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# STATES, SOVEREIGNTY, AND INTERNATIONAL LAW: A VOLUNTARY SERVITUDE?

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## A. HISTORICAL PERSPECTIVE

Sovereignty—its origins and content, meaning, and implications—is a much-debated concept. A generally accepted view among scholars of international relations and political science is that this principle was formally established with the signing of the Peace of Westphalia in 1648. The Westphalian model is founded on the notion that States possess supreme authority within their **1.001**

own territories while being equal in status among themselves. As such, sovereignty became synonymous with state independence, a defining feature of the international legal system that shaped inter-state relations and set clear limits on external influence.

**1.002** Nevertheless, the notion of sovereignty has not remained static. While the Westphalian conception laid the foundation for the autonomy of nation-States, it also contributed to the growth of an international community (initially limited to Europe), which gradually began to alter the classical understanding of the sovereign state. It was during the 19th and 20th centuries, however, that the Westphalian understanding of sovereignty faced its greatest challenges and transformations. Social, economic, and industrial changes brought with them new complexities for international order, calling into question the extent of state control and autonomy. These transformations gave rise to a broader understanding of sovereignty that acknowledged the interconnected international legal order. The growing interdependence among States and the emergence of new transnational issues led to the creation of multilateral treaties and international organizations aimed at gradually redefining the scope of sovereignty.

### 1. Treaty of Westphalia – WWI: sovereign state as sole actor and subject of international law

**1.003** The period between the signing of the Treaty of Westphalia and World War I marked the emergence of the sovereign state as the central actor and subject of international law. Westphalian sovereignty, by positioning States as the supreme authorities within their territories and recognizing their equality under international law, provided a new understanding of the legal and political landscape of Europe, setting the stage for the upcoming centuries. Although initially limited to Europe, the Westphalian principles of sovereignty and non-intervention became 'universal' norms, gradually influencing the structure and behavior of States throughout the world.

#### (a) Treaty of Westphalia – historical context

**1.004** The Thirty Years' War came to an end in 1648 with the signing of two significant treaties: the Treaty of Osnabrück and the Treaty of Münster, which together formed the Peace of Westphalia. The Holy Roman Empire, then the dominant political entity in Central Europe under Habsburg leadership, was central to both agreements—signing the Treaty of Osnabrück with Sweden and the Treaty of Münster with France. The war was fueled by religious

conflict (or religious intolerance)[1] between Catholics and Protestants within the empire,[2] it evolved into a broader European power struggle, with States like France intervening to challenge Habsburg hegemony. At the time, though fragmented, the Holy Roman Empire still held significant political power, its structure deeply intertwined with religious and political dynamics.[3] The Peace of Westphalia established the revolutionary principle of *cuius regio, eius religio*—the right of sovereigns to determine the religion of their own territories.[4]

**1.005** In the early 17th century, Europe was a volatile and unstable combination of religious and political tensions.[5] The Protestant Reformation had fractured the religious unity of Western Christendom, leading to deep-seated rivalries between Catholic and Protestant powers.[6] In 1618, these tensions erupted into the Thirty Years' War when Protestant nobles in Bohemia rebelled against their Catholic Habsburg ruler.[7] What began as a localized conflict within the Holy Roman Empire quickly escalated into a European war. Concurrently, the Eighty Years' War had been raging since 1568, as the Dutch provinces fought to throw off Spanish Habsburg rule.[8] This conflict, also known as the Dutch War of Independence, was closely linked with the broader European power struggle.

**1.006** By the 1640s, these prolonged conflicts' immense human and economic toll had exhausted the warring parties, creating a growing desire for peace.[9] After Westphalia, the European political landscape was dramatically altered. The Holy Roman Empire's power was significantly reduced, with its numerous principalities gaining increased autonomy. France emerged as the dominant Western European power, while Sweden gained control over several Baltic territories. The Dutch Republic was recognized as an independent state, ending

1 Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 [1] The American Journal of International Law 20, 21.

2 *See* Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 [2] World Politics 206, 222–44.

3 For a description of Europe in the 17th century *see* David Ogg, *Europe in the Seventeenth Century* (E Lipson (ed), A. and C. Black 1925); on the origins of the war *see* Peter H Wilson, 'The Causes of the Thirty Years War 1618–48' (2008) 125 [502] The English Historical Review 554.

4 *See infra* § A.I(b).

5 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 51–2.

6 *See* Sir AW Ward, 'The Outbreak of the Thirty Years' War' in *The Cambridge Modern History: An Account of its Origin, Authorship and Production* (Volume IV, Cambridge University Press 1934) ch 1.

7 *See* Myron P Gutmann, 'The Origins of the Thirty Years' War' (1988) 18 [4] Journal of Interdisciplinary History 749.

8 *See* Laura Manzano Baena, 'Negotiating Sovereignty: The Peace Treaty of Münster, 1648' (2007) 28 [4] History of Political Thought 617.

9 *See* Sir AW Ward, 'The Outbreak of the Thirty Years' War' in *The Cambridge Modern History: An Account of its Origin, Authorship and Production* (Volume IV, Cambridge University Press 1934).

Spanish claims over the region. Additionally, the peace treaties established principles of religious tolerance, allowing rulers to choose the official religion of their territories while granting certain rights to religious minorities.[10]

**1.007** During the negotiations, also in Münster, to end the Eighty Years' War, one of the Unified Provinces of the Netherlands' principal demands was "the specification of the status of the United Provinces […] demanding the recognition of the provinces as 'free and *sovereign*'."[11] This demand stemmed from the ambiguous wording in the previous Treaty of Antwerp,[12] which, at best, formally acknowledged Dutch independence rather than granting full, perpetual sovereignty in the eyes of Spain—despite many other European powers already recognizing Dutch independence.[13] Moreover, the Dutch sought to establish their autonomy not only from Spain but also from the Holy Roman Empire. They refused any form of subordination to any external authority, even if merely symbolic.[14]

**1.008** Months later, the negotiations that led to the end of the broader Thirty Years' War through the Peace of Westphalia further cemented the concept of sovereignty as a cornerstone of international relations.[15] Just as the Dutch had demanded recognition of their sovereignty in the negotiations to end the Eighty Years' War, the principle of state sovereignty emerged as a crucial element in the Westphalian treaties. The Peace of Westphalia established different vital principles that would define modern international relations; it brought

10 *See* Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 [2] World Politics 206.

11 Laura Manzano Baena, 'Negotiating Sovereignty: The Peace Treaty of Münster, 1648' (2007) 28 [4] History of Political Thought 617, 621.

12 Concluded in 1609, the Treaty of Antwerp established a twelve-year truce during the Eighty Years' War between the Spanish Empire and the Dutch Provinces. This treaty is commonly known as the Twelve Years Truce. *See* Randall CH Lesaffer, *The Twelve Years Truce and the Formation of the Classical Law of Nations* (SSRN, 30 June 2009).

13 Laura Manzano Baena, 'Negotiating Sovereignty: The Peace Treaty of Münster, 1648' (2007) 28 [4] History of Political Thought 617, 621–22.

14 Laura Manzano Baena, 'Negotiating Sovereignty: The Peace Treaty of Münster, 1648' (2007) 28 [4] History of Political Thought 617, 623.

15 Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 [3] The International History Review 569, 591 "Although no one yet conceived sovereignty as the recognition of the right of other states to rule the territory, the increasingly complex diplomatic milieu shows how a polar system was able to develop. In this sense, one may locate the origins of sovereignty around the peace of Westphalia, but only as a consequence of the negotiations, not of an explicit or implicit endorsement of the sovereignty in the terms of the treaties."

numerous States into its framework, defined interstate obligations, and positioned the state as the emerging focal point of collective identity.[16]

### (b) Treaty's significance in establishing the concept of state sovereignty and international law

**1.009** The legacy of the Peace of Westphalia extends far beyond merely ending the war. Its principles redefined sovereignty, religious tolerance, and international relations, actively transforming the European political landscape and setting the stage for our contemporary understanding of nation-States.[17] Moreover, despite ongoing debate,[18] it is often perceived as the starting point for the concept of territorial sovereignty[19] and state autonomy in international relations.[20] This diplomatically divisive moment—contested by the Catholic Church and rulers who opposed the redistribution of political power—laid the foundation for principles that would shape global politics for many years to come.

**1.010** The term 'Westphalian sovereignty' is not gratuitous.[21] As noted, Westphalia emphasized religious independence for each ruler by affirming the principle of *cuius regio, eius religio*.[22] This principle determined that each state has complete and exclusive sovereignty over its territory, free from external interference. This concept of sovereignty became a cornerstone of the new international order.

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16 Laura Cruz, 'Policy Point-Counterpoint: Is Westphalia History?' (2005) 80 [3] International Social Science Review 156, 153.

17 Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Brill Nijhoff 2019) 74. *See* Jason Farr, 'Point: The Westphalia Legacy and the Modern Nation-State' (2005) 80 [3] International Social Science Review 156.

18 *See* Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 59.

19 *See* Benjamin Mueser, 'Why Westphalia Still Matters: Territorial Rights under Empire' (2024) 26 [2] International Studies Review viae024.

20 David Armstrong, *The Westphalian Conception of International Society, Revolution and World Order: The Revolutionary State in International Society* (Oxford University Press 1993) 33 *See also* Laura Cruz, 'Policy Point-Counterpoint: Is Westphalia History?' (2005) 80 [3] International Social Science Review 151: "Many of the precepts ascribed to Westphalia, such as state sovereignty and enforcement and regulation of international law, come from these two treaties rather than the Treaty of Westphalia itself."

21 This article does not assume that either sovereignty or the modern state was created in a single moment. Sovereignty was a gradual process acquiring relevance and transcendence from a milestone which set forth some of its core basis: the Peace of Westphalia. As Armstrong noted, "Westphalia was an important breaking point that could be accurately taken as reference. Holy Empire continued existing, but the renounce of a basilar concept such as the determination of the religion implied a great loss for the power." Coinciding with Farr, leaving religion (considering its fundamental importance at that time) to the internal domain of each territorial sovereign "not only solidified national sovereignty, it also laid the foundation for the modern competitive state system."

22 Aaron X Fellmeth and Maurice Horwitz, '*Cuius regio eius religio*' *in Guide to Latin in International Law*' (Oxford University Press 2009). The "'*Whosever territory, his religion*' principle, established by the Treaty of Westphalia of 1648, that the prince of any particular principality determines the religion of the inhabitants of that principality. The maxim has sometimes been applied as an expression of the concept of a state's sovereignty over its own territory."

As Farr explains, "[a]fter 1648, *national sovereignty*, characterized by *autonomy* and *interstate competition*, became the primary governing system among European States."[23] Curiously, the Treaty of Westphalia does not mention sovereignty at all.[24] Nonetheless, Westphalia marked the last—and probably most significant—pact in a series of treaties over centuries in which the Holy Roman Empire yielded power to the monarchs and thus led to the recognition that religion was an issue within each territory.[25] It was a crucial defeat for imperial and papal authority, altering Europe's political landscape and ushering in the modern state system.[26]

**1.011** The consolidation of the sovereign state led to the emergence of the concept of the modern state as a subject in the international sphere,[27] which would become the dominant form of political organization in the modern era.[28] Westphalia was an emerging point for an international legal order—although only European—and the nascent formation of an international society tied to a notion of legitimacy and built on the collective will—*consensus*—of the European States.[29] Also, the idea of international recognition gained paramount value as it

> was an important indicator of the existence [of the States]. States were not only created by their own efforts but were to gain international recognition by the acts of the collectivity: the society ratifies (or withholds) the independence of individual states.[30]

**1.012** Despite not creating an everlasting peace in Europe,[31] the Peace of Westphalia marked a pivotal moment in the evolution of public international law and led

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23 Jason Farr, 'Point: The Westphalia Legacy and the Modern Nation-State' (2005) 80 [3] International Social Science Review 156.

24 Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 [3] The International History Review 569, 569.

25 Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 [2] World Politics 206, 209: "[…] Westphalia signals the consolidation, not the creation *ex nihilo*, of the modern system. It was not an instant metamorphosis, as elements of sovereign statehood had indeed been accumulating for centuries."

26 Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 [2] World Politics 206, 211.

27 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 50–1.

28 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 57–8.

29 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 60.

30 Kalevi J Holsti, *Peace and War: Armed Conflicts and International Order, 1648–1989* (Cambridge University Press 1991) 36.

31 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 630–31.

to a period of relative stability in Central Europe. The significance of the Peace of Westphalia, coupled with the resolution of major wars in the 17th century, lay in its creation of the necessary conditions for stability, paving the way for the construction of a new international legal order. The principles established at Westphalia, particularly those related to *state sovereignty* and *non-interference*, became foundational elements of this emerging legal framework.

**1.013** The path to a more comprehensive international order was not immediate or straightforward. In the years following Westphalia, several other significant agreements were necessary to address ongoing conflicts and reshape the European political landscape. Notable among these were the Treaty of Utrecht in 1713, which ended the War of the Spanish Succession, and the Congress of Vienna in 1815, which reorganized Europe following the Napoleonic Wars. For instance, the Congress of Vienna introduced the idea of collective multilateral agreements under which a European order was established,[32] through the Concert of Europe and the institutionalization of European collaboration for security (regular meetings between major powers like Britain, Prussia, and Russia to prevent wars and resolve disputes through diplomatic negotiations rather than armed conflict).[33]

**1.014** This period from Westphalia to Vienna witnessed significant historical events, including the French Revolution, the United States' independence, and the rise and fall of the Napoleonic Empire. Concurrently, significant innovations in international law emerged. The concept of interstate relations governed by a community of civilized nations (*nations civilisées*) gained prominence. Although linked with the prohibition of slavery and thus representing an incipient form of international human rights, this concept was also entwined with the idea of States maintaining religious neutrality.[34] Furthermore, this era saw the recognition of the first American States as independent entities and their inclusion in the 'civilized nations' community.[35] The aftermath of

32 Miloš Vec, 'From the Congress of Vienna To the Paris Peace Treaties of 1919', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 657–59.

33 'Vienna 1815: The Making of a European Security Culture' (Vienna 1815, The Hague, January 2015) <http://www.h-net.org/reviews/showrev.php?id=43228>.

34 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 651 "This was, in principle, a constitutional matter, but was to have an immediate effect on international law: for a State to be a nation civilisée, it henceforth had to be, at least in theory, a State neutral to confessional matters."

35 Liliana Obregón, 'The Civilized and the Uncivilized', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 921–24.

the Congress of Vienna for international law was significant,[36] as summarized by Schulz:

> [T]he modernisation of the international order by the Vienna Congress and the immediate post-Napoleonic years was impressive: by redefining the balance in a political and legal way, by giving the territorial order a new legal form through a multilateral treaty, by not antagonising France, by reducing the security dilemma through carefully arranged borders and innovative security institutions, by seeking varied local compromises between restoration and reform, and by transforming communicative interaction between states through monarchical encounters and ambassador conferences, the Vienna system enhanced the stability of the international system more than any other peace before in the modern era.[37]

**1.015** The years following the Congress of Vienna were crucial for the development of international law and relations among sovereign States. This period saw the emergence of the first international organizations,[38] such as the Central Commission for Navigation on the Rhine, which remains the oldest international institution still in existence.[39] Several international congresses were held before the eruption of World War I,[40] and the international order underwent an intense 'juridification' during this time.[41] This process led to an increased enthusiasm for international judicial mechanisms and arbitration as a means of dispute settlement. A notable example is the Alabama Claims Arbitration, which significantly boosted expectations for the effectiveness of arbitration as a tool for international dispute settlement.[42]

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36 *See* Richard Langhorne, 'Reflections on the Significance of the Congress of Vienna' (1986) 12 [4] Review of International Studies 313.

37 Matthias Schulz, 'The Construction of a Culture of Peace in Post-Napoleonic Europe: Peace through Equilibrium, Law and New Forms of Communicative Interaction' (2015) 13 [4] Journal of Modern European History 474.

38 Miloš Vec, 'From the Congress of Vienna To the Paris Peace Treaties of 1919', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of Cultures of Peace International Law* (Oxford University Press 2012).

39 Matthias Schulz, 'Cultures of Peace and Security from the Vienna Congress to the Twenty-First Century Characteristics and Dilemmas', in Beatrice de Graaf, Ido de Haan and Brian Vick (eds), *Securing Europe after Napoleon* (Cambridge University Press 2019) 25.

40 Miloš Vec, 'From the Congress of Vienna To the Paris Peace Treaties of 1919', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

41 *See* Daniel Loick, 'Juridification', in Amy Allen and Eduardo Mendieta (eds), *The Cambridge Habermas Lexicon* (Cambridge University Press 2019) 208 Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1987) 3–48.

42 The Alabama claims were a diplomatic dispute between the United States and Great Britain that arose out of the U.S. Civil War. The peaceful resolution of these claims between 1862 and 1867 set an important precedent for resolving international disputes through arbitration. Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 [1] International and Comparative Law Quarterly 1.

