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Back to the Future?
Investment Protection at a Time of Uncertainty

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I. Introduction

With the rapid growth of foreign investment around the globe, the issue of investment dispute settlement has gained prominence in the minds of investors and the legal community alike. Among the different mechanisms currently available, investment arbitration under bilateral and multilateral investment treaties has become, and has remained, the option most frequently pursued by investors.

Recent developments have, however, raised concerns over the ongoing availability and reliability of the investment arbitration regime. Against that background, this paper considers what other investment protection options could be available in a world in which investment treaty protection is constrained or uncertain. As suggested below, part of the answer may lie in the past—that is, in the investment protection strategies, typically involving commercial arbitration, which investors used in the age before investment arbitration achieved its current prominence. After summarizing the current challenges to the existing regime, this paper surveys some of those strategies and assesses their ongoing utility.

II. Problem: The Uncertain Future of Investment Treaty Arbitration

Investment treaty arbitration, which allows investors to bring claims directly against the host state before an international arbitration tribunal, has seen tremendous growth over the past two decades.[1] It has served not only as a valuable avenue of recourse for investors facing existing disputes, but also as a source of comfort for companies planning future investments. Many investors now choose to structure their investments through countries that have favorable investment

[1] The number of new cases registered at ICSID increased from 11 in 1998, to 21 in 2008, and to 56 in 2018. *See ICSID Caseload – Statistics (Issue* 2019-1) (Int'l Ctr. for Settlement of Inv. Disputes, Wash., D.C.), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

treaties with the host state of the investment. Such structuring has proven so useful in practice that, anecdotal evidence suggests, it is employed nearly universally by sophisticated foreign investors.

Recently, however, a confluence of factors has raised concerns over the future reliability of the investment treaty regime.

- *First,* a number of frequently-named respondent states have either unilaterally withdrawn from their existing bilateral investment treaties ("*BIT*s") or refused to renew expiring treaties.[2] Some have also denounced the Convention on the Settlement of Disputes between States and Nationals of Other States (the "ICSID Convention").[3]
- *Second,* certain traditionally pro-investor states have shown signs of cabining investment treaty protections. This is reflected, for example, in the new model BIT promulgated by The Netherlands in 2018.[4] Compared with the earlier

[2] For example, Ecuador denounced ten of its BITs between 2008 and 2010, and then the remaining 16 in 2017. *See* Int'l Inst. for Sustainable Development, *Ecuador Denounces its Remaining 16 BITs and Publishes* CAITISA *Audit Report*, INV. TREATY NEWS, June 2017, at 18, https://www.iisd.org/sites/default/files/publications/iisd-itn-june-2017-english.pdf. Meanwhile, Bolivia allowed eight of its BITs to expire, and then collectively denounced the remaining 13. *See* Aldo Orellana López, *Bolivia Denounces its Bilateral Investment Treaties and Attempts to Put an End to the Power of Corporations to Sue the Country in International Tribunals*, ALAINET.ORG (Apr. 7, 2014), *available at* https://www.alainet.org/en/active/75151. In South Africa, the South African Department of Trade and Industry decided, after a review of its existing BIT policies, to terminate its first-generation BITs and to refrain from entering into BITs in the future unless there were compelling economic and political reasons to do so. *See* Dep't of Trade and Industry, *Update on the Review of Bilateral Investment Treaties in South Africa*, *available at* www.thedti.gov.za (Feb. 15, 2013), *available at* https://www.thedti.gov.za/parliament/2013 /bit's_in_sa.pdf. India, meanwhile, has terminated 76 of its BITs between 2016 and 2019. *See* DEP'T. OF ECON. AFFAIRS OF INDIA, *Bilateral Investment Treaties* (BITs)/*Agreements*, *available at* https://dea.gov.in/bipa.

