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party.[118] In the non-exhaustive list of Article 1 shares are listed as a form of investment. This approach has also been

[114] U.S. 2012 Model BIT.
[115] The Netherlands 2019 Model BIT.
[116] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.30-8.31.
[117] *Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia*, signed on 17 March 2010, entered into force on 10 October 2014.
[118] *Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands*, signed on 26 November 2001, entered into force on 1 August 2004.

embraced and implemented by various countries in the Western world. The Italy Model BIT[119], the Belgium-Luxembourg Economic Union Model BIT[120], the UK Model BIT[121], the Germany Model BIT[122], the France Model BIT[123] and the Switzerland Model BIT[124] all include the asset-based approach with a non-exhaustive list.

In some cases the asset-based definition includes a non-exhaustive list, but the investment itself needs to fulfil certain requirements in order to be covered under the applicable treaty.[125] The Morocco Model BIT refers to shares as a potential investment, but also states in Article 3.3 that an investment means assets invested in good faith by an investor of a Party in the territory of the other Party, who contribute to the sustainable development of this last Party and which implies a certain duration, a capital commitment or other similar resources, a profit expectation and risk taking. Morocco decided to incorporate the Salini criteria in the definition of investment in their Model BIT. If an investment is not made in good faith, it shall not be regarded as a covered investment. This requirement is similar to the tribunal's approach in *Phoenix Action Ltd v. Czech Republic* in the sense that only *bona fide* investments fall under this definition. Moreover, the investment must contribute to sustainable development, which can be measured in for instance the increase in production capacity, the growth of the economy, the quality of jobs created, the duration of the investment and the technology transfer or poverty reduction.[126]

The scope of the definition of investment is more restricted if the concerned investment

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[119] Article 2 of the Italy 2021 Model BIT: "*"investment" means every kind of asset that has the characteristics of an investment, including such characteristics as a certain duration, the commitment of capital or other resources, the assumption of risk, or the expectation of gain or profit. Forms that an investment may take include:* […] *(b) shares, stocks and other forms of equity participation in an enterprise*".

[120] Article 2(3) of the Belgium-Luxembourg Economic Union 2019 Model BIT: "*The term "investment" shall mean every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk and that is at all times in compliance with the obligations of this Agreement. Forms that an investment may take include:* […] *(b) shares, stocks and other forms of equity participation in an enterprise*".

[121] Article 1(a) of the United Kingdom 2008 Model BIT: "*"investment" means every kind of asset, owned or controlled directly or indirectly, and in particular, though not exclusively, includes (ii) shares in and stock and debentures of a company and any other form of participation in a company*".

[122] Article 1(1) of the Germany 2008 Model BIT: "*the term "investments" comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State. The investments include in particular:* […] *(b) shares of companies and other kinds of interest in companies*".

[123] Article 1(1) of the France 2006 Model BIT: "*The term "investment" means every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively: (b) shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party*".

[124] Article 1(2) of the Switzerland 1995 Model BIT: "*The term "investments" shall include every kind of assets in particular:* […] *(b) shares, parts or any other kinds of participation in companies*".

[125] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 96-97.

[126] Article 3(3) of the Morocco Model BIT.

treaty contains a so-called closed list.[127] In this case only the types of investments that are mentioned in the treaty will be regarded as a covered investment. An example of this approach can be found in the Mexico Model BIT that includes a list of assets in Article 1(5) that are owned or controlled by investors of a Contracting Party in accordance with the laws and regulations of the host state.[128] Under the Mexico Model BIT shares, stocks and other forms of equity participation in an enterprise are also considered to be a protected investment. There is no room for discretion of the tribunal, if the investment treaty contains a closed list of assets that are considered a protected investment.

When it comes to the asset-based definition of investment, most modern investment treaties use a rather broad definition of investment, e.g. by defining it as "every kind of assets".[129] In some of the treaties a non-exhaustive list is added, which explicitly mentions shares as a covered form of investment.[130] The UK-Chile BIT for instance defines an investment as every kind of asset and then provides examples of what these types of assets can be.[131] This list includes types of assets such as: movable and immovable property, participation in a company (e.g. shares, stocks and debentures), claims to money, intellectual property rights, goodwill, technical processes and know-how and business concessions conferred by law or under contract.

Tribunals consider shares in a company of the host state a covered investment if the investment treaty contains an asset-based definition. In *AMT v. Zaire* an ICSID tribunal confirmed that shares are protected under the US-Zaire BIT by rejecting Zaire's argument that AMT (US Investor) did not make a direct investment in the host country because it was only holding shares in a local company.[132] The tribunal assessed the definition of investment under the US-Zaire BIT, which included "*a company or shares of stock or other interest in a company or interests in the assets thereof*".[133] Similar decisions were rendered by the ICSID tribunals in

[127] M.. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press 2010, p. 220-225; L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 94.
[128] Mexico 2008 Model BIT.
[129] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.
[130] See e.g. the US 2012 Model BIT which includes "*shares, stock and other forms of equity participation in an enterprise*".
[131] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Chile for the Protection of Investments, signed on 8 January 1996, entered into force on 21 April 1997.
[132] *American Manufacturing and Trading Inc. v. Republic of Zaire*, Award, ICSID Case No. ARB/93/1, IIC 14 (1997).
[133] Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment, signed on 3 August 1994, entered into force on 28 July 1989.

CMS v. Argentina[134] and *Suez*.[135] In *CMS v. Argentina* the tribunal examined the definition of investment in the Argentina-US BIT[136] as included in Article I(1).[137] The treaty defines an investment as:

> "[…] *every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt and service and investment contracts; and includes without limitation* […] *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof* […]."

The treaty includes a rather broad definition of investment and includes a non-exhaustive list that includes shares in a company located in the host country. In *Suez v. Argentina* the tribunal recognised that shares fall within the definition of investment in the Argentina-France BIT as well as the Argentina-Spain BIT.[138] If an investment treaty contains a broad, asset-based definition of the term 'investment', the shares of the state shareholder will be regarded as an investment in case of reflective loss arising from commercial activities.

2.3.3 The Enterprise-Based Approach in (Model) Investment Treaties

An enterprise-based definition of the term investment may qualify shares as a protected investment. Depending on the wording in the applicable treaty shares are considered an investment as they are linked to an enterprise. The definition of investment in the Canada Model BIT is a clear example of the enterprise-based approach in which shares fall in the scope of a protected investment. Article 1 states that an investment means an enterprise, but also for instance an equity security in an enterprise.[139]

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[134] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003.
[135] *Suez, Sociedad General deAguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006.
[136] Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 2992, entered into force on 20 October 1994.
[137] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 57.
[138] *Suez, Sociedad General deAguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 51.
[139] Article 1 of the 2021 Canada Model FIPA: "investment means: *"(I) an enterprise; (II) an equity security of an enterprise; (III) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (IV) a loan to an enterprise […] and […] any other claims to money, that do not involve the kinds of interests set out in* [this Article]".

The enterprise-based approach was also implemented in Article 1139 of the NAFTA that contained a closed list of items that were considered to be investments.[140] The NAFTA included a provision that an enterprise owned or controlled by an investor is considered to be a type of investment, as well as the activities that are undertaken by that particular company.[141] The definition of enterprise was to be found in Article 201(1) that stated that any entity constituted or organised under the applicable law, whether or not for profit, and whether privately-owned or *governmentally-owned*, including any corporation, trust, partnership, sole proprietorship, joint venture or other association was considered to be an enterprise. The Canada-United States FTA contained an even narrower definition of investment in Article 1611, whereby a share in a business enterprise qualified as an investment provided that the business enterprise continued to be controlled by the investor.[142]

The notion of control as used in the Canada-United States FTA may create problems for minority shareholders because they ordinarily have limited control over the enterprise. This is peculiar since a shareholder claim for reflective loss would be a viable alternative for the minority shareholder, whereas majority shareholders may direct the company in the host state into arbitral proceedings in case they want to see compensation for the inflicted harm. NAFTA abandoned the notion of control and the United States-Mexico-Canada Agreement (USMCA) – that replaced NAFTA and entered into force on 1 July 2020 – furthermore abandoned the enterprise-based closed list approach and implemented an asset-based approach with a non-exhaustive list, whereby minority shares also qualify as a covered investment.[143]

An enterprise-based definition of investment, which narrows down the scope of the asset-based definition, does not necessarily have to list the notion of control as criterion for the

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[140] Article 1139 of the *North American Free Trade Agreement*: "*investment means:*
(a) an enterprise;
(b) an equity security of an enterprise; […] *but investment does not mean,*
(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h).

[141] *North American Free Trade Agreement*, signed on 17 December 1992, entered into force on 1 January 1994, Article 1139. The United States-Mexico-Canada Agreement (USMCA) – that replaced NAFTA and entered into force on 1 July 2020 – abandoned the closed list approach and implemented an asset-based approach with a non-exhaustive list.

[142] The Canada- US Free Trade Agreement, signed on 2 January 1988, entered into force on 1 January 1989.

[143] Article 14.1 of the United States-Mexico-Canada Agreement: "*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. An investment may include:* […] *(b) shares, stock and other forms of equity participation in an enterprise*".

protected investment. The reason is that sometimes all capital or resources that have crossed the borders to create an enterprise in the territory of a foreign country are included in the definition. This means that the shares of the minority shareholder will also be considered an investment under the applicable investment treaty. Such an example of a broader enterprise-based definition can be found in the Canada-Guinea BIT, whereby a share in an enterprise is also listed unconditionally in the definition of investment.[144] The enterprise-based approach is furthermore preferred by India. The India 2015 Model BIT defines an investment in Article 1.4 as:

> "*an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.*"

The India 2015 Model BIT is a hybrid example of the enterprise-based approach because it contains a non-exhaustive list of assets in possession of an enterprise that are considered to be an investment. Shares, stocks and other forms of equity instruments of the enterprise or in another enterprise constitute an investment.[145] On the other hand, the India 2015 Model BIT includes a negative definition of the term "investment" as it lists assets of an enterprise that do not qualify as a protected investment.[146]

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[144] Article 1 of the Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (2015): "*investment means: 1. an enterprise; 2. a share, stock or other form of equity participation in an enterprise; 3. a bond, debenture or other debt instrument of an enterprise; 4. a loan to an enterprise; 5. notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located; 6. an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; 7. an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; 8. an interest arising from the commitment of capital or other resources in the territory of a*
Party to economic activity in that territory, such as under: 1. a contract involving the presence of an investor's property in the territory of the Party, including a turnkey or construction contract, or a concession, or
2. a contract where remuneration depends substantially on the production, revenues or profits of an enterprise;
9. intellectual property rights; and 10. any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose".

[145] Article 1.4 of the India 2015 Model BIT.

[146] Article 1.4 of the India 2015 Model BIT: "[…] *For greater clarity, investment does not include the following assets of an enterprise: (i) portfolio investments of the enterprise or in another enterprise; (ii) debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise; (iii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise*

Another example of the enterprise-based definition is to be found in the (Draft) Pan-African Investment Code (PAIC).[147] The PAIC was drafted in 2016 by the Member States of the African Union (AU) as the first continent-wide African model investment treaty.[148] The objective of the PAIC is to promote, facilitate and protect investments that foster the sustainable development of each Member State (Article 1 PAIC). According to Article 3 the PAIC does not affect rights and obligations deriving from any existing investment agreement, but Member States of the AU may agree to replace their intra-African BITs with a binding version of the PAIC. This has not occurred so far, but the PAIC does show that the African Member States have shifted from an asset-based approach to an enterprise-based approach when it comes to the definition of investment. Article 4(4) PAIC indicates that an investment is an enterprise or company established, acquired or expanded by an investor including through the constitution, maintenance or acquisition of shares, provided that the enterprise or company is established or acquired in accordance with the laws of the host State. The enterprise or company may possess assets such as shares. This approach is in many ways similar to the Salini test as the investment must have the characteristics of a substantial business activity (including a certain duration), commitment of capital or other resources (contribution), the expectation of gain or profit, the assumption of risk and it must be a significant contribution to the host State's economic development. In accordance with Article 4(1) PAIC an enterprise or company needs to be constituted or incorporated under the applicable laws of a Member State and carry out substantial business activity, which will be assessed on a case-by-case basis based on the amount of the investment, the number of jobs created, the effect of the investment on the local community and the duration of the business operation. Hence, the question whether or not shares are considered to be an investment depends to a great extent on the types of activities that the enterprise or company conducts. If the company is merely a letterbox company or shell corporation, the PAIC does not qualify the shares and the enterprise or company as an investment. The PAIC was a source of inspiration for the Investment Protocol of the Agreement of the African Continental

in the territory of the Party where the investment is made; (iv) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party; (v) goodwill, brand value, market share or similar intangible rights; (vi) claims to money that arise solely from the extension of credit in connection with any commercial transaction; (vii) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding; (viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Treaty".

[147] African Union Commission. Economic Affairs Department, *Draft Pan-African Investment Code* (2016). Available via https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

[148] https://afaa.ngo/page-18097/10440007.

Free Trade Area (AfCFTA Agreement). [149] In Article 1 of this Investment Protocol an investment means:

> "*means an enterprise or company, as defined in this Article, which is established, acquired or expanded in conformity with the laws and regulations of a Host State by an investor which maintains substantial business in the territory of that Host State. The enterprise or company may possess assets, such as:*
>
> *a. shares, stocks, or any other form of participation of the enterprise/company or another enterprise/company;* […]
>
> *For greater certainty, the investment must have the following characteristics: commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, and a significant contribution to the Host State's sustainable development*".[150]

In this case the term investment is limited to an enterprise or company, which may possess shares. Furthermore, the Salini criteria are introduced in the definition of investment in a slightly adjusted form. The investment must be a significant contribution to the Host State's sustainable development. This means that also under this investment protocol shares are not in every case considered to be an investment.

The SADC 2012 Model BIT provides the member states with three options in Article 2(I-III): the enterprise-based definition, the closed list option based on the Canadian Model BIT or the non-exhaustive asset-based option based on the U.S. Model BIT.[151] All in all, various definitions of the term "investment" are used in investment treaties. Although the enterprise-based approach is more restrictive than the asset-based approach, it acknowledges shares as a type of investment that enjoys treaty protection.[152] If the investment treaty contains a closed list, shares need to be specifically included on that list to be covered.

[149] M.A. Forere, 'The Agreement establishing the African Continental Free Trade Area: Will it spur foreign direct investment in Africa?', *Acta Juridica*. Volume 2018. No.1, p. 65-68.
[150] Article 1 of the Investment Protocol of the AfCFTA Agreement.
[151] SADC 2012 Model BIT.
[152] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 98-99.

2.3.4 A Definition by Reference to Commercial Presence

An unusual approach to determine what qualifies as a covered investment is linked to the commercial presence of an entity in the host state. This approach tends to narrow down the scope of covered investments even more compared to the enterprise-based approach. In the General Agreement on Trade in Services (GATS) "commercial presence" is for instance defined as:

> "*any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office within the territory of a Party for the purpose of supplying a service*".[153]

In some of the EU's trade agreements this approach is chosen for the purpose of liberalisation and market access.[154] The aim of these agreements is not to promote and protect foreign investments, but to enable the cross-border supply of goods and services and to provide market access opportunities in the form of establishing a commercial presence through legal entities, branches and representative offices.[155] This concept has also been incorporated in the negotiated EU-Vietnam Free Trade Agreement (EUVFTA) and EU-Vietnam Investment Protection Agreement (EUVIPA). The EUVIPA is not in force yet as the ratification process is still ongoing.[156] Looking at the definition of investment in EUVFTA it is unclear if shareholder claims for reflective loss initiated by a state (party under the agreement) would be admissible.[157] The investment needs to be related to commercial activities, which are defined in Article 11.1(a) as: ""*commercial activities" means activities the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making*".

The same approach is incorporated in the Economic Partnership Agreement between the CARIFORUM (Caribbean Forum) States, the EU and the EU Member States (CARIFORUM-

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[153] *General Agreement on Trade in Services*, Article XXVIII(d).
[154] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 23-24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[155] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 23, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[156] The Investment Protection Agreement will enter into force when it is ratified by all EU Member States. As of the end of October 2023, 16 EU Member States had ratified it.
[157] See Chapter 11 EUVFTA and the EU-Vietnam Investment Protection Agreement.

EU EPA).[158] Article 65 of the CARIFORUM-EU EPA stipulates that an investor performs an economic activity through setting up a commercial presence. A commercial presence means any type of business or professional establishment through the constitution, acquisition or maintenance of a juridical person, branch or representative office. Capital participation, as is explained in footnote 2 under Article 65, is only included in this definition if a lasting economic link is established. In case of shares this will be the case if the block of shares enables the shareholder to effectively participate in the management of the company or in its control. Hence, minority shareholders are excluded from protection. The "commercial presence approach" is however extremely rare and according to UNCTAD too narrow to be used in investment treaties.[159]

2.4 The Interpretation of the Definition in the Applicable Investment Treaty

The wording of the treaty will determine to what extent shares constitute a protected investment.[160] The concerned definition needs to be interpreted by a tribunal to assert jurisdiction in a particular case. The primary aim and *raison d'être* of IIA is the promotion of foreign investment and the protection of foreign investors with the aim to achieve greater trade and investment liberalisation.[161] In this framework of teleological interpretation, tribunals need to adopt a wide definition of the term "investment".

The large variety of applicable BITs and arbitral awards are providing for a strong legal framework, in which shares ordinarily constitute a protected investment. However, sometimes the aim of the investment needs to be business oriented (commercial in nature).[162] This may cause difficulties, if the concerned shareholder is a state. States may have public interest reasons to participate in a certain commercial enterprise. The aim of the investment does not necessarily have to be commercial in nature, even if the enterprise of entity itself is business-oriented.[163] Furthermore, the phenomenon of passive investing is often excluded from treaty protection, which makes it impossible for both private and state shareholders to claim treaty protection under

[158] ECONOMIC PARTNERSHIP AGREEMENT between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJEU L 289/I/3.
[159] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[160] See also: V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 211-214.
[161] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration. Substantive Principles* (second edition, 2017), Oxford University Press, nr. 1.01.
[162] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 15, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[163] See more detailed in chapter 7.

the applicable investment treaty.[164] Nevertheless, holding shares in a company in the host state will in general be covered under most investment treaties in contrast to for instance holding debt securities or bonds.[165]

In general, a broad scope of the definition of investment is used in international investment arbitration. This means that depending on the wording in the applicable treaty both direct and indirect investments through intermediaries are covered, being contractual or other types of transactions having economic value.[166] When it comes to the definition of investment, most modern investment treaties use a rather broad definition of investment, e.g. by defining it as "every kind of assets".[167] In some of the treaties a non-exhaustive list is added, which explicitly mentions shares as a covered form of investment.[168]

2.5 The Objective of the Investment

The objective of the investment can play a crucial role in the determination if that particular investment qualifies as a protected investment and therefore it falls under the scope of the applicable investment treaty. At this point the abuse of process / abuse of rights doctrine becomes relevant because tribunals need to assess if the concerned investment is truly made for commercial purposes. There is a fundamental difference between the actions *de jure imperii* and actions *de jure gestionis.*[169] The question here is whether investments that are commercial in nature, but are being undertaken by public entities can also qualify as a covered investment under a BIT or FTA that link the investment to a commercial presence.[170] These treaties are primarily aimed at bringing FDIs into the host territory, but the purpose of the investment plays a crucial

[164] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 29-30, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.
[165] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 97-98. Brazil 2015 Model BIT: Article 3(1.3) of the Brazil 2015 Model BIT excludes "*debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the legislation of that Party*".
[166] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.33.
[167] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.
[168] See e.g. the US 2012 Model BIT which includes "*shares, stock and other forms of equity participation in an enterprise*".
[169] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 542-543.
[170] See e.g. M. Rajavuori, Making International Legal Persons in Investment Treaty Arbitration: State-Owned Enterprises along the Person/Thing Distinction, 18 German Law Journal 1183 (2017), 1184; J. Klabbers, *The Concept of Legal Personality,* 11 us GENTIUM 35 (2005).

role.[171] If there is a (hidden) political agenda behind the investment, the commercial arena of investment arbitration is not the appropriate stage to resolve disputes. This is however part of the general requirement in IIA that an investment should be made in good faith (*bona fide*).[172] This criterion applies to investments made by private or public entities. By making sure that investments made by public entities are truly commercial in nature, that they fall under the protection scope of the applicable investment treaty and are therefore carried out in good faith, the balance between private and state investors can be ensured.[173] After all, private investments that are not made in good faith will in general also be banned from treaty protection under an applicable BIT.

The issue of abuse is broader and not limited to the question whether an investment is commercial or public in nature.[174] It can become relevant when an investor makes an investment for the sole purpose of enjoying the protection of an investment treaty or bringing a case to a certain forum, which can sometimes be qualified as culpable treaty or forum shopping.[175] The origin of the investment should not be determining for the protection of a certain activity under the applicable investment treaty. An important way to prevent culpable treaty shopping is to examine whether the concerned investment has been made in good faith. In *Phoenix Action Ltd v. Czech Republic* the tribunal referred to Article 31 of the VCLT , according to which a treaty must be interpreted in good faith. The principle of good faith also incorporates the prevention of an abuse of the system of international investment protection.[176] In this framework, the tribunal based its assessment of a *bona fide* investment on the timing of the investment, the timing of the claim, the substance of the transaction and the true nature of the operation.[177] The parties to the treaty can also play a crucial role here by including denial of benefits clauses in the treaty which deny certain treaty benefits to parties that have no real economic connection with the host state.[178]

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[171] W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', The Law and Practice of International Courts and Tribunals (9) 2010, p. 19-20.
[172] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26.
[173] See Paragraph 6.3.
[174] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 3.
[175] Sometimes forum shopping is advisable. See also: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 3.100. See more details in chapter 6 on (culpable) forum shopping.
[176] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para. 76 and 113; See also: J. Lee, 'Resolving Concerns of Treaty Shopping in International Investment Arbitration', *Journal of International Dispute Settlement* 2015, Vol. 6, p. 375.
[177] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para. 135-144.
[178] B. Böhme, 'Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They?' *Journal of International Arbitration* (2021), No.4 , p. 515-519.

Given the teleological focus of international investment law that lies in the achievement of greater trade and investment liberation through the promotion and protection of the investment, the mere classification of an investment as "private" or "public" should not be the deciding factor in asserting jurisdiction. A different treatment between private and state investors may arise when the definition of investment based on commercial presence is being used. The question here is how commercial presence should be interpreted.[179] If it means that only investments made by private entities are considered commercial, the imbalance between private and state investors is obvious. Under such a BIT or FTA "private" investments generally will be regarded as a protected investment, whereas "public" investments will not be covered.[180] Abuse of rights needs to be prevented, and tribunals have the option to act accordingly during the merits stage, but excluding public investments in total would also exclude *bona fide* public investments, which is not desirable for the achievement of a level-playing field.

2.6 Conclusion

This chapter focused on the definition of investment under BITs and FTAs and the qualification of shares as protected investments. Following the 3 different types of definitions detected in investment treaties, an investment can be asset-based, enterprise-based or based on a reference to commercial presence. The prevailing definition is the broad asset-based definition, according to which "every kind of asset" constitutes a protected investment. Under the enterprise-based definition, an investment qualifies by virtue of the enterprise that carried out the economic activity in the host state. However, both approaches can potentially get restricted substantially by the incorporation of a closed list of assets that enjoy investment treaty protection in the investment treaty. The definition based on commercial presence shifts the scope of investment to the commercial presence of an entity established by an investor in the host state. This narrow approach is chosen by some of the EU's economic agreements and is rarely used in investment treaties. Ordinarily, shares qualify as protected investments in the context of the asset-based and

[179] There is no case law on the interpretation of the term "commercial presence" in relation to the question if a certain entity is a protected investor under an applicable investment treaty. In *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016 the claimant argued that the MFN-clause in Article II.1 of the GATS allows foreign investors to benefit from treaty protection from bilateral investment treaties concluded between Senegal and third countries. The claimant argued that its investment was to be qualified as a commercial presence as defined in Article 11.1(a) of the GATS. The tribunal declined jurisdiction on the basis that the MFN-clause in Article II:1 GATS cannot be considered as an offer to arbitrate in itself.

[180] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 23-24, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

the enterprise-based definition. In the case of investment treaties embracing the criterion of commercial presence it is often questionable whether shares meet the investment definition. For instance, shares owned by minority shareholders are not covered by the CARIFORUM-EU EPA because the qualification of shares as investments requires that the block of shares enables the shareholder to effectively participate in the management of the company or in its control. Moreover, shares owned by state shareholders may get excluded from the investment definition in BITs or FTAs that links the investment to a commercial presence, if they do not consider investments made by state entities commercial. The rationale that the motives of state investors are not always truly commercial in nature and that there may be a (hidden) political agenda behind the investment does not justify the *a priori* exclusion of investments made by public entities from the protection scope of investment treaties, as this approach will ultimately apply to the same extent to *bona fide* investments. A potential abuse of rights by state investors can be controlled by the arbitral tribunals, which should filter the investments made in good faith. In *Phoenix Action Ltd v. Czech Republic* for instance the tribunal based its assessment of a *bona fide* investment on the timing of the investment, the timing of the claim, the substance of the transaction and the true nature of the operation.

CHAPTER 3: THE PROTECTION OF STATE SHAREHOLDERS UNDER EXISTING INVESTMENT TREATIES

3.1 Introductory Remarks

In general there are three sources of law that determine whether state shareholders are entitled to bring claims for reflective loss in a foreign jurisdiction: the applicable investment treaty; the domestic laws of the contracting party of the host state (depending on the wording of the applicable investment treaty); and the rules of the institution.[181] The interplay between the rules of the applicable institution, the domestic arbitral law of the seat (procedural law) and the international investment agreement (substantive law) determines the (in)admissibility of a claim for reflective loss made by a state shareholder. As far as the substantive law is concerned, a state shareholder needs to be addressed as a protected investor under the applicable treaty in order to enjoy treaty protection.[182]

This chapter focuses on the treatment of state shareholders in IIA and deals with the issues of: a) whether state shareholders fit the definition of investor under an applicable investment treaty and b) whether state shareholders are treated in a similar manner compared to private shareholders.[183] Because state shareholders hold shares in SOEs this chapter will provide an overview of the different types of entities that are considered to be SOEs. This chapter will subsequently focus on the protection of the state as a shareholder under existing investment treaties. Based on the (model) investment treaties and the jurisprudence, the difference between public and private shareholders in IIA will be analysed. The aim is to find out when and why state shareholders are treated differently when it comes to seeking protection under an applicable investment treaty compared to private shareholders.[184]

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[181] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 21-22.
[182] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.19.
[183] See also: P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 3.
[184] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 380-381

3.2 The Entities in which a State is a Shareholder

3.2.1 The Term State-Owned Enterprise (SOE) and its Distinctions

SOEs have started to globalise since the 2000s following the example of private companies.[185] The Organization for Economic Cooperation and Development (OECD) published recently that 126 among the largest 500 enterprises in the world are SOEs in 2023, with a total of USD 53.5 trillion in assets and USD 12 million in revenue.[186] The definition of a SOE is relevant because many international investment treaties distinguish between privately and publicly owned foreign investors. In IIA the majority of investment treaties establish procedures for the resolution of investor-state disputes rather than state-to-state disputes. Due to the increasing amount of investments made by SOEs, the likelihood of disputes among their shareholders and a host state also increases. This means that the question whether or not an investment dispute falls inside or outside the scope of an applicable investment treaty will also increase.[187] The OECD defines a SOE as:

> "[any] *undertaking recognised by national law as an enterprise, and in which the state exercises ownership or control*. […] *This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or large parts of their activities, are of an economic nature*".[188]

The term SOE is mostly used as an umbrella term. A SOE can either be a SWF or a SOC in which a public body holds shares.[189] The difference between these two forms is mostly related to the fact that the management of SOCs and SWFs may differ because of the different purposes that both entities fulfil. SOCs are generally created to provide services to the people or to engage

[185] A. Ragoussis and S. Miroudot, "Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds" in Prospects in International Investment Law and Policy, eds. Roberto Echandi and Pierre Sauvé (Cambridge University Press, 2013), p. 51.
[186] OECD, *Ownership and Governance of State-Owned Enterprises* (2024), p. 8.
[187] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 615.
[188] OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2024), p.9.
[189] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 27- 28.

in activities that form part of a state's industrial policy.[190] SWFs have been created as investment vehicles for financial purposes. It is therefore assumed that the behaviour and conduct of SWFs are closer to private entities, i.e. private investment funds, since their main objective is to make money and not necessarily to serve a public goal.[191] They are closer to private companies or closer to other private investment funds than a SOC, but nonetheless, both entities are examples of SOEs.[192]

3.2.2 The Definition and Structure of State-Owned Companies (SOCs)

SOCs are not a recent phenomenon, but over the course of the last few decades, there has been a substantial growth in size and importance.[193] Despite this fact, there is no clear settled definition of the term State-Owned Company.[194] State-Owned Companies need to be distinguished from state entities that exercise elements of government authority.[195] Various investment treaties refer to the applicable domestic law in their definition of the term company.[196] Many US BITs[197], for example, define a "company" as "any entity constituted or organised under

[190] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 380-381.
[191] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 617-618; A. Ragoussis and S. Miroudot, "Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds" in: *Prospects in International Investment Law and Policy*, eds. Roberto Echandi and Pierre Sauvé (Cambridge University Press, 2013), p. 56.
[192] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 381.
[193] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', Journal of International Law and International Relations 2011, Vol. 6, No. 2, p.6.
[194] See also A.G, Stevens, *Enforceable Accountability. A Corporate Governance Mirage for South African State-Owned Companies*, PhD Thesis University of Cape Town (2020), p. 26.
[195] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* (2011), Vol. 10, No. 3, p. 537.
[196] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* (2011), Vol. 10, No. 3, p. 536-537.
[197] See for instance Article 1(a) of the Treaty Between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investment, signed on 1 August 1997, entered into force on 2 August 2001 (US-Azerbaijan BIT); Article 1(a) of the Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, signed on 29 September, entered into force on 30 May 2001 (US-Bahrain BIT); Article 1(1)(b) of the Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, entered into force on 20 October 1994 (US-Argentina BIT); Article (1)(1)(b) of the Treaty Between the United States of America and the Republic of Armenia Concerning the Encouragement and Reciprocal Protection of Investment, signed on 23 September 1992, entered into force on 29 March 1996 (US-Armenia BIT); Article 1(1)(1)(b) of the Treaty Between the United States of America and the Republic of

the applicable law, whether or not for profit, and whether privately or governmentally owned or controlled".[198] South Africa's Companies Act 71 of 2008 defines a State-Owned Company as:

> "*an enterprise that is registered in terms of this Act as a company, and either—*
> *(a) falls within the meaning of "state-owned enterprise" in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or*
> *(b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph (a)*".[199]

SOCs can either be owned by a state-holding vehicle or by the government itself through one of its Ministries, agencies or decentralised state bodies.[200] In line with the definition of the OECD for SOEs, an enterprise needs to be owned and/or controlled by the state in order to be regarded as state-owned.[201] For the purpose of this thesis, SOCs are considered companies that are either wholly or partially owned or controlled by a state for commercial purposes. Even a minority state shareholder can sometimes wield control over a SOC, often through the instrument of golden shares or enhanced voting rights.[202] The issue of reflective loss becomes relevant when a state directly holds shares in a SOC, either in the capacity of a majority or as a controlling minority shareholder. The largest SOC in the world is Saudi Aramco, and the other companies in the top five are Chinese: State Grid, China National Petroleum, Sinopec Group and China State Construction Engineering.[203] All in all, SOCs come in many shapes and forms across the globe in sectors like energy, finance, telecommunications, transport and water.[204]

Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment, signed on 23 September 1992, entered into force on 2 June 1994 (US-Bulgaria BIT).

[198] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* (2011), Vol. 10, No. 3, p. 537.

[199] Section 1 of the Companies Act 71 of 2008 (definitions).

[200] See also T. Thabane, *The Ownership and Control Architecture of South Africa's State-Owned Companies and Its Impact on Corporate Governance*, PhD Thesis University of Cape Town (2020), p. 207.

[201] See OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2024), p.9: "*The Guidelines apply to SOEs that are owned and/or controlled by the state. Ownership comprises direct majority ownership and, provided that control exists, includes other types of direct and indirect ownership. Control can be exercised if an ownership entity (or several ownership entities acting in concert)* […] *is the ultimate beneficiary owner of the majority of voting rights; or otherwise exercises an equivalent degree of control*."

[202] OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2024), p. 10.

[203] OECD, *Ownership and Governance of State-Owned Enterprises* (2024), p. 15; K.J. Lin, X. Lu, J. Zhang and Y. Zheng, 'State-owned enterprises in China: A review of 40 years of research and practice', *China Journal of Accounting Research* (2020).

[204] World Bank Group*, State-Owned Enterprises. Understanding their market effects and the need for competitive neutrality* (2020).

3.2.3 The State as a Minority Shareholder in a Private Company

If a state holds shares in a company as a minority shareholder without exercising control over the entity, the availability of a claim for reflective loss becomes even more relevant.[205] The influence of minority shareholders in a company ordinarily tends to be more limited compared to the influence of majority shareholders. The only viable option for the concerned state is to claim damages for reflective loss if the concerned company itself decides not to take legal action. Examples of companies in which a state (body) holds shares as a minority shareholder are Volkswagen Group (the Bundesland of Lower Saxony/Niedersaksen owns 11.8% of the total amount of shares)[206] and Nippon Telegraph and Telephone (the Japanese Ministry of Finance owns 34.72% of the total amount of shares).[207]

3.2.4 The Definition of Sovereign Wealth Funds (SWFs) under the Santiago Principles

An important investment vehicle which is used by states to create foreign investments is the SWF .[208] A SWF is defined by the UNCTAD as "*a fund which is owned by the State or the Government and which is composed of financial assets such as stocks, bonds, property, gold, currencies and other investment vehicles*".[209]

SWFs are state-owned investment funds or entities which are established by the state by using their foreign currency reserve, government transfer payments, and foreign exchange from exports of natural resources.[210] SWFs aim to gain monetary return through investment.[211] The amount of FDIs by SWFs has been on the rise for years now.[212] On a more pragmatic level, concerns around FDIs by SWFs typically revolve around three policy areas: (i) a lack of transparency about the SWF's objectives, structure, and operations; (ii) the potential for non-

[205] See more detailed in chapter 2.
[206] https://www.volkswagen-group.com/en/shareholder-structure-15951.
[207]https://group.ntt/en/ir/shares/digest.html.
[208] OECD (2007), *International investment of sovereign wealth funds: are new rules needed?*
[209] "*The Protection of National Security in IIAs: UNCTAD Series on International Investment Policies for Development*" (New York and Geneva: United Nations, 2009) at 19, online: <http://www.unctad.org/en/docs/diaeia20085_en.pdf> [UNCTAD, "National Security"].
[210] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 380-381.
[211] S.Y. Chen, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration', *Contemporary Asia Arbitration Journal* 2013, Vol. 6, No. 2, p. 301.
[212] See e.g. W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', *The Law and Practice of International Courts and Tribunals* (9) 2010, p. 18.

commercially motivated investments; and (iii) the lack of reciprocity in the treatment of foreign investors.[213]

The first SWFs were based in the Middle East and later in China, Russia, Brazil, Algeria, Libya and Venezuela.[214] The growth of most SWFs is, to a large extent, related to the rapid escalation of oil prices over the last decade and the increasing foreign reserves accumulated by oil and gas exporting nations as a result.[215] As Blyschak points out, the Abu Dhabi Investment Authority, thought to be the world's largest SWF, was in 2007 estimated to hold over US$875 billion in assets.[216] In 2023, the largest SWF, the Norges Bank Investment Management (NBIM), was estimated to hold over US$1.375 trillion in assets.[217] The significance of SWFs in the international investment arena keeps rising every year. This also leads to an increase in potential international investment disputes. By defining SWFs, we can determine more easily whether and when these entities have legal standing in international investment arbitration.

In 2008, the International Working Group of SWFs (IWG) drafted the following extensive definition, known as the Santiago Principles Definition:

> *"SWFs are defined as special purpose investment funds or arrangements, owned by the general government.* […] *The three key elements that define an SWF are: Ownership: SWFs are owned by the general government, which includes both central government and sub-national governments. Investments: The investment strategies include investments in foreign financial assets, so they exclude those funds that solely invest in domestic assets. Purposes and Objectives: Established by the general government for macroeconomic purposes, SWFs are created to invest government funds to achieve financial objectives, and (may) have liabilities that are only broadly defined, thus allowing SWFs to employ a wide range of investment strategies with a medium- to long-term timescale.*"[218]

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[213] A. Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds', *Asian Journal of International Law* (2011), Vol. 1, Issue 2, p. p 250.

[214] A. Ragoussis and S. Miroudot, "Actors in the International Investment Scenario: Objectives, Performance and Advantages of Affiliates of State-Owned Enterprises and Sovereign Wealth Funds" in: *Prospects in International Investment Law and Policy*, eds. Roberto Echandi and Pierre Sauvé (Cambridge University Press, 2013), p. 56-57.

[215] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 3.

[216] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 5.

[217] https://globalswf.com/ranking. Please note that NBIM is ranked on the 3rd position in this list. However, the PBoC and the GPIF which are respectively ranked as 1st and 2nd are not considered to be SWFs. The PBoC is a central bank and the GPIF is a pension fund.

[218] International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds. Generally Accepted Principles and Practices "Santiago Principles"*, October 2008, p. 28. Available via

Under the above-mentioned definition, SWFs are government-owned institutional investors that invest in foreign financial assets for macroeconomic purposes.

As Rozanov points out, SWFs were defined as sovereign-owned asset pools, not being traditional public pension funds nor reserve assets supporting national currencies in the original article.[219] This means that a fund is considered a SWF if the funds are sovereign owned and managed and if the assets are not prudential monetary reserves or traditional pension funds.[220] This definition contains three criteria. The first criterion refers to the concept of sovereignty. This concept is typically related to national or federal authorities, but it can also include subnational or sub-federal authorities.[221] The concept of sovereignty, in this case, does not apply to the activities carried out by the SWF but to the fund itself. This means that the investments of SWF may be commercial in nature.[222]

The second and third criteria provide for a negative definition by excluding prudential monetary reserves and pension funds from the definition of SWFs.[223] The rationale behind this exception is that these entities do not maintain or create sovereign wealth.[224] Central banks and pension funds maintain an amount of foreign exchange and monetary reserves for (prudential) policy purposes.[225] These assets are not necessarily used for the creation of wealth, but they are rather a necessity or financial minimum to achieve the policy goals for which they have been created.[226]

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https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf;.https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr0897.

[219] A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 252.

[220] A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 252.

[221] A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 252.

[222] See also: M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 635; A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 102-103.

[223] International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds. Generally Accepted Principles and Practices "Santiago Principles"*, October 2008, accessible via https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf., p. 12.

[224] International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds. Generally Accepted Principles and Practices "Santiago Principles"*, October 2008, accessible via https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf., p. 12-13.

[225] A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 252.

[226] International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds. Generally Accepted Principles and Practices "Santiago Principles"*, October 2008, accessible via https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf., p. 27.

There are other definitions of SWFs. Clay Lowery, the Former Acting Under Secretary for International Affairs at the US Treasury, defined a SWF as: "*a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from official reserves.*"[227] The International Monetary Fund (IMF) used the following definition of SWFs in its Global Financial Stability Report: "*SWFs can generally be defined as special investment funds created or owned by governments to hold foreign assets for long-term purposes.*"[228] The difficulty with the aforementioned definitions is that they all include foreign elements or make reference to foreign exchange.[229] This leaves out investment vehicles that are active in local markets. According to Rozanov, a SWF needs to have five characteristics in the sense that a SWF needs to be sovereign, it needs to have a high foreign currency exposure, it needs to have no explicit liabilities, it needs to have a high-risk tolerance, and it needs to have a long investment horizon.[230] These criteria bring their own challenges to the table. It raises questions such as when a fund is considered sovereign. To what extent is the fund exposed to foreign currency exposure, and who determines what a long investment horizon is? A positive aspect of this definition is that national pension reserve funds are excluded because they have explicit future liabilities.

3.3 The Definition of Investor

To determine whether the state as a shareholder falls under the protection scope of a specific type of investment treaty or FTA, the definition of the term "investor" becomes relevant. In principle, the wording of the applicable investment treaty must be the starting point, except if the treaty directly refers to the domestic laws of either one of the parties or if the chosen institution has additional rules that need to be taken into consideration.[231] Usually, the BIT refers

[227] See also: United States Department of Treasury, *Sovereign Wealth Funds*, Appendix 3. Accessible via: https://home.treasury.gov/system/files/206/2007_Appendix-3.pdf; A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 254.
[228] *Sovereign Wealth Funds*, IMF Global Financial Stability Report 2007, Annex 1.2, p. 45. Accessible via: https://www.imf.org/external/pubs/ft/gfsr/2007/02/pdf/annex12.pdf.
[229] International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds. Generally Accepted Principles and Practices "Santiago Principles"*, October 2008, accessible via https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf., p. 14.
[230] A. Rozanov, 'Definitional Challenges of Dealing With Sovereign Wealth Funds', *Asian Journal of International Law* I (2011), p. 255.
[231] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 211-214. See for instance Article 1(2) of the Bilateral Investment Treaty Between The Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore, signed on 16 May 2004, entered into force on 22 August 2005; Section A of the Agreement between the Government of the State of Israel and the Government of the Republic of the

to the domestic laws of the contracting states.[232] In some cases, additional requirements of residence or domicile are applicable.[233] The definition of investor used in various model BITs, investment treaties and FTAs is usually shaped around the (legal) personality of the concerned entity or natural person.[234]

The amount of investment treaties that address the issue of shareholders' rights is scarce.[235] The China-Mexico BIT is an exception to that rule because it includes the following provision in Article 13(8):

> "*The Contracting Parties recognize that under this Article, minority non-controlling investors have standing to submit only a claim for direct loss or damage to their own legal interest as investors*".[236]

Under the China-Mexico BIT shareholder claims for reflective loss are limited to the shareholders whose interests are deemed to be more aligned with the interests of the company (majority/controlling shareholders).[237] The vast majority of investment treaties, however, do not contain any specific provisions or references on the issue of shareholders' rights.[238] This means that a shareholder ordinarily will have standing in arbitral proceedings provided that the shares will be regarded as a protected investment under the applicable investment treaty.[239] The question that subsequently arises is to what extent can public and private shareholders enjoy the same

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Philippines on Promotion and Protection of Investments, signed on 7 June 2022, entered into force on 12 March 2024.

[232] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.20.

[233] See e.g. Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and the Reciprocal Protection of Investments, signed on 24 June 1976, entered into force on 14 April 1980, Art. 1(3)(b) or the Agreement between the Government of Denmark and the Government of the Republic of Indonesia Concerning the Encouragement and the Reciprocal Protection of Investments, signed on 30 January 1968, entered into force on 10 March 1970. Art. 1.

[234] See for instance Article 1(c) and (d) of the Agreement Between Australia and the Republic of Uruguay on the Promotion and Protection of Investments, signed on 5 April 2019, entered into force on 27 January 2022. N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.20-8.29.

[235] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 99.

[236] Agreement Between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed on 11 July 2008, entered into force on 6 June 2009.

[237] A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3, p. 613.

[238] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 100-102.

[239] See also: V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 245.

treaty protection in international investment arbitration.[240] Looking at the applicable investment treaties, a distinction can be made between the following three categories: a) the applicable investment treaty includes public entities under the definition of investor; b) the applicable investment treaty excludes public entities from treaty protection; and c) the applicable investment treaty does not contain a provision on public entities.[241]

If a certain investment treaty is applicable, the concerned shareholder can most likely be classified as a national or enterprise of one of the parties to the treaty.[242] These commercial activities ordinarily will take place via SOCs, in which the state holds (minority) shares, or via a SWF owned by the state.[243] As a shareholder of such a SOE, a state may suffer a reflective loss that lies in the cause of indirect damage attributed to a decrease in the value of the concerned shares.[244] The three categories of treaty provisions on state investors will be discussed below.

3.3.1 The Treaty Includes Public Entities

The first category of treaties unequivocally grants state shareholders the right to treaty rights of that concerned investment treaty.[245] The US tends to include such a provision in its investment treaties. The U.S.-Rwanda BIT, for instance, contains the following definition of investor (of a Party):

> "*a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other 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*".[246]

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[240] See also: L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.
[241] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 98-99.
[242] W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', The Law and Practice of International Courts and Tribunals (9) 2010, p. 19-20; see e.g. Article 1 United States-Uruguay BIT (2005).
[243] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 542-543.
[244] M. Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration', in: *ICSID Review*, Vol. 31, No. 1 (2016), p. 25. See more details about this issue in Chapter 3.
[245] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 99.
[246] Treaty Between The Government of the United States of America and The Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, Signed on 19 February 2008, Entered into force on 1 January 2012, Article 1.

This provision provides that not only the concerned SOE will be classified as an investor but also the state itself.[247] If the state suffers reflective loss because of a decrease in the value of its shares, it will be able to initiate arbitral proceedings based on this BIT, provided that the rules of the forum and the institution allow the state to initiate arbitral proceedings as a claimant.[248]

The Norway Model BIT contains another example of a provision in which public entities fall under the definition of investor.[249] The Model BIT clearly qualifies one of the Parties to the treaty as a protected investor. If the concerned shareholder is the state itself, i.e. a Party, this entity would without a doubt be protected under the applicable treaty in accordance with Article 2(1).[250]

The China-Tanzania BIT contains an enterprise-based approach whereby SOEs and their owners are clearly regarded as protected investors under Article 1(2)(b):

> "*the term "enterprise" means any entity, including companies, firms, associations, partnerships and other organizations, incorporated or constituted under the laws and regulations of either Contracting Party and that have their seat and substantial business activities in that Contracting Party, irrespective of whether it is owned or controlled by a private person or the government*".[251]

Because the parties to the treaty, i.e. the states that have formed the treaty, are explicitly mentioned and qualified as protected investors, the state is able to initiate arbitral proceedings

[247] D. Tamada, 'Host States as Claimants. Corruption Allegations', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 103.
[248] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 384.
[249] India 2015 Model BIT.
[250] Article 2(1) of the Norway 2015 Model BIT: "*"Investor" means:*
i. a Party;
ii. a natural person having the nationality of, or permanent residence in, a Party in accordance with its applicable law; or
iii. any entity established in accordance with, and recognised as a legal person by the law of a Party, and engaged in substantive business operations in the territory of that Party, irrespective of whether their liabilities are limited and whether or not their activities are directed at profit that seeks to make, is making or has made an investment in the other Party."
[251] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments, signed on 24 March 2013, entered into force on 17 April 2014.

depending on the rules of the forum.[252] The wording of the treaty in the aforementioned cases is unequivocal. There is no room for discretion for the arbitral tribunal to deviate.[253]

In the BIT between the United States and Uruguay from 2005, the definition of investor of a party is e.g. as follows:

> *"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party*".[254]

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – by referring to the Trans-Pacific Partnership agreement (TPP), which did not enter into force after the withdrawal of the US – provides its own definition of a SOE. The CPTPP incorporated the bulk of the provisions of the TPP by reference, except for certain suspended provisions. The suspension of the provisions was a consequence of the withdrawal of the US. According to Article 17.1 of the TPP, an enterprise needs to be principally engaged in commercial activities, in which a Party (state) owns more than 50% of the share capital, controls or exercises more than 50% of the voting rights or holds the power to appoint the majority of the board members or other equivalent management body.[255] Enterprises that are governmentally-owned as well as their shareholders are not excluded from protection based on Articles 1.3 and 9.1 of the agreement.

3.3.2 The Treaty Excludes Public Entities

The second category of investment treaties excludes public entities or parties from treaty protection.[256] An example of excluding state entities from treaty protection is the optional addition to the definition of 'investor' in Article 2 of the SADC Model BIT of 2012: "*The provisions of this Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds*".

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[252] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.30.
[253] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 101.
[254] Article 1 United States-Uruguay BIT (2005).
[255] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed on 8 March 2018, entered into force on 30 December 2018.
[256] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 99.

This issue was highly debated among the SADC member states.[257] This clause means that SADC states have the option to exclude public entities completely or partially from the definition of investor. If the applicable investment treaty excludes public entities, there also is no room for discretion left for the tribunal.[258] The state shareholder, in that case, does not have legal standing in the arbitral proceeding.[259] This is a clear example in which the state shareholder is treated differently even when it is acting *de jure gestionis*.

3.3.3 The Treaty Makes No Reference to Public Entities

The third category of treaties does not explicitly qualify states or parties to the treaty as protected investors.[260] The applicable treaty or agreement will include provisions on defining the eligible investors or nationals.[261] The wording varies per treaty, but a definition in essence is used whereby treaty protection is applicable based on the nationality of the investor and in which both natural and legal persons are included in the definition.[262] The definition of investor in the Switzerland-Georgia BIT, for instance, refers to natural persons from a contracting party or legal entities (including companies, corporations, business associations and other organisations) which are constituted or organised under the law of a contracting party or controlled by a natural person or legal entity from a contracting party.[263]

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[257] The commentary section under Article 2 of the SADC 2012 Model BIT gives the following explanation: "*A final issue is reflected in the "optional" paragraph in the proposed definition of investor, relating to an exclusion of State-owned enterprises. This is a highly debated issue. One can treat them the same as a private investor, which will be done by saying nothing specific in the text, removing them from coverage with a text such as that set out above. An additional option, so far untested, is to include a reference to the Santiago Principles on the operation of sovereign wealth funds and State-owned enterprises to establish a minimum expected standard of conduct and transparency of such enterprises, and penalizing a failure to meet these standards with a withdrawal of coverage under the treaty. As this is a new area of debate, the reference here can be seen as a placeholder to allow for debate on this issue between the negotiating parties*".

[258] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 101.

[259] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford University Press 2012), p. 631; L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 17-18.

[260] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 102-103.

[261] UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 13-18, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[262] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.20-8.29; C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 536; UNCTAD, *Scope and Definitions (A Sequel), Series on Issues in International Investment Agreements II* (UN 2011), p. 13-14, available online at https://unctad.org/system/files/official-document/diaeia20102_en.pdf.

[263] Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, signed on 3 July 2014, entered into force on 17 April 2015, Art.1(1).

A similar definition has been included in the Italy Model BIT, whereby a distinction is made between natural persons of a party and juridical persons constituted or otherwise organised under the applicable law of a party that engages in substantive business operations in the territory of a party. Because Italy is a member state of the EU, Article 1.1 stipulates that nationals or juridical persons of other member states of the EU or the European Economic Area (EEA) would also be protected. [264]

The PAIC defines an investor in Article 4(5) as any national, company or enterprise of a Member State or from any other country that has invested or has made investments in a Member State of the AU. These types of definitions do not specifically refer to public entities. There is, therefore, room for discretion, which means that a tribunal needs to interpret the wording of the treaty in order to determine whether or not a state shareholder is considered to be an investor.[265] Many (model) BITs are drafted based on the same approach, whereby only a distinction between natural and legal/juridical persons is included under the definition of investor.[266] This approach is, for instance, also incorporated in the Belgium-Luxembourg Economic Union Model BIT[267], the Netherlands Model BIT[268], the Mexico Model BIT[269], the UK Model BIT[270], the Germany

[264] Italy 2021 Model BIT.

[265] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 101-102.

[266] See e.g. M. Rajavuori, Making International Legal Persons in Investment Treaty Arbitration: State-Owned Enterprises along the Person/Thing Distinction, 18 German Law Journal 1183 (2017), 1184; J. Klabbers, 'The Concept of Legal Personality', *Ius Gentium* 2005, Vol. 11, p. 35-66..

[267] Article 2(2) of the Belgium-Luxembourg Economic Union 2019 Model BIT: "*The term "investor" shall mean : a) natural persons who, according to the legislation of the Kingdom of Belgium, the legislation of the Grand Duchy of Luxembourg or the legislation of ....., is considered as a citizen of the Kingdom of Belgium, a citizen of the Grand Duchy of Luxembourg or a citizen of ..... respectively; b) legal persons of either Contracting Party which are established under the laws of that Contracting Party and their headquarters or their real economic activities are located in the territory of that Contracting Party. For the purposes of this Agreement, an enterprise incorporated or constituted under the law of one Contracting Party, but effectively controlled, directly or indirectly, by nationals or enterprises of the other Contracting Party, shall be treated as an enterprise of the latter Contracting Party*".

[268] Article 1(b) of the The Netherlands 2019 Model BIT: "*"investor" means with regard to either Contracting Party: (i) any natural person having the nationality of that Contracting Party under its applicable law; (ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or (iii) any legal person that is constituted under the law of that Contracting Party and is directly or indirectly owned or controlled by a natural person as defined in (i) or by a legal person as defined in (ii). A natural person who has the nationality of the Kingdom of the Netherlands and the other Contracting Party is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality*".

[269] Article 1(6) of the Mexico 2008 Model BIT: "*"investor of a Contracting Party" means: (a) a natural person having the nationality of a Contracting Party in accordance with its applicable laws, or (b) an enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in substantive business operations in the territory of that Contracting Party; having made an investment in the territory of the other Contracting Party*".

[270] Article 1(c) and 1(d) of the UK 2008 Model BIT: "*"nationals" means: (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; (ii) "companies" means: (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12*".