**1.016** What, then, is 'Westphalian sovereignty'? At its core, it asserts that each state has complete autonomy over its territory, aligning with four key characteristics defining the Westphalian system: territoriality, sovereignty, equality, and non-intervention.[43] Territoriality establishes that a state's power is bounded by and applies within clearly defined geographical borders. Sovereignty ensures that the state holds supreme authority within its territory, free from external interference. Equality posits that all States, regardless of size or power, are considered equal under international law. Finally, non-intervention prohibits States from interfering in the internal affairs of other sovereign States. These four pillars collectively form the foundation of Westphalian sovereignty, a starting point for the transition from the feudal system to the modern States, and a concept that has shaped modern international relations. Brown concluded in the late 20th century that:

> Even to this day two principles of interstate relations codified in 1648 constitute the normative core of international law: (1) the government of each country is unequivocally sovereign within its territorial jurisdiction, and (2) countries shall not interfere in each other's domestic affairs.[44]

**1.017** As noted by Krasner, the term sovereignty has been used in different ways than the 'Westphalian' definition: (i) the extent of control by government bodies and the distribution of power within territorial boundaries;[45] (ii) as a synonym for the level of control that public authorities have over cross-border flows of goods, people, and ideas;[46] and (iii) the right of actors to enter into international agreements (*e.g.*, treaties).[47] Alongside the Westphalian concept of sovereignty,[48] it is possible to provide an overall—and possibly oversimplifying—understanding of sovereignty as the control of the state (which includes the government and public authorities) over its own territory, to the extent other States recognize and respect such control, further allowing it to enter into agreements with its peers.

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43 Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 [2] International Organization 251, 266.

44 Seyom Brown, *International Relations in a Changing Global System: Toward a Theory of the World Polity* (2nd edn, Westview Press 1992) 74, as cited in Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 [2] International Organization 251, 261.

45 Stephen D Krasner, Compromising Westphalia (1995) 20 [3] International Security 115, 118.

46 Stephen D Krasner, Compromising Westphalia (1995) 20 [3] International Security 115, 118.

47 Stephen D Krasner, Compromising Westphalia (1995) 20 [3] International Security 115, 119.

48 Stephen D Krasner, Compromising Westphalia (1995) 20 [3] International Security 115, 118, 119: "An institutional arrangement for organizing political life that is based on territoriality and autonomy. States exist in specific territories. Within those territories, domestic political authorities are the only arbiters of legitimate behavior."

### (c) Sovereign immunity – an introduction

**1.018** The acceptance of sovereignty as a fundamental concept in international relations led States to share several key commonalities. Under the principle of *superiorem non recognoscentes*,[49] all States were deemed sovereign, with none acknowledging any authority superior to their own.[50] This principle formed the essence of sovereignty: the exclusive right to impose and enforce commands on individuals within a state's territory.[51] Notably, regardless of their size or military might, all States were considered equal from a legal standpoint. Each state prioritized its own interests,[52] resulting in political, economic, and military alliances that were characteristically temporary, enduring only as long as they served each state's individual goals.[53]

**1.019** In this system of sovereign States, only the States themselves were recognized as subjects of the international community.[54] This community initially comprised solely European States but gradually expanded to incorporate newly independent nations. Individuals held no status within this international legal framework, exclusively shaped and governed by States. Instead, individuals were categorized as nationals, foreigners, or, in some cases, hostiles (such as pirates).[55] Bentham's definition of international law as "the mutual transactions between sovereigns as such"[56] reinforced this state-centric view,

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49 "a king who does not recognize a superior". Julia Costa Lopez, 'Of Sovereign Kings and Propertied Subjects: Beginnings and Alternatives: Chapter 1: Legal Imagination in a Christian World' (2021) 32 [3] European Journal of International Law 949, 950.

50 Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Brill Nijhoff 2019) 76–7; Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 50–1.

51 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 51.

52 *See* Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 [2] International Organization 251, 282; 'Westphalian State System' (Oxford Reference) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803121924198> accessed 20 September 2024.

53 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 51–2.

54 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 52–4.

55 Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 54.

56 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (JH Burns and HLA Hart eds, Athlone Press 1970) 296, as cited in Mark W Janis, 'Individuals as Subjects of International Law' (1984) 17 [1] Cornell International Law Journal 62.

equating it with the traditional law of nations that acknowledged only States as its subjects.[57] This era was characterized by a system of sovereign States striving for coexistence. It represented a pragmatic response to the need for balance and mutual respect,[58] aiming to preserve each state's sovereignty to the greatest extent possible.

**1.020** Sovereign immunity—or better understood as state immunity which derives from sovereignty—emerged as a crucial advantage for States in the international arena, although its scope has gradually narrowed as international relations have evolved.[59] This principle is rooted in the notion that "a State is entitled to require that other States abstain from wielding regalian functions within its territory,"[60] and the maxim that equals have no sovereignty over each other (*par in parem non habet imperium*).[61] Consequently, a sovereign state is not subject to the jurisdiction of other States. While often complex in its application, this foundational tenet of international law effectively shielded States from the jurisdiction of foreign domestic courts. To a certain extent, this immunity also extended to state instrumentalities.

**1.021** In its original conception, the doctrine of sovereign immunity was understood in *absolute* terms—the belief that a sovereign state enjoyed complete immunity from the jurisdiction of foreign courts.[62] While it is open to question whether the United States Supreme Court's landmark 1812 decision in *The Schooner Exchange v. McFaddon* was truly grounded in this absolute theory of sovereign immunity,[63] the Court's opinion nonetheless provided a remarkably precise description of such:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

57 Mark W Janis, 'Individuals as Subjects of International Law' (1984) 17 [1] Cornell International Law Journal 62.

58 Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 197.

59 *See infra* § B.1.

60 Giovanni Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* (Brill Nijhoff 2019) 79.

61 John P Grant and J Craig Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd edn, Oxford University Press 2009): *par in parem non habet imperium*. "The principle that, as a consequence of the equality of States in international law, no State can claim jurisdiction over another, is manifest in, e.g., the rules on sovereign immunity; and in the statement in the Lotus Case (1927) P.C.I.J, Ser. A, No. 10 at 18: '… the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State'."

62 Ernest K Bankas, *The State Immunity Controversy in International Law* (Springer 2005); Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 [4] The European Journal of international Law 853, 870–71.

63 For a description of the dispute *see infra* § B.1(a).

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation *not imposed by itself*. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.[64]

**1.022** Under the absolute theory of sovereign immunity, States enjoyed immunity before foreign tribunals in any possible matter, even for commercial or private purposes. This was the prevailing position during the 19th century and the first part of the 20th century.[65] As further discussed below, this understanding of absolute sovereign immunity was successively abandoned in favor of what is considered today the prevalent theory of sovereign immunity: the *restrictive* theory.[66]

### (d) State consent and sovereignty

**1.023** Consent is one of the fundamental principles of law and, consequently, of paramount importance in international law.[67] The concept of consent was instrumental in shaping the Westphalian model of sovereignty and statehood,[68] which has profoundly influenced modern international relations.[69] The Treaty of Westphalia, often regarded as laying the "first foundations of the international law of treaties,"[70] not only required the explicit consent of the parties for its enactment but also embedded the principle of consent within its very provisions. For instance, the preamble of the Treaty of Münster made clear that all the princes had approved and devised the treaty "with their consent."[71] This acknowledgment highlighted the voluntary aspect of the agreement by implying that the princes could have equally declined to consent. As noted, the treaty introduced the concept of a 'public law of Europe' based on general consent,[72] particularly evident in articles dealing with the transfer of territories

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64 *The Schooner Exchange v. McFaddon* 11 US 116, 136 (1812). *See* Lori Fisler Damrosch and Sean D Murphy, *International Law: Cases and Materials* (7th edn, West Academic Publishing 2019) 802–05. *See infra* § B.1.

65 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 7–10.

66 *See infra* §§ A.1.(c), B.1.

67 *See* Samantha Besson, *Consenting to International Law* (Cambridge University Press 2023) 1–28.

68 *See supra* ¶ 1.011.

69 Christoph Kampmann, 'The Treaty of Westphalia as Peace Settlement and Political Concept: From a German Security System to the Constitution of International Law', in Marc Weller, Mark Retter and Varga (eds), *International Law and Peace Settlements* (Cambridge University Press 2021) 77–9.

70 Heinhard Steiger, 'Concrete Peace and General Order: The Legal Meaning of the Treaties of 24 October 1648' in Klaus Bussmann and Heinz Schilling (eds), *1648—War and Peace in Europe, vol 1: Politics, Religion, Law and Society* (Westfälisches Landesmuseum 1998) 437, as cited in Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 60.

71 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 59.

72 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 60–1.

from the Empire. The idea of international legitimacy grew dramatically in importance with the emergence of consensual international agreements.[73] Finally, the Peace of Westphalia established the basis for 'positive' written international law founded on conventions between sovereigns, setting a fundamental norm upon which almost all treaties in the subsequent eighteenth century were based.[74]

**1.024** Thus,[75] a state's compromise of its sovereignty had to be voluntary. As a consequence, a sovereign state could renounce certain aspects of its sovereignty by consenting to international agreements, thereby binding itself to adhere to international commitments.[76] While the state retained its domestic sovereignty, its autonomy in international affairs was constrained by the obligations it had voluntarily accepted. For instance, although it is cited mostly for its discussion of the concept of sovereign immunity, the *Schooner* case also accurately depicts the impact of consent vis-à-vis a state's sovereignty over its territories:

> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the *consent of the nation itself*. They can flow from no other legitimate source.
>
> This *consent* may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but if understood, not less obligatory.[77]

**1.025** Consent plays a key role in a state's sovereignty in the international investment field, as will be further addressed.[78] By consenting to international investment agreements, States are not only bound by obligations arising from relations with other States but also extend certain obligations to private investors and individuals.

### 2. Twentieth century: private actors enter the international arena

**1.026** While this introductory chapter will not delve into the complex history of international law—an endeavor far too ambitious for this scope—it is essential to acknowledge the significant role of social movements, revolutions,

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73 Ian Clark, *Legitimacy in International Society* (Oxford University Press 2007) 62–3.

74 Christoph Kampmann, 'The Treaty of Westphalia as Peace Settlement and Political Concept: from a German Security System to the Constitution of International Law', in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (Cambridge University Press 2021) 77–9.

75 Daniel Bodansky and J Shand Watson, 'State Consent and the Sources of International Obligation' (1992) 86 *Proceedings of the Annual Meeting* (American Society of International Law) 108.

76 *See* Matthew J Lister, 'The Legitimating Role of Consent in International Law' (2011) 11 *Chicago Journal of International Law* 663.

77 *The Schooner Exchange v. McFaddon* 11 US 116, 136 (1812).

78 *See infra* § B.2.

and independence struggles in reshaping the international legal landscape.[79] These historical developments were instrumental in redefining sovereignty and authority among States, setting the stage for modern international relations and influencing specific areas such as international investment law. As shown,[80] it was initially held that a single, ultimate authority governed each territory. However, this notion evolved due to globalization, changing international dynamics, and the emergence of new global players.[81] The traditional conception of sovereignty as "territorially rooted political authority, which is exclusive and undivided,"[82] over time was subject to ever greater challenge. To encourage international cooperation, nations have had to partially modify their understanding from an outdated model of absolute sovereignty by aligning their laws with international agreements and conventions.

**1.027** By the early 20th century, the traditional framework of state sovereignty had begun to shift, making way for a more nuanced interpretation. Consequently, the boundaries of Westphalian sovereignty began to acquire a new shape. The transformation of state sovereignty throughout the 20th century was driven not only by the rise of international organizations but also by the increasing influence of non-state actors. This shift expanded the scope of international law beyond state-to-state interactions, creating new avenues for these new actors to participate in the formation of international norms and policies.

#### (a) Shifts in sovereignty and the inclusion of non-state actors in international law

**1.028** In the 20th century, international law evolved to include not just States, but also non-state actors like organizations and individuals.[83] This change raised an important question: *should these relations be understood from a vertical perspective, or horizontally, equating States and non-state actors?* Moreover, the 20th century witnessed a significant shift in power within the international

79 While this introduction focuses primarily on the European origins of international law, we acknowledge that the development of international legal systems is diverse and complex. The Eurocentric emphasis here is not meant to exclude or marginalize other significant global contributions, nor does it dismiss critiques of this perspective.

80 *See supra* §§ A.1(b)–(d).

81 Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 193.

82 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 165.

83 Ole Spiermann, 'Twentieth Century Internationalism in Law' (2007) 18 [5] European Journal of International Law 785, 785–86.

legal realm.[84] The previously dominant European influence gave way to other preeminent actors, primarily the United States.

**1.029** These developments have significantly influenced the understanding of sovereignty within the international order, leading to the emergence of three distinct variations. First is internal sovereignty, which refers to how a state interacts with its citizens. Second is external sovereignty, which is the way States interact with each other, forming the basis of traditional international law. Third is the new relationship between individuals and international law, a concept that has gained importance in recent decades.[85]

**1.030** The growing connections between States and private actors have brought non-state entities into the realm of international law.[86] This shift has complex implications for how we understand, apply, and enforce international law today. Including non-state actors has created a more detailed and nuanced view of global governance and responsibility. The challenge has been to create a legal framework that satisfies diverse interests while ensuring the stability and order that international law aims to provide. Recent changes in the international legal order have also affected the concept of state sovereignty. Globalization, increased cross-border transactions, and the emergence of new States from larger ones have all contributed to this.[87] Furthermore, the growing involvement of States and the international community in protecting human rights has led to norms that try to address these issues from a global perspective. This expansion has begun to touch on topics that governments traditionally controlled as domestic matters.

**1.031** As a result, non-governmental organizations have gained political influence, moving away from the traditional model of governance based solely on territorial authority. New forms of global governance through international organizations now focus on specific issues rather than solely on geographical locations (*e.g.*, Organization of the Petroleum Exporting Countries 'OPEC').[88]

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84 *See* Ole Spiermann, 'Twentieth Century Internationalism in Law' (2007) 18 [5] European Journal of International Law 785.

85 Ronald A Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century' (2002) 25 Hastings International and Comparative Law Review 279, 286–87.

86 Ronald A Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century' (2002) 25 Hastings International and Comparative Law Review 279, 294–95.

87 *See* Saskia Sassen, *Losing Control?: Sovereignty in the Age of Globalization* (Cambridge University Press 2015).

88 *See* Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 181.

Dispute resolution mechanisms have also changed, shifting from simply banning the use of force to creating specialized systems for resolving conflicts (*e.g.*, a shift from gunboat diplomacy to the International Centre for Settlement of Investment Disputes).[89] This change has given rise to regional and global frameworks, even leading to the creation of new 'supra-national' organizations and laws in some cases (*e.g.*, the European Union).[90] Another important development has been the rise of private international law,[91] and the application of international law to dealings between States and private actors. These changes were fostered by the dissipation of the absolute theory of sovereign immunity, making it possible to subject foreign States to domestic law and national courts in certain circumstances.

**1.032** Furthermore, human rights issues gained prominence during this time, as new norms and organizations emerged to protect these rights, dramatically changing international law and state sovereignty. Logically, these events and changes are closely tied to key 20th-century events. After World War I, the League of Nations was formed and the Treaty of Versailles reshaped Europe. However, the League's inability to address the challenges presented by aggressor States and the United States Congress' refusal to ratify that Treaty and join the League led to the League's failure and the subsequent creation of the United Nations following World War II. Simultaneously, this period also saw the birth of many new States due to independence from colonial powers or secession from bigger countries, which strengthened the complexities of global law and relations.[92]

89 *See* Ronald A Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century' (2002) 25 *Hastings International and Comparative Law Review* 279. *See infra* ¶ 1.086.

90 *See infra* ¶¶ 1.038, 1.075–1.082.

91 Globalization, driven by the surge in international trade, cross-border mobility, and digital communication, among other factors, fostered the development of Private International Law to address complex legal issues across jurisdictions. Examples include treaties like the Hague Convention on International Child Abduction, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, various treaties on the conflict of laws, the International Institute for the Unification of Private Law (UNIDROIT) and its Principles of International Commercial Contracts, the United Nations Convention on Contracts for the International Sale of Goods, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, all of which have played a pivotal role in standardizing the resolution of cross-border disputes.

92 Anne Peters and Tom Sparks, 'Introduction', in Anne Peters and Tom Sparks (eds), *The Individual in International Law, The History and Theory of International Law* (Oxford Academic 2024) 3: "With the explosion of international organisations in the post-World War II era, international law has been forced to come to terms with actors beyond the State."

**1.033** Despite challenges to the traditional notion of power being primarily held by States, they remained the key players on the global stage.[93] Changes in the international relations landscape have not diminished the crucial role of States in international law. Instead of indicating an erosion or disappearance of sovereignty, these changes signify a transformation and relocation of sovereign power. States remain the principal actors in international law and are essential for providing the infrastructure necessary for global capitalism.[94] While non-state actors are increasingly involved in international law and global governance, they have not replaced the state's role under the prevailing state-centric legal order. Current legal frameworks struggle to fully accommodate all actors in a manner that ensures meaningful participation and decision-making,[95] while non-state organizations often encounter difficulties in implementing their decisions and executing proposed actions. A more accurate understanding of the transformation occurring within the international system is that States have lost their exclusivity in international law.

### (b) The rise of multilateralism and regional integration in international law

**1.034** Globalization altered the traditional notion of exclusive state authority, leading to a multi-layered international order. This new model features wide participation from transnational (non-state) actors and intergovernmental organizations, which have assumed varying degrees of control over diverse international transactions.[96] Multilateral treaties have fostered cooperation and even integration among States within specific policy domains, both regionally and globally. Under these frameworks, non-governmental bodies have been formed to provide sovereign States with assistance in monetary, economic, and development matters. However, these organizations often implement policies that exert significant influence over the States they purport to assist, challenging traditional concepts of state sovereignty.[97] Likewise, collective decision-making international organizations (League of Nations, United Nations, European Union) reflect a decline in the state's control over policy making,

93 Magdalena Petronella Ferreira-Snyman, *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* (PhD thesis, University of Johannesburg 2011) 61.

94 Gavin W Anderson, *Constitutional Rights After Globalization* (Hart Publishing 2005).

95 Zoe Pearson, 'Mapping New Mechanisms for Governance' (2004) 23 Australian Yearbook of International Law 101, 101–02.

96 *See* Robert W Cox, 'Globalization, Multilateralism, and Democracy' (ACUNS 1992 John W. Holmes Memorial Lecture, 1992) as cited in Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 167.

97 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 167.

which to some degree are now subordinate to regional or global homogenic policies and legal structures.[98] It thus became impossible for a state to isolate itself from the international community, not only being bound by the rules to which the state has consented—*e.g.*, by entering into an international convention—or the *jus cogens* rules by which all States are considered to be bound, as well as expectations from the international community—*e.g.*, democratic elections.[99]

**1.035** The 20th century saw a proliferation of significant international treaties and organizations, reshaping global governance and interstate relations. To list just a few key developments, this evolution began with the Treaty of Versailles and the Treaty of Saint-Germain-en-Laye in 1919, which ended World War I and reorganized Central Europe, respectively. The same year saw the establishment of the International Labor Organization (ILO). In 1920, the Covenant of the League of Nations was signed, followed by the Slavery Convention in 1926. Post-World War II, 1945 marked the creation of the United Nations and the International Court of Justice. The North Atlantic Treaty Organization (NATO) was formed in 1949, creating a military alliance among Western nations. The European Economic Community (EEC), the consequential precursor of the European Union, was created by the Treaty of Rome in 1957. The 1950s and 1960s brought further developments: the supplementary Slavery Convention (1956), the Organization for Economic Cooperation and Development (OECD) in 1961, and the ICSID Convention—establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States—(1965). The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the American Convention on Human Rights both occurred in the late 1960s. The 1970s witnessed the Convention on the Elimination of All Forms of Discrimination Against Women (1979). The final decades of the century saw the formation of the European Union through the Treaties of Maastricht (1992) and Amsterdam (1997), the establishment of the World Trade Organization—WTO—(1995), and the creation of the International Criminal Court via the Rome Statute (1998).

**1.036** All these treaties and provisions exemplify how matters once dependent on the sole discretion of individual state rulers have now been incorporated into the body of international law. This shift represents a significant transformation

98 Janice E Thomson, 'State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research' (1995) 39 [2] International Studies Quarterly 213, 229.

99 Henry Schermers, 'Different Aspects of Sovereignty', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 165, 185.

in the international legal landscape, where sovereign prerogatives have been partially ceded to a collective framework. Such a transition reflects the evolving nature of state sovereignty vis-à-vis an increasingly interconnected global order, where adherence to international norms and obligations has become an integral aspect of state conduct. Of major importance, though not previously listed, is the Vienna Convention on the Law of Treaties (1969), the "treaty of treaties." This convention contains provisions of significant consequence. For instance, Article 26 enshrines the legal principle of *pacta sunt servanda*, which mandates that treaties are binding upon States and must be performed in good faith.

**1.037** In addition, Article 27 provides that a state cannot invoke its domestic law as justification for failing to comply with an international treaty, as reinforced by Article 46, which determines that a "state may not invoke the violation of internal law unless certain conditions [the violation was manifest and concerned a rule of its internal law of fundamental importance] are met." As stressed by Dörr and Schmalenbach:

> [D]eviating internal law is not internationally recognized as a valid justification for non-performance. Without prejudice to the fact that a manifest violation of fundamental internal laws allows for the invalidation of the consent to be bound by a treaty (Art 46), international law turns a blind eye to internal law […].
>
> The problem underlying Art 46 is characterized by a fundamental tension between State sovereignty and the security of treaties. On the one hand, each State, by virtue of its sovereignty, has the right to determine the organs and procedures by which its will to be bound by treaties is formed and expressed. On the other hand, the security of treaties would be seriously undermined.
>
> Art 46, read in conjunction with Arts 7 and 27, resolves the tension between State sovereignty and the security of treaties in favor of the latter. It reaffirms the principles of ostensible authority (Art 7) and the irrelevance of internal law on the international plane (Art 27) while allowing only a narrowly tailored exception based on the rationale of good faith.[100]

**1.038** Another example can be seen with the European Union, a unique political and legal system that disregards the traditional classifications of state structures. It is a *sui generis* system blending supranational and intergovernmental elements.[101] Instead of a single supreme authority, the European Union features overlapping functional competencies across various levels of

100 Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 499, 837–38.

101 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 179.

governance, from European institutions to national and sub-national governments. Berger described it as:

> On May 9, 1950, the French foreign minister Robert Schuman made a declaration in which he developed the vision of setting up "common foundations for economic developments as a first step in the federation of Europe" in order to "change the destinies" of this war-torn continent. His idea was to render any war between the possible Member States of an integrated economic union to be established "not merely unthinkable, but materially impossible." Schuman envisaged the creation of an integrated economic union enhancing cooperation and interdependencies to prevent further wars among the European neighbours. Inspired and encouraged by this vision, Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands concluded in 1951 the Treaty of Paris, establishing the European Coal and Steel Community, which later merged into the European Economic Community established by the Rome Treaty in 1957. In the following decades, the Schuman plan became a reality. The European Union (EU) became a unique and unprecedented success story of peace, stability and economic development among its Member States.[102]

**1.039** Furthermore, the global transformation of state sovereignty was profoundly influenced by the principle of international human rights protection. Initially an aspirational ideal, this principle gradually acquired (almost) global acceptance and relevance over time, eventually being considered a supranational mandatory norm. Consequently, governments became increasingly accountable to the international community, primarily to the organizations that created the human rights conventions.[103] This shift reflected a growing global trend towards the mandatory protection of certain fundamental human rights deemed 'basic' or essential.[104] After World War II, human dignity became the nucleus of international human rights law.[105] This was followed by broadening the scope of international law through the establishment of independent tribunals to address war crimes and the implementation of the Rome Statute, which led to the creation of the permanent International Criminal Court.[106]

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102 Julien Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (Routledge 2021) 2.

103 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 171.

104 Ginevra Le Moli, *Human Dignity in International Law* (Cambridge University Press 2021) 119.

105 Ginevra Le Moli, *Human Dignity in International Law* (Cambridge University Press 2021) 218–19.

106 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 171.

### (c) The impact of globalization on sovereignty and foreign investment

**1.040** This rise of non-state actors was greatly facilitated by globalization accompanied by economic growth.[107] The transnational movement of goods and capital has been expedited by the increasing tendency of national governments to ease legal restrictions on international trade, leading to diminished control over transaction flows within their borders.[108] In recent years, however, a counter-trend of protectionism has emerged, with some governments seeking to onshore supply chains and reintroduce trade barriers. Nonetheless, the broader liberalization trend has significantly boosted foreign investment, particularly in the post-imperial and colonial era, where the concession agreement has become a key legal instrument.[109]

**1.041** Generally concluded between a host state and an individual or company, concession agreements allowed a private actor to engage in an activity that had previously been the sole realm of the state.[110] These arrangements typically involve the extraction of natural resources or the development and management of public services, such as postal systems and railways. Concessionaires often acquired extensive rights, including control over large land areas and valuable natural resources for extended periods, in exchange for royalty payments.[111] While the specifics of individual agreements varied, even when limited to a single enterprise, these concessions effectively transferred certain sovereign rights from the state to the concessionaire. A common criticism of these agreements is that they disproportionately favored the concessionaire, often resulting in exploitative terms for the host state. Notably, this period—beginning in the mid-20th century, particularly after the wave of decolonization—also witnessed a rise in state-owned enterprises entering the commercial sphere. These government-backed entities began to compete

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107 Janne E Nijman, *The Concept of Legal Personality: An Enquiry into the History and Theory of International Law* (TMC Asser Press 2004) 365, as cited in Magdalena Petronella Ferreira-Snyman, *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* (PhD thesis, University of Johannesburg 2011) 61.

108 Alfred Van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Gerard Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford University Press 2012) 167.

109 *See* Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 28–31.

110 *See* Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 28; Matthew Craven, 'Colonial Fragments: Decolonization, Concessions, and Acquired Rights', in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era, The History and Theory of International Law* (Oxford University Press 2019) 101–23.

111 *See* Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 28.

directly with private businesses, adding a new dimension to the evolving economic landscape.

**1.042** Legal theories applicable in foreign investment reflect the tensions and the ways in which it intersects with States' sovereignty, such as, for example, the police powers doctrine.[112] Foreign investment law is not a creation of the 20th century but did significantly increase in that time. As noted by Viñuales:[113]

> The protection of aliens was an important practical consideration since at least the nineteenth century […] However, investment agreements (whether at the contractual or treaty level) proliferated in the second half of the 20th century, particularly since the 1960s, as a tool to protect and promote foreign investment in developing (and often newly independent) countries.

**1.043** The relationship between States and private entities, along with the inherent tensions, is notably reflected in foreign investment law. Developments in this field have prompted debate over whether allowing private actors to encroach upon areas traditionally regarded as matters of public and domestic control constitutes a concession of state sovereignty. As the following chapter will explore, international investment law—particularly its dispute resolution mechanisms—raises the critical question of whether States have subjected themselves to a form of voluntary servitude.

## B. THE RELATIONSHIP BETWEEN STATES AND PRIVATE PARTIES, KEY PRINCIPLES

### 1. Sovereignty and immunity defined

#### (a) Absolute immunity

**1.044** State immunity derives from the principles of sovereign equality and independence, pursuant to which a sovereign state shall not be subject to another state's jurisdiction.[114] Its origins are generally traced to Roman law and English law maxims,[115] as well as Jean Bodin's contribution to the notions of state

112 Jorge E Vinuales, 'Sovereignty in Foreign Investment Law', in Zachary Douglas and Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 326–59. *See* ¶ 1.042.

113 Jorge E Vinuales, 'Sovereignty in Foreign Investment Law', in Zachary Douglas and Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 359.

114 Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 22.

115 Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 21–2.

and sovereignty.[116] State immunity was conceived as a bar to the forum state's jurisdiction, "which would exist *but for* the doctrine of immunity, and which can be waived by the beneficiary state."[117]

**1.045** As noted,[118] the United States Supreme Court's decision in 1812 in the *Schooner* case is considered the foundation of the modern law of state immunity. That case involved an *in rem* suit brought by two United States citizens who sought to recover what they claimed was their ship (the Schooner Exchange). They alleged the French Empire had unlawfully seized the ship, converted it into a French battleship (and thus, French public property) and docked it in Philadelphia.[119] The District Court for the District of Pennsylvania dismissed the suit, reasoning that "a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel."[120] The case was reversed by the Circuit Court on the ground that a sovereign's property, including public armed vessels, is subject to liens in foreign courts just like private property, absent a clear basis for exempting it from jurisdiction.[121] At the same time, the Circuit Court acknowledged the "delicate nature of the question [...] decided," and volunteered that any error should be corrected by the Supreme Court, opining that "a question of such national importance as this is, ought not, and I hope will not, rest upon the decision of this court."[122] In response, the Supreme Court reversed the Circuit Court's decision and affirmed that of the lower court.

**1.046** The Supreme Court highlighted the importance of the issue at hand—"whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States"—and recognized the absence of clear legal standards. As a result, the Court had to rely "much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this."[123] Afterwards, Chief Justice Marshall elaborated as follows on the conceptual foundation for state immunity, characterizing

116 Penelope Dalton, 'Sovereign Immunity: The Right of the State Department and the Duty of the Court' (1965) 6 William & Mary Law Review 70, 70–1. *See also* Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 15.

117 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 320. (Emphasis original)

118 *See supra* § B.1. Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 17.

119 *The Schooner Exchange v. McFaddon* 11 US 116, 116–20 (1812).

120 *The Schooner Exchange v. McFaddon* 11 US 116, 116–20 (1812).

121 *McFadden v. The Exchange* 16 F Cas 85, 88 (CCD Pa 1811).

122 *McFadden v. The Exchange* 16 F Cas 85, 88 (CCD Pa 1811).

123 *The Schooner Exchange v. McFaddon* 11 US 116, 136 (1812).

sovereign immunity as the rule as it is one State's waiver of exercise of its exclusive territorial jurisdiction over subjects considered as immunes derived from the immunities inherent in independent sovereign States:

> This full and absolute territorial jurisdiction, being alike the attribute of every sovereign and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.[124]

**1.047** In *Schooner*, the Supreme Court identified three general scenarios in which a sovereign would be granted immunity (exceptions to the jurisdiction of domestic courts): (i) the sovereign (*i.e.*, head of state); (ii) foreign ministers; and (iii) troops of a foreign nation whose passage through the country has been allowed.[125] Accordingly, the Court considered the public armed vessel to be "part of the military force of her nation,"[126] and found that as the vessel was property of a foreign sovereign "with whom the government of the United States is at peace," the ship "should be exempt from the jurisdiction of the country."[127] As the Supreme Court noted in more recent years,[128] Chief Justice Marshall agreed to extend state immunity as a matter of *comity*.

**1.048** Years later,[129] the British courts followed that reasoning. In *The Parlement Belge* (1880), the English Court of Appeal ruled that a Belgian government

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124 *The Schooner Exchange v. McFaddon* 11 US 116, 136–37 (1812).

125 *See* Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 322.

126 *The Schooner Exchange v. McFaddon* 11 US 116, 144 (1812).

127 *The Schooner Exchange v. McFaddon* 11 US 116, 147 (1812).

128 *Opati v. Republic of Sudan* 590 US 418, 420 (2020). *See also Republic of Austria v. Altmann* 541 US 677, 688–89 (2004).

129 The French courts had also applied this line of decision (*Spanish Government v. Lambe et Pujol* (1849), Supreme Court of France): "The reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations." *See* Joseph M Sweeney, *International Law of Sovereign Immunity* (Bureau of Intelligence and Research, US Department of State 1963) 20; Stefan A Riesenfeld, 'Sovereign Immunity in Perspective' (2021) 19 Vanderbilt Law Review 1, 10–11.

vessel used for mail, passenger, and freight transport could not be subjected to an admiralty court's jurisdiction, as it was public property of a foreign government used for national purposes. The key principle the court gleaned from the then existing cases was that States will refrain from exercising jurisdiction over foreign sovereigns, ambassadors, or their public property, even when they are present within their territory, in deference to the absolute independence of sovereign States and international *comity*, "which induces every sovereign state to respect the independence and dignity of every other sovereign state."[130] However, these cases did not present significant challenges for the courts, as the subject matter was clearly linked to "official" property. In *Schooner*, it involved a state's warship, and in *The Parlement Belge*, a government vessel—both situations that leave little room for debate regarding the nature of the property.

**1.049** Subsequently, in the first decades of the 20th century, American and British courts held that state immunity applied even if the foreign state's activity was of a commercial nature—referred to as private acts. In *The Pesaro* (1926), the United States Supreme Court concluded that, while the Court's prior *Schooner* decision said nothing about government-owned *merchant* vessels, this omission was not significant, as governments did not engage in such operations at the time. The Court went on to hold that such vessels should be afforded the same immunity as warships unless a treaty or statute provided otherwise.[131] Similarly, *in Cristina* (1938), known as the "leading UK case on absolute immunity,"[132] Lord Atkin addressed the question of whether state immunity protects property from seizure or detention, even in cases involving a foreign state's commercial or private dealings. He affirmed that, in the UK, immunity extends to both official property and private or commercial assets.[133]

**1.050** This was the core understanding of immunity: it was absolute and States and their property could not be subject to another state's jurisdiction, except with their consent. This concept encompasses both immunity from suit and immunity of property, ensuring that sovereign States are protected from legal proceedings and the seizure of their assets in foreign jurisdictions.[134] However,

130 *The Parlement Belge* (1880) 5 P.D. 197.

131 *Berizzi Bros. Co. v. The Pesaro* 271 U.S. 562, 573–74 (1926).

132 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 9.

133 *Compania Naviera Vascongado v. S. S. Cristina*, [1938] AC 485 (HL) 509. *See* Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 9.

134 As noted in *Compania Naviera Vascongado v. S. S. Cristina*, [1938] AC 485 (HL) 509. "*Two* propositions of international law that have been engrafted into our domestic law are well established and beyond dispute. The *first* is that the courts of a country will not implead a foreign sovereign; that is, they will not, by their

in reality, absolute immunity was never truly absolute. States could subject themselves to the jurisdiction of foreign courts either by initiating claims or by consent.[135] Otherwise, however, unless an established exception to state immunity under international law applied, the foreign state was immune from jurisdiction.

### (b) Development of the restrictive theory of state immunity

**1.051** The aim of Part B of Chapter 1 is not to provide an in-depth analysis of the status and application of state immunity, nor to offer a comprehensive global overview. Rather, it aims to convey a general understanding of state immunity, highlighting its inherent tension and the concept of 'ceding' sovereignty. This tension arises from the fundamental question of whether a sovereign state can be subjected to the jurisdiction of another state's courts or have its property seized within a foreign jurisdiction—further considering it plays a crucial role in the settlement of investment disputes between investors (private parties) and States.

**1.052** The transition from the *absolute* to the *restrictive* theory of state immunity was neither linear nor uniform. During the nineteenth and twentieth centuries, different jurisdictions gradually began to modify their understanding of state immunity. Nonetheless, a common feature of this development was the previously noted distinction deriving from the "private acts theory" between *acta iure imperii* (official acts "in the exercise of sovereign authority")[136] and *acta iure gestonis* (private or commercial acts "in the exercise of managerial functions").[137]

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process, make him a party to legal proceedings against his will, whether those proceedings involve actions against his person or seek to recover specific property or damages from him. The *second* proposition is that the courts will not, by their process—whether the sovereign is a party to the proceedings or not—seize or detain property that is his or of which he is in possession or control. While there has been some difference in the practice of nations regarding possible limitations of this second principle, particularly as to whether it extends only to property used for the commercial purposes of the sovereign or also to personal private property, it is my opinion that, in this country, it is well settled that this principle applies to both."

135 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 323: "The 'immunity' is not absolute, for it can be waived; and there are limits and exceptions varying with the nature of the occasion for the licence."

136 Stefan A Riesenfeld, 'Sovereign Immunity in Perspective' (2021) 19 Vanderbilt Law Review 1, 10–11.

137 Stefan A Riesenfeld, 'Sovereign Immunity in Perspective' (2021) 19 Vanderbilt Law Review 1, 10–11.

**1.053** By the time the *Pesaro* and *Cristina* cases 'settled' the absolute theory in the United States and UK,[138] some other countries had already adopted the restrictive view of immunity.[139] In a landmark 1903 case (*Société Anonyme des Chemins de Fer Liégeois-Luxembourgeois v. The Netherlands*), the Belgian Supreme Court distinguished between public and commercial acts, explaining that sovereignty applies only to political acts. However, since States are not confined to their political role and can engage in commerce, they act in the same manner as a private party in such transactions. In these circumstances, the court explained, the state operates on an equal footing with private individuals, and if drawn into litigation, the case falls under the jurisdiction of the courts as outlined in the Belgian constitution. Hence, the foreign state is subject to the jurisdiction of the Belgian courts in such matters.[140] Italy had also adopted the restrictive theory since the late 1880s,[141] and other jurisdictions

138 *See also* Hazel Fox and Philippa Webb, *The Law of State Immunity* (revised and updated 3rd edn, Oxford University Press 2015) 140–41 "[T]he decision in The Porto Alexandre remained binding authority in the English courts. The House of Lords had the opportunity to consider this case in The Cristina. While the facts of The Cristina admitted that the ship was used for public purposes, all the Law Lords expressed opinions on the immunity of public vessels engaged in trading activities. Lords Atkin and Wright held that the English rule prohibiting the seizure or detention of state property by action in rem applied to all ships, including those used solely for trading or commercial purposes. In contrast, Lords Thankerton and Macmillan preferred to reserve judgment on the matter for future consideration, while Lord Maugham openly opposed the rule. He argued that The Parlement Belge was not authoritative support for the absolute doctrine in rem proceedings and maintained that, had the court found the ship was used solely for trading purposes, the decision would have been different."

139 As early as 1857, Belgium had refused to grant foreign states absolute immunity from the jurisdiction of its courts. *See* Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 14, citing "Cf for *L'Etat de Perou v. Kreglinger* (Cour d'Appel de Bruxelles, 13 August 1857) [1857] P.B. II 348 (Bel)"; *Rau, Vanden Abeele et Cie v. Duruty* PB 1879-2-175 (Commercial Tribunal Ostend, 1879); *SA des Chemins de Fer Liégeois-Luxembourgeois v. l'État Néerlandais* PB 1903-I-294 (Cour de cassation, 1903). *See also* Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 [4] The European Journal of international Law 853, 858.

140 *See* Joseph M Sweeney, *International Law of Sovereign Immunity* (Bureau of Intelligence and Research, US Department of State 1963) 20–1.

141 Stefan A Riesenfeld, 'Sovereign Immunity in Perspective' (2021) 19 Vanderbilt Law Review 1, 10–11. "In Italy, the various regional Corte di Cassazione courts, followed by the national Corte di Cassazione, adopted the restrictive theory of sovereign immunity more than a decade before the end of the 19th century. The first to do so was the Corte di Cassazione of Naples, which, in a March 16, 1886, judgment, held that Italian courts could exercise jurisdiction over an action brought by the mental hospital of Aversa against the Greek consul and Greece, based on a contract concluded in Greece's name for the care of a Greek patient. This approach was mirrored by the Corte di Cassazione of Florence in the same year and the Corte di Cassazione of Rome in 1893, the latter ruling involving a contract dispute against Austria over construction work in Venezia when Austria still held sovereignty over the province. […] After the establishment of a unified Italian court of cassation in civil matters in 1923, the new court continued to apply the restrictive doctrine of immunity in two significant cases: Unione Republiche Soviettiste c. Tesini e Malrezzi and Governo Rumeno c. Trutta. In the latter, the court examined the doctrine of sovereign immunity as practiced in Italy and concluded that international law does not prohibit domestic courts from adjudicating private law disputes between a national and a foreign state, provided the attached

followed.[142] This swift movement towards the *restrictive* theory of immunity was enshrined in 1926 in the International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships—although not widely signed nor ratified,[143] Article 1 of which provided:

> Seagoing vessels *owned or operated by states*, along with their cargoes and passengers carried *on government vessels*, are *subject to the same rules of liability and obligations as private* vessels, cargoes, and equipment when it comes to claims relating to the operation of these vessels or the carriage of such cargoes. *The states* that own or operate these vessels, or own the cargoes, *are equally accountable under these rules*.[144]

**1.054** This provision subjecting state-owned vessels to the same rules as privately-owned vessels based on the nature of the activity in which they were involved evidenced a clear recognition of the distinction between official and private or non-official acts.[145] However, in the United States—which was not a party to the convention—the "definitive break" did not occur in practice until 1952 in the form of a letter from the United States Department of State to the United States Department of Justice, generally known as the "Tate Letter."[146] In that

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property of the foreign state is not exempt for reasons beyond mere ownership by a foreign state, a principle that also applies to the execution of judgments"; Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press 2008) 14, citing *Morellet v. Governo Danese* (1882) Giu It 1883-I-125 (Corte di Cassazione di Torino); *Guttieres v. Elmilik* (1886) 11 F It 1886-I-913 (Corte di Cassazione di Firenze); *Typaldos, Console di Grecia a Napoli v. Manicomio di Aversa* (1886) Giu It 1886–I–1–222 (Corte di Cassazione di Napoli).

142 *See* United States Department of State, 'Letter from Jack B. Tate, Acting Legal Adviser, to the Attorney General Regarding the Restrictive Theory of Sovereign Immunity' (1952) 19 *Department of State Bulletin* 984, 984–85. *See also* Penelope Dalton, 'Sovereign Immunity: The Right of the State Department and the Duty of the Court' (1965) 6 William & Mary Law Review 70, 75: "With the rise of state trading and the nationalization of enterprises after World War II, the United States needed a clear policy on sovereign immunity. In 1952, for the second time, the State Department provided advisory guidance, concluding that absolute immunity should not be granted in certain cases. This decision was explained in the Tate Letter. The United States, though not a signatory to the treaty, had ratified the 1926 Brussels Convention, which waived immunity for government-owned vessels. More significantly, countries such as Greece, Belgium, Italy, France, Switzerland, Austria, Peru, Denmark, Egypt, and Romania had abandoned the theory of absolute immunity in favor of the restrictive theory. Even in nations that maintained absolute immunity, influential legal scholars were shifting toward the restrictive approach, a factor that played a key role in the development of international law."

143 Commonly referred to as the "Brussels Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships."

144 *International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels* (signed 10 April 1926, entered into force 8 January 1936).

145 Article 3 of the Convention provides that: "1. The provisions of the two preceding Articles shall not apply to ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem." *International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels* (signed 10 April 1926, entered into force 8 January 1936).

146 Lori Fisler Damrosch and Sean D Murphy, *International Law: Cases and Materials* (7th edn, West Academic Publishing 2019).

letter, the State Department acknowledged the two conflicting views of sovereign immunity and noted that the growing involvement of governments in commercial activities required a legal framework that allowed individuals to resolve disputes with foreign States in court. The Tate Letter announced that the State Department would henceforth adopt the restrictive theory when considering foreign States' pleas of immunity.

**1.055** Courts in the United States defer significantly to the executive branch on matters of foreign relations, including sovereign immunity. In particular, United States courts give considerable weight to State Department recommendations, issued on a case-by-case basis, as to whether a foreign states' plea of immunity should be granted or denied. This deference dates back to the early 19th century, as seen in *Schooner*, where the United States Attorney General made a 'suggestion' of immunity to the court.[147] Over time, this practice became the norm, with courts routinely following the executive's guidance.[148] The practice was further reinforced by the fact that only foreign governments or their accredited representatives had standing to raise a plea of immunity,[149] typically through diplomatic channels via the State Department.

147 As the decision comments, U.S. Attorney for the District of Pennsylvania appeared in court and, "at the instance of the executive department of the government of the United States," filed a suggestion. He argued that, in light of the peaceful relations between the U.S. and France, public vessels of the French Empire, like *The Balaou*, were protected under international law and should not be subject to seizure in U.S. ports. Dallas maintained that any ownership previously claimed by the libellants had been lawfully transferred to the French government outside U.S. jurisdiction. He requested that the court quash the attachment and release the vessel, asserting that such actions fell outside the court's authority. *The Schooner Exchange v. McFaddon* 11 US 116, 117–19 (1812).

148 An exception occurred in Pesaro, where the Supreme Court did not follow the State Department's recommendation. However, by the 1940s, under Chief Justice Stone, the rule was firmly established that U.S. courts must follow executive directives on a plea of immunity. In Ex parte Peru, the Supreme Court granted immunity to a Peruvian vessel at the executive's request, while in Mexico v. Hoffman, the court denied immunity to a Mexican merchant vessel when the State Department forwarded but did not endorse Mexico's request. Chief Justice Stone stressed that courts should neither deny immunity granted by the executive nor create new grounds for immunity that the government had not sanctioned, as such actions could complicate foreign relations. *See* Hazel Fox and Philippa Webb, *The Law of State Immunity* (revised and updated 3rd edn, Oxford University Press 2015) 146–48.

149 "For much of our history, claims of foreign sovereign immunity were handled on a piecework basis that roughly paralleled the process in Schooner Exchange. Typically, after a plaintiff sought to sue a foreign sovereign in an American court, the Executive Branch, acting through the State Department, filed a "suggestion of immunity"—case-specific guidance about the foreign sovereign's entitlement to immunity. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Because foreign sovereign immunity is a matter of "grace and comity," *Republic of Austria v Altmann* 541 US 677, 689 (2004), and so often implicates judgments the Constitution reserves to the political branches, courts "consistently ... deferred" to these suggestions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 US 480, 486 (1983)." *Opati v. Republic of Sudan* 590 US 418, 420–21 (2020).

**1.056** However, as noted by the Supreme Court in *Opati* (2020), this arrangement began to break down. Due to inconsistent and unclear standards developed by United States courts over time, in 1976 Congress enacted the Foreign Sovereign Immunities Act (FSIA),[150] which replaced the previous case-by-case approach with a uniform set of rules delineating the extent to which foreign States and their property are entitled to immunity in United States court proceedings. The FSIA established a general rule of immunity for foreign States and their "agencies and instrumentalities," while also carving out specific exceptions from immunity.

**1.057** These developments were not confined only to the United States. Rather, the 1970s marked a broader watershed moment globally. The restrictive theory of sovereign immunity, once primarily a matter for case-by-case determination by courts, was now enshrined in law, with three principal legal frameworks leading the way: the 1972 European Convention on State Immunity,[151] the United States FSIA,[152] and the 1978 UK State Immunity Act (SIA) (see Table 1.1).[153] These legal regimes collectively formalized the shift toward restricting state immunity in favor of accountability for commercial activities. As outlined below, these three instruments establish a presumption of state immunity, accompanied by a set of defined exceptions, including for commercial activities, and, as discussed below, based on waiver and consent.

**1.058** In the decades that followed, most States adopted the restrictive approach to state jurisdictional immunity, either through legislation or case law.[154] Today, virtually all States have embraced restrictive immunity, albeit with distinct national variations. While maintaining the traditional exception of jurisdictional consent, States have consistently recognized commercial activities as another key exception to immunity. However, the field remains dynamic, with ongoing debates about the precise contours of restrictive immunity. Critical questions and differences between States persist, including, among others, as to what constitutes valid consent or waiver, how to define and distinguish commercial activities, and which entities are deemed to be part of the state.

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150 28 USC §§ 1602 et seq.

151 *European Convention on State Immunity* (opened for signature 16 May 1972, entered into force 11 June 1976) ETS No 074. *See* Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 332–33.

152 28 USC §§ 1602 et seq. *See* Lori Fisler Damrosch and Sean D Murphy, *International Law: Cases and Materials* (7th edn, West Academic Publishing 2019) 812–48.

153 State Immunity Act 1978, c. 33 (UK). *See* Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 333–34.

154 In 2004 the United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted. This convention is not yet in force. *See* Lori Fisler Damrosch and Sean D Murphy, *International Law: Cases and Materials* (7th edn, West Academic Publishing 2019) 811.

*Table 1.1 Comparative framework of state jurisdictional immunity in the United States, the United Kingdom, and Europe*

| U.S. Foreign Sovereign Immunities Act | U.K. State Immunity Act | European Convention on State Immunity |
|---|---|---|
| (codified in Part 28 of the United States Code):<br>Section 1604 provides that foreign states are generally immune from the jurisdiction of U.S. courts, except as specified in sections 1605 to 1607, and subject to existing international agreements.<br>Section 1605 outlines exceptions to this immunity, which include:<br>1. Waiver of Immunity: A foreign state is not immune if it has waived its immunity, either explicitly or implicitly. This waiver remains effective unless withdrawn according to its terms. | Part I – Proceedings in United Kingdom by or against other States<br>General Immunity: States are generally immune from the jurisdiction of UK courts, except as specified in subsequent provisions. Courts must uphold this immunity even if the state does not participate in the proceedings.<br>Exceptions to Immunity, which include:<br>1. Submission to Jurisdiction: A state is not immune if it has agreed to submit to the jurisdiction of UK courts for specific proceedings. | Chapter I – Immunity from jurisdiction (exceptions), which include:<br>1. Court Proceedings: A Contracting State that initiates or intervenes in proceedings in another Contracting State's court submits to that court's jurisdiction for those proceedings. |

*Table 1.1 continued*

| U.S. Foreign Sovereign Immunities Act | U.K. State Immunity Act | European Convention on State Immunity |
|---|---|---|
| 2. Commercial Activities: Immunity does not apply in cases based on:<br>• Commercial activities conducted by the foreign state within the U.S.<br>• Acts performed in the U.S. related to the foreign state's commercial activities elsewhere.<br>• Acts outside the U.S. connected to the foreign state's commercial activities that cause a direct effect in the U.S.<br>3. Arbitration Exception: Immunity does not apply in cases involving (i) enforcement of arbitration agreements made by the foreign state with or for the benefit of a private party; and (ii) confirmation of arbitral awards. | 2. Commercial Transactions and Contracts:<br>• A state is not immune in cases related to commercial transactions it has entered into.<br>• Immunity does not apply to obligations arising from contracts that are to be performed wholly or partly in the UK, regardless of whether the contract is a commercial transaction.<br>3. Arbitration Exception: When a state agrees in writing to arbitrate a dispute, it is not immune to UK court proceedings related to that arbitration. This is subject to any contrary terms in the arbitration agreement and does not apply to arbitration agreements between states. | 2. State's Agreement: A Contracting State cannot claim immunity if it has agreed to submit to the court's jurisdiction through:<br>• An international agreement.<br>• An express term in a written contract.<br>• Express consent given after a dispute arises.<br>3. Commercial or Financial Activities: A Contracting State cannot claim immunity if it has an office, agency, or establishment in the forum state engaging in industrial, commercial, or financial activities, and the proceedings relate to those activities.<br>4. Arbitration Exception: When a Contracting State agrees in writing to arbitrate a civil or commercial dispute, it cannot claim immunity from another Contracting State's court for proceedings related to: (i) the validity or interpretation of the arbitration agreement; (ii) the arbitration procedure; (iii) setting aside the award. This is unless the arbitration agreement specifies otherwise. This rule does not apply to agreements between states. |

### (c) Immunity distinctions

#### *(i) Immunity from jurisdiction and immunity from execution*

**1.059** A key distinction in the state immunity context exists between a state's immunity from jurisdiction (*i.e.*, immunity from suit) and immunity from execution (*i.e.*, immunity from enforcement measures against state property). While closely related, these two forms of immunity operate independently and serve distinct purposes in international law. Jurisdictional immunity protects States from being subjected to foreign court proceedings, while execution immunity shields state property from enforcement measures like attachment or seizure. Courts generally apply execution immunity more strictly than jurisdictional immunity, reflecting the view that enforcement measures against state property represent a greater intrusion on state sovereignty than merely exercising jurisdiction. While much of the early discussion of state immunity focused on immunity from execution,[155] the distinction between the two forms of immunity was not always clear, and it was only with time that they developed into separate categories. While immunity from jurisdiction underwent a gradual transformation from its original absolute understanding to the now prevailing restrictive or relative approach, "a separate immunity from execution is afforded to States and largely remains an absolute bar on enforcement of judgments against State property" considering that there is still a "rule of absolute immunity from execution."[156]

**1.060** In the United States, for example, the FSIA establishes separate rules governing a foreign state's immunity from suit in United States courts, on the one hand, and the immunity of the foreign state's United States property from attachment and execution, on the other.[157] As between the two categories, the scope of execution immunity is generally broader than the scope of immunity from suit. As the United States Court of Appeals for the Second Circuit has explained, given this difference in scope, a plaintiff may succeed in obtaining jurisdiction over a foreign state but then find itself unable to satisfy the resulting judgment if the foreign state's United States property remains immune from execution:

> [T]he execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself. For example, while a foreign state is not immune

155 *See supra* § B.1.

156 Hazel Fox and Philippa Webb, *The Law of State Immunity* (revised and updated 3rd edn, Oxford University Press 2015) 312–13.

157 Andreas A Frischknecht and others, *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 313.

> from suit for its commercial activities, see 28 U.S.C. § 1605(a)(2), or for damages caused by its tortious acts or omissions, see id. § 1605(a)(5), a plaintiff who prevails against the sovereign in such actions can generally execute the judgment only upon assets with respect to which the foreign state has waived immunity, see id. § 1610(a)(1), or that the foreign state used for the commercial activity upon which the claim was based, see id. § 1610(a)(2). The special protection afforded to the property of a foreign sovereign is due to the fact that "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action […]."
>
> Indeed, our court has observed that the asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice to create a "*right without a remedy*" in circumstances where there is jurisdiction over a foreign state for purposes of obtaining a judgment, but its property is immune from attempts to execute the judgment […].[158]

**1.061** Thus, while the restrictive theory of sovereign immunity has largely prevailed in matters of jurisdiction, execution immunity remains a significant, if not insurmountable, obstacle. This distinction creates a practical paradox: plaintiffs may succeed in court yet remain unable to enforce their judgments. Debates over how to balance the inherent tension between the protection of sovereign dignity and the enforcement of legal rights continue to shape the evolution of state immunity law. A pertinent example of this ongoing tension is the debate over the use of Russian assets frozen in the US and Europe under the Russia/Ukraine sanctions. Specifically, the question arises whether these assets should be allocated to rebuild the Ukrainian economy or to compensate victims of the conflict.[159]

*(ii) Consent to jurisdiction or waiver of immunity*

**1.062** Waiver of immunity, or consent to jurisdiction, refers to a deliberate act by which a state relinquishes its immunity before a foreign court. Two conditions must be satisfied for an effective waiver of immunity.[160] First, the state must have immunity to waive; without it, the concept of waiver is irrelevant. Second, the state must clearly express, either explicitly or through its actions, that it does not intend to claim immunity. This expression may consist of an

158 *Walters v. Industrial and Commercial Bank of China Ltd* 651 F 3d 280, 289 (2nd Cir 2011). (Emphasis added)

159 *See e.g.*, Illia Chernohorenko, 'Seizing Russian Assets to Compensate for Human Rights Violations in Ukraine: Navigating the Legal Labyrinth' (2023) 8 [3] *European Papers* 1067. Evan J Criddle, 'Turning Sanctions into Reparations: Lesson for Russia/Ukraine' (2023) 1 Harvard International Law Journal Online 1.

160 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 316.

unmistakable declaration or conduct that clearly signals the state's intent to forgo immunity.[161]

**1.063** As discussed above,[162] from the time of the Treaty of Westphalia, it was generally accepted that States could only compromise their sovereignty voluntarily, *i.e.*, with their *consent*. Thus, even during the era of absolute immunity, a state was free to consent to another sovereign's jurisdiction.[163] This remains the case today. Waiver of immunity can occur in several ways, most commonly through an international instrument (such as a treaty), by contract (*e.g.*, a forum selection provision)[164] or through the state's participation in the proceedings. Even today, a division exists between those who argue that a waiver of immunity is the only valid basis upon which one state may exercise jurisdiction over another, and those who understand state immunity as a rule that is subject to multiple exceptions, including (but not limited to) waiver or consent. Under the former conception, waiver will be implied when a state undertakes an act that subjects it to another state's jurisdiction, thereby effectively surrendering its immunity.[165]

**1.064** Consistent with the distinction between immunity from jurisdiction and immunity from execution, a state that has waived its immunity from jurisdiction will not thereby be deemed to have consented to the seizure of its assets to satisfy any resulting judgment. In other words, "voluntary submission to jurisdiction does not extend to measures of execution."[166] For example, the FSIA recognizes three distinct types of waivers: (i) waiver of immunity

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161 Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 316.

162 *See supra* § A.1(d).

163 *See supra* § B.1.(a).

164 Catherine Amirfar, 'Waivers of Jurisdictional Immunity', in Tom Ruys and Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 177. Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 335.

165 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 335: "Waiver is not to be implied, by law, as it were, from the fact that given activity is commercial [including footnote No. 91 which states: "such a doctrine of implied waiver has been employed by the Italian Courts …]."; Catherine Amirfar, 'Waivers of Jurisdictional Immunity', in Tom Ruys and Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 167: "driven in large part by the idea of a State imputing consent through its participation in commercial enterprises."

In addition, the concept of waiver or consent is also reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), adopted in 2004. Article 7 of the UNCSI provides that a state cannot invoke immunity if it has given express consent to the jurisdiction of another state's courts, whether through an international or arbitration agreement, a contract, or a unilateral declaration.

166 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 335.

from jurisdiction;[167] (ii) waiver of immunity from attachment in aid of execution or from execution;[168] and (iii) waiver of immunity from pre-judgment attachment.[169]

**1.065** A waiver of immunity or consent to jurisdiction is generally considered irrevocable unless the waiver explicitly reserves a right to revoke or all parties agree to the revocation.[170] Absent an express revocation clause in an international agreement, revocation requires clear evidence of the parties' intent or a treaty provision permitting said revocation. Allowing revocation without these conditions would leave no legal remedy, as the renewed immunity would prevent any further action. Furthermore, when a state submits to a court's jurisdiction, that act of consent is typically regarded as irrevocable.[171]

**1.066** State immunity plays a particularly crucial role in the settlement of international investment disputes.[172] While States frequently consent to neutral arbitrators' jurisdiction to resolve disputes with foreign investors, immunity remains a significant obstacle, especially during enforcement proceedings. Even after obtaining a favorable arbitral award, investors often face challenges in monetizing their victory due to state immunity protections.[173] These difficulties highlight the practical tension between the growing acceptance of investment arbitration as a means of resolving international investment disputes and the persistent barriers posed by sovereign immunity during the enforcement phase.

### 2. The rise and development of international investment law

**1.067** As a body of international law, foreign investment law is governed primarily by international treaties and conventions.[174] In this context, it adheres to the standards set out in Article 38 of the ICJ Statute, which defines the sources of international law the International Court of Justice applies when resolving

167 28 USC § 1605(a)(1).
168 28 USC §§ 1610(a)–(c).
169 28 USC § 1610(d).
170 Hazel Fox and Philippa Webb, *The Law of State Immunity* (revised and updated 3rd edn, Oxford University Press 2015) 380–81.
171 Catherine Amirfar, 'Waivers of Jurisdictional Immunity', in Tom Ruys and Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 184.
172 Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 15–16.
173 Zixin Meng, *State Immunity and International Investment Law* (Springer 2022) 15–16.
174 *See* Arnaud de Nanteuil, *International Investment Law* (Edward Elgar Publishing Limited 2020) 71–91.

disputes[175]—and which are understood as the sources of international law.[176] These instruments establish and document the mutual consent and reciprocal obligations of sovereign States, establishing binding rules and standards for investment protection and dispute resolution. In addition, domestic law also plays a significant role in the resolution of international investment disputes.[177]

**1.068** This section will examine the normative systems that generate and encompass the relevant laws governing foreign investment, focusing primarily on treaties between sovereign States. These international instruments either establish specific applicable rules for the contracting parties or provide for the creation of (third party) non-state entities with distinct legal capacity and authority to regulate investment matters.

(a) Key Normative Systems

*(i) Bilateral Investment Treaties (BITs)*

**1.069** BITs are the primary source of international investment agreements. These treaties appeared "primarily as a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property."[178] Although BITs were considered a 'relatively recent phenomenon'[179] in the 1980s, they have since proliferated significantly, with 2,833 treaties signed to date.[180]

**1.070** For international law and international arbitration alike, BITs marked a watershed moment as they gave a widespread standing to private actors to sue, and

175 *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1055, 33 UNTS 993, art 38: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *See* Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 79.

176 *See* David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 27–31.

177 The traditional treatment of domestic laws, in the context of international law, as "mere facts" has not lessened their practical significance for the resolution of international investment disputes. See Arnaud de Nanteuil, *International Investment Law* (Edward Elgar Publishing Limited 2020) 40.

178 Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 41.

179 Merit Janow and Petros Mavroidis and Damien J Neve, 'Introduction: Protecting and Adjudicating Investment-Trascending the Obvious' (2019) 30 [1] The American Review of International Arbitration 1.

180 UNCTAD, International Investment Agreements (as of 21 October 2024) <http://investmentpolicyhub.unctad.org/IIA>.

put state actors on par with States in an international forum. The world's first BIT was signed between Pakistan and Germany on November 25, 1959,[181] and the first such treaty to provide for investor-state arbitration was the Chad-Italy BIT of 1969. After that, investor-state arbitration became the norm. The influence of the ICSID Convention and the possibilities it created expanded the traditional requirement of consent to international arbitration, which previously had been limited to contractual agreements but now encompassed disputes between an investor and a state.[182]

**1.071** In a nutshell, BITs are treaties entered into by two countries, which, once effective, become binding law with which the parties (countries) must comply.[183] What makes BITs unique is that, generally, not only the signatory States themselves benefit from their provisions, but investors who are nationals of the signatory States may also rely on them as a source of law and for the resolution of disputes concerning their investments.[184]

**1.072** Under a BIT, contracting States typically agree on key definitions, including what qualifies as an investment and who qualifies as nationals of the parties—those who will receive the treaty's protections and benefits.[185] These definitions are crucial, as they determine the scope of protection and the individuals or entities eligible to bring claims. Additionally, BITs set out the standard of treatment that each party must provide to investments made by nationals of the other party. This often includes commitments to fair and equitable treatment, protection against expropriation, and guarantees of free transfer of funds. Importantly, BITs almost universally allow for the international settlement of investment disputes arising out of a breach of the investment treaty through arbitration,[186] with the particularity of being considered as a 'standing offer' to arbitrate from one contracting State (consent from the State) to the investor national of the other contracting State—when the investor initiates the arbitration proceedings or provides written notice it accepts said invitation

181 Muna B Ndulo and Abigail N Chase, *International Law and Foreign Direct Investment* (Carolina Academic Press 2020) 166–69.

182 Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 44–5.

183 Muna B Ndulo and Abigail N Chase, *International Law and Foreign Direct Investment* (Carolina Academic Press 2020) 166–69.

184 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 35.

185 Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality. Cambridge* (Cambridge University Press 2023) 42–6; David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 33–40.

186 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 35.

(consent from the investor).[187] This mechanism helps investors avoid potential diplomatic complications and aims for disputes to be resolved in a neutral and impartial forum.

**1.073** In addition to defining the scope of protections available to investors—standard of protections—,[188] modern BITs included over the past 15 years increasingly include safeguards and exceptions to rebalance the interests of both States and investors to address perceived excesses of awards issued under BITs in favor of investors to the detriment of States.[189] These safeguards address issues such as the protection of public interests, which preserve States' ability to exercise their regulatory authority in areas like environmental protection, human rights, and economic development without violating the terms of the treaty.[190]

**1.074** Although BITs are the most common form of international investment agreement, such agreements may take various forms, as described by the Investment Policy Hub of the United Nations Conference on Trade and Development.[191] Examples include specialized investment treaties, whether bilateral or multilateral, as well as general trade agreements.[192] Many free trade or preferen-

187 *See* Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 505–06.

188 *See infra* § B.2(b).

189 *See generally*, Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2018* (Oxford University Press 2020); Crina Baltag, Riddhi Joshi and Kabir Duggal, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' (2023) 38 [2] *ICSID Review – Foreign Investment Law Journal* 381; Jesse Coleman, Lisa Sachs and Lise Johnson, 'International Investment Agreements, 2015–2016: A Review of Trends and New Approaches', in Lisa E Sachs and Lise Johnson, *Yearbook on International Investment Law & Policy 2015–2016* (Oxford University Press 2018).

190 *See infra* ¶¶ 1.107–1.108. *See* Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 222–35.

191 UNCTAD, International Investment Agreements (as of 21 October 2024) <http://investmentpolicyhub.unctad.org/IIA> "International investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. A bilateral investment treaty (BIT) is an agreement between two countries regarding the promotion and protection of investments made by investors from respective countries in each other's territory. The great majority of IIAs are BITs. The category of treaties with investment provisions (TIPs) brings together various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished: 1. broad economic treaties that include obligations commonly found in BITs (e.g. a free trade agreement with an investment chapter); 2. treaties with limited investment-related provisions (e.g. only those concerning establishment of investments or free transfer of investment-related funds); and 3. treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues."

192 *See* Kenneth J Vandevelde, 'A Brief History of International Investment Agreements', in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 25: "The mixing of trade and investment provisions in the same agreement reflected changes in the nature of economic activity.

tial trade agreements—bilateral, regional, or multilateral—have implemented *investment* provisions comparable to BITs, the most famous of which is probably the North American Free Trade Agreement (NAFTA),[193] which has now been supplanted by the United States-Mexico-Canada Agreement (USMCA). Furthermore, although different from BITs, some States have enacted national legislation regulating foreign investment, which may grant consent to investor-state arbitration.[194] However, some of these laws also provide the opposite, denying consent to such proceedings.[195]

*(ii) European Union*

**1.075** The European Union, as previously discussed,[196] exemplifies one of the leading models of international collectivity and a significant cession of member states' sovereignty through the creation of binding supranational laws and standards. Considered as a whole, the European Union is one of the world's largest economies,[197] underscoring the importance of its investment laws and standards. The European Union's supranational regulations, which must be followed by its member States, provide for a coordinated approach to various

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Trade and investment are no longer seen as substitutes but as complements. Traditionally, establishing a foreign subsidiary was viewed as a means of delivering goods or services to a foreign market, particularly when high tariffs made exporting unattractive, making foreign investment an alternative to trade. In the global era, however, investment is increasingly seen as a way to promote trade. Once established, foreign subsidiaries often serve as links in a broader production chain, importing raw materials and parts from other subsidiaries and exporting products to others for further refinement. Deeper economic integration required lowering barriers to both trade and investment, leading states to negotiate bilateral and regional trade agreements that included investment-related provisions. This approach reintroduced the "package deal," allowing parties to offer investment concessions in exchange for concessions in other areas, such as market access for goods."

193 Kenneth J Vandevelde, 'A Brief History of International Investment Agreements', in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 26: "After the conclusion of NAFTA, free trade agreements with investment-related provisions between developed and developing countries became increasingly common. By mid-2005, such agreements made up 39% of all preferential trade agreements containing investment provisions."

194 *See* Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 505–06: "An offer to arbitrate investment disputes with foreign investors can also be made in national legislation providing for arbitration of foreign investment disputes under the ICSID Convention."

195 *See* Tarald Laudal Berge and Taylor St John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws' (2020) 28 [3] Review of International Political Economy 584.

196 *See supra* ¶¶ 1.038–1.039.

197 Directorate-General for Trade, 'EU Position in World Trade' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en>; The World Factbook, 'European Union' <https://www.cia.gov/the-world-factbook/countries/european-union/>; Thomas Henquet, 'International Investment and the European Union: An Uneasy Relationship', in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 375–86.

issues, including trade and foreign investment matters, guided by the principle of free movement of capital.

**1.076** The Court of Justice of the European Union (CJEU) has played an increasingly prominent role in creating a unified EU trade policy that supersedes individual Member States' international agreements (IAs).[198] Consequently, the EU has also become a focal point for intense debate and transformative changes impacting foreign investment, particularly in relation to investor-state dispute settlement (ISDS) mechanisms.

**1.077** Alongside the surge in bilateral investment agreements between States, the European Union's legal system also took shape and consolidated a new legal regime encompassing all of its member States. With both legal frameworks emerging concurrently, EU member States found themselves under a dual framework: on one hand, subject to EU law, and on the other, bound by specific investment commitments to other countries, including agreements between States within the European community.[199] Initially, it seemed that both systems might coexist and develop harmoniously; however, tensions gradually intensified, disrupting this apparent compatibility, and ultimately resulting in the supremacy of EU law over individual investment commitments. As described by Bermann in 2012:

> European Union law and the law of international arbitration have, until recently, largely existed in separate realms. To describe their relationship as one of mutual indifference would be scarcely an overstatement. In the past, these two bodies of law coexisted, each following its own distinct logic, presenting what now appears to be something of an age of innocence.
>
> This separation is changing, however, as EU law and international arbitration law increasingly come into contact and conflict. The emerging conflict between these two legal regimes has taken two distinct forms. First, the European Court of Justice (ECJ) has recently advanced a particularly expansive notion of EU public policy. While not inherently problematic, this approach challenges a core premise of international arbitration law: that public policy should be narrowly interpreted when invoked as grounds to annul or deny recognition or enforcement of arbitral awards. This conflict typically arises when EU Member State courts are asked to refuse enforcement of an otherwise valid award due to a conflict with an EU public policy norm.

198 *See* Charalampos Tagaroulias, *International Investment Law and the Law of the European Union: How Regionalism and Interregionalism Have Shaped the Relationship in the Post-Lisbon Era* (Kluwer Law International 2024) 102.

199 *See* Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality. Cambridge* (Cambridge University Press 2023) 153–93; *see* George A Bermann, 'Chapter 8: General Aspects of Investor-State Dispute Settlement', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024) 152–204.

> Second, EU law may require Member States to take actions that risk violating their obligations under international investment treaties, thereby exposing them to potential liability from investor-State arbitral tribunals. In this scenario, it is not only Member State courts that face conflicting claims between EU law and investment law; investment arbitration tribunals encounter these competing claims as well.[200]

**1.078** In 2009, this tension reached an initial breaking point with the Treaty of Lisbon, through which the European Union acquired exclusive competence over foreign investment, including foreign direct investment, as part of the common commercial policy (CCP) that falls within the EU's exclusive purview under Article 207 of the Treaty on the Functioning of the European Union (TFEU). Consequently, the EU has the authority to conclude international agreements, including free trade agreements and investment agreements, provided that the agreement falls within the scope of Article 207(1) TFEU.[201] The CJEU has played a crucial role in interpreting these competences through landmark Opinions, attempting to clarify the EU's authority to enter into investment agreements and specify the conditions under which member States may enter into international treaties.[202] Nonetheless, the EU's authority under Article 207(1) TFEU applies exclusively to agreements between member States and third-party non-member States (extra-EU BITs).[203] A different, but similarly complex, set of rules applies to treaties among member States, or between member States and the EU itself (intra-EU treaties).

**1.079** Despite initially promoting investment agreements among its member States, the EU shifted its stance in the mid-2010s, opposing such agreements to

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200 George A Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 [3] Arbitration International 397, 398.

201 *Treaty on the Functioning of the European Union* (Signed 13 December 2007, entered into force 1 December 2009) art 207: "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

202 For a detailed analysis, *see* George A Bermann, 'Chapter 8: General Aspects of Investor-State Dispute Settlement', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024) 152–204.

203 Julien Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (Routledge 2021) 4: "Even though this transfer of competence only affected extra-EU investments, it created a new dynamic and a greater general attention to this field of transnational economic activities and their legal framework. It is for all these reasons that potential conflicts and collisions between the two investment protection regimes became apparent only in recent years"; Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality. Cambridge* (Cambridge University Press 2023) 252–313. Print. Cambridge International Trade and Economic Law.

prevent conflicts between treaties and EU law.[204] This shift was motivated by the EU's desire to vindicate two principles: (i) that EU law must take precedence over any conflicting investment treaty provisions;[205] and (ii) that the authority to interpret EU law, which could be subject to dispute in an investment arbitration, must be reserved exclusively for the CJEU.[206] Consequently, the European Commission began to intervene as *amicus curiae* in ongoing ISDS proceedings[207] as well as initiating infringement proceedings against member States that failed to terminate their intra-EU Bilateral Investment Treaties (BITs).[208]

**1.080** Two decisive CJEU rulings in cases involving intra-EU investment arbitration awards marked turning points in this context: (i) in *Slovak Republic v. Achmea B.V.*,[209] the CJEU held that investment arbitration clauses in treaties between EU member States were incompatible with EU law;[210] and (ii) in *Republic of Moldova v. Komstroy*,[211] the CJEU extended this understanding to investment arbitration clauses within multilateral treaties, such as the Energy

204 *See* George A Bermann, 'Chapter 8: General Aspects of Investor-State Dispute Settlement', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024) 152–204.

205 *See* Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality. Cambridge* (Cambridge University Press 2023) 252–313.

206 *See* Isabelle Van Damme and Trajan Shipley, 'Chapter 10: Investment Arbitration under Intra-EU BITs', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024).

207 *See* Charalampos Tagaroulias, *International Investment Law and the Law of the European Union: How Regionalism and Interregionalism Have Shaped the Relationship in the Post-Lisbon Era* (Kluwer Law International 2024) 102: "At the same time, the adoption of a new common investment policy for the EU, the EU Regulation 1219/2012 that intends to control the Member States' international activity on investment protection, the EU Regulation 912/2014 aspiring to manage financial responsibility of the EU States from the EU IIAs, and the amicus curiae submissions of the Commission in different ISDS tribunals and lately the US Courts claiming the supremacy of EU law and exclusive EU competence over Member States' BITs reveal a developing trend in the EU Commission; an effort to expand the exclusive EU FDI competence to fully subrogate the Member States in the promotion and protection of investments, while having limited experience and without concrete answers on issues of compatibility of international investment law with EU law's autonomy. This expansive tendency of the EU Commission has been supported by EU judgments essentially supporting that the Member States should provide in their extra-EU BITs for international law mechanisms that enable them to adjust their international obligations to avoid conflict even with future EU law when those obligations de facto restrict the freedom which the Treaty confers on the EU to act in the same areas."

208 *See* Lucian Ilie, 'What is the Future of Intra-EU BITs?' (*Kluwer Arbitration Blog*, 21 January 2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-bits/>.

209 *Slovak Republic v. Achmea BV* [2018] Case C-284/16, ECLI:EU:C:2018:158.

210 *See* Ivana Damjanovic, *The European Union and International Investment Law Reform: Between Aspirations and Reality. Cambridge* (Cambridge University Press 2023) 153–94; *see* George A Bermann, 'Chapter 8: General Aspects of Investor-State Dispute Settlement', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024) 152–204.

211 *Republic of Moldova v. Komstroy LLC* (Case C-741/19, ECLI:EU:C:2021:655, 2 September 2021).

Charter Treaty (ECT), when disputes arose between EU investors and EU member States.[212] These developments have had numerous consequences for investment law generally and investment arbitration in particular within the EU, including a novel trend of negotiating investment treaties without arbitration clauses.[213] Moreover, in May 2020, the EU member States signed an agreement "for the termination of Bilateral Investment Treaties between the Member States of the European Union," considering that "clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union."

**1.081** For present purposes, two elements are particularly noteworthy. First, the impact on the ECT,[214] which had previously been a prominent source of intra-EU investment disputes, has been profound. Following these decisions, alongside additional rulings from the CJEU and other European courts, there has been a wave of withdrawals from the ECT by EU member States including the EU itself and the European Atomic Energy Community (Euratom). In June 2024, twenty-six EU member States and the EU signed a declaration rendering the investor-state arbitration clause in the ECT inapplicable in intra-EU contexts,[215] while additionally aiming to render the ECT's 21-year sunset clause inapplicable in intra-EU disputes.[216] Shortly thereafter, the European

212 *See* David Ingle and Jeffrey Sullivan, 'Chapter 11: Arbitration under the Energy Charter Treaty: The Impact of EU Law', in Nikos Lavranos and Stefano Castagna (eds), *International Arbitration and EU Law* (Edward Elgar Publishing Limited 2024) 262–78. Furthermore, in *Republiken Poland v. PL Holdings S.ÀR.L.*, Case C-109/20, Judgment of the Court (Grand Chamber), 26 October 2021, Case C-109/20, ECLI:EU:C:2021:87, the CJEU "extended that scope even further [to an *ad hoc* arbitration], finding that any arbitration agreement between an investor domiciled within the EU and an EU Member State was invalid as a matter of EU law". *Id.* PAGE: 265.

213 *See infra* § B.4.

214 *See infra* ¶¶ 1.084–1.085.

215 Directorate-General for Energy, 'Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration' (Proceedings made by the representatives of the governments of the Member States and of the European Union, June 2006).

216 The ECT is subject to two sunset clauses set forth under Article 47 of the treaty. First, Article 47.2 extends the validity of the treaty for one year after the date on which the notification of withdrawal is received. Second, Article 47.3 provides that the treaty will apply to investments already made, extending the validity of the ECT's provisions over such investments for 20 years from the date when the withdrawal takes effect. *Energy Charter Treaty* (opened for signature 17 December 1994, entered into force 16 April 1998). *See* Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, *Study on the Implementation of the Energy Charter Treaty* (IPOL/STU(2022)703592, January 2022).

Commission announced that the EU and Euratom had formally withdrawn from the ECT.[217] As noted in the press release accompanying the declaration:

> The EU has taken the final step to exit the Energy Charter Treaty (ECT), a multilateral trade and investment agreement applicable to the energy sector, which is *not compatible with the EU's climate and energy goals* under the European Green Deal and the Paris Agreement. […] the Union and its Member States have also reached a formal agreement to put an *end to the continuation of intra-EU arbitration* proceedings under the ECT that are *contrary to Union law*. More specifically, the agreement is aimed at clarifying, for the benefit of courts and arbitral tribunals, that the arbitration clause provided in the ECT *does not apply – and never has* – in the relations between an EU investor and an EU country […].[218]

**1.082** Second, the impact of this paradigm shift on ongoing disputes remains unclear. Conflicting views have emerged worldwide regarding the enforceability of arbitral awards dealing with intra-EU investment disputes. While the courts of the European Union generally adhere to the precedent set by the CJEU,[219] courts in other jurisdictions have dismissed these arguments and have recognized and enforced such awards.[220] Additionally, arbitral tribunals themselves have confronted challenges concerning the admissibility of jurisdictional objections in cases involving intra-EU disputes in diverging ways.[221]

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217 International Energy Charter, 'The European Union, Euratom, and Member States Deny Advantages of Part III under Article 17 of the ECT' (Press Release, 25 September 2024) <https://www.energycharter.org/media/news/article/the-european-union-euratom-and-member-states-deny-advantages-of-part-iii-under-article-17-of-the-e/>.

218 European Commission, 'European Commission Proposes New Measures to Enhance Digital Security' (Press Release, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513>. (Emphasis added)

219 *See e.g.*, *Athena Investments A/S v. Italy* (Case No T 3229-19, Svea Court of Appeal, 17 June 2024), and *Festorino Invest Limited and others v. Republic of Poland* (T 12646-21); Bundesgerichtshof (Federal Court of Justice, BGH), Decisions of 27 July 2023 – I ZB 43/22, I ZB 74/22, and I ZB 75/22; *Slot Group as v. Republic of Poland* (Judgment of the Paris Court of Appeal, Department 5 – Chamber 16, 20/14581, 19 April 2022), and *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. Republic of Poland* (Case No 20/13085, Department 5 – Chamber 16, 19 April 2022).

220 *See e.g.*, *NextEra Energy Global Holdings BV v. Kingdom of Spain* 112 F4th 1088 (DC Cir 2024); *EDF Energies Nouvelles S.A. v. Kingdom of Spain* (Judgment of the Swiss Federal Tribunal, 4A_244/2023, 3 April 2024); *Infrastructure Services Luxembourg S.À.R.L. (formerly Antin Infrastructure Services Luxembourg S.À.R.L.) and Energia Termosolar B.V. (formerly Antin Energia Termosolar B.V.) v. Kingdom of Spain* [2023] EWHC (Comm).

221 Before 14 October 2024, only one public investment arbitration award had been upheld (*Green Power K/S and Obton A/S v. Kingdom of Spain*, SCC Case No. V 2016/135). All other cases had dismissed such objections (*see e.g.*, *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49); *Triodos SICAV II v. Kingdom of Spain*, SCC Case No. 2017/194; *Encavis AG and others v. Italian Republic*, ICSID Case No ARB/20/39). However, as the Kingdom of Spain reported on 14 October 2024, that on 11 October 2024 two not yet published awards (*Sapec, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/19/23) and *European Solar Farms v. Kingdom of Spain*, ICSID Case (*See* The Kingdom of Spain, Ministry for the Ecological Transition and Demographic Challenge, *Historic Victory in ICSID: Spain Wins Two Renewable Energy Awards Due to Lack of Jurisdiction of Arbitral Tribunals* (Press Release, 14 October

Consequently, this is a critical moment for foreign investment protection systems in the European Union. It remains to be seen whether the EU will succeed in its enterprise of becoming a leading global proponent of restricting investor-state arbitration as a mechanism for resolving investment disputes.

*(iii) Multilateral treaties and other international organizations*

**1.083** States have established and signed numerous multilateral treaties that create frameworks for encouraging, promoting, and protecting foreign investments. These agreements serve as essential sources for interpreting international investment law. While it is beyond the scope of this chapter to detail each agreement or enumerate the broad array of treaties in this field, they form a critical part of the foundation for the regulation of international investments.

*Energy Charter Treaty*

**1.084** The ECT was formed in the 1990s as one of the most important multilateral agreements affecting investments in the energy sector. The treaty, signed in 1994, was designed to facilitate the objective of many Western European States, at the time, of establishing closer connections and cooperation in energy matters with Russia, as well as with the newly independent Eastern European and Central Asian States.[222] It entered into force four years later and was eventually ratified by over 50 countries. Article 18 of the ECT establishes the recognition of national sovereignty over energy resources as a core principle of the treaty. The ECT provides significant protections for investments in the energy sector, grounded in principles of non-discrimination based on the source of investment and safeguards against non-commercial risks, such as expropriation and currency restrictions.[223] Under Article 26 of the ECT, national investors from one ECT member state may resort to investment arbitration to resolve disputes regarding their investments in another ECT member state.

**1.085** Thirty years later, however, the ECT appears destined to fade away. Despite being explicitly based on the European Energy Charter and having been formed under the auspices of the European Economic Community, the European Union and its member States are in the process of withdrawing from the treaty. Beyond the challenges resulting from the incompatibility of

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2024) <https://www.miteco.gob.es/es/prensa/ultimas-noticias/2024/octubre/espana-gana-dos-laudos-de-energias-renovables-por-falta-de-juris.html>).

222 Julien Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (Routledge 2021) 29–31.

223 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 40–1.

intra-EU investment arbitration awards with EU law, member States have also cited the impossibility of meeting environmental goals and international climate agreements as reasons to justify their withdrawal from the treaty,[224] claiming that energy transition needs cannot be fully pursued due to the obligation to protect investments covered by the ECT.

*World Bank Group*

**1.086** The World Bank, established in 1944 alongside the International Monetary Fund (IMF) following the Bretton Woods Conference, is an international financial institution dedicated to funding and providing resources to countries in economic distress, enabling them to undertake large-scale projects focused on promoting reconstruction and development. Initially limited in scope, the World Bank has since expanded into a global entity comprising various departments and agencies, each of which operates as an international organization created through treaties.[225] Of relevance to international investment law are the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

a. Multilateral Investment Guarantee Agency:[226] Established in 1988 as the newest member of the World Bank Group, MIGA promotes foreign investment in developing countries by providing political risk insurance and credit enhancement. Originally founded by 29 members, including the United States and United Kingdom, it has developed into a comprehensive institution with broad international membership and its own juridical personality under international law. MIGA operates with legal and financial autonomy, aiming to facilitate investment flows to and among developing nations through an investment guarantee scheme focused on non-commercial risks associated with governmental actions.

   MIGA's operational framework includes insurable risks, investor eligibility, investment parameters, and a self-contained dispute resolution mechanism. A key feature is its robust subrogation mechanism, enabling the enforcement of insured parties' rights against third parties. MIGA's legal strength is further supported by provisions limiting MIGA's exposure to potential adverse state

224 *See supra* n. 217. *See also*, Patrick Pearsall and David Ingle and Gary Smadja, 'Chapter 10: The Energy Charter Treaty: A Friend or Foe of Decarbonisation?', in Anja Ipp and Annette Magnusson, *Investment Arbitration and Climate Change* (Kluwer Law International 2023); Anna De Luca, 'The Withdrawal by the EU and some Member States from the Energy Charter Treaty: International Protection for Energy Investments and Climate Change Related Carve-outs' (*Kluwer Arbitration Blog*, 5 August 2024) <https://arbitrationblog.kluwerarbitration.com/2024/08/05/the-withdrawal-by-the-eu-and-some-member-states-from-the-energy-charter-treaty-international-protection-for-energy-investments-and-climate-change-related-carve-outs>.

225 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 45–6.

226 Muna B Ndulo and Abigail N Chase, *International Law and Foreign Direct Investment* (Carolina Academic Press 2020) 97–8.

action, including by providing for its immunity from suit in State courts, universal recognition of its rights, and protection of its assets from pre-judgment seizure. Together, these and other provisions encourage host States to uphold strong protections for MIGA-backed investments.

b. ICSID: Widely recognized as a vital component of the international investment arbitration system, the International Centre for Settlement of Investment Disputes (ICSID) was created in 1965 as "the realization of the World Bank's idea to provide institutional facilities and procedures promoting voluntary resolution of investment disputes"[227] through the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). It has been described as a "daring proposal addressed to individuals and States to settle their investment disputes."[228] Despite carrying the same name, it is important to differentiate between the ICSID Convention—a multilateral treaty—and the institution of the "Centre" (ICSID) itself—which operates under and pursuant to the ICSID Convention.

The ICSID Convention created an exclusive investor-State dispute system and, despite a slow start, the Centre has consolidated its position as the predominant investment arbitration institution. It is generally preferred due to the advantages conferred by the ICSID Convention oriented towards compliance and enforcement of the awards, as well as its status as an independent self-contained procedural framework,[229] excluding any possible influence from external bodies such as domestic courts or governments.[230] Moreover, ICSID awards are final and binding, subject only to the limited review mechanisms provided by the Convention itself, including an internal annulment process that precludes any interference by local courts. ICSID awards may be annulled only on one of the narrow grounds enumerated in the ICSID Convention.[231]

ICSID arbitration offers two significant advantages in this context: (i) as the arbitration is part of the World Bank universe, the award imposes a framework in which States are generally bound to comply with its decisions to maintain eligibility for the financial assistance offered by the World Bank; and (ii)

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227 Yarik Kryvoi, *International Centre for Settlement of Investment Disputes (ICSID)* (5th edn, Kluwer Law International 2023) 24.

228 Crina Baltag, 'Chapter 1: The ICSID Convention: A Successful Story – The Origins and History of the ICSID', in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) 20.

229 Alejandro López Ortiz and Patricia Ugalde Revilla and Christopher Chinn, 'Chapter 12: The Role of National Courts in ICSID Arbitration', in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V. 2017) 329–31.

230 Ursula Kriebaum and Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 342–44.

231 Article 52 of the ICSID Convention, namely "(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." Furthermore, the *ad hoc* annulment committee will not review the facts of the dispute. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) art 52.

> Contracting States are required to recognize the awards as binding and enforce all pecuniary obligations imposed by the award as a final judgment from its domestic courts.[232]

*World Trade Organization*

**1.087** Trade plays a crucial role in fostering foreign investment,[233] making international trade organizations essential players in the global investment landscape. Following World War II, States initiated efforts to establish a multilateral framework for international trade. The General Agreement on Tariffs and Trade (GATT),[234] laid the groundwork for international trade law, particularly with its focus on reducing trade barriers. In 1995, the World Trade Organization (WTO) was established,[235] expanding upon GATT's principles and serving as a pivotal institution in regulating global trade and investment, with a key focus on facilitating dispute resolution and market access.

**1.088** One of the significant contributions of GATT, and later the WTO, to international investment law is Article XX,[236] which outlines exceptions allowing

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232 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) art 54.

233 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 50–1.

234 Kenneth J Vandevelde, 'A Brief History of International Investment Agreements', in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 7: "as a reaction to the severe economic depression that had preceded the war and that many believed had been exacerbated by the protectionist policies of the 1920s,30 the victorious allies forged a consensus in favor of liberalizing trade. In 1947 that consensus led to the conclusion of the General Agreement on Tariffs and Trade (GATT), which shifted the primary legal framework for international trade relations from bilateral to multilateral agreements and set in motion successive rounds of negotiations aimed at worldwide trade liberalization. A separate treaty, the Havana Charter, that was intended to create a liberal investment regime for both trade and investment never entered into force. Thus, entry into force of the GATT created a major multilateral organization with competence over trade but not investment. Investment would need to be treated outside the GATT framework, which to a large extent meant separately from trade."

235 For a detailed commentary on the history of the World Trade Organization, *see* Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 31–78.

236 *The General Agreement on Tariffs and Trade (GATT 1947)* (signed 30 October 1947, entered into force 1 January 1948) art XX: "Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal, or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks, and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labor; (f) imposed for the protection of national treasures of artistic, historic, or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of

member States to adopt regulatory measures to promote free trade while still safeguarding certain public interests. These exceptions have inspired the inclusion of similar provisions in other international investment agreements, aiming to protect the broader interests of the global community.[237] The WTO's purview extends beyond trade in goods to include services and intellectual property, with frameworks such as the General Agreement on Trade in Services (GATS)[238] and the Agreement on Trade-Related Investment Measures (TRIMS),[239] which regulate foreign investment by addressing issues like market access, non-discrimination, and performance requirements. Additionally, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement sets minimum standards for intellectual property protection, further integrating trade and investment regulations on a global scale.

### (b) Key norms and principles

**1.089** In any legal claim, including investment disputes, the claimant bears the burden of proving that the respondent failed to honor its obligations. Investment disputes typically involve investors asserting claims against the States in which they have, or had, investments, alleging breaches of applicable obligations. This begs the question: what are those obligations under international investment law? Drawing from established sources of international law, primarily treaties and international commitments, but also general principles of customary international law,[240] States undertake to provide specific levels or standards of

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obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them, or which is itself so submitted and not so disapproved; (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan, provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply, provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement, shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960."

237 *See* Barton Legum and Ioana Petculescu, 'GATT Article XX and International Investment Law', in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013) 340–62.

238 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 51–2; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 263.

239 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 266–67.

240 *See e.g.*, Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 498: "Second, many claims and defenses in investment arbitrations arise under the substantive

treatment for foreign investments within their jurisdiction. However, the content of these standards is not always clear-cut, as there can be significant variations in both wording and substance across different treaties or conventions. Therefore, tribunals adjudicating investment disputes have heavily influenced this area of law through their interpretations of those instruments. The following section briefly outlines some of the main standards of treatment that a state may be obligated to afford foreign investments within its territory.[241]

*(i) Fair and equitable treatment*

**1.090** Most investment treaties require host States to grant 'fair and equitable treatment' (FET) to the investors of other contracting States—'protected investors'. Alongside expropriations, violations of the FET standard are perhaps the most frequently invoked basis for investment treaty claims against respondent States.[242] The prevalence of FET claims stems in part from FET's role as a residual protection for investors, providing safeguards when a state's conduct does not fall within the scope of other, more specific standards outlined in the treaty, combined with its status as one of the standards most commonly found to have been breached.[243] The FET standard is typically framed in broad terms, under the treaty's minimum standard of treatment provision that sets forth the standard investors should receive along with full protection and security. The use of such broad language grants arbitral tribunals substantial leeway to interpret and apply the standard on a case-by-case basis.[244] An example of a very broad formulation is found in the Angola – Japan BIT, which provides:

> Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[245]

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protections of either a BIT or a multilateral treaty such as the NAFTA or the Energy Charter Treaty or (less commonly) under customary international law."

241 For a detailed analysis *see inter alia*, Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 186–295. Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 233–98.

242 *See* Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022).

243 *See* Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022).

244 Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 186–239.

245 *Agreement between Japan and the Republic of Angola for the Liberalisation, Promotion and Protection of Investment* (signed 9 August 2023, entered into force 21 July 2024).

**1.091** In other cases, while still broad, contracting States have delineated certain aspects of the FET standard, reflecting its ongoing evolution in response to the challenges posed by the unpredictability and potential excesses of tribunals arising from the indefinite formulations of the FET standard. An example can be seen in the Israel – Philippines BIT:

> 1. Covered investments made by investors of each Party shall be accorded fair and equitable treatment and full protection and security in the territory of the other Party.
> 2. For greater certainty, a Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitute:
>  (a) denial of justice in criminal, civil, or administrative proceedings;
>  (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
>  (c) manifest arbitrariness; or
>  (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief.[246]

**1.092** Furthermore, the FET standard has generated considerable debate, particularly regarding whether it merely reflects the minimum standard of treatment for aliens under customary international law or if it is an autonomous standard which encompasses broader protections,[247] and arbitral tribunals have reached differing conclusions on this issue.[248] Whether it is deemed "autonomous" or derives from customary international law, the FET standard inquires whether host States have treated foreign investors fairly and equitably. To determine

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246 *Agreement between the Government of the State of Israel and the Government of the Republic of the Philippines on Promotion and Protection of Investments* (signed 7 June 2022, entered into force 12 March 2024).

247 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 134–5: "[T]here is extensive debate as to whether the FET standard merely reflects the international minimum standard of treatment as contained in customary international law or whether it offers an autonomous standards that is additional to customary international law that requires iteration through a treaty. […] The debate over the standard's link to customary international law's minimum standard of treatment has led some countries to clarify the matter in their IIAs. For example, the US Model BIT of 2012 states: The concept of 'fair and equitable treatment' …do[es] not require treatment in addition to or beyond that which is required by that standards [the minimum standard of treatment], and do[es] not create additional substantive rights. In its FET clause, Spain's BIT with Albania notes: '[I]n no case shall a Party accord to such investments treatment less favourable than that required by international law.' This sets a lower limit than an upper one, potentially allowing for the inclusion of many types of treatment. […] Some tribunals have found that the FET clause can be equated with the minimum standard of treatment of foreign investment required under customary international law. Other tribunals have viewed it as autonomous, ruling that the standard should be taken in its plain meaning, and in light of the object and purpose of the treaty."

248 *See e.g.*, *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No ARB/17/44, Award (1 March 2023) paras 407–08; *Latin American Regional Aviation Holding S de RL v. Oriental Republic of Uruguay*, ICSID Case No ARB/19/16, Award (13 February 2024) para 844; *Philip Morris Brand SARL, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 316–17.

whether a state's measures violate this standard, tribunals frequently assess "the impact of the measure on the reasonable investment-backed expectations of the investor"[249] and whether the state is attempting to undermine expectations it has created or reinforced through its own actions (investor's legitimate expectations).[250] Such legitimate expectations generally give rise to the following obligations:[251]

a. transparency and stability. States must maintain a stable and reasonably predictable regulatory framework that investors can rely on. Although the legal stability requirement does not require that a state's legal system remain unchanged, "legislative changes that are unfair and inequitable in the face of specific commitments to the contrary may constitute a compensable treaty breach";[252]
b. due process. Host States must assure investors' fair treatment in legal proceedings (also known as procedural propriety), a category that is more expansive than judicial proceedings.[253] Failure to provide such protection in judicial, or even administrative,[254] proceedings may be categorized as a "denial of justice";[255] and
c. good faith.[256] This obligation, which encompasses a duty to honor specific representations made to investors and to uphold commitments made by the state, is central to the FET standard.[257]

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249 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.101.

250 *See e.g.*, *Encavis AG and others v. Italian Republic*, ICSID Case No ARB/20/39.

251 *See e.g.*, *Philip Morris Brand SARL, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay,* ICSID Case No ARB/10/7, Award (8 July 2016) para 320: "Based on investment tribunals' decisions, typical fact situations have led a leading commentator to identify the following principles as covered by the FET standard: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith.", citing Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 [3] The Journal of World Investment & Trade 373–74.

252 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.104.

253 Arif Hyder Ali and David L Attanasio*, International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2021) 228. "It is often recognized that both the administrative authorities—including banking and finance regulators—as well as the judicial authorities are subject to requirements of due process in their treatment of the foreign investor."

254 *See e.g.*, *ECE Projektmanagement v. The Czech Republic,* UNCITRAL, PCA Case No. 2010–5, Award (19 September 2013) para 4.742: "the Tribunal equally notes that denial of justice is not limited to judicial proceedings but may equally occur in administrative proceedings, and that a denial of justice in respect of an investment constitutes one form of treatment by a respondent State that would in general result in a violation of the fair and equitable treatment standard."

255 Martín Molinuevo, *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (Kluwer Law International 2011) 147–49.

256 *See* Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021).

257 Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of international Investment Law* (3rd edn, Oxford University Press 2022) 225–28.

**1.093** Furthermore, any conduct that qualifies as arbitrary, grossly unfair, unjust, idiosyncratic, or discriminatory may constitute a breach of the FET standard.[258] However, tribunals have varied in the standards they apply when determining a breach of the FET provision, with some adopting a more stringent burden of proof, while others have accepted a lower threshold for identifying such breaches.[259]

*(ii) Expropriation*

**1.094** Protection of property was one of the primary motivating factors behind the development of investment treaties, as countries sought to protect the investments of their nationals abroad from potential takings and confiscatory actions in violation of international law. For this reason, the standard for expropriation—or rather, the prohibition thereof—has become one of the most significant and best-developed protections in international investment law.

**1.095** The expropriation analysis in the investment protection context encompasses two main prongs. First, the necessary understanding of what constitutes expropriation, a concept that has expanded over time from the traditional taking of foreign-owned property by the state to include a broader range of government actions.[260] Second, the recognition that expropriation is not categorically prohibited, as it remains a prerogative of state sovereignty and governmental authority. Accordingly, expropriations are typically scrutinized to assess whether they meet the requirements to be deemed lawful under international law. Investment treaties usually prohibit expropriations absent compliance with these requirements.

**1.096** Expropriation requires a "substantial deprivation of the use of the investment."[261] This substantial deprivation may flow either from a deliberate deprivation of

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258 *See e.g.*, *Vercara, LLC (formerly Security Services, LLC d/b/a Neustar Security Services (formerly Neustar, Inc.) v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award (20 September 2024) para 606: "In the Tribunal's view, the above cases show that in order for there to be a violation of the content of the minimum FET standard, the party alleging such violation bears the burden of proving that the conduct in question is: (i) "arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety", (ii) harmful to the claimant, and (iii) attributable to the respondent State. This is a high burden of proof."

259 *See* Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 512.

260 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 363.

261 *See e.g.*, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Final Award (9 August 2023) para 680.

the investor's rights over its investment (*direct expropriation*),[262] *i.e.*, from the traditional or classic notion of an outright taking,[263] or from an "incidental interference with the use of property which has the effect of depriving [the investor of its investment] even if not necessarily to the obvious benefit of the state"[264] (*indirect expropriation*).[265] Indirect expropriation, in turn, does not necessarily need to occur in a single act, as it can result from a series of measures over time (*creeping expropriation*), even if those measures, considered individually, would not constitute expropriatory acts.[266] Thus, "the crux of the matter lies within the [actual] effects resulting from those measures."[267]

**1.097** That said, an expropriation does not necessarily constitute a breach of international investment law. As Hepburn described, treaties usually reflect customary international law and "accept the right of states to expropriate foreign-owned private property" if they comply with four conditions,[268] namely that the measure at issue: (i) was taken for a public purpose; (ii) is not

262 *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. No. 2015-30, Final Award (9 August 2023) para 680.

263 *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No ARB/20/11, Final Award (22 December 2023) para 554.

264 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para 103.

265 *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 6.62: "In short, the Tribunal considers that the extensive body of international legal materials, including both arbitral decisions and scholarly writings, consistently outlines the requirement—though articulated differently—for both direct and indirect expropriation under international law: the investor must demonstrate a substantial, radical, severe, devastating, or fundamental deprivation of rights, or the virtual annihilation, effective neutralization, or factual destruction of the investment, its value, or its enjoyment. Arbitral decisions supporting this standard include Metalclad and Tecmed, along with cases such as Pope & Talbot (2000, paragraphs 102–104), S.D. Myers (2000, paragraphs 282–285), Lauder (2001, paragraphs 200–201), CME (2001, paragraphs 603–604), GAMI (2004, paragraphs 123–126), Telenor (2006, paragraphs 63–67), Sempra (2007, paragraphs 284–285), and ParkeringsCompagniet (2007, paragraph 455). Conversely, tribunals have rejected claims of expropriation under international law where the investor has failed to meet this threshold for "substantial" deprivation, as seen in CMS (2005, paragraphs 260–264) and Azurix (2006, paragraph 321). Given the consistent approach to this legal standard, additional citations are unnecessary."

266 *See e.g.*, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 February 2000) para 76.

267 *Smurfit Holdings BV v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/18/49, Final Award (28 August 2024) paras 377–78.

268 *See e.g.*, the Morocco – Japan BIT provides that no party "shall expropriate or nationalize investments in its Territory of investors of the other [party] or take any measure equivalent to expropriation or nationalization," except for measures taken for a public purpose, without discrimination, in accordance with due process, and "upon payment of prompt, adequate and effective compensation." In relation to compensation, the treaty further provides that it shall "amount to the fair market value of the investments," disregarding any impact of the publicity surrounding the expropriation, and that it "shall be paid without undue delay and shall include interest at a commercially reasonable rate […]." *Agreement between Japan and the Kingdom of Morocco for the Promotion and Protection of Investment* (signed 8 January 2020, entered into force 23 April 2022).

discriminatory (*e.g.*, on the basis of nationality); (iii) satisfies due process; and (iv) entails payment of adequate compensation.[269] The purpose of compensation is to place the investor in a position equivalent to that which would have existed had the expropriation not occurred. It is common for treaties to require "prompt, adequate and effective compensation," meaning, generally, that compensation should occur before the expropriation, pursuant to an appropriate valuation, and in readily convertible currency to ensure the investor's access to the compensation awarded. Therefore, as recognized in *Westwater Resources v. Turkey*, absent payment of adequate compensation, a state's otherwise "lawful" expropriation may constitute a breach of the applicable investment treaty:

> To be lawful, the expropriation must satisfy all of the BIT criteria. The BIT calls for compensation at fair market value and the Respondent never agreed even to negotiate fair market value let alone make a settlement proposal on that basis. Moreover, its approach to compensation did not even cover all investment costs. The expropriation was a violation of the BIT and Westwater is entitled to compensation for breach of the BIT.[270]

**1.098** Some tribunals have set the payment of compensation as the primary threshold for determining whether a violation of the expropriation clause of the treaty occurred. In such cases, the failure to provide compensation is considered sufficient to establish a breach, and tribunals do not need to assess or analyze the other necessary conditions or elements typically required to determine expropriation.[271]

*(iii) Full protection and security*

**1.099** The full protection and security (FPS) standard aims to impose positive obligations on host-States for the protection of investments.[272] As previously noted, the FPS standard is generally comprised within the minimum standard of treatment clause in investment agreements.[273] As originally conceived, FPS was designed to safeguard the physical security of foreign investments by requiring "host countries to take steps to protect investors against physical injury to their persons or properties, whether by government agents or third

269 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 46.

270 *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Award (3 March 2023) para 274. (Emphasis original)

271 *See e.g.*, *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania*, ICSID Case No ARB/17/33, Final Award (13 April 2022) para 352.

272 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.115.

273 Arif Hyder Ali and David L Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2021) 233: "Investment protection treaties commonly demand that host States provide FPS to foreign investors or their investments (often at the same time as they impose the FET obligation)."

persons."[274] However, this did not transform the state into "a guarantor of the safety of the investor or its property"; rather, FPS merely required "the host state [to] exercise due diligence in carrying out its obligations under the treaty."[275]

**1.100** In more recent awards, the FPS standard has been interpreted more broadly,[276] requiring not only due diligence from the state when carrying out physical measures but also in relation to other governmental activities.[277] For instance, it has been established that a country may violate the FPS standard by failing to provide legal certainty or by allowing deficiencies in its judicial system to persist. However, this interpretation is far from settled, as arbitral tribunals addressing similar issues have differed in their conclusions. For example, in *National Grid v. Argentina*, the tribunal found "no rationale for limiting the application of a substantive protection of the Treaty to a category of assets – physical assets – when it was not restricted in that fashion by the Contracting Parties."[278] On the other hand, the tribunal in *BG v. Argentina*, despite being "mindful" of other awards that have extended the FPS standard to include the "stability of the legal framework applicable to the investment," deemed it "inappropriate to depart from the originally understood standard of 'protection and constant security'."[279]

#### *(iv) National and Most-Favored-Nation (MFN) Treatment*

**1.101** Separate from the FET standard, investment treaties also incorporate standards of protection that are comparative rather than absolute. These standards require, on one hand, that the host state not treat foreign investors and their

274 *See* Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 278.

275 *See* Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 278.

276 Ursula Kriebaum, Christoph Schreuer and Rudolf Dolzer, *Principles of international Investment Law* (3rd edn, Oxford University Press 2022) 289: "Certain arbitral cases indicate that protection may be expanded to cover non-physical injuries caused by host states or their instrumentalities. Thus, the host state may be held responsible for the failure to provide 'legal security', which is defined by tribunals as the quality of the legal system and particularly the certainty of its norms and their foreseeable application. Additionally, the interrelationship of 'fair and equitable treatment' and 'full protection and security' might allow for full protection and security to be breached without physical violence or damage; however, the force and durability of this trend is not yet clear or certain."

277 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.119: "it has been held that withdrawal of an authorisation vital to the operation of the investment amounts to a breach of 'full protection and security'. Similarly, a change in the legal framework, making it impossible to preserve and continue contractual arrangements underpinning the investment, has also been found to be incompatible with a BIT's 'full protection and security' provision."

278 *National Grid PLC v. Republic of Argentina*, UNCITRAL, Award (3 November 2008) para 187.

279 *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) para 326.

investments less favorably than its own nationals, and on the other hand, that it not extend preferential treatment to other States investors (MFN).[280]

**1.102** The national treatment standard aims to ensure that the host state does not discriminate against protected investments in favor of its nationals. On that basis, foreign investors are allowed to compete on an equal footing with local investors. While they are quite common, some treaties omit these provisions in light of concerns and criticisms over potential favoritism toward large, established industries over developing countries. Where they do exist, national treatment clauses often employ open-ended language, as evidenced, for example, in the 2012 United States Model BIT:

> Article 3: National Treatment
>
> 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
> 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.[281]

**1.103** As seen, under most national treatment clauses, the treatment of foreign investors must be "no less favorable" than that of their domestic counterparts. This leaves open the possibility that national law may be more favorable to the foreign investor. On the other hand, MFN clauses ensure non-discriminatory treatment by obliging host States to extend the same benefits to covered foreign investors that they provide (typically also by way of treaty) to investors

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280 Some treaties include both provisions under the same article. *See e.g.*, *Agreement between the Government of the State of Qatar and the Governments of the Republic of Singapore for the Reciprocal Promotion and Protection of Investments* (signed 17 October 2017, entered into force 25 April 2018): "ARTICLE 4 NATIONAL TREATMENT & MOST-FAVOURED-NATION TREATMENT. 1. With respect to the management, maintenance, conduct, operation, and sale or other disposition of investments, each Contracting Party shall in its territory accord to investors of the other Contracting Party and their investments treatment no less favourable than that it accords, in like circumstances, to: (a) investors of any third State and their investments; or (b) its own investors and their investments, whichever is more favourable."

281 U.S. Department of State, 2012 *U.S. Model Bilateral Investment Treaty* (2012) <https://2009-2017.state.gov/documents/organization/188371.pdf>.

from any other state.[282] As with national treatment, it is incumbent on the claimant to prove that the host state afforded more favorable treatment to another foreign investor under similar circumstances.[283]

**1.104** MFN clauses allow investors to "import" rights and benefits granted by the host state to investors from other countries, provided these rights and benefits are of the same nature or category (*ejusdem generis*). There is an ongoing debate regarding the possibility of applying MFN clauses to import procedural or jurisdictional standards from other treaties.[284] On the other hand, arbitral tribunals will strictly construe the host state's treaty reservations in relation to the MFN provision. For instance, in a recent case involving the Guatemala-Colombia BIT, an arbitral tribunal excluded the applicability of an MFN clause where the host state, under the applicable treaty, had disclaimed any obligation to extend MFN treatment based on other investment treaties signed prior to that treaty, and "each of the clauses invoked by the Claimants [we]re found in international treaties that came into force or were signed prior to the entry into force of" that treaty.[285]

*(v) Umbrella clauses*

**1.105** In a nutshell, 'umbrella clauses' allow investors to elevate claims for breach of any obligation owed to the investor (such as a contractual obligation) to a treaty breach.[286] Ordinarily, a breach of the host-state contractual obligations would not amount to a breach of international law, but pursuant to an umbrella clause, the state may be liable for its breach as a matter of international law.[287] An example of an umbrella clause is contained in the Georgia – Switzerland BIT:

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282 A standard MFN clause provides as follows: "Each Contracting Party shall treat investors of the other Contracting Party and their investments no less favourably than it treats, in like circumstances, investors and investments of a non-Contracting Party." *See e.g.*, *Bilateral Agreement for the Promotion and Protection of Investments between the Government of Jersey and the Government of the United Arab Emirate*s (signed 9 November 2021, entered into force 13 March 2023).

283 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.128.

284 *See* Tanjina Sharmin, *Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries* (Springer 2020) para 1.4.3.

285 *Grupo Energía Bogotá S.A. E.S.P. and Transportadora de Energía de Centroamérica S.A. v. Republic of Guatemala (I)*, ICSID Case No. ARB/20/48, Decision on Preliminary Objections (24 November 2023) § IV.C.C. Reference translation.

286 Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 516: "In principle, however, an umbrella clause permits investors to assert claims against the host state for breach of any obligation owed by that state, including obligations under contracts, treaties, customary international law, national legislation and regulatory provisions, and otherwise."

287 Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 278.

> Each Contracting Party shall observe any obligation it has assumed with regard to an investment in its territory by an investor of the other Contracting Party in the exercise of its sovereign authority, which the investor could rely on in good faith when making or modifying the investment.

**1.106** Umbrella clauses are among the most controversial standards in international investment agreements,[288] heightened by the fact that they are found in only a minority of treaties, and by the lack of consistent wording among the treaties that do include such provisions.[289] The most quarrelsome aspect surrounding umbrella clauses pertains to their ambiguity,[290] which has made them a significant issue of concern in UNCITRAL Working Group III's ongoing efforts to reform investor-state dispute settlement. On one side, proponents argue that the literal meaning of the clauses encompasses any obligation assumed by a state. Conversely, opponents contend that such an interpretation could undermine the principle of privity, disrupt ordinary contractual dispute resolution procedures, and, from a logical perspective, that only sovereign acts should give rise to a claim for breach.

*(vi) Exceptions*

**1.107** States relinquish a portion of their sovereignty when they permit a framework for foreign investment that is as broad and protected as the current globally prevailing regime. By entering into investment treaties, States bind themselves to adhere to certain standards of respect and protection for foreign investments. These commitments can render them liable before external tribunals—often autonomous and non-national. Investment treaties may also prohibit host States from abruptly altering the conditions under which an investment was made, which can be seen as an infringement on state sovereignty. However, these are not conditions imposed on States; rather, through their consent, they have chosen to limit their sovereign powers as a quid pro quo to attract foreign investment. As described by the tribunal in *ADC v. Hungary*:

> It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it

288 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 145–9.

289 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 8.115.

290 Borzu Sabahi, Noah Rubins and Don Wallace, Jr., *Investor-State Arbitration* (2nd edn, Oxford University Press 2019) 508–10.

becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[291]

**1.108** Nevertheless, this does not imply that States cannot exercise appropriate regulatory authority over foreign investment matters or must refrain from taking 'necessary' measures, which may be inconsistent with a treaty's minimum standard of treatment. This is where exceptions to protection standards come into play. These exceptions—whether understood as treaty-based or customary international law defenses—have taken on increasing significance in recent years.[292] The most common of these exceptions can be categorized as essential security interests, public policy – regulatory matters, and specific subject matter exceptions.

a. *Essential security interests*: where they are implicated, a host state's essential security interests may allow it to enact measures necessary to protect those interests in derogation of its substantive treaty obligations. This exception was scrutinized in cases against Argentina following its economic and financial crisis in the early 2000s.[293] Recently, a tribunal upheld the essential security exception raised by a host state (in that case, Colombia), noting that "the standard of review for essential security exceptions is an issue that is far from settled in international investment law."[294] Therefore, the tribunal found it "plausible that the measures Respondent took are connected to its stated essential security interest."[295] Considering that there were "no indications in the case record that the ESI Provision was not invoked by Respondent in good faith[.]"

   The Tribunal concluded that "the measures taken by Respondent are excluded from the scope of the TPA coverage and Tribunal's inquiry must stop here."[296] Based on this determination, the tribunal found that it lacked jurisdiction to determine the dispute on the merits. However, the tribunal made clear that it was not prejudging the legality of the state's measures, as "it its findings – which are not based on the Tribunal's review of the case on the merits – are without prejudice to Claimants' rights in [an]

291 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (7 May 2003) para 423.

292 *See* Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 453–66.

293 *See* Arif Hyder Ali and David L Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2021) 255–56; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 458–60.

294 *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) para 744.

295 *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) para 792.

296 *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) para 795.

appropriate forum [national court proceedings], including a right to compensation, if any."[297]

b. *Public policy – regulatory matters*: contemporary investment treaties include a general exception that explicitly allows host-States to implement measures deemed necessary or appropriate to safeguard the environment, public health, or achieve other regulatory aims.[298] Over the years, particularly from 2007 to 2017, there has been a notable increase in the prevalence of public policy exceptions in treaties.[299] This trend stems from host-States' experiences with investor–state arbitration, in which several tribunals have dismissed a state's defense based on the states' perceived legitimate need to regulate absent explicit treaty provisions. Thus, for example, the UK – New Zealand FTA investment chapter now provides that:

> Article 14.1 Objectives. The objective of this Chapter is to encourage and promote the flow of investment between each Party on a mutually advantageous basis, under conditions of transparency within a stable framework of rules to ensure the protection and security of investments by investors of the other Party within each Party's territory, while recognising the right of each Party to regulate in order to achieve legitimate public policy objectives, such as the protection of public health, safety, and the environment […].
>
> Article 14.18 Investment and Environmental, Health, and Other Regulatory Objectives
>
> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing, in a manner consistent with this Chapter, any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.
> 2. The Parties recognise the importance of environmental protection, including with respect to climate change mitigation and adaptation, and recall each Party's rights and obligations relating to the protection of the environment provided for in this Agreement.[300]

c. *Specific subject matter exceptions*: investment treaties often include exceptions or reservations for specific measures or subject areas. These exceptions typically encompass tax policies, grants and subsidies, government procurement, and prudential regulations for financial services, while also reflecting heightened concerns about foreign ownership in specific sectors identified by each state.[301] For example, under Annex II of the Canada – Moldova BIT, the contracting States stipulated that:

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297 *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 June 2024) para 802.

298 Arif Hyder Ali and David L Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2021) 191–260.

299 Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 278.

300 *Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland* (signed 28 February 2022, entered into force 31 May 2023).

301 Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 481–528.

> Article 5 (Most-Favoured-Nation Treatment) does not apply to treatment accorded by a Party under an existing or future bilateral, regional or multilateral agreement: (a) establishing, strengthening or expanding a free trade area or customs union; or (b) relating to: (i) aviation; (ii) fisheries; or (iii) maritime matters, including salvage.

### 3. The multiple fora

**1.109** The rules governing foreign investment recognize three distinct actors: (i) the investor; (ii) the investor's home state; and (iii) the host state (*i.e.*, the state where the investment is made). While this triad of actors has remained constant, the available fora for resolving investment disputes have continually evolved. In the system that exists today, individuals (natural or legal persons) may bring a claim against a state, effectively standing on equal procedural footing with a sovereign. This was not always the case. In fact, it has only become possible within the past few decades, based on States' willingness to waive substantial elements of their sovereignty by allowing private parties to bring claims against them and have those disputes resolved by an independent panel of arbitrators not subject to the state's control.

#### (a) From state-to-state dispute resolution to investor-state arbitration

**1.110** The development of the doctrine of "Diplomatic Protection" is frequently seen as the first milestone in the history of investment disputes between foreign investors and states. Before this doctrine took shape, foreign investors could expect, at best, to be treated equally with their domestic counterparts; foreign investments typically received no additional protection. However, in the 18th century, the doctrine of diplomatic protection emerged as an international mechanism whereby a state could, at its discretion, seek compensation for wrongful acts under international law committed by another state.[302] This doctrine recognized a state's right to protect its citizens when they suffered harm outside its territory. During the colonial period, this doctrine saw limited use, as investments in colonies were not viewed as foreign, and investors from colonizing countries remained subject to the laws and protections of their home States.[303] These investments were primarily safeguarded through a combination of force and diplomacy. Furthermore, at that time, local laws were not necessarily thought to apply to foreign investors, who were subject to the national laws of their more "civilized" countries.[304]

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302 Alejandro Linares, *El Derecho Aplicable en el Arbitraje de Inversión: La Tensión con el Derecho Interno* (Universidad Externado 2019) 113–216.

303 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 19.

304 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 9.

**1.111** However, at the same time, European States and their colonies entered into treaties, as did the United States, which fostered foreign investment and provided for protection of the foreign investors. These agreements, which were usually called friendship treaties, established a framework for economic relations between States. Under these treaties, foreign investors were able to bring the protections of their home country's laws to the countries where they engaged in business.[305]

**1.112** While the doctrine of diplomatic protection provided a foundation for protecting foreign investments, it did not grant standing to individuals or entities in international law, which, at the time, remained the exclusive domain of sovereign States. As a result, the protection investors received was contingent on their home state's discretion to exercise diplomatic protection on their behalf. In response to this, and as a reaction against the perceived abuse of diplomatic protection through tactics like gunboat diplomacy, several States—primarily in Latin America—advocated for the adoption of an equal treatment standard. This standard was embedded in dispute resolution clauses that required investors to resolve contractual claims solely through available local remedies, thereby renouncing the right to seek diplomatic protection from their home States.[306] Known as the "Calvo Doctrine" and attributed to Argentinian lawyer Carlos Calvo, it rested on three core principles: (i) foreign nationals should not receive better treatment than nationals of the host state; (ii) the rights of foreign nationals should be governed by the host state's law; (iii) and host state courts should have exclusive jurisdiction over disputes involving foreign nationals.[307] The Calvo Doctrine was a direct response to the use of diplomatic protection as a tool of political leverage, often through military intervention, but it did not achieve widespread acceptance and thus never became a fully recognized principle of international law.

**1.113** Later, from the 19th to the early 20th century, the protection of foreign investments through diplomatic protection was gradually formalized as an element of public international law. Initially, however, States did not apply the doctrine uniformly and instead pursued claims by whatever means they saw fit, ranging from simple demands to more coercive measures. By the early 19th century, this more aggressive approach became known as gunboat diplomacy:

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305 David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 9.

306 *See* Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955).

307 Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 13.

> [a] practice whereby European States and the United States used diplomatic protection aggressively, resorting to the threat or use of force to secure compensation, enforce public debt repayments, and even justify military intervention under the pretext of safeguarding their investors' interests in newly independent American States.[308]

**1.114** Even setting aside the inherently questionable justification for a state's threat to use force to resolve disputes within another state, this system made non-state actors dependent on their home state's willingness to escalate a claim to this level. Because a state's violation of the rights of another state's nationals could be considered a wrongful act under international law, the investor's home state could assert a claim for violation of international law.

**1.115** During the 18th and 19th centuries, a new dispute settlement structