

# Reshaping the Investor-State Dispute Settlement System

*Journeys for the 21st Century*

*Edited by*

Jean E. Kalicki and Anna Joubin-Bret



BRILL  
NIJHOFF

LEIDEN | BOSTON

# Contents

Foreword      xiii  
*Meg Kinnear*

Acknowledgments      xv

Acronyms      xvii

Author Bios      xx

Introduction      1  
*Anna Joubin-Bret and Jean E. Kalicki*

## PART 1

### *Strengthening the Role of States: Treaty Interpretation and Revising Treaty Language*

1 Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions      21

*Anne van Aaken*

2 Lessons from International Uniform Law      48

*Joshua Karton*

3 Which Is to Be the Master? Extra-Arbitral Interpretative Procedures for IIAs      91

*Michael Ewing-Chow and Junianto James Losari*

4 Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of State Parties      115

*Tomoko Ishikawa*

5 *Travaux Préparatoires* and the Legitimacy of Investor-State Arbitration      150

*Baiju S. Vasani and Anastasiya Ugale*

6 Reform of Investor-State Dispute Settlement: The U.S. Experience      172

*Karen L. Kizer and Jeremy K. Sharpe*

- 7 **Rethinking Rights and Responsibilities in Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions** 183  
*Elizabeth Boomer*
- 8 **Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law** 221  
*Locknie Hsu*
- 9 **Limiting Investor Access to Investment Arbitration: A Solution without a Problem?** 250  
*Liang-Ying Tan and Amal Bouchenaki*
- 10 **Back to the Future: Contemplating a Return to the Exhaustion Rule** 310  
*Daniel Kalderimis*
- 11 **ISDS Growing Pains and Responsible Adulthood** 344  
*Silvia Constein*

## PART 2

***Structural Reform: State-State Procedures, A Standing Investment Court, or an Appellate Mechanism***

- 12 **In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms** 353  
*Nicolette Butler*
- 13 **The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes** 381  
*Theodore R. Posner and Marguerite C. Walter*
- 14 **Permanent Investment Tribunals: The Momentum is Building Up** 394  
*Omar E. García-Bolívar*

- 15 **The Challenges of Creating a Standing International Investment Court** 403  
*Eduardo Zuleta*
- 16 **Making Impossible Investor-State Reform Possible** 424  
*Luis González García*
- 17 **Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?** 437  
*Barton Legum*
- 18 **Appellate Review in Investor-State Arbitration** 443  
*Eun Young Park*
- 19 **Reform of the Investor-State Arbitration Regime: The Appeal Proposal** 455  
*Gabriel Bottini*
- 20 **Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks** 474  
*Jaemin Lee*
- 21 **Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead** 496  
*Kristina Andelić*
- 22 **Fragmentation and Harmonization in the ICSID Decision-Making Process** 506  
*Roberto Castro de Figueiredo*
- 23 **Initial Hiccups or More? Efforts of the EU to Find Its Future Role in International Investment Law** 531  
*Jan Asmus Bischoff*
- 24 **The Emperor Has No Clothes: A Critique of the Debate Over Reform of the ISDS System** 560  
*J.J. Saulino and Josh Kallmer*

## PART 3

***Reform from within: Changing Institutional Rules and Encouraging Innovations by Tribunals***

- 25 **Advancing Reform at ICSID** 569  
*Antonio R. Parra*
- 26 **UN Commission on International Trade Law and Multilateral Rule-making: Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency** 584  
*Julia Salasky and Corinne Montineri*
- 27 **Inter-Governmental Evaluation of Investor-State Dispute Settlement: Recent Work at the OECD-Hosted Freedom of Investment Roundtable** 597  
*David Gaukrodger and Kathryn Gordon*
- 28 **The Sixth Path: Reforming Investment Law from Within** 621  
*Stephan W. Schill*
- 29 **Achieving a Faster ICSID** 653  
*Adam Raviv*
- 30 **Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions** 718  
*Joongi Kim*
- 31 **Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy** 731  
*Jeffrey Sullivan and David Ingle*
- 32 **Costs in Investment Treaty Arbitration: The Case for Reform** 748  
*Matthew Hodgson*
- 33 **Distinguishing Investors from Exporters under Investment Treaties** 760  
*Mark Feldman*