Model BIT[271], the France Model BIT[272] and the Indonesia Model BIT.[273] Some Model BITs impose additional requirements with regard to the notion of control or the concerned activities that a legal person must undertake in order to qualify as an investor. Article 3.5 of the Morocco Model BIT, for instance, requires a shareholder to hold a participation of at least 50% in a domestic company that carries out substantial economic activity.[274]

The question of whether a shareholder enjoys treaty protection in such a case needs to be determined based on the concrete case at hand.[275] The applicable treaty determines whether a shareholder can be regarded as a protected investor.[276] The same applies even if that shareholder is a state or a state entity. The (model) treaties mentioned above do not make a specific reference to whether public entities meet the investor definition. In some older Bilateral Investment Treaties to which the Netherlands is a party there is no specific definition of the term investor.[277] An example is the Netherlands-Indonesia BIT, which defines an investment in Article 1(1) as "*every kind of asset invested by nationals of one of the Contracting Party* […]". Similar to the requirements of Article 25 of the ICSID Convention, the investment needs to be made by a national. The term nationals include natural persons having the nationality of that Contracting

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[271] Article 1(3) of the Germany 2008 Model BIT: "*in respect of the Federal Republic of Germany:*
− any natural person who is a German within the meaning of the Basic Law of the Federal Republic of Germany or a national of a Member State of the European Union or of the European Economic Area who, within the context of freedom of establishment pursuant to Article 43 of the EC Treaty, is established in the Federal Republic of Germany;
− any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of the Federal Republic of Germany or the law of a Member State of the European Union or the European Economic Area and is organized pursuant to the law of the Federal Republic of Germany, registered in a public register in the Federal Republic of Germany or enjoys freedom of establishment as an agency or permanent establishment in Germany pursuant to Articles 43 and 48 of the EC Treaty; which in the context of entrepreneurial activity is the owner, possessor or shareholder of an investment in the territory of the other Contracting State, irrespective of whether or not the activity is directed at profit".

[272] Article 1(2) of the France 2006 Model BIT: "*The term "investor" means: a) Nationals, that is, natural persons possessing the nationality of either Contracting Party. b) Any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party and having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one contracting Party and constituted in accordance with the legislation of that Party. For the purposes of this Article, juridical persons shall include companies as well as non-profit organisations having juridical personality*".

[273] Article I(2) of the Indonesia Model BIT: "*The term "investors" shall comprise with regard, to either Contracting Party: (i) natural persons having the nationality of that Contracting Party; (ii) legal persons constituted under the law of that Contracting Party*".

[274] Morocco 2019 Model BIT.

[275] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.22.

[276] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), Yearbook on International Investment Law & Policy 2010-2011 (Oxford University Press 2012), p. 631.

[277] See e.g. the Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment, signed on 6 April 1994, entered into force on 1 July 1995 (unilaterally denounced on 30 June 2015); Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Sultanate of Oman, signed on 17 January 2009 (not yet into force).

Party or legal persons constituted under the law of that Contracting Party according to Article 1(2) of the Netherlands-Indonesia BIT. In general, a state is not considered to be a national of one of the parties to the treaty, and therefore its investments will not be protected under such an investment treaty.[278] Article 1(b)(iii) of the Netherlands-Bolivia BIT stipulates that the term national shall comprise "*legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party*".[279] The state itself is not protected under the scope of this investment treaty. This implicit exclusion of the state does not apply in the Netherlands-UAE BIT whereby Article 1(b) explicitly stipulates that the term nationals also comprises "*(iv) the Government of that Contracting Party*".[280] The tribunal needs to assess on a case-by-case basis, but there seems to be a *jurisprudence constante* in favour of the inclusion of SOEs in these cases.[281]

3.4 The Structure and Conduct of the Investor

The (corporate) structure and conduct of the investor can play an important role in the interpretation of the wording of the definition of the term investor in the applicable investment treaty.[282]

3.4.1 The Legal Structure of the Investor

Depending on the applicable domestic law, a company's nationality is based on its place of incorporation (where it is publicly registered), its *siège social* (where it conducts its core activities) or the control or substantial interests held in the company.[283] In many investment treaties the legal entity needs to be incorporated or constituted under the laws of one of the

[278] See also *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para. 74. The tribunal pointed out that it had no jurisdiction to arbitrate disputes between two states or between two nationals N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.19.
[279] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, signed on 10 March 1992, entered into force on 1 November 1994 (terminated on 1 November 2009).
[280] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Arab Emirates, signed on 26 November 2013, not yet into force.
[281] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 383; C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 536.
[282] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 19.
[283] https://jusmundi.com/en/document/publication/en-nationality-planning.

contracting parties.[284] In some BITs, additional requirements are imposed, which means that these legal entities actually need to carry out economic activities in the host state.[285] Article 2.4 of the Cabo Verde-Morocco BIT includes a requirement that the juridical person needs to conduct substantial economic activities, which will be assessed on a case-by-case basis based on *inter alia* the amount of the investment, the number of jobs created, the effect of the investment on the local community and the duration of the company's operations.[286] If no additional requirements are mentioned in the applicable treaty, tribunals tend to look only at the formal definition of investor under the treaty.[287] In *Yukos Universal Ltd (Isle of Man) v. Russian Federation*, Russia's argument that the claimant did not qualify as an investor under the Energy Charter Treaty (ECT) because the concerned shell company was owned and controlled by Russian nationals was rejected because:

> "*no general principles of international law* […] *would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party*".[288]

In *Tallinn v. Estonia,* the tribunal confirmed that in ICSID arbitration, the jurisdictional requirements of both the ICSID Convention and the applicable investment treaty need to be fulfilled.[289] Article 25(2) of the ICSID Convention sets out the nationality requirement for legal persons:

> "*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such*

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[284] See, for instance, 2008 Germany Model BIT, art. 1(3): "the term 'investor' means (a) in respect of the Federal Republic of Germany: [...-] any juridical person and any commercial or other company or association with or without legal personality [...w]hich in the context of entrepreneurial activity is the owner, possessor or shareholder of an investment in the territory of the other Contracting State, irrespective of whether or not the activity is directed at profit"; 2004 US Model BIT, art. 1; 2004 Canada Model BIT, art. 1; NAFTA, 32 ILM (1993), 289, arts. 201 and 1139.

[285] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.22.

[286] Accord Entre Le Gouvernement de la Republique du Cabo-Verde et le Gouvernement du Royaume du Maroc pour la Promotion et la Protection Réciproques des Investissements, signed on 9 May 2023 (not into force yet). This provision is based on Article 3.4 of the Morocco 2019 Model BIT.

[287] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 384.

[288] *Yukos Universal Ltd (Isle of Man) v. Russian Federation,* Interim Award on Jurisdiction and Admissibility, UNCITRAL, PCA Case No. AA 228, IIC 416 (2009).

[289] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Repblic of Estonia*, ICSID Case No. ARB 14/24, Award, 21 June 2019, para. 341.

dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention".[290]

In *Autopista,* the tribunal extensively considered the jurisdictional prerequisites deriving from Article 25(2) of the ICSID Convention: in order for an ICSID tribunal to assert jurisdiction over an investment dispute the criteria of a two-part test containing an objective and a subjective part need to be fulfilled.[291] The tribunal in *National Gas S.A.E. v. Arab Republic of Egypt* pointed out that the objective condition of this test means that the concerned juridical person must be under foreign control.[292] The subjective prerequisite of the test means that the parties have agreed to treat the concerned juridical person as a national of the contracting state other than the state party to the dispute.[293] The applicable investment treaty, which contains the consent to arbitrate, will determine the applicable criteria for the requirement of foreign control.[294] The tribunal in *Mobil v. Venezuela* found that formal control under the Netherlands-Venezuela BIT was sufficient and that genuine control of the Dutch investor over a non-Dutch entity was not required. [295] The tribunal based its decision on Article 1 of the Netherlands-Venezuela BIT that stipulated that the term nationals comprises *inter alia* legal persons that are controlled directly or indirectly by legal persons constituted under the law of the concerned contracting party.[296] The fact that the claimant owned 100% of its subsidiaries meant, according to the tribunal, that those companies were under foreign control by a legal person constituted under the law of the Netherlands.[297] The same outcome occurred in *Tokios Tokeles v. Ukraine,* where a Lithuanian company was classified as a Lithuanian investor even though 99% of its shares were owned by

[290] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Repblic of Estonia*, ICSID Case No. ARB 14/24, Award, 21 June 2019, para. 342.
[291] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 94-116.
[292] *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, para. 79.
[293] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Repblic of Estonia*, ICSID Case No. ARB 14/24, Award, 21 June 2019, para. 345.
[294] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 113-114.
[295] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010, para. 152.
[296] Article 1(b)(iii) of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed on 22 October 1991, entered into force on 1 November 1993 (terminated on 1 November 2008).
[297] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010, para. 153.

Ukrainian nationals.[298] The tribunal looked at the definition of the term investor under Article 1(2)(b) of the Ukraine-Lithuania BIT, which included "*any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations*".[299] The tribunal also pointed out that Mr Broches explained that the purpose of Article 25(2)(b) of the ICSID Convention was not to define corporate nationality but to set the "*outer limits*" and give the parties the "*widest possible latitude to agree on the meaning of nationality*".[300] Because the ICSID Convention allows parties to agree upon the rules for defining the nationality of juridical persons and because the Ukraine-Lithuania BIT confirmed the "*standard rule (incorporation)*", the tribunal asserted jurisdiction because the seat of incorporation of the claimant (Lithuania).[301]

In *Aguas del Tunari SA v. Republic of Bolivia,* the tribunal asserted jurisdiction based on Article 1(b)(iii) of the Netherlands-Bolivia BIT, which provided that a national of a Contracting Party includes "*legal persons controlled directly or indirectly by nationals of that contracting party, but constituted in accordance with the law of the other Contracting Party*".[302] The tribunal found by majority that the word "controlled" indicates a certain level of ownership interest whereby the concerned legal person needs to have the capacity to control that company.[303] Because Aguas del Tunari SA was indirectly 55% owned by a Dutch holding company, the tribunal concluded that the Netherlands-Bolivia BIT was applicable to the investment dispute.[304]

This formalistic ownership-based approach is however not always chosen by tribunals. The dissenting declaration of José Luis Alberro-Semerena in *Aguas del Tunari SA v. Republic of Bolivia* focuses on the difference between ownership and control: majority shareholding does not always constitute control, and in some cases minority shareholders may actually exercise control over a company.[305] In *TSA Spectrum de Argentina SA v. Argentine Republic,* the tribunal ruled

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[298] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 21.
[299] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 28; Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, signed on 8 February 1994, entered into force on 27 February 1995.
[300] Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 136 RECUEIL DES COURS 331, 359-60 (1972-II); *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 25-26.
[301] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 69.
[302] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 264.
[303] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 232.
[304] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 321-322.
[305] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Dissenting Declaration of José Luis Alberro-Semerena, 21 October 2005, para. 21-25.

that there was no "foreign control" in accordance with Article 25(2)(b) of the ICSID Convention because the ultimate owner of the Dutch parent company that owned 100% of the shares was an Argentinian national.[306] Depending on the wording in the applicable investment treaty and the particular circumstances of the case, tribunals may be forced to look beyond the traditional test of share ownership to determine control.

3.4.2 The Conduct of the Investor

This deviation is however an exception to a general "formalistic" rule based on ownership,[307] which makes it easier for companies to create a certain structure and open branches and holdings in countries in order to become a qualified investor under a particular investment treaty.[308] The practice of deliberately seeking to acquire investment treaty protection by making foreign investments or bringing claims from third countries that have more favourable treaty terms with the concerned host state is called treaty shopping[309], and under this formalistic approach is legitimate. In *Aguas del Tunari SA v. Republic of Bolivia,* the tribunal even qualified these practices as not uncommon and in the absence of a particular (treaty) limitation not illegal.[310]

It becomes problematic if the practice can be qualified as "culpable forum or treaty shopping".[311] In IIA forum and/or treaty shopping it can be considered as an abuse of process under some circumstances as can be seen in *Philip Morris v. Australia*.[312] This dispute arose from Australia's plain packaging regulations for tobacco products. The tribunal concluded that:

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[306] *TSA Spectrum de Argentina SA v. Argentine Republic*, Award, ICSID Case No. ARB/05/5, Award, 19 December 2008, para. 160-162.
[307] See also *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para. 64; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983; *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984.
[308] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 8.25.
[309] M. Skinner, C.A. Miles and S. Luttrell, 'Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping', *Journal of World Energy Law & Business* (2010), Vol. 3, Nr. 3, p. 260.
[310] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 330.
[311] G.S. Georgiev, 'The Award in Saluka Investments v. Czech Republic', in: W.M. Reisman (ed.), *The Reasons Requirement in International Investment Arbitration. Critical Case Studies*, Martinus Nijhoff Publishers (2008), p. 164.
[312] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015).

"*the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection*".[313]

A similar decision was rendered by the tribunal in *Mobil Corporation Venezuela Holdings BV v. Bolivarian Republic of Venezuela,* where it concluded that it had jurisdiction over claims related to disputes that arose after the corporate restructuring, but not over the claims related to disputes that arose before the corporate restructuring.[314]

In some cases, the applicable investment treaty requires the investment to be made in an active and direct manner: the tribunal in *Standard Chartered Bank v. Tanzania* came to the conclusion that the UK-Tanzania BIT requires an active relationship between the investor and the investment because it creates conditions for nationals or companies in accordance with Article 2(1) to invest capital in the concerned territory.[315] According to the tribunal, there needs to be some sort of activity involved in addition to the "*abstract possession of shares in a company that holds title to some piece of property*".[316] In this case, the claimant (UK bank) only held shares in a subsidiary bank (based in Hong Kong) that issued a loan to a local company to finance a Power Plant in Tanzania.[317] The tribunal dismissed the arbitration for lack of jurisdiction.[318]

All in all, the conduct of the investor plays an important role in the determination of whether a certain investment and investor are protected under a particular investment treaty.

3.4.3 The Public Capacity of the Investor

The capacity in which the concerned investor operates needs to be assessed by the tribunals, whereby the question of whether the investor is private, public or hybrid in nature

[313] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015), para. 588.
[314] *Mobil Corporation Venezuela Holdings BV v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/07/27, IIC 435 (2010).
[315] *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 229-230.
[316] *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 231.
[317] *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 2.
[318] *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, para. 277.

should not necessarily be the main consideration.[319] There are several cases under ICSID in which the claimant's public character as an investor has not been raised and/or dealt with by the tribunal.[320] This happened for instance in the *Compagnie Minière Internationale Or S.A. v. Republic of Peru*[321] and in *Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire.*[322] In both cases, the investors were SOCs under ICSID arbitration, but the tribunals did not deal with the public nature of the investors. In *CDC v. Seychelles,* the claimant was established by the UK government for investing in developing countries.[323] CDC was wholly owned by the British Government but acted without government instruction or operational involvement. Seychelles raised an objection according to which the claimant was not a national of another contracting party, but the question was ultimately not dealt with since the objection was not pursued by Seychelles. In *Telenor v. Hungary,* a dispute related to a concession agreement in the telecom sector was submitted to ICSID under the BIT between Hungary and Norway.[324] Telenor was 75% owned by the State of Norway, but the issue of the public character of the investor was not raised during the proceedings[325]. In this case, the tribunal found out that it lacked jurisdiction because the dispute resolution clause contained in the BIT signed between the parties did not explicitly provide for its jurisdiction on this dispute, and it could not be extended.[326]

In Article 65(d) of the CARIFORUM-EU EPA, it is clarified that activities carried out in the exercise of government authority are excluded from protection, but only when the activities are not carried out on a commercial basis or in competition with one or more economic operators in the market. As discussed above, state investors may very well engage in commercial activities

[319] S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 43-44; A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', Boston College Law Review (2018), Vol. 59, Issue 8, p. 2798-2799.

[320] The cases in which ICSID tribunals did address the issue of the claimant's public character are discussed in Chapter 5.

[321] *Compagnie Minière Internationale Or S.A. v. Republic of Peru*, ICSID Case No. ARB/98/6 (not public); W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', The Law and Practice of International Courts and Tribunals (9) 2010, p. 20.

[322] *Compagnie Française pour le Développement des Fibres Textiles v. Côte d'Ivoire*, ICSID Case No. ARB/97/8 (not public); W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', The Law and Practice of International Courts and Tribunals (9) 2010, p. 20.

[323] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, 17 December 2003 (Award), para. 1.

[324] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, 13 September 2006 (Award), para. 16.

[325] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, 13 September 2006 (Award), para. 44-49.

[326] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, 13 September 2006 (Award), para. 102.

through various investment vehicles.[327] Investments made by state shareholders, provided that they are truly commercial and carried out in good faith, need to be covered under the applicable investment treaty, in order to ensure the balance between private and state investors.[328] The same applies to the conduct and nature of the investor. Host states need to be able to screen foreign investors in advance to determine if the concerned investor is *bona fide* and acts in good faith.[329] After all, private investors that are not acting in good faith will, in general, also be banned from treaty protection under an applicable BIT.[330]

3.5 Renegotiation of Investment Treaties or Free Trade Agreements

As presented above, the applicable investment treaties or FTAs determine a) whether holding shares in a certain company in the host state can be classified as an investment[331] and b) whether the concerned investor qualifies as a protected investor.[332] The wording of the applicable investment treaty or FTA is crucial for the determination of the extent to which state shareholders can successfully bring a claim to a tribunal.[333]

One option for mitigating the imbalance between private and state shareholders would be to renegotiate existing treaties and FTAs, ensuring that investments made by state entities and state investors are included in their scope of protection. This would require the negotiation of new agreements that provide sufficient protection for public entities and their investments. Although a thorough negotiation process is an extremely time-consuming process,[334] in principle any party to a treaty may take the initiative to propose an amendment to the treaty at any time.[335] The legal force of replacement is based on the contractual consent of the parties to the new treaty.[336] The new rules will only apply to the parties that have formed the new treaty and the

[327] See the more detailed discussion in paragraph 3.2.
[328] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 558.
[329] See more the more detailed discussion in chapter 5.
[330] See also: E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26.
[331] Please note that investments need to be protected under an applicable investment treaty in order for a tribunal to assert jurisdiction in an international arbitral procedure. See e.g.: N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 6th edition (Oxford University Press 2015), nr. 8.28-8.44.
[332] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*. *Student Version*, 6th edition (Oxford University Press 2015), nr. 8.17.
[333] See also: J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52, p. 68.
[334] See e.g. J. Barrett and R. Beckman, *Handbook on Good Treaty Practice*, Cambridge University Press (2020), p. 159-202.
[335] E. Raftopoulos, *International Negotiation. A Process of Relational Governance for International Common Interest,* Cambridge University Press 2019, p. 223.
[336] J. Barrett and R. Beckman, *Handbook on Good Treaty Practice*, Cambridge University Press (2020), p. 188.

replacement mechanism, whereas an amendment will apply to all the parties to the original treaty.[337] The renegotiation of existing international investment treaties may be a challenging route, but it is necessary since IIA is based on consent between the contracting parties to the treaty.[338]

In the case of a multilateral agreement, there is a crucial difference between amendment and replacement when it comes to the time in which the new rules will come into force.[339] In case of replacement, new rules tend to come into force more quickly when compared to amendments. This is because replacement requires only the minimum number of ratifications for its original establishment.[340]

3.6 Conclusion

A state may hold shares in a private company or a SOE. A SOE is a blanket term, which encompasses SOCs and SWFs. SOCs constitute companies owned and/or controlled by a state for commercial purposes. SWFs can be defined as institutional investors, as they are funds or entities established by states with the objective to be used as investment vehicles and gain monetary return through foreign investments. The main difference between these two forms lies in the different management of SOCs and SWFs, which is attributed to the different purposes that both entities pursue. The state, as a shareholder of a SOE, may suffer a reflective loss that lies in the cause of indirect damage attributed to a decrease in the value of the concerned shares. From a substantive law aspect, the merits of such a claim require the qualification of state shareholders as protected investors under the applicable treaties. In this framework, this chapter explored the possible definitions of the term investor in (bilateral) investment treaties and FTAs. By virtue of the inclusion of public entities under the definition of investor, investment treaties can be classified as a) those including public entities under the definition of investor; b) those excluding public entities from treaty protection and c) those not containing a provision on public entities. A discriminatory treatment between public and private investors is detected in treaties excluding state entities from treaty protection. An example of such a treaty is the SADC 2012 Model BIT (Article 2). An imbalance between private and state investors can also be found in

[337] E. Raftopoulos, *International Negotiation. A Process of Relational Governance for International Common Interest,* Cambridge University Press 2019, p. 231-232.
[338] J. Barrett and R. Beckman, *Handbook on Good Treaty Practice*, Cambridge University Press (2020), p. 195-196.
[339] J. Barrett and R. Beckman, *Handbook on Good Treaty Practice*, Cambridge University Press (2020), p. 186.
[340] E. Raftopoulos, *International Negotiation. A Process of Relational Governance for International Common Interest,* Cambridge University Press 2019, p. 232.

treaties excluding investments made by state entities and state investors from their protection scope or in treaties that only protect investments made by nationals of a contracting party without specifically including the government in the scope of the definition of the term national. Treaties not explicitly qualifying states as protected investors offer room for discretion to the tribunal to interpret the wording of the treaty. Two criteria are being taken into consideration by tribunals in their determination on whether or not a state shareholder fits the definition of investor: a) the legal structure and b) the conduct of the investor.

CHAPTER 4: SUBSTANTIATION OF SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS

4.1 Introductory Remarks

Reflective loss is an injury suffered by the shareholders as the result of an injury suffered by the company itself.[341] One important distinction between international investment law and the domestic laws of various legal systems across the globe lies in the ability of shareholders to claim damages for reflective loss. Under international investment law, claims for reflective loss are admissible. On the other hand, under both civil and common law, claims for reflective loss are often inadmissible. Based on the existing domestic law of the 10 selected jurisdictions and the international legal framework, jurisprudence, as well as the available literature, the topic of shareholder claims for reflective loss will be analysed.[342] This chapter aims to outline the differences and similarities between the presented legal orders and to consider the pros and cons of shareholder claims for reflective loss. The cases presented below mostly refer to disputes between private shareholders and states. However, the presented framework on shareholders' claims for reflective loss in IIA applies to state shareholders as well.

4.2 The Pros and Cons of Shareholder Claims for Reflective Loss

From a policy perspective, it makes sense to strengthen the legal position of shareholders as claimants in IIA because they are the real parties of interest within a corporation and the ultimate source of the monetary resources of that company.[343] The availability of derivative actions and claims for reflective loss for shareholders does not always overlap, which is especially the case when a shareholder holds shares in a company that is incorporated in the host state.[344] The "domestic" company would have no cause of action under an investment treaty, whereas the foreign shareholder may benefit from an applicable investment treaty. Moreover, the interests of the various shareholders and the company do not always align with each other and

[341] See also: Julian Arato, Kathleen Claussen, Jaemin Lee and Giovanni Zarra, 'Reforming Shareholder Claims in ISDS', *Academic Forum on ISDS Concept Paper* 2019/9, 17 September 2019.
[342] See Paragraph 1.5 for the rationale behind the 10 selected jurisdictions.
[343] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 17.
[344] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 126.

even among shareholders there can be diverging interests.[345] Conflicting interests can potentially arise between shareholders and the directors of a company during settlement negotiations.[346] By providing the shareholder with its own and independent right to claim damages for reflective loss, the likelihood of recovery increases. The importance of this possibility becomes even stronger if the concerned shareholder is a minority shareholder. Minority shareholders generally face more difficulties in safeguarding their interests within the company. As Vanhonnaeker indicates, this can be the case if local equity requirements contain an obligation for foreign investors to let nationals or the (local) government itself participate in the investment, for instance, via a joint venture construction.[347]

In general, there are three main objections against shareholder claims for reflective loss in international investment arbitration, i.e. a) the risk of (parallel) proceedings with inconsistent outcomes, b) the risk of forum shopping and treaty shopping and c) the risk of double recovery.[348]

a) The risk of parallel procedures and their inconsistencies can perhaps best be illustrated in the *Lauder and CME* cases.[349] CME (incorporated in the Netherlands) lost the economic exploitation of a TV license in the Czech Republic. Mr. Lauder was a U.S. shareholder of CME and initiated arbitral proceedings against the Czech Republic based on the Czech Republic-U.S. BIT.[350] Shortly thereafter another arbitral proceeding was commenced by CME based on the Netherlands-Czech Republic BIT.[351] The U.S. BIT contained more restricting provisions such as an exhaustion of remedies provision and a six-month cooling-off period, whereas the Dutch BIT did not contain such provisions.[352] Both proceedings ran almost parallel to each other but with different outcomes. The issues of *lis pendens* and *res judicata* have been discussed extensively in relation to these two cases. The *lis pendens* doctrine in international arbitration is developed to avoid contradicting awards by requiring a tribunal to stay arbitral proceedings if another

[345] C. Schreuer, "Shareholder Protection in International Investment Law", *Transnational Dispute Management* 2005/3, p. 4.
[346] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 24.
[347] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 25.
[348] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p 22.
[349] W. Kühn, "How to Avoid Conflict Awards: The Lauder and CME Cases", *Journal of World Investment & Trade* 2004/5, p. 7.
[350] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award) (Sep. 3, 2001) (The London Tribunal), paras. 172 et seq.).
[351] *CME v. Czech Republic*, UNCITRAL (Final Award) Mar. 14, 2003) (the Stockholm Tribunal), paras. 432-436.
[352] J. Carver, "How to Avoid Conflicting Awards: The Lauder and CME Cases", *Journal of World Investment & Trade* 2004/5, p. 24.

tribunal has already been seized with an identical claim.[353] The *res judicata* doctrine is developed in order to avoid duplicative proceedings, but definitions vary slightly between civil law and common law countries.[354] In civil law countries, *res judicata* is defined by two elements, i.e. the parties to the lawsuit need to be the same as the identity of the claim (facts of life and the claim itself).[355] In common law jurisdictions, the triple identity test applies, which means that *res judicata* applies in case of the same parties, the same subject matter and the same cause of action.[356] Despite these differences and nuances, international *res judicata* (as an existing custom under international law) has been acknowledged by tribunals in the past.[357] In the *Lauder and CME* cases the second tribunal applied the triple identity test and decided that: 1) both proceedings were launched by different parties (the controlling shareholder versus the company itself); 2) the subject matter was different, as the facts submitted to the two tribunals might not be identical; 3) the cause of action was different, since the two arbitrations were based on two different BITs.[358] As a result the proceedings continued simultaneously and led to different outcomes.[359] This strict application of the triple identity test has been heavily criticized for being overly formalistic.[360]

b) The term forum shopping refers to the practice of claimants/investors pursuing their claim in the forum that is most likely to rule in the most advantageous way.[361] Culpable forum shopping raises various concerns, such as the risk of an increase in litigation costs due to multiple proceedings, the risk of oppressive litigation tactics, the risk of inconsistent rulings, the risk of double recovery and the risk that the choice of the forum may breach the principle of party equality to the disadvantage of the defendant.[362] For the host state, this may lead to a waste of domestic resources (taxpayers' money) and may lead further to the public in the host state

[353] See also C. Söderlund, 'Lis Pendens, Res Judicata and the Issue of Parallel Judicial Decisions', *Journal of International Arbitration* (2005), Vol. 22, Issue 4, p. 301-322.
[354] W. Kühn, "How to Avoid Conflict Awards: The Lauder and CME Cases", *Journal of World Investment & Trade* 2004/5, p. 8.
[355] W. Kühn, "How to Avoid Conflict Awards: The Lauder and CME Cases", *Journal of World Investment & Trade* 2004/5, p. 7.
[356] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 270.
[357] See e.g. *Apotex Inc. v. The Government of the United States of America*, UNCITRAL (Award of Jurisdiction and Admissibility) (Jun. 14, 2013).
[358] *CME v. Czech Republic*, UNCITRAL (Final Award) Mar. 14, 2003) (the Stockholm Tribunal), para. 432.
[359] See also: H. Bagner, "How to Avoid Conflicting Awards: The Lauder and CME Cases", *Journal of World Investment & Trade* 2004/5, p. 32.
[360] G. Zarra, *Parallel Proceedings in Investment Arbitration*, Eleven International Publishing (2016), p. 139 et seq. with further references.
[361] J. Pauwelyn and L.E. Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions', *Cornell International Law Journal* (2009), Vol. 42, p. 77-78.
[362] J. Pauwelyn and L.E. Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions', *Cornell International Law Journal* (2009), Vol. 42, p. 81.

questioning the legitimacy of the system of IIA or a particular forum.[363] The practice of treaty shopping has, for instance, led to the denunciation of the ICSID Convention by Venezuela and Ecuador.[364] However, in the absence of culpable intention, there is nothing wrong when an investor strives to bring a case to a forum that is most likely to deal with it adequately. In England, the term "good forum shopping" was introduced by Mr Justice Newey in the English insolvency law case of *Codere*.[365] Codere SA, was the parent of a group of companies that operated business in Latin America, Italy and Spain. The company fell into financial difficulties and sought to restructure itself because its centre of main interest (COMI) was in England.[366] The reason for the restructuring was to achieve the best possible outcome for the (English) creditors, who wanted to take advantage of the scheme jurisdiction available in England. Mr Justice Newey approved the scheme because it was very much in the interests of the creditors, had been prepared after close consultation with them and had received overwhelming support.[367] Because this forum shopping was for a bona fide purpose, the English High Court described it as 'good forum shopping'.[368]

A corresponding case of 'good' forum shopping in IIA is when investors structure their investments in advance of a potential dispute, with the intention of maximising their forum shopping opportunities if a conflict arises. This type of targeted structuring prior to dispute resolution is also known as treaty shopping.[369] Forum/Treaty shopping is common practice in international investment arbitration, provided that the (re)structuring of the assets does not take place to avoid existing treaty obligations in existing investment disputes. When it comes to future disputes, there is nothing wrong if companies are structured in such a way that the most beneficial investment treaty regime is applicable. In the case of maritime disputes, states often prefer international arbitration instead of bringing a case to the International Tribunal for the Law of the Sea (ITLOS). The avoidance is due to sovereignty issues, in the public opinion of the losing state, or to confidentiality issues.[370] Trade disputes between the US and Mexico have been brought to both NAFTA's and the WTO's (World Trade Organisation's) dispute settlement

[363] J. Pauwelyn and L.E. Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions', *Cornell International Law Journal* (2009), Vol. 42, p. 82.
[364] M. Skinner, C.A. Miles and S. Luttrell, 'Access and Advantage in Investor-State Arbitration: The Law and Practice of Treaty Shopping', *Journal of World Energy Law & Business* 2010, Vol. 3, Nr. 3, p. 283.
[365] *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch), para. 18.
[366] See also: K. Ramesh, 'The Gibbs Principle. A Tether on the Feet of Good Forum Shopping', *Singapore Academy of Law Journal* (2017), Vol. 29, p. 56.
[367] *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch), para. 19.
[368] *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch), para. 18.
[369] https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3748.013.3748/law-mpeipro-e3748.
[370] D.W. Gates, 'International Law Adrift: Forum Shopping, Forum Rejection, and the Future of Maritime Dispute Resolution', *Chicago Journal of International Law* (2017), Vol. 18, No. 1, p. 305.

bodies in the past.[371] Moreover, forum shopping is used in order to achieve public policy objectives: the WTO Dispute Settlement Mechanism (DSM) has been used to push for international labour standards (despite the recognition and implementation of the International Labour Organisation's conventions) and to seek access to medication for developing countries.[372]

The phenomenon of culpable forum and/or treaty shopping did not occur in the Lauder and CME cases because both parties were already covered by different BITs before the exploitation license was withdrawn. The risk of culpable forum and treaty shopping is furthermore not exclusively related to shareholder claims for reflective loss, but rather to investment disputes in general. In case of culpable forum or treaty shopping that constitutes an abuse of rights, the tribunals should not assert jurisdiction over that claim.

c) The risk of double recovery needs to be avoided. The question is how this matter should be addressed in the context of IIA. The ICSID cases of *Impregilo,*[373] *Urbaser and CABB*[374] all dealt with the issue of double recovery. In *Impregilo,* the dispute was related to a concession of water and sewage services under a concession contract. The contract was formed between the Argentinian company Aguas del Gran Buenos Aires (AGBA) and the Province of Buenos Aires.[375] Impregilo S.p.A. was an Italian shareholder of AGBA and brought a claim for reflective loss before an ICSID tribunal against Argentina under the Argentina-Italy BIT after the termination of the concession contract, which was granted to a consortium.[376] The tribunal ruled that Impregilo's shares were protected under the BIT and therefore, the issue of whether AGBA was subjected to expropriation or unfair treatment was also relevant to determine if Impregilo's rights as an investor under the applicable BIT have been affected.[377] The risk of double recovery was not considered to be theoretical but a real practical problem by the ICSID tribunal because if compensation was granted to AGBA this would immediately have an impact on the extent to which Impregilo was entitled to compensation. The tribunal declined jurisdiction because AGBA filed legal action at a domestic level against the measures, which made it clear that there was a concrete risk of double recovery.[378]

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[371] C. Fattore, 'Forum Shopping and Fairness in Mexico-United States Trade Disputes', *Latin American Policy* (2018), Vol. 9, No. 1, p. 77-93.
[372] See also: H. Murphy and A. Kellow, 'Forum Shopping in Global Governance: Understanding States, Business and NGOs in Multiple Arenas', *Global Policy* (2013), Volume 4, Issue 2, p. 142-144.
[373] *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/01/17, Award, 21 June 2011, para. 137-140.
[374] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 248-250.
[375] *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/01/17, Award, 21 June 2011, para. 1.
[376] *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/01/17, Award, 21 June 2011, para. 2.
[377] *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/01/17, Award, 21 June 2011, para. 138-139.
[378] *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/01/17, Award, 21 June 2011, para. 119-120.

In *Urbaser and CABB,* two other shareholders of AGBA brought a claim for reflective loss against Argentina after the termination of the concession contract.[379] This claim was based on the Argentina-Spain BIT. In its Decision on Jurisdiction, the ICSID tribunal referred to the *Impregilo* case and came to a similar conclusion regarding the fact that there is a potential risk of double recovery. [380] However, the fact that both Urbaser and CABB were holding shares in a local company through a subsidiary company – that was in practice functioning as an investment vehicle – was considered to be an indirect investment protected under the Argentina-Spain BIT.[381] This tribunal asserted jurisdiction while addressing the issue of double recovery:

> "*The Tribunal is aware of the risk that the proceeding in the instant case and the parallel proceedings initiated by AGBA before domestic courts in the Republic of Argentina could lead to a recovery for damages in both proceedings, which could ultimately, at least theoretically, raise an issue of double recovery in favour of Claimants as investors and shareholders of AGBA, as well as a conflict in interest with AGBA's other creditors who are not parties, at least, to any of the referenced proceedings. Such a risk, however, is inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level. This configuration does not in any way constitute a restriction on the jurisdiction of this Tribunal pursuant to the Argentina-Spain BIT. Hence, as stated by the Impregilo Tribunal, if compensation were granted to AGBA at the domestic level, this would affect the claims brought under the BIT, and conversely, compensation under the BIT may affect claims submitted by AGBA before Argentine courts. The issue will, if necessary, be addressed at a later stage of this proceeding, along with the merits of the dispute*".[382]

In the merits stage of the procedure, the issue of double recovery was not addressed because the claimants' claims for damages were dismissed on other grounds.[383] The question is

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[379] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 28-29.
[380] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 247.
[381] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 250.
[382] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 253.
[383] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1234.

how the risk of double recovery can be avoided. Demirkol proposes to generally consider shareholder claims for indirect loss to be inadmissible since the damage has been incurred by the local company, which has a different legal personality.[384] Only if the (local) company itself has lost its capacity to bring a claim for the loss it suffered, for instance, because of denial of justice or dissolution of the local company, a shareholder claim should be regarded as admissible.[385]

Korzun proposed inter alia to use civil procedural doctrines like *res judicata* or collateral estoppel to prevent separate claims from both the company and its shareholders.[386] Another option would be to limit claims for reflective loss through private ordering, which is a form of self-regulation whereby a company includes provisions in its bylaws that provide for a waiver by shareholders of their right to bring claims for indirect loss under international investment law.[387] Admissibility allows international courts or tribunals, having assumed jurisdiction over an international claim, to refuse to exercise that jurisdiction.[388] Various tribunals have declared claims inadmissible because of the nature of the claim (e.g. because the claim does not fall within the mandate of the tribunal or because the claim has been brought too late) or the claimant (e.g. because of corruption, the doctrine of clean hands).[389] It is questionable whether or not the claim of a shareholder should be declared inadmissible solely for the reason that a local company can also bring a claim. This is different if the concerned local company has initiated a claim, which was the case in *Impregilo*. In these cases, there is an imminent and concrete risk of double recovery, which needs to be avoided. The mere alleged risk of double recovery should not be a reason for various tribunals to declare a shareholder claim for reflective loss as inadmissible. In line with the *Hochtief* case, where the tribunal addressed the issue of double recovery, the risk of double recovery should be mitigated in the valuation of damages based on the defendant's defence on this issue.[390] It should not be an argument to bar a shareholder from bringing his claim

[384] E.C. Demirkol, 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', *ICSID Review* Vol. 30. Nr. 2 (2015).
[385] E.C. Demirkol, 'Admissibility of Claims for Reflective Loss Raised by the Shareholders in Local Companies in Investment Treaty Arbitration', *ICSID Review* Vol. 30. Nr. 2 (2015), p. 405-408.
[386] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 245.
[387] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 252.
[388] S.A. Pauker, "Admissibility of Claims in Investment Treaty Arbitration", *Arbitration International*, Volume 34, Issue 1, March 2018.
[389] F. Fontanelli and A. Tanzi, "Jurisdiction and Admissibility in Investment Arbitration. A view from the Bridge at the Practice", *The Law and Practice of International Courts and Tribunals* 2017, p. 13-16.
[390] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (Dec. 29, 2014).

for reflective loss upfront: "[the risk of double recovery is] *a matter concerning the remedy rather than the claim*".[391]

The risk of double recovery can also be addressed by the parties to the treaty in the applicable investment treaty.[392] Article 8:22(1)(e) of the 2014 FTA between Canada and South Korea stipulates that the domestic company needs to waive the right to litigate or arbitrate on that particular dispute in order for the shareholder to successfully initiate arbitral proceedings for reflective loss.[393] Schreuer suggests furthermore that the issue of double recovery and the risk of parallel procedures may require new solutions such as the consolidation of proceedings, pro rata awards and a critical look at matters like abuse of rights, *lis pendens* and *res judicata*.[394] It is important to bear in mind that shareholder claims for reflective loss are individual claims whereby shareholders are exercising their own rights under a treaty.[395] Especially for minority shareholders the extent of control over the local company is probably quite limited. Despite the sometimes legitimate objections against shareholder claims for reflective loss, the primary aim and *raison d'être* of international investment arbitration, being the promotion of foreign investment and the protection of foreign investors to achieve greater trade and investment liberalisation, together with the large variety of applicable BITs and arbitral awards, provides for a strong legal framework for the acceptance of shareholder claims for reflective loss in international investment law.[396] The mere fact that a claim is based on reflective loss as a result of the diminution of the value of the concerned shares is and should not be a restriction for the state shareholder to initiate arbitral proceedings.

4.3 The Position under International Law

The UNCITRAL Secretariat in Working Paper 170 (Shareholder Claims and Reflective Loss) states that shareholders can generally be harmed in two different ways. Firstly, they can suffer direct injury to their rights as shareholders, for instance, in case of a seizure of shares or

[391] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (Dec. 29, 2014), para. 180.
[392] D. Páez-Salgado, 'Settlements in investor-State Arbitration: Are Minority Shareholders Precluded from Having Its Treaty Claims Adjudicated?', *Journal of International Dispute Settlement* (2017), Vol. 8, Issue 1, p. 122-123.
[393] Free Trade Agreement between Canada and the Republic of Korea (2014).
[394] C. Schreuer, 'Shareholder Protection in International Investment law' in: P.M. Dupuy and others (eds), *Common Values in International Law: Essays in Honor of Christian Tomuschat*, N.P. Engel Publishers (2006), p. 618; D. Páez-Salgado, 'Settlements in investor-State Arbitration: Are Minority Shareholders Precluded from Having Its Treaty Claims Adjudicated?', *Journal of International Dispute Settlement* (2017), Vol. 8, Issue 1, p. 124.
[395] D. Páez-Salgado, 'Settlements in investor-State Arbitration: Are Minority Shareholders Precluded from Having Its Treaty Claims Adjudicated?', *Journal of International Dispute Settlement* (2017), Vol. 8, Issue 1, p. 123-124.
[396] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 350.

interference with declared dividends. On the other hand, shareholders can also be harmed because of an indirect injury, i.e. through an injury caused to the company.[397] In case of an investment dispute between a certain company (investor) and a state, the company may choose to bring a case before the domestic court or initiate IIA proceedings to claim damages. The latter is an option if there is an applicable BITor FTA which qualifies the company as a foreign investor and the concerned transaction as a foreign investment. However, depending on the wording of the applicable BIT/FTA in IIA there is a chance that foreign shareholders of the company also benefit from the same investment treaty protection.[398]

In general, tribunals have allowed shareholders to bring claims for reflective loss in IIA. The wording of the applicable BIT/FTA is crucial here, although investment treaties generally do not refer to the concept of reflective loss specifically.[399] Under the majority of investment treaties a shareholder is considered to be a national or enterprise of one of the parties to the treaty.[400] When it comes to the definition of investment, most modern investment treaties use a rather broad definition of investment, e.g. by defining it as "every kind of asset".[401] In some of the treaties, a non-exhaustive list is added, which explicitly mentions shares as a covered form of investment.[402] Based on these broad definitions, various tribunals (ICSID and non-ICSID) have accepted shareholder claims for reflective loss because their shareholding in a local company was protected under an applicable investment treaty, see e.g. *CMS v. Argentina*,[403] *IBM*

[397] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) *Shareholder claims and reflective loss. Note by the Secretariat*, A/CN.9/WG.III/WP.170, 9 August 2019, p. 2.
[398] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 211-214.
[399] J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52, p. 68.
[400] W.B. Hamida, 'Sovereign FDI and International Investment Agreements: Questions Relating to the Qualification of Sovereign Entities and the Admission of their Investments under Investment Agreements', The Law and Practice of International Courts and Tribunals (9) 2010, p. 19-20; see e.g. Article 1 United States-Uruguay BIT (2005).
[401] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.
[402] See e.g. the US 2012 Model BIT which includes "*shares, stock and other forms of equity participation in an enterprise*".
[403] *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003.

World,[404] *Vivendi,*[405] *Mobil,*[406] *Telefonica,*[407] *Jan Oostergetel and Theodora Laurentius,*[408] and *Suez*.[409]

In *CMS v. Argentina,* the tribunal asserted jurisdiction over a reflective loss claim from a US minority shareholder (CMS Gas Transmissions Company) under the US-Argentina BIT.[410] The claimant held shares in the local domestic gas transportation company *Transportadora de Gas del Norte* (TGN) and initiated arbitral proceedings after the suspension by Argentina of a tariff adjustment formula for gas transportation applicable to TGN.[411] The tribunal explained that shareholder claims for reflective loss are mostly the result of *lex specialis*, which are the applicable investment treaties in international investment law that allow independent claims from shareholders independently from the concerned corporation.[412] Referring to a wide range of ICSID cases, the tribunal pointed out that there is no bar for shareholders to claim independently from the affected corporate entity.[413] In the merits stage of the procedure the tribunal concluded that the Fair and Equitable Treatment (FET) obligation guaranteed in Article II(2)(c) of the US-Argentina BIT was breached and that the respondent needed to pay CMS compensation in the amount of US$133.2 million equal to the loss valuation of CMS' shares.[414]

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[404] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 48. Please note that the Decision of the tribunal was drafted in Spanish. An unofficial English Translation by Goossens and Abogados is available at: https://www.italaw.com/cases/546.

[405] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 51.

[406] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010, paras. 162-166.

[407] *Telefonica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 75.

[408] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad Hoc Tribunal (Decision on Jurisdiction) (Apr. 30, 2010), paras. 136-150.

[409] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 46.

[410] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 3.

[411] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 1.

[412] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 48.

[413] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 53; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990; *American Manufacturing and Trading Inc. V Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997; *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal, 8 December 1998; *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999; *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001.

[414] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, para. 468.

In *IBM World,* a claim was brought against Ecuador under the U.S.-Ecuador BIT for the lack of payment under various lease, service and concession agreements concerning IT equipment and maintenance between the Ministry of Finance and IBM Ecuador.[415] In its Decision on Jurisdiction, the ICSID tribunal ruled that IBM had the right to request arbitration because it had made a direct investment in the Ecuadorian state through its shares in IBM Ecuador.[416]

In *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* a claim was brought against Argentina by Aguas Argentinas S.A.("AASA"), Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR"), Vivendi Universal S.A. ("Vivendi") and AWG Group Ltd ("AWG"), (together, "the Claimants"). AASA is a company incorporated in Argentina. Suez and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA.[417] Suez and Vivendi initiated arbitral proceedings (ICSID) under the Argentina-France BIT, the claimant AGBAR was relying on the Argentina-Spain BIT and claimant AWG brought a claim based on the Argentina-UK BIT.[418] The claimants were part of a consortium that was awarded the concession to operate the water and wastewater services systems in the City of Buenos Aires and its surrounding municipalities by the Federal Ministry of Public Works and Services in Argentina after the implementation of Argentina's State Reform Law in 1989 that declared the country's public services to be in a state of emergency and proposed to launch a programme of privatisation.[419] After the economic and financial crisis in 1999, the Argentinian Peso decreased in value significantly, and the claimants entered into fruitless negotiations with the Argentinian Government to adjust their tariffs.[420] AASA chose to withdraw from the arbitral proceedings, but nonetheless, the tribunal ruled that "*AASA's withdrawal cannot erase the legal effects of the*

[415] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Award, 22 July 2004, para. 1 (Spanish).
[416] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 48. Please note that the Decision of the tribunal was drafted in Spanish. An unofficial English Translation by Goossens and Abogados is available at: https://www.italaw.com/cases/546.
[417] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 1.
[418] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 2.
[419] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 20-22.
[420] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 24.

shareholders' investment nor affect their ius standi under the BITs".[421] All shareholders were entitled to bring their individual claims for reflective loss against Argentina.

In *Mobil,* five different claimants from the same corporate family were involved: one from the Netherlands, two from the U.S. and two from the Bahamas related to expropriation in various oil exploitation projects in Venezuela. One claimant, Venezuela Holdings, was created under the laws of the Netherlands during Venezuela's attempt to regulate its petroleum industry based on its 2001 Hydrocarbons Law.[422] Before the restructuring, the Government of Venezuela increased royalty and tax rates on *inter alia* the concerned Cerro Negro and La Ceiba projects and it declared the operating service agreements illegal. After the restructuring, Venezuela announced that all projects that had been operating outside the framework of the Hydrocarbons Law would be nationalised.[423] The tribunal asserted jurisdiction under the applicable 1993 BIT between the Netherlands and Venezuela :

> "*In the present case, Venezuela Holdings (Netherlands) owns 100 % of the share capital of its two American subsidiaries, which in turn own 100 % of the share capital of the two Bahamas subsidiaries. Thus the share capital of Venezuela Holdings (Netherlands) in those subsidiaries makes it possible for it to exercise control on them. The Tribunal does not have to consider whether or not such control was exercised in fact. In any case, under paragraph 1 (c) of the Protocol, those subsidiaries must be considered as nationals of the Netherlands benefiting of the provisions of the BIT*".[424]

Because of the broad definition of the term investment in Article 1 of the Netherlands-Venezuela BIT, which comprised every kind of asset and more particularly, though not exclusively, rights derived from shares, bonds and other kinds of interests in companies and joint

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[421] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 51.
[422] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010), para. 16-25.
[423] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010), para. 19.
[424] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010), para. 160.

ventures, the tribunal ruled that a literal reading of the definition of investment in the applicable BIT does not allow for the exclusion of indirect investments.[425]

In *Telefonica,* the claimant was a Spanish shareholder that indirectly owned 97.91% of the local company Telefonica de Argentina S.A. (TASA). The case was initiated based on the Argentina-Spain BIT because of a tariff dispute that arose from a telecom license that was granted to TASA; similar to the *Vivendi* case, after the economic and financial crisis in 1999 the Argentinian Peso decreased in value significantly and the claimants entered into fruitless negotiations with the Argentinian Government to adjust their tariffs.[426] The ICSID tribunal ruled that TASA, considering the definition in the BIT, can be considered as a protected investment and therefore Telefonica was entitled due to its shareholding to claim damages on its own behalf.[427]

A similar approach was taken by the non-ICSID tribunal in *Jan Oostergetel and Theodora Laurentius v. Slovakia*, an arbitral case initiated after a tax dispute whereby the bankruptcy decision was rendered by a regional court.[428] The case was initiated by various shareholders from the Netherlands, Belgium and the UK under respectively the Netherlands-Slovakia BIT, the Belgium-Luxembourg Economic Union-Slovakia BIT and the UK-Slovakia BIT. The tribunal noted that complex corporate structures are by no means uncommon to make investments abroad and that arbitral tribunals often assess investments under bilateral investment treaties made through corporate vehicles. The tribunal chose a formalistic approach by looking at the text of the applicable BIT. The text did not preclude that the concerned shareholders, through their control and ownership of the companies, could be considered investors.[429]

The wide definition of investment and the shareholder's control over the local company were important reasons for these (ICSID and non-ICSID) tribunals to allow shareholder claims for reflective loss.[430] *Suez v. Argentina* recognised the right of a majority shareholder to bring an

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[425] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB07/27, Decision on Jurisdiction, 10 June 2010), para. 165.
[426] *Telefonica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 10-16.
[427] *Telefonica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 75.
[428] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad Hoc Tribunal (Final Award) (Apr. 23, 2012), paras 7-40.
[429] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad Hoc Tribunal (Decision on Jurisdiction) (Apr. 30, 2010), paras. 142.
[430] L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p. 18.

investment treaty claim as an independent and distinct right from the local company.[431] The withdrawal of the company's claim did not prevent the shareholders from bringing their own claim based on the same events. However, this does not mean that shareholders have the unlimited right to claim damages. In *SAUR,* the situation was different due to the role of the notion of control.[432] In this case, a French shareholder who wholly owned the shares of a local company in Argentina was not allowed to bring a claim for reflective loss because the local company had already agreed on a settlement with the host state. The transactional agreement that was made between the company and the local authorities also bound the sole shareholder.[433] This case is a deviation from how most tribunals deal with shareholder claims for reflective loss. In *Sempra Energy International v. Argentina,* the concerned tribunal ruled differently, stating that (minority) shareholders are not bound by an agreement between the local company and the authorities that negatively affected their interests.[434] In *Hochtief v. Argentina,* the ICSID tribunal came to a similar conclusion and ruled that a settlement agreement between the company and the host state did not prevent a (minority) shareholder from pursuing international proceedings against that state.[435] When it comes to minority shareholders two views are established under ICSID jurisprudence, i.e. the *SAUR* approach that hinders minority shareholders from bringing an arbitral claim for reflective loss after a settlement agreement between a company and a host state and the *Sempra Energy/Hochtief* approach that allows minority shareholders to do so.[436]

The option for a shareholder to bring a claim for reflective loss in IIA has also been recognised and accepted for minority shareholders.[437] This is important because the influence of minority shareholders in a company ordinarily tends to be more limited compared to the influence of majority shareholders. Even indirect minority shareholders can - depending on the applicable

[431] *Suez, Sociedad General deAguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, para. 46.
[432] *Saur International SA v. Republic of Argentina*, ICSID Case No. ARB04/4 (Décision au Tribunal Arbitral Relative aux Exceptions a la Juridiction) (Feb. 27, 2006), para. 87.
[433] *Saur International SA v. Republic of Argentina*, ICSID Case No. ARB04/4 (Décision au Tribunal Arbitral Relative aux Exceptions a la Juridiction) (Feb. 27, 2006), para. 80.
[434] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Original Proceeding, Award (Sep. 28, 2007), paragraph 225-228.
[435] *Hochtief v. The Argentine Republic*, ICSID Case No ARB/07/31, Award, (Dec. 29, 2014).
[436] D. Páez-Salgado, 'Settlements in investor-State Arbitration: Are Minority Shareholders Precluded from Having Its Treaty Claims Adjudicated?', *Journal of International Dispute Settlement* (2017), Vol. 8, Issue 1, p. 101-102.
[437] See e.g. *Enron Corporation and Ponderosa Assets L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, paras. 39, 44, 49; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 51; *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras. 112-119; *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal, 8 December 1998, paras. 10 and 12.

BIT - bring a claim for reflective loss. This was the case in *Ioannis Kardassopoulos v. Georgia*.[438] Article 1(1)(b) of the Greece-Georgia BIT did not contain any distinction between direct and indirect investments.[439] The tribunal concluded that indirect ownership constitutes an investment under the BIT.[440] A similar reasoning was applied by the tribunal in the *Siemens* case, in which the German Siemens A.G. claimed damages from Argentina based on the damage inflicted to its Argentinian subsidiary Siemens IT Services S.A. According to the Tribunal, the literal reading of the Argentina-Germany BIT did not exclude indirect investments from the definition of investment: there was no explicit reference in the treaty nor did the treaty require that there were no "*interposed companies between the investment and the ultimate owner of the company*".[441] In *Saluka v. Czech Republic*, a UNCITRAL tribunal asserted jurisdiction in a case based on the Netherlands-Czech Republic BIT, in which the Japanese Nomura Group transferred their shares in a local bank (a predecessor of IPB) to a Dutch intermediate corporation, even though the Dutch Saluka Investment B.V. had been created by Nomura as a shell company to hold the concerned shares.[442]

All in all, depending on the applicable investment treaty, there is a lot of room for shareholders to bring their claims for reflective loss in IIA. Tribunals tend to interpret the applicable investment treaties in favour of the investor on this issue, provided that the applicable treaty does not explicitly exclude shareholders and their shares from treaty protection.