[3] Bolivia withdrew from the ICSID Convention in 2007, followed by Ecuador in 2009, and then Venezuela in 2012. INT'L CTR. FOR SETTLEMENT OF INV. DISP., LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (as of Apr. 12, 2019) at 5, https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

[4] The Netherlands Model Investment Agreement, Oct. 26, 2018, https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

(2004) version, the 2018 Dutch model BIT provides a narrower definition of qualifying "investors"—apparently in an effort to require investors to maintain more substantial connections with the Netherlands—as well as reduced substantive protections.[5]

- *Third*, a number of states and regions are shifting away from the traditional investor-state dispute settlement ("ISDS") model and experimenting with alternative mechanisms. In response to the *Achmea* decision,[6] all 28 European Union (EU) Member States recently resolved to terminate their intra-EU BITs by December 6, 2019.[7] Separately, the EU Council has instructed the Commission to open negotiations for the establishment of a multilateral investment court, on which all or most of the judges would likely be appointed by the Member States, to replace current ISDS mechanisms.[8] Meanwhile, the

[5] For example, limitations have been imposed on the national treatment and most-favored-nation provisions, and the scope of the umbrella clause has also been narrowed. *See id.* at arts. 1(a), 1(b)(ii), 8.3, 9.5.

[6] Case C-284/16, Slovak Republic v. Achmea BV, EU:C:2018:158, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3287046.

[7] Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 15, 2019), *available at* https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

[8] *See* Press Release, *Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations* (Mar. 20, 2018), EUROPEAN COMMISSION, *available at* https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations; *see also* Eur. Council Doc. 12981/17 ADD 1 on the Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (Mar. 20, 2018), *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf. The new Comprehensive and Economic Trade Agreement ("CETA") between Canada and the European Union likewise provides for an investment court system. *See* Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Oct. 30, 2016, art. 8.29, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&from=EN.

reincarnation of NAFTA—the US-Mexico-Canada Agreement—does not provide for ISDS between the United States (US) and Canada, while the claims that US and Mexican parties can raise against the Mexican and US governments, respectively, have been limited in scope.[9]

Given the unsettled future of investment treaty arbitration, investors are wise to consider alternative dispute settlement options, and to plan their investments accordingly from the outset. As discussed below, this would likely include greater incorporation of contractual protections, with commercial arbitration as the dispute resolution backstop. At the same time, states are well-advised to consider the alternatives that investors may pursue, or structure investment contracts to pursue, in formulating their own policies on foreign direct investment.

III. LESSONS FROM THE PAST: THE AIR FRANCE CASE AND THE BÖCKSTIEGEL GUIDELINES

A useful way to conceptualize the alternatives to ISDS is to look back at the past, and to consider the legal strategies that investors employed before the contemporary form of ISDS existed. In that period, there were few or no bilateral or multilateral investment treaties that could offer substantive protections for investments and give rise to direct causes of action against states. Instead, the available legal instrument was the investment contract itself, and the available dispute resolution option was commercial arbitration.[10] This created obstacles to achieving effective relief from adverse state action, and legal doctrines developed to address those challenges.

A. *The Challenges*

[9] *See* Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; *see also* Public Citizen-Global Trade Watch, NAFTA 2.0 *and Investor-State Dispute Settlement* (ISDS): *U.S.-Canada ISDS Is Terminated, Expansive Investor Rights Eliminated and New Review Procedures Mostly Replace* ISDS *between* US *and* Mexico, https://www.citizen.org/sites/default/files/nafta-2.0-and-isds-analysis.pdf.

[10] Theoretically, investors could also bring claims in the domestic courts of the host state. However, due to concerns about the potential lack of impartiality, transparency, and delay, domestic litigation is often avoided by foreign investors. *See*, *e.g.*, Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 29 (June 17, 2005).