<b>34</b>	<b>ICSID Treaty Counterclaims: Case Law and Treaty Evolution</b>	<b>779</b>
	<i>José Antonio Rivas</i>	
<b>35</b>	<b>ICSID Annulment Standards: Who Has Finally Won the Reisman v. Broches Debate of Two Decades Ago?</b>	<b>828</b>
	<i>Nikolaos Tsolakidis</i>	
<b>36</b>	<b>ICSID Annulment Reform: Are We Looking at the Right Problem?</b>	<b>853</b>
	<i>Mallory Silberman</i>	
<b>37</b>	<b>Addressing and Redressing Errors in ICSID Arbitration</b>	<b>864</b>
	<i>Diego Brian Gosis</i>	
<b>38</b>	<b>Do We Need Investment Arbitration?</b>	<b>879</b>
	<i>Christoph Schreuer</i>	
	<b>Consolidated Bibliography</b>	<b>891</b>
	<b>News Reports</b>	<b>939</b>
	<b>Table of Cases</b>	<b>947</b>
	<b>Table of Conventions, Treaties, Agreements, Rules and Other Official Documents</b>	<b>972</b>
	<b>Index Terms</b>	<b>993</b>

# The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes

*Theodore R. Posner and Marguerite C. Walter*

It is a truism among observers of trends in international investment dispute resolution that the conclusion over the past 30 years of thousands of bilateral investment treaties, most of which give investors a private right of action against host States, has all but eliminated the role of diplomacy and other modes of State-to-State engagement in the resolution of international investment disputes. In reality, the picture is considerably more nuanced. Current developments suggest not only an abiding role for State-to-State engagement in the resolution of investor-State disputes, but perhaps an increasing role for such engagement. Several factors support this trend, including: host States resisting arbitration or the enforcement of awards against them; a greater variety of international economic treaties, giving rise to the possibility of defining international law norms in one (State-State) forum (*e.g.*, the World Trade Organization (WTO)) and relying on them in advocacy in a different (investor-State) forum; and investor recognition that certain kinds of disputes in certain relationships may be better addressed through State-State mechanisms even where the investor-State option may be available (*e.g.*, ‘pre-establishment’ disputes, disputes involving relatively small investments, disputes over ‘forced localization’ and other performance requirements, and disputes involving investors who hope to stay in the host State’s market and therefore wish to avoid high-profile confrontations with the State).

By many accounts, we now live in a golden age of investor-State arbitration. As of this writing, there are more than 3,100 BITs and FTAs containing

---

\* In full disclosure, Mr. Posner represents or has represented parties involved in certain of the matters mentioned in this chapter, including Bank of America subsidiary Blue Ridge Investments in its petition for withdrawal or suspension of Argentina’s trade preferences, and Chevron Corp. in its (as of September 2014) pending petition for withdrawal or suspension of Ecuador’s trade preferences. He also advises Philip Morris International on issues related to Australia’s plain packaging legislation. An earlier version of this chapter appeared in the Fall 2013 edition of the Weil World Arbitration Report.

investment provisions in force around the world, compared with barely 500 just two decades ago.<sup>1</sup> In addition to these well-known instruments of consent, some States have agreed to have foreign nationals submit claims against them to arbitration pursuant to foreign investment statutes and contracts. The International Centre for Settlement of Investment Disputes (ICSID) reports that it registered 50 new cases in 2012 (the most in any one year since ICSID's establishment in 1966), and that as of the middle of 2014 it had registered a total of 473 cases.<sup>2</sup> When one adds other, non-ICSID-administered arbitrations to the mix, the number is even higher.<sup>3</sup>

And the kinds of arbitrations being initiated have grown more diverse. No longer are investor-State arbitrations confined to cases involving infrastructure projects and similar hard asset investments. Today we also see investor-State cases involving intellectual property rights, financial instruments, and other tangible and intangible investments. Not only has there been a proliferation of legal instruments allowing companies to sue foreign governments, but the willingness to bring such suits also appears to have grown, as has the availability of resources (often provided by third-party funders) to support such suits.

Having reached the point where the means and the will of private parties to take control of the resolution of their disputes with foreign governments is at an all-time high, one might expect that recourse to diplomacy and other forms of State-to-State interaction to resolve investment disputes would be at an all-time low. And yet, the opposite seems to be true. Despite our being in a golden age of investor-State arbitration, several high-profile cases in recent years have shown the continued relevance of State-to-State interaction in the resolution of disputes between States and investors of other States.