4.4 The Position under Domestic Laws: A Comparative Analysis

One important distinction between International Investment Law and the domestic law of the various legal systems across the globe is the ability of shareholders to claim damages for reflective loss. If it is more difficult for state shareholders to successfully bring an arbitral claim forward, the imbalance between states and private investors manifests itself unequivocally on the issue of reflective loss. Domestic law generally does not provide shareholders with the option to

[438] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 123; L. Ilie, "Shareholder Claims in Investment Treaty Arbitration: No Piece of Cake!", *Romanian Arbitration Journal* 2019/13, p 20.
[439] Agreement between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments, signed on 9 November 1994, entered into force on 3 August 1996.
[440] *Ioannis Kardassopoulos* v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 124.
[441] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction) (Aug. 3, 2004).
[442] *Saluka Investment BV (The Netherlands) v. The Czech Republic*, UNCITRAL (Partial Award) (Mar. 17, 2006); L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 153-154.

claim damages for the decreased value of their shares. The damage is directly suffered by the company itself, which has a separate legal personality in this regard to claim damages for the loss it suffered.[443] This applies both to civil law and to common law jurisdictions. It is up to the company itself - since it has a separate legal personality - to decide whether it will sue the potential wrongdoer for the caused damage. Under domestic law, the corporate veil is upheld to avoid conflicting or competing interests between the company, shareholders and creditors of the company as much as possible.[444]

This paragraph will focus on the derivative action under domestic law. In international investment law, the derivative action cannot be considered as an adequate replacement for reflective loss claims. The availability of derivative actions and claims for reflective loss for shareholders does not always overlap depending on the question of whether a certain investment treaty applies to both cases. In contrast to international investment law, the protection of shareholders and companies is governed by the same domestic laws. The legislator of the concerned jurisdiction determines to what extent shareholders are protected after potential wrongdoing that leads to the decrease in the value of their shares. Under domestic law, the no reflective loss rule is upheld and the concerned shareholder's alternative is to resort to a derivative action claim on behalf of the company. The problem with the derivative action from a shareholder's perspective is that it does not remedy the loss suffered by the shareholder. The derivative action may restore the value of the concerned shares indirectly after a successful claim, but it may very well be that the shareholder is left with a residual loss. Nonetheless, under domestic law the derivative action is the only available vehicle for the shareholder. This comparative analysis aims to provide an overview of the motives for national legislators not to allow claims for reflective loss, as well as to indicate what alternatives shareholders have under domestic law to obtain partial and indirect recovery for the decreased value of their shares through the derivative action.

4.4.1 China

In China, shareholders are not allowed to bring a claim for reflective loss to court. The issue of derivative actions and shareholders' rights is laid down in the Chinese Company Law of

[443] See also J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52.
[444] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 198-201.

1994 (CCL).[445] Although China does not have a common law tradition, the instrument of the derivative actions in China is based on the English/US tradition.[446] The Chinese corporate landscape traditionally consists of many SOEs owned by a single or a few shareholders; the most important shareholder usually is the state.[447] The derivative action (Article 151 of the CCL) is one of the most significant legal instruments for shareholder protection, as it was introduced to give minority shareholders a way to hold insiders accountable for potential wrongdoing.[448] In accordance with Article 151 CCL, minority shareholders that hold either independently or collectively at least 1% of the issued shares of the company for at least 180 consecutive days are entitled to bring a derivative action.[449] Additionally, shareholders have to submit a written request to the supervisory board or to the board of directors (in case the lawsuit is filed against the supervisors) to issue an action in court. Shareholders are entitled to file an action in a court directly: a) if the supervisory board or the board of directors decides not to proceed with the lawsuit, b) if the supervisory board or the board of directors does not bring a claim within 30 days upon receipt of the shareholder's written request and c) in emergency cases.[450] In addition to the derivative action shareholders have a right to bring a direct action under Article 152 of the CCL against directors and senior management of the company in case they breach laws, administrative regulations or bylaws to the detriment of the shareholders' interests.[451].

4.4.2 England and Wales

The no reflective loss principle under common law was upheld by national courts in England and Wales, e.g. in *Foss v. Harbottle*[452] and *Prudential Assurance Co Ltd v. Newman Industries Ltd*.[453] More recently, in *Johnson v. Gore Wood & Co.,* the House of Lords explained

[445] D.C. Clarke and N.C. Howson, 'Pathway to minority shareholder protection: derivative actions in the People's Republic of China', in: D.W. Puchniak et al. (ed.), *The Derivative Action in Asia: a Comparative and Functional Approach*, Cambridge University Press 2012, p. 243.
[446] D.C. Clarke and N.C. Howson, 'Pathway to minority shareholder protection: derivative actions in the People's Republic of China', in: D.W. Puchniak et al. (ed.), *The Derivative Action in Asia: a Comparative and Functional Approach*, Cambridge University Press 2012, p. 244.
[447] D.C. Clarke and N.C. Howson, 'Pathway to minority shareholder protection: derivative actions in the People's Republic of China', in: D.W. Puchniak et al. (ed.), *The Derivative Action in Asia: a Comparative and Functional Approach*, Cambridge University Press 2012, p. 245.
[448] Q. Fu, *A Comparative Study of Minority Shareholder Protection in China, the US and the Netherlands*, PhD Thesis Erasmus University Rotterdam 2020, p. 98.
[449] Q. Fu, *A Comparative Study of Minority Shareholder Protection in China, the US and the Netherlands*, PhD Thesis Erasmus University Rotterdam 2020, p. 51.
[450] Q. Fu, *A Comparative Study of Minority Shareholder Protection in China, the US and the Netherlands*, PhD Thesis Erasmus University Rotterdam 2020, p. 98.
[451] Q. Fu, *A Comparative Study of Minority Shareholder Protection in China, the US and the Netherlands*, PhD Thesis Erasmus University Rotterdam 2020, p. 57.
[452] *Foss v. Harbottle* (1843) 2 Hare 461, 67 ER 189.
[453] *Prudential Assurance Co Ltd v. Newman Industries Ltd* (No 2) [1982] 1 All ER 354

the policy considerations behind the no reflective loss principle.[454] The rule established by the English court in *Foss v. Harbottle* was based on the idea that when a wrong is done to a company, only the company may sue for redress.[455]

The case of *Foss v. Harbottle* marked the abolition of the common-law derivative action, justified by the principle of separate legal personality. In this case, two minority shareholders sued two directors for the alleged conduct of concerted and illegal transactions that resulted in a loss for the company. The Court of Chancery rejected the claim of the minority shareholders under the rationale that only the company owns the cause of action, which is also known as *"the proper plaintiff principle"*.[456] The company ultimately decides if it wants to seek redress and these types of corporate decisions bind every shareholder, also minority shareholders. This principle is also known as the majority rule aimed at corporate autonomy.[457]

In *Prudential Assurance,* the case was about a breach of a fiduciary duty by two company directors that attempted to acquire another company in which they held substantial interest above market value.[458] The minority shareholder Prudential Assurance was able to bring a derivative action on behalf of the company, but its personal action failed on appeal because it was considered to be a reflection of the loss of the company.[459] In *Johnson,* the reflective loss principle was upheld and articulated as follows by Lord Bingham:

> "*Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company*".[460]

There are however under English law two limited exceptions to the reflective loss principle that stem from *Johnson v. Gore Wood & Co*.: a) a shareholder is entitled to sue for the diminution in value of the shareholding if the company has no cause of action to sue to recover

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[454] *Johnson v. Gore Wood & Co*. [2002] 2 AC 1 (HL 2000).
[455] M.F. Cassim, 'Shareholder Remedies and Minority Protection', in: F.Hl. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev and J. Yeats, *Contemporary Company Law*, Juta Law (2011), p. 701.
[456] A. Rahmani, 'No Reflective Loss: The English Approach Reconsidered', *Journal of Corporate and Commercial Law and Practice* (2020), Vol. 6, No. 2, p. 6.
[457] A. Rahmani, 'No Reflective Loss: The English Approach Reconsidered', *Journal of Corporate and Commercial Law and Practice* (2020), Vol. 6, No. 2, p. 22.
[458] *Prudential Assurance Co. Ltd v. Newman Industries LTD & others* (No 2) 1982 1 All E.R. 354 CA, para 302-303. A. Rahmani, 'No Reflective Loss: The English Approach Reconsidered', *Journal of Corporate and Commercial Law and Practice* (2020), Vol. 6, No. 2, p. 11.
[459] *Prudential Assurance Co. Ltd v. Newman Industries LTD & others* (No 2) 1982 1 All E.R. 354 CA, para 303.
[460] *Johnson v. Gore Wood & Co*. [2002] 2 AC 1 (HL 2000).

that loss and b) a shareholder is entitled to sue if he suffers a loss separate and distinct from that suffered by the company caused by a breach of a duty independently owed to the shareholder.[461] The arguments in favour of the no reflective loss principle focus on ensuring 1) the efficiency and fairness of the dispute settlement and 2) that the interests of all the different stakeholders are considered.[462]As explained by Bjorklund, the reason behind the reluctance in allowing shareholders to claim damages for reflective loss is that it may lead to duplicative filings, which can undermine the efficiency of the process, can potentially cause inconsistent decisions and may even provide one claimant with double recovery arising from the same conduct.[463]

Shareholders in England and Wales are allowed to bring derivative actions on behalf of the company in accordance with sections 260-264 of the Companies Act 2006 (statutory derivative claim), but they are in general not entitled to bring a personal claim for the diminution of the value of the shares due to inflicted harm caused to the company.[464] The derivative action in the Companies Act 2006 is a two stage proceeding under section 261, whereby a member of a company who brings a derivative claim must apply to the court for permission first to continue it.[465] The applicant must establish during the first stage that there is a prima facie case, which means that the issue is 'triable' or arguable and that the mandatory bar from section 263(2) is been met.[466] In the second stage of the proceeding the court must take into account the following factors in particular ex section 263(3) in considering whether to give permission:

> "*(a)whether the member is acting in good faith in seeking to continue the claim;*
> *(b)the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;*
> *(c)where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—*

[461] *Johnson v. Gore Wood & Co*. [2002] 2 AC 1 (HL 2000) at 529; *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31.
[462] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 42.
[463] A.K. Bjorlund, "Private Rights and Public International Law: Why Competition among International Economic Law Tribunals Is Not Working", *Hastings Law Journal* (2007) Vol. 59, No. 2, p. 259.
[464] A. Dignam and J. Lowry, *Company Law*, 12th edition, Oxford University Press (2022), p. 177-181.
[465] D. Gibbs, 'The Statutory Derivative Claim: A Case Based Analysis. Has the Statutory Derivative Claim Fulfilled its Objectives, *UEA Law School Working Paper Series* (2011), p. 6.
[466] Permission (or leave) must be refused if the court is satisfied—(a)that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or (b)where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or (c)where the cause of action arises from an act or omission that has already occurred, that the act or omission—(i)was authorised by the company before it occurred, or (ii)has been ratified by the company since it occurred.

(i)authorised by the company before it occurs, or

(ii)ratified by the company after it occurs;

(d)where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e)whether the company has decided not to pursue the claim;

(f)whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company".

In *Franbar Holdings v. Patel* the High Court considered that the second stage of the proceedings requires an obvious breach of duty from the concerned director.[467] The court refused permission to a minority shareholder to continue the claim because of the potential for ratification of the actions of the directors and the availability of another remedy.[468] Simultaneously, Franbar had initiated a petition under section 994.The majority shareholders were happy to allow the concerned director to remain in office and the alternative would therefore be for the court to provide for the purchase of the shares of the minority shareholder in accordance with section 996 of the Companies Act 2006.[469] This alternative would effectively end Franbar's involvement in the company. All in all, the statutory derivative claim is available in England and Wales, but for minority shareholders the availability is restricted, especially in cases in which there is a potential for ratification by the members of the company.

4.4.3 France

In France, shareholders have restricted options to initiate derivative actions on behalf of the company. The French Commercial Code *(Code de commerce)* provides the rules for shareholders' rights in case of a limited company *[Société a la responsabilité limité (SARL)]*, a public limited company *[Société anonyme (SA)]* or joint venture/simplified joint-stock limited company *[Société par actions simplifée (SAS)]*.[470] The rules on shareholders' rights for

[467] *Franbar Holdings Ltd. v. Patel & Ors*, [2008] BCC 885, para. 37.
[468] *Franbar Holdings Ltd. v. Patel & Ors*, [2008] BCC 885, para. 54.
[469] D. Gibbs, 'The Statutory Derivative Claim: A Case Based Analysis. Has the Statutory Derivative Claim Fulfilled its Objectives, UEA Law School Working Paper Series (2011), p. 19.
[470] D. Cabrelli, 'Shareholders' Rights and Litigation', in: M. Siems and D. Cabrelli, *Comparative Company Law. A Case-Based Approach*, Hart Publishing 2013, p. 297.

shareholders of an SA are contained in Article L. 225-252 of the French Commercial Code.[471] According to this article, certain capital thresholds need to be met to initiate derivative actions.[472] If legal charges cannot be met by the single shareholder, a "group" of shareholders that fulfils the financial criteria is entitled to sue the managers of the company. Shareholders qualify as plaintiffs if a) in listed companies at least 5% of them have the right to vote (art. L. 225-120(1) of the French Commercial Code) and b) in "closed" companies they hold one-twentieth of the share capital (art. L. 225-200 of the French Commercial Code).[473]

4.4.4 Hong Kong

In Hong Kong, shareholders are not entitled to claim damages for reflective loss. The mechanism for shareholders to claim losses is the common law derivative action that still exists next to the statutory derivative action and is based on part IVAA of the Companies Ordinance.[474] The common law derivative action has its roots in the English case *Foss v. Harbottle* and is upheld in Hong Kong for three reasons: a) the existence of companies incorporated outside Hong Kong but controlled by Hong Kong residents, b) the provision of more flexibility to shareholders who can now choose to bring a common law derivative action or a statutory derivative action, and c) the continuation of the remedy in situations that may not be covered by the statutory derivative action.[475]

The derivative action is included in section 732 of the Companies Ordinance. It stipulates that a member of the company or of an associated company of the company may bring proceedings on behalf of the company if misconduct is committed against that company and the company is not taking any measures itself.[476] In accordance with section 733 of the Companies Ordinance an application must be made to the court first and the court needs to grant leave for the initiation of these proceedings. In *Ferrari SPA v. F&S Express Limited* it was established by the Hong Kong's High Court that leave should only be granted if it appears to be in the interest

[471] A. Dorrestein, T Monteiro, C. Techmann and E. Werlauff, *European Corporate Law*, Kluwer Law International 2009 (2nd edition), no. 6.19.
[472] P. Le Cannu and B. Dondero, *Droit des sociétés*, LGDJ 2015 (6th edition), no. 945-946;Article R 225-169.
[473] D. Latella, Corporate Ownership and Control. The Shareholder Derivative Suits: Disfunction and Remedies against a Paradoxal Inactivity, II.2.
[474] P. von Nessen, S.H. Goo and C.K. Low, 'A parallel path to shareholder remedies: Hong Kong's derivative actions', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012 p. 310.
[475] P. von Nessen, S.H. Goo and C.K. Low, 'A parallel path to shareholder remedies: Hong Kong's derivative actions', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012 p. 303-304.
[476] *Swannson v. R A Pratt Properties Pty Ltd and Another* HCMP2675 (2002) 42 ACSR 318.

of the company.[477]

The law of Hong Kong acknowledges four well-recognised exceptions to the rule developed in the English case in Foss *v. Harbottle*: (1) in case of an ultra vires or illegal action by the company or its directors; (2) in case the act complained of would be effective only through a resolution requiring a special majority; (3) in case of infringement of a particular shareholder's personal rights; or (4) in case of a fraud committed on the minority.[478]

4.4.5 Netherlands

In the Netherlands, shareholders are in most cases not allowed to claim damages for reflective loss. The Dutch Supreme Court *(Hoge Raad)* ruled in *Poot/ABP* that corporate entities enjoy separate legal personality, which means that their equity and assets are separated from those of their shareholders, and therefore the company itself has the right to claim damages for the direct loss it suffered.[479] As a result of this, shareholders are not entitled to claim damages for indirect loss because of, e.g. a decrease in the value of their shares.[480] There is only one exception to this rule, namely when a wrongdoer by inflicting harm to the company also breaks a specific rule of prudence *(specifieke zorgvuldigheidsnorm)* towards the concerned shareholder directly.[481] This exception applies when a third party damages the company in order to inflict harm on the concerned shareholder(s) indirectly.[482] These shareholders are subsequently able to bring a successful claim against the wrongdoer for the indirect loss (i.e. the decreased value of their shares) they have suffered, but this is only a very limited exception to the no reflective loss rule in the Netherlands.

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[477] *Ferrari SPA v. F&S Express Limited* (2005) 4 HKLRD 743; *Re Lucky Money Limited* HCMP505 of 2006; *Ng Wong Alfred v. Wong Heng Investment Company Limited*, HCMP1302 of 2009.

[478] P. von Nessen, S.H. Goo and C.K. Low, 'A parallel path to shareholder remedies: Hong Kong's derivative actions', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012 p. 298.

[479] HR 2 December 1994, ECLI:NL:HR:1994:ZC1564, NJ 1995/288 m.nt. J.M.M. Maeijer (*Poot/ABP*), para. 3.4.1.

[480] H.W. Haksteeg and A.C.W. Pijls, "De vordering tot vergoeding van koersgerelateerde schade geleden door aandeelhouders en optiebeleggers", *Maandblad voor Vermogensrecht* 2020/10-11.

[481] H.W. Haksteeg and A.C.W. Pijls, "De vordering tot vergoeding van koersgerelateerde schade geleden door aandeelhouders en optiebeleggers", *Maandblad voor Vermogensrecht* 2020/10-11, p. 291.

[482] See also HR 14 June 2001, ECLI:NL:HR:2001:AB2443, NJ 2001/573 m.nt. J.M.M. Maeijer (*Chipshol*); HR 16 February 2007, ECLI:NL:HR: 2007:AZ0419, NJ 2007/256 m.nt. J.M.M. Maeijer (*Tuin Beheer/Houthoff*); HR 2 November 2007, ECLI:NL:HR:2007:BB3671, NJ 2008/5 m.nt. J.M.M. Maeijer (*Kessock*).

4.4.6 Singapore

The primary source of law in Singapore dealing with (minority) shareholder protection is the Companies Act[483] which came into force in 1967 after Singapore's independence. Its latest revised version was issued in 2020. Section 4 of the Companies Act stipulates that a company is considered any company incorporated under this Act or the corresponding previous law. This means that shareholders of companies that are not incorporated in Singapore need to resort to the traditional common law derivative action.[484] Singapore has a common law tradition and adopts the *Foss v. Harbottle* rule, which means that shareholders are not able to claim damages for reflective loss under Singapore's domestic law.[485] There are only very limited exceptions to derivative actions under common law and they refer to derivative actions against directors and board members based on "fraud on the minority" and in case of "wrongdoer control".[486] The first criterion of the common law derivative action is the issue of fraud on the minority and is explained thoroughly by Davies.[487] All in all, the individual shareholder may not sue to enforce the company's rights if the wrong in question is ratifiable by the company in a general meeting by ordinary resolution.[488] The second criterion is that the derivative action may not be brought unless the wrongdoers are in control of the company. The leading Singapore case on this issue is *Tsing Sing Ning v. Ting Check Swee*.[489] In this case, the claimant was a minority shareholder and a director of a Hong Kong incorporated company, whereby the Court of Appeal ruled that the directors who were responsible for the wrongdoing and who held 42 per cent of the shares of the company were in control of the company because the sister of one of the directors controlled a further 10 per cent of the company.[490] The influence of family relationships on business decisions

[483] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 329.
[484] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 332-333.
[485] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 324.
[486] B.C. Cheong and K. Lin, 'The Proper Basis for the Reflective Loss Principle in Singapore' Journal of Business Law (2023), Vol. 8, p. 452-469;.M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 333.
[487] P. Davies, Gower and Davies' *Principles of Modern Company Law*, 7th edn. (2003), London: Sweet & Maxwell, p. 458.
[488] https://www.aoshearman.com/en/insights/sgca-limits-rule-against-recovery-of-reflective-loss.
[489] *Ting Sing Ning v. Ting Chek Swee* [2006] SGHC 192; [2007] 1 SLR(R) 369.
[490] *Ting Sing Ning v. Ting Chek Swee* [2007] SGCA 49; [2008] 1 SLR(R) 197, para. 16.

in these cases cannot be discounted, according to the Court of Appeal.[491] According to the analysis of the Court of Appeal, the wrongdoer control can be determined by: a) the percentage of shares held by the wrongdoers; b) the actual de facto control that the wrongdoers have over the company's decision to sue; and c) the potential support of the company's action by fully informed independent shareholders (if they existed).[492]

Apart from the common law derivative action, the law of Singapore also provides for a statutory derivative action if the concerned company is incorporated in Singapore.[493] The statutory derivative action provides any member of a company, the Minister in case of an official investigation listed in Part 9 of the Companies Act or any other person that according to the court's discretion is a proper person to make an application with the option to apply to the Court for permission to bring a derivative action [Section 216A (1) (2) of Companies Act]. The person that applies to the Court for permission is called the "complainant". Because (minority) shareholders fall within the scope of Section 216A of the Companies Act they are entitled to bring a statutory derivative action in the name and on behalf of the company after permission of the court.[494]

4.4.7 South Africa

South Africa adopts the English approach to reflective loss claims. The rules on the personal actions of a shareholder can be found in the Companies Act 71 of 2008 (Companies Act).[495] The Supreme Court of Appeal was faced with the issue of whether section 218(2) of the Company Act gives shareholders the right to bring claims for reflective loss. This section states the following: "*any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention*". The Supreme Court of Appeal has ruled in *Itzikowitz v. Absa Bank Ltd* that shareholder claims for reflective loss are prohibited because it is up to the company itself to bring the claim: the company is a

[491] *Ting Sing Ning v. Ting Chek Swee* [2007] SGCA 49; [2008] 1 SLR(R) 197, para. 19.
[492] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 335.
[493] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 337.
[494] M.S. Wee and D.W. Puchniak, 'Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth', in: D.W. Puchniak, H. Baum and M. Ewing-Chow (eds.), *The Derivative Action in Asia. A Comparative and Functional Approach*, Cambridge University Press 2012, p. 337-338.
[495] M.F. Cassim, 'The Doctrine of Contemporaneous Share Ownership and Aspects of Locus Standi in the New Derivative Action', *South African Law Journal* 2018/1, p. 101.

distinct legal entity whereby a shareholder merely has the right to participate in the company.[496] Shareholders are not allowed to bring personal claims for the decrease in value of their shares against a wrongdoer who caused loss to the company. This approach was later confirmed by the Supreme Court of Appeal in *Hlumisa Investment Holdings (RF) Limited and Others v. Leonidas Kirkinis and Others*.[497] The rationale behind this principle is that the company is the only entity that suffered from the wrongdoing personally and directly. The company therefore needs to sue the potential wrongdoer, which would then also benefit the shareholders and avoids the risk of double recovery.[498]

However, (minority) shareholders are entitled to bring a derivative action claim on behalf of the company (section 165 of the Companies Act). In this case, the term shareholder refers to shareholders of the company, shareholders of a related company and persons entitled to be registered as shareholders of the company or a related company.[499] This mechanism has been implemented to protect minority shareholders if the company decides not to sue the potential wrongdoer.[500] Nonetheless, it is important to note that this is not a personal claim for the reflective loss suffered by the shareholders, but a claim on behalf of the company if the board refuses to seek compensation. Section 165(5) of the Companies Act stipulates that a derivative action on behalf of the company and its shareholders is only granted by the court if the applicant is acting in good faith, if the subject matter of the trial is of a serious question of material substance to the company and if it is in the best interest of the company.[501]

4.4.8 Sweden

Under section 50 of the Swedish Companies Act shareholders are entitled to bring a derivative action against the directors on behalf of the company if the majority of shareholders or shareholders holding at least one-tenth of all shares in the company have either supported a shareholders' resolution to bring an action or voted against a shareholders' resolution to discharge one or more directors from liability. In certain limited circumstances, individual shareholders

[496] *Itzikowitz v. Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 (31 March 2016) (4) SA 432 (SCA).
[497] *Hlumisa Investment Holdings (RF) Ltd and Another v. Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 (03 July 2020).
[498] J.S. McLennan, 'Companies, Shareholders and 'Reflective Losses'', *South African Mercantile Law Journal* 2015/17, p. 195-201.
[499] M.F. Cassim, 'Shareholder Remedies and Minority Protection', in: F.H. Cassim, M.F. Cassim, R. Cassim, R. Jooste, J. Shev and J. Yeats, *The Law of Business Structures*, Juta Law (2015), p. 424.
[500] M.F. Cassim, 'Judicial Discretion in Derivative Actions Under the Companies Act of 2008', *South African Law Journal* 2013/130, p. 779.
[501] T. Mongalo and T. Scott, *Corporate Law and Corporate Governance. An Overview of Business Undertakings in South Africa*, 2nd edition, Van Schaick Publishers (2023), p. 322.

may bring an action against directors for breach of the Companies Act, the Annual Accounts Act or the company's Articles of Association.[502]

4.4.9 Switzerland

Under Swiss law, shareholders are not entitled to claim damages for reflective loss. Shareholders of Swiss companies may bring derivative actions against the directors, members of the executive management or the auditors in case they breach their fiduciary duties and consequently the company suffers damage (and the shareholder subsequently suffers indirect damage).[503] The derivative action in Switzerland is laid down in Article 756 of the Swiss Code of Obligations *(Obligationenrecht, OR)*[504] which provides the individual shareholder with the possibility to bring an action for damages caused by the company against wrongfully acting directors.[505] In Switzerland, there are no capital requirements or thresholds. Every shareholder has the right to initiate a derivative action or derivative suit against the directors.[506] Article 756(2) of OR contains a non-exhaustive list of decisions/resolutions that may be the subject of the proceedings that:

> "*1. deprive or restrict the rights of shareholders in violation of law or statutes; 2. deprive or restrict the rights of shareholders in an unobjective manner; 3. cause unequal treatment or disadvantage of shareholders that is not justified by the company's purpose; 4. abolish the company's profit motive without the consent of all shareholders."*

The derivative action is brought in the name of the individual shareholder as the plaintiff and not in the name of the corporation. However, since the derivative action is brought on behalf of the corporation (see section 3.3 Legal Remedies Against the Company's Directors), the plaintiff may only request payment of damages to the corporation (but not to the plaintiff). Shareholders are indirectly compensated because the corporation is compensated for the damages (losses) suffered.[507] If a shareholder suffers direct damage because of the breach of the director's and/or

[502] https://iclg.com/practice-areas/corporate-governance-laws-and-regulations/sweden.
[503]https://practiceguides.chambers.com/practice-guides/shareholders-rights-shareholder-activism-2023/switzerland.
[504] Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht).
[505] B. Becchio, U. Wehinger, A.S. Farha and S. Siegel, *Swiss Company Law*, Kluwer Law International 1996 (2nd edition), p. 142.
[506] A. Meier-Hayoz and P. Forstmoser, *Schweizerisches Gesellschaftsrecht*, Stämpfli Verlag AG Bern 2004 (9th edition), p. 403.
[507] https://www.walderwyss.com/assets/content/publications/019_SWITZERLAND-LP.pdf.

executive manager's fiduciary duties, the shareholder can sue the director and/or executive manager who have breached their fiduciary duties and request indemnification of the damage. The shareholder must prove: the damage suffered by the company or the shareholder, the breach of the director's fiduciary duties, the causal link between the breach of fiduciary duties and the damage and that the breach is the result of the wilful action or negligence of the director.[508]

4.4.10 United States

In the United States, the concept of reflective loss does not exist.[509] When it comes to shareholder claims there is a distinction between derivative actions and direct actions.[510] A similar distinction can for instance be found in the NAFTA.[511] The former category concerns cases in which a shareholder brings a claim on behalf of the company and the latter refers to claims that are brought by shareholders on their own behalf, but only if there is a direct breach of duty against the shareholder.[512] A shareholder will never be entitled to claim damages for his own loss based on a derivative action because a derivative action can only be brought to court in case of harm suffered by the company, as determined by the Delaware Supreme Court in *Tooley v. Donaldson*.[513] US Law generally does not provide shareholders with the possibility to claim damages for reflective loss.

4.5 Conclusion

This chapter analysed how (private) investors are enabled to claim damages for reflective loss in IIA in order to find out the magnitude of the imbalance between private investors and state investors. Reflective loss is the reduction in the value of shareholders' shares due to a direct injury inflicted on the company itself. Claims for reflective loss are admissible under international investment law, provided that the shares qualify as investments and the shareholders

[508] https://www.walderwyss.com/assets/content/publications/019_SWITZERLAND-LP.pdf
[509] J. Chaisse and L. Zhuoye Li, Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss, *Stanford Journal of International Law* 2016/52, p. 57.
[510] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 201.
[511] See Article 1116: "Claim by an Investor of a Party on Its Own Behalf" and Article 1117: "Claim by an Investor of a Party on Behalf of an Enterprise" of the NAFTA.
[512] See e.g. *F.D.I.C. v. Howse*, 802 F. Supp. 1554, 1562 (S.D. Tex. 1992); V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 202. A similar approach was followed in *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024 under NAFTA.
[513] *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031, 1033 (Del. 2004).

as investors under the applicable investment treaty. Even minority shareholders are allowed to bring claims for reflective loss under international investment law. If it is more difficult for state shareholders to successfully bring an arbitral claim forward, the imbalance between states and private investors manifests itself unequivocally on the issue of reflective loss. IIA aims for the promotion and protection of investments. The enhancement of the legal position of shareholders as claimants in IIA is essential as they are the real parties of interest within a corporation and the ultimate source of the monetary resources of that company. On the other hand, under both civil and common law domestic jurisdictions claims for reflective loss are often inadmissible on the premise that the company can decide whether it will sue the potential wrongdoer for the damage since it has separate legal personality. This is the case in China, France, Hong Kong, Singapore, South Africa, Sweden, Switzerland and the United States. However, in England and Wales and the Netherlands there are very narrow exceptions to the no reflective loss rule. In England and Wales a shareholder is entitled to bring a direct claim if the concerned company has no cause of action to recover its loss or if the shareholder suffers a loss separate and distinct from that suffered by the company caused by a breach of a duty independently owed to the shareholder. In the Netherlands a shareholder is entitled to bring a claim for the diminution in value of the concerned shares if a third party inflicts damage on the company in order to inflict harm on the shareholder indirectly. The only available mechanism for the shareholder in the other examined jurisdictions is to bring a derivative action on behalf of the company. In some jurisdictions (e.g. China and France) there are minimum requirements in terms of voting rights and control and sometimes (e.g. in China, Hong Kong and Singapore) a derivative action on behalf of the company prerequisites preapproval from the court. The main presumption under domestic law is that the company itself needs to decide whether to bring a claim against a wrongdoer to the company.

Under international investment law the situation is more complicated. Investors need to be protected by an investment treaty or FTA in order to successfully bring an arbitral claim against the host state. If the concerned company is incorporated under the laws of the host state without being under foreign control it cannot benefit from treaty protection because it is not to be regarded as a foreign investor. In such a case the only viable alternative for the foreign shareholder is to bring a claim for reflective loss under an applicable investment treaty or FTA. In contrast to claims under domestic law the availability of a claim for reflective loss under international investment law does not always overlap with the availability of a claim for the concerned company in the host state. Restricting the availability of reflective loss claims under international investment law therefore increases the risk of insufficient recovery after a potential wrongdoing by the host state.

There are three main objections against shareholder claims for reflective loss: a) the risk of (parallel) proceedings with inconsistent outcomes, b) the risk of forum shopping and treaty shopping and c) the risk of double recovery. The risk of parallel procedures and inconsistent decisions is addressed through *lis pendens* and *res judicata*, two procedural mechanisms existing both in common law and civil law jurisdictions that aim at avoiding contradicting awards (*lis pendens*) and duplicative proceedings (*res judicata*). Forum/Treaty shopping is common and permissible practice in international investment arbitration, if there is no culpable intention to avoid existing treaty obligations in existing investment disputes. The risk of double recovery should not impede the admissibility of a shareholder's claim for reflective loss as it is connected rather to the remedy than to the claim itself and it can be mitigated in the valuation of damages based on the defendant's defence on this issue.

CHAPTER 5: PROCEDURAL RESTRICTIONS FOR STATE SHAREHOLDERS DERIVING FROM THE RULES OF THE INSTITUTION AND SELECTED FORUM

5.1 The Significance of the Rules of the Selected Institution

Even if a party has suffered damage and is entitled to compensation, the rules of the institution may stand in the way of seeking redress.[514] A state shareholder can suffer reflective loss via a company in which it holds shares but not every institutional tribunal asserts jurisdiction over state claims.

In this framework the standing of a state entity to bring proceedings in a foreign jurisdiction and the consequent (in)admissibility of a reflective loss claim need to be examined. The standing of state shareholders in arbitral proceedings depends on the applicable investment treaty, the rules of the selected institution and the applicable arbitral law of the seat of arbitration.[515] The option of a reflective loss claim in international investment law is meaningless if the concerned state shareholder is unable to successfully bring that claim to the appropriate forums due to its personal capacity. Under some investment treaties, whether a (state) shareholder can be considered a covered investor depends on their capacity as a direct or indirect, controlling or non-controlling shareholder.[516] As far as the rules of the selected institution are concerned, a distinction is made between institutional and ad hoc arbitration. This chapter will focus on the rules of these arbitral institutions to find out to what extent state shareholders can bring their investment treaty dispute to these forums. This is an important prerequisite for tribunals to assert jurisdiction *ratione personae* over a claim for reflective loss by a state shareholder.[517] A comparative analysis of a selected number of arbitral laws of the seat of arbitration is incorporated under the section that refers to ad hoc arbitration. However, domestic arbitral laws of the seat of arbitration apply to non-ICSID institutional arbitration as well.

The rules of the institution are crucial in settling a dispute effectively through arbitration.[518] In 2021 Queen Mary University of London published a survey on international

[514] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 619-620.
[515] C. McLachlan, Lis Pendens in International Litigation, *The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye*, Volume: 5, Brill Nijhoff Publishers 2009, Chapter III.
[516] See and Paragraph 3.3 and 4.3.
[517] https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-personae.
[518] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 70.

arbitration.[519] According to this survey the 10 most preferred arbitral institutions are respectively the International Chamber of Commerce (ICC),[520] the Singapore International Arbitration Centre (SIAC),[521] the Hong Kong International Arbitration Centre (HKIAC),[522] the London Court of International Arbitration (LCIA),[523] the China International Economic and Trade Arbitration Commission (CIETAC),[524] ICSID, the Stockholm Chamber of Commerce (*Sw. Stockholms Handelskammares Skiljedomsinstitut*, the 'SCC') ,[525] the International Centre for Dispute Resolution (ICDR)[526] and the PCA[527] and the London Maritime Arbitration Association (LMAA).[528] The order of preference is to a large extent the result of the fact that a substantial amount of cases lie in the field of international commercial arbitration rather than international investment arbitration, which means institutions that primarily focus on international investment arbitration, such as ICSID and the PCA, are ranked relatively low on this list.

The rules of the institution play an important role if a claimant wants to bring a case before an arbitral tribunal.[529] In IIA the rules for the arbitral institutions vary to a certain extent.[530] There is a substantial difference between proceedings initiated before the International Centre for the Settlement of Investment Disputes (ICSID) under the Washington Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States (ICSID Convention) and non-ICSID proceedings, using e.g. the UNCITRAL Arbitration Rules, the SCC 2017 Arbitration Rules or the ICC Arbitration Rules.[531] The ICSID Convention contains additional

[519] Queen Mary University of London and White and Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*. Available via: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
[520] ICC 2021 Arbitration Rules. Available via: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.
[521] SIAC 2017 Investment Rules. Available via: https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Investment-Rules-2017.pdf.
[522] HKIAC 2018 Administered Arbitration Rules. Available via: https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#01.
[523] LCIA 2020 Arbitration Rules. Available via: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.
[524] CIETAC 2024 Arbitration Rules. Available via: https://www.cietac-eu.org/rules/.
[525] SCC 2023 Arbitration Rules. Available via: https://sccarbitrationinstitute.se/sites/default/files/2023-01/scc_arbitration_rules_2023_eng.pdf.
[526] ICDR 2021 International Dispute Resolution Procedures. Available via: https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar.
[527] PCA Arbitration Rules 2012. Available via: https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf.
[528] LMAA 2021 Terms. Available via: https://lmaa.london/wp-content/uploads/2022/11/LMAA-Terms-2021.pdf.
[529] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 3.242-3.245.
[530] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 15.
[531] D.A. Pentsov, 'Contractual Joint Ventures in International Investment Arbitration', Northwestern Journal of International Law & Business 2018, Vol. 38, No. 3, p. 426.

rules with regard to jurisdiction. Other institutions such as the ICC, the SCC and the PCA have more lenient rules for asserting jurisdiction compared to Article 25 of the ICSID Convention.

5.2 Institutional Arbitration

Institutional arbitration is arbitration that is administered by a specialist arbitral institution under its own rules of arbitration.[532]

5.2.1 ICSID Arbitration

An important reason in favour of ICSID arbitration is its self-contained nature and the manner of setting aside as well as its enforcement mechanisms.[533] ICSID arbitration can either be treaty-based or contract-based.[534] In accordance with Article 2 of the ICSID Convention the Centre has its own seat not connected to any domestic forum. The annulment and enforcement regimes regarding ICSID awards are different compared to non-ICSID awards.[535] Parties may request interpretation of an ICSID award ex Article 50 ICSID Convention or for revision in accordance with Article 51 on the basis of "*discovery of some fact of such nature as to decisively affect the award*". The annulment of an ICSID award is only available under Article 52(1) ICSID Convention by an ad hoc Committee on the basis of one or more of the following grounds:

> *"(a) that the Tribunal was not properly constituted;*
> *(b) that the Tribunal has manifestly exceeded its powers;*
> *(c) that there was corruption on the part of a member of the Tribunal;*
> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
> *(e) that the award has failed to state the reasons on which it is based*".[536]

[532] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 1.155.
[533] See for instance: G. Coop, Á. Nistal and R.G. Volterra, 'Sovereign immunities and investor-state awards', in: Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards*, Globe Law and Business (London) 2015, p. 67-82; UNCTAD, *Dispute Settlement. International Centre for Settlement of Investment Disputes (2.2 Selecting the Appropriate Forum)*, United Nations New York and Geneva 2003.
[534] https://icsid.worldbank.org/news-and-events/speeches-articles/spotlight-contract-based-disputes-icsid.
[535] O. van der Haegen and M-C. Van den Bossche, 'Procedural Issues: Annulment, Recognition and Enforcement of Investment Treaty Awards (ICSID and Non-ICSID)', in: J.R. Mata Dona and N. Lavranos, *International Arbitration and EU Law*, Elgar Arbitration Law and Practices (2021), no. 16.07.
[536] Article 52(1) of the ICSID Convention.

Article 53 of the ICSID Convention stipulates that the award shall be binding on the parties. Furthermore, an ICSID award needs to be recognised and enforced by each Party to the ICSID Convention as if were a final judgment of a court of that state. In contrast to non-ICSID awards, ICSID awards do not have to be recognised by national courts under the applicable domestic arbitral law and the rules of the New York Convention.[537] The self-contained regime of ICSID without intervention from national courts increases the finality of the awards and makes ICSID an attractive forum for investors to bring their investment disputes.[538] There is a difference between non-ICSID and ICSID awards with regard to the possibilities of invoking public policy exceptions at the enforcement stage before domestic legal courts.[539] The public policy exception for non-ICSID awards is contained in Article V, Section 2(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Non-ICSID awards are thus in principle exposed to judicial review on this issue.[540] In addition, non-ICSID awards can be subject to setting aside procedures before the national courts at the seat of arbitration.[541] In terms of assessing for instance the arbitrability of a case, public policy can also play a role, depending on the applicable arbitration act (domestic law).[542]

(a) Article 25(1) of the ICSID Convention

States are barred from initiating arbitral proceedings *against other states* under the ICSID Rules (state-to-state arbitration).[543] The ICSID Convention states in Article 25(1) that the jurisdiction of the Centre extends to any legal investment dispute between a Contracting state and a national of another Contracting state,[544] i.e. any natural or juridical person of another

[537] O. van der Haegen and M-C. Van den Bossche, 'Procedural Issues: Annulment, Recognition and Enforcement of Investment Treaty Awards (ICSID and Non-ICSID)', in: J.R. Mata Dona and N. Lavranos, *International Arbitration and EU Law*, Elgar Arbitration Law and Practices (2021), no. 16.14.
[538] O. van der Haegen and M-C. Van den Bossche, 'Procedural Issues: Annulment, Recognition and Enforcement of Investment Treaty Awards (ICSID and Non-ICSID)', in: J.R. Mata Dona and N. Lavranos, *International Arbitration and EU Law*, Elgar Arbitration Law and Practices (2021), no. 16.15.
[539] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration', *Law and Policy in International Business* (1990), Vol. 21, p. 389-440.
[540] Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards*, Globe Law and Business (London) 2015.
[541] See more detailed in Paragraph 7.6.
[542] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr.10.78.
[543] See e.g. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para. 74.
[544] Article 25(1) ICSID Convention: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*"

contracting state in the sense of Article 25(2).[545] Both direct and indirect shareholders are able to bring a claim depending on the applicable investment treaty.[546] Host states are able to bring a claim against investors under Article 25 as pointed out by the executive directors of the World Bank in approving the Draft Convention in 1965:

> ""[T]*he Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases*".[547]

The option for a state to initiate arbitral proceedings under the ICSID Rules is limited to disputes in which the counterparty is an investor.[548] According to Article 27[549] states were also not entitled to bring claims for diplomatic protection of their own private investors under the ICSID Convention.[550] In *Maffezini v. Spain,* the tribunal pointed out that it had no jurisdiction to arbitrate disputes between two states or between two nationals.[551] This demonstrates that the ICSID mechanism has been created for disputes between private investors (nationals) and states

[545] Article 25(2) ICSID Convention: "*a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention*".
[546] See Paragraph 4.3.
[547] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ICSID Convention, Regulations and Rules (18 March 1965), p. 41. Available via: https://icsid.worldbank.org/sites/default/files/Report_Executive_Directors.pdf.
[548] See also M. Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration', *ICSID Review*, Vol. 31, No. 1 (2016), p. 33-34; Christoph Schreuer et al., The ICSID Convention: A commentary (Cambridge: Cambridge University Press, 2009), p. 160.
[549] Article 27 ICSID Convention: "*1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute*". See also: S. Blanchard, 'State Consent, Temporal Jurisdiction and the Importation of Continuing Circumstances Analysis into International Investment Arbitration', *Washington University Global Studies Law Review*, vol. 10, nr. 3, 2011, pp. 419-476.
[550] See e.g. Banro American Res., Inc. & Société Aurifere du Kivu et du Maniema S.A.R.L. v. Dem. Rep. Congo, ICSID Case No. ARB/98/7, Award of the Tribunal (Sept. 1, 2000).
[551] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000), para. 74.

and that it is neither primarily created with a focus on SOEs nor designed for state-to-state arbitration.[552]

It follows from the above that a state's claim for reflective loss, in front of an ICSID tribunal is inadmissible. On the other hand, the ICSID Rules do not block private shareholders from bringing claims for reflective loss. Under the ICSID Rules the nature of the claim for reflective loss is not the problem per se.[553] The problem here lies in the nature (legal personality) of the concerned entity.

For the qualification of state shareholders as claimants in ICSID arbitral proceedings, an amendment of Article 25(1) of the ICSID Convention is recommended.[554] The ICSID currently has 158 member states.[555] At least two-thirds of the member states are required for amendments to the ICSID Convention (Articles 65 and 66 of the ICSID Convention). Theoretically, it is possible to draft a new Article 25, which also asserts jurisdiction in case of legal disputes arising out of investments between two contracting states instead of solely disputes between a contracting state and a national of another contracting state. The question is whether there is political will for such an amendment.[556] The fact that SOEs engage more and more in international cross-border investments and their increased role in IIA may be an additional incentive to consider such an amendment.[557]

(b) The Broches Test

For the assertion of jurisdiction in ICSID proceedings, the "Broches test" applies. The Broches test stipulates that ICSID arbitration is unavailable to state entities which are either "discharging an essentially governmental function" or "acting as an agent".[558]

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[552] The preamble of the ICSID convention attaches particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes under the auspices of the International Bank for Reconstruction and Development. See also M. Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration', *ICSID Review*, Vol. 31, No. 1 (2016), p. 31.

[553] L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p.134-135.

[554] J.C. Thomas and H.K. Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitral Awards', *ICSID Review*, Vol. 32, No. 3 (2017).

[555] https://www.worldbank.org/en/about/leadership/members#icsid.

[556] See also T. St. John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences*, Oxford University Press (2018).

[557] See P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 1-52.

[558] M. Potesta, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?' in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 383.

ICSID tribunals are influenced, but not bound, by the existing *jurisprudence constante*.[559] According to Aron Broches – the main architect of the ICSID Convention: "*a mixed company or a government-owned company should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function*".[560]

The Broches test stipulates that ICSID arbitration is unavailable to state entities which are either "discharging an essentially governmental function" or "acting as an agent".[561] The goals pursued by SWFs vary but may include securing access to natural resources (including energy and minerals), growing national brands into global leaders, and strengthening international relationships. The "corporate structure", Memorandum of Incorporation (MOI) and the relationship between the concerned SWF and its shareholder in practice will determine to what extent it is sufficiently independent and remote not to be regarded as an agent.

The issue of legal standing has been the subject of the ICSID case *CSOB v. Slovak Republic*.[562] The investment dispute of this case finds its origin in the privatisation of the bank CSOB.[563] Slovakia argued that the dispute did not meet the requirements of Article 25(1) of the ICSID Convention in the context of the division of Czechoslovakia into two separate states because it considered CSOB to be a state agency of the Czech Republic rather than an independent commercial entity.[564] The tribunal in *CSOB v. Slovakia* applied the Broches test and did not consider that CSOB was acting as an agent of the state or discharging essentially

[559] Albeit that a rule of precedent in IIA does not exist and tribunals are not bound by previous decisions of other tribunals, investment tribunals very often refer to previous decisions issued by their predecessors. See e.g. P.M. Norton, 'The Role of Precedent in International Investment Law', *ICSID Review*, Vol. 33, No. 1 (2018), pp. 280–301; AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) para 23 and 26-33; SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) para 119; Bayindir inşaat turizm ticaret ve sanayi a.ş. v. Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 76.
[560] *Ceskoslovenska Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999), para. 17.
[561] See also: Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 4.
[562] *Ceskoslovenska Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999), para. 16–21.
[563] Both Czech and Slovak Republics had founded so called 'collection companies' after their separation for the assignment of certain non-performing loan portfolio receivables by CSOB in the privatization process. CSOB commenced arbitral proceedings against Slovakia for the failure to cover the losses incurred by the Slovak Collection Company in violation of the Consolidation Agreement which was concluded by the Ministry of Finance of the Slovak Republic, the Ministry of Finance of the Czech Republic, and CSOB. The Slovak Collection Company faced bankruptcy proceedings during this period of time.
[564] *Ceskoslovenska Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999), para. 15.

governmental activities as far as that dispute was concerned.[565] The tribunal found that for the purpose of obtaining legal standing under the ICSID Convention, the question is whether the activities of a SOE, in this case CSOB, are commercial in nature.[566] Despite the fact that *CSOB v. Slovakia* is extensively cited in the literature as a key example of the application of the Broches test, the tribunal missed a part of the test, namely because of the lack of focus on the question when investors are acting as government agencies.[567]

A further example is the ICSID case of *Beijing Urban Construction Group* ("BUCG") *v. Yemen*, which was about an expropriation claim concerning the alleged use of: "*military forces and security apparatus to assault and detain BUCG's employees and forcibly deny BUCG access to the Project site and thus its ability to perform its contractual obligations*".[568] The claimant, BUCG, was a publicly funded and wholly state-owned entity established by the Chinese government and in this case a contractor for an international airport project in Yemen.[569] However, despite a statement from China's Foreign Economic and Trading Department stating that the foreign business undertaken by BUCG shall be administered, coordinated and regulated by the department, the assertion by Yemen that the Chinese Government was the ultimate decision maker for BUCG was too remote, considering the facts of the project, to be relevant according to the tribunal.[570] There was furthermore no evidence, according to the tribunal, that BUCG was discharging a governmental function rather than a commercial function.[571] The tribunal upheld jurisdiction.[572]

Sometimes SOEs can be treated as private investors which provides them with the opportunity to commence ICSID proceedings against a host state, which was for instance the

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[565] *Československa Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999), para. 27.
[566] *Československa Obchodní Banka, A.S. (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (May 24, 1999), para. 21.
[567] Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 27-35; J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 383.
[568] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 25 and 147.
[569] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 1 and 21.
[570] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 43; UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017', *IIA Issues Note. International Investment Agreements*, June 2018, Issue 2, p. 7.
[571] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 43.
[572] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (ICSID Case No. ARB/14/30), Decision on Jurisdiction, 31 May 2017, para. 146-148.

case in *Vattenfall v. Germany* (not publicly available).[573] However, this will not be the case for the state as a direct shareholder itself. Under the ICSID mechanism, *the Broches test* applies to SOEs, but not to the state itself. The home state itself has no legal standing at all under ICSID. On the other hand, a state can be held responsible under ICSID proceedings for a wrongful act of a SOE if it is attributable to its state owner(s).[574] Whether or not such a wrongful act is attributable needs to be assessed on a case-by-case basis and goes beyond the scope of this thesis.[575]

(c) The Role of the Applicable Investment Treaty

If the concerned treaty appoints ICSID as the (only) available forum, state investors that engage in FDIs will not be able to seek recourse to arbitration against host states.[576] Article 7 of the Israel-Czech Republic BIT stipulates that any dispute between an investor and a host state that cannot be settled within six months shall be submitted to a court of the competent jurisdiction, ICSID or an ad hoc tribunal as agreed by the parties.[577] In this case ICSID arbitration may be the only realistic option for arbitration because the cooperation of both parties is needed to opt for ad hoc arbitration.

The situation is different if the applicable BIT provides for an additional arbitration

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[573] *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), Decision pursuant to ICSID Arbitration Rule 41(5), 2 July 2013 (not publicly available). On 9 November 2021 the case was discontinued upon the Parties' request: *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), Discontinuance Order, 9 November 2021.

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[574] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 384.

[575] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, 22 ICSID Review-Foreign Investment LJ (2007), 100, para. 146; Noble Energy Inc and MachalaPower Cia Ltda v. Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 165-166; L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para.78. L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para.78. J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 384; C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 558; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000). In *Maffezini v. Spain* a two-step analysis was applied: the Tribunal first looked whether the entity whose conduct is implicated is a "state entity" and subsequently it looked whether the conduct of the State entity is attributable to the respondent State.

[576] D. Tamada, 'Host States as Claimants. Corruption Allegations', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 114-115.

[577] Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, signed on 23 September 1997, entered into force on 16 March 1999.

option, such as arbitration under the UNCITRAL rules at a different forum. This is the case in many other BITs, such as for instance in the Bahrain-Japan BIT (Article 16)[578], the Hungary-UAE BIT (Article 10)[579] and the Singapore-Rwanda BIT (Article 11).[580]

The answer to the question of whether a state entity will enjoy investment treaty protection under e.g. a BIT depends to a large extent on the applicable BIT itself.[581] However, despite the wording in the applicable investment treaty the ICSID Convention bars states from bringing an arbitral dispute to an ICSID tribunal. This principle even applies when the concerned case derives from an arbitration clause or arbitration agreement instead of an investment treaty.[582] In *East Kalimantan v. PT Kaltim Prima Coal and Others*, the ICSID tribunal stated the following:

> "*Given that the main basis for jurisdiction is an arbitration clause contained in a contract, the Tribunal finds that nothing in the ICSID Convention prevents a State or its subdivisions or agencies from appearing as claimant in an arbitration based on a contract. The question might receive a different response if the basis for jurisdiction were an investment treaty which, in principle, reserves the right to bring an arbitration to investors and does not grant substantive protections to States.*
>
> *However, after long deliberations, a thorough assessment of all the arguments put forward in this complex case, and a careful assessment of the evidence, the Tribunal cannot but conclude that the Claimant's case fails ab initio for the simple reason that the Claimant has no right to bring this arbitration. The ICSID Convention subjects jurisdiction to specific conditions which ICSID tribunals are not empowered to ignore. The Claimant does not meet one of these specific conditions and this turns out to be fatal to its case*".[583]

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[578] Agreement Between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment, signed on 26 June 2022, entered into force on 6 September 2023.
[579] Agreement Between the Government of Hungary and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, signed on 15 July 2021, entered into force on 10 April 2022.
[580] Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Kenya on the Promotion and Protection of Investments, signed on 12 June 2018, entered into force on 16 August 2023.
[581] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 536.
[582] *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and Others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009.
[583] *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and Others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009**,** para. 174-175 and 186; C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 537.

Despite the fact that the ICSID tribunal in *East Kalimantan v. PT Kaltim Prima Coal and Others* was not confronted with the issue of jurisdiction in relation to state claimants building their claims on investment treaties, it can be deduced that the options under the ICSID mechanism do not apply to the home state itself.[584]

5.2.2 Non-ICSID Investor-State Arbitration

The fact that the ICSID mechanism is usually unusable for state claimants against host states creates the necessity to search for alternatives of several non-ICSID institutions, where arbitral proceedings deriving from investor-state disputes can be initiated. In contrast to ICSID arbitration, non-ICSID arbitration rules generally do not have any specific requirements regarding the private nature of the claimant.[585] In non-ICSID arbitral institutions the notion of investment and the definition of both the investment and the investor under the applicable treaty or agreement play a more central role in asserting jurisdiction.

The UNCITRAL Arbitration Rules, which are often used in non-ICSID arbitration, do not exclude state entities. [586] Furthermore, there is no direct or indirect exclusion of (certain) state entities and therefore state entities can choose to more easily bring claims to non-ICID institutions, such as the ICC,[587] SIAC,[588] HKIAC,[589] LCIA,[590] CIETAC,[591] SCC,[592] ICDR,[593]

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[584] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 542. See also: M. Potesta, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?' in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 253-259.

[585] D.A. Pentsov, 'Contractual Joint Ventures in International Investment Arbitration', *Northwestern Journal of International Law & Business* 2018, Vol. 38, No. 3, p. 426.

[586] Article 1(1) UNCITRAL Arbitration Rules 2021: "*Where parties have agreed that disputes between them in Respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree*."

[587] ICC 2021 Arbitration Rules. Available via: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

[588] SIAC 2017 Investment Rules. Available via: https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Investment-Rules-2017.pdf.

[589] HKIAC 2018 Administered Arbitration Rules. Available via: https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#01.

[590] LCIA 2020 Arbitration Rules. Available via: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

[591] CIETAC 2024 Arbitration Rules. Available via: https://www.cietac-eu.org/rules/.

[592] SCC 2023 Arbitration Rules. Available via: https://sccarbitrationinstitute.se/sites/default/files/2023-01/scc_arbitration_rules_2023_eng.pdf.