The unique characteristics of investment contracts provide the background for the analysis. Investment contracts are typically entered into by a private investor and a public entity, which is sometimes the state itself, but is often a separate state-owned legal entity (such as a national oil company). When a state or state-owned entity concludes an investment contract, it assumes the role of a private contracting party and agrees to abide by the terms of the contract. However, because the state retains its status as a sovereign, it could potentially abuse its sovereign powers to interfere with or undermine the investment contract. For example, the state could change its laws in a manner that negatively impacts the economics of the investment; or it could unilaterally modify, cancel, or expropriate the contract. The 2007 nationalizations in the oil sector in Venezuela provide a recent example of sovereign powers being used in precisely these ways.[11]

Meanwhile, where the investment contract is concluded with a state-owned entity and not the state itself, the state-owned entity may be in a unique position to influence state actions in its favor, while using its separate legal personality from the state as a shield. When the state takes action against the investor, such as enacting an adverse piece of legislation, the state-owned entity can argue that the state action is an external event that constitutes *force majeure*, or otherwise precludes liability on the state-owned company's part for any resulting breach or non-performance of the investment contact. Although this might sometimes be an accurate description of the factual situation, there is always a risk that it is merely a pretext to avoid liability that should rightfully lie with the state-owned entity.

In short, as has been well-explained elsewhere,[12] investment contracts differ from ordinary private contracts due to the sovereign capacity of the state, and the separate legal personalities of the state and state-owned entities. Thus, any meaningful

[11] *See, e.g.*, Reuters, *Factbox: Venezuela's nationalizations under Chavez* (Oct. 7, 2012), https://www.reuters.com/article/us-venezuela-election-nationalizations/factbox-venezuelas-nationalizations-under-chavez-idUSBRE89701X20121008.

[12] *See* Charles N. Brower & Shashank P. Kumar, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, 30 ICSID REV. 35 (2015).

substitute for ISDS should be able to accommodate these unique features of investment contracts and the disputes that may arise under them.

B. *Legal Doctrines to Address the Challenges*

In the pre-ISDS period, national court judges and arbitral tribunals developed legal doctrines to address the unique circumstances of disputes under contracts involving a state or its progeny. As early as 1970, the French *Cour de Cassation* weighed in on the issue in an instructive way, albeit in the context of a domestic dispute. The case was the much-discussed *Air France* decision.[13]

The *Air France* case involved a dispute under a collective bargaining agreement between Air France—at that point in time, still 70% owned by the state—and its flight personnel. In brief, the agreement required Air France to extend to its flight personnel any financial advantages accorded to ground personnel. In 1963, the governmental authority regulating Air France declined to permit the airline to make certain payments that its flight personnel had claimed under this arrangement. The French courts overturned that regulatory decision five years later; Air France proceeded to pay the principal amount that had been withheld from its flight personnel but refused to pay interest on it. Air France's defense to the interest claim was *force majeure*, as defined in a section of the French Civil Code which provided that a party's non-performance is excused where it is due to "an external cause which cannot be attributed to [that party]."[14] The government had forbidden it from paying the principal amount at the time it was due, Air France argued, and therefore it should not be liable to pay interest.

[13] Cour de Cassation [Cass.][Supreme Court], Apr. 15, 1970, Decision No. 69-40253, 249 Bull. des arrêts Cour de Cassation Chambre sociale 199 (Fr.) [hereinafter "*Air France Decision*"]; *see also* Conclusions by *Avocat Général* on the Cour de Cassation [Cass.][Supreme Court], Apr. 15, 1970, Decision No. 69-40253, Recueil Dalloz, *Jurisprudence* (1971) (Fr.) [hereinafter "*Air France Mellottée Conclusions*"].

[14] *See Air France Decision*, *supra* note 14, at 2 (referencing French Civil Code art. 1147, which provided: "A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part."). *See* C. CIV., art. 1147 (Fr.)(1970).

Following the recommendation of the *Avocat Général*, the *Cour de Cassation* rejected Air France's *force majeure* defense on the ground that the decision taken by the regulatory authority was not external to the company.[15] In considering whether the governmental act was imputable to Air France, the *Avocat Général* had noted that: nearly 70% of Air France's capital was owned by the government; half of the members of its board of directors were government officials or persons nominated by them; the company's financial management was strictly controlled by the government; and the remuneration paid to its employees was subject to prior approval by the government.[16] Thus, according to the *Avocat Général* (whose position the *Cour de Cassation* accepted):

> In view of the foregoing, it is extremely shocking that *Air France*, a private law entity, hides behind Air France, a public law entity, to avoid complying with its contractual obligations and therefore escape the consequences of a delay inherently related with the functioning of its bylaws. If this position were admitted, it would become too easy for [public] companies to rid themselves of their obligations. It would be sufficient for them to cause a withdrawal of authorization and afterwards claim *factum principis*. There would no longer be any balance or security in terms of legal relations . . . . [T]he intervention of the public authority, which is organically related with the normal operation of the company, does not represent an external cause which can be held against third parties and contracting parties.[17]

The US Supreme Court addressed an analogous issue, in the international context, in the case of *First National City Bank v. Banco para el Comercio Exterior de Cuba*.[18] The question in that case was whether the *Banco para el Comercio Exterior de Cuba* [Foreign Trade Bank of Cuba] ("BANCEC") could, based on its separate legal

[15] *Air France Decision*, *supra* note 14, at 2 ("[T]he subsequent irregular intervention of this authority in an attempt, as such, to hinder the performance of the obligations stipulated in such a manner cannot be opposed by the debtor subject to such regulation as an unforeseeable and insurmountable act of a third party external to it.").

[16] *Air France Mellottée Conclusions*, *supra* note 14, at 109.

[17] *Id.*

[18] First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611 (1983); *but see* Rubin v. Iran, 138 S. Ct. 816, 818 (2018).

personality from the state, avoid a set-off claim based upon the Cuban government's expropriation of First National's assets. The Supreme Court held that the claim could be asserted against BANCEC in circumstances where: it was wholly-owned by the Cuban state; the corporate purpose of BANCEC was to support the international trade policy of the Cuban government; the government received all of BANCEC's profits; and Ernesto "Che" Guevara was simultaneously the President of BANCEC and the Cuban Minister of State.[19] In essence, the Supreme Court upheld a veil-piercing claim in order to prevent the state-owned entity from shielding itself from liability for a closely related act of the state.

Arbitral tribunals in the pre-ISDS era showed themselves willing to adopt similar solutions. Thus, in some cases where state-owned entities invoked *force majeure* or related defenses to contractual breach based on an act of state, tribunals rejected those defenses and held the state-owned entity liable.[20]

Drawing on prior jurisprudence and scholarship, Professor Karl-Heinz Böckstiegel, one of the leading commentators on the status of state-owned entities in international arbitration, put forward a proposed analytical framework in a seminal publication in 1984.[21] Among other issues, he examined the question of when an act of state could be considered as a *force majeure* event that excuses a state-owned entity's breach of an investment contract. Approaching the question as "a matter of proof and presumption,"[22] the Böckstiegel Guidelines address two issues—administrative acts of states, and legislative acts—as potential *force majeure* circumstances, and provide as follows:

> A. *Acts of state in the form of administrative acts*
> 1. Due to the presumption that a state will not have its executive organs act to the detriment of its own foreign trade organs, including state enterprises, administrative acts of state

[19] First Nat'l City Bank, 462 U.S. at 614.

[20] KARL-HEINZ BÖCKSTIEGEL, ARBITRATION AND STATE ENTERPRISES: SURVEY ON THE NATIONAL AND INTERNATIONAL STATE OF LAW AND PRACTICE 47 (1984); *see also id.* at n.67 (citing examples in arbitral practice).

[21] *Id.* at 46-48.

[22] *Id.* at 47.