What this means for companies and their counsel in resolving disputes with foreign governments is that it pays to be aware of the extent to which policy and diplomacy may affect the dispute resolution process. In some cases, investors may be able to leverage their home State's diplomatic interest in resolv-

---

1 See United Nations Conference on Trade and Development, *International Investment Agreements Research and Policy Analysis*, [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Research-and-Policy-Analysis.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx). According to UNCTAD, the 3,100 mark was reached in 2011.

2 ICSID, *The ICSID Caseload—Statistics*, Issue 2014-2 at 7, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>. This figure includes cases registered under ICSID's Additional Facility Rules.

3 See United Nations Conference on Trade and Development, *International Investment Agreements Research and Policy Analysis* (indicating that total number of known investor-State cases as of the end of 2013 was 568), [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Research-and-Policy-Analysis.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx).



ing (or helping to resolve) the dispute in a satisfactory way. In other cases, an awareness of developments in corners of the international economic law and policy universe that may seem only distantly linked to one's own interests may provide an important edge in advancing those interests. In this chapter, we survey some of the different ways in which, even today, the resolution of a dispute between an investor and a foreign State can include an important State-to-State component that parties to actual or potential investment disputes should be aware of.

In Section 1, we discuss the role State-to-State interaction can play when the host State in an investment dispute resists enforcing an arbitral award against it or resists going to arbitration in the first place.

In Section 2, we discuss the possible interplay between State-State dispute settlement mechanisms and investor-State dispute settlement mechanisms and, in particular, how the former might be used to advance an investor's objectives in the latter. The paradigm we have in mind here is a State-State dispute settlement proceeding in the WTO, for example, that serves to clarify a particular obligation (say, under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights), which clarification then becomes relevant in other contexts (*e.g.*, because of the incorporation of 'international law' into BITs and other treaties) and is used by an investor in an investor-State dispute settlement proceeding under a BIT.

In Section 3, we discuss possible uses of State-State dispute settlement as an alternative to investor-State dispute settlement. Although it may seem counter-intuitive, it is possible to envision scenarios in which an investor would prefer to have a dispute resolved through State-State dispute settlement even though investor-State arbitration is an option, and even though the investor inevitably will have less control over the State-State process. This might be the case where there is a persistent pattern of harmful treatment of foreign investments, but where the size of the harm to each individual investor is relatively small, making it difficult for aggrieved investors to seek resolution through investor-State arbitration. It may also be the case if the investor is impeded from entering a market to which it should have access pursuant to a BIT (in which case quantifying damages might be impractical), or the investor wants to stay in a market and would prefer removal of a problematic measure to payment of monetary damages, or fears retaliation if it were to bring a claim on its own. We project such scenarios will become more common with the advent of BITs between major commercial actors with significantly different views on the role of government, such as an eventual U.S.-China BIT.

## 1 State-State Engagement and the Reluctant Respondent

It is true that investor-State arbitration gives the investor an important degree of control over its own destiny as compared with a system in which the investor must rely on its home State to resolve disputes with a host State. But the effectiveness of investor-State arbitration depends significantly on the cooperation of the host State. If the host State refuses to enforce an arbitral award or refuses to participate in the arbitration in the first place (despite having given its consent in a BIT, a statute, or a contract), the investor may be constrained in its ability to compel the host State to cooperate. That is especially so if the State has few if any attachable assets outside its own territory (*i.e.*, it essentially is judgment-proof). In such circumstances, it may be useful for the investor to seek the assistance of its home State.

Assistance from the investor's home State may be provided at the diplomatic level, but also may involve more public means of exerting pressure. This is what occurred in the cases of Blue Ridge Investments and Azurix Corp., two U.S. companies with arbitration awards against Argentina. The awards, in the amounts of \$133 million and \$165 million, respectively, resulted from arbitrations before ICSID tribunals and survived petitions for annulment.<sup>4</sup> The awards became enforceable in 2007 and 2009, respectively. But Argentina declined to pay voluntarily, and the award creditors were unable to locate assets of Argentina that were not protected by sovereign immunity and against which they might enforce the awards.