[593] ICDR 2021 International Dispute Resolution Procedures. Available via: https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar.

PCA[594] and LMAA.[595] The rules of the aforementioned institutions regarding their use by state entities will be analysed below. The rules of the LMAA will not be discussed since this arbitral institution is primarily focused on maritime disputes.

(a) The International Chamber of Commerce

The ICC has its own International Court of Arbitration. Their role is to provide individuals, businesses and governments with "a variety of customisable services for every stage of their dispute".[596] The key focus of the ICC International Court of Arbitration is to resolve difficulties in international commercial and business disputes to support trade and investment.[597] State entities are explicitly mentioned as the potential party in a dispute. Article 13(4)(a) of the ICC 2021 Arbitration Rules includes the following provision: "*The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:* […] *one or more of the parties is a state or may be considered to be a state entity*".[598]

In their ICC Commission Report "Financial Institutions and International Arbitration" from 2018 the issue of sovereign finance is highlighted.[599] Financial institutions and states or state entities have many types of agreements for which arbitration can be used as a dispute settlement mechanism. Examples can for instance be found in the issue of state bonds, capital market instruments, loan agreements or shareholder agreements.[600]

The settlement of investment disputes between private entities and sovereign states has become an important part of the activities of the ICC International Court of Arbitration. However, there are still difficulties when it comes to successfully bringing a case to the ICC International Court of Arbitration. Most disputes in which a state or state entity is involved are in the field of commercial arbitration, whereby a clause in the relevant contract between a private entity and a state forms the basis of the consent to arbitrate.[601] In the case of reflective loss commercial arbitration is not an option because the ICJ confirmed that shareholders do not have standing in

[594] PCA Arbitration Rules 2012. Available via: https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf.
[595] LMAA 2021 Terms. Available via: https://lmaa.london/wp-content/uploads/2022/11/LMAA-Terms-2021.pdf.
[596] https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/.
[597] https://iccwbo.org/about-icc-2/our-mission-history-and-values/.
[598] *International Chamber of Commerce 2021 Arbitration Rules*, Article 13(4)(a).
[599] Commission on Arbitration and ADR ICC Commission Report, *Financial Institutions and International Arbitration*, published in March 2018, available at: https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf.
[600] Commission on Arbitration and ADR ICC Commission Report, *Financial Institutions and International Arbitration*, published in March 2018, available at: https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf, p. 12.
[601] ICC Commission Report, *States, State Entities and ICC Arbitration*, ICC Dispute Resolution Services (Revised Version of 2017) p. 3.

claims affecting the rights of the company under customary international law.[602] BITs and international investment agreements are considered to be a *lex specialis* whereby the no reflective loss rule is not applicable.[603] This means that investment arbitration is the way forward for the state shareholder who wants to bring an arbitral claim for reflective loss. Only a minority of the ICC's caseload arises from the breach of a BIT because more than 80% of BITs do not allow for the possibility of using the ICC rules.[604] The current caseload of the ICC involves cases in which one of the parties to the dispute is a private party rather than disputes between two states on a commercial dispute.[605]

(b) The Singapore International Arbitration Centre

The SIAC is an independent and neutral not-for-profit organisation established in 1991 offering arbitration services to the global business community. The SIAC 2017 Investment Rules offer a specific set of rules designed for investment treaty arbitration by SIAC. The model arbitration clause, as presented in the SIAC 2017 Investment Rules, specifically mentions that the rules may apply to any type of arbitration, including arbitration involving states, SOEs or intergovernmental organisations. The state shareholder is not excluded under the rules of SIAC, however, most SIAC cases are related to international commercial arbitration and do not involve host states. In *Nexbis Pty Ltd. v. Republic of Maldives,* the SIAC tribunal asserted jurisdiction based on an arbitration clause in a concession agreement.[606] The claimant had completed the installation of an IT border control system and they initiated arbitral proceedings based on the concession agreement after the disconnection of the system by the respondent.[607] The arbitration in this case was based on an agreement and not on a provision in an investment treaty, but it is an example of SIAC arbitration between an investor and a host state. In principle it is possible

[602] See more detailed in chapter 6. L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 66-85; A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3, p. 596; D. Gaukrodger, 'Claims for Reflective Loss Under Investment Treaties' (Presentation for OECD-hosted Side Meeting, UNCITRAL Working Group III on ISDS Reform, 22 January 2020).
[603] Ahmadou Sadio Diallo (*Diallo*) (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 88; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration. Substantive Principles* (second edition, 2017), Oxford University Press, nr. 1.10-1.11.
[604] ICC Commission Report, *States, State Entities and ICC Arbitration*, ICC Dispute Resolution Services (Revised Version of 2017) p. 2.
[605] ICC Commission Report, *States, State Entities and ICC Arbitration*, ICC Dispute Resolution Services (Revised Version of 2017) p. 4-6.
[606] *Nexbis Pty Ltd. v. Republic of Maldives* (SIAC Case No. ARB/003/2014), Final Award, 24 November 2016, para. 6-7.
[607] *Nexbis Pty Ltd. v. Republic of Maldives* (SIAC Case No. ARB/003/2014), Final Award, 24 November 2016, para. 119.

for a state investor to initiate arbitral proceedings at SIAC for the alleged breach of an investment treaty obligation by a host state, but the amount of investment disputes handled by SIAC is apparently few.

(c) The Hong Kong International Arbitration Centre

The HKIAC was established in 1985 as a company limited by guarantee and a not-for-profit organisation under Hong Kong law. Article 1 of the HKIAC 2018 Arbitration Rules stipulates that HKIAC arbitration is available in case of an arbitration agreement that provides for the HKIAC Rules to apply or provides for arbitration administered by HKIAC. There is no exclusion of public entities to HKIAC arbitration and HKIAC does deal with investment treaty disputes, although its primary focus is commercial arbitration. In *Jin Hae Seo v. Republic of Korea* the HKIAC tribunal denied jurisdiction in an expropriation case based on the South Korea-US Free Trade Agreement (KORUS FTA) because the claimant was unable to demonstrate that the concerned property was to be classified as a covered investment under the KORUS FTA.[608]

(d) The London Court of International Arbitration

The LCIA is one of the leading international institutions for commercial dispute resolution.[609] The LCIA aims at providing a flexible administration regardless of location and under any system of law. The LCIA 2020 Arbitration Rules do not rule out the possibility that a legal person is public in nature. Article 6.2 of the LCIA Arbitration Rules stipulates that the nationality of a legal person means the jurisdiction in which it is incorporated and/or has its effective management, including the nationalities of its controlling shareholders.

The caseload of LCIA is mainly related to international commercial arbitration disputes, but the institution is suitable for international treaty arbitration as well. In *Empresa Distribuidora de Electricidad del Este,S.A., DR Energy Holdings Limited ("DREH"), Société Générale v. Dominican Republic* the LCIA tribunal upheld jurisdiction in a concession case on electricity supply in the Dominican Republic based on the Dominican-Republic France BIT.[610] The tribunal ruled that the French nationality can extend from the French registered company to its indirect

[608] *Jin Hae Seo v. Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, para. 168-169.
[609] https://www.lcia.org/LCIA/introduction.aspx.
[610] *Empresa Distribuidora de Electricidad del Este,S.A., DR Energy Holdings Limited ("DREH"), Société Générale v. Dominican Republic*, (LCIA Case No. UN/7297), Award on Preliminary Objections to Jurisdiction, 19 September 2008 , para. 64-66.

shareholder but only within the limits of its participation.[611] In other words the amount of shares in the French company determined the scope of the investment of the indirect shareholder under the Dominican Republic-France BIT of 1999.[612]

(e) The China International Economic and Trade Arbitration Commission

The CIETAC was established in 1956 and it is one of the major permanent arbitral institutions in the world handling both commercial and investment disputes. The CIETAC 2024 Arbitration Rules do not exclude public entities from their scope. State shareholders are entitled to bring their international investment disputes to CIETAC. The institution, however, is particularly focused on international commercial arbitration. There are currently no published cases in the field of international treaty arbitration in which a host state is a defendant based on an alleged violation of an international investment treaty.[613]

(f) The Stockholm Chamber of Commerce

The SCC is a viable option for state entities to bring their investment disputes. Article 1(1) of Appendix III Investment Treaty Disputes of the SCC 2023 Arbitration Rules clarifies that the concerned arbitration rules apply to treaty-based arbitration of disputes between an investor and a state. The SCC Arbitration Institute aims at providing a neutral, independent and impartial venue for dispute resolution in commercial business around the world.[614]

The scope of the investment disputes which can be brought to the SCC is quite broad. In *Petrobart Ltd. v. Kyrgyz Republic* the SCC tribunal asserted jurisdiction over a claim related to a gas purchase agreement covered by the ECT .[615] In *GPF GP S.à.r.l v. Republic of Poland* the SCC tribunal upheld jurisdiction over a claim from a private equity investor from Luxembourg in relation to a real estate project in Poland based on the (intra-EU) Luxembourg-Poland BIT.[616] Although the claims for the alleged breach of the FET provision in the BIT were dismissed by

[611] *Empresa Distribuidora de Electricidad del Este,S.A., DR Energy Holdings Limited ("DREH"), Société Générale v. Dominican Republic*, (LCIA Case No. UN/7297), Award on Preliminary Objections to Jurisdiction, 19 September 2008 , para. 118-119.
[612] Accord entre le Government de la République Française et le Gouvernement de la Republique Dominicaine sur l'encouragement et la protection réciproques des investissiments (1999).
[613] *CIETAC 2022 Work Report and 2023 Work Plan*. Available via: http://www.cietac.org/index.php?m=Article&a=show&id=18848&l=en.
[614] https://sccarbitrationinstitute.se/en.
[615] *Petrobart Ltd. v. Kyrgyz Republic*, (SCC Case No. 126/2003), Award, 29 March 2005.
[616] *GPF GP S.à.r.l v. Republic of Poland*, (SCC Case No. V. 2014/68), Final Award, 29 April 2020, para. 580.

the SCC because it did not consider the claims well-founded, it asserted jurisdiction over investment treaty disputes between investors and host states.[617] There is no restriction with regard to the private nature of the investor as long as both parties agree to settle the concerned investment disputes at the SCC.

(g) The International Centre for Dispute Resolution

The ICDR is the international division of the American Arbitration Association (AAA). A dispute can be submitted to an arbitral tribunal for a final and binding decision. In ICDR arbitration, each party is given the opportunity to make a case presentation following the process provided by these Rules and the tribunal.[618] The rules do not exclude public entities as parties, but so far there are no published cases of an international treaty-based investment dispute between an investor and a host state.[619]

(h) The Permanent Court of Arbitration

The PCA has a long history in the settlement of disputes in which states or state entities are involved. In contrast to the ICC International Court of Arbitration and the SCC Court of Arbitration, the PCA has been dealing with a broader range of disputes over time and not (necessarily exclusively) with commercial disputes. It was established in 1899 to facilitate arbitration and other forms of dispute resolution between states.[620] It was the first permanent intergovernmental organization to provide a forum for the resolution of international disputes through arbitration and other peaceful means.

The PCA has 122 Contracting Parties which have acceded to one or both of PCA's founding conventions. According to article 1(1) of PCA Arbitration Rules 2012:

> "*Where a State, State-controlled entity, or intergovernmental organization has agreed with one or more States, State-controlled entities, intergovernmental organizations, or private parties that disputes between them in respect of a defined legal relationship, whether contractual, treaty based, or otherwise, shall be referred to arbitration under the Permanent Court of Arbitration Arbitration Rules 2012 (hereinafter the "Rules"), then*

[617] *GPF GP S.à.r.l v. Republic of Poland*, (SCC Case No. V. 2014/68), Final Award, 29 April 2020, para. 579.
[618] https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf.
[619] ICDR International Arbitration Rules, Article 1(1).
[620] https://pca-cpa.org/en/about/.

such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree."[621]

The PCA provides support in arbitral proceedings which are treaty-based, but also for instance in ad hoc proceedings. It is possible to commence arbitral proceedings under the UNCITRAL Rules at the PCA.[622] Neither the UNCITRAL Arbitration Rules nor the PCA Arbitration Rules exclude state entities. The PCA is a very interesting alternative for states or state entities for the settlement of their investment disputes. Since 1899 more than 700 cases have been registered and in 2023 the PCA provided registry services in 246 cases: 122 investor-state arbitrations under international investment treaties or national investment laws, 110 contract-based arbitrations involving a state, intergovernmental organisation or state entity, 7 interstate arbitrations and 7 other proceedings.[623] The PCA has ample experience in interstate arbitrations with a total of 42 arbitrations concluded since 1902.[624]

Furthermore, PCA tribunals have asserted jurisdiction over reflective loss claims over the years.[625] The wording of the applicable investment treaty is always leading in these decisions. In *Horthel v. Poland* the PCA tribunal asserted jurisdiction over a case under the Netherlands-Poland BIT, initiated by three Dutch claimants who held direct and indirect shares in Polish companies operating in the gambling industry.[626] The claimants argued that the increased taxation and Poland's refusal to renew the gambling permits of their Polish (sub-)subsidiaries constituted an unlawful expropriation and unfair and inequitable treatment of their investments in Poland.[627] The definition of the term investment under the applicable Netherlands-Poland BIT was as follows:

> "*the term 'investments' shall comprise every kind of asset and more particularly, though not exclusively: i. movable and immovable property as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds*

[621] PCA Arbitration Rules 2012, Article 1(1).
[622] UNCITRAL Arbitration Rules 2021, Article 1(1).
[623] Permanent Court of Arbitration, *Annual Report 2023*, p. 30. Available via https://docs.pca-cpa.org/2024/06/0bd839f2-pca-annual-report-2023.pdf.
[624] https://pca-cpa.org/en/cases/.
[625] See e.g. *Horthel Systems B.V., Tesa Beheer B.V. and Poland Gaming Holding B.V. v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017) and *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award (13 December 2017). *Louis Dreyfus Armateurs v. the Republic of India*, PCA Case No.2014-26, Decision on Jurisdiction (22 December 2015).
[626] *Horthel Systems B.V., Tesa Beheer B.V. and Poland Gaming Holding B.V. v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para..
[627] *Horthel Systems B.V., Tesa Beheer B.V. and Poland Gaming Holding B.V. v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para. 6.

> *and other kinds of interests in companies and joint-ventures; iii. title to money and other assets and to any performance having an economic value; iv. rights in the field of intellectual property, technical processes, goodwill and know-how; v. rights to conduct economic activity, including rights to prospect, explore, extract and win natural resources, granted under contract, administrative decisions or under the legislation of the Contracting Party in the territory of which such activity is undertaken*".[628]

The tribunal found that the claimants' direct and indirect participations were to be regarded as covered investments under the Netherlands-Poland BIT and that the claimants were "*entitled to claim based on the loss that they suffered in their investment, i.e. reflective loss on the value of their shares and receivables from ASM, AW Holding and PGI*".[629]

In *Louis Dreyfus Armateurs v. India* the wording of the applicable France-India BIT only included indirect investments as covered investments if the investor owned at least 51 percent of the company through which the investment was made.[630] In its final award the tribunal stated that in case of double reflective loss, which is reflective loss because of harm inflicted to a sub-subsidiary, there are

> "*significant differences (and arguably greater hurdles) in the way such a* […] *claim would have to be proven on the merits and quantum, including inter alia with respect to issues of causation and loss*".[631]

It will be much more difficult to prove to what extent the diminution in value of the claimant's shares are the result of a harm inflicted to a sub-subsidiary company but in general the tribunal in *Louis Dreyfus Armateurs v. India* confirmed that this does not preclude the availability of the claim.[632] However, in this concrete case at hand the claimant did not own at least 51 percent

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[628] Article 1(a) of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, signed on 7 September 1992, entered into force on 1 February 1994 (terminated by consent on 2 February 2019).
[629] *Horthel Systems B.V., Tesa Beheer B.V. and Poland Gaming Holding B.V. v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para. 122.
[630] *Louis Dreyfus Armateurs v. the Republic of India*, PCA Case No.2014-26, Decision on Jurisdiction (22 December 2015), para. 109.
[631] *Louis Dreyfus Armateurs v. the Republic of India*, PCA Case No.2014-26, Award (11 September 2018), para. 285.
[632] *Louis Dreyfus Armateurs v. the Republic of India*, PCA Case No.2014-26, Award (11 September 2018), para. 285.

of the subsidiary company and therefore the tribunal declined jurisdiction over the double reflective loss claim.[633]

In *HICEE B.V. v. Slovakia* a Dutch claimant held shares in a Slovakian holding company (Dovera Holding).[634] The dispute was about two Slovakian health insurance companies that were subsidiaries of Dovera Holding.[635] The companies were prohibited under Slovakian law to distribute profits and to cap their permissible administrative expenses.[636] The Netherlands-Czechoslovakia BIT contained the following restricted definition of the term investment including a non-exhaustive list: "*every kind of asset invested either directly or through an investor of a third State* […]".[637] The tribunal found that the explanatory notes of the Dutch Ministry of Foreign Affairs that were shared with the Dutch parliament indicated that this provision was included upon Czechoslovakia's request in order to exclude indirect investments in "*sub-subsidiaries*" from treaty protection since these were in fact companies created by a Czechoslovakian entity.[638] Slovakia confirmed this interpretation of Article 1(a) of the Czechoslovakia BIT which made the tribunal decline jurisdiction.[639] As explained by the tribunals in *Horthel v. Poland* this case was rather exceptional because of the unique wording of Article 1(a) of the Netherlands-Czechoslovakia BIT.[640]

All in all, the PCA is experienced in both the settlement of commercial investment disputes based on reflective loss claims and in arbitrations where states or state entities are involved. It is, therefore, a significant alternative for ICSID in case of an investment dispute where a state party is involved as a claimant. An important difference between ICSID awards and PCA awards is that the latter have to be recognised by national courts under the applicable domestic arbitral laws and the rules of the New York Convention in the enforcement stage of the

[633] *Louis Dreyfus Armateurs v. the Republic of India*, PCA Case No.2014-26, Decision on Jurisdiction (22 December 2015), para. 157.
[634] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award (23 May 2011).
[635] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award (23 May 2011), para. 2-3.
[636] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award (23 May 2011), para. 3.
[637] Article 1(a) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992 (terminated by consent on 10 December 2021).
[638] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award (23 May 2011), para. 126.
[639] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award (23 May 2011), para. 136-137 and 152.
[640] *Horthel Systems B.V., Tesa Beheer B.V. and Poland Gaming Holding B.V. v. The Republic of Poland*, PCA Case No. 2014-31, Final Award (16 February 2017), para. 116.

procedure.[641] This means that the PCA award may be exposed to judicial review on for instance public policy exceptions.[642]

5.2.3 The Choice Between ICSID and Non-ICSID Arbitration for State Entities

The main purpose of the aforementioned institutions and rules focuses on the attraction and protection of private investment. However, it is impossible for the concerned state itself as a direct shareholder in a company to successfully pursue a claim under the ICSID rules. Therefore, the only realistic option for a state is non-ICSID arbitration. For state entities, on the other hand, the option to seek redress for reflective loss deriving from commercial activities under the ICSID rules appears to be restricted but possible because of the *Broches test* and Article 25 of the ICSID Convention.[643]

In non-ICSID arbitration, the legal standing of state entities needs to be examined on a case-by-case basis, not because of the arbitration rules, but due to the applicable investment agreement.[644] In *Kaliningrad Region v. Lithuania*, a reported, but unpublished ICC award, the tribunal held that the Regional Government of Kaliningrad can be regarded as an "investor" in accordance with Article 1(1) of the Russia-Lithuania BIT.[645] In the PCA-case *China Heilongjiang and others v. Mongolia* the definition of investor in the China-Mongolia BIT (1991) became

[641] O. van der Haegen and M-C. Van den Bossche, 'Procedural Issues: Annulment, Recognition and Enforcement of Investment Treaty Awards (ICSID and Non-ICSID)', in: J.R. Mata Dona and N. Lavranos, *International Arbitration and EU Law*, Elgar Arbitration Law and Practices (2021), no. 16.14.

[642] See more detailed in paragraph 7.6 on the follow-on proceedings in the case of *Deutsche Telekom AG v The Republic of India*, PCA Case No. 2014-10, Final Award (27 May 2020).

[643] M. Feldman, 'The Standing of State-Owned Entities under Investment Treaties', in: K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010-2011*, Oxford University Press 2012, p. 616; See Aron Broches, Selected essays, World Bank, ICSID, and other subjects of public and private international law(Dordrecht: Martinus Nijhoff & Publishers, 1995), p. 167 (the ICSID Convention requirement that disputes be between "Contracting States" and "nationals" of other Contracting States "is in keeping with the purpose of the Convention, to create an international forum for the settlement of disputes between states and foreign investors. "The facilities of the Centre are neither available for disputes between private parties who can either have recourse to national courts or to commercial arbitration, nor for disputes between states who can bring their disputes before the International Court of Justice or can agree to submit them to conciliation or arbitration through conventional arrangements."); Christoph Schreuer et al., The ICSID Convention: A commentary (Cambridge: Cambridge University Press, 2009), p. 160 (same).

[644] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 383.

[645] C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 536; Luke E. Peterson, Lithuania Prevails in Investor-State BIT Claim Brought by Russian Regional Government: ICC Tribunal Rules That Enforcement of Commercial Arbitration Award in Lithuania Cannot Be Challenged as an Expropriation under BIT, 2-5 IA Reporter (2009), 4-5. See: https://www.italaw.com/cases/593.

relevant.[646] Mongolia argued that the claimants – which were three Chinese regional SOEs – did not qualify as investors because the company was not for profit and allegedly under (direct) control of the Chinese state.[647] The tribunal, established under the UNCITRAL rules, rejected the argument and reasoned that the applicable BIT did not impose restrictions on investors based upon their organization, business purpose, ownership, or control. The reason was that the BIT required in Article 1(2) that an investor can be any kind of legal entity engaging in economic or business activities in accordance with domestic law.[648]

From the analysis above it can be concluded that it is more difficult for state entities to commence proceedings under the ICSID rules than under non-ICSID rules, regardless of the applicable BIT and/or applicable law.[649] In terms of legal standing, there are more options for state entities under non-ICSID proceedings than under ICSID proceedings. Nevertheless, in comparison to non-ICSID cases, where a private investor pursues a claim, the examples in which a state investor initiates non-ICSID arbitral proceedings deriving from commercial investments, are more limited. There can be legitimate reasons for a claimant to prefer non-ICSID arbitration over ICSID-arbitration, e.g. lower legal costs (for example because of the de facto loser pays rule in ICSID proceedings), the possibility of private proceedings (no publication of the Award) or the fact that there is more certainty about jurisdictional matters in non-ICSID proceedings for state entities.[650] On the other hand, there can be good reasons for a state entity, just as for any other claimant, to prefer ICSID-arbitration, e.g. the exclusivity of ICSID proceedings, the institutional experience within ICSID or the enforcement mechanism of ICSID-awards.[651]

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[646] Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia (PCA Case No. 2010-20), Award, 30 June 2017, para. 408; UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017', *IIA Issues Note. International Investment Agreements*, June 2018, Issue 2.

[647] UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017', *IIA Issues Note. International Investment Agreements*, June 2018, Issue 2, p. 7.

[648] UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017', *IIA Issues Note. International Investment Agreements*, June 2018, Issue 2, p. 7.

[649] J.C. Thomas and H.K. Dhillon, 'Nus Centre for International Law Collection of Articles on an Appellate Body in ISDS. The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitral Awards', *ICSID Review*, Vol. 32, No. 3 (2017), pp. 500–502.

[650] V.V. Veeder, 'The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties', in: A.W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2009*, Brill Nijhoff Publishers 2010, p. 5-14.

[651] See for instance: G. Coop, Á. Nistal and R.G. Volterra, 'Sovereign immunities and investor-state awards', in: Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards*, Globe Law and Business (London) 2015, p. 67-82; UNCTAD, *Dispute Settlement. International Centre for Settlement of Investment Disputes (2.2 Selecting the Appropriate Forum)*, United Nations New York and Geneva 2003.

5.3 Ad Hoc Arbitration

In case of a contract-based ad hoc tribunal the assertion of jurisdiction is based on the concrete agreement between the investor and the host state or the option of ad hoc arbitration in the applicable investment treaty that is accepted by the investor. In these cases, the difference between international commercial arbitration and IIA starts to become fluid. The investment dispute may be based on an investment treaty, but the method of arbitration is based on a commercial agreement. Arbitration is based on the consent between the parties to resolve a dispute in an amicable manner. This consent to arbitrate can find its origin in an arbitration agreement (contract) or for instance in an investment treaty or FTA .[652]

An arbitration agreement can be formed by means of a separate submission agreement or an arbitration clause in an existing contract.[653] The applicable arbitration agreement, being a contract or applicable investment treaty, can appoint a specific arbitral forum, where investment disputes need to be brought.[654] If this is the case, the rules of the forum play a crucial role.[655] However, there is also the possibility that parties agree to opt for ad hoc arbitration. In that case parties may decide that the arbitration will be conducted without involving an arbitral institution, but in accordance with specific types of rules.[656] Parties may for instance declare the UNCITRAL Rules applicable to the arbitral proceeding that follows. The UNCITRAL Arbitration Rules (2021)[657] are a comprehensive and universal set of arbitration rules used by parties in ad hoc arbitration, but also under various institutional arbitrations.[658] In accordance with Article 1 of the UNCITRAL Rules parties can agree that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules subject to any modification as the parties may agree. Article 1(3) stipulates that the rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that

[652] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 2.01-2.07.
[653] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 2.02.
[654] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 61-62.
[655] See also, F. Li, *The Divergence and Convergence of ICSID and non-ICSID Arbitration*, PhD Thesis University of Glasgow 2014, p. 47-48. Available via http://theses.gla.ac.uk/6292/.
[656] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 1.153.
[657] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.
[658] C. Croft, C. Kee and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules*, Cambridge University Press (2013), p. 1-8.

provision shall prevail. The set of UNCITRAL rules is divided into four sections: introductory rules (about the scope of application, the notice of arbitration and the response, representation and designating/appointing authorities), rules about the composition of the arbitral tribunal. Rules on the arbitral proceedings and rules on the award. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ex Article 1(4). The UNCITRAL Rules of Transparency contain rules about publications (Article 2 and 3), submission of third parties (Article 4 and 5), hearings (Article 6) and possible exceptions to the principle transparency (Article 7), e.g. because the shared information during the proceedings is confidential or protected or because the integrity of the arbitral process requires confidentiality. The UNCITRAL Rules provide for a structured and flexible set of rules without the need for the parties to reinvent the wheel. However, the parties are also free to establish their own set of procedural rules provided that these rules treat each party with equality and allow each party a reasonable opportunity to present its case.[659]

An advantage of ad hoc arbitration is that the procedure can be shaped to meet the wishes of the parties.[660] This means that state shareholders will be perfectly capable to initiate arbitral proceedings as long as there is consent between the parties to resolve the investment dispute before the ad hoc tribunal of choice.[661] The problems that may occur in case of ad hoc arbitration are related to the fact that its effectiveness is completely dependent on the willingness of the parties and their lawyers to cooperate.[662]

Procedures can be delayed easily because there is no clear set of established rules of an arbitral institution to guide the procedure.[663] When one of the parties refuses to cooperate or decides to delay the procedure, an ad hoc arbitration may be able to continue, only when an arbitral tribunal is in existence and there is an established set of rules. Furthermore, the seat of arbitration is crucial in the compliance and enforcement stage after the procedure.[664] Not only

[659] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 1.152.
[660] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 69.
[661] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 1.157-1.161.
[662] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 63.
[663] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 70.
[664] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 70- 71.

the award needs to be acknowledged in the applicable jurisdiction[665], but the legal system of the seat of arbitration also needs to have appropriate enforcement mechanisms to function properly.[666]

In case of institutional arbitration compliance and enforcement are more regulated.[667] Moreover, the procedural rules and the rules on asserting jurisdiction are clearer. There is in general less room for parties to delay the procedure, but it is also argued that institutional support comes with additional costs, administration and delay.[668] However, the main question here is if these rules of the forum allow state shareholders to initiate arbitral proceedings.

5.4 The Arbitral Laws of the Seat: A Comparative Analysis

5.4.1 China

In China the primary source of domestic arbitration law is contained in Chapter XXVIII (Articles 257-261) of China's Civil Procedure Law (CPL), which adopts selected UNCITRAL Model Law principles.[669] The arbitration agreement can be incorporated either in an arbitration clause in a contract or in a separate arbitration agreement. If an arbitration agreement is in place neither party may bring the action to court and if property preservation measures are necessary the arbitral tribunal shall refer the matter to the Intermediate People's Court.[670] In China the Supreme Court provides interpretations on the CPL, for instance in relation to the enforcement of foreign arbitration awards and the validity of an arbitration clause.[671] The agreement to arbitrate needs to explicitly contain an expressed intent to arbitrate, the items for arbitration and the specific institution chosen to act as the arbitration commission. Ad hoc arbitration is not permitted under Chinese law.[672] In China, commercial disputes are in general arbitrable.

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[665] E. Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin', *ICSID Review – Foreign Investment Law Journal* 1999, Vol 14, Issue 1, p. 16-45.
[666] F. Li, *The Divergence and Convergence of ICSID and non-ICSID Arbitration*, PhD Thesis University of Glasgow 2014, p. 184-186. Available via http://theses.gla.ac.uk/6292/.
[667] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 11.39 and 11.132.
[668] C. Wallgren-Lindholm, 'Ad hoc arbitration v. institutional arbitration', in: G. Cordero-Moss (ed.), *International Commercial Arbitration. Different Forms and their Features*, Cambridge University Press 2013, p. 67.
[669] P. Murray and J. Lin, 'People's Republic of China', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 255.
[670] P. Murray and J. Lin, 'People's Republic of China', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 258.
[671] P. Murray and J. Lin, 'People's Republic of China', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 258.
[672] P. Murray and J. Lin, 'People's Republic of China', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 264.

Excluded are disputes over marriage, adoption, guardianship, child maintenance, inheritance and administrative disputes that fall within the jurisdiction of the relevant administrative organs.[673] State entities are not prohibited to enter into an arbitration agreement.

5.4.2 England and Wales

In England and Wales, the principal statute of domestic arbitration law is the Arbitration Act 1996. An arbitration agreement under English law is a written agreement to submit a present or future dispute to arbitration.[674] The Arbitration Act 1996 leaves it to the courts' discretion to develop rules on the issue of arbitrability. In general, there are no restrictions on the types of normal commercial matters that may be subject to arbitration.[675] Arbitration will not be permitted according to section 1(b) of the Arbitration Act 1996, in so far as the concerned arbitration agreement offends public policy.[676] The Arbitration Act 1996 does not prohibit state entities from arbitral proceedings if the dispute matter can be qualified as a "normal commercial dispute".[677] Recently the 2025 UK Arbitration Act received Royal Assent, concluding a four-year reform process to refine and modernise the arbitration law in England and Wales. The 2025 Act consists of 18 Clauses amending the Arbitration Act 1996.[678] The aforementioned sections remain unchanged.

5.4.3 France

In France the domestic arbitration law is largely codified in the French Code of Civil Procedure and the Code Civil. Every person having legal capacity has the right to choose either litigation or arbitration as the means of resolving any dispute in which they are involved.[679] As far as arbitrability is concerned, a distinction needs to be made between domestic and

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[673] P. Murray and J. Lin, 'People's Republic of China', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 265.
[674] A. Sheppard, ´England and Wales´, in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 66.
[675] A. Sheppard, ´England and Wales´, in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 67.
[676] The principle of public policy under the English common law doctrine of illegality is applicable to all contracts under English law. See also Z. Mansoor, 'Contracts Contrary to Public Policy under English and Dutch Law. The Case of Agreements Commercialising the Human Body', *European Journal of Comparative Law and Governance* (2014), Vol. 1, No. 4.
[677] A. Sheppard, ´England and Wales´, in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 67.
[678] https://www.acerislaw.com/english-arbitration-act-2025-key-reforms.
[679] J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 29.

international public policy, depending on whether the arbitration is domestic or international.[680] In accordance with Article 1443 or 1448-9 of the French Code of Civil Procedure, an arbitration agreement is null and void if it is not set out in writing that it concerns a domestic arbitration. This rule is not applicable to international arbitration ex Article 1495 of the French Code of Civil Procedure.[681] The French Cour de Cassation (French Supreme Court) and the Cour d'appel de Paris effectively made new law in judgments related to international arbitration.[682] The French public policy restrictions on arbitration were considered too rigid compared to the needs of the international business community. The provisions of Article 2060 of the Code Civil regulate domestic public policy. Under these provisions, disputes involving the state or public communities or establishments are not arbitrable.[683] However, this does not apply to arbitration agreements in the field of international commerce. In these cases, an arbitration agreement is valid under French law even if one of the parties is the French state or a local authority.[684] Such an agreement would be in violation with domestic public policy, but under international public policy the arbitration agreement is valid. Under international arbitration, state entities are not prohibited to enter into an arbitration agreement in relation to a commercial matter. The rules on public policy and arbitrability in international arbitration under French law prohibit arbitration on matters concerning for instance personal status or capacity or certain IP issues.[685] From the above it can be concluded that an international arbitration agreement between state entities in commercial matters is valid under French law.

5.4.4 Hong Kong

In Hong Kong the principal sources of law relating to arbitration are primarily codified in the Hong Kong Arbitration Ordinance.[686] The Ordinance is applicable to both domestic and international arbitrations and largely incorporates the UNCITRAL Model Law.[687] Part IIA of the

[680] J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 87.
[681] J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 96.
[682] Civ. I 23 March 1994, Rev. Arb. 1994 (*Société Hilmarton v. Société O.T.V*).
[683] J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 87.
[684] Civ. I. 2 May 1966, the Galakis Case, J.D.I., 1966; J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 11.
[685] J-L. Delvolvé, J. Rouche and G.H. Pointon, French Arbitration Law and Practice, Kluwer Law International 2003, no. 87-88.
[686] S. Latham and B. Chark, 'Hong Kong', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 107.
[687] S. Latham and B. Chark, 'Hong Kong', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 108.

Ordinance governs international arbitrations. The Ordinance allows parties to treat an international arbitration as a domestic arbitration. An arbitration agreement is international if the parties' places of business are in different states; or if the place of arbitration or performance of the contract is outside the state in which the parties have their places of business; or if the parties have agreed that the subject-matter of the arbitration agreement relates to more than one country.[688] Section 20(1) of the Arbitration Ordinance stipulates that arbitration cannot be used to resolve disputes that would involve the exercise of the state's jurisdiction, which is for instance the case with matrimonial issues or criminal matters.[689] The Arbitration Ordinance does not prohibit state entities from entering into an arbitration agreement.

5.4.5 Netherlands

In the Netherlands the domestic arbitration law is incorporated in Book IV of the Dutch Code of Civil Procedure [*Wetboek van burgerlijke rechtsvordering* (Rv)]. The Dutch legal framework for arbitration adopts a liberal approach and consists mostly of default rules, which allows for a lot of flexibility for the specific needs of the parties.[690] The arbitration agreement does not need to fulfil any formal requirements as it can also be concluded orally.[691] However, if one of the parties challenges the existence or validity of the agreement, the counterparty needs to provide written proof of the agreement in accordance with Article 1021 Rv.[692] Article 1020 Rv excludes the arbitrability of certain types of disputes such as disputes related to family law, bankruptcy orders and certain intellectual property disputes.[693] Furthermore the arbitration agreement is subject to the same public policy restrictions under the Dutch Civil Code (BW) as any other agreement. State entities are not prohibited to enter into an arbitration agreement and normal commercial disputes can be submitted to arbitration in the Netherlands.

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[688] S. Latham and B. Chark, 'Hong Kong', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 108.
[689] S. Latham and B. Chark, 'Hong Kong', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 111.
[690] B. van Tongeren and M. van Leyenhorst, 'The Netherlands', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 219.
[691] H.J. Snijders, *Nederlands Arbitragerecht. Algemene beschouwingen en artikelsgewijze opmerkingen bij de art. 1020-1076 Rv in nationaal en internationaal perspectief*, Deventer: Wolters Kluwer 2018, p. 94.
[692] B. van Tongeren and M. van Leyenhorst, 'The Netherlands', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 222.
[693] B. van Tongeren and M. van Leyenhorst, 'The Netherlands', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 223.

5.4.6 Singapore

In Singapore domestic and international arbitrations are governed by respectively the Arbitration Act and the International Arbitration Act.[694] Singapore adopts a common law system, modelled on the English legal system, which is considered pro-arbitration.[695] Both arbitration acts are largely based on the UNCITRAL Model Law. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.[696] The arbitration agreement needs to be in writing and signed by the parties and it can be contained in a document or otherwise in an exchange of letters, telex, fax, or other means of communication that record the agreement. The intention to arbitrate must be clear and unequivocal. Section 11 of the International Arbitration Act prohibits arbitrations that are in violation with public policy. Criminal matters and matters which affect the status of individuals or corporations, such as bankruptcy and insolvency are not arbitrable.[697] State entities are not prohibited to enter into an arbitration agreement. An arbitration agreement between state entities regarding a commercial matter is arbitrable under Singapore's domestic arbitration law.

5.4.7 South Africa

In South Africa the applicable statute for international commercial arbitration is the International Arbitration Act 2017. It provides for the settlement of disputes by arbitration tribunals in terms of arbitration agreements and for the recognition and enforcement mechanisms.[698] Section 1 of the International Arbitration Act defines an arbitration agreement as "*an agreement referred to in article 7 of the Model Law*". In South Africa the first definition of the term arbitration agreement in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 has been incorporated in the International Arbitration Act 2017:

> "'*Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defi*

[694] C. Lau, 'Singapore', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 315.
[695] C. Lau, 'Singapore', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 318.
[696] C. Lau, 'Singapore', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 319.
[697] C. Lau, 'Singapore', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 320.
[698] D. Williams, 'South Africa', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 330.

ned legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."[699]

The arbitration agreement needs to be in writing in accordance with Article 7(2) of the Model Law. Arbitration agreements or contracts that have been concluded orally need to be recorded in any form ex Article 7(3) of the Model Law. An oral arbitration agreement is not invalid per se in South Africa as long as it is recorded in accordance with Article 7(3). To prove the arbitrability, a party needs to demonstrate that there is a valid arbitration agreement in accordance with objective arbitrability requirements of Section 7(1) of the International Arbitration Act 2017 and that the dispute falls within the ambit of that agreement.[700] State entities are not barred from entering into an arbitration agreement.[701] If the scope of the arbitration agreement is commercial in nature the general approach will be to enforce the arbitration agreement.

5.4.8 Sweden

The primary source of domestic arbitration law in Sweden is the Arbitration Act of 1999, which is partially inspired on the UNCITRAL Model Law.[702] Even though Sweden is a civil law country, the Swedish Supreme Court also operates as a source of domestic arbitration law. A written arbitration agreement is not required; a verbal agreement suffices. The Swedish courts are traditionally pro-arbitration. The court is not required to dismiss the proceedings on its own accord by reference to the arbitration agreement. The Arbitration Act requires an objection raised by one of the parties requesting the court to dismiss the action due to the existence of the arbitration agreement.[703] Under the Arbitration Act, parties are allowed to arbitrate any matter on which they are entitled to reach settlement; matters of criminal law, family law and some employment law and tenancy rights issues are excluded.[704] In Sweden state entities are not prohibited to enter into an arbitration agreement.

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[699] UNCITRAL Model Law on International Commercial Arbitration 1985 (amended 2006).
[700] D. Williams, 'South Africa', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 334.
[701] See Section 5 of the International Arbitration Act 2017. The definition of public body is included in Section 1.
[702] H. Bagner and M. Rosengren, 'Stockholm Arbitration Institute', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p.cxxi.
[703] H. Bagner and M. Rosengren, 'Stockholm Arbitration Institute', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p.cxxvii.
[704] H. Bagner and M. Rosengren, 'Stockholm Arbitration Institute', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p.cxxvii.

5.4.9 Switzerland

Switzerland is one of the traditional venues for both international and domestic commercial arbitration.[705] Under Swiss law a distinction is made between rules for international arbitration and rules for domestic arbitration. The rules applicable to international arbitration are set forth in Chapter 12 (Articles 177-194) of Switzerland's Federal Act on Private International Law (PILA).[706] The provisions on international arbitration are applicable to arbitrations with their seat in Switzerland provided that at least one of the parties to the arbitration agreement did not have its domicile, habitual residence or seat in Switzerland at the time of the conclusion of the arbitration agreement [Article 176 (1)]. Article 178 (1) of the PILA stipulates that the arbitration agreement is valid if made in writing or in any other manner that can be evidenced by text. A signature or exchange of documents is not required.[707] In terms of substance the agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter or to Swiss law [Article 178 (2)]. Pursuant to Article 177 (1) of the PILA any dispute involving a financial interest may be the subject-matter of an international arbitration. This includes all kinds of monetary interests connected to contractual, quasi-contractual, commercial, civil, administrative and public law matters whether they arise under domestic, foreign or international law.[708] The scope is quite broad when it comes to international arbitration under Swiss law. State entities are not prohibited to enter into an arbitration agreement.[709]

5.4.10 United States

The primary federal statute governing arbitration in the US is the Federal Arbitration Act (FAA).[710] The US Supreme Court has ruled that the FAA is substantive federal law that applies to all state courts with respect to all transactions affecting interstate commerce, which also

[705] G. von Segesser and A. Jolles, 'Switzerland', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 359.
[706] G. von Segesser and A. Jolles, 'Switzerland', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 360.
[707] G. von Segesser and A. Jolles, 'Switzerland', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 363.
[708] G. von Segesser and A. Jolles, 'Switzerland', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 363.
[709] In terms of article 177(2), where a state or body controlled by the state is a party to an arbitration agreement, it may not rely on its own law to contest arbitrability of the dispute or its capacity to be a party to the arbitration.
[710] D.W. Rivkin and D.F. Donovan, 'United States', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 395.

includes all international commercial transactions.[711] Due to the freedom of contract principle it is firmly established in the US that agreements to arbitrate must be enforced in accordance with their terms.[712] Regarding the scope of issues subject to arbitration, there is a strong presumption of arbitrability in the US.[713] The FAA stipulates that agreements to arbitrate shall be valid, irrevocable and enforceable. In general, the FAA provides no restrictions on arbitration when it comes to commercial disputes other than the restraints of fundamental public policy that are applicable to any contract.[714] Many state-law prohibitions on public policy on commercial arbitration have been overruled by federal case law. The FAA limitations on public policy exceptions are applied strictly.[715]

5.5 Conclusion

The rules of the selected forum and institution determine the legal standing of state shareholders in arbitral proceedings and consequently the admissibility of state shareholders' claims for reflective loss. A distinction is made between institutional and (non-institutional) ad-hoc arbitration. In terms of institutional arbitration, a further distinction is made between ICSID and non-ICSID investor-state arbitration. Since the ICSID mechanism has been created for disputes between private investors (nationals) and host states, states as claimants are barred from initiating arbitral proceedings against other states under the ICSID Rules [Article 25(1) of the ICSID Convention]. Furthermore, states are also not entitled to bring claims for the purpose of diplomatic protection of their own private investors [Article 27 of the ICSID Convention]. According to the Broches test, which determines the assertion of jurisdiction in ICSID proceedings, arbitration is unavailable to state entities which are either "discharging an essentially governmental function" or "acting as an agent". Although SOEs can be treated as private investors and claimants under the Broches test and initiate ICSID proceedings against a host state, the state as a direct shareholder itself is barred. In the framework of ICSID arbitration,

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[711] *Allied-Bruce Terminix Cos v. Dobson* 513 US 265 (1995); D.W. Rivkin and D.F. Donovan, 'United States', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 395.
[712] *Allied-Bruce Terminix Cos v. Dobson* 513 US 265 (1995); D.W. Rivkin and D.F. Donovan, 'United States', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 396.
[713] *Moses H Cone Memorial Hospital v. Mercury Construction Corpn* 460 US 1 (1983), para. 24-25.
[714] D.W. Rivkin and D.F. Donovan, 'United States', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons*, The European Lawyer Ltd 2006 (2nd edition), p. 400.
[715] D.W. Rivkin and D.F. Donovan, 'United States', in: J. William Rowley (ed.), *Arbitration World: Jurisdictional Comparisons,* The European Lawyer Ltd 2006 (2nd edition), p. 401.

state investors are discriminated against in comparison to private investors in their capacity as potential claimants against host states. The qualification of state shareholders as claimants in ICSID arbitral proceedings requires arguably an amendment of Article 25(1) of the ICSID Convention. Out of all non-ICSID arbitral institutions, which in general do not have any specific requirements regarding the private nature of the claimant, the most viable alternative for state entities to bring their claims for reflective loss against host states is the PCA due to its long history in the settlement of disputes between states. Ad hoc arbitration does not necessarily follow a set of established rules of an arbitral institution and provides for more (procedural) flexibility, as it is based on the concrete agreement between the investor and the host state and the applicable investment treaty. Yet the option of ad hoc arbitration does not appear to be a practicable alternative as it entirely depends on the willingness of the parties to cooperate and on whether or not the parties have designated a set of ad hoc rules (e.g. the UNCITRAL Arbitration Rules of 2010 (as subsequently adapted) in their arbitration agreement, particularly if they have also designated an appointing authority. In the case of non-ICSID arbitration the arbitral laws of the seat play a role in the determination of whether states or state entities have legal standing in arbitral proceedings. The arbitral laws of the examined jurisdictions do not contain any restrictions for states or state entities to engage in arbitral proceedings. Various of the examined jurisdictions, such as England and Wales, the US, the Netherlands, France and Singapore, have explicit public policy restrictions when it comes to the agreement or consent between the parties to arbitrate. This means that arbitrations in violation of public policy are prohibited. These public policy restrictions tend to be the same type of restrictions that apply to ordinary contracts. If the conduct of the investor that led to the conclusion of the agreement is fraudulent or in bad faith, the arbitration may violate national public policy. In some cases, the domestic law of the seat provides that the contract is unenforceable, for instance, because the subject matter of the dispute cannot be resolved through arbitration. The examined jurisdictions allow for arbitration in case of normal commercial disputes. Arbitration in case of criminal matters, family law or bankruptcy is disallowed and in some jurisdictions there are restrictions in the fields of intellectual property (the Netherlands, France) or employment (Sweden). None of the examined jurisdictions have restrictions for states or state entities to enter into an arbitration agreement or to initiate arbitral proceedings.

CHAPTER 6: PUBLIC INTEREST CONCERNS FOR THE HOST STATE

6.1 Introductory Remarks

The purpose of the present thesis is to examine and analyse the legal position of state shareholders in IIA in the event of claims for reflective loss arising from commercial investments (*de jure gestionis*). The objective of this thesis is to find the most appropriate method to restore the balance between private shareholders and state shareholders in case of reflective loss deriving from commercial activities. This cannot be achieved without looking at the relationship between IIA and public interest concerns for the host state. The difference in treatment between state and private investors stems *inter alia* from the fact that state investors may invest for different reasons than private investors.[716] States may try to gain political power in a host state by investing in crucial sectors of the host state's economy.[717] The host state may have valid public interest concerns regarding these types of investments.[718] The difference between investments made by a state entity and investments made by a private entity is that there is a risk that the first are not solely commercial in nature.[719] There may be a hidden political agenda behind certain types of investments that are made by public entities.[720] The influence that an investment can potentially have on vital sectors within a state's economy may create some objections on the side of the host state.[721] These objections can lie in the field of advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defence, energy, synthetic biology, military and dual use, quantum technologies, satellite and space technologies and transport. In particular, the application of the abuse of rights/abuse of process doctrine will be explored regarding cases in which a state uses private

[716] G. van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against the State', *International and Comparative Law Quarterly* (2007), Vol. 56, No. 2, p. 371-394.
[717] See e.g.: W. Miles and M. Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID', *ICSID Review* (2019), Vol. 34, No. 1, p. 1-31; F.G. Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes', *ICSID Review* (2019), Vol. 34, No. 1, p. 136-155.
[718] See also A. Giest, 'Interpreting Public Interest Provisions in International Investment Treaties', *Chicago Journal of International Law* (2017), Vol. 18, No.1, Article 9, p. 321-352.
[719] The line between acta jure gestionis and acta jure imperii is not always clear. See e.g. H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 25; *Jurisdictional Immunitites of the State (Germany v. Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, paras. 53-57; A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 99-101.
[720] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 18.
[721] A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review* (2018), Vol. 59, Issue 8, p. 2791-2824.

investments to achieve public goals.[722] Public policy is furthermore of great importance in the enforcement stage of arbitral awards. The enforcement mechanism of ICSID awards is different from non-ICSID awards. The role that public interest arguments and public policy play therefore differs when ICSID arbitration and non-ICSID arbitration are compared.

6.2 The Role of Public Interests in Investor-State Arbitration

Despite potential investment disputes that may arise, foreign investments ordinarily contribute in a positive way to the national economy of the host state.[723] Nonetheless, if a foreign investment comes from a foreign public entity, it might raise additional concerns for the host state.[724] A state can namely have valid public interest concerns regarding certain investments coming from foreign public entities.[725] These objections can lie in the field of national security, public health or the environment, but also in in the field of the public utilities sectors, such as energy and water supply, IT and telecoms, transport or waste disposal.[726] The question that subsequently follows is how public interests can be safeguarded in IIA.[727]

Investor-state arbitration has been designed to ensure and protect foreign investment and the interests of a foreign investor in the host state.[728] Nonetheless, the host state also has an interest in guarding certain objectives for the common good.[729] Public interests refer to those interests that go beyond those of the parties involved in the dispute. Generally, public interests can be defined as certain collective values, or interests benefitting a large group of individuals.[730]

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[722] See also E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 17-37.
[723] See for instance: OECD (2007), *International investment of sovereign wealth funds: are new rules needed?*; OECD (2007)*, International Investment Perspectives: Freedom of investment in a changing world*.
[724] See e.g.: I. Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good', *Manchester Journal of International Economic Law* (2016), Vol. 13, p. 50-62.
[725] A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review* (2018), Vol. 59, Issue 8, p. 2804-2805.
[726] A. Tanzi, 'On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector', The Law and Practice of International Courts and Tribunals (2012), Vol. 11, p. 47-76.
[727] A. Giest, 'Interpreting Public Interest Provisions in International Investment Treaties', *Chicago Journal of International Law* (2017), Vol. 18, No.1, Article 9, p. 333-338.
[728] D. Tamada, 'Host States as Claimants. Corruption Allegations', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 103.
[729] De Re Publica, 1, XXV, Par. 39, Cicero, in: A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review* (2018), Vol. 59, Issue 8, p. 2804.
[730] K. Drličková, 'Arbitrability and Public Interest in International Commercial Arbitration', *International and Comparative Law Review* (2017), Vol. 17, No. 2, p. 58; P. Mates, M. Barton, 'Public versus Private Interest – Can the Boudaries Be Legally Defined?', in: A.J. Belohlavek and J. Rozehnalova, *Czech Yearbook of International Law. Volume II.* Juris Publishing, 2011, p. 172; A.J. Belohlavek, 'Public Policy and Public Interest in International Law and EU Law', in: A.J. Belohlavek and J. Rozehnalova (eds). *Czech Yearbook of International Law. Volume III.* Huntington: Juris Publishing, 2012, p. 126.

The role that these values play in investor-state arbitration depends on: a) the situations in which a host state might raise public interest arguments in investor-state arbitral proceedings;[731] b) the instances in which a host state might face a form of usage or abuse of investor-state arbitration by SOEs for public goals[732] and c) the role that public policy can play as a ground for exception of the enforcement of arbitral awards.[733]

6.3 Public Interest Concerns for the Host State

The role that public interests play under domestic law is a little different compared to its position in international investment arbitration.[734] The enlarged role for SOEs in the field of investor-state arbitration also raises public interest/policy concerns.[735] These concerns will be addressed below as a host state needs to be able to bring forward valid public interest arguments in arbitration proceedings in order to protect itself from unjust investments. In order to enable state shareholders to claim damages for reflective loss it is important that the host state is sufficiently able to address valid public interest concerns. This section will first look into various public interest arguments raised by host states in IIA. Potential recommendations to enhance the role of public interests in international investment law are made in subparagraph 6.3.2.

6.3.1 Public Interest Arguments from the Host State in Investor-State Arbitration

Arbitrators have often disregarded public interest arguments from the host state by mainly looking at the rules laid down in the applicable agreement and BIT.[736] Depending on the wording of the applicable investment treaty arbitrators appear to be reluctant to take into account public policy considerations and expose the rendered arbitral awards to the risk of non-enforcement. A

[731] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration', *Law and Policy in International Business* (1990), Vol. 21, p. 392.
[732] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26-27.
[733] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration', *Law and Policy in International Business* (1990), Vol. 21, p. 402-417.
[734] I. Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good', *Manchester Journal of International Economic Law* (2016), Vol. 13, p. 57.
[735] M. Rajavuori, 'Making International Legal Persons in Investment Treaty Arbitration: State-Owned Enterprises Along the Person/Thing Distinction', *German Law Journal 2017*, Vol. 8, Nr. 5, p. 1207.
[736] Some tribunals decline jurisdiction regarding public interest issues or rule that despite public interest considerations do not take away the obligation to compensate. See for instance: *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8); *Compania del Desarollo de Santa Elena SA v. Republic of Costa Rica* (2000) 15 ICSID Rev 169; or *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, YCA 1979, at 177 et seq. See also I. Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good', *Manchester Journal of International Economic Law* (2016), Vol. 13, p. 50-62; A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', Boston College Law Review (2018), Vol. 59, Issue 8, p. 2791-2824.

fair comparison is difficult because tribunals apply different investment agreements in each case. Some investment treaties contain Non-Precluded Measures (NPM) clauses, enabling treaty parties to implement measures deemed necessary for safeguarding specific interests.[737] These exceptions can lie in various areas of public interests such as national security, the environment or financial services.[738] Article 11 of the China-New Zealand BIT for instance contains the following NPM clause:

> "*The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action directed to the protection of its essential security interests, or to the protection public health or the prevention of disease and pests in animals or plants*".[739]

If an investment treaty contains an NPM clause, tribunals must take the included public interests into consideration. However, if the treaty does not contain an NPM clause, or if the specific interest is not included in the treaty, tribunals may be reluctant to consider public interests.[740] In *CMS Gas Transmission Co. v. Argentina*, which was about the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise, in which CMS had an investment, the tribunal ruled that questions of general economic policy are not directly related to the investment.[741] A distinction was made between measures of public interest and industry-specific measures. The tribunal decided to only look at the measures that were directly related to the investment.[742] The applicable Gas Law only ensured the right to a fair and reasonable tariff and therefore did not provide any additional rights. It was acknowledged by the tribunal that the state did have the right to fix tariffs for its public services and to modify contracts in consideration of public interest.[743] Nonetheless, the tribunal ordered Argentina to pay

[737] D. Pathirana and M. McLaughlin, 'Non-Precluded Measures Clauses: Regimes, Trends and Practice', in: J. Chaisse, L. Choukroune and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Springer (2020), p. 483-488.
[738] See for instance Article 12, 18 and 20 of the 2012 US Model BIT; C.H. Gibson, 'Beyond Self-Judgment: Exceptions Clauses in US BITS', *Fordham International Law Journal* (2015), Vol. 38, Issue 1, p. 17; O. Bayrak, 'Economic Crises and the Fundamental Change of Circumstances in Investment Arbitration', *ICSID Review* (2020), Vol. 35, No. 1-2, p. 132.
[739] New Zealand and China Agreement on the promotion and protection of investments, signed on 22 November 1988, entered into force on 25 March 1989.
[740] A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review* (2018), Vol. 59, Issue 8, p. 2791-2824.
[741] *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 27.
[742] *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Decisions of the Tribunal on Objections to Jurisdiction, July 17, 2003, para. 23-35.
[743] *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Award, para. 132.

compensation for damages and the decrease in value of the shares of the investment vehicle.[744] The fact that public interests play an important role in the adjustment of the tariff did not mean that in this particular case there was no breach of the state's obligations to accord the investor the FET as guaranteed in Article II(2)(a) of the US-Argentina BIT.