> should in principle not be considered as *force majeure*.
> 2. This presumption is not applied, however, if it can be seen *prima facie* or can be proved by the state enterprise that the administrative act was caused by general considerations not connected with this contract or this sort of contract.
> 3. In spite of rule 2 the presumption under 1 is applicable again, if the private party proves that in its specific case the general considerations did not apply.[23]
> *B. Acts of state in the form of law*
> 1. If it is not a general law but a law for an individual case, the same rules apply as under A.
> 2. A general law, due to its *per definitionem* general character, will in principle have to be recognized as *force majeure*.
> 3. Rule B2 does not apply, however, if the private enterprise supplies at least *prima facie* evidence that it was in the interest of the state not to fulfil its contractual obligations which was the motivation of the law.[24]

The analysis under the Böckstiegel Guidelines is thus the following: where an administrative act of state is invoked by a state-owned entity, the *force majeure* defense is presumptively unavailable, subject to proof by the state entity that the administrative act was unconnected with the contract at issue (i.e., that it had a general motivation). However, when the governmental measure invoked is a general act of the legislature, the *force majeure* defense is presumptively available, unless the claimant can provide evidence suggesting that the measure was motivated by the wish to avoid the contractual obligation at issue.

[23] *Id.*

[24] *Id.* at 48.

The Böckstiegel Guidelines received considerable approval in subsequent literature.[25] They have also been applied by commercial arbitration tribunals in resolving problems in relation to claims of *force majeure*.[26]

Thus, in the pre-ISDS period, legal doctrines emerged to avoid unfair results in cases where acts of state provoked breaches of contract by state-owned entities.[27] In the current period of uncertainty about the ongoing availability of ISDS, it is worthwhile for investors to recall those doctrines, and to take them into account in investment planning.

IV. STRATEGIES FOR THE FUTURE: SMART CONTRACTUAL DRAFTING

The principles discussed above can be invoked in situations where an investment contract contains no specific provisions protecting the investor against adverse governmental measures. To promote greater certainty, however, contracts should be drafted to include specific provisions aimed at achieving similar results. There are

[25] *See*, *e.g.*, CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 295-303 (2008) (applying the Böckstiegel Guidelines to analyze whether a state-owned enterprise can raise a defense of *force majeure* based on an act of its own public authority to excuse a breach of an international contract); L.J. Bouchez, *Prospects for International Arbitration: Disputes between States and Private Enterprises*, 8 J. INT'L ARB. 81, 90-91 (1991) (citing the Böckstiegel Guidelines and concluding that acts of state specifically interfering with a contract made by a state-owned entity are not a basis for *force majeure*); IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 55 (1987) ("Can a State corporation rely on its separate personality to plead that an act of State constitutes *force majeure*, freeing the corporation from a contract with a third party? The third party may sometimes have good reason to think that the State may have acted *jure imperii* in order to escape from a commitment contracted *jure gestionis* by its [state-owned entity]. Böckstiegel recognizes that the other party to the contract may have great difficulty in proving such a connivance. He would therefore place the burden on the [State-owned] corporation to prove that the act of *force majeure* had been taken for the benefit of the general public good and not only for the benefit of the corporation.").

[26] *See*, *e.g.*, *Krupp-Koppers v. Kopex*, *Interim Award* ("German FR Engineering Company v. Polish Firm"), 12 Y.B. COM. ARB. 63, 67 (1987); Pierre Lalive, *Arbitration with Foreign States or State-Controlled Entities: Some Practical Questions*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 289, 294 (Julian D.M. Lew ed., 1987) (discussing Eurodif arbitration).

[27] Protective doctrines have also developed in the context of investment contracts concluded directly with states—including the theory of "internationalization" of state contracts, and prohibitions on states invoking their internal law to avoid agreements to arbitrate. *See* Brower et al., *supra* note 13, at 41.

various types of contractual clauses that can be employed to accomplish this purpose, and the present section addresses three of them: stabilization clauses; compensation provisions; and *force majeure* clauses.

A. *Stabilization Clauses*

A stabilization clause in an investment contract addresses the extent to which subsequent changes in the host state's laws and regulations can affect the rights and obligations of the parties to the contract. The main purpose of including a stabilization clause is to protect the investor against changes in host state law that could diminish or destroy the value of the investment. Historically, stabilization clauses contained relatively broad phrasing that sought either to prohibit the state from enacting legislation that was inconsistent with the contract, or to exempt the investment contract from the application of new, adverse legislation. Those broad provisions faced criticism from some developing nations and non-governmental organizations, which argued that they unduly impinged upon the sovereignty of a state to enact legislation and to regulate its own economy, especially on matters pertaining to the environment, public health and human rights.

The modern forms of stabilization clauses are more varied and nuanced, and they cover the spectrum from most to least restrictive of the host state's legislative freedom. Here, we highlight three common variations.

1. Freezing Clauses

The most restrictive iteration, as mentioned above, is the traditional "freezing clause," which specifies that the law as it exists at the time of execution of the contract will be the governing law of the contract, such that the investor will be exempt from subsequent changes in laws and regulations.[28] A typical example of a freezing clause can be found in the contract at issue in the *Texaco Overseas Petroleum Co. v. Libya* arbitration, which stated: "This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations

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[28] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 71-72 (3d ed. 2017).

in force on the date of execution . . . . Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent."[29]

In terms of scope, a freezing clause can either broadly cover all relevant national regulatory regimes, or it can be limited to specific areas such as tax law.[30] An example of the latter variant is the so-called "taxes in lieu" or "tax paid" clause—often found in production sharing contracts ("PSC")—which provides that the investor will take its share of production free and clear of all taxes, royalties, and similar charges, and thereby insulates the investor from future tax and royalty increases. For example, Qatar's Model Development and Production Sharing Agreement of 2002 contained a clause providing as follows: "The Government shall assume, pay and discharge or cause to be discharged on behalf of [the investor] all Qatar income tax of the [investor] . . . . [The national oil company], acting on behalf of the Government shall perform these duties."[31]

2. Renegotiation/Economic Equilibrium Clauses

A second popular iteration consists of "renegotiation" or "adaptation" clauses, which provide that on the occurrence of a triggering event—typically, an adverse change in host state law—the contract will be renegotiated to restore the pre-existing "economic equilibrium."[32] There are two potential pitfalls to avoid in drafting such clauses: it is critical (*i*) to define with some precision what restoring the "economic equilibrium" means, and (*ii*) to provide a binding backstop in case the renegotiation is

[29] Texaco Overseas Petrol. Co. v. Gov't of the Libyan Arab Republic, *Ad-Hoc*, Award, ¶ 3 (Jan. 19, 1977), 17 I.L.M. 1 (1978).

[30] *See* PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 70 (2010).

[31] QATAR, Model Development & Production Sharing Agreement of 2002 Between the Gov't of Qatar and Contractor (North Field), § 22.5, *available at* https://www.resourcecontracts.org/contract/ocds-591adf-6349675951/download/pdf.

[32] *See* Kyla Tienhaara, *Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses*, 2 INV. TREATY NEWS 1, Oct. 2011, at 12, https://www.iisd.org/pdf/2011/iisd_itn_october_2011_en.pdf ("Stabilization clauses come in various forms . . . . A more nuanced version is often referred to as an 'economic equilibrium' clause, which requires the government to restore the balance of risks and rewards established in a contract when it is upset by a new regulation or tax.").

unsuccessful. A useful example is the clause contained in the PSC between a subsidiary of Eni and the Nigerian National Petroleum Company, which was at issue in a recent arbitration between the two parties:

> In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 hereof. Following [the] arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination.[33]

3. Hybrid Clauses

A third type of stabilization clause is the so-called "hybrid clause," which combines two or more forms of stabilization. An example, based on a PSC with a North African State, reads as follows:

> This PSC is governed by Hydrocarbon Law 52,100 as currently in force.
>
> Clause 6(a): The Contractor shall take its share of production free and clear of all charges, taxes, royalties and similar contributions.
>
> Clause 6(b): All charges, taxes, royalties and similar contributions that would otherwise be payable by Contractor shall be paid by the [national oil company] . . . .
>
> Clause 23: In the event of a change in law that affects the economic equilibrium of this PSC, the parties shall agree to modify its terms in order to restore the economic equilibrium.

While such hybrid clauses have the potential of offering a useful combination of protections, they can also create ambiguity or even contradiction. Therefore, parties should pay special attention to ensuring that the different elements of a hybrid

[33] *See* Nig. Agip Exploration Ltd. v. Nig. Nat'l Petrol. Corp., No. 17-cv-04483 (S.D.N.Y. June 14, 2017)(Ex. 2 to Declaration of Jerome Finnis at Section 19.2).

stabilization clause are consistent with each other and do not impose conflicting obligations.

Finally, it is worth noting that stabilization clauses can be included in contracts with either a state-owned entity, or the state itself (for example, in the form of a "freezing clause"). In contrast, the two contractual mechanisms discussed in the following subsections apply only to contracts with the former.

B. *Indemnification Provisions*

A second type of contractual provision intended to mitigate the risk of adverse governmental measures is an indemnification provision, which typically provides that in the event the state takes certain adverse measures—such as the imposition of new or discriminatory taxes—the state-owned party to the investment contract will indemnify the investor in whole or in part. For example, in the mid-1990s, the Venezuelan national oil company, *Petróleos de Venezuela*, S.A. ("PDVSA"), included such clauses in association agreements with foreign parties for the exploitation of Venezuela's extra-heavy crude oil reserves.[34] The advantage of including such a provision is that it eliminates the need to establish any breach on the part of the state-owned entity in order for payment to be due. Such contractual liability is supplementary to that which may arise on the part of the state, in its own right, under a BIT or other investment protection instrument.

C. *Force Majeure Provisions*

Third, and again in the context of an investment contract with a state-owned entity, a properly drafted *force majeure* clause can effectively allocate the risk of adverse governmental action to the state-owned company. In other words, such a clause can expressly mandate the result reached in *Air France* and envisaged in the Böckstiegel Guidelines.

Force majeure provisions typically provide that a party will not be liable for non-performance caused by an external, non-attributable act—which, as the *Air France* case illustrates, could include governmental measures. For investment protection

[34] *See* Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 38-44 (Oct. 9, 2014).

purposes, *force majeure* can instead be contractually defined in a way that *excludes* adverse governmental measures: in particular, by expressly specifying circumstances that do *not* constitute *force majeure* events. For example, discriminatory or targeted actions by the state against the foreign party or its investment can be specifically excluded from the scope of *force majeure*. In terms of the consequences of such (excluded) events, the clause should go on to specify whether the state-owned party merely has a duty to use reasonable efforts to mitigate the effects, or whether it instead directly incurs liability for any resulting non-performance or breach.[35] With these details specified in the contract, a later tribunal will be able to apply the particular allocation of risk in respect of governmental measures that the parties have agreed.

V. PARALLEL PROCEEDINGS IN COMMERCIAL AND INVESTMENT ARBITRATION

The contractual mechanisms surveyed above are of course not exclusive of other remedies. In most cases, an investor can pursue claims arising out of the same, or substantially similar, facts before both a commercial arbitration tribunal and an investment tribunal. This has in fact become increasingly common in practice. Recent prominent examples include the parallel investment treaty claims against Venezuela, and commercial arbitration claims against PDVSA, pursued by ExxonMobil in the wake of the 2007 Venezuelan oil expropriations.[36]

Investors are able to pursue such claims, either simultaneously or sequentially, because the same state action can give rise both to a breach of contract and a breach of the state's international obligations. Different legal instruments—the contract in the case of commercial arbitration, and the investment treaty in the case of investment arbitration—provide different rights for the investor, which arise under

[35] A clause imposing the latter result might, for example, read as follows: "Failure of a Party to fulfill any obligation incurred under this Agreement shall be excused and shall not be considered a default thereunder during the time and to the extent that such non-compliance is caused by an event of *force majeure*, except that if the event of *force majeure* is an act of [the host state], such event of *force majeure* shall not preclude an action for damages against [the state-owned entity] for the non-performance of the relevant obligation."

[36] *See* Venez. Holdings, Award, ¶ 379.

different governing laws and therefore give rise to separate causes of action.[37] The distinction between contract claims and treaty claims, even when both are asserted against the state itself, has been well-established since the *Vivendi I* annulment decision, which held as follows:

> As to the relation between breach of contract and breach of treaty . . . [a] State may breach a treaty without breaching a contract, and *vice versa* . . . .
>
> In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the [municipal law].
>
> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract . . . .
>
> On the other hand, where the "fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent State or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.[38]

Subsequent investment tribunals have followed this approach in allowing investment claims to go forward so long as they allege, on a *prima facie* basis, breaches of an investment treaty.[39] And so the investor may be able to obtain, in

[37] *See*, *e.g.*, Sempra Energy Int'l. v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶ 123 (May 11, 2005); *see also* Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 113 (July 3, 2002).

[38] Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 95, 96, 98, 101 (July 3, 2002) (internal footnotes omitted).

[39] *See*, *e.g.*, SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 128 (Feb. 12, 2010); Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶¶ 41-45 (Aug. 3, 2006); Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 132-33 (June 16, 2006); Eureko B.V. v. Republic of Poland, UNCITRAL, Partial Award, ¶¶ 92-114 (Aug. 19, 2005); Impregilo S.p.A. v. Islamic Republic of

effect, two bites at the same factual apple by pursuing parallel proceedings. Where the target of one of the actions is a state-owned entity, as opposed to the state itself, this may also offer advantages in terms of enforcing any resulting award.[40] Commercial entities, even if fully state-owned, are typically not in a position to claim sovereign immunity as a defense to enforcement, unlike the state itself.[41]

To be sure, the pursuit of parallel proceedings can give rise to possible concerns, including the risk of inconsistent decisions and the potential for double recovery.[42] These risks are, however, capable of being addressed. Tribunals have at their disposal various legal doctrines, such as *res judicata*[43] and estoppel,[44] to reduce the risk of inconsistent results; and the potential for double recovery can be addressed through appropriate stipulations in the awards in either or both proceedings.[45]

VI. CONCLUSION

At a time of uncertainty about the ongoing availability and scope of ISDS, international commercial arbitration has the potential to fill gaps that may arise from changes to the investment arbitration regime. The degree of success that can be achieved by commercial arbitration depends on its adaptability to a unique characteristic of investment contracts—specifically, the ability of the state to use its

Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶¶ 286-90 (Apr. 22, 2005); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶¶ 75-85 (Dec. 8, 2003); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶¶ 146-48 (Aug. 6, 2003); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶¶ 70-76 (July 17, 2003).

[40] *See*, *e.g.*, Gene M. Burd & Bradford J. Kelley, *Light at the End of The Tunnel: Enforcing Arbitral Awards Against Sovereigns*, MEALEY'S INT'L ARB. REP., Nov. 2017, at 3.

[41] *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 444 (2nd ed. 2009).

[42] *See* Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 51 (May 16, 2006).

[43] For example, the tribunal in *Inceysa v. El Salvador* found that *res judicata* would apply if there was an identity of parties and claims. *See* Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 214 (Aug. 2, 2006).

[44] *See* Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.18 (Aug. 25, 2014).

[45] *See*, *e.g.*, Venez. Holdings, Award, ¶¶ 380-81.

sovereign powers to put a thumb on the scale of the contractual balance. Equipped with the appropriate legal doctrines, and with properly drafted contracts before them, commercial tribunals should be able to meet the challenge. As history has shown, the Böckstiegel Guidelines and similar principles in domestic jurisprudence can provide useful legal frameworks. In addition, investors can make use of tools such as stabilization clauses, indemnification provisions, and protective *force majeure* clauses to shift the risk of adverse regulatory change, in whole or in part, to their contractual counterparties. Further, in many cases, commercial arbitration will be available as a supplement to whatever ISDS options remain open to the investor.

States and state-owned entities, for their part, may also usefully consider non-ISDS alternatives in framing their investment policies and investment contracts. Their incentives may not be fully aligned with those of investors, but both sides have an interest in a dispute resolution regime that strikes a workable balance between their competing perspectives.

The future in this regard remains unwritten. But the lessons of the past may provide useful guidance in charting the path.

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