Faced with this dilemma, the award creditors invoked a little-used provision of U.S. trade law in an effort to enlist the assistance of the U.S. government in enforcing their awards. As a developing country, Argentina participates in the U.S. trade preference program known as the Generalized System of Preferences (GSP).<sup>5</sup> Under GSP, most Argentine goods exported to the United States can enter the United States on a duty-free basis even though similar exports from developed countries would be subject to import duties.

However, participation in GSP is subject to certain conditions, including the requirement that the participating country in good faith recognize and

---

4 Blue Ridge acquired, through an assignment from the original award holder, the rights to payment under the award in *CMS Gas Transmission Co. v. Argentina* (ICSID Case No. ARB/01/8 (12 May 2005), as affirmed in the Decision of the *Ad Hoc* Committee on the Application for Annulment (25 Sept. 2007). See also *Azurix Corp. v. Argentina*, Award, ICSID Case No. ARB/01/12 (14 July 2006), as affirmed in the Decision on the Application for Annulment (1 Sept. 2009).

5 See 19 U.S.C. §§ 2461–2467.

enforce awards rendered by international arbitral tribunals.<sup>6</sup> As Argentina's refusal to pay the awards held by Blue Ridge and Azurix was inconsistent with that condition, the companies petitioned the Office of the United States Trade Representative (USTR) to recommend that the President suspend Argentina's GSP eligibility.<sup>7</sup> After briefing and a hearing, USTR made that recommendation, and on 26 March 2012, the President proclaimed that Argentina's GSP eligibility would be suspended, resulting in Argentine exports to the United States losing their preferential duty-free treatment.<sup>8</sup> This was the first time in the more than 35-year history of the GSP statute that a country's eligibility had been suspended on this basis. Perhaps in part as a result of this action—as well as other actions, including U.S. opposition to most new World Bank lending to Argentina<sup>9</sup>—Argentina reached a settlement with several investment arbitration award creditors in October 2013.<sup>10</sup>

Apparently inspired by the U.S. response to Argentina's non-enforcement of arbitral awards in favor of U.S. companies, Spanish oil company Repsol prevailed upon the government of Spain and the European Union to take punitive action in response to Argentina's expropriation of Repsol's investment in Argentine energy company YPF. At Repsol's behest, the European Parliament called for a “partial suspension” of the preferential tariff treatment Argentina

6 19 U.S.C. § 2462(b)(2)(E).

7 USTR chairs an inter-agency body, known as the GSP Subcommittee of the Trade Policy Staff Committee, that makes recommendations to the President on whether and how to act on petitions under the GSP statute.

8 Proc. No. 8788 at ¶¶ (1)–(2), 77 Fed. Reg. 18,899, 18900-01 (29 Mar. 2012).

9 Assistant Secretary of the Treasury for International Markets and Development Marisa Lago announced in September 2011 that, as a result of Argentina's failure to pay outstanding arbitral awards and respect other international obligations, the United States would vote against loans to Argentina from the World Bank and other multilateral lending institutions. See, e.g., Sandrine Rastello & Eric Martin, *U.S. Opposes Loans to Argentina in Bid to Step Up Pressure for Debt Accord*, Bloomberg News (28 Sept. 2011), <http://www.bloomberg.com/news/2011-09-28/u-s-opposes-loans-to-argentina-in-bid-to-boost-pressure-for-debt-accord.html>.

In addition, the Spanish oil company Repsol called on EU Member States to form a bloc in international financial institutions to vote against development projects in countries, such as Argentina, that are not complying with arbitral awards or are delinquent on debts owed to sovereign lenders. See Sebastian Perry, *Repsol's Perspective on EU Investment Policy*, Global Arb. Rev. (18 Mar. 2013), <http://www.globalarbitrationreview.com/news/article/31416/>.

10 See Ken Parks, *Argentina Reaches \$677M Investment Dispute Settlement—Government*, Wall Street Journal (18 Oct. 2013), <http://online.wsj.com/article/BT-CO-20131018-705467.html>.

receives from the European Union.<sup>11</sup> At the same time, the Spanish government introduced restrictions on imports of biofuels from Argentina<sup>12</sup> (which then led Argentina to initiate WTO dispute settlement proceedings against the European Union and Spain).<sup>13</sup>

Another example of an investor's effort to use withdrawal of trade preferences to bring about compliance with arbitral awards arises in the context of the well-publicized, ongoing arbitration between Chevron and Ecuador under the U.S.-Ecuador BIT.<sup>14</sup> There, the tribunal has issued several interim awards which, as the tribunal found in its fourth interim award, Ecuador has failed to enforce.<sup>15</sup> Consequently, Chevron has asked the United States to withdraw or suspend Ecuador's eligibility to continue receiving trade preferences under GSP. As of September 2014, that petition has been accepted for review, but there has been no decision on the merits.<sup>16</sup>

Moreover, while withdrawal of trade preferences accorded by a major trading partner like the United States or the European Union is an attractive tool for addressing the non-enforcement of arbitral awards by countries that receive trade preferences, it is not the only tool at the disposal of an award

- 
- 11 *On the Legal Security of European Investments Outside the European Union*, Eur. Parl. Doc. 2012/2619(RSP) at ¶ 8 (19 Apr. 2012) (urging European Commission and Council “to explore and adopt any measures required to safeguard European interests in order to avoid such situations arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme”). As of September 2014, however, it appears that the EU has not suspended Argentina's preferential tariff treatment, and, as was widely reported at the time, Repsol settled its dispute with Argentina in May 2014. See, e.g., Rachel Hall, *Repsol lawyers shed light on Argentina strategy*, Global Arb. Rev. (21 May 2014), <http://globalarbitrationreview.com/news/article/32660/repsol-lawyers-shed-light-argentina-strategy/>.
- 12 Raphael Minder, *Spain Stings Argentina Over Oil Company Nationalization*, N.Y. Times (20 Apr. 2012), [http://www.nytimes.com/2012/04/21/business/global/spain-stings-argentina-over-nationalization-of-repsol-ypf.html?\\_r=0](http://www.nytimes.com/2012/04/21/business/global/spain-stings-argentina-over-nationalization-of-repsol-ypf.html?_r=0).
- 13 *European Union and a Member State—Certain Measures Concerning the Importation of Biodiesels*, Request for Consultations by Argentina, WT/DS443/1 (23 Aug. 2012). Argentina subsequently asked the WTO Dispute Settlement Body to establish a dispute settlement panel. WT/DS443/5 (7 Dec. 2012). But as of September 2014, a panel had not been established.
- 14 *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. 2009–23.
- 15 *Chevron Corp.*, *supra* fn. 15, Fourth Interim Award on Interim Measures, pt. IV, ¶ 1) (7 Feb. 2013).
- 16 See 78 Fed. Reg. 40,822 (8 July 2013). The GSP statute lapsed at the end of July 2013, and all action by the GSP Subcommittee on pending petitions has been stayed until the statute is renewed. As of September 2014, the statute has not been renewed.

creditor's home State. Other tools may include withholding (or threatening to withhold) other valuable benefits, including export credits, political risk insurance, foreign aid, or support for lending from multilateral development banks.<sup>17</sup>

And in addition to unilateral measures, a State may be able to use State-State dispute settlement to deal with a recalcitrant host State. Although the dispute settlement provisions in BITs that receive the most attention are the investor-State provisions, BITs also frequently include provisions that allow one State Party to seek arbitration with another State Party over the treaty's "interpretation or application."<sup>18</sup> One can imagine scenarios in which those State-State provisions could be used to deal with the problem of a non-cooperative arbitral award debtor or otherwise facilitate the successful resolution of an investor-State dispute.

For example, reporting about a pending arbitration between British Caribbean Bank Limited (BCB) and the government of Belize suggests that State-State arbitration over interpretation or application of a treaty (the UK-Belize BIT) might have been used to overcome a serious impasse in that arbitration had the impasse not been removed through other means (a decision of the Caribbean Court of Justice (CCJ) reversing an injunction that had prevented the arbitration from moving forward).<sup>19</sup> In that case, BCB asserted claims under the UK-Belize BIT following the compulsory acquisition by the government of Belize of loans and debentures that were held by Belize Telemedia Ltd. and under which debts were owed to BCB.<sup>20</sup> Various local court proceedings were initiated around the same time as the arbitration, and in May 2010 the Attorney General of Belize enjoined BCB from continuing to pursue the arbitration.<sup>21</sup> On the basis of that order, the arbitral proceedings were

---

17 As noted above, the decision by the United States to withhold support for most new lending to Argentina by the World Bank and other multilateral development banks appears to have played an important part in bringing about the settlement of claims between Argentina and various arbitral award creditors.

18 See, e.g., U.S. Model Bilateral Investment Treaty, Art. 37 (providing a mechanism for obtaining a "binding decision or award by a tribunal" in a dispute concerning the interpretation or application of the treaty).

19 See Luke Eric Peterson, *Spectre of state-to-state claim recedes as Belize makes peace with investor-state proceeding (and some transparency)*, Inv. Arb. Rep. (30 September 2013), [http://www.iareporter.com/articles/20130930\\_1](http://www.iareporter.com/articles/20130930_1).

20 *British Caribbean Bank Ltd. v. Attorney Gen. of Belize*, CCJ Appeal No. CV 001 of 2013; BZ Civil Appeal No. 6 of 2011, Judgment of the Caribbean Court of Justice [2013] CCJ 4 (AJ) (25 June 2013), ¶¶ 2–4.

21 *Id.* ¶ 10.

suspended while BCB sought relief in the local courts. In June 2013, the CCJ quashed the injunction, allowing the arbitration to resume.<sup>22</sup>

While the CCJ's decision appears to have resolved the impasse, it is interesting to consider what might have happened if the court had not quashed the injunction. As Luke Peterson's reporting on the case suggests, one option might have been for the United Kingdom to go to arbitration with Belize under Article 9 of the BIT to obtain a binding determination of whether the availability of investor-State arbitration under the BIT "must be subordinated to the prior resolution of claims in domestic courts."<sup>23</sup> If the United Kingdom had done so and prevailed, then presumably the investor-State arbitration could have proceeded notwithstanding the absence of a favorable decision from a local court in Belize. As it turns out, there was no need to use the State-State arbitration option, but the case is a good reminder of one way in which State-State arbitration could be used as an aid to investor-State arbitration.<sup>24</sup>

---

22 *Id.* ¶ 12.

23 Peterson, *supra* fn. 19.

24 Another recent case reminds us that State-State arbitration over the interpretation or application of a BIT can be used not only as a 'sword' by a State trying to bring about another State's cooperation in the resolution of an investment dispute, but also as a 'shield' by the State resisting cooperation. Here we have in mind the arbitration that Ecuador initiated against the United States over interpretation of the U.S.-Ecuador BIT as part of an effort to resist enforcement of an investor-State award under the same BIT. The investor-State award was a US \$96 million award in favor of Chevron Corp. based on a determination that Ecuador had breached its obligation to "provide effective means of asserting claims and enforcing rights with respect to investment." In addition to seeking set-aside of the investor-State award, Ecuador sought a new interpretation of the BIT's "effective means" clause through a follow-on arbitration with the United States. However, that arbitration ultimately was dismissed for lack of jurisdiction due to the absence of an actual dispute. See Jarrod Hepburn & Luke Eric Peterson, *US-Ecuador inter-state investment treaty award released to parties; tribunal members part ways on key issues*, Inv. Arb. Rep. (30 October 2012), [http://www.iareporter.com/articles/20121030\\_1](http://www.iareporter.com/articles/20121030_1). As of September 2014, the award had not been made public. In a similar vein, Argentina's erstwhile resistance of the enforcement of certain ICSID awards relied on a novel interpretation of Article 54 of the ICSID Convention (whereby award creditors would need to go through local Argentine judicial proceedings in order to receive payment); when creditors and others criticized that interpretation, Argentina suggested that the proper forum in which to resolve that dispute was State-State litigation before the International Court of Justice, pursuant to Article 64 of the ICSID Convention. See, e.g., Public Hearing for U.S. Generalized System of Preferences (GSP) 2009 Annual Review for Country Practices at 113 (28 September 2010) (representative of Argentina stating that "[t]his is the position we have, and if somebody does not agree with us, there is specific provision, a specific proceeding under international law to resolve this issue, which is eventually going to the

## 2 State-State Dispute Settlement Supporting Investor-State Dispute Settlement

To see another way in which a State-State proceeding could bear upon an investor-State proceeding, consider the pending arbitration between Philip Morris Asia Limited (PMA) and Australia over that State's adoption of a law requiring cigarettes and other tobacco products to be sold in "plain packaging"—*i.e.*, packaging that excludes a company's logo, trade dress, or other intellectual property distinguishing its product from those of its competitors. In November 2011, PMA initiated arbitration under the BIT between Hong Kong and Australia. PMA alleges expropriation, denial of fair and equitable treatment, impairment by unreasonable measures, denial of full protection and security, and failure to observe obligations entered into with regard to PMA's investments—all as a result of the plain packaging legislation.<sup>25</sup>

Although PMA is asserting rights under the Hong Kong-Australia BIT, its Notice of Arbitration (NOA) also referred extensively to the legislation's inconsistency with Australia's obligations under WTO agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>26</sup> According to the NOA, "PM Asia made its investments with the legitimate expectation that Australia would comply with its international trade treaty obligations."<sup>27</sup> Australia's alleged breach of international trade treaty obligations disturbed that legitimate expectation, PMA contends, and denied PMA the treatment it was entitled to under the BIT.<sup>28</sup>

---

International Court of Justice"), <http://federal.eregulations.us/rulemaking/document/USTR-2009-0015-0077>.

25 See *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012–12, Notice of Arbitration, ¶ 7.2 (21 November 2011).

26 *Id.* ¶¶ 6.6–6.12.

27 *Id.* ¶ 6.6.

28 See, *e.g.*, *id.* ¶ 7.7 ("[W]here a regulation has no demonstrable utility to improve public health, violates international law, and effective alternative measures are available (all of which is the case here), then the State cannot justify the imposition of the regulation on the investor" (emphasis added)); *id.* ¶ 7.17 (breaches of WTO obligations alleged to constitute breach of "umbrella clause" obligation under BIT). A procedural order issued in April 2014 and since made public reveals that since filing its notice of arbitration, Philip Morris Asia may have amended its claims as they relate to Australia's WTO obligations. See *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012–12, Procedural Order No. 8, ¶ 34 (14 Apr. 2014).

At the time when PMA filed its NOA, there had as yet been no challenge before the WTO to the plain packaging legislation. However, in March 2012, about four months after PMA filed its Notice of Arbitration, the government of Ukraine initiated a challenge to Australia's plain packaging law at the WTO. It took the first step in WTO dispute settlement by asking for formal consultations with Australia. When consultations failed to resolve the dispute, Ukraine followed up, in August 2012, with a request that the WTO Dispute Settlement Body (DSB) establish a dispute settlement panel to hear its claims.<sup>29</sup>

Following Ukraine's lead, a few months later the Dominican Republic and Honduras both requested the establishment of dispute settlement panels on Australia's plain packaging law (although as of this writing the DSB has not yet established those panels).<sup>30</sup> And, on 3 May 2013, Cuba requested consultations with Australia on the same measure.<sup>31</sup>

Not surprisingly, the allegations of WTO breaches by the Ukraine, the Dominican Republic, Honduras, and Cuba are similar to the allegations in PMA's complaint. The interplay between the WTO proceedings and the BIT proceeding is somewhat difficult to predict, because both proceedings are at a relatively early stage, and the pace at which each will proceed is uncertain. (Also, as noted above, the claimant in the BIT proceeding appears to have modified its complaint as it relates to WTO obligations.) The most direct interplay would be a finding by a WTO panel (or the Appellate Body) that is picked up by the BIT tribunal as the basis for a finding that Australia has breached investment-related obligations, such as the commitment to accord fair and equitable treatment to an investment of a Hong Kong investor or to "observe

---

29 *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Ukraine, WT/DS434/11 (17 August 2012). On September 28, 2012, the WTO Dispute Settlement Body established a panel, although as of this writing the members of the panel have not yet been appointed.

30 *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Dominican Republic, WT/DS441/15 (12 Nov. 2012); *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Establishment of a Panel by Honduras, WT/DS435/16 (17 Oct. 2012).

31 *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Request for Consultations by Cuba, WT/DS458/1 (7 May 2013).



any obligation it may have entered into with regard to investments of investors of [Hong Kong].”<sup>32</sup>

But even if such a direct link is not made in this instance, the Australia plain packaging case illustrates yet another way in which State-State dispute settlement could impact the resolution of disputes between investors and States. It has become common for BITs to incorporate by reference obligations under international law. That phenomenon, coupled with the proliferation of other instruments of international law (including but not limited to the WTO agreements) opens up the possibility of State-State arbitration in one forum leading to an interpretation of international law that then becomes the basis for, or otherwise informs, the resolution of disputes in an investor-State forum.

### 3 The State as Claimant: Back to the Future

This then leads to a third way in which we may start to see States (in addition to the host State) playing a more important role in investment dispute settlement. We already have mentioned the use of State-State arbitration under a BIT as a way to facilitate investor-State arbitration (as in the hypothetical under the UK-Belize BIT). But another possible use of State-State arbitration under a BIT is to substitute for investor-State arbitration in circumstances where, even though investor-State arbitration is available, it is a sub-optimal solution for any number of different reasons including, for example, the widespread or systemic nature of the State conduct being complained of.

At first blush, the idea of States pursuing claims against other States under BITs might seem to defeat the very purpose of having investor-State arbitration in BITs in the first place. But here it must be borne in mind that just because an investor has the option to sue a host State in investment arbitration does not mean the option will be attractive to the investor. Although the legal barriers to suing States may not be as steep today as they were several decades ago, the practical barriers are not insignificant. Especially for a company that hopes to continue doing business in the territory of the State at issue and therefore to maintain good relations with the local government, or for a company that faces insurmountable obstacles in making an investment in the first place, an investor-State case just may not be in the cards, even if the complaint is legitimate and the harm real.

---

32 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, Art. 2.2 (15 September 1993).

Consider, for example, the situation of a company that is trying to establish itself in a new market but is confronted with hurdles ranging from ownership restrictions (*e.g.*, requirements to partner with a local entity), to licensing delays, to conditions requiring use of locally produced goods and services. Any one of these hurdles, or a combination of them, may make establishment of the investment cost-prohibitive, if not impossible. A BIT may give the would-be investor the opportunity to challenge the State's conduct in arbitration over breach of a national treatment obligation with respect to 'pre-establishment,' as well as other obligations. But proving damages in this situation is likely to be difficult. And, in any event, an award of monetary damages is not the investor's goal in this circumstance; getting into the market is. Moreover, depending on the sector, it is quite possible that if one investor is facing these hurdles, others are as well. In these circumstances, State-State arbitration is likely to be far preferable to investor-State arbitration, especially if the prospective remedy is removal of the regulatory barriers to entry.

Similarly, State-State arbitration may be an attractive alternative to investor-State arbitration even for investors established in the host State where the conduct at issue is systemic rather than targeted at particular investors, where the harm to particular investors is relatively small, or where fear of retaliation acts as a deterrent to submitting claims to investor-State arbitration. For example, allegations of systemic harm directed at Italian investors, coupled with relatively low monetary damages (at least compared to the cost of seeking relief through investor-State arbitration), appear to have led Italy to pursue State-to-State dispute settlement with Cuba pursuant to the Italy-Cuba BIT in a proceeding begun in May 2003 and concluded in January 2008.<sup>33</sup>

It seems to us that the likelihood of such scenarios arising in the future should increase according to the size of the commercial relationship between two countries and the differences in their governments' respective views about the ways in which the State should relate to foreign investments. This is why, although State-State dispute settlement under BITs has been extremely rare until now, we anticipate more as larger economies with diverse views about the role of government enter into investment treaties with one another. Here

---

33 *République d'Italie v. République de Cuba*, arbitrage ad'hoc, Sentence finale (15 January 2008), <http://www.italaw.com/cases/580>. Italy relied on Article 10 of the BIT, which provided that disputes between the two contracting parties relating to the interpretation or application of the BIT that could not be settled diplomatically could be resolved through *ad hoc* arbitration. See also Jarrod Hepburn & Luke Eric Peterson, *Cuba Prevails in Rare State-to-State Investment Treaty Arbitration Initiated by Italy on Behalf of Italian Nationals*, *Inv. Arb. Rep.* (4 July 2011), [http://www.iareporter.com/articles/20110704\\_3](http://www.iareporter.com/articles/20110704_3).

we have in mind a prospective U.S.-China BIT in particular, although that certainly is not the only treaty on the horizon that could give rise to the State-State engagement we have in mind.

\* \* \*

In sum, even in this golden age of investor-State arbitration, State-State interaction in the resolution of investment disputes remains relevant. As we have seen, it may be even more relevant now given the diverse ways in which proceedings between two States can bear on the resolution of disputes between an investor and a State. It behooves investors and their advisors, therefore, to recognize that the path to resolution of a dispute with a host State may well be a game of multidimensional chess, requiring the deployment of different kinds of tools to achieve a satisfactory result.