However, even if there is no applicable NPM clause, public interest arguments are not necessarily discarded during arbitral proceedings, since most tribunals understand that states need to act in the public interest. The concerned state is however required to compensate the investor for the suffered loss. *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* was about an expropriation case under the US-Costa Rica BIT, whereby the tribunal ruled that expropriation may be legitimate in some cases, for instance when carried out for environmental reasons, but this does not take away the legal character of such an action and for which compensation needs to be paid to the concerned investor.[745]

Nonetheless, there are some examples of cases, in which tribunals have looked implicitly[746] or more explicitly at possibilities to take public interests into account.[747] In *Azurix Corp. v. Argentina Republic*, which was about an investment in a utility which distributes drinking water and treats and disposes of sewerage water in the Province of Buenos Aires, the tribunal stated that the so-called public purpose criterion needs to be considered.[748] The tribunal was inspired by the case law of the European Court of Human Rights (ECtHR) by ruling that when a person is deprived of his property by a measure that is imposed by the state a legitimate aim in the public interest is required.[749] However, in line with the case law of the ECtHR,[750]there must also be a reasonable relationship of proportionality between the measures, the aim and the outcome thereof. In general, there will be no proportionality if a certain individual bears an

[744] *CMS Gas Transmission Co. v. Argentina* (ICSID Case No ARB/01/8), Award, para. 468-469.
[745] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 71-72.
[746] See for instance: *Azurix Corp. v. Argentina Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/97/3), Award, 20 August 2007; or *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, para. 374–391 (Investor's due diligence).
[747] See for instance: *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No ARB/84/3), Award, 20 May 1992; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/03/19), Decision on Liability, 30 July 2010; *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL Case), Partial Award, 13 September 2001, para. 429; *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No ARB/01/08), Award, 12 May 2005, para. 359; *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v. The Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006, para. 238.
[748] *Azurix Corp. v. Argentina Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006, para. 310.
[749] *Azurix Corp. v. Argentina Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006, para. 311.
[750] See also European Court of Human Rights (21 February 1986) *James and Others v. The United Kingdom* – 8793/79 [1986] ECHR 2.

excessive burden as a result of the measures.[751] In case of such an individual and excessive burden compensation to the investor is required.[752]

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina Republic was about a similar concession agreement under the France-Argentina BIT, whereby the tribunal had to rule on claims related to abuses of regulatory authority and dealings in bad faith.[753] The tribunal dismissed the claims filed by the claimants against the Republic of Argentina.[754]

In *Glamis Gold Ltd. v. United States of America*, Glamis Gold Ltd. ("Glamis"), a Canadian mining company brought proceedings against the United States of America, claiming that the United States breached obligations owed to it under Chapter 11 of the NAFTA.[755] In particular, Glamis claimed that the United States expropriated rights possessed by Glamis to mine gold in southeastern California and that the United States denied Glamis FET in its attempt to utilize those rights.[756] The concerned area was considered to be native American sacred land containing cemeteries and other places of worship.[757] The Sacred Sites Act prohibited state agencies and private entities from causing any severe and irreparable damage to these sites unless such destruction is necessary for the public interest. The tribunal dismissed the claims by the mining company and stated that the destruction of the site, protected by the UNESCO (United Nations Educational, Scientific and Cultural Organization) World Heritage Convention, would impoverish the heritage of all the nations in the world.[758] The claim for damages under Article 1105 of the NAFTA was therefore dismissed by the tribunal.[759]

In *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* the company SPP, established in Hong Kong, entered into a contract with EGOTH, which was a public enterprise under the control of the Minister of Tourism for the development of tourist and resort facilities at the Pyramids area near Cairo.[760] The permission was withdrawn as a result of a Decree from the Minister of Culture because the Pyramids Plateau was considered to be a monumental area and according to the nature of the land had changed to be a public domain

[751] *Azurix Corp. v. Argentina Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006, para. 311.
[752] *Azurix Corp. v. Argentina Republic* (ICSID Case No ARB/01/12), Award, 14 July 2006, para. 311.
[753] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/97/3), Award, 20 August 2007, para. 68-70.
[754] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/97/3), Award, 20 August 2007, para. G.
[755] *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009, para. 1.
[756] *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009, para. 1.
[757] *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009, para. 82.
[758] *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009, para. 82.
[759] *Glamis Gold Ltd. v. United States of America* (UNCITRAL case), Award, 8 June 2009, para. 830.
[760] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No ARB/84/3), Award, 20 May 1992, para. 42-43.

owned by the State as a public property.[761] In 1979 the World Heritage Committee accepted the nomination of the pyramids fields for inclusion in the inventory of property to be protected by the UNESCO Convention and the Pyramids Oasis Project was not considered to be compatible with its obligations to protect and conserve antiquities in these protected areas.[762] The host state was entitled to withdraw permission for this public purpose, but SPP was entitled to compensation for the suffered loss after a lawful expropriation.[763]

The aforementioned ICSID case *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* regarding a concession for water distribution and wastewater treatment services in the city of Buenos Aires and some surrounding municipalities also focused on the role of public interest reasons in Argentina's refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.[764] Article V of the Argentina-Spain BIT provided that nationalisation and expropriation or any other measure having similar characteristics shall be effected only in the public interest in accordance with the law and shall not be discriminatory.[765] The tribunal ruled on the issue of the renegotiation of the contract stating that:

> "*Argentina's initiation of the renegotiation of the contract for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment, and thus constituted a violation of its obligations under the BIT*".[766]

In *CME Czech Republic B.V. v. Czech Republic* the tribunal concluded based on the Netherlands-Czech Republic BIT that neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments, unless : a) the measures are taken in the public interest and under due process of law; b) the

[761] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No ARB/84/3), Award, 20 May 1992, para. 64.
[762] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No ARB/84/3), Award, 20 May 1992, para. 64.
[763] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No ARB/84/3), Award, 20 May 1992, para. 179-183.
[764] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/03/19), Decision on Liability, 30 July 2010, para. 1.
[765] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/03/19), Decision on Liability, 30 July 2010, para. 128.
[766] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina Republic* (ICSID Case No ARB/03/19), Decision on Liability, 30 July 2010, para. 176.

measures are not discriminatory and c) the measures are accompanied by provision for the payment of just compensation.[767]

In *CMS Gas Transmission Company v. The Argentine Republic* was about the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS had an investment.[768] Argentina argued that this measure was necessary in accordance with Article XI of the US-Argentina BIT which stipulates that each Party may impose measures necessary for *inter alia* the maintenance of public order or the protection of its own essential security interests. The tribunal determined that Article XI of the US-Argentina BIT can be interpreted in such a way that it includes economic emergency as an essential security interest.[769] The text of the Article did not refer to economic crises or difficulties, but according to the tribunal there is nothing in the context of customary international law or the object and purpose of the BIT that could on its own exclude major economic crises from the scope of Article XI.[770]

The tribunal in *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v. The Argentine Republic* reached a similar conclusion:

> "*The Tribunal rejects the notion that Article XI is only applicable in circumstances amounting to military action and war. Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion*".[771]

All in all, there seems to be room for states to bring valid public interest arguments in international investment arbitration. The applicable investment treaty needs to provide a basis, but tribunals do not seem to be unwilling to take public interest arguments into consideration.

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[767] *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL Case), Partial Award, 13 September 2001, para. 24.
[768] *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No ARB/01/08), Award, 12 May 2005, para. 1.
[769] *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No ARB/01/08), Award, 12 May 2005, para. 360-361.
[770] *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No ARB/01/08), Award, 12 May 2005, para. 359.
[771] *LG&E Energy Corp./LG&E Capital Corp./LG&E International Inc. v. The Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006, para. 238.

6.3.2. The Enhancement of the Representation of Public Interests in International Investment Law

According to Schill and Djanic, it is and should be a matter of public international law and in line with Article 31(1) of the VCLT, for tribunals to take non-economic interests into consideration when interpreting IIAs.[772] One of the venues, where this principle is being increasingly applied, is the PCA. The PCA accepts cases involving at least one state, state-controlled entity or intergovernmental organisation in accordance with Article 1(1) of the PCA Rules 2012.[773] In comparison to other more commercially focused institutions, the PCA more explicitly emphasises the importance of public interests in its arbitration cases as it was established in 1899 as the first global mechanism for the settlement of disputes between states.[774] Despite this trend in cases administered by the PCA , there is in general a limited focus on public interests in international arbitration.[775]

On the other hand, if states want to ensure that sufficient appreciation will be given by arbitrators to aspects such as public interests and human rights, the most effective way – since many investment treaties currently do not provide for sufficient protection of public interest objectives – would be to include provisions that guard these objectives in the applicable agreement or BIT itself,[776] either via the negotiation of new investment agreements or the renegotiation of the current ones.[777] The difficulty here lies in the fact that currently more than 2,500 International Investment Agreements are in force, usually without any references to public interests. Furthermore, the frequent incorporation of "survival clauses" in IIAs guarantee treaty protection even after the termination of the treaty.[778] Renegotiation, therefore, often appears to be a challenge.[779] As Raftopoulos points out treaties even often refer to the possibility of the

[772] S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 29-55.
[773] Available via: https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf.
[774] https://pca-cpa.org/en/about/introduction/history/.
[775] A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', *Boston College Law Review* (2018), Vol. 59, Issue 8, p. 2793.
[776] A. Giest, 'Interpreting Public Interest Provisions in International Investment Treaties', *Chicago Journal of International Law* (2017), Vol. 18, No.1, Article 9, p. 333.
[777] S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 43.
[778] S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 44.
[779] S.W Schill and V. Djanic, 'Wherefore Art Thou? Towards a Public-Interest Based Justification of International Investment Law', *ICSID Review* (2018), Vol. 3, No. 1, p. 54-55.

amendment of the treaty text.[780] The purpose of renegotiations if the existing treaty contains a survival clause is to arrange a new set of rules for future investment disputes. If a certain investment dispute dates from before the new (version of the) treaty the old set of rules will still be applicable. This will also depend on whether the contracting parties will choose for an amendment or a replacement of the existing treaty.[781] The importance of the public interest needs to be taken into consideration.[782]

The extent to which public interest arguments can play a role in arbitral proceedings depends *inter alia* on the wording of the applicable investment treaty.[783] As discussed earlier, in IIA forum and/or treaty shopping can sometimes be regarded as an abuse of process as can for instance be seen in *Philip Morris v. Australia*.[784] Nevertheless, forum and/or treaty shopping is also common practice in international investment arbitration. If there are numerous public interests at stake because of a certain investment, there is nothing wrong if the structure of the investment vehicle is created in such a way that these public interests are sufficiently safeguarded. There is nothing wrong with corporate (re)structuring if it happens in good faith and compliant with the appropriate Environment, Social and Governance (ESG) requirements.

When it currently comes to public interest arguments in investor-state arbitration, the system protects foreign investors, whereas citizens, domestic investors, and host states are entitled to thin rights.[785] One reason – among others – is that states have limited possibilities to initiate counterclaims and citizens have limited participatory rights (e.g., via submission of Amicus Briefs).[786] As a challenge in this regard appears the identification of the right balance between providing state entities/SOEs with the option to bring their investment disputes before ICSID tribunals and the need to safeguard public interests in investor-state arbitration.[787]

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[780] E. Raftopoulos, *International Negotiation. A Process of Relational Governance for International Common Interest,* Cambridge University Press 2019, p. 223.
[781] E. Raftopoulos, *International Negotiation. A Process of Relational Governance for International Common Interest,* Cambridge University Press 2019, p. 231.
[782] See also I. Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good', *Manchester Journal of International Economic Law* (2016), Vol. 13, p. 50-62; A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', Boston College Law Review (2018), Vol. 59, Issue 8, p. 2791-2824.
[783] See also V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", *University of Pennsylvania Journal of International Law* 2018/40, p. 211-214.
[784] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12 (Award on Jurisdiction and Admissibility) (Dec. 17, 2015).
[785] See also B. Kingsbury and S.W. Schill, 'Public Law Concepts To Balance Investor's Rights With State Regulatory Actions in the Public Interest – The Concept of Proportionality', in: S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press 2010, p. 75-104.
[786] A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', Boston College Law Review (2018), Vol. 59, Issue 8, p. 2798-2799.
[787] B. Kingsbury and S.W. Schill, 'Public Law Concepts To Balance Investor's Rights With State Regulatory Actions in the Public Interest – The Concept of Proportionality', in: S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press 2010, p. 102-104.

6.4 Potential Abuse of Investor-State Arbitration by SOEs for Public Goals

A second scenario, in which public objectives play a role in investor-state arbitration occurs, when a SOE initiates arbitral proceedings and misuses a commercial dispute in order to achieve public goals.[788] The increased emphasis on (environmental) corporate social responsibility (CSR) in the international commercial arena is a promising development and IIA can play an important role in applying and enforcing climate change obligations or human rights.[789] However, it becomes problematic if such practices are in violation of the spirit of international arbitration law and can be regarded as an abuse of process.[790]

According to Gaillard, an example of such a practice can be found in *Neckarpri GmbH/EDF*, which is an ICC arbitration case, initiated by a SOE owned by the German State of Baden-Württemberg and the State itself against the French electricity company EDF.[791] The case was allegedly initiated to gain media attention after the nuclear disaster in Fukushima by bringing a claim against EDF in relation to the purchase price for the shares in a local nuclear power company.[792] The goal of gaining publicity became even clearer, when Baden-Württemberg decided to televise an expert report concerning the value of the shares six months before the submission of the report to the tribunal.[793] The German State of Baden-Württemberg and Germany argued that the excessive purchase price of EDF's shares should have been notified as state aid to the European Commission in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU).[794] This argument was later supported by the European Commission:

> "[T]*he Commission is of the opinion that the fact that a Member State refrains from notifying a transaction with an excessive purchase price paid by a wholly-owned*

[788] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26-27.
[789] See e.g.: W. Miles and M. Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of All Stakeholders: The Role of ICSID', *ICSID Review* (2019), Vol. 34, No. 1, p. 1-31; F.G. Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes', *ICSID Review* (2019), Vol. 34, No. 1, p. 136-155.
[790] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26.
[791] ICC Case No 1815/GFG/FS (unpublished). See Kyriaki Karadelis and Alison Ross, 'EDF Faces ICC Claim Over German Power Company Purchase' Global Arbitration Review (6 June 2012).
[792] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26-27.
[793] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 26.
[794] *Neckarpri GmbH v. EDF International S.A.S. v. Federal State of Baden-Württemberg*, ICC Case No. 18519/GFG, Award (6 May 2016), para. 314-321.

subsidiary of a political subdivision of that Member State to a company in another Member State results in a breach of Article 107 and Article 108 TFEU".[795]

In this particular case the claimants in *Neckarpri* disputed the purchase of EDF's shares based on *inter alia* their own failure to notify this transaction to the European Commission. This raises the question of the extent to which claimants should be permitted to claim damages for a shared failure to notify a transaction to the European Commission. The claimant's own conduct is an important factor for a tribunal to take into consideration when assessing a potential frivolous claim. However, it is questionable whether the doctrine of abuse of process is helpful in these types of situations in order to filter out proceedings whereby a SOE allegedly uses a private instrument such as investor-state arbitration in order to achieve public goals.[796] Classifying certain (procedural) conduct as an abuse of rights is a serious charge.[797] The majority of the ICC tribunal in *Neckarpri* provided an elegant solution by taking into account the claimants' conduct in the allocation of costs in its allocation of costs by considering that "*that 'a very substantial part of the arbitration costs' should be borne by the State- owned entity and the State, namely 75% of the arbitration costs including a further 4 million EURO towards EDF's legal costs and fees, plus interest*."

The PCA tribunal explained in *Philippines v. China* that the mere fact that a claimant is initiating arbitral proceedings is not sufficient to classify the action as an abuse of rights.[798] In this case, on the United Nations Convention on the Law Of the Sea (UNCLOS) the tribunal considered that this classification is only appropriate in the most blatant cases of abuse or harassment.[799] This vigilance is important in order to filter out frivolous cases effectively. The good-faith rule enables tribunals to deny jurisdiction, if the claimant is blatantly misusing its arbitral procedural rights. In other cases tribunals need to focus on the claimants' conduct in the merits stage of the procedure while levying adverse costs, minimising the risk of misuse of the system as much as possible.[800]

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[795] *Neckarpri GmbH v. EDF International S.A.S. v. Federal State of Baden-Württemberg*, ICC Case No. 18519/GFG, Written Observations of the European Commission (19 Sept 2014).
[796] E. Gaillard, 'Abuse of Process in International Arbitration', *ICSID Review* (2017), Vol 32, No. 1, p. 37.
[797] M.J. Solis, 'Good-Faith Rule Against Abusing Process by Multiplying Action', *ICSID Review* (2021), Vol. 36, No. 1, p. 83.
[798] *Philippines v. China*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility (29 October 2015).
[799] *Philippines v. China*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility (29 October 2015), para. 128.
[800] M.J. Solis, 'Good-Faith Rule Against Abusing Process by Multiplying Action', *ICSID Review* (2021), Vol. 36, No. 1, p. 97-98.

6.5 The Principle of Public Policy as a Justification for Exception of the Enforcement of Arbitral Awards

Public interests can play a critical role in the execution stage of arbitral awards. The enforcement of arbitral awards can be exempted on the grounds of public interest or public policy. If an arbitral award has been rendered and the defendant does not comply with it, the award needs to be enforced and executed via the domestic legal system of choice.[801] In the case of enforcement via national courts, the claimant will choose the state where the defendant's assets and resources are located. The national court of the concerned state can then also bring up public policy objectives in relation to the enforcement of the award.[802] The risks of public policy exceptions to recognition and enforcement are self-evident. As presented by Garcia de Enterra, the concept of public policy has been interpreted in this context as: "*an invitation to legal anarchy,* [whereby] *each nation* [is] *pursuing its own policies without regard to* [any] *notion of community interests or the interests of other nations*."[803] On the other hand, this approach disregards a key benefit of public policy that lies in its function as a last safeguard.[804] In case of IIA this benefit is even more crucial because an appropriate appeal mechanism is often lacking.

There is a difference between non-ICSID and ICSID awards regarding the possibilities of invoking public policy exceptions at the enforcement stage before domestic legal courts.[805] The public policy exception for non-ICSID awards is contained in Article V, Section 2(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Non-ICSID awards are thus in principle exposed to judicial review on this issue.[806] In addition, non-ICSID awards can be subject to setting aside procedures before the national courts of the seat of arbitration. In terms of assessing for instance the arbitrability of a case, public policy can also play a role, depending on the applicable arbitration act (domestic law).[807]

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[801] Depending on the situation, other enforcement options are e.g. diplomatic protection, ICJ proceedings or even in withholding World Bank benefits (ICSID).
[802] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration', *Law and Policy in International Business* (1990), Vol. 21, p. 389-440.
[803] Javier Garcia de Enterria, 'The Role of Public Policy in International Commercial Arbitration', Law and Policy in International Business (1990), Vol. 21, p. 440.
[804] B. Kingsbury and S.W. Schill, 'Public Law Concepts To Balance Investor's Rights With State Regulatory Actions in the Public Interest – The Concept of Proportionality', in: S.W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press 2010, p. 79-85.
[805] I. Uchkunova and O. Temnikov, 'Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?', *ICSID Review* (2013), Vol. 29, No. 1, p. 187-211.
[806] Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards*, Globe Law and Business (London) 2015.
[807] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr.10.78-10.84.

An example of judicial review of a non-ICSID award in multiple jurisdictions is the case of *Deutsche Telekom AG v. India*. This PCA case was about the annulment of an agreement between an indirect subsidiary of Deutsche Telekom (Devas Multimedia Private Limited) and the Indian SOC Antrix Corporation Limited for the lease of S-band electromagnetic spectrum on two satellites.[808] Initially, ICC arbitration proceedings were brought by Devas against Antrix based on an arbitration clause in the agreement for the lease of the space segment capacity on the concerned satellites, whereby the ICC tribunal ruled that Antrix was liable for the wrongful repudiation of the agreement.[809] In the PCA arbitration proceedings initiated by Deutsche Telekom AG under the later denounced Germany-India BIT[810] the tribunal decided that the conduct of Antrix must be attributed to India since the company was exercising a governmental function in accordance with Article 5 of the International Law Commission Articles on State Responsibility (ILC- Articles) and it was under the direction and control of India pursuant to Article 8 of the ILC Articles.[811] India argued that the annulment was necessary for essential security interests based on the policy decision to reserve capacity for non-commercial use by military and other security agencies.[812] The tribunal found that India had breached the FET standard provided in Article 3(2) of the BIT.[813] In the enforcement stage India has challenged and resisted enforcement of the awards around the world based on public policy exceptions.[814]

In Switzerland the Swiss Federal Supreme Court dismissed India's request for an additional stage of the proceedings on the merits under Article V of the New York Convention, finding that the awards were not open for revision.[815] In Singapore the arguments raised by India to resist enforcement were precluded by Singapore's Court of Appeal based on the doctrine of transnational issue estoppel because the same grounds were already dismissed by the Swiss Federal Supreme Court.[816] In Germany the Higher Regional Court of Berlin (*Kammergericht*) granted Deutsche Telekom's request for partial enforcement of the PCA awards because the

[808] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 (27 May 2020), Final Award, para. 8.
[809] *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK (1 July 2011), Final Award, para. 6 and 401.
[810] Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments, signed on 10 July 1995, entered into force on 13 July 1998, terminated on 3 June 2017.
[811] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 (13 December 2017), Interim Award, para. 306; United Nations International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001). Available via: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.
[812] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 (13 December 2017), Interim Award, para. 8.
[813] *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 (27 May 2020), Final Award, para. 9.
[814] https://www.cliffordchance.com/insights/resources/blogs/arbitration-insights/2024/02/moving-towards-an-international-legal-order-transnational-issue-estoppel-in-the-republic-of-india-v-deutsche-telekom-ag.html.
[815] Tribunal fédéral 11 December 2018 4A_65/2018 (fr).
[816] *The Republic of India v. Deutsche Telekom* AG [2023] SGCA(I) 4.

awards do not violate the basic principles of German law and the tribunal's interpretation of Article 12 of the German-India BIT on essential security interests was not against public policy.[817] This decision was upheld by the German Supreme Civil Court.[818] Lastly, the US District Court for the District of Columbia initially stayed proceedings of enforcement pending the Swiss set-aside and revision procedure, but eventually dismissed India's *forum non convenience* argument, India's arguments on the arbitrability of the matter and its request for additional proceedings on the merits under Article V of the New York Convention.[819]

When it comes to ICSID awards, public policy has already been omitted as a basis to deny enforcement.[820] Furthermore, the ICSID system provides for its own annulment procedure, whereby setting aside procedures before national courts cannot be used as an option.[821] In order to annul an ICSID award, a party needs to submit a request for annulment of the award to the Secretary-General of ICSID , but only based on the following grounds listed in Article 52(1) of the ICSID Convention:

> "*(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based*".

The annulment request will be dealt with by an ad hoc annulment committee [Article 52(2)-(6)]. In contrast to non-ICSID arbitration, the national courts of the seat of arbitration are not competent to set aside an award.[822] The rules of Articles 53, 54 and 55 furthermore contain a unique framework on the enforcement of ICSID awards. It was confirmed in the *Vivendi v. Argentina* case that: "[o]*ne of the fundamental issues which the drafters of the ICSID Convention*

[817] *Deutsche Telekom AG v. The Republic of India*, Kammergericht Berlin 26 January 2023, 12 Sch 7/21.
[818] *The Republic of India v. Deutsche Telekom AG, Bundesgerichtshof*, 12 October 2023, I ZB 12/23.
[819] *Deutsche Telekom AG v. The Republic of India*, United States District Court for the District of Columbia, Case No. 1:21-cv-01070-RJL.
[820] I. Uchkunova and O. Temnikov, 'Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?', *ICSID Review* (2013), Vol. 29, No. 1, p. 187-211.
[821] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr.10.10-10.13.
[822] N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration. Student Version*, 7th edition (Oxford University Press 2023), nr. 11.132-11.138.

were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention."[823]

Recognition and enforcement takes place before the courts of the parties to the Convention.[824] In accordance with Article 54 of the ICSID Convention the ICSID award should be treated as a "*final judgment of the courts of the State where the award is being enforced*" as long as it "*concerns only the enforcement of pecuniary obligations*".[825] As indicated by the ad hoc Committee in *Sempra v. Argentina*:

> "[T]*here is a fundamental difference between enforcement of awards under the New York Convention and the ICSID Convention, in that Article 5 of the New York Convention envisages certain grounds on which the award may be subject to judicial review at a national level and which may entitle a State to refuse enforcement*".[826]

There is no ground for judicial review of a final ICSID award. The only reasons for a state to decline execution are if the concerned assets are immune under its domestic law or if enforcement has been stayed in accordance with Article 52(5) of the ICSID Convention.[827]

In summary, public policy has the potential to play a role in the recognition and enforcement of awards, but in principle only in the case of non-ICSID awards.[828] ICSID awards cannot be subject to judicial review before national courts. Therefore, increased focus should be attributed to public interests in the arbitration procedure. This observation refers to all investor-state arbitration proceedings and not only to proceedings initiated by SOEs.

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[823] *Compania de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3 (Second Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (4 November 2008) para 35.
[824] I. Uchkunova and O. Temnikov, 'Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?', *ICSID Review* (2013), Vol. 29, No. 1, p. 187-211.
[825] Article 54(1) of the ICSID Convention: "*Each Contracting State shall recognize 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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state*".
[826] *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (5 March 2009) para 40.
[827] I. Uchkunova and O. Temnikov, 'Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?', *ICSID Review* (2013), Vol. 29, No. 1, p. 190.
[828] I. Uchkunova and O. Temnikov, 'Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?', *ICSID Review* (2013), Vol. 29, No. 1, p. 210-211.

6.6 Conclusion

To restore balance between private and state shareholders in the event of reflective loss arising from commercial activities, the relationship between IIA and the host state's public interest concerns must also be balanced. Due to the different motives between private and state investors, a foreign investment made by a foreign public entity on the host state's territory may raise additional concerns for the host state. A state can namely have valid public interest concerns if a foreign state entity makes an investment in vital sectors of the host state's economy such as national security, public health or the environment, but also in the field of the public utilities sectors, such as energy and water supply, IT and telecoms, transport or waste disposal. The same applies in case a foreign SOE initiates arbitral proceedings against the host state with the aim to misuse a commercial dispute for the achievement of public goals on the host state's territory.

Public interests can be defined as certain collective values, or interests benefiting a large group of individuals, which the host state needs to safeguard for the common good. To avoid exposing an arbitral award to the risk of non-enforcement, arbitrators tend to disregard public interest arguments raised by the host state by mainly focusing on the established rules by the applicable agreement and BIT. Contrary to this practice, the PCA has highlighted the importance of public, non-economic interests. The question that subsequently arises is how public interests can be safeguarded in IIA. Some investment treaties contain NPM clauses, enabling treaty parties to implement measures deemed necessary for safeguarding specific interests. These exceptions can lie in various areas of public interests such as national security, the environment or financial services. By including NPM clauses in investment treaties states force tribunals to take the included public interests into consideration. Tribunals will then only assess if the concerned public interest measure has been implemented in good faith.

Even though public policy impedes the enforcement of non-ICSID awards, the *a priori* consideration of public interest concerns of the host state can be achieved a) through their inclusion by the parties to the treaty in the applicable agreement or BIT itself and b) through the focus of tribunals on the claimants' conduct in the merits stage of the procedure while levying adverse costs, minimising the risk of misuse of the system as much as possible. The good-faith rule could in extreme cases enable tribunals to deny jurisdiction, but only if the claimant is blatantly misusing its arbitral procedural rights.

CHAPTER 7: COUNTERBALANCING PUBLIC INTEREST CONCERNS FOR THE HOST STATE THROUGH INVESTMENT SCREENING

7.1 Introductory Remarks

The previous chapter focused on the relationship between IIA and public interest concerns for the host state. In order to find the most appropriate method to restore the balance between private shareholders and state shareholders in case of reflective loss deriving from commercial activities, it is important to explore how valid public interest concerns from the host states can be mitigated. One solution is to include NPM clauses in investment treaties in order to force tribunals to take the included public interests into consideration. This chapter elaborates on the issue of investment screening, which is a useful instrument for the host state to investigate the nature of the investment and conduct of the investor and how it acts as a counterbalance mechanism mitigating the public interest concerns for the host state. The importance of investment screening has increased significantly over the last few decades.[829] FDIs may raise valid public interest concerns for the host state, arising from the nature of the investment and its influence on vital sectors within the host state's economy.[830] Enhancing the position of the state shareholder in IIA when bringing claims for reflective loss against a host state must not undermine the host state's duty to act in the public interest of its people. Investment screening measures enable host states to filter out certain investments that could potentially harm to public interests. The OECD reported that investment screening mechanisms can be traced back to the 1960s and that since 2018 more than half of its members have implemented investment screening mechanisms in some shape or form.[831] Initially investment screening mechanisms were implemented in response to a variety of emerging national security concerns about foreign

[829] OECD, *Thirty-first Report on G20 Investment Measures* (2024), p. 3. Available via: https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/11/31st-oecd-unctad-report-on-g20-trade-and-investment-measures_20f6f241/ea409cda-en.pdf.
[830] I. Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good', *Manchester Journal of International Economic Law* (2016), Vol. 13, p. 57.
[831] OECD, *Investment Screening in times of COVID-19 – and beyond* (2020), p. 2. Available via: https://www.oecd.org/en/publications/investment-screening-in-times-of-covid-19-and-beyond_aa60af47-en.html.

investments.[832] This was for instance the main reason why the US introduced screening mechanisms for FDIs in 1975.[833] The OECD recognises that:

> "*governments may need to take measures to safeguard essential security interests and public order* […] *including policies which relate to national security risks associated with the acquisition, ownership or control of assets*".[834]

Over time the objectives of investment screening mechanisms have broadened from national security concerns alone to interests of security and public policy.[835] This means that investment screening mechanisms are used not only to protect national security, but also to safeguard national economic interests, public health and the environment, for instance.[836] This chapter will focus on investment screening measures as implemented by host states in 10 domestic jurisdictions as well as on the role of investment screening in international investment law as a safeguard for host states.

7.2 Domestic Law Restrictions on Foreign Direct Investment

The enlarged role for SOEs in the field of investor-state arbitration also raises public interest/policy concerns. Host states may have valid public interest concerns, when SOEs would like to invest in certain sensitive sectors of the economy. Therefore, it is important for host states, especially when dealing with foreign SOEs/SWFs, to scrutinise upfront if a potential investor and its investments are *bona fide* and truly commercial in nature. In general, investment screening or KYI (Know Your Investor) screening mechanisms are crucial in order to allow state entities to seek recourse in IIA for the suffered loss in a commercial investment.

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[832] OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies* (2020), para. 557. Available via: https://www.oecd.org/en/publications/acquisition-and-ownership-related-policies-to-safeguard-essential-security-interests_d35bdcb0-fr.html.
[833] G. Lichtenbaum and D.J. Ribner, 'Foreign Investment Screening in the USA', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening* (CELIS), p. 363-364.
[834] OECD, *Thirty-first Report on G20 Investment Measures* (2024), p. 14.
[835] S. Hindelang and A. Moberg, 'Towards a "Common European Law on Investment Screening (CELIS)"', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening* (CELIS), p. 2.
[836] OECD, *Acquisition- and ownership-related policies to safeguard essential security interests. Current and emerging trends, observed designs, and policy practice in 62 economies* (2020), para. 221-223.

Most of the regulation on SOEs is established as domestic law by individual states at a national level.[837] Various host states around the world have introduced screening mechanisms for FDIs to spot potential public interest concerns regarding a certain investment before the investment is made. This issue will also be addressed below in the context of the domestic law regimes.

7.2.1 China

Historically, China has a tradition of strong screening mechanisms of FDIs.[838] The screening of FDIs is regulated by the Foreign Investment Law (FIL) 2019 of the People's Republic of China (PRC).[839] A foreign investment transaction is subject to foreign investment screening if it offers to foreign investors "actual control" of the target enterprise and it falls under the scope of sectors related to: a) national defence (such as arms and arms-related industries or in geographic locations in close proximity to military facilities or defence-related industries facilities) or b) national security (such as critical agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and internet products and services, financial services, and key technologies).

Foreign investors gain "actual control" over a target enterprise through their investment if a) they hold more than 50 percent of the equity interest in such enterprise, b) if they hold less than 50 percent of the equity interest in such enterprise, but they can exercise significant influence either at the shareholder or board level by virtue of voting rights or under other circumstances over the operational decision-making, personnel, finance and technology of the target enterprise. In terms of the review of the applications, the Foreign Investment Screening Office may consider additional criteria that are not explicitly stipulated under relevant laws and regulations. These criteria refer to: a) direct or indirect connections of the foreign investor to any foreign government or any political parties of a foreign country, b) whether the customers of the Chinese enterprise involved are SOEs or entities in military, defence, financial, transportation or public utilities

[837] See also: M. Rajavuori, 'Making International Legal Persons in Investment Treaty Arbitration: State-Owned Enterprises along the Person/Thing Distinction', *German Law Journal* 2017, Vol. 18, No. 5, pp. 1183-1228.
[838] M. Ruhl, 'The national security review in China's new foreign investment legal regime', in: Y. Li, F. Lin and C. Bian, *National Security in International and Domestic Investment Law. Dynamics in China and Europe*, London and New York: Routledge 2024, p 108
[839] M. Ruhl, 'The national security review in China's new foreign investment legal regime', in: Y. Li, F. Lin and C. Bian, *National Security in International and Domestic Investment Law. Dynamics in China and Europe*, London and New York: Routledge 2024, p 107.

sectors, c) whether the products or services provided by the Chinese enterprise involved are otherwise readily available in the Chinese market and d) whether the Chinese enterprise involved has access to the important data of its customers or collects any personal data within China.[840]

7.2.2 England and Wales

In England, the screening of FDIs has been regulated by the UK's National Security and Investment Act 2021 (NSIA), which was established after Brexit and entered into force on 4 January 2022.[841] The screening of FDIs will be carried out by the newly established Investment Security Unit within the Department of Business, Energy and Industrial Strategy.[842] The NSIA introduces a new notification regime in relation to certain types of acquisitions in one of the 17 sensitive sectors of the UK economy.[843] These sectors are:

> "*advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defence, energy, synthetic biology, military and dual use, quantum technologies, satellite and space technologies and transport*."[844]

In accordance with Article 13(1) of the NSIA every notifiable acquisition that is completed without the approval of the Secretary of State is void.[845] This applies to acquisitions by private parties as well as acquisitions by SOEs or foreign states. FDIs by publicly owned bodies are subject to the same scrutiny as private entities if the investment is made in one of the 17 sensitive sectors and the thresholds as laid down in the NSIA will be exceeded.

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[840] https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-china.
[841] https://www.gov.uk/government/collections/national-security-and-investment-act.
[842] K.S. Desai, 'The National Security and Investment Act 2021', *European Competition and Regulatory Law Review* (2021), Vol. 4, p. 416-422.
[843] K.S. Desai, 'The National Security and Investment Act 2021', *European Competition and Regulatory Law Review* (2021), Vol. 4, p. 417.
[844] https://www.shlegal.com/news/f-is-for-foreign-investment-uk-s-new-foreign-investment-screening-regime-what-you-need-to-know
[845] K.S. Desai, 'The National Security and Investment Act 2021', *European Competition and Regulatory Law Review* (2021), Vol. 4, p. 416.

7.2.3 European Union

The EU has established its own framework for the screening of FDIs via Regulation (EU) 2019/452 (FDI Screening Regulation).[846] In accordance with Article 288 of the Treaty on the Functioning of the EU a regulation has general application. It is binding in its entirety and directly applicable in all Member States of the EU.[847] Regulations are the most centralising of all legislative instruments of the EU and they automatically form part of the domestic legal order of each Member State from the moment they enter into force.[848]

The purpose of the FDI Screening Regulation is to establish a framework for the screening of FDIs into the EU on the grounds of security or public order as described in Article 1(1).[849] The FDI Screening Regulation does not require member states to implement screening measures for FDIs, but it does impose minimum requirements regarding the screening, notification and cooperation mechanisms, if member states choose to impose screening measures on FDIs.[850] The Regulation is applicable to FDIs from third countries, which means that it is applicable to investments coming from undertakings (enterprises/investment vehicles) organised under the laws of a country outside the EU [Article 2(7) of the FDI Screening Regulation].[851]

In accordance with Article 4 of the FDI Screening Regulation, Member States may consider the potential effects of the investment on inter alia critical infrastructure, critical technologies, supply and critical inputs, access to sensitive information and the freedom and pluralism of the media.[852] Article 4(2)(a) stipulates that Member States and the European Commission may also take into account whether the concerned foreign investor is state-owned or in any way directly or indirectly owned by the government. This article refers to foreign investors owned by foreign governments. Recital 13 of the FDI Screening Regulation furthermore addresses the issue whether or not an entity is state-owned as one of the relevant

[846] REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.
[847] S. Hindelang and A. Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment', *Common Market Law Review* (2020), Vol. 57, Issue 5, p. 1445-1446.
[848] See also: D. Chalmers, G. Davies and G. Monti, *European Union Law*, Cambridge University Press (3rd edition 2014), p. 112.
[849] See also S. Hindelang and A. Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment', *Common Market Law Review* (2020), Vol. 57, Issue 5, p. 1427-1460.
[850] G. Oosterhuis and O. Korneeva-Offerman, 'Wet Vifo tegen de achtergrond van de Europese regelgeving', *Nederlands Tijdschrift voor Europees Recht* 2013, nr. 1/2, p. 7-14.
[851] S. Hindelang and A. Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment', *Common Market Law Review* (2020), Vol. 57, Issue 5, p. 1435.
[852] S. Hindelang and A. Moberg, 'The Art of Casting Political Dissent in Law: The EU's Framework for the Screening of Foreign Direct Investment', *Common Market Law Review* (2020), Vol. 57, Issue 5, p. 1430.

factors in determining if an investment affects public security or the public order. In these cases, extra vigilance may be required during the FDI screening process.

In 2024 the European Commission proposed a new EU regulation on the screening of foreign investments.[853] The proposed regulation introduces minimum requirements for the Member States which will make it compulsory to apply screening mechanisms in certain sectors relevant for security or public order.[854] Examples of these sectors are sectors related to critical infrastructure, cybersecurity, energy, air transport or dual-use goods.[855] Article 3 of the draft FDI regulation obliges Member States to establish a screening mechanism. The minimum requirements for this screening mechanism are introduced in Article 4. Member States need to introduce adequate procedures for an in-depth investigation to determine whether the concerned foreign investment is likely to negatively affect security or public order. Furthermore, the screening authority needs to ensure compliance and needs to be empowered to start FDI screening by its own initiative for at least 15 months after the completion of investments that are not subject to an authorisation requirement, but may affect security or public order.[856] This is up to the discretion of the concerned screening authority. Foreign investments subject to an authorisation requirement need to be screened in advance.[857] The concerned investor needs to have the possibility to seek judicial recourse against the screening decision.[858] Member States are obliged to monitor and notify the concerned investments to the European Commission under the proposed Article 5. The European Commission shall determine in accordance with Article 13 of the proposed regulation whether a certain type of investment is likely to have a negative impact on security and/or public order.[859] This will be in particular the case if the investment is likely to negatively affect the security, integrity and functioning of critical infrastructure (physical or virtual), the availability of critical technologies, the continuity of supply of critical inputs, the protection of sensitive information and the freedom and pluralism of the media.[860] The information related to the historical conduct and background foreign investor will also be taken into consideration in accordance with Article 13(4) of the proposed regulation.

[853] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Screening of Foreign Investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, COM(2024) 23 final, 2024/0017(COD).
[854] COM(2024) 23 final, p 11.
[855] COM(2024) 23 final, p 5-9
[856] COM(2024) 23 final, p 32 (Article 4(2)(c)).
[857] COM(2024) 23 final, p 32 (Article 4(2)(g)).
[858] COM(2024) 23 final, p 32 (Article 4(2)(e)).
[859] COM(2024) 23 final, p 42.
[860] COM(2024) 23 final, p 43.

The current FDI Screening Regulation only provides for a framework. It is up to the individual member states to decide if and to what extent FDI screening will be implemented. The European Commission however stimulates the individual member states to incorporate these mechanisms in the applicable domestic law.[861] The extent to which member states are imposing screening measures on FDIs varies across the EU. France has for instance implemented stricter mechanisms than the Netherlands as will be discussed below.

7.2.4 France

The FDI Screening Regulation of the EU is directly applicable in France. The main principle in France is the free flow of investments and financial relations between France and other countries.[862] However, under domestic law there are exceptions to the freedom of investment that serve the security of national interests in accordance with Article L 151-1 of the French Monetary and Financial Code *(Code monétaire et financier)* or MFC. The French Ministry of Economy is authorized to screen FDIsin France that might jeopardise public policy, public security or national defence.

The central rule for the screening of foreign investments is Article L 151-3MFC. Certain FDIs in entities governed by French law require prior approval depending on the respective sector of the investment.[863] The types of investments that need approval can be categorized as "sensitive" or "extra-sensitive".[864] The level of sensitivity is being assessed on a case-by-case basis, depending on the characteristics of each transaction (such as the sector concerned by the investment, state of the market, etc.).[865] The difference between extra-sensitive and sensitive sectors in terms of screening is related to the indirect acquisition of control pursuant to Article 153-4 MFC. In the case of indirect acquisition, prior authorization is only required if the

[861] G. Oosterhuis and O. Korneeva-Offerman, 'Wet Vifo tegen de achtergrond van de Europese regelgeving', *Nederlands Tijdschrift voor Europees Recht* 2013, nr. 1/2, p. 10.
[862] P. Strompfe, 'Foreign Investment Screening in Germany and France', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 99.
[863] C. Miles, 'Foreign investment screening mechanism in France', in: Y. Li, F. Lin and C. Bian, *National Security in International and Domestic Investment Law. Dynamics in China and Europe*, London and New York: Routledge 2024, p. 128.
[864] P. Strompfe, 'Foreign Investment Screening in Germany and France', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 99-100.
[865] C. Miles, 'Foreign investment screening mechanism in France', in: Y. Li, F. Lin and C. Bian, *National Security in International and Domestic Investment Law. Dynamics in China and Europe*, London and New York: Routledge 2024, p. 134.

investment falls under the scope of an extra-sensitive sector.[866]

The sensitive sectors are listed in Article R.151-3(I-III) MFC and they encompass businesses dealing with the gambling industry (except casinos), private security services, the research and development or manufacture of means of a) fighting the illegal use of pathogens or toxic substances by terrorists and b) preventing the adverse health-related consequences of such case, wiretapping and mail interception equipment, auditing and certification services relating to the security of information technology systems and products, goods or services relating to the security of the information, systems of public or private-sector companies managing critical infrastructures and dual civil and military technology goods and services. "Extra-sensitive" sectors include a) businesses related to cryptology goods and services, defence secret information, research, development and sale of weapons, munitions, powder or explosive substances to be used for military ends or war and other restricted materials, b) businesses involving companies that have entered directly or through a subcontractor into a design or equipment supply contract with the French Defence Ministry concerning dual-use items and technology or the prementioned items, c) businesses involved in research and development in the fields of cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors and dual-use items and technologies listed in Annex I to Council Regulation (EC) of 5 May 2009 and d) businesses related to data hosting.[867] Moreover, "extra sensitive" sectors constitute the facilities, equipment, products or services, including the safety and proper functioning of them, which are essential for the protection French national interests in terms of public policy, public security or national defence. More specifically, businesses linked to a) integrity, safety and supply of water in accordance with public health standards, b) integrity, safety and supply of energy resources (including electricity, gas, and hydrocarbons) c) integrity, safety and exploitation of transport networks and services d) integrity, safety and exploitation of electronic communication networks and services and e) integrity, safety and exploitation of an installation, facility or structure of critical importance within the meaning of Articles L 1333-1 and L 1332-2 of the French Defence Code and Public health protection are considered "extra sensitive".[868]

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[866] P. Strompfe, 'Foreign Investment Screening in Germany and France', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 105.

[867] P. Strompfe, 'Foreign Investment Screening in Germany and France', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 102-103.

[868] P. Strompfe, 'Foreign Investment Screening in Germany and France', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 102-103.

7.2.5 Hong Kong

In Hong Kong, there is no general domestic legislation to screen FDIs .[869] However, there is a mandatory and suspensory foreign investment screening procedure for FDIsin the broadcasting and telecommunication sector, specifically in relation to the influence and control of the Domestic Free TV Licensee and Sound Broadcasting Licensee. Transactions that meet the relevant criteria in these sectors need to be notified to the relevant authority and cleared before they can be completed.[870]

7.2.6 The Netherlands

In the Netherlands, the screening of FDIs in accordance with the FDI Screening Regulation of the EU has been clarified in the *Uitvoeringswet screeningsverordening buitenlandse directe investeringen*.[871] The Ministry of Economic Affairs and the Ministry of Justice are jointly responsible for the screening process. The national act did not contain additional provisions on FDIs until 2023 when the *Wet veiligheidstoets investeringen, fusies en overnames* (Dutch Foreign Direct Investment Screening Act , Vifo Act)) came into force. The Vifo Act introduces a general FDI Screening obligation related to acquisition activities of so-called vital providers (*vitale aanbieders*) in the Dutch economy, corporate campuses in which via public and/or private initiative new technologies are developed of economic or strategic importance for the Netherlands or businesses that are involved in the development of sensitive technology.[872] The aim is to prevent unwanted influence from public and private entities from third countries.[873] Transactions that are not notified to and, where necessary, approved are deemed void (Article 28 of the Vifo Act), except if the transaction has been carried out through a securities settlement system (sss). The reason behind this exception is to safeguard the financial trade in stocks via stock exchanges.[874] The investor is nonetheless obliged in these cases to reverse the transaction upon request of the authorities and the transaction is considered to be voidable.[875] In accordance with Article 7 of the Vifo Act this includes companies in the field of

[869] https://www.lexisnexis.co.uk/legal/guidance/hong-kong-fdi-control.
[870] https://resourcehub.bakermckenzie.com/en/resources/global-private-ma-guide-limited/asia-pacific/hong-kong/topics/quick-reference-guide
[871] Available at: https://wetten.overheid.nl/BWBR0044449/2023-06-01.
[872] H. Koster, 'Investeringstoetsing door de Wet veiligheidstoets investeringen, fusies en overnames', *Onderneming en Financiering* 2023 (31) 1, p. 10-20.
[873] *Kamerstukken* II 2020/21, 35880, nr. 3 (MvT), p. 38.
[874] H. Koster, 'Investeringstoetsing door de Wet veiligheidstoets investeringen, fusies en overnames', *Onderneming en Financiering* 2023 (31) 1, p. 19.
[875] Article 28(2) and 28(3) of the Vifo Act.

(residual) heat transportation, nuclear energy, aviation, shipping and the infrastructure for the financial market.[876] Other categories of vital providers can be appointed by Royal Decree in accordance with Article 7(11) of the Vifo Act. When it comes to sensitive technology the legislator has indicated that dual use goods, which can also be used for military purposes are an example of this category.[877] In line with the FDI Screening Regulation the screening will be carried out on the grounds of national security or public order by the *Bureau Toetsing Investeringen* (Investment Screening Bureau), if the investor obtains significant influence (*significante invloed*) in one of the aforementioned sectors.[878] In the explanatory memorandum (*memorie van toelichting*) the legislator explains that (additional) notification is required, when the investor obtains a 10%, 20% or 25% stake in the business.[879]

The FDI screening, as introduced in the Vifo Act, is not applicable to sectors like mining, electricity and gas and telecommunications, because these sectors already had specific screening mechanisms in place.[880] These sector specific types of screenings will always prevail over the general screening in the Vifo Act.[881] FDI Screening in the Netherlands is applicable to both private and public entities. The outcome of the screening procedure can be negative, if foreign public entities try to obtain unwanted influence, but the nature of the investor as such (public or private) does not necessarily matter as much as the nature of the investment.[882]

7.2.7 Singapore

On 28 March 2024, the Significant Investment Review Act 2024 (SIRA) came into force in Singapore. This legislation introduces a new investment management regime for the regulation of entities critical to Singapore's national security interests. According to section 17 (1) of SIRA, the Minister may designate any entity as a Designated Entity if the entity fulfils one of the following criteria: a) is incorporated, formed, or established in Singapore, b) carries out any

[876] H. Koster, 'Investeringstoetsing door de Wet veiligheidstoets investeringen, fusies en overnames', *Onderneming en Financiering* 2023 (31) 1, p. 14.
[877] *Kamerstukken* II 2020/21, 35880, nr. 3 (MvT), p. 17.
[878] *Kamerstukken* II 2020/21, 35880, nr. 3 (MvT), p. 7; J. de Kok and A. Crespo van de Kooij, 'Het Nederlandse stelsel voor investeringstoetsing', *Mededingingsrecht in de praktijk*, SDU, Nr. 4, Oktober 2022, p. 4-11; H. Koster, 'Investeringstoetsing door de Wet veiligheidstoets investeringen, fusies en overnames', *Onderneming en Financiering* 2023 (31) 1, p. 16.
[879] *Kamerstukken* II 2020/21, 35880, nr. 3 (MvT), p. 36-37.
[880] These mechanisms are introduced in the *Mijnbouwwet* (Mining Act), *Electriciteitswet* (Electricity Act), *Gaswet* (Gas Act) and the *Telecommunicatiewet* (Telecommunications Act).
[881] G. Oosterhuis and O. Korneeva-Offerman, 'Wet Vifo tegen de achtergrond van de Europese regelgeving', *Nederlands Tijdschrift voor Europees Recht* 2013, nr. 1/2, p. 10.
[882] *Kamerstukken* II 2020/21, 35880, nr. 3 (MvT), p. 41.

activity in Singapore or c) provides any goods and services to any person in Singapore, and the Minister considers the designation necessary in the interest of Singapore's national security. Under this regime, designated entities must comply with various ownership and control requirements.[883]

Prospective investors into designated entities need to notify the Minister within seven days after becoming a 5% controller [sections 18 and 16(2) of SIRA] and obtain the Minister's approval before becoming a 12%, 25% or 50% controller or an indirect controller, or acquiring as a going concern (parts of) the business or undertaking [sections 19 (1) and 16(2) of SIRA]. Existing investors in Designated Entities are required to obtain the Minister's approval before ceasing to be a 50% or 75% controller [sections 19 (1) and 16(2) of SIRA].[884]

7.2.8 South Africa

In South Africa, FDIs are regulated by the Protection of Investment Act 2015 (PIA). The national Act was created to provide protection to foreign investments on a domestic law level, but also to replace the numerous bilateral investment treaties that were unilaterally terminated by South Africa.[885] The PIA defines an investment in Article 2(1) as any lawful enterprise committing resources of economic value, but also the holding or acquisition of shares in such an enterprise is specifically listed as an investment.[886] The Immigration Act of 2002 furthermore requires foreign investors to obtain a business visa before they have legal access to South Africa for the purpose of their investment. Under Article 12 of the PIA South Africa introduces a right to regulate by determining that the government may take measures that are necessary for the protection of the security interests including the financial stability of the country. This means that there is room for the Republic of South Africa to scrutinise FDIs for the protection of security interests.[887] The issue of state-owned entities and FDIs coming from governmental bodies is not addressed specifically in the PIA. In that regard public investments will be assessed and regulated in a similar manner as private investments based on the premise that domestic legislation is more

[883]https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4459/singapore-introduced-a-screening-regime-for-national-security.
[884] https://www.nortonrosefulbright.com/en/knowledge/publications/bc19a16c/proposed-statutory-developments-in-singapore-foreign-direct-investment-regime.
[885] See also. T. Gazzini, 'Travelling the National Route: South Africa's Protection of Investment Act 2015' *African Journal of International and Comparative Law* 2018, Vol. 26, No. 2, p. 242-263.
[886] https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/south-africa.
[887] T. Gazzini, 'Travelling the National Route: South Africa's Protection of Investment Act 2015' *African Journal of International and Comparative Law* 2018, Vol. 26, No. 2, p. 244-245.

appropriate than international legal instruments to regulate foreign investment.[888]

The Competition Amendment Act of 2018 will contain a new section 18A under which the President is to constitute a special committee to assess if a merger involving a foreign acquiring firm may harm the national security interests of South Africa.[889] The Minister of Trade and Industry will publish a decision in the Gazette to permit or prohibit the concerned merger based on the opinion of the special committee.[890] In this decision all the relevant factors regarding the potential impact of the merger on issues such as the use of sensitive technology, the security of the infrastructure, the supply of critical goods and services and the economic and social stability of South Africa are taken into account.[891]

7.2.9 Sweden

The FDI Screening Regulation of the EU directly applies to Sweden as it is an EU Member State. On the 1st of December 2023 the domestic Screening of Foreign Direct Investments Acts *(Lag om granskning av utländska direktinvesteringar)* or SFDIA came into force.[892] Until then FDIs were not being screened, but for some investments there was a notification obligation under the Protective Security Act.[893] The SFDIA introduces a screening mechanism by the screening authority that is designated by the Government in accordance with section 6 of the SFDIA. Under the SFDIA the term FDI means an investment made by: a) a natural person who is a national of a state outside the EU, b) a legal person with a registered office in a state outside the EU, c) a legal person directly or indirectly owned or controlled by a state outside the EU, or d) a legal person directly or indirectly owned or controlled by a legal person with a registered office of a state outside the EU or by a natural person who is a national of such a state. The screening will take place if the investment is related to so-called "protection-worthy activities", which are: a) essential services (activities, services or infrastructure that

[888] T. Gazzini, 'Travelling the National Route: South Africa's Protection of Investment Act 2015' *African Journal of International and Comparative Law* 2018, Vol. 26, No. 2, p. 249.
[889] Competition Act of 1998 (South Africa) s 18A (1) (to be inserted by Competition Amendment Act of 2018 (South Africa) s 14, not yet commenced). See also: T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 80-81.
[890] https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3406/south-africa-introduces-a-screening-mechanism-of-foreign-investment-.
[891] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 81.
[892] https://isp.se/eng/foreign-direct-investment/translation-of-the-screening-of-foreign-direct-investments-act/.
[893] J. Hallberg, 'Foreign Investment Screening in Finland, Norway, Sweden and Denmark', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)*, p. 220.

maintain or ensure societal functions that are essential for society's basic needs, values or security under section 5), b) security-sensitive activities under the Protective Security Act (2018:585), c) prospecting, extraction, enrichment or sale of critical raw materials or of metals or minerals of strategic importance for Sweden's supply, d) large-scale processing of sensitive personal data or location data in or through a product or service, e) manufacturing or development of, research into, or supply of military equipment under the Military Equipment Act (1992:1300) or supply of technical support for military equipment, f) manufacturing or development of, research into, or supply of dual-use items or supply of technical assistance for such items and g) research into or supply of products or technologies within emerging technologies, or of other strategic protection-worthy technologies or activities that have the capacity to produce or develop such products or to develop such technologies (section 3 of the SFDIA). Any direct or indirect investment coming from a foreign entity in protection-worthy activities needs to be notified to the screening authority prior to the investment in accordance with section 7 of the SFDIA. The screening authority must decide within 25 working days after notification whether to initiate screening of the investment (section 14 of the SFDIA).

7.2.10 Switzerland

The Federal Council of Switzerland has adopted a draft version of the Investment Screening Act (D-ISA) on the 15th of December 2023.[894] This act aims at introducing investment controls in critical sectors in order to control and prevent takeovers of a Swiss domestic company operating in these sectors by foreign state-controlled investors, provided that certain thresholds are reached.[895] The definition of foreign investor is restricted in article 2(d) of the D-ISA to any natural or legal person acting on behalf of a state body and companies that are directly or indirectly controlled by such an entity.

Article 3(1) of the D-ISA refers to the de minimis threshold. Approval is required prior to the investment in case the concerned domestic companies, in the two preceding financial years, had an average of at least 50 full-time employees worldwide or generated a global annual turnover of at least CHF (Swiss Franc) 10 million. This de minimis threshold is applicable to companies operating in the following critical sectors: a) the manufacturing of goods or transfer of intellectual property that are essential to the operational capability of the Swiss Armed Forces,

[894] https://www.newsd.admin.ch/newsd/message/attachments/85445.pdf.
[895]https://globallitigationnews.bakermckenzie.com/2024/04/25/switzerland-draft-investment-screening-act/#:~:text=Main%20elements%20of%20the%20draft,order%20or%20security%20in%20Switzerland.

other federal institutions responsible for national security, or space programs, b) the domestic transmission grid for electricity or distribution grids at grid level 3 or lower, through which at least 450 gigawatt-hours are sold annually, c) the domestic power plants for electricity production with a capacity of 100 megawatts or more, d) the domestic high-pressure natural gas pipelines, e) in the water supply to more than 100,000 inhabitants in Switzerland or f) in the supply or provision of central security-relevant IT systems or services for domestic authorities.

A larger threshold, i.e. an annual global turnover or, in the case of banks, a global gross income of at least CHF 100 million, is required for takeovers by companies operating in/controlling the following critical sectors [article 3(2) of the D-ISA]: a) domestic university hospitals and general hospitals with centralized care, b) the research, development, production or distribution of medicinal products, medical devices, vaccines or personal medical protective equipment, c) domestic hubs for the transportation of goods or passengers, namely ports, airports or transshipment facilities for combined transportation, d) domestic railroad infrastructures, e) significant domestic food distribution centres, f) domestic telecommunications networks, g) important financial market infrastructures or h) important banks.[896]

The request for approval and the potential investment is being screened by the State Secretariat for Economic Affairs (articles 4 and 5 of the D-ISA). The screening authority approves the takeover if there is no reason to assume that public order or safety is at risk. The screening focuses on the conduct of the investors by controlling whether they are involved in Switzerland or in other countries in activities that are undermining the public order or security or whether they are on a sanction list or attempts in espionage. The significance of the domestic Swiss company involved will be assessed by controlling whether its products or services can be substituted within a reasonable period or whether it has access to important or sensitive security-related information and personal data (article 4 D-ISA).

7.2.11 United States

Investment screening in the United States is carried out by the Committee on Foreign Investment in the United States (CFIUS), which was created by President Ford in 1975 in response to various investments of OPEC countries in U.S. Treasury securities and corporate

[896]https://globallitigationnews.bakermckenzie.com/2024/04/25/switzerland-draft-investment-screening-act/#:~:text=Main%20elements%20of%20the%20draft,order%20or%20security%20in%20Switzerland.

stocks and bonds.[897] The Exon-Florio amendment to the Defense Production Act of 1950 (section 721), introduced in 1988, enabled the President to block foreign investments on the grounds of national security.[898] Under US law, screening for national security purposes of foreign investment into the United States was a presidential power.[899] This power included the authority to prohibit or suspend any foreign merger, acquisition or takeover of a US enterprise that is identified as a threat to national security.

The covered transactions of section 721 are listed in subparagraph (b)(i) and applicable to transactions in or related to various sectors, such as the military, critical infrastructure, maritime ports and airports, intelligence, sensitive data, real estate in the proximity of military installations or property or critical technologies. Critical technologies are:

> " (*1) defense articles and services on the U.S. Munitions List in the International Traffic in Arms Regulations administered by the State Department;*
> *(2) items controlled by the Export Administration Regulations administered by the Commerce Department for certain reasons related to national security, chemical and biological weapons proliferation, nuclear non-proliferation, missile technology, regional stability, and surreptitious listening;*
> *(3) nuclear-related equipment, material, parts, components, and technology;*
> *(4) select agents and toxins; and*
> *(5) emerging and foundational technologies*".[900]

The covered transactions need to be declared to the CFIUS in accordance with section 721(b)(1)(c) of the Defense Production Act of 1950. In 2007, the Foreign Investment and National Security Act 61 (FINSA) included "transactions involving critical infrastructure and energy" whereby a second-stage review investigation is required for most proposed acquisitions

[897] G. Lichtenbaum and D.J. Ribner, 'Foreign Investment Screening in the USA', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening* (CELIS), p. 363-364.
[898] 50 U.S.C. § 4565; 31 C.F.R. Parts 800 to 802 (the CFIUS Regulations).
[899] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 11.
[900] 50 U.S.C. § 4565(a)(6); G. Lichtenbaum and D.J. Ribner, 'Foreign Investment Screening in the USA', in: S. Hindelang and A. Moberg, *YSEC Yearbook of Social-Economic Constitutions 2020. A Common European Law on Investment Screening* (CELIS), p. 371.

by SOCs .[901] However, the 2008 Treasury Department regulations implementing the Act do not contain a definition of "control" by a foreign person or "national security.[902] Foreign ownership control is established based on a functional approach not connected to any ownership requirements.[903] In 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) was established, whereby covered transactions with foreign government interests need to be approved by the Committee on Foreign Investment in the United States in advance.[904] Section 1719 of FIRRMA contains a specific obligation to report FDIs coming from the PRC to Congress and CFIUS.

7.3 Foreign Investment Screening and International Investment Law

The screening of FDIs is an important prerequisite for the acknowledgement of more procedural rights for state shareholders in international investment arbitration. In order to find out if an investment is truly commercial in nature, foreign investment screening helps to provide the host state with valuable insights on the origin and purpose of the concerned investment. Foreign investment screening is implemented more and more in the domestic laws of the host states.[905] The question is what constraints international investment law may impose on these screening mechanisms.[906]

In *Global Telecom v. Canada,* the ICSID tribunal found that the investment screening was covered by the Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the promotion and Protection of Investments, which entered into force on 11 March 1997 (BIT), but that it did not breach the FET obligation of Article II(2)(a) of the BIT.[907] The applicable investment treaty may hinder a host state from imposing certain screening

[901] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 11.
[902] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 11-12.
[903] https://sgp.fas.org/crs/natsec/RL33388.pdf.
[904] P. Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protected?', *Journal of International Law and International Relations* 2011, Vol. 6, No. 2, p. 12.
[905] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 79-82.
[906] J. Paine, '*Global Telecom Holding v. Canada*: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties', *Journal of international Arbitration* (2021), Vol. 38, p. 547.
[907] *Global Telecom Holding SAE v. Canada*, ICSID Case No ARB/16/16, Award (27 March 2020), para. 334 and 449.

measures.[908] A distinction needs to be made here between new and existing investments. Investment treaties may contain non-discrimination provisions such as national treatment or Most Favoured Nation (MFN) treatment that may hinder host states from taking investment screening measures if these measures are for instance not imposed on domestic companies or companies from third countries.[909] Investments screening measures may also be at odds with for instance umbrella clauses, expropriation clauses and FET clauses in existing investment agreements.[910] Some BITs and FTAs protect an investor prior to the investment. The BIT between the United States and Uruguay from 2005 for instance protects a Party that attempts to make an investment:

> *"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party*".[911]

The TPP contains a similar definition in Article 9.1: *"means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party*".[912] Article 2 of Chapter 11 of the ASEAN-Australia-New Zealand FTA includes a person that seeks to make an investment as a covered investor. In the footnote under the Article it is further specified that:

> "*For greater certainty, the Parties understand that an investor that "seeks to make" an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor of another Party that has initiated such notification or approval process*".[913]

The wording of the applicable investment treaty is again key to determine if a certain screening measure is in violation with that particular treaty. Whether the applicable investment treaty contains a self-judging or non-self-judging NPM clause is an important factor in

[908] J. Paine, '*Global Telecom Holding v. Canada*: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties', *Journal of international Arbitration* (2021), Vol. 38, p. 536.
[909] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 91-92.
[910] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 96-105.
[911] Article 1 United States-Uruguay BIT (2005).
[912] Article 9.1 of the Trans-Pacific Partnership Agreement.
[913] Footnote 4 of the ASEAN-Australia-New Zealand Free Trade Agreement.

determining the extent to which an arbitral tribunal is able to constrain host states to screen a concerned investment.[914] In case of a self-judging NPM clause the applicable investment treaty limits the tribunal's review of an implemented measure to a determination of good faith.[915] Article 2102(1)(b) NAFTA contained a self-judging NPM clause stipulating that nothing in the Agreement prevents a Party from taking actions that is considers necessary for the protection of its essential security interests. Other investment treaties include non-self-judging NPM clauses, which enable arbitral tribunals to determine whether a particular public interest applies and justifies the measure.[916] In these cases the investment treaty only refers to the concept of 'necessary measures' rather than 'measures that it considers necessary'.[917]

Investment screening is crucial especially in case of state investors that use SOEs and SWFs to determine the origin and purpose of the investor. In general investment screening measures can be imposed more easily on new investments rather than existing investments. This is in line with the purpose of IIA, i.e. the promotion and protection of investments. The most important prerequisite of screening measures in general is that implementation needs to meet certain non-discrimination requirements depending on the applicable investment treaty.[918] In some investment treaties or FTAs investment screening is included as a non-conforming measure (NCM), which means that certain treaty obligations are not applicable to investment screening measures.[919] Annex III of the Free Trade Agreement between China and Australia (ChAFTA) for instance includes Australia's foreign investment policy as an NCM pursuant to Article 8:9 ChAFTA.[920] The wording of the applicable investment treaty determines the extent to which investment screening measures can be implemented by a host state. It is up to the domestic

[914] G.R. Elgueta and B. Mauro, The Paradoxical Relationship between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?, Kluwer Arbitration Blog (2020). Available via: https://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/.
[915] The Statement of Administrative Action to the 1993 U.S. NAFTA Implementation Act interpreted the NPM clause of the NAFTA (i.e., Article 2102) to be "self-judging in nature, although each government would expect the provisions to be applied by the other in good faith".
[916] See for instance *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para. 368 and *Enron Corporation and Ponderosa Assets L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 339. In both cases the tribunals reached the conclusion that an economic crisis cannot be regarded as a security interest.
[917] G.R. Elgueta and B. Mauro, The Paradoxical Relationship between "Foreign Direct Investment Screening" and International Investment Law: What Role for Investor-State Arbitration?, Kluwer Arbitration Blog (2020).
[918] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 113-114.
[919] T. Voon and D. Merriman, 'How International Investment Law Constrains Foreign Investment Screening', *Journal of World Investment and Trade* (2023), No. 24, p. 110.
[920] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, signed on 17 June 2015, entered into force on 20 December 2015.

legislator to ensure that treaty obligations under international investment law are being respected when FDI screening legislation is drafted.

7.4 Conclusion

Public interest concerns for the host state can arise in case a foreign state entity makes an investment in vital sectors of the host state's economy. It is important for host states, especially when dealing with foreign SOEs/SWFs, to scrutinise upfront if a potential investor and its investments are *bona fide* and truly commercial in nature. To restore balance between private and state shareholders in the event of reflective loss arising from commercial activities, the relationship between IIA and the host state's public interest concerns can be strengthened by introducing investment screening mechanisms. Investment screening or KYI screening mechanisms are useful tools for the host state to successfully and at an earlier stage determine the origin and purpose of an investment originating from a foreign state entity.

The law governing FDI screening is established as domestic law by individual states at a national level. Out of the examined jurisdictions only Hong Kong has not introduced screening mechanisms into its domestic law. Some jurisdictions, such as England and Wales, the Netherlands, Singapore and Switzerland have introduced thresholds in regard to the amount money that is invested or the percentage of ownership that is acquired through a certain transaction. The US and China have based their screening mechanisms on the establishment of actual control regardless of a percentage of ownership. Screening measures are based on the amount of control that is acquired through an investment. The majority of the examined domestic jurisdictions (China, England and Wales, France, the Netherlands, South Africa, Sweden, Switzerland and the US) apply screening measures in certain critical sectors. Therefore, the question whether the acquisition of shares by a state shareholder needs to be notified and scrutinised depends on the amount of ownership or control that is acquired and on the sector in which the investment is made (e.g. dual-use goods, critical infrastructure or technologies or public utilities). The presentation of the European FDI Screening Regulation (EU) 2019/452 and of the domestic laws on FDIs of the examined jurisdictions shed light on the scope of sensitive sectors to which FDIs apply and on the established procedures and indicated whether extra vigilance is required during the FDI screening process of investments made by SOEs. In 2024 the European Commission proposed a new EU regulation on the screening of foreign investments. The proposed regulation introduces minimum requirements for the Member States

which will make it compulsory to apply screening mechanisms in certain sectors relevant for security or public order.

The implementation of certain screening measures may be hindered by non-discrimination provisions contained in the applicable investment treaty such as national treatment or MFN treatment that prevent host states from applying investment screening measures not imposed on domestic companies or companies from third countries. In the same line, existing investments screening measures may be blocked by umbrella clauses, expropriation clauses and FET clauses included in the applicable investment treaty. This is different if the concerned investment treaty contains an NCM clause that excludes the applicability of certain articles to investment screening measures. States need to consider the existing framework of international investment treaties when drafting and implementing FDI screening legislation. Another option is the inclusion of self-judging NPM clauses in investment treaties restricts the tribunal's options to review whether a particular public interest applies and justifies the measure. In case of a self-judging NPM clause it is assumed that the concerned it is assumed that the screening measure is necessary to safeguard the concerned public interest. Tribunals will then only review whether the measure was taken in good faith.

CHAPTER 8: ALTERNATIVE INVESTOR-STATE DISPUTE SETTLEMENT OPTIONS FOR STATE SHAREHOLDERS

8.1 Insufficient Protection for State Shareholders' Claims in IIA

There are instances in which a state can suffer reflective loss via a company in which it holds shares. As the state has no legal standing under ICSID to pursue a claim for reflective loss against the host State, the only realistic option for a state to seek redress for reflective loss deriving from commercial activities is the non-ICSID investor-state arbitration. There is an imbalance between private and state investors when it comes to the most important forum (ICSID).

There are many alternative institutions that administer investment disputes, such as the ICC, the SIAC, the HKIAC, the LCIA, the SCC and the PCA. The question is whether these institutions are appropriate for states and desirable when compared to ICSID arbitration. Investment disputes tend to have a global scope and states tend to be selective when it comes to their selection of dispute settlement fora, with regional arbitration not being the first preferable option. Several of the aforementioned institutions are closely linked to particular jurisdictions. There can be various political motives not to bring a dispute to a certain jurisdiction. An additional concern is that most of the abovementioned institutions are primarily engaged with international commercial arbitration between private parties, and do not have, as far as is known the requisite experience when it comes to investment disputes between public entities. An exception here is the PCA which has a long history in the settlement of disputes in which states or state entities are involved. Another option for states would be to opt for ad hoc arbitration, which can be customised in accordance with the wishes of both parties.

This chapter will focus on the settlement of international (investment) disputes in general with the aim to identify whether there are fruitful alternatives for states to bring their investment related claims. The available options for states to seek redress are state-to-state arbitration,[921] ICJ proceedings,[922] diplomacy or mediation.[923] The utility of these alternative tools depends on the case at hand. The European Commission proposed to use mediation more frequently, for instance

[921] A. Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority', *Harvard International Law Journal* 2014, Vol. 55, No. 1, p. 68-70.
[922] See e.g. A. Pellet, 'The Case Law of the ICJ in Investment Arbitration', *ICSID Review*, Vol. 28, No. 2 (2013), pp. 223–240; D.A. Desierto, 'The International Court of Justice in the Settlement of International Investment Disputes', *Journal od Dispute Prevention and Resolution* (2013).
[923] A. Goetz-Charlier, 'Mediating Investor-State Disputes in Free Trade Agreements: An Evaluation of the EU's Proposal', *European Foreign Affairs Review* 2019, Vol. 24, No. 1, p. 81–100.

in relation to investment disputes arising out of EU FTAs.[924] The following analysis aims to determine which alternatives to investor-state arbitration would satisfy the needs of state shareholders to claim damages for reflective loss when an international investment dispute is of a solely commercial nature.[925]

8.2 State-to-State Arbitration and Commercial Arbitration

In international arbitration, three types of arbitration exist: international commercial arbitration between nationals and companies from different countries, IIA between a state and a foreign national or company and interstate arbitration between states.[926] The legal basis of the arbitral procedure in international commercial arbitration and in IIA may be different, but they increasingly share institutions, rules and arbitrators.[927] In international commercial arbitration the parties' consent to arbitrate can follow from an arbitration clause in a commercial contract or in a submission agreement for ad hoc arbitration.[928]

Interstate arbitration involves disputes between states or state entities, typically concerning issues of public international law or treaty obligations.[929] The awards rendered are not subject to enforcement under the New York Convention. particularly where the states involved have made the commercial reservation when joining the Convention.[930] The concerned dispute between two states may however be commercial in nature and in that case the award is subject to the enforcement mechanism of the New York Convention. In interstate arbitration the consent to arbitrate can originate from a submission agreement (*compromis*) or from a provision in an existing international treaty that governs the relationship between the parties to the treaty in case of a conflict.[931] As the present thesis examines the relation between two states in case a

[924] European Commission, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement 89–90, 96–99 (1 Mar. 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.
[925] See also: C.J. Trevino, 'State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the Same Treaty', *Journal of International Dispute Settlement* 2014, Vol. 5, p. 199–233.
[926] J.W. Salacuse, 'Interstate Arbitration: "…Settling Disputes Which Diplomacy Has Failed to Settle"', *Negotiation Journal* 2022, Vol. 38, Issue 2, No. 5, p. 181.
[927] T. Meshel, 'Procedural Cross-Fertilization in International Commercial and Investment Arbitration: A Functional Approach', *Journal of International Dispute Settlement* (2021), Vol. 12, Issue 4, p. 585-586.
[928] M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, 4th edition, Cambridge University Press 2024, p. 20-21.
[929] G.B. Born, *International Arbitration: Law and Practice*, Wolters Kluwer Law and Business (2011), p. 439.
[930] G.B. Born, *International Arbitration: Law and Practice*, Wolters Kluwer Law and Business (2011), p. 42.
[931] J.W. Salacuse, 'Interstate Arbitration: "…Settling Disputes Which Diplomacy Has Failed to Settle"', *Negotiation Journal* 2022, Vol. 38, Issue 2, No. 5, p. 182.

state shareholder suffers reflective loss and pursues a claim against the host state, the only arbitral resort will be interstate arbitration, should IIA not be a viable option.

In case of reflective loss commercial arbitration or contract-based institutional arbitration is not preferable because the ICJ confirmed that shareholders do not have standing in claims affecting the rights of the company under customary international law.[932] In *Barcelona Traction*, the ICJ explained that:

> "*whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed*.
>
> […]
>
> [A] *distinction* [must be made] *between injury in respect of a right and injury to a simple interest.* […] *Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected*".[933]

BITs and international investment agreements in international investment law are considered to be *lex specialis* whereby the no reflective loss rule is not applicable, but this does not apply to ordinary commercial agreements.[934] Furthermore, when the consent to arbitration is based on an arbitration clause in the investment contract the shareholder ordinarily would have no cause of action because it is not a party to the agreement. All in all, commercial arbitration

[932] See more detailed in chapter 6. L. Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law*, Cambridge University Press 2020, p. 66-85; A. Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States', *ICSID Review* (2023), Vol. 38, No. 3, p. 596; D. Gaukrodger, 'Claims for Reflective Loss Under Investment Treaties' (Presentation for OECD-hosted Side Meeting, UNCITRAL Working Group III on ISDS Reform, 22 January 2020).

[933] *Barcelona Traction, Light and Power Company, Limited (Barcelona Traction) (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, para. 44 and 46; Ahmadou Sadio Diallo (Diallo) (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, para. 155-156.

[934] *Barcelona Traction, Light and Power Company, Limited (Barcelona Traction) (Belgium v. Spain)*, Preliminary Objections, Judgment, I.C.J. Reports 1964, para. 62-63. *Ahmadou Sadio Diallo* (*Diallo*) (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, I.C.J. Reports 2010, para. 155-156; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration. Substantive Principles* (second edition, 2017), Oxford University Press, nr. 1.10-1.11.

would be a viable option for the company itself, but not for the state shareholder who suffers reflective loss.

Under the UNCITRAL Arbitration Rules states are able to commence arbitral proceedings against a host state in case of an investment dispute.[935] According to Roberts, there are roughly three types of issues that are brought before a tribunal in the field of state-to-state or interstate arbitration: diplomatic protection claims, pure interpretive disputes about e.g. the explanation and interpretation of certain treaty rights and conditions, and requests for declaratory relief about a state's conduct and liability in a certain matter.[936] Diplomatic protection claims are brought by the investor's home state with the purpose of espousing its national's claim and of exercising diplomatic protection.[937] Pure interpretive disputes refer to ''abstract interpretation'' of the treaty[938] and are not connected to a particular factual dispute.[939] The third category, claims for a declaratory judgment relating to a particular measure or fact situation do not aim at the complete resolution of an investor case, but they seek a declaration about certain factual or legal issues in the case.[940] In the case of diplomatic protection claims, where the claimant state has been injured indirectly (through its national), the rule of exhaustion of local remedies is applicable.[941] The rule of exhaustion of local remedies, an important principle of customary international law,[942] requires the exhaustion of local remedies before the institution of international proceedings because *"the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system"*.[943] Examples of claims submitted to state-to-state arbitration can be found in the following cases: *Italy v. Cuba*[944] (diplomatic

[935] Article 1 of the UNCITRAL Arbitration Rules 2021 define the scope of application based on consent between the disputing parties. The nature of the parties is not mentioned in the UNCITRAL Arbitration Rules 2021.
[936] A. Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority ', *Harvard International Law Journal* 2014, Volume 55, Number 1, Winter 2014, p. 7.
[937] Michele Potestà, State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential? P.756.
[938] Michele Potestà, State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential? P.755.
[939] David Gaukrodger, State-to-State dispute settlement and the interpretation of investment treaties, OECD Working Papers on International Investment 2016/03, p.8.
[940] David Gaukrodger, State-to-State dispute settlement and the interpretation of investment treaties, OECD Working Papers on International Investment 2016/03, p.10.
[941] See more details about this topic in Michele Potestà, State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential? p.757 et sqq.
[942] ICJ: Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), para 50.
[943] ICJ: Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 25.
[944] *Republic of Italy v. Republic of Cuba*, Sentence préliminaire, [Interim Award] (Ad Hoc Arb. Trib. Mar. 15, 2005), *available at* http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf [hereinafter Italy v. Cuba, Interim Award]; *Republic of Italy v. Republic of Cuba*, Sentence finale [Final Award] (Ad Hoc Arb. Trib. Jan. 15, 2008), *available at* http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf [hereinafter Italy v. Cuba, Final Award].

protection), *Peru v. Chile*[945] and *Ecuador v. U.S.*[946] (interpretation issues concerning an investment treaty) or *Mexico v. U.S.*[947] (NAFTA-case for declaratory relief).

In *Italy v. Cuba,* the claims were issued for the sake of the diplomatic protection of Italian private investors, but Italy also launched a claim on its own behalf for the alleged misapplication of the BIT in relation to those same private investors.[948] All the claims were related to the Italy-Cuba BIT.[949] Italy initiated the claim for diplomatic protection on behalf of sixteen investors operating in various industry sectors, including food production, the automotive industry, pharmaceuticals, aluminium production, construction and tourism.[950] In the preliminary phase of the arbitration, Cuba raised the objection that Italy was prohibited from resorting to diplomatic protection, as it had not exhausted domestic remedies.[951] In response, Italy argued that the exhaustion rule had been in effect waived because the presence of the investor-State arbitration mechanism, which offers investors a direct alternative to domestic courts, constitutes an implied waiver of the exhaustion rule within the framework of State-to-State proceedings.[952] This argument was rejected by the tribunal, which held that diplomatic protection claims were subject to an exhaustion requirement.[953] As far as the diplomatic protection claims were concerned, the ad hoc tribunal ruled that it had jurisdiction with respect to some of the claims (depending on the specific investments/investor the claims were based on), but eventually rejected all of them in the merits stage, which led to the rejection of the claim on Italy's behalf as well.[954]

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[945] *See* Empresas Lucchetti, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005) [hereinafter Lucchetti v. Peru] (discussion of Peru v. Chile).
[946] Ecuador v. United States, PCA Case No. 2012-5, Request for Arbitration, (28 June 2011) [hereinafter Ecuador v. United States]; Chevron Corp. (U.S.) v. Ecuador, PCA Case No. 34877, Partial Award on the Merits, (Perm. Ct. Arb. 2010) [hereinafter Chevron v. Ecuador].
[947] Cross-Border Trucking Services (Mex. v. U.S.), Case No. USA-MEX-98-2008-01, North America Free Trade Agreement Chapter 20 Arb. Trib. Panel Decision, Final Report, (Feb. 6, 2001), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf.
[948] See e.g.: M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 341-347.
[949] Tra Il Governo Della Repubblica Italiana E Il Governo Della Reppublica Di Cuba Sulla Promozione Degli Investimenti (Agreement Between the Government of the Italian Republic and the Government of the Republic of Cuba on the Promotion and Protection of Investments), signed on 8 March 1993, entered into force on 23 August 1995.
[950] M. Recanati, 'Diplomatic intervention and State-to-State arbitration as alternative means for the protection of foreign investments and host States' general interests', in: G. Sacerdoti, P. Acconci, M. Valentini and A. De Luca (eds.), *General Interests of Host States in International Investment Law*, Cambridge University Press (2014), p. 422; M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 341; *Italy v. Cuba*, Interim Award, para. 23.
[951] *Italy v. Cuba*, Interim Award, para. 57.
[952] *Italy v. Cuba*, Interim Award, para. 41.
[953] *Italy v. Cuba*, Interim Award, para. 89-91.
[954] M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 344.

The tribunal declined jurisdiction on Italy's claim to provide diplomatic protection to shareholders holding shares in a foreign company.[955] Italy was not allowed by the tribunal to provide diplomatic protection to foreign companies, albeit that the company's capital was mainly derived from Italian nationals.[956] The question remains whether the outcome would have been different if the protection was based on a shareholder claim from an Italian national. The answer would still be negative under customary international law, which does not enable diplomatic protection in relation to shareholder claims whereby the concerned company is incorporated in a foreign country.[957]

On the other hand, the tribunal asserted jurisdiction regarding the claims that were related to the Italian companies.[958] One of the reasons it asserted jurisdiction over Italy's exercise of diplomatic protection lies in the fact that the private investor had not already brought a claim before an investor-state tribunal or had given its advance consent to such dispute settlement.[959]

The case of *Italy v. Cuba* is an important one since the tribunal asserted jurisdiction in a state-to-state proceeding, whereas the same dispute could have been resolved before an investor-state tribunal, if the private investors had decided to bring their respective claims individually against Cuba.[960] Despite the fact that the investor-State provision in the BIT between Italy and Cuba provided for ad hoc arbitration, the tribunal held that as long as the investor has not submitted to international arbitration against the host State, its right to diplomatic protection persists.[961] The tribunal applied the mechanism of Article 27 of the ICSID Convention and the functional test from *Maffezini* by analogy, although Cuba was not a party to the ICSID Convention.[962]

On the other hand, *Italy v. Cuba* also dealt with important questions around the attributability of the conduct of SOEs to the state.[963] The tribunal accepted the functional test, whereby a hotel could not be considered a Cuban state entity because it does not involve the exercise of public authority, and it is a commercial activity. Italy would have had the right to

[955] *Italy v. Cuba,* Final Award, para. 163.
[956] *Italy v. Cuba,* Final Award, para. 204.
[957] This is confirmed by the ad hoc tribunal in *Italy v. Cuba* and by the ICJ in *Barcelona Traction*. *Italy v. Cuba,* Final Award, para. 204; *Barcelona Traction, Light and Power Company, Limited* (*Barcelona Traction*) (*Belgium v. Spain*), Preliminary Objections, Judgment, I.C.J. Reports 1964.
[958] *Italy v. Cuba*, Interim Award, para. 92-97.
[959] M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 342.
[960] M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 342.
[961] *Italy v. Cuba*, Interim Award, para. 65.
[962] *Italy v. Cuba,* Final Award, para. 160-161.
[963] *Italy v. Cuba,* Final Award, para. 164-165.

exercise diplomatic protection if for instance the conduct of the hotel was controlled by the state, but this was not the case.[964]

The settlement of commercial disputes does not fall under the scope of state-to-state arbitration, which covers mainly three types of disputes: diplomatic protection claims, pure interpretive disputes and requests for declaratory relief about a state's conduct and liability in a certain matter. One could argue that arbitral proceedings initiated by a state against another state because of an investment dispute should be regarded as a fourth example of state-to-state arbitration, but state-to-state arbitration is not designed to resolve *de jure gestionis* disputes of the state itself and the claimant in this case (state) fits in the definition of investor and is using the available mechanisms within the investment arbitration framework. Here the distinction between investor-state and state-to-state arbitration becomes fluid. The question that *Reisman* asked in this regard is whether it is and should be acceptable that state-to-state arbitration still exists now that investors themselves can bring investment disputes before investment tribunals.[965]

In case of a state shareholder that suffers reflective loss the option of interstate arbitration may constitute a viable alternative to ICSID arbitration in some cases. However, there are no genuine cases of state-to-state arbitration that enable state shareholders to claim the damages they suffer for reflective loss as investors.[966] The elevation of a claim for reflective loss made by a state shareholder to the state-to-state adjudication prerequisites that it fits in one of three broad types of claims falling under the scope of inter-State arbitration. The most adequate vehicle for a reflective loss claim appears to be a diplomatic protection claim brought by the state on behalf of its nationals for the injury they suffered as investors. However, three problems arise in this constellation. A diplomatic protection claim a) is an indirect claim for injury caused to the state's nationals and not a direct claim for the reflective loss that the state shareholder suffered itself; b) may be hindered by the operation of the rule requiring the exhaustion of local remedies; and c) constitutes a politicised mechanism. Similar to the derivative action the option of diplomatic protection and the direct claim for reflective loss do not always overlap. This particularly the case if the state holds shares in a company that is incorporated in a different state because in these cases the state (shareholder) is unable to provide diplomatic protection to the company.

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[964] *Italy v. Cuba,* Final Award, para. 164.

[965] See e.g.: Ecuador v. United States, Expert Opinion with Respect to Jurisdiction of Professor W. Michael Reisman, 20–21 (Perm. Ct. Arb. 4 April 2012) [hereinafter Reisman Opinion].

[966] E. De Brabandere, *International Procedure and Interstate Litigation and Arbitration. A Comparative Approach*, Cambridge University (2021), p.2. Most interstate arbitration cases are politically sensitive such as the South China Sea Arbitration between the Philippines and China, and the Arctic Sunrise Arbitration between the Netherlands and Russia.

8.3 ICJ Proceedings

Another option that needs to be examined is whether a state is entitled to seek redress and resolve its disputes under international investment law in front of the ICJ, when the concerned activity is solely commercial in nature.[967] Investment disputes are not the ICJ's core business.[968] ICJ-cases on the issue of diplomatic protection of domestic shareholders with shares in foreign companies, such as *Barcelona Traction*[969] and *Diallo*[970], do not seem encouraging for states to bring their investment disputes before this forum. In both cases it was decided that only the country where the concerned company is incorporated can bring a case to the ICJ.[971] Despite the fact that the shareholders were nationals of the state claimants, namely nationals of respectively Belgium and Guinea, the ICJ did not allow these states to pursue a claim via ICJ proceedings.[972]

It follows from the above that there is little room left for the pursuit of the interests of the shareholder in ICJ proceedings, if the concerned company is incorporated in a foreign state.[973] An underlying reason for this is that according to the traditional assumption under public international law, BIT provisions cannot be regarded as principles of customary international law, but only as *lex specialis*.[974]

Moreover, the ICJ appears reluctant when it comes to investment disputes.[975] In the *ELSI* case, a forced requisition of a U.S. company in Italy which was not justified under the applicable local law, did not constitute a breach of Italy's Treaty obligations and was not considered to be in violation of international law due to ELSI's financial position, which was already poor and

[967] See also https://www.icj-cij.org/court. The ICJ's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.
[968] C.L. Davis and J.C. Morse, 'Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice', *International Studies Quarterly* 2018, Nr. 62, p. 709-722.
[969] Barcelona Traction, Light and Power Company, Limited (*Barcelona Traction*) (*Belgium v. Spain*), Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 6.
[970] Ahmadou Sadio Diallo (*Diallo*) (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582
[971] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 137-138.
[972] A. Pellet, 'The Case Law of the ICJ in Investment Arbitration', *ICSID Review*, Vol. 28, No. 2 (2013), pp. 223–240; D.A. Desierto, 'The International Court of Justice in the Settlement of International Investment Disputes', *Journal of Dispute Prevention and Resolution* (2013), p. 1-46.
[973] A. Pellet, 'The Case Law of the ICJ in Investment Arbitration', *ICSID Review*, Vol. 28, No. 2 (2013), pp. 225–226.
[974] Ahmadou Sadio Diallo (*Diallo*) (*Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 88; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration. Substantive Principles* (second edition, 2017), Oxford University Press, nr. 1.10-1.11.
[975] Elettronica Sicula S.P.A. (*ELSI*) (*U.S. v. Italy*), Judgment, I.C.J. Reports 1989. A. Pellet, 'The Case Law of the ICJ in Investment Arbitration', *ICSID Review*, Vol. 28, No. 2 (2013), pp. 223–240.

lacking control and management.[976] The ICJ ruled that a violation of domestic law does not necessarily mean that the act was unlawful or arbitrary under international law.[977]

The ICJ has indirect influence in the field of international investment arbitration. According to Pellet the ICJ has a significant influence on investment tribunals in the form of "*mimetism, judicial borrowing and cross-fertilisation*", which means that most investment tribunals respect the case law of the ICJ when rendering an award.[978] However, it is not used frequently as a forum to resolve investment disputes.[979]

In practice the ICJ has mainly ruled about *de jure imperii* (public) activities and not extensively about *de jure gestionis* (public) activities.[980] This does not mean that the ICJ will never deal with investment issues, but it does raise the question whether the ICJ offers an appropriate forum to state shareholders to resolve their commercial disputes as a result of the diminution of the value of their shares.[981] In my opinion, the ICJ does not provide for an adequate alternative forum for investment disputes because commercial disputes are not part of the ICJ's daily practice. Furthermore, both states must have submitted to the jurisdiction of the ICJ in accordance with Article 36 of the Statute of the International Court of Justice. This could be done through a compromissory clause in a treaty or by optional clause declarations under Article 36(5), which would give the ICJ jurisdiction to settle any disputes that might arise between the states.[982] Article 34 (1) of the Statute of the International Court of Justice furthermore stipulates that only states may be parties in cases before the Court, which means in accordance with Article 35(1) that the Court shall be open to the states parties to the present Statute. This means that agencies or (decentralised) state bodies do not have access to the ICJ as a shareholder in case of reflective loss deriving from a commercial activity. Only the state itself is a party to the Statute.

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[976] Elettronica Sicula S.P.A. (*ELSI*) (*U.S. v. Italy*), Judgment, I.C.J. Reports 1989, para. 101; See also F.A. Mann, 'Foreign Investment in the International Court of Justice: The ELSI Case', The American Journal of International Law 1992, Vol. 86, p. 92-102; S.D. Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice', Yale Journal of International Law 1991, Vol. 16, Issue 2, p. 392-452.
[977] Elettronica Sicula S.P.A. (*ELSI*) (*U.S. v. Italy*), Judgment, I.C.J. Reports 1989, para. 124.
[978] A. Pellet, 'The Case Law of the ICJ in Investment Arbitration', *ICSID Review*, Vol. 28, No. 2 (2013), pp. 240.
[979] D.A. Desierto, 'The International Court of Justice in the Settlement of International Investment Disputes', *Journal of Dispute Prevention and Resolution* (2013), p. 45-46.
[980] https://www.icj-cij.org/en/court.
[981] C.L. Davis and J.C. Morse, 'Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice', *International Studies Quarterly* 2018, Nr. 62, p. 709-710.
[982] https://www.icj-cij.org/declarations. See also International Court of Justice, Arbitral Award of 3 October 1899, Declaration of Judge Robinson. Available via: https://www.icj-cij.org/node/142455#:~:text=A%20compromissory%20clause%20reflects%20the,the%20jurisdiction%20of%20the%20Court.

8.4 Investment Courts

There has been much debate regarding the legitimacy of IIA.[983] The arguments against IIA that have been addressed more frequently include: (potential) lack of transparency, independence, impartiality and review, inconsistency of awards and the privileged legal position of international investors.[984] In response to this criticism the EU has proposed a new ISDS mechanism, namely the Multilateral Investment Court (also referred to as "Multilateral Investment Tribunal" or "Investment Court System"), which was introduced for the first time in its concept paper from 2015.[985] The concept of an investment court has also been incorporated as Bilateral Investment Court in the negotiated FTAs with Canada, Vietnam, Singapore and Mexico (in principle). The agreements are not (completely) in force yet as the ratification process is still ongoing.[986] The wording of the terms investment and investor in the Comprehensive and Economic Trade Agreement (CETA) between Canada and the EU seems to allow claims for reflective loss made by a state shareholder.[987] Article 8.1 CETA includes a broad asset-based approach to the definition of investment with a non-exhaustive list that includes shares as covered investments.[988] The term investor in Article 8.1 CETA includes states as potential investors because an investor *inter alia* means a "Party" to the Agreement.[989]

The EU-Vietnam Investment Protection Agreement (EUVIPA) contains a broad asset-based definition that includes shares as covered investments.[990] The same applies to the EU-

[983] See for instance F. Li, *The Divergence and Convergence of ICSID and non-ICSID Arbitration*, PhD Thesis University of Glasgow 2014, p. 47-48. Available via http://theses.gla.ac.uk/6292/.
[984] See also: T. Dietz, M. Dotzauer & E. S. Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system', *Review of International Political Economy* (2019), Vol. 26, No. 4, p. 749-772.
[985] C. Malmström, 'Investment in TTIP and Beyond - The Path for Reform: Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court', Concept Paper (2015), available at trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 2 February 2020).
[986] Article 8.27CETA and Article 3.38 EU-Vietnam Investment Protection Agreement.
[987] See Article 8.1 and 8.29 CETA.
[988] Article 8.1 CETA: "*investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such 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:* […] (*b) shares, stocks and other forms of equity participation in an enterprise*".
[989] Article 8.1 CETA: "*investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party* ".
[990] Article 1.2(h) of the EU-Vietnam Investment Protection Agreement: *"investment" means every kind of asset which is owned or controlled, directly or indirectly, by an investor of a Party in the territory of the other Party, which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and a certain duration; forms that an investment may take include* […] *an enterprise as well as shares, stocks and other forms of equity participation in an enterprise, including rights derived therefrom*". See also Chapter 11 EUVFTA and Article 3.41 of the EU-Vietnam Investment Protection Agreement.

Singapore Investment Protection Agreement (EUSIPA)[991] and to the EU-Mexico Agreement (in principle).[992] The EU-Mexico Agreement (in principle) furthermore regards a Party as a covered investor.[993] In principle a state shareholder would therefore be able to bring a claim for reflective loss as a covered investor under the proposed EU-Mexico Agreement. The definitions of investor in the EUVIPA and EUSIPA do not include the state but refer to natural or juridical persons of a Party, which also includes any legal entity duly constituted or otherwise organised under the applicable law, whether or not governmentally-owned.[994] It depends on the interpretation of the investment court whether or not states are included in the definitions of investor under EUVIPA and EUSIPA.

Regardless of the aforementioned definitions it is currently unclear whether shareholder claims for reflective loss initiated by a state (Party under the agreement) would be admissible. Under the proposed mechanism the panellists are appointed by the court instead of by the parties themselves. Furthermore, an appeal mechanism is introduced in case of manifest errors in relation to the established facts or the applied legal framework.[995] The EU has proposed this idea in the UNCITRAL Working Group of 18 January 2019 as well.[996] The EU's UNCITRAL proposal also indicates that it should be possible to use the proposed MIC mechanism for state-to-state dispute settlement.[997] However, the rules of the MIC have not been established yet and it is currently unclear if the parties to the agreement intended to provide protection for reflective loss claims to state shareholders.[998] Furthermore, one of the potential recommendations of Working Group III

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[991] Article 1.2(1) of the EU-Singapore Investment Protection Agreement: *"investment" means every kind of asset which has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration. Forms that an investment may take include*:[…] (*b) an enterprise including a branch, shares, stocks and other forms of equity participation in an enterprise, including rights derived therefrom*". See Article 3.12 of the EU-Singapore Investment Protection Agreement.

[992] Article 3 of Chapter XX of the EU-Mexico Agreement (in principle): ""*investment" means every kind of asset which is owned or controlled, directly or indirectly, by an investor and acquired in the expectation of, or used for the purpose of, economic benefit or other business purposes and that has the characteristics of an investment, including such characteristics as a certain duration, 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:* […] *b) shares, stock and other forms of equity participation in an enterprise*". See Section C of the Chapter on Investment of the EU-Mexico Agreement in Principle.

[993] Article 3 of Chapter XX of the EU-Mexico Agreement (in principle): ""*investor of a Party" means a Party or natural person or an enterprise of a Party, other than a branch or representative office that seeks to make, is making, or has already made an investment in the territory of the other Party*".

[994] See Article 1.2(i) EUVIPA and Article 1.2(2) EUSIPA.

[995] Y. Wang, 'Power of Discourse in Free Trade Agreement Negotiation', *Leiden Journal of International Law* (2019), Vol. 32, p. 442–445.

[996] Submission of the European Union and its Member States to UNCITRAL Working Group III 18 January 2019 establishing a standing mechanism for the settlement of international investment disputes.

[997] *Ibid,* Paragraph 3.9.

[998] The Parties to NAFTA for instance did not intend to protect direct claims for reflective loss, which made the tribunal decline jurisdiction over reflective loss claims in *Alicia Grace et al. v. The United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024.

is for states to include restrictions on the availability of reflective loss claims in investment treaties because of the company's separate legal personality, the potential risk of multiple proceedings and its inconsistency with domestic corporate law principles and customary international law.[999] It is potentially a very promising development in empowering the role of the state investor in ISDS, but it must be emphasized that the investment court mechanism currently has only been embraced by the EU (as initiator) and by Canada, Vietnam, Singapore and Mexico in their respective FTAs with the EU. It is currently unknown whether other major global players as for instance the US and China would support this proposal. At first glance this does not appear to be the case.[1000]

The concept of an investment court is not a new one. The Arab Investment Court (AIC), for instance, became operational in 1986.[1001] The League of Arab States (LAS or Arab League) was founded in 1945 and in 1980 the Member States concluded the Unified Agreement for the Investment of Arab Capital in the Arab States (the LAS Investment Agreement).[1002] The AIC was introduced as an initiative in this agreement and the mechanism exists alongside the possibility for investors to commence arbitral proceedings. In practice, however, those arbitral alternatives are more frequently used by Arab investors. Over the past years Arab investors have referred their disputes, namely more often to other institutions, such as the PCA, the Organisation of Islamic Cooperation (OIC) and ICSID.[1003] The role of the AIC has been reconfirmed in the 2013 Amendment to the LAS Investment Agreement.[1004] The AIC is considered the default ISDS under the LAS Investment Agreement.[1005]

The AIC has jurisdiction to settle disputes between state parties in accordance with Article 29 of the Arab Investment Agreement.[1006] Article 1(7) classifies an Arab investor as "*an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not*

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[999] See Paragraph 1.2.
[1000] Y. Wang, 'Power of Discourse in Free Trade Agreement Negotiation', *Leiden Journal of International Law* (2019), 32, p. 437–455.
[1001] A. A. Hasaan, 'The 2013 Amendments to the Arab Investment Agreement' *ICSID Review* 2019 Vol. 34 No. 1, p. 108.
[1002] A. A. Hasaan, 'The 2013 Amendments to the Arab Investment Agreement' *ICSID Review* 2019 Vol. 34 No. 1, p. 107-108.
[1003] A. A. Hasaan, 'The 2013 Amendments to the Arab Investment Agreement' *ICSID Review* 2019 Vol. 34 No. 1, p. 108-109.
[1004] Joint Meeting of the ESCLAS (n 17). The Amendment came into force on 24 April 2016. The countries that ratified it were Iraq, Jordan, Kuwait, Mauritania, Oman, Palestine and Qatar.
[1005] A. A. Hasaan, 'The 2013 Amendments to the Arab Investment Agreement' *ICSID Review* 2019 Vol. 34 No. 1, p. 124: *"Under the Agreement, the AIC was sought to be a provisional court until the establishment of the Arab Court of Justice. According to art 23 of the Amendment, the AIC remains the default mechanism, and the Amendment eliminated all the provisional clauses of the Arab Court of Justice. If the parties fail to agree to mediation, conciliation or arbitration, the AIC will be competent to resolve the dispute."*
[1006] Unified Agreement for the Investment of Arab Capital in the Arab States, signed on 26 November 1980, entered into force on 7 September 1981.

a national". Arab States and bodies corporate which are fully state-owned, whether directly or indirectly, are regarded as Arab citizens ex Article 1(4). In principle Arab state shareholders are able to bring their reflective loss claim to the AIC. However, in 2013 a revised version of the Arab Investment Agreement (the Amended Agreement) has been adopted in which a much narrower definition of the term investor is used:

> "*the natural or juridical person who/which owns Arab capital which it invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least (51%) of the share capital of the relevant juridical person*".[1007]

The new definition of investor in the Amended Agreement excludes minority shareholders. Furthermore the explicit inclusion of state parties under the definition of investor has been removed in the revised version. Under the amended agreement it will therefore not be possible for Arab state shareholders to bring a claim for reflective loss to the AIC. Another complicating factor is the fact that various intra-Arab BITs tend to contain narrower definitions of the term investor as well.[1008] In the Jordan-Algeria BIT the term investor for instance means:

> "*i- Any physical person holding the nationality of a Contracting Party or permanent residence therein according to its laws.*
> *ii- Any company enjoying juridical personality, participation, consortium, organization, association or enterprise (venture) formed or established in conformity with the laws in force in a Contracting Party*".[1009]

The state cannot be classified as a natural person or a company and therefore state shareholders are not covered within the definition of investor under the Jordan-Algeria BIT. Even under the original Arab Investment Agreement there are no known cases at the AIC in which a state shareholder has brought a claim for reflective loss.

Overall, investment courts are not currently regarded as a viable alternative for state shareholders seeking to claim damages for reflective loss arising from commercial activities.

[1007] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5616/download.
[1008] https://arbitrationblog.kluwerarbitration.com/2020/12/29/the-arab-investment-court-and-intra-arab-bits-a-potential-new-frontier/.
[1009] Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the People's Democratic Republic of Algeria on the Reciprocal Encouragement and Protection of Investments, signed on 1 August 1996, entered into force on 5 June 1997.

Investment courts, as proposed by the EU, have not yet been introduced, and apart from the court to be established under the EU-Mexico Agreement, it is questionable whether state shareholders will have access to them. State shareholders do not use the AIC to claim damages for reflective loss, and access to the AIC for state shareholders is restricted under the 2013 Amendment Agreement. Lastly, investment courts are local in nature and not used by major global players such as the US, China and India.

8.5 The AfCFTA Dispute Settlement Body

On 30 May 2019 the Agreement Establishing the African Continental Free Trade Area (AfCFTA agreement) entered into force. The AfCFTA agreement created a single continental market for goods and services in the AU.[1010] The agreement is an additional FTA compared to the several regional agreements that were already in force. Article 19(1) of the AfCFTA agreement indicates that its provisions shall prevail in case of any conflicts or inconsistencies between the AfCFTA Agreement and regional agreements.[1011] These regional agreements were mainly established by the various Regional Economic Communities (RECs) in Africa. The AU recognises eight RECs, which respectively are the: Arab Maghreb Union (UMA);
Common Market for Eastern and Southern Africa (COMESA); Community of Sahel–Saharan States (CEN–SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD) and the SADC.[1012]

The AfCFTA agreement is a step forward in the continental integration in Africa and one of its aims is to facilitate investments.[1013] It has the potential to attract more FDIs because the new framework is applicable to an increased market size and it provides an opportunity to create more policy certainty across the continent.[1014] In accordance with the cooperation objective on

[1010] J.T. Gathii, 'Agreement Establishing the African Continental Free Trade Area', *International Legal Materials* 2019. Vol. 58. Issue 5, p. 1028.
[1011] J.T. Gathii, 'Agreement Establishing the African Continental Free Trade Area', *International Legal Materials* 2019. Vol. 58. Issue 5, p. 1029.
[1012] https://au.int/en/organs/recs.
[1013] See e.g. Article 3(c) of the AfCFTA agreement: "*The general objectives of the AfCFTA are to* […] *contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs*".
[1014] See also: M.A. Forere, 'The Agreement establishing the African Continental Free Trade Area: Will it spur foreign direct investment in Africa?', Acta Juridica. Volume 2018. No.1, p. 65-68.

investments in Article 4(c), an Investment Protocol is incorporated into the AfCFTA agreement.[1015]

The definition of investment in the Investment Protocol is quite similar to the definition of investment in the PAIC.[1016] It is an enterprise-based definition whereby shares are included as long as the investment has the characteristics of a commitment of capital or other resources, the expectation of gain or profit, a certain duration, and the assumption of risk and is a significant contributor to the Host State's sustainable development. The definition of investor is slightly different compared to the PAIC-definition, because the term investor under the Investment Protocol encompasses a legal or juridical person in accordance with the definitions of the law of the Home State that makes an investment in the territory of the Host State. This is an interesting development as the AfCFTA agreement also introduces a Dispute Settlement Body (DSB) and a separate DSM in the Protocol on Rules and Procedures on the Settlement of Disputes (Dispute Settlement Protocol). The DSM is established in Article 20 of the AfCFTA agreement and it is inspired by the WTO model.[1017]

The DSM shall be administered in accordance with the Dispute Settlement Protocol.[1018] The procedure for the settlement of disputes can be divided into two stages. In stage I, the state parties are encouraged to solve their dispute amicably via consultations, good offices (diplomacy), conciliation or mediation, respectively. If the dispute is not resolved within 60 days, any party to the dispute may refer the matter to the DSB in accordance with Article 7(8) and Article 8(3) of the Dispute Settlement Protocol. This is the beginning of stage II of the procedure. The DSB is composed of representatives of the state parties and it has the authority to establish a Dispute Settlement Panel. This panel must initiate the formal dispute settlement process, after which it will submit a report to the DSB for adoption.[1019] Article 19(4) of the Dispute Settlement Protocol stipulates that parties will have 60 days to file an appeal against the final panel report. When this situation occurs, the matter will be referred to a standing Appellate Body (AB) (Article 20 of the Dispute Settlement Protocol). The AB will submit a final report to the DSB for adoption at the end of the appellate review procedure.

[1015]https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/5114/afcfta-protocol-on-investment-2023-.

[1016] African Union, *Protocol to the Agreement Establishing The African Continental Free Trade Area on Investment. Draft*. Available via: https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf.

[1017] D. Okoko, 'Dispute Resolution Protocols In African Continental Free Trade Area: Reviewing Existing Protocols And Rules - International Trade & Investment – Nigeria', *Mondaq*, March 2022(accessible via https://www.mondaq.com/nigeria/international-trade-investment/1175724/dispute-resolution-protocols-in-african-continental-free-trade-area-reviewing-existing-protocols-and-rules).

[1018] Article 1(1)(j) of the AfCTA agreement

[1019] Articles 18 and 19 of the Dispute Settlement Protocol.

Based on the final report of the panel or AB, the DSB shall make its determination of the matter in accordance with Article 6(5) of the Dispute Settlement Protocol and its decision shall be final and binding upon the parties. If a member state fails to comply with the rulings and recommendations of the DSB, the aggrieved party has the option to apply for compensation and/or the temporary suspension of concessions or other obligations based on Article 25 of the Dispute Settlement Protocol.[1020] This can ultimately mean that nationals of certain member states will temporarily not be able to use their AfCFTA rights. In addition to that, parties may also resort to arbitration under the DSM subject to their mutual agreement and after notification to the DSB (Article 6(6) and Article 27 of the Dispute Settlement Protocol). However, the definition of investor under Article 1 of the Investment Protocol does not cover a State Party:

> ""*Investor" means:*
> *a. a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides;*
> *b. a legal or juridical person, in accordance with the definition of the legal or juridical person of the Home State in this article, that has made an investment in the territory of the Host State*;".[1021]

The definition of investment is enterprise-based and covers shares under Article 1. However, the Investment Protocol is limited under Article 44 to settling state-to-state disputes relating to the interpretation and application of the Protocol, and claims through the exercise of diplomatic protection. It could therefore not be regarded as an alternative dispute settlement option for state shareholders from Africa in case of an investment dispute arising from a reflective loss claim on the African continent.

[1020] See also: https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Dispute/International-Dispute-Resolution-in-Africa-22-June-Dispute-settlement-under-the-AfCFTA.html.
[1021] Article 1 of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment.

8.6 Diplomacy

When it comes to the settlement of disputes, states are generally free to decide the mechanism, which is used to resolve the concerned dispute with another state. States will often decide to engage on a diplomatic or political level to address their concerns to other states.[1022] The conduct of the parties is crucial in diplomacy since both parties need to be willing to resolve the dispute amicably and negotiate successfully. Diplomacy ordinarily takes place behind closed doors but there are known examples of situations in which a home states exercises diplomatic protection despite the existing ISDS framework.[1023] Habyyev points out that the UK Government has for instance intervened when the Bolivian Government nationalised its country's biggest energy provider which was indirectly owned by the UK company Rurelec.[1024] Another example of a home state trying to resolve an investment dispute through diplomatic methods is the aforementioned case of *Italy v. Cuba*, which eventually resulted in state-to-state arbitration after initial attempts to resolve the concerned disputes amicably.[1025]

There are various diplomatic dispute settlement methods, such as consultation, negotiation and good offices.[1026] Consultation is also known as preventive diplomacy in the sense that it aims to avoid conflict by exchanging information between states. A state may obtain new insights on the interests of the other party which may lead to the modification of the original investment plan.[1027] Potential conflicts or disputes can be discovered before the investment decision is made in case of a fruitful consultation.

The second method for the parties is to directly try to negotiate a suitable solution.[1028] In this case both parties acknowledge that there is perhaps not an optimal solution for either of them, but through negotiations an exchange of concessions and/or benefits can be discussed.[1029] There are in principle no established procedures or practices for when and how these types of negotiations should take place. In some cases, states commit themselves to seeking a resolution by negotiation or other peaceful means of their own choice if they are party to a dispute with

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[1022] See C.F. Dugan et al., *Investor-State Arbitration* (New York: Oxford University Press 2008), p. 27–28.
[1023] R. Habyyev, *Diplomatic Protection as a Dispute Settlement Mechanism in Investor-State Arbitration, in the Light of Modern International Law* (dissertation), Brunel University London 2018, p. 4-5.
[1024] https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.
[1025] See Paragraph 8.2.
[1026] S.M.G Koopmans, *Diplomatic Dispute Settlement. The Use of Inter-State Conciliation*, T.M.C. Asser Press (2008), p. 19.
[1027] S.M.G Koopmans, *Diplomatic Dispute Settlement. The Use of Inter-State Conciliation*, T.M.C. Asser Press (2008), p. 20.
[1028] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 240.
[1029] S.M.G Koopmans, *Diplomatic Dispute Settlement. The Use of Inter-State Conciliation*, T.M.C. Asser Press (2008), p. 21.

another state. This commitment is particularly important if the continuance of the dispute may endanger international peace and security. In *Georgia v. Russia,* the ICJ ruled that:

> "*In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute*."[1030]

Sometimes states will appoint a third party to facilitate and support potential efforts to enter into direct negotiations. This third party is usually someone deemed neutral and trustworthy by both parties.[1031] In these cases, the procedure of negotiations under the guidance and supervision of this third party is referred to as "good offices".[1032] An example of good offices in practice was Iceland's facilitation of the 1986 Reykjavik Summit on US and Soviet arms reduction.[1033] The United Nations also play an important role in the amicable settlement of disputes among states. The UN General Assembly fulfils an important role in peaceful dispute resolution by providing an international platform for all sorts of debates, negotiations and interstate dialogues.[1034]

The aforementioned methods of peaceful negotiations among states often contain a strong political dimension. Politics will come into play when diplomacy is used by states as an instrument of dispute settlement. Especially, when a third party is appointed to guide the negotiations, states opt for some sort of "political" or "diplomatic" mediation.[1035] The option of diplomacy is not always desirable when a dispute is purely commercial in nature. There is a risk that a commercial dispute would become politicised.

[1030] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), Preliminary Objections, Judgment [2011] ICJ Report 70, para. 157.
[1031] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p.240-241.
[1032] A. O'Donoghue, 'Good Offices: Grasping the Place of Law in Conflict', *Legal Studies* 2014, Vol. 34, No. 3, pp. 469-472.
[1033] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p.240.
[1034] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p.243.
[1035] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, The Role of the State in Investor-State Arbitration (Nijhoff International Investment Law Series, vol.3, 2015), p. 381-382.

8.7 Conclusion

This chapter focused on the examination and evaluation of alternatives to investor-state arbitration for state shareholders to bring their claims for reflective loss. International commercial arbitration and contract-based institutional arbitration are based on the parties' consent to arbitrate, which is included in an arbitration clause in a commercial contract or in a submission agreement for ad hoc arbitration. It is not a fruitful alternative to investor-state arbitration, because shareholders have no legal standing under customary international law when it comes to claims affecting the rights of the company. Therefore, claims based on ordinary commercial agreements follow the no reflective loss rule. BITs and international investment agreements allowing for shareholders' claims for reflective loss are considered *lex specialis*. Moreover, since the company itself and not the shareholder is the party to the investment agreement, which contains the arbitration clause, the shareholder does not have any legal basis to initiate commercial arbitration proceedings against the host state. As a reflective loss claim raised by a state shareholder against the host state creates a dispute between two states, the only resort is interstate arbitration. However, the problem here is that the scope of interstate arbitration extends to diplomatic protection claims, pure interpretive disputes about e.g. the explanation and interpretation of certain treaty rights and conditions, and requests for declaratory relief about a state's conduct and liability in a certain matter and does not cover commercial disputes such as claims for reflective loss. A diplomatic protection claim does not qualify as a suitable vehicle for a state to recover compensation on the grounds of reflective loss inflicted on its nationals on whose behalf it was acting, for three main reasons: a) a state cannot recover direct compensation for the reflective loss it suffered itself as a direct shareholder in a company, as it is "representing" the investors and aims at the protection of their rights through a diplomatic protection claim; b) the applicability of the exhaustion of local remedies rule in interstate arbitration and c) the politicisation of investment disputes between states. The rest of the available mechanisms do not provide viable alternatives to investor-state arbitration. The ICJ mainly deals with disputes arising out of public/*de jure imperii* activities of states and not with commercial disputes. The MIC, AIC and AfCFTA are local dispute settlement mechanisms, which state shareholders are not inclined or able to use in order to bring a claim for reflective loss. Diplomacy requires the willingness of both parties to find a solution to the concerned dispute, which is not always the case.

CHAPTER 9: THE LOSING PARTY'S IMMUNITY FROM EXECUTION IN FOLLOW-ON PROCEEDINGS

9.1 The Application of Immunity from Execution in Investment Disputes between States

The issue of state immunity becomes relevant to this dissertation as it relates to the enforcement stage of an arbitral award rendered in an investment dispute for reflective loss between a state shareholder (claimant) and the host state (defendant). Since the arbitration itself is based on the consent of the parties to submit a certain dispute to it, the principle of state immunity in the framework of IIA becomes relevant when it comes to immunity from execution.[1036] The importance here lies in the fact that both parties are public entities that may enjoy immunity from execution in the follow-on proceedings. In a constellation, when the host state is the winner of the arbitral proceedings, the enforcement of the decision on arbitration costs entailed in the arbitral award against the state shareholder (claimant and losing party) may be problematic if the assets of the state shareholder are immune from execution. Vice versa, an arbitral award granting compensation for reflective loss to a state or private shareholder may not be enforced against the host state (losing party) because the latter benefits from state immunity. Immunity from execution may hinder the effectiveness of IIA as a dispute resolution mechanism, because it enables public entities to run away from obligations during or in the aftermath of the procedure.[1037] Since compliance and execution are crucial for IIA to form a fruitful framework for both investors and states, it is important to see how the principle of state immunity interferes in (the aftermath) of arbitral proceedings. The aim of this chapter is a) to examine the risks imposed by state immunity in terms of a holistic approach (from the side of the state shareholder and the side of the host state itself) and b) to propose feasible solutions to tackle them.

[1036] See also: M. Potesta, 'Republic of Italy v. Republic of Cuba', *The American Journal of International Law* 2012, Vol. 106, p. 342.
[1037] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 10.

9.2 Overview of the Principle of State Immunity

9.2.1 General

The rules of state immunity focus primarily on the protection of a foreign state against liability and litigation in the courts of other countries.[1038] Under international law, foreign states should in general not be subject to proceedings or execution without their consent. The principle of state immunity is a result of the Westphalian state system that has been created under international law and according to which states enjoyed absolute immunity which meant that all proceedings against foreign states without their consent were inadmissible.[1039] The principle of state immunity follows from the starting point that all states enjoy independence from each other.[1040] Sovereign immunity is therefore defined as a barring plea relating to the adjudicative and enforcement jurisdiction of national courts in relation to cases that concern another state.[1041]

The international legal personality of the state that enjoyed state immunity enabled it to interact on a sovereign and independent basis in the international community.[1042] However, there is a difference between actions *de jure imperii* and actions *de jure gestionis*.[1043] The interdependence between states is based on the principles of equality and independence when it comes to *acta jure imperii*.[1044] The Declaration on Friendly Relations of the General Assembly of the United Nations defines this relationship as follows:

> "*All States enjoy sovereign equality and independence. They have equal rights and duties and we are equal members of the international community, notwithstanding differences of an economic, social, political or other nature*".[1045]

[1038] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 2.
[1039] A. Clapham, *Brierly's Law of Nations,* Oxford University Press 2012, p. 41-42.
[1040] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 99.
[1041] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 3.
[1042] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 99-101.
[1043] See also: *Jurisdictional Immunitites of the State (Germany v. Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, paras. 53-57.
[1044] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 25.
[1045] Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV) of 24 October 1970.

In case of commercial activities, there is a tendency to apply the principle of state immunity in a more restrictive manner.[1046]

The principle of state immunity is applied differently over time. Depending on the applicable jurisdiction and field of law the application even currently still varies.[1047] There are three models or doctrines that determine the extent to which state immunity is applicable.[1048]

The first model is the so-called absolute doctrine. The foundation of this doctrine was established by Jean Bodin in his book *Les six livres de la république* (1576): "[Bodin] *centralized governmental power, located it in the Westphalian State, conferred legal personality upon the State which distinguished it from the other overlords, and vested in it the powers, rights and privileges previously scattered among feudal, guild and other relationships*".[1049] The cornerstone of this doctrine lies around the internal exclusive competence of the state. Grotius added the external aspects to this concept for an international community, which were adopted by Lawrence, Phillimore, Hyde and Wharton based on equal and independent states observing a rule of non-intervention in the domestic affairs of other states.[1050]

The second model is called the restrictive doctrine. In the early twentieth century there was debate in the League of Nations about the rigorous outcomes of the doctrine of absolute state immunity given the fact that in some cases states act as private individuals. The Committee of Experts declared in relation to the absolute nature of state immunity that:

> "[…] *there can be no doubt since the last century the activities of the State in the economic, financial and industrial spheres have developed to such an extent as to render it an increasingly common occurrence for it to come into contact with private individuals particularly in regard to large undertakings. In these circumstances it might be just to recognise that there are cases in which acts done by a foreign State and leading to a dispute ought to be treated by the law as acts of a private individual* […]".[1051]

[1046] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 101-102.
[1047] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 51.
[1048] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 25.
[1049] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 26.
[1050] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 26.
[1051] Third Session of the Committee of Experts for the Progressive Codification of International Law, 22 AJIL (1928) Sp Supp 128, at p 128, 11 October 1926; H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 32-33.

The principle of relative state immunity made a distinction between public and private acts, which means that the immunity of the state is deemed to be waived under particular circumstances.[1052] This is for instance an important reason why the application of this principle by national courts varies on whether the exercise of jurisdiction is criminal or civil.[1053]

The third model defines immunity as a procedural plea.[1054] This means that state immunity can be waived by the state itself by giving its consent.[1055] The conduct of a state's behaviour is not necessarily relevant, even if the relevant act takes place on the territory of another state.[1056] The plea of state immunity excludes questions as to the lawfulness of the act of a foreign state, but it has a procedural character.[1057] The question is whether a concerned state can be held liable/accountable from a procedural perspective.[1058] When it comes to civil jurisdiction the question in what capacity a state has undertaken a certain act therefore becomes relevant.[1059]

The starting point for the presentation of the principle of state immunity under international law is placed on the fundamental difference between actions *de jure imperii* and actions *de jure gestionis.*[1060] The distinction between the two categories of actions is that the former are official or sovereign acts, and the latter are commercial acts carried out by a state entity.[1061] The underlying reason for this distinction is the assumption that when a state engages in commercial activities and competes with private entities, it must be treated like its competitors, which are also not immune from scrutiny by the courts in the state in which they compete.[1062] The principle of state immunity is not absolute anymore in international law when it comes to acts conducted in a commercial setting.[1063]

[1052] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 101.
[1053] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 87. See also Paragraph 9.2.3 and 9.2.4 on the 2004 the United Nations Convention on Jurisdictional Immunities for States and Their Property (UNCSI) and the restrictive approach on state immunity under domestic law.
[1054] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 52-53.
[1055] See e.g.: *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece Intervening*), Judgment, ICJ Reports 2012, para. 131.
[1056] A. Clapham, *Brierly's Law of Nations,* Oxford University Press 2012, p. 41-42.
[1057] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 117.
[1058] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 12-13.
[1059] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p 23-24.
[1060] See also: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, paras. 53-57.
[1061] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 101.
[1062] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 102-103.
[1063] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p 18.

Historically, for the determination of the distinction between sovereign and commercial acts, the "private individual test" was applied, whereby the question asked was whether the activity in question could also be carried out by a private entity.[1064] According to the "purpose test", an act is considered to be sovereign if it is performed for public or governmental purposes.[1065] However, from the moment that states started engaging in (international) commercial activities, many jurisdictions have chosen a more restrictive approach that leads to the rejection of state immunity in relation to commercial and private law disputes.[1066] This restrictive approach has also been chosen and applied in the *Empire of Iran* case by the German Federal Constitutional Court in 1963.[1067] The case referred to compensation for the repairs to the heating system, which were carried out in the Iranian embassy. In this well-known case the German Court dealt with the issue of state immunity and its status under international law. The German Court applied the restrictive approach by looking at the nature of the state transaction or the resulting legal relationship rather than the motive or purpose of the state activity.[1068] The "private individual test" can, to a large extent assist in the determination of the nature of the act. In these terms, the nature of the act is likely to be categorized as commercial if the concerned act can also be carried out by a private individual.

The ICJ took a firm position in favour of the principle of state immunity in case of public acts carried out by government officials.[1069] In decisions such as *Arrest Warrant*[1070], *Djibouti v. France*[1071], *Jurisdictional Immunities*[1072] and *Belgium v. Senegal*[1073] the ICJ provides rulings which are directly relevant to the law of state immunity.[1074] In *Arrest Warrant* the ICJ considered the issue of an international arrest warrant for the arrest of a serving minister of the Democratic Republic of Congo to be in violation of the law of state immunity.[1075] The same conclusion was drawn by the ICJ in *Djibouti v. France* in regard to witness summons to a visiting Head of

[1064] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 400-401.
[1065] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 102.
[1066] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 11.
[1067] *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963).
[1068] *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963).
[1069] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 107-112.
[1070] *Arrest Warrant (Democratic Republic of Congo v. Belgium)*, Judgment [2002] ICJ Reports 2002.
[1071] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment [2008] ICJ Reports 2008.
[1072] *Jurisdictional Immunitites of the State (Germany v. Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, paras. 53-57.
[1073] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Reports 2012.
[1074] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p 102.
[1075] *Arrest Warrant (Democratic Republic of Congo v. Belgium)*, Judgment [2002] ICJ Reports 2002, para. 55.

State.[1076] In *Jurisdictional Immunities* the ICJ ruled that generally speaking immunity from execution must be specifically waived first.[1077] The ICJ, however, came to a different conclusion in *Belgium v. Senegal*, which was about the extradition of a former Head of State in relation to his alleged failure to comply with the *erga omnes partes* obligations of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1078] In this case, which was about an *acta jure imperii*, the law of state immunity was not considered to be completely absolute in case of alleged violations of principles where no reservations or derogations are permissible.[1079] Hence, the principle of state immunity in case of actions *de jure imperii* is almost absolute. The principle of state immunity in case of actions *de jure gestionis* has developed in a different direction over time.

9.2.2 The Distinction between Immunity from Jurisdiction and Immunity from Execution

One important issue that arises when it comes to seeking reimbursement from a foreign state entity is that state immunity plays in general an even more restrictive role at the execution stage than at the jurisdictional stage, regardless of the divergences between the applicable frameworks on state immunity in the involved legal orders.[1080] In IIA states can waive their immunity via an ad hoc agreement, a BITor a multilateral FTA.[1081] A state's consent can also be established by simply engaging in the arbitral proceedings.[1082] However, a clear distinction should be made here between a waiver of immunity from jurisdiction and a waiver of immunity from execution.[1083] Immunity from jurisdiction is important in relation to the recognition of arbitral awards, whereas immunity from execution place a vital role in the execution stage of the award.[1084]

[1076] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Reports 2012, para. 171-172.
[1077] *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece Intervening*), Judgment, ICJ Reports 2012, para. 131.
[1078] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Reports 2012, para. 15-22.
[1079] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Reports 2012, para. 113.
[1080] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 105.
[1081] F. Fontanelli and A. Tanzi, "Jurisdiction and Admissibility in Investment Arbitration. A view from the Bridge at the Practice", *The Law and Practice of International Courts and Tribunals* 2017, p. 13-16.
[1082] See also: S. Blanchard, 'State Consent, Temporal Jurisdiction and the Importation of Continuing Circumstances Analysis into International Investment Arbitration', *Washington University Global Studies Law Review*, Vol. 10, No. 3, 2011, pp. 419-476.
[1083] G. Coop, A. Nistal and R.G. Volterra, 'Sovereign immunities and investor-state awards', in: Julien Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards*, Globe Law and Business (London) 2015, p. 67-82
[1084] https://www.corrs.com.au/insights/the-enforcement-of-arbitral-awards-against-states-and-state-entities-global-developments.

Immunity from jurisdiction protects the state from being involuntarily subject to court or arbitral proceedings.[1085] There are various grounds to justify immunity from jurisdiction, such as the status of equality between independent sovereign states, which means that one state shall not exercise jurisdiction over another state in line with the principle of *par in parem non habet jurisdictionem*: one sovereign state is not subject to the jurisdiction of another state.[1086] It has also been argued that the non-intervention in the internal affairs of other states is justified in relation to among other things the dignity of the foreign nations as well as the functional need in relation to their respective public mission.[1087] In many jurisdictions there is a restrictive approach (in line with the *Empire of Iran* case) towards this type of immunity from jurisdiction when it comes to disputes with a private law character or commercial disputes.[1088] The former criterion (private law character) is mainly applied in civil law jurisdictions and the latter (commercial disputes) in common law jurisdictions.[1089] Immunity from jurisdiction does not need to be waived explicitly as such in order to apply the restrictive approach.[1090] It also can be presumed that when a state is engaged in a commercial transaction and acting *de jure gestionis* instead of *de jure imperii*, it therefore is acting like any other ordinary commercial party.[1091]

The execution of an award or judgment against a foreign state is subject to greater challenge than having that actual award or judgment rendered itself.[1092] The execution of an award or judgment against a foreign state has an even larger impact on the immunity of that particular state than the legal proceedings.[1093] At the same time, the Organisation for Economic Cooperation and Development (OECD) indicates that it would make sense to align the framework on state immunity from jurisdiction and execution; a national legal system which has jurisdiction to render a judgment can then also enforce that judgment more easily.[1094] Generally speaking immunity from jurisdiction must specifically be waived in contrast to immunity from

[1085] A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 100.
[1086] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 26-27.
[1087] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 13.
[1088] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 51-53.
[1089] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 133-166.
[1090] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 32-33.
[1091] See also: C. Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties', *Chinese Journal of International Law* 10, no. 3 (2011), p. 542-543.
[1092] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 518.
[1093] See also: A. Henriksen, *International Law*, Oxford University Press 2023 (4th edition), p. 105.
[1094] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 20.

execution.[1095] Countries have developed different approaches, but usually execution against foreign states is limited rather than adjudicated.[1096] State immunity can prevent execution even if the dispute is commercial in nature. Very often the state will argue that the assets are immune from execution since they are for a public cause or purpose.[1097]

9.2.3 Restrictions on State Immunity

The issue of restricting state immunity under international law is mostly aimed at restricting immunity from jurisdiction instead of restricting immunity from execution.[1098] In Germany the shift from absolute to restrictive doctrine has been made after some hesitancy. In *The Ice King* the German *Reichsgericht* ruled in 1921 that despite a tendency in the literature to shift to a more restrictive doctrine, even in purely private law cases a foreign state is to be regarded as immune.[1099] Later before the Second World War Germany's position changed: Germany ratified the Brussels Convention, and its courts increasingly started applying a restrictive doctrine in maritime and private law cases. The *Empire of Iran* case by the German Federal Constitutional Court (*Bundesverfassungsgericht*) in 1963 even became a landmark case for the establishment of the private individual test and shaped the restrictive doctrine significantly.[1100] When it comes to the issue of immunity from execution the Federal Constitutional Court concluded in *Philippine Embassy Bank Account* in 1977 that execution measures against Embassy bank accounts are inadmissible without the State's consent insofar as the bank account in serving sovereign purposes.[1101]

The most important international conventions imposing restrictions on state immunity are a) the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (Brussels Convention) and the 1934 Protocol; b) the 1972 European Convention on State Immunity (ECSI); and c) the 2004 the United Nations Convention on Jurisdictional Immunities for States and Their Property (UNCSI).

[1095] Jurisdictional Immunities of the State (*Germany v. Italy, Greece Intervening*), Judgment, ICJ Reports 2012, para. 131.
[1096] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 20.
[1097] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 518.
[1098] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 13.
[1099] *The Ice King*, Reichsgericht, 11 December 2021, 1 ILR 151-2, Case No. 102, 151-2; H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 159.
[1100] *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963).
[1101] *Philippine Embassy Bank Account*, German Federal Constitutional Court, 2 BvM 1/76 (1977).

The Brussels Convention is a form of maritime law/admiralty law that deals with the treatment of state-owned ships.[1102] The treaty was drafted by the League of Nations.[1103] Article 3(1) of the Brussels Convention mentions the principle of state immunity and stipulates that claimants shall have the right of initiating proceedings in the courts of the state owning or operating the vessel without that state being permitted to avail itself of its immunity. The Brussels Convention is a clear example of a restriction of the principle of state immunity.[1104] The Brussels Convention was legally binding upon the parties to the treaty, which had given consent by signing and ratifying the concerned convention.

The ECSI is a convention that was drafted by the Council of Europe.[1105] The ECSI is a regional convention legally binding upon the contracting states.[1106] The ECSI is a further restriction on the principle of state immunity.[1107] The contracting parties desired to establish common rules on the scope of the immunity in their jurisdictions.[1108] The ECSI deals mostly with the issue of immunity from jurisdiction and it contains procedural rules for the application of the principle.[1109] Article 1(1) of the ECSI states that:

> "*A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State*".

Under the ECSI a contracting state cannot claim state immunity from the jurisdiction of a court if it has given its consent for the procedure.[1110] This is also the case if the state has taken any steps in the proceedings relating to the merits.[1111] The ECSI also lists certain obligations and fields in which the state will not be able to plead for immunity from jurisdiction.[1112] Article 12

[1102] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 116.
[1103] https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166914.
[1104] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 116-117.
[1105] https://rm.coe.int/16800730b1.
[1106] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 10.
[1107] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 118.
[1108] See also the Preamble of the European Convention on State Immunity.
[1109] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 119.
[1110] *1972* ECSI, Article 2.
[1111] *1972* ECSI, Article 3.
[1112] This is for instance the case if the proceedings relate to a contract of employment (Article 5), if the state participates with one or more private persons in a company, association or other legal entity (Article 6), if the state carries out commercial, financial or industrial activities through an office, agency or establishment on the territory

of the ECSI furthermore excludes the option of immunity from jurisdiction if the consent previously given by the contracting state is based on an arbitration agreement. The procedural rules determine that these rules on immunity from jurisdiction apply as long as the proceedings between contracting states take place in accordance with the rules as included in Chapter II of the ECSI.

The UNCSI lists certain types of agreements and transactions for which immunity from jurisdiction is excluded.[1113] After years of negotiation this treaty on immunity from jurisdiction has been adopted by the General Assembly in 2004.[1114] The UNCSI is not in force (yet) because currently it has been signed by 28 countries and ratified by 22. The UNCSI, however, provides that it will enter into force once thirty states have submitted their ratification. The UNCSI adopts the restrictive doctrine on state immunity which is supported by the vast majority of states.[1115] However, some aspects of the UNCSI are controversial due to a lack of support in general state practice, such as the omission of any provision relating to criminal proceedings and the exclusion in Article 3 of immunities enjoyed by diplomatic missions or the Head of State acting ratione personae from its scope.[1116] Nonetheless, it is a useful document for understanding how the restrictive approach in relation to immunity from jurisdiction works. Article 5 states that a state "*enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention*". This immunity can be restricted in relation to commercial transactions as stipulated by Article 2(c), whereby a commercial transaction means any commercial contract or transaction for the sale of goods or supply of services, any contract for a loan or other transaction of financial nature or any other contract or transaction of commercial, industrial, trading or professional nature not including a contract of employment.

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of the other state (Article 7), in relation to IP disputes (Article 8) and in relation to certain property disputes (Article 9-11).

[1113] This approach is also used in the UNCSI, which, in addition to the transactions defined in Art. 2 contains a series of specific exceptions in Articles 11 (employment contracts), 14 (intellectual property), 15 (companies), 16 (shipping) and 17 (arbitration agreements). See also: D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 20.

[1114] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 287.

[1115] See Paragraph 9.2.4. H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 322-323.

[1116] T. Treves, 'Some Peculiarities of the UN Convention on Jurisdictional Immunities of States and their Property: a Footnote on the Codification Technique', in: I. Buffard, J. Crawford, A. Pellet, and S. Wittich (eds), *International Law Between Universalism and Fragmentation, Festschrift in Honor of Gerhard Hafner*, Brill (2009), p. 505–506. H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 324.

In addition to the above, the UNCSI also lists specific types of commercial transactions, whereby the law of state immunity should be restricted. These exceptions are for instance disputes related to employment contracts,[1117] intellectual property,[1118] companies,[1119] shipping[1120] and arbitration agreements.[1121] The attempts to restrict the law of state immunity in case of commercial transactions demonstrates a need to deviate from the general rule that was applicable to the state in its traditional capacity.[1122]

The article on arbitration agreements specifically restricts the immunity from jurisdiction of a state if that state has entered into an arbitration agreement in a procedure which relates to the validity, interpretation or application of the agreement, the arbitration procedure itself or the award that is the result of such an arbitral procedure (follow-on procedure).

9.2.4 Domestic Law on State Immunity

(a) China

Until 2023, the PRC followed the absolute doctrine of state immunity which meant that all foreign states were immune from jurisdiction and execution in respect of all their transactions, activities and assets.[1123] On the 1st of January 2024, the new Foreign State Immunity Law of the PRC (FSIL) came into force.[1124] The FSIL implements a form of restrictive immunity including a commercial exception. In general, states enjoy immunity from jurisdiction (art. 3 of the FSIL). Exceptions to this general rule apply to proceedings arising from commercial activities (art. 7), in case of an explicit waiver of a foreign state's immunity (art. 4-5) or in case of a dispute arising out of commercial activity and having been submitted to arbitration (art. 12).

A foreign state will not be able to claim immunity from suit in related court proceedings concerning the validity of the arbitration agreement, the recognition and enforcement of the award, the setting aside of the award and other matters related to arbitration prescribed by law to be reviewed by the court (art. 12 of the FSIL). When it comes to immunity from execution, the property of a foreign state enjoys immunity from compulsory judicial measures in the courts of

[1117] *2004 United Nations Convention on Jurisdictional Immunities for States and Their Property*, Article 11.
[1118] *2004 United Nations Convention on Jurisdictional Immunities for States and Their Property*, Article 14.
[1119] *2004 United Nations Convention on Jurisdictional Immunities for States and Their Property*, Article 15.
[1120] *2004 United Nations Convention on Jurisdictional Immunities for States and Their Property*, Article 16.
[1121] *2004 United Nations Convention on Jurisdictional Immunities for States and Their Property*, Article 17.
[1122] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 18.
[1123] https://www.herbertsmithfreehills.com/insights/reports/inside-arbitration/a-new-era-foreign-state-immunity-in-the-prc-and-hong-kong.
[1124] http://en.npc.gov.cn.cdurl.cn/2023-09/01/c_924629.htm.

the PRC (art. 13 of the FSIL). However, the immunity of a foreign state from execution does not exist in the PRC, if the foreign state has waived the immunity, if it has allocated or earmarked the property for the enforcement of compulsory judicial measures or if the property of the foreign state is 1) located in the territory of the PRC, 2) used for a commercial activity and 3) connected to the proceedings (art. 14 of the FSIL).

(b) England and Wales

Under English law there was a tendency in favour of the absolute doctrine up until the 1970s. Various attempts have been undertaken to shift to a more restrictive approach, but the fact that US Courts were able to render judgments against foreign states for their commercial debt allowed the City of London to convince the administration of the need to reform its legislation.[1125] The UK State Immunity Act 1978 (UKSIA) also contains rules to restrict state immunity. These rules aim to limit the law of state immunity when it comes to immunity from jurisdiction. In principle the state is immune from jurisdiction ex section 1 of the UKSIA except for when the concerned state has given its consent[1126] or when the dispute is related to a commercial transaction listed in the UKSIA.[1127] This is, for instance, applicable to employment contacts

[1125] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 145.

[1126] Section 2 (Submission to jurisdiction) UKSIA: "(1)A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
(2)A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
(3)A State is deemed to have submitted—
(a)if it has instituted the proceedings; or
(b)subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
(4)Subsection (3)(*b*) above does not apply to intervention or any step taken for the purpose only of—
(a)claiming immunity; or
(b)asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.
(5)Subsection (3)(*b*) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.
(6)A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.
(7)The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract".

[1127] Section 3 (Commercial transactions and contracts to be performed in United Kingdom) UKSIA:
"(1)A State is not immune as respects proceedings relating to—
(a)a commercial transaction entered into by the State; or
(b)an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(section 4), personal injuries and damage to property (section 5), ownership, possession and use of property (section 6), patents and trademarks (section 7), memberships of corporate bodies, commercial ships (section 10) and VAT (value added tax) issues (section 11). The restriction of the principle of state immunity from jurisdiction in case of an arbitration agreement is included in section 9, whereby the agreement needs to be put in writing and does not concern arbitration between states. These rules are applicable when it comes to immunity from jurisdiction. At the enforcement stage the assets of the state are deemed to be immune from execution under section 13.

This is different if the concerned assets are used for commercial purposes.[1128] In *Zhongshan Fucheng v. Nigeria* the High Court of Justice found, in an enforcement procedure of an UNCITRAL award under the China-Nigeria BIT, that real estate property owned by Nigeria did not benefit from the state's immunity from enforcement because at the time the property was used for commercial purposes: in this case for the purpose of leases to residential tenants.[1129] Alternatively, a waiver of state immunity from execution can also be established in the form of written consent in advance of any process related to the enforcement of a judgment or award in accordance with section 13(3) of the UKSIA.[1130] The High Court found in *General Dynamics v. Libya* that such a form of consent can also be incorporated in an arbitration clause of the investment contract.[1131] In this case the arbitration clause included the following provision: "*Both parties agree that the decision of the arbitration panel shall be final, binding and wholly enforceable*".[1132]

The High Court ruled that there is no single prescribed form of wording that would amount to "written consent" and that the effect of the words needs to be assessed in their correct legal and factual context.[1133] Because the intention of the parties was that all arbitral awards

(2)This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(*b*) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
(3)In this section "commercial transaction" means—
(a)any contract for the supply of goods or services;
(b)any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
(c)any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual".

[1128] *AIC v. Nigeria* [2003] EWHC 1357, para. 56.
[1129] *Zhongshan Fucheng v. Nigeria* [2024] EWHC 1503 (Comm).
[1130] A. Dickinson, R. Lindsay and J.P. Loonam, *State Immunity. Selected Materials and Commentary*, Oxford University Press (2004), no. 4.164; *Gold Reserve Inc v. Venezuela* [2016] EWHC 153 (Comm); https://www.lexology.com/library/detail.aspx?g=e98d861b-418e-4ad3-9dd4-1be851fb7f37.
[1131] *General Dynamics v. Libya* [2024] EWHC 472.
[1132] *General Dynamics v. Libya* [2024] EWHC 472, para. 2.
[1133] *General Dynamics v. Libya* [2024] EWHC 472, para. 24.

would be final and binding and that they would be fully enforceable the High Court concluded that the arbitration clause included a waiver of immunity from execution.[1134]

(c) France

In France, the law on state immunity has been developed through case law. There are few statutory provisions governing sovereign immunity. Examples of recent statutory contributions are the Sapin II Law (art. L.111-1-1), the French Civil Enforcement Proceedings Code (CEPC, art. L.111-1-3) and the MFC (art. 153-1).[1135] France is a party to the 2004 UN Convention, but not to the 1972 European Convention on State immunity.

Under French case law, if a state enters into an arbitration agreement in writing and agrees to submit to arbitration procedures related to a commercial transaction, it cannot claim immunity from jurisdiction thereafter. In case 1986 *Société européenne d'Etudes et d'Entreprise (S.E.E.E.) c. République de Yougoslavie*, the Cour de Cassation ruled that Yugoslavia's agreement to arbitration meant that it "*has submitted itself to the jurisdictional power of the arbitrators, has thereby accepted that their award be recognised as enforceable*".[1136]

The Sapin II Law laid down the conditions for a state's waiver of its immunity from execution. In contrast to the immunity from jurisdiction, a waiver of the state's immunity from execution with respect to all its assets cannot be concluded by the state's entry into an arbitration agreement. A waiver of the state's immunity from execution is effective, if it is express, special and targets purely commercial assets [see art. L 111-1-1 to L 111-1-3 of the French Code of Civil Procedures for Enforcement (CCP Enforcement), as introduced by the Sapin II Law].

The evolution of French case law on state immunity is a prerequisite for the understanding of the new regime governing state immunity from execution under French law and its impact on arbitration.[1137] In the famous *Creighton v. Qatar* decision (Cass. 1re civ. 6 juillet 2000, Société Creighton Ltd c. Qatar), the Cour de Cassation held that the state of Qatar had waived its immunity from execution, by agreeing to an arbitration clause and to executing the award in accordance with the ICC Rules of Arbitration.[1138] The Cour de Cassation ruled that a waiver of

[1134] *General Dynamics v. Libya* [2024] EWHC 472, para. 24 and 26.
[1135] https://www.lexology.com/library/detail.aspx?g=d5ec5d21-d652-49cd-a95d-14a1c8af6a5c.
[1136] Civ. I 13 October 1986, Rev. Arb. 1986 (*Société européenne d'Etudes et d'Entreprise (S.E.E.E.) c. République de Yougoslavie*).
[1137] LexisNexis State immunity and Arbitration in France.
[1138] Civ. I 6 July 2000, Rev. Arb. 2000 (*Creighton v. Qatar*).

Qatar's immunity from execution was implied by the commitment made by the state in the arbitration clause to carry out the award within the terms of article 24 of the ICC Rules.[1139]

(d) Hong Kong

Before 1997 Hong Kong used to follow the English approach of restrictive immunity. After June 1997 and the handover of Hong Kong to the PRC, Hong Kong adopted the doctrine of absolute immunity, as it was required by the Hong Kong Basic Law to adopt the PRC position on "foreign affairs". This fundamental change to Hong Kong's approach to state immunity was highlighted in the case of *FG Hemisphere v. The Democratic Republic of Congo* (FACV 5-7/2010), where the Hong Kong Court of Final Appeal (CFA) decided that after 1997 the absolute doctrine of immunity applies in Hong Kong.[1140] The CFA's decision was duly confirmed by the Standing Committee of the National People's Congress (SCNPC), which has the ultimate responsibility for matters of foreign affairs in Hong Kong. This shift from the restrictive to absolute immunity meant that foreign states were absolutely immune from suits brought against them in the Hong Kong courts.[1141] As of 1 January 2024, the PRC has introduced the new PRC Foreign State Immunity Law (FSIL).[1142] Under the new FSIL, Hong Kong has moved from the absolute doctrine on state immunity to a more permissive restrictive doctrine on State Immunity.

(e) Netherlands

In the Netherlands the restrictive doctrine has repeatedly been recognised by the Dutch Supreme Court (*Hoge Raad*).[1143] In *Koninkrijk Marokko/Aissaoui* and *Russische Federatie/Pied-Rich B.V.* the question of whether certain actions of a foreign state should be classified as commercial needs to be determined by the nature of the concerned actions (*aard van het handelen*). The purpose of a state's actions is less relevant, because the *Hoge Raad* deems it important to apply the restrictive doctrine as objectively as possible. The restrictive approach is recognised as a principle of international law and therefore directly applicable ex Article 13a of the *Wet algemene bepalingen* in the Netherlands. This regime is however only applicable with

[1139] Civ. I 6 July 2000, Rev. Arb. 2000, para. 2-6 (*Creighton v. Qatar*).
[1140] *FG Hemisphere v. The Democratic Republic of Congo* FACV 5-7/2010.
[1141] https://www.nortonrosefulbright.com/en-sg/knowledge/publications/1f4d07b1/state-immunity-and-international-arbitration#section3.
[1142] https://www.herbertsmithfreehills.com/insights/reports/inside-arbitration/a-new-era-foreign-state-immunity-in-the-prc-and-hong-kong.
[1143] HR 5 februari 2010, para. 3.4, *NJ* 2010/524 m.nt. Th. de Boer (*Koninkrijk Marokko/Aissaoui*); HR 28 mei 1993, para. 3.2, *NJ* 1994/329 m.nt. J.C. Schultsz (*Russische Federatie/Pied-Rich B.V.*).

regard to immunity from jurisdiction and not with regard to immunity from execution. In the Netherlands immunity from execution is presumed until proven differently by the counterparty.[1144] The Dutch Supreme Court ruled that immunity from execution is deemed to be waived only if the party relying on the exception can establish that the property is not used for public purposes by the foreign state.[1145]

(f) Singapore

In Singapore the domestic law on state immunity is codified in the State Immunity Act 1979 (SSIA). The SSIA is largely based on the UKSIA with a few minor differences.[1146] The latest version of this act is the revised version of 2020.[1147] In line with other common law jurisdictions, the state is in general immune from the jurisdiction of the courts of Singapore (s. 3 of SSIA). The exceptions to this general rule are laid down in sections 4-13 of SSIA. According to them, a state is not immune from jurisdiction, if it has submitted proceedings to the jurisdiction of the courts of Singapore (s. 4), in case of obligations that follow from commercial transactions and contracts (s. 5) or in the fields of employment contracts (s. 6), personal injuries and damage to property (s. 7), ownership, possession and property (s. 8), intellectual property (s. 9), membership of corporate bodies (s. 10), arbitrations (s. 11), maritime issues (s. 12) and custom duties (s. 13). When it comes to arbitrations, the state is not immune from jurisdiction as respects proceedings in the courts of Singapore which relate to the arbitration, if that state has agreed in writing to submit a dispute to arbitration.[1148] The immunity from execution follows from section 15 SSIA. According to section 15(2) the general rule is that the property of a State must not be subject to any process for enforcement. There is only one exception in section 15(4) SSIA which stipulates that this does not apply to property which is for the time being in use or intended for commercial purposes.[1149]

[1144] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 51.
[1145] HR 18 December 2020, ECLI:NL:HR:2020:2103, NJ 2021/106 (*Republic of Kazakhstan v. SamrukKazyna JSC*).
[1146]https://www.nortonrosefulbright.com/en-sg/knowledge/publications/1f4d07b1/state-immunity-and-international-arbitration#section4.
[1147] https://sso.agc.gov.sg/Act/SIA1979.
[1148] Section 11(1) of Singapore's State Immunity Act 1979.
[1149]https://www.nortonrosefulbright.com/en-sg/knowledge/publications/1f4d07b1/state-immunity-and-international-arbitration#section4.

(g) South Africa

In South Africa the issue of state immunity is incorporated in the Foreign States Immunities Act 87 of 1981 (SAFSIA). The rules are very much in line with the English approach on the issue of state immunity from jurisdiction. In principle a state shall be immune from jurisdiction, except if that immunity has been expressly waived in accordance with the provisions of section 3. This immunity is also not applicable if the dispute is related to a commercial transaction.[1150] The SAFIA furthermore lists the same types of procedures as the UKSIA as exempted from the law of state immunity from jurisdiction, i.e. employment contracts (section 5), personal injury (section 6), ownership and use of property (section 7), patents and trademarks (section 8), memberships of associations and other bodies (section 9), arbitration (section 10), admiralties (section 11) and sales taxes and rates in respect of premises used by it for commercial purposes (section 12). A foreign state which has agreed in writing to submit a dispute to arbitration shall not be immune from any jurisdiction of the courts related to the arbitration.[1151] The difficulty here lies in the Foreign State Immunities Amendment Act No. 48 of 1985 which stipulates that the property of a foreign state shall not be subject to attachment.[1152] However, section 14(3) SAFIA provides that this rule does not apply in respect of property which is for the time being in use or intended for use for commercial purposes. This aligns section 14 SAFIA for this purpose with section 13 of the UK State Immunity Act of 1978.

(h) Sweden

In Sweden there is no codified domestic law on state immunity. While Sweden is a party to the 2004 UN Convention, the rules on state immunity have been in general developed through

[1150] Section 4 SAFIA: "(1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to (a) a commercial transaction entered into by the foreign state; or
(b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.
(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.
(3) In subsection (1) "commercial transaction" means—
(a) any contract for the supply of services or goods;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and
(c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority,
but does not include a contract of employment between a foreign state and an individual".

[1151] A. Dickinson, R. Lindsay and J.P. Loonam, *State Immunity. Selected Materials and Commentary*, Oxford University Press (2004), no. 5.135.

[1152] A. Dickinson, R. Lindsay and J.P. Loonam, *State Immunity. Selected Materials and Commentary*, Oxford University Press (2004), no. 5.144.

case law. Although there is no general legislation in Sweden concerning the immunity of foreign sovereign States and connected persons, certain areas of state immunity have been regulated under Swedish law. Statutory provisions on state immunity can be found in a) the Act on Foreign State-Owned Ships and other matters from 1938 that implements the 1926 Brussels Convention on State-owned vessels [*Lag* (1938:470) *med vissa bestämmelser om främmande statsfartyg m.m.*], b) the Act on the Exemption of Certain Aircraft from Attachment and Injunction from 1939 implementing the Rome Convention, c) the 1961 and 1963 Vienna Conventions that have been implemented through sections 2 and 3 in the Act (1976:661) on Immunity and Privileges in Certain Cases [*Lag* (1976:661) *om immunitet och privilegier i vissa fall*] and various other treaties concerning diplomatic immunities and d) the Act (2009:1514) on Jurisdictional Immunity of States and Their Property [*Lag* (2009:1514) *om Immunitet för stater och deras egendom*] incorporating the United Nations Convention on Jurisdictional Immunities of States and their Property into Swedish law. The latter Convention and the Swedish Act implementing it are not yet into force[1153].

The legal foundation regulating immunity in civil court proceedings is still case law that is relatively limited. The qualified immunity doctrine has been confirmed under Swedish case law. This means that a foreign State can only claim immunity from jurisdiction with respect to sovereign acts, and not with respect to its commercial transactions or other civil law actions.[1154] In the Swedish Court of Appeal case RH 1981:76, brought by the Libyan American Oil Company in 1979 (the *Liamco* case), which concerned the issue of recognition and enforcement of a foreign arbitral award in Sweden, the Court granted the application by Liamco and accordingly declared the award enforceable in Sweden. Libya appealed the decision to the Supreme Court, but the dispute was settled before the Supreme Court issued a ruling on the question. Nevertheless, following the *Liamco* case, the generally accepted view in Sweden is that an arbitration agreement constitutes a waiver of immunity in judicial proceedings aimed at the recognition and enforcement of a foreign arbitral award in Sweden. The actual execution of a judgment or award against the assets of a foreign state requires a separate and specific waiver of immunity from execution. However, although additional protections from measures of execution may apply at the subsequent execution stage, recent case law suggests a shift towards a more liberal view of enforcement measures against foreign states, where the determinative factor is whether the

[1153] https://www.mannheimerswartling.se/app/uploads/2021/07/Quick-Answers-on-State-Immunity-%E2%80%93-Sweden-Kristoffer-Lof-Asa-Waller-Lisa-Hyder.pdf.
[1154] Supreme Court cases NJA 1999 section 825, NJA 2009 section 905 and NJA 2011 section 475 (Sedelmayer).

property is held for sovereign purposes or not.[1155] In this line, the Swedish Supreme Court ruled on 18 November 2021 in *Ascom v. Kazakhstan* that property owned by a central bank must have a clear connection to the central bank's monetary policy work, or some other clear connection to a qualified purpose of acta jure imperii, to be protected by state immunity from enforcement.[1156] The financial assets of a SWF from Kazakhstan were not considered to be immune from execution because the purpose of the assets must be seen as a contribution to the preservation and increase of the state's wealth for future use, which cannot be regarded as an expression of a state's right of dominion or similar official activity.[1157]

(i) Switzerland

In Switzerland, there is no codified domestic law on state immunity. The European Convention on State Immunity of 16 May 1972 regulates the protection of the property of foreign states. Switzerland has also ratified the United Nations Convention on Jurisdictional Immunities of States and their Property which was adopted on 2 December 2004.

The Swiss Federal Supreme Court adopts a narrow interpretation of state immunity, under which state immunity is not absolute. It has clarified the conditions under which a) a foreign state can be summoned before a Swiss court (immunity from jurisdiction)[1158] and b) Switzerland is entitled to take compulsory measures against a foreign state (immunity from execution).[1159] With regard to immunity from jurisdiction, the Swiss Federal Supreme Court acknowledges the distinction between actions a foreign state performs while exercising state authority ("acta iure imperii") and actions performed in a private capacity as a private person ("acta iure gestionis"). Immunity from jurisdiction may be invoked by a state exclusively for actions performed while exercising state authority.[1160] This means that a foreign state may therefore be summoned before a Swiss court for acts performed in a private capacity, provided there is a sufficient connection between the civil law matter and Swiss territory.

In the same line, immunity from execution can only be invoked in respect of the property and assets of a state which are to be used for official state purposes. Consequently, property and

[1155] https://www.mannheimerswartling.se/app/uploads/2021/07/Quick-Answers-on-State-Immunity-%E2%80%93-Sweden-Kristoffer-Lof-Asa-Waller-Lisa-Hyder.pdf.
[1156] Swedish Supreme Court 18 November 2021, NJA 2021 section 850 (*Ascom v. Kazakhstan).* https://www.magnussonlaw.com/news/the-swedish-supreme-court-certain-property-owned-by-central-bank-is-not-protected-from-enforcement-according-to-international-principles-of-state-immunity/.
[1157] Swedish Supreme Court 18 November 2021, NJA 2021 section 850, para.47-48 (*Ascom v. Kazakhstan*).
[1158] Tribunal fédéral 16 November 1994: ATF 120 II 400 (fr).
[1159] Tribunal fédéral 20 August 1998: ATF 124 III 382 (fr).
[1160] Tribunal fédéral 9 July 2008: ATF 134 III 570 (fr).

assets that the state uses in the capacity of a private person may be seized. Some elements of a state's property and assets, such as the ones used for the operations of diplomatic and consular representations, as well as those of the central bank or another state monetary authority, are automatically presumed to be for use in the state's capacity as a sovereign authority.

All in all, the concept of state immunity followed by the Swiss Federal Supreme Court is in accordance with the jurisprudence developed by most states and it has its foundation in customary international law. The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 refers to the same distinction between "*acta iure gestionis*" and "*acta iure imperii*".[1161]

(j) United States

Under US law a shift has been made from the implementation of the absolute doctrine to a more restrictive approach.[1162] The Foreign Sovereign Immunities Act 1976 (FSIA) is the basis for this restrictive approach.[1163] The FSIA was the political outcome of the Tate letter, which was issued by the Department of State in 1952 to support the application of the restrictive approach by US courts:

> "[T]*he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity*".[1164]

Under the FSIA state immunity is the main rule, but exceptions to this general rule have been included in section 1605. Under section 1605(a) of the FSIA a foreign state shall in principle

[1161]https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/privileges-and-immunities/state-immunity.html.
[1162] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 148.
[1163] M. Argentini, *Sovereign Wealth Funds and State Immunity. Queen Mary Studies in International Law*, Brill | Nijhoff (2025), p. 89.
[1164] US Department of State, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments: letter of 19 May 1952 addressed by the Department of State's Acting Legal Adviser Jack B. Tate to the Acting Attorney General Phillip B. Perlman' (1952) 26 *Department of State Bulletin* 984 (Tate letter).

not be immune from the jurisdiction of the courts if the foreign state has waived its immunity or if the action is based upon a commercial activity connected to the US.[1165]

Commercial activities as used in the FSIA mean "regular commercial conduct or a particular commercial transaction or act".[1166] Of all common law jurisdictions the exception related to commercial activities has been adopted in the US first.[1167] Section 1605(a)(2) FSIA determines that the action must be:

> "*based upon a commercial activity carried on in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States*".[1168]

This is called the nexus element which requires a jurisdictional link with the concerned country in order for the commercial exception to apply.[1169] In *Weltover*, the Supreme Court found that state investments such as the issuance of government bonds should be regarded as a commercial activity. [1170] The nexus element is established 1) if the concerned transaction behind the investment is carried out in the US (for instance via a US stock exchange), 2) if the concerned assets are brought into the US or 3) if the concerned claim is based upon a commercial act of the foreign state that has a direct effect in the US, which is the case if the effect is an immediate consequence of the foreign state's activity.[1171] This rule applies only in case of a breach of an obligation that is required in the US.[1172] An example is for instance a misrepresentation of the value of notes outside the US insofar as US investors base their investment decision on this misrepresentation.[1173] Hence, foreign states are not immune from jurisdiction in case of commercial activities that are linked to the US. In 1988 an additional exception related to state

[1165] Section 1605(a) of the Foreign Sovereign Immunities Act 1976.
[1166] A. Dickinson, R. Lindsay and J.P. Loonam, *State Immunity. Selected Materials and Commentary*, Oxford University Press (2004), no. 3.020.
[1167] M. Argentini, *Sovereign Wealth Funds and State Immunity. Queen Mary Studies in International Law*, Brill | Nijhoff (2025), p. 88.
[1168] Section 1605(a)(2) of the Foreign Sovereign Immunities Act 1976.
[1169] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 249.
[1170] *Republic of Argentina v. Weltover, Inc* [1992] 504 US 607 (US Supreme Court).
[1171] *Republic of Argentina v. Weltover, Inc* [1992] 504 US 607 (US Supreme Court), para. 618.
[1172] See also *Janvey v. Libyan Investment Authority* [2016] 840 F3d 248 (US Court of Appeal for the Fifth Circuit).
[1173] See *Atlantica Holdings, Inc v. Sovereign Wealth Fund Samruk-Kazyna jsc* [2014] 2 F Supp 3d 550 (US District Court for the Southern District of New York) 556.; M. Argentini, *Sovereign Wealth Funds and State Immunity. Queen Mary Studies in International Law*, Brill | Nijhoff (2025), p. 88.

immunity was added in relation to certain arbitration agreements and in 1996 another exception was added, when the concerned state is acting as a "sponsor of terrorism" for acts of terrorism and similar activities.[1174]

When it comes to the execution stage of the proceedings, the FSIA contains a list of types of property that are immune from execution in section 1611. This is for instance the case, if the concerned assets belong to an International Organisation or if the property is held by a foreign central bank or of a military character. The other assets are not deemed to be immune from execution ex section 1610(a) as long as the foreign state has explicitly or implicitly waived immunity or if the property is or was used for the commercial activity upon which the claim is based.[1175] In *Af-Cap, Inc. v. Republic of Congo* the US Court of Appeal for the Ninth Circuit found that property is used for commercial activities in the US "*when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity*".[1176] As Argentini points out, this purpose-based approach may create friction with section 1603(d) that stipulates that the commercial character of an activity shall be determined based on its nature rather than its purpose.[1177] The US Supreme Court found that also when it comes to immunity from execution there must be a nexus between the commercial activity on which the claim is based and the concerned property.[1178]

Section 1610(d) contains stricter rules in regard to pre-judgment execution whereby attachment is only granted if the foreign state has explicitly and specifically waived its immunity prior to the attachment and the purpose of the attachment is to secure satisfaction of a judgment against the foreign state and not to obtain jurisdiction.[1179] In *Libra Bank Ltd v. Banco Nacional de Costa Rica*, the US Court of Appeal for the Second Circuit found that the waiver of immunity must be unambiguous and expressed by unmistakable and plain language.[1180] The US is one of

[1174] H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 148.
[1175] M. Argentini, *Sovereign Wealth Funds and State Immunity. Queen Mary Studies in International Law*, Brill | Nijhoff (2025), p. 150.
[1176] *Af-Cap, Inc v Republic of Congo* [2007] 475 F3d 1080 (US Court of Appeal for the Ninth Circuit), para 1087.
[1177] M. Argentini, *Sovereign Wealth Funds and State Immunity. Queen Mary Studies in International Law*, Brill | Nijhoff (2025), p. 151.
[1178] *First National City Bank v Banco Para El Comercio Exterior de Cuba* [1983] 462 US 611 (US Supreme Court), para. 621.
[1179] *S S Machinery Co v Masinexportimport* [1983] 706 F2d 411 (US Court of Appeal for the Second Circuit), para. 416; *Banco de Seguros del Estado v Mutual Marine Office, Inc* [2003] 344 F3d 255 (US Court of Appeal for the Second Circuit), para. 261; *Kensington Intern Ltd v Republic of Congo* [2006] 461 F3d 238 (US Court of Appeal for the Second Circuit), para. 243; H. Fox and P. Webb, *The Law of State Immunity. Revised and Updated Third Edition*, Oxford University Press 2015, p. 282-283.
[1180] *Libra Bank Ltd v Banco Nacional de Costa Rica* [1982] 676 F2d 47 (US Court of Appeal for the Second Circuit) 49.

the few jurisdictions that established explicit rules on the principle of state immunity from execution.

9.3 Immunity from Execution as a Risk for the Host State

9.3.1 The Decision on Arbitration Costs and its Enforcement

In terms of a claim for reflective loss made by a state shareholder against the host state, immunity from execution poses a risk for the host state in the aftermath of the arbitral proceeding. If the state claimant loses the case, the tribunal will likely order that the host state (defendant) will be reimbursed for the incurred arbitration costs. Article 40(2) of the UNCITRAL Arbitration Rules breaks down the different types of costs that are considered "costs of arbitration". Costs of arbitration consist of the fees of the arbitral tribunal, the reasonable travel and other expenses incurred by the arbitrators or witnesses (if approved by the tribunal), the reasonable costs of expert advice and other assistance required by the tribunal, the reasonable legal and other costs incurred by the parties in the procedure and any fees and expenses of the appointing authorities.[1181] Arbitration costs have substantially increased in the last years and their total amount is significant. In 2021, the British Institute of International and Comparative Law and Allen & Overy published an empirical study on the costs of investor-state arbitration.[1182] According to this study, the mean costs incurred by host states in investor-state arbitration are around US$4.7 million. The median figure is US$2.6m.[1183] The costs for the investors are even higher: the mean costs exceed US$6.4m. The median figure is US$3.8m.[1184] The study found that there is no significant difference in costs incurred or awarded by ICSID tribunals compared to UNCITRAL tribunals.[1185]

As noted above, a state shareholder that loses an arbitration case for reflective loss, may seek to prevent execution of the arbitral award that is in favour of the host state on the grounds of immunity. The state shareholder as the losing party of the dispute may plead that certain of its

[1181] Article 40(2) of the UNICTRAL Arbitration Rules 2021.
[1182] M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration of Investor-State Arbitration*. Available via: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
[1183] M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration of Investor-State Arbitration*, p. 4. Available via: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
[1184] M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration of Investor-State Arbitration*, p. 4. Available via: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
[1185] M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration of Investor-State Arbitration*, p. 20. Available via: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.

assets are immune from execution in follow-on proceedings. This specific situation of the state shareholder as a losing party is breaking the balance between public and private entities. This happens because the enforcement of an arbitration costs decision against a private shareholder (claimant and losing party) is not being hindered by the principle of state immunity. This imbalance constitutes a risk for the host state (defendant and winning party), which will potentially increase if more arbitration tools are granted to state shareholders in terms of their claims for reflective loss. The issue of state immunity can create an unjustified imbalance in favour of the state shareholder [1186] (claimant and losing party). Therefore, it cannot be avoided in the quest for an answer to the question of whether state shareholders as claimants can and should enjoy the same protection as private shareholders in investor-state arbitration when they seek redress for reflective loss deriving from commercial activities.[1187]

9.3.2 The State Shareholder's Immunity from Execution

State shareholders enjoy immunity from execution either as direct shareholders in a SOC or as indirect shareholders through an investment vehicle. An important investment vehicle, which is used by states to create foreign investments, is the SWF.[1188] On the one hand, a SWF has legal standing in arbitral proceedings, it will ordinarily invest as a private entity and it may be incorporated and act like any other commercial party in the international investment arena.[1189] On the other hand, when a SWF loses an arbitral proceeding and refuses to pay damages, the counterparty may be faced with difficulties when it comes to enforcing the arbitral award.[1190]

Given the fact that SWFs are ultimately creations of states, it is important to find out whether they benefit from immunity[1191] as this may create risks for the host state that wins the investment dispute against a SWF (shareholder and claimant for reflective loss) and is interested in enforcing the arbitral award against the SWF's assets. For the determination of whether a SWF and its assets enjoy immunity, the following parameters should be taken into account: a) the law

[1186] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 11.
[1187] D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment* 2010/02, p. 6.
[1188] OECD (2007), *International investment of sovereign wealth funds: are new rules needed?* For the definition of SWF see chapter 3.
[1189] J. Li, 'State-Owned Enterprises in the Current Regime of Investor-State Arbitration', in: S. Lalani and R.P. Lazo, *The Role of the State in Investor-State Arbitration* (Nijhoff International Investment Law Series, vol.3, 2015), p. 383-384.
[1190] S.Y. Chen, 'Positioning Sovereign Wealth Funds as Claimants in Investor-State Arbitration', *Contemporary Asia Arbitration Journal* 2013, Vol. 6, No. 2, p. 301.
[1191] A. Cannon and H. Ambrose, 'Dealing with sovereign wealth funds: immunity concerns and practical steps to mitigate them', *Butterworths Journal of International Banking and Financial Law* 2020, p. 775.

of the jurisdiction in which proceedings are being brought, since immunity constitutes a procedural defence; b) the doctrine on state immunity that applies in the state where the dispute takes place; and c) the legal structure, governance, extent of the autonomy of the SWF from the State, the purpose for which it has been set up and its explicit aims or mission.[1192] Given the variety of the parameters that need to be taken into account and the applicable domestic laws on state immunity, the risk that a SWF benefits from immunity should be assessed on a case-by-case basis[1193].

Even if a state or a state entity carries out solely commercial activities, it may still be protected from execution at the enforcement stage. If arbitral awards cannot be enforced properly, initiating arbitral proceedings against a SWF or state in the first place can become a toothless tiger, if the state entity refuses to cooperate and compensate for the damages. The enhancement of the procedural position of state shareholders in IIA prerequisites the mitigation of the non-enforcement risk that the host state faces, in the event that it wins. In this regard, a successful outcome of an enforcement proceeding depends on the waiver of state immunity of the concerned entity when it carries out solely commercial in nature activities.[1194]

9.4 Immunity from Execution as a Risk for the State Shareholder

In the context of an enforcement action against the host state, the issue of immunity from execution becomes a complicating factor. An arbitral award granting compensation for reflective loss to a state shareholder potentially cannot be enforced against the host state (defendant and losing party) because the host state may enjoy immunity from execution. However, at this point it needs to be emphasised that the main presumption in international investment law is that states are willing to comply with arbitral awards and that non-compliance is the exception rather than the rule.[1195] Non-compliant states would risk reputational repercussions such as less foreign investment into the country.[1196]

In recent years many empirical studies on the compliance of states with investment

[1192] A. Cannon and H. Ambrose, 'Dealing with sovereign wealth funds: immunity concerns and practical steps to mitigate them', *Butterworths Journal of International Banking and Financial Law* 2020, p. 775.
[1193] A. Cannon and H. Ambrose, 'Dealing with sovereign wealth funds: immunity concerns and practical steps to mitigate them', *Butterworths Journal of International Banking and Financial Law* 2020, p. 776.
[1194] T.W. Wälde, '"Equality of Arms" in Investment Arbitration: Procedural Challenges', in: K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements* (2nd Edition), Oxford University Press 2018, pp. 161-188.
[1195] N. Strain et al, 'Compliance politics and international investment disputes: a new dataset', *Journal of International Economic Law* (2024), Vol. 27, Issue 1, p. 70-71.
[1196] T. Allee and C. Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' *International Organization* (2011), Vol. 65, Issue 3, p. 401.

awards have taken place. Although the existing sources for the time being are scarce, early studies show that compliance is not automatic and that follow-on proceedings in the form of setting aside or annulment and enforcement proceedings are frequent.[1197] Recently, the Compliance Politics and International Investment Disputes project of the University of Oslo has published a new dataset in order to facilitate research on compliance with ISDS awards.[1198] In June 2024 ICSID published a background paper on compliance with and enforcement of ICSID awards.[1199] In this study 151 Awards for Damages have been considered and the research showed that in 66% of the cases Award debtors voluntarily complied.[1200] In 26% of cases the outcome is (still) unknown (40 Damages Awards).[1201] In cases where the outcome is known (111 out of the 151 Damages Awards) the rate of voluntary compliance and post-award settlement was 90% and in relation to a further 7% of Damages Awards enforcement was sought successfully.[1202]

The ICSID study found that compliance rates related to Cost Awards against investors are lower. In total 80 Cost Awards were considered: Award debtors complied in 36% of cases and enforcement was sought in relation to 34% of the Cost Awards (with a 42% success rate).[1203] In cases where the outcome is known (41 out of the 80 Cost Awards) the rate of voluntary compliance was 71% and in relation to 12% of Cost Awards enforcement was pursued successfully.[1204]

It follows from the above that compliance by states with investment awards is not a given, but at least in ICSID proceedings respondent states tend to comply in the majority of cases.[1205] When it comes to enforcement proceedings against respondent states the outcome is unknown in 87% of cases.[1206] Out of the cases in which the outcome of enforcement proceedings is known (in relation to 11 Damages Awards), 73% of the enforcement actions (related to 8 Damages

[1197] Y. Chernykh et al, Compliance with ISDS Awards: Empirical Perspectives and Reform Implications, *ISDS Academic Forum Working Group Paper* (2022), p. 3.
[1198] N. Strain et al, 'Compliance politics and international investment disputes: a new dataset', *Journal of International Economic Law* (2024), Vol. 27, Issue 1, p. 71.
[1199] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024.
[1200] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 7.
[1201] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 8.
[1202] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 8.
[1203] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 9.
[1204] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 9.
[1205] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 3.
[1206] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 7.

Awards) was successful.[1207] Although the execution of an ICSID award cannot derogate from the applicable domestic law on state immunity from execution (art. 55 of the ICSID Convention), which practically means that states need to waive their immunity from execution under the applicable domestic law of the jurisdiction where enforcement is pursued, it follows from the above presented empirical data that the host state's immunity from execution does not hinder the enforcement of arbitral awards against it.

9.5 Mechanisms to Support Enforcement Against the Losing Party

9.5.1 Waiver of Immunity from Execution

In terms of a reflective loss claim made by a state shareholder against the host state, a potential solution to ensure that the state shareholder in case of a defeat will be willing and able to pay the arbitration costs is to "include" the execution stage earlier in the arbitration process. Both state parties could be requested to provide a waiver of immunity from execution.

Article 19(c) of the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004 provides that execution or attachment may be sought against property that *"has a connection with the entity against which the proceeding was directed"* and is *"specifically in use or intended for use by the State for other than government non-commercial purposes"*.[1208] As explained above the question whether the state's assets are immune needs to be answered in accordance with the domestic law of the state where the execution is sought. Most domestic laws allow the state to waive its immunity from execution provided that the waiver is clear and expressly consented to by the concerned state.[1209] The waiver of immunity from execution can either be included in an arbitration clause of the investment contract, in a submission agreement or in the treaty itself.[1210] An example of such a clause is provided by the ICSID Model Clauses (clause 15):

[1207] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 7.
[1208] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 50.
[1209] International Centre for Settlement of Investment Disputes, *Compliance with and Enforcement of ICSID Awards*. Background Paper. June 2024, p. 53.
[1210] B. Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards', *Asian Journal of International Law* (2016), Vol. 6, Issue 2, p. 199-200.

"The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement".[1211]

Another example can be found in the PCA Optional Rules for Arbitration between International Organizations and Private Parties Model Arbitration Clauses:

"This agreement to arbitrate constitutes a waiver of any right to sovereign immunity from execution to which a party might otherwise be entitled with respect to the enforcement of any award rendered by an arbitral tribunal constituted pursuant to this agreement".[1212]

Juratowitch proposes his own example of a waiver of immunity from execution clause:

"State X consents to execution against any current or future property or other assets of it or of any of its organs or other emanations of any debt arising from such an award or order, wherever such property or other assets are located and whether or not they have any connection with the legal entity against which the award or order was rendered or with the subject matter of that award or order or with this contract. Such property and assets shall include bank accounts of the central bank and any other monetary authority of State X, but shall not include property, including any bank account, which is dedicated solely to the performance of the functions of a diplomatic mission or consular post, or property used or intended for use solely in the performance of military functions ".[1213]

If the waiver of immunity from execution is not included in the applicable investment treaty, the state shareholder and the host state can both include a waiver of immunity from execution in a submission agreement in case of a claim for reflective loss: it is recommended that both parties waive their immunity from execution in relation to the damages or the compensation of the arbitration costs that may follow from the award.

[1211] ICSID, '*Model Clauses*,' Doc ICSID/5/Rev.1 (February 1, 1993); Waiver of immunity from execution of the Award, Model Clause 15, available at: https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/model-clauses-en/15.htm.

[1212] https://docs.pca-cpa.org/2016/02/Model-Arbitration-Clauses-for-Use-in-Connection-with-the-Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-Is-a-State.pdf.

[1213] B. Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards', *Asian Journal of International Law* (2016), Vol. 6, Issue 2, p. 232.

9.5.2 Bank Guarantees

In addition to the waiver of immunity from execution, state shareholders could be requested to provide some form of judicial guarantee; by providing enough assets to cover the arbitration costs upfront, should they lose the case. The submission agreement can also contain the obligation to provide for an independent bank guarantee or their US equivalent of standby letters of credit. The independent bank guarantee can be employed to back up all sorts of financial transactions.[1214] It may secure both monetary and non-monetary transactions.[1215] There are usually two types of transactions: guarantees which provide security for financial (or payment) obligations and guarantees which provide security for non-financial obligations.[1216] A specific, but rare type of guarantee is the judicial guarantee, which is payable upon submission of an arbitral award or court judgment affirming the beneficiary's right to payment of a certain amount by the principal applicant or submission of the principal applicant's acknowledgment by default.[1217] The maximum amount payable under the guarantee usually corresponds with the amount of the asserted claim. In this case, the bank guarantee stands for a specific type of waiver of immunity from execution since the state shareholder's monetary assets are indirectly available through the bank.

9.5.3 Freezing Orders

In case the host state (defendant) does not comply with the arbitral award and refuses to pay for the state shareholders' (claimant's) reflective loss, freezing orders like the conservatory attachment order in civil law and the Mareva injunction in common law jurisdictions may be useful tools.[1218] The same applies the other way round, when the state shareholder loses the case and the host state is entitled to the arbitration costs. In a follow-on proceeding that the host state (claimant) starts against the state shareholder (defendant) in front of a domestic court in order to

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[1214] R.F. Bertrams, *Bank Guarantees in International Trade. The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil Law and Common Law Jurisdictions*, Kluwer Law International 2013 (4th edition), p. 2.
[1215] R.F. Bertrams, *Bank Guarantees in International Trade. The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil Law and Common Law Jurisdictions*, Kluwer Law International 2013 (4th edition), p. 3.
[1216] E.L.A. van Emden and E.A.L. van Emden, 'De bankgarantie', *Recht en Praktijk, Financieel Recht (FR4)*, Deventer: Kluwer 2014, No. 1.1.
[1217] R.F. Bertrams, *Bank Guarantees in International Trade. The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil Law and Common Law Jurisdictions*, Kluwer Law International 2013 (4th edition), p. 43.
[1218] J.J. Spigelman, 'Freezing Orders in International Commercial Litigation', *Singapore Academy of Law Journal* 2010, Vol. 22, No. 21.

claim the arbitration costs, freezing orders can also provide for a solution. The purpose of these vehicles is to freeze the assets of the defendant temporarily. This will enable the claimant to secure part of the sum that needs to be paid and it will therefore smooth the enforcement stage considerably. The conservatory attachment order or Mareva injunction need to be filed in the domestic court where the assets of the defendant are.

When it comes to freezing orders, it is important to note that public assets are often immune from execution. The common feature across jurisdictions is that immunity from execution in most cases needs to be waived explicitly by the concerned state in order for its assets to be seized. In case of investment disputes between states the chances that the states will agree on a waiver of execution from immunity are limited. This issue needs to be tackled during the (pre) contracting phase of the investment project. The concerned agreement between the state investor and the public authority of the host state needs to include a clause that identifies the assets which are to be used for the execution of the agreement including a waiver of immunity if applicable.[1219] It needs to be clear early in the process if and to what extent recourse can be sought, in case the project leads to an investment dispute. In the negotiation stage of a project these types of hazards can still be fixed. From the moment a project has become an investment dispute between the state investor and host state it will be very unlikely that the host state will waive state immunity on the concerned assets. This means that lawyers need to be vigilant and aware of these potential execution risks when drafting the contracts in which public entities are involved as contracting parties.

The following comparative analysis aims at identifying to what extent the winning party from a third country can successfully file a Mareva injunction or conservatory attachment order against the losing party to secure the assets.

(a) China

The identification of a debtor's assets in China is a challenge, since there is no obligatory legal requirement for a debtor under PRC law to reveal his assets, unless: a) there is a pending bankruptcy proceeding against the debtor before a People's Court, or b) the debtor refuses to fulfil a final and enforceable judgment that has been rendered.[1220] If the last two scenarios are applicable, the People's Court may issue an order to grant asset preservation measures (such as

[1219] A.G.F. Ancery and M.A.M. Essed, 'Staatsimmuniteit van executie', *Maandblad voor Vermogensrecht* (2015), No. 2, p. 39-46.
[1220] K. Nilsson, L. Lian and N. Gu, 'China', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 6.02.

seal-up, seizure, freezing and other methods as prescribed by law) against a debtor before or after a lawsuit. A party whose legitimate rights and interest would, due to urgent circumstances, suffer irreparable damage in the absence of immediate asset preservation measures, needs to file an application before a lawsuit is initiated. In cases, where the enforcement of a judgement or an award becomes challenging, a party may request asset preservation measures after a lawsuit or an arbitration is initiated but before the judgment or the award is rendered. An order is granted by the People's Court upon request from a party, but in certain circumstances (e.g. disputed asset in the lawsuit at risk of being damaged or lost, or in case of proof that the debtor is likely to conceal, transfer or sell his assets), the People's Court may also issue such an order on its own initiative.[1221]

A tribunal established under the rules of an arbitration institution in China, such as the China International Economic and Trade Arbitration Commission, is not empowered to order an asset preservation measure against any party (PRC Arbitration Act). In case of a pending arbitration proceeding in China, the claimant wishing to pursue an asset preservation measure must apply to the competent People's Court under the above-described procedure.[1222] After the initiation of arbitration proceedings, the claimant must submit the application for an asset preservation order to the relevant arbitral institution, which will then forward the application to the competent People's Court.[1223]

(b) England and Wales

In England a claimant can file an application for a freezing order (formerly known as the Mareva injunction) in accordance with Part 25 of the Civil Procedural Rules (CPR Part 25).[1224] The freezing order was introduced in England in 1975 in the *Mareva* case.[1225] The fundamental principle of the Mareva injunctions was stated by Lord Denning MR:

> "*If it appears that [a] debt is due and owing – and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment – the Court has jurisdiction in a*

[1221] K. Nilsson, L. Lian and N. Gu, 'China', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 6.03.
[1222] K. Nilsson, L. Lian and N. Gu, 'China', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 6.03.
[1223] K. Nilsson, L. Lian and N. Gu, 'China', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 6.03.
[1224] The Civil Procedural Rules contain rules for Interim Remedies and Security for Costs in Part 25. The court may grant an order referred to as a freezing injunction ex CPR 25.1(f).
[1225] *Mareva Compania Naviera S A v. International Bulkcarriers S A*, The Mareva [1980] 1 All ER 213, CA.

proper case to grant an interlocutory judgment so as to prevent him disposing of those assets".[1226]

It has been extended to include orders of worldwide effect and a party may apply for a Mareva injunction after trial as well as before.[1227] This does however not mean that a freezing order will be granted lightly.[1228] In *The Siskina* the House of Lords decided that the English courts will only grant a freezing order if they have jurisdiction on the merits and when the freezing order is ancillary to a cause of action for final and substantial relief.[1229] The court will consider whether or not the freezing order does not unduly prejudice defendants, third parties or banks.[1230] Unless the claimant seeks a worldwide injunction there must be some grounds to show that the defendant has assets within the jurisdiction.[1231] The criteria in order to obtain a freezing order are the following: a) The defendant has assets in the concerned jurisdiction. b) The applicant must have a good arguable claim as to the merits of the claim. c) The applicant must show that there is a real risk that without injunction the respondent may put its assets beyond the reach of the applicant with the consequence that the arbitral award would remain unsatisfied. d) The applicant must show that there is a cause of action and that in all cases it is just and convenient for the court to exercise its discretion to grant the freezing order.[1232]

The freezing order may enable the claimant to secure the assets of the defendant pending an arbitral procedure. In England there are however limits when it comes to the continuation of freezing injunctions during arbitral proceedings. In *Petrochemical Logistics Ltd & Axel Krueger v. PSB Alpha AG & Konstantinos Ghertsos*,[1233] the English Commercial Court declined to continue two freezing injunctions against the Defendants in support of both a London-seated LCIA arbitration (as there was an insufficient risk of dissipation) and a Swiss-seated arbitration

[1226] *Mareva Compania Naviera S A v. International Bulkcarriers S A*, The Mareva [1980] 1 All ER 213, CA, para. 215.
[1227] R.N. Ough and W. Flenley, *The Mareva Injunction and Anton Piller Order*, Butterworths London, Dublin, Edinburgh 1993, p. 9-10.
[1228] M.S.W. Hoyle, *The Mareva Injunction and Related Orders*, Lloyd's of London Press Ltd. 1989, p. 48.
[1229] *Siskina (Owners of cargo lately laden on board) v. Distos Cia Naviera SA ("The Siskina")* [1979] AC 210; https://eapil.org/2021/10/05/privy-council-overrules-the-siskina/.
[1230] R.N. Ough and W. Flenley, *The Mareva Injunction and Anton Piller Order*, Butterworths London, Dublin, Edinburgh 1993, p. 10.
[1231] R.N. Ough and W. Flenley, *The Mareva Injunction and Anton Piller Order*, Butterworths London, Dublin, Edinburgh 1993, p. 11.
[1232] S. Sime, *A Practical Approach to Civil Procedure*, 19th edition, Oxford University Press (2016), No. 43.08; https://cms.law/en/int/expert-guides/cms-expert-guide-to-interim-measures/england-wales.
[1233] *Petrochemical Logistics Ltd & Axel Krueger v. PSB Alpha AG & Konstantinos Ghertsos* [2020] EWHC 975 (Comm).

(due to an insufficient connection to the English jurisdiction).[1234] The Court referred to the test set by Walker J in *Mobil Cerro Negro*:

> "[the English Court] *will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has a sufficiently strong link here" or where "there is some other factor of sufficient strength to justify proceedings in the absence of such link*".[1235]

Hence, the English Commercial Court ruled that if the seat of arbitration is not England, there needs to be a sufficiently strong link with the jurisdiction of England (long term connection) or injunctive relief can only be granted in exceptional circumstances. A party to a foreign-seated arbitration agreement is deemed to file for injunctive relief in the jurisdiction of the court of that foreign jurisdiction unless there is a very good reason to seek relief from the English court.[1236] In its discretion the court can refuse a freezing injunction even if at first glance the usual requirements are met.[1237] When the 'cleanliness of the claimant's hands' is open to question, the court may refuse to grant an order.[1238]

(c) France

Under French law, the freezing order is regulated by article L511-1 CEPC. In France, any person with a justified claim may seek an order for any interim measure from the judge to be enforced against the assets of the debtor.[1239] French law acknowledges two types of freezing orders: the preventive seizure and the judicial security.[1240] The preventive seizure is a temporary seizure by a creditor whose claim is under threat and the judicial security is a guarantee to a creditor whose claim is threatened. The concerned freezing order needs to fulfil two requirements (art. L511-1 of the CEPC). The creditor must prove a) that the existence of a justified claim is reasonable and plausible[1241] and b) justify circumstances likely to threaten the recovery of the

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[1234] https://www.dlapiper.com/insights/publications/2020/06/the-english-commercial-court-declines-to-continue-freezing-injunctions.
[1235] *Mobil Cerro Negro v. Petroleos de Venezuela* [2008] 1 Lloyds's Rep 684, para 119.
[1236] https://www.dlapiper.com/insights/publications/2020/06/the-english-commercial-court-declines-to-continue-freezing-injunctions.
[1237] S. Sime, *A Practical Approach to Civil Procedure*, 19th edition, Oxford University Press (2016), No. 43.23.
[1238] *Rasu Maritima SA v. Perushaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] QB 644.
[1239] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.1.
[1240] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.2.
[1241] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.2.

claim.[1242] The freezing order is granted quite easily and the concerned claim may also arise from an arbitral dispute.[1243] Certain assets immune from execution cannot be seized. In case of a preventive seizure, a debtor may request the domestic court to waive the seizure after which it is up to the creditor to prove that the conditions for the preventive seizure are fulfilled.[1244] The creditor may be ordered to pay damages in case of an unjustified preventive seizure of assets.

(d) Hong Kong

The English approach on the granting of Mareva Injunctions and Anton Piller Orders is being followed by the Law of Hong Kong. Taking into account that Mareva Injunctions and Anton Piller Orders are draconian reliefs, dramatically described by some as *"nuclear bombs in a litigant's arsenal"*, parties seeking such relief must show clear and solid evidence in support of their applications.[1245] There are two main ways of identifying the assets of another party without initiating bankruptcy proceedings against it, namely by a) obtaining a court order and b) by conducting asset searches in publicly available registers.[1246] Interim relief has been a useful tool in aid of arbitration proceedings in Hong Kong.[1247] The relevant rules in relation to interim reliefs granted in aid of arbitration proceedings are to be found in the Arbitration Ordinance, which was reformed on the basis of the UNCITRAL Model Law in 2011, the United Nations Commission on Internal Trade Law and the UNCITRAL Model Law on International Commercial Arbitration.[1248] The arbitral tribunal has the power at the request of a party to grant interim measures, including an injunction (section 35 of the Arbitration Ordinance, art. 17 of UNCITRAL Model Law).[1249] The courts in Hong Kong exercise discretion in granting interlocutory injunctions and they tend to only grant them when it is just or convenient to do so.

Applications for the Mareva Injunction can be made ex parte, without informing the defendant until the injunction is ordered, to prevent any dissipation of assets beforehand. In

[1242] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.3.
[1243] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.4.
[1244] F. Berbinau, *French and EU Freezing Orders – Injunctive Relief in France*, p.5.
[1245] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.
[1246] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.02.
[1247] *China Merchants Bank & Orders v. I-China Holdings Ltd & Another* [2003] 1 HKLRD 271.
[1248] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.
[1249] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.

return, the applicant is obliged to make full and frank disclosure of all material facts of the matter. The importance of full and frank disclosure was highlighted in the case *Intercontinental Housing Development Ltd v. Quek Teck-huat and Others*.[1250] Even though non-disclosure is not deliberate, the court would be slow in granting a Mareva Injunction, since applicants have gained an advantage, to which they were not entitled.[1251] Apart from the disclosure obligation, applicants also need to prove that: a) they have a good arguable case;[1252] b) the defendant has assets within the jurisdiction;[1253] c) there is a real risk of dissipation of assets;[1254] d) there is balance of convenience in favour of the grant.[1255]

The scope of a Mareva Injunction is not limited to assets within Hong Kong. The plaintiff could apply for a Worldwide Mareva Injunction, if the defendant does not have any assets in Hong Kong, or if the plaintiff seeks to freeze the defendant's assets outside the jurisdiction. To get a Worldwide Mareva Injunction granted, the applicant needs to prove that the defendant has assets outside the jurisdiction of Hong Kong and that his domestic assets in Hong Kong do not satisfy the judgment.[1256]

(e) Netherlands

In the Netherlands the rules on the conservatory attachment order are implemented in Articles 700-776 Rv . The conservatory attachment order in the Netherlands is based on three pillars. The claimant has the option to apply for conservatory attachment, the defendant has the option to apply for removal of the attachment and the defendant has the possibility to claim damages, if the attachment in hindsight was considered to be wrongful.[1257] In accordance with Article 705 Rv, a conservatory attachment may be removed, if the defendant provides an independent bank guarantee.[1258] The question whether a conservatory attachment order is available in case of a pending foreign-seated arbitral proceeding depends on the question whether

[1250] *Intercontinental Housing Development Ltd v. Quek Teck-huat and Others* [1986] HKLR 1153.
[1251] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.
[1252] *Akai Holdings Ltd v. Ho* [2009] HKCU 172.
[1253] *Siu Yuk Hung v. Sin Tung San* [2013] HKEC 2020.
[1254] *Pacific King Shipping Holdings Pte Ltd v. Huang Ziqiang* [2014] HKEC 582.
[1255] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.
[1256] C. Cohen, 'Hong Kong', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 11.03.
[1257] M. Meijsen, *Ontwikkelingen in het civielrechtelijk conservatoir beslag in Nederland. Serie Burgerlijk Proces en Praktijk,* Deventer: Wolters Kluwer 2013, p. 104, 156 and 210-211.
[1258] N.E.D. Faber, H.W. Heyman, C.J.M. Klaassen, Ch.A.M. Domingus-Schwencke and C. Rijckenberg (eds.), *Knelpunten bij beslag en executie. Serie Onderneming en Recht. Deel 49*, Deventer: Wolters Kluwer 2009, p. 296-307.

or not it can be qualified as an '*eis in de hoofdzaak*' ex Article 700 lid 3 Rv, i.e. claim on the merits.[1259] The explanatory memorandum of the Dutch Code of Civil Procedure clarifies that a pending foreign arbitral proceeding is indeed to be considered as an '*eis in de hoofdzaak*'.[1260] The legislator deliberately used a broad definition for the '*eis in de hoofdzaak*' which means that the conservatory attachment order is available if the assets of the defendant in a foreign-seated arbitral proceeding are in the Netherlands.[1261]

(f) Singapore

The English model on freezing orders or Mareva injunctions has been influential in Singapore.[1262] *The Siskina*[1263] was adopted as the law by the Court of Appeal in *Karaha Bodas LLC v. Pertamina Energy Trading Ltd* in 2006.[1264] A court in Singapore can successfully grant a Mareva injunction, only if there is a general cause of action.[1265] This cause of action can derive from an (international) arbitral proceeding.[1266] In Singapore the 1985 Model Law was implemented on provisions for interim measures by arbitrators and by courts in support of an arbitral proceeding.[1267] Ex parte freezing orders will need to be made by a court. Section 12A of the International Arbitration Act of Singapore also expressly authorises the court to grant interim measures in support of a foreign arbitration.[1268]

(g) South Africa

In South Africa, the Mareva injunction that is aimed at freezing a party's assets is available, if the applicant is able to demonstrate that it avoids a disposal of the assets that would make it difficult for a claimant to satisfy a judgment debt. This type of freezing order is known

[1259] M. Meijsen and A.W. Jongbloed, *Conservatoir beslag in Nederland. Zekerheid en pressiemiddel*, Raad voor de rechtspraak 2010, nr. 6.2. Available via: https://www.rechtspraak.nl/SiteCollectionDocuments/RM-Conservatoir-beslag-in-Nederland.pdf.
[1260] Parl. Gesch. Wijziging Rv e.a.w. (Inv. 3, 5 en 6), p. 310-311.
[1261] See also: M.A.J.G. Janssen, 'Wat is een eis in de hoofdzaak ex art. 700 lid 3 Rv?: Een overzicht', *Beslag en executie in de rechtspraktijk* (2011), No. 2, p. 15-20.
[1262] J.J. Spigelman, 'Freezing Orders in International Commercial Litigation', *Singapore Academy of Law Journal* 2010, Vol. 22, nr. 62.
[1263] *Siskina (Owners of Cargo Lately Laden on Board) v. Distos Compania Naviera SA* [1979] AC 210.
[1264] *Karaha Bodas LLC v. Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [31]-[43].
[1265] *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334.
[1266] J.J. Spigelman, 'Freezing Orders in International Commercial Litigation', *Singapore Academy of Law Journal* 2010, Vol. 22, No. 66.
[1267] J.J. Spigelman, 'Freezing Orders in International Commercial Litigation', *Singapore Academy of Law Journal* 2010, Vol. 22, No. 21.
[1268] J.J. Spigelman, 'Freezing Orders in International Commercial Litigation', *Singapore Academy of Law Journal* 2010, Vol. 22, No. 22.

in South Africa as the *Knox D´Arcy* interdict, anti-dissipation interdict or Mareva type interdict.[1269] In *Knox D'Arcy Ltd. and Others v. Jamieson and Others* the Supreme Court of Appeal ruled that:

> "*Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him*."[1270]

The Mareva injunction is not a remedy that is fully available under South African law. South African law recognises an interdict sui generis for matters of this nature. The court emphasised that the requirements of the interdict sui generis are (a) the presence of a *bona fide* claim and (b) that the debtor is dissipating assets or is likely to do so with an intention to defeat the *bona fide* claim.[1271] In other words, the applicant must show that the defendant was actually dissipating or concealing assets or that the defendant was likely to do so with the intention of defeating the claim of the applicant.[1272] There are stringent requirements that the applicant needs to comply with in order to obtain injunctive relief in South Africa. These requirements depend on the existence of a particular state of mind in the respondents, i.e. that they are getting rid of the funds or are likely to do so with the intention of defeating the claims of the creditors.[1273] The applicant needs to provide prima facie proof that the respondent had the intention to defeat the petitioner's claim and the general rule is that the respondent is given notice given the exceptional circumstances under which anti-dissipation injunctions are obtained.[1274] In case of non-compliance with an anti-dissipation injunction the court has the discretion to order specific compliance with an appropriate penalty.[1275]

[1269] S. Peté, M. Du Plessis and O. Sibanda, *Civil Procedure. A Practical Guide*, 2nd edition, Oxford University Press Southern Africa (2011), p. 417-419.
[1270] *Knox D'Arcy Ltd. and Others v. Jamieson and Others* (283/95) [1996] ZASCA 58; 1996 (4) SA 348 (SCA); [1996] 3 All SA 669 (A); (29 May 1996), para. 64.
[1271] *Commissioner for The South African Revenue Services v. Moloto and Others* (63778/2021) [2022] ZAGPPHC 832 (2 November 2022).
[1272] S. Peté, M. Du Plessis and O. Sibanda, *Civil Procedure. A Practical Guide*, 2nd edition, Oxford University Press Southern Africa (2011), p. 418.
[1273] *I.F and Another v. B.B.D and Others* (9797/2019) [2019] ZAWCHC 77 (24 June 2019), para. 11-12.
[1274] S. Peté, M. Du Plessis and O. Sibanda, *Civil Procedure. A Practical Guide*, 2nd edition, Oxford University Press Southern Africa (2011), p. 418-419.
[1275] *Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Co Ltd and Others 2006* (5) SA 333 (W), para. 353; *Van den Aardt and Another v. Weehuizen and Others* 2006 (4) SA 401 (N), para. 410; S. Peté, M. Du Plessis

(h) Sweden

The freezing order is incorporated in chapter 15 of the Swedish Code of Judicial Procedure or SCJP *[Se. Rättegångsbalken (1942:740)]*. The Swedish courts have the discretion to decide which interim measure needs to be used in order to secure the concerned assets.[1276] In general, the creditors need to indicate the assets that need to be frozen, but in case of the enforcement or a judgment the debtors may be ordered to disclose information about any assets they may have.[1277]

Pursuant to Section 4 of the Swedish Arbitration Act *[Se. Lag (1999:116) om skiljeförfarande]* the security measures from Chapter 15 SCJP are also applicable in relation to a claim that derives from arbitral proceedings.[1278] In this framework, claimants are required to present sufficient evidence that they have a valid claim against the defendants in order to obtain a freezing order in a civil case. The evidentiary requirement is obviously lower compared to that which is required for a claim to be ultimately successful. Additionally, claimants must demonstrate that according to defendants' imminent or ongoing behaviour it is reasonable to suspect that they – without the security measure sought - will attempt to dispose of their property or take measures to hide or dissipate their assets.[1279]

The Arbitration Institute of the SCC , as one of the first arbitration institutes in the world, introduced in 2010 into the Arbitration Rules of the SCC the concept of the appointment of an emergency arbitrator. Such emergency arbitrators may, if appointed by the SCC, decide on any security measures that they consider appropriate to secure the claimant's claim. A decision for a security measure shall be rendered within five days after the submission of the request to the emergency arbitrator. It is valid and binding until otherwise decided, and it ceases to be binding, if arbitration is not commenced within thirty days from the date of the decision, or – if a referral is not made – within ninety days. An application for the appointment of an emergency arbitrator may be made until the arbitration has been referred to the arbitral tribunal. The fee is EUR 15,000

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and O. Sibanda, *Civil Procedure. A Practical Guide*, 2nd edition, Oxford University Press Southern Africa (2011), p. 419.

[1276] F. Madsen and D. Prawitz, 'Sweden', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 17.03.

[1277] F. Madsen and D. Prawitz, 'Sweden', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 17.02.

[1278] F. Madsen and D. Prawitz, 'Sweden', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 17.03.

[1279] F. Madsen and D. Prawitz, 'Sweden', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 17.03.

and is paid by the claimant. The number of applications for the appointment of an emergency arbitrator has been steady since the introduction of this possibility.[1280]

(i) Switzerland

In Switzerland the freezing order is incorporated in the Swiss Federal Code of Civil Procedure (CPC) and the Federal Debt Enforcement and Bankruptcy Act (DEBA).[1281] Under Swiss law, the creditor needs to specify and prove the existence of the debtor's assets in Switzerland on a prima facie basis.[1282] The rules on interim measures in domestic courts are set out in Article 261 of the CPC.[1283] When it comes to interim measures in arbitration proceedings, Article 374 CPC and Article 183 of the PILA are applicable. The procedures and requirements regarding freezing orders are set out in Article 271-281 DEBA. It must be established that the creditor has a mature and unsecured claim against the debtor and that there are assets of the debtor located in Switzerland.[1284] These assets must not be immune from execution to be successfully frozen. In accordance with Article 183 PILA and Article 374 CPC the Swiss courts and arbitral tribunals have concurrent jurisdiction to order interim measures. However, requests for freezing orders always need to be directed to the Swiss courts.[1285] Article 271(1) contains the following statutory reasons under which a freezing order can be granted by a Swiss court: a) the debtor has no permanent place of residence in Switzerland; b) the debtor is concealing his or her assets, absconding or making preparations to abscond so as to evade the fulfilment of his or her obligations; c) the debtor is on a journey through Switzerland or belongs to the persons visiting trade fairs and markets and the creditor's claim is to be fulfilled immediately; d) the debtor does not live in Switzerland, no other reason for an attachment is fulfilled and the claim has a sufficient connection with Switzerland or is based on a signed acknowledgment of debt pursuant to Article 82(1) of the DEBA; e) the creditor holds a provisional or definitive loss certificate against the debtor; or f) the creditor holds an enforceable title to set aside an objection in debt enforcement

[1280] F. Madsen and D. Prawitz, 'Sweden', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 17.03.
[1281] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.01.
[1282] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.02.
[1283] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.03.
[1284] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.03.
[1285] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.04.

proceedings *("definitiver Rechtsöffnungstitel")* within the meaning of Article 80 DEBA, that is, an enforceable judgment, award or similar.[1286]

(j) United States

In the United States, the court uses a much more restrictive approach when it comes to the Mareva injunction.[1287] The US Supreme Court ruled in *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.* that Rule 65 of the Federal Rules of Civil Procedure does not provide the U.S. federal courts with the inherent power to issue freezing orders in monetary-damages cases.[1288] This means that even if a preliminary injunction is warranted, the court may not have the power to issue it.[1289] Justice Scalia concluded that, writing for the majority, an injunction was beyond the equitable powers conferred on federal courts by the Judiciary Act of 1789.[1290] According to Justice Scalia this followed the well-established rule in the U.S. that a judgment establishing the debt was necessary before a court of equity can interfere with the debtor's use of his property. This judgment restricts the possibility of a freezing order or Mareva injunction severely. There is the option of attachment under Rule 64 of the Federal Rules of Civil Procedure which prevents the defendant from selling or otherwise disposing of any real or personal property that has been taken into custody of the attaching officer, but this option is not applicable to monetary assets.[1291] Moreover, in case of foreign-seated arbitration, this option may also be further restricted by the legislation of the state where the injunctive relief under Rule 64 is sought. New York's attachment statute, N.Y.C.P.L.R. 6201, permits attachment in case of non-residents: a) when the defendant is a nondomiciliary residing outside the state or an unlicensed foreign corporation; b) when the defendant is within the state but diligent efforts to serve them personally have failed, or c) when the defendant's conduct in connection with the property indicates their intent to defraud creditors or frustrate the enforcement of a potentially unfavourable

[1286] A. Jolles and S. Leimgruber, 'Switzerland', in: J.C. Jorgensen (ed.), *Finding, Freezing and Attaching Assets. A Multi-Jurisdictional Handbook*, Deventer: Wolters Kluwer 2016, nr. 18.03.
[1287] https://www.mintz.com/insights-center/viewpoints/54206/2021-01-07-freeze-orders-united-states-district-courts-strategic.
[1288] *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc*., 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).
[1289] See also J.H. Friedenthal, A. R. Miller, J.E. Sexton and H. Hershkoff, *Civil Procedure. Cases and Materials 2008 Revised Ninth Edition*, Thomson West 2008, p. 1075.
[1290] *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc*., 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999); J.H. Friedenthal, A. R. Miller, J.E. Sexton and H. Hershkoff, *Civil Procedure. Cases and Materials 2008 Revised Ninth Edition*, Thomson West 2008, p. 1075.
[1291] J.H. Friedenthal, A. R. Miller, J.E. Sexton and H. Hershkoff, *Civil Procedure. Cases and Materials 2008 Revised Ninth Edition*, Thomson West 2008, p. 1074.

judgment.[1292]Since non-monetary assets will most likely be immune from execution; injunctive relief hardly appears to be a realistic option under U.S. jurisdiction. Therefore, the fruitfulness of this vehicle to secure the fulfilment of a state's obligation is highly questionable.

9.6 Conclusion

The issue of state immunity becomes relevant to this dissertation as it examines the potential dispute between two state entities arising from a state shareholder's claim for reflective loss against the host state. Since both public entities may enjoy immunity from execution in the follow-on proceedings, the enforcement of the arbitral award against the losing party may be challenging. Under the restrictive doctrine of state immunity, the immunity of the state is deemed to be waived, when the state engages in commercial activities (actions *de jure gestionis*). The state should not benefit from immunity in this case on the premise of equal treatment between state and private entities, when they compete with each other. However, the problem is that this restrictive approach applies to immunity from jurisdiction and to a far lesser extent to immunity from execution. Among the examined jurisdictions, the ones that have established explicit rules on the principle of state immunity from execution are England and Wales (section 13 of the UKSIA), South Africa (section 14 of the SAFIA), the US (section 1611 of the FSIA), France (Sapin II Law), Singapore (art. 15 SSIA) and China (art. 13-14 of the FSIL). On the grounds of the relatively high compliance rates of host states with ICSID investment awards, the risk of the enforcement of an arbitration costs decision against the state shareholder for the host state as a winner will potentially increase, if state shareholders are granted access to the ICSID forum to pursue their claims for reflective loss. To ensure the losing party's compliance with the arbitral award, it is recommended to request both parties (the state shareholder and the host state) to provide *a priori* a waiver of immunity from execution in the applicable investment or the submission agreement and additionally a judicial guarantee which secures that they have enough assets in case of defeat. Freezing orders can provide a solution in case the losing party does not comply with the arbitral award, provided that the concerned assets are not immune from execution.

[1292] J.H. Friedenthal, A. R. Miller, J.E. Sexton and H. Hershkoff, *Civil Procedure. Cases and Materials 2008 Revised Ninth Edition*, Thomson West 2008, p. 1074.

CHAPTER 10: CONCLUSIONS

This thesis examined and analysed the legal position of state shareholders as investors in IIA in case of shareholder claims for reflective loss deriving from commercial investments (*de jure gestionis*). The imbalance between private shareholders and state shareholders becomes visible in the treatment of state entities as ordinary competitors under international investment law when they carry out commercial activities. This thesis addressed this imbalance by answering the following central question: *To what extent can and should state shareholders be able to use International Investment Arbitration for the protection of their foreign commercial investments?*

The objective of this thesis was to find the most appropriate method to restore the balance between private shareholders and state shareholders in case of reflective loss deriving from commercial activities, while safeguarding valid public interest concerns for the host state in relation to investments coming from a foreign state entity. The following conclusions and recommendations are drawn from the conducted research.

(a) The wording of the applicable investment treaty (BIT or FTA) is crucial for the determination of the inclusion of state entities and their investments within the treaty's scope. Regarding the investor definition, investment treaties are categorised into three types: a) those including public entities under the definition of investor; b) those not containing a provision on public entities; and c) those excluding public entities from treaty protection. Tribunals tend to take a formalistic approach by looking at the formal definition of investor in the applicable investment treaty. If the applicable investment treaty does not contain a provision on public entities, there is room for discretion for the tribunal, which means that it needs to interpret the wording of the treaty to determine whether a state shareholder meets the investor definition.

(b) Under an investment treaty, the definition of the investment can be asset-based, enterprise-based or with reference to commercial presence. In the first two cases the applicable investment treaty may cover shares (of a state) as a qualified investment. In the case of a reference to commercial presence, the objective of the investment is determinative, and since investments made by states cannot always be characterised as commercial, they can potentially be excluded from the protection scope of the applicable investment treaty.

(c) Under domestic law claims for reflective loss are often inadmissible. This applies to both to civil and common law jurisdictions. The arguments in favour of the no reflective loss principle are focused on ensuring the efficiency and fairness of the dispute settlement, whereby allowing shareholders to claim damages for reflective loss may lead to duplicative filings, which can undermine the efficiency of the process, can potentially cause inconsistent decisions and may

even provide one claimant with double recovery arising from the same conduct. In IIA a different choice is made. Various tribunals – both ICSID and non-ICSID – have granted shareholder claims for reflective loss. In accordance with international investment law these claims are admissible provided that the shares qualify as investments and the shareholders as investors under the applicable investment treaty. Taking into account a) the teleological scope of IIA, which lies in the achievement of greater trade and investment liberalisation through the promotion and protection of investments and b) the cases, where a domestic company is hindered from claiming the damage on its own behalf against the home state, but the damage is already indirectly inflicted on its shareholders, claims for reflective loss should be available to (state) shareholders, as they will increase their recovery options.

(d) State shareholders do not have access to ICSID arbitration and its enforcement mechanism as they cannot be qualified as nationals of a Contracting State in accordance with Article 25(2) of the ICSID Convention. Under the Broches test, the state shareholder itself -in contrast to SOEs- is not allowed to initiate ICSID proceedings against the host state. This issue could be addressed by an amendment of Article 25 of the ICSID Convention. The most viable alternative for state entities to bring their claims for reflective loss is the PCA as it has demonstrated experience in the settlement of commercial investment disputes where state entities are involved.

(e) State shareholders can either opt for non-ICSID institutional arbitration or ad hoc arbitration. The latter differs from institutional arbitration as a) its effectiveness depends completely on the willingness of the parties involved to cooperate; b) there is not necessarily a clear set of established rules of the arbitral institution to guide the procedure, which provides more (procedural) flexibility, but increases the risk of delay and c) the compliance and enforcement of the arbitral awards depends to a larger extent on the law of the seat of arbitration because it is not autonomously regulated.

(f) Commercial arbitration is not a viable option for the state shareholder in case of reflective loss. If the consent to arbitration is based on an arbitration clause in the investment contract the shareholder ordinarily would have no cause of action because it is not a party to the agreement. Furthermore, reflective loss claims are inconsistent with the principles of customary international law. BITs and international investment agreements are considered to be *lex specialis* whereby the no reflective loss rule is not applicable. This exception does not apply to ordinary commercial contracts. This means that even a submission agreement between the shareholder and the host state for commercial arbitration is not an option in case of reflective loss.

(g) Public interest concerns for the host state can arise a) in case a foreign state entity makes an investment in vital sectors of the host state's economy and b) in case a foreign SOE initiates arbitral proceedings against the host state with the aim to misuse a commercial dispute to pursue public goals on the host state's territory. To ensure the enforceability of arbitral awards, arbitrators tend to ignore public interest arguments raised by the host state by mainly focusing on the rules laid down in the applicable agreement and BIT. Although public policy constitutes a reason for refusal of enforcement of non-ICSID awards, public interest objectives of the host state could be sufficiently protected at an earlier stage a) through their inclusion by the parties to the treaty in the applicable agreement or BIT itself and b) through the focus of tribunals on the claimants' conduct in the merits stage of the procedure while levying adverse costs, minimising the risk of misuse of the system as much as possible. The good-faith rule could in extreme cases enable tribunals to deny jurisdiction, but only if the claimant is blatantly misusing its arbitral procedural rights.

(h) The most effective way to counterbalance potential public interest concerns by the host state regarding a certain investment made by foreign SOEs is the introduction of screening mechanisms for FDIs to determine the origin and purpose of the investor before the investment is made. The comparative analysis of the European FDI Screening Regulation (EU) 2019/452 and of the domestic laws on FDIs of the examined jurisdictions provide for the sensitive sectors to which FDIs apply and indicate whether extra vigilance is required during the FDI screening process of investments made by SOEs. However, the applicable investment treaty may hinder a host state from imposing certain screening measures. In some cases, FDI screening may be at odds with non-discrimination obligations in some investment treaties regarding new investments. Moreover, if the investment screening applies to existing investments other treaty obligations concerning expropriation, FET, performance requirements and umbrella clauses may prevail.

(i) There is a wide range of alternative dispute settlement mechanisms, such as state-to-state arbitration, ICJ proceedings or diplomacy. The most fruitful alternative to ICSID for a state shareholder's reflective loss claims appears to be state-to-state arbitration. Although claims for reflective loss constitute commercial disputes that are excluded from the scope of state-to-state arbitration, via the vehicle of a diplomatic protection claim a state could act as a diplomatic protection claimant for remuneration due to reflective loss inflicted on its nationals on whose behalf it was acting. There are three problems with such a construction: a) through diplomatic protection claim a state cannot recover direct compensation for the reflective loss it suffered as it is acting on behalf of the investors and the protection of their rights; b) the applicability of the exhaustion of local remedies rule in state-to-state proceedings, which conditions the initiation of

international proceedings on the exhaustion of domestic remedies and c) the politicalisation of investment disputes between states. The room for resorting to the rest of the available mechanisms is extremely narrow as the concerned fora are either not used to deal with investment disputes or not available for (decentralised) state bodies (ICJ), are local in nature (MIC, AIC, AfCFTA) and are not being used by major global players (e.g. USA, China, India), or entail the risk of politicising disputes between state investors and host states and depend on the willingness of both parties to work towards a solution (diplomacy, consultation, negotiation and good offices/mediation).

(j) In case a claim for reflective loss made by the state shareholder (claimant) against the host state (defendant) is rejected by the arbitral tribunal, the execution of the arbitral decision on costs that is entailed in the arbitral award may be challenging for the host state due to the application of the principle of state immunity. Under the restrictive doctrine on state immunity, which has been embraced by various international conventions and domestic law regimes around the globe, the immunity of the state is deemed to be waived, when the state engages in commercial activities (actions *de jure gestionis*). The problem is that this restrictive approach applies to immunity from jurisdiction and to a far lesser extent immunity from execution, which means that the assets owned by the state shareholder (claimant) tend to be immune from execution unless immunity is explicitly waived by the concerned state. Among the examined jurisdictions, the ones that have established explicit rules on the principle of state immunity from execution are England and Wales (section 13 of the UKSIA), South Africa (section 14 of the SAFIA), the US (section 1611 of the FSIA), France (Sapin II Law), Singapore (art. 15 SSIA) and China (art. 13-14 of the FSIL). The risk of the enforcement of an arbitration costs decision against the state shareholder and losing party imposed on the host state will potentially increase, if state shareholders are granted access to the ICSID forum to pursue their claims for reflective loss. Due to the relatively high compliance rates of host states with ICSID investment awards, the same problem does not apply vice-versa to the same extent, in case the state shareholder wins the case and tries to execute an arbitral award granting compensation for reflective loss against the host state. The mitigation of the non-enforcement risk that the host state as counterpart faces, in case it wins, can be achieved through the following mechanisms: a) waiver of immunity from execution, b) bank guarantees in the form of judicial guarantees, which stand for a specific type of waiver of immunity from execution and c) freezing orders.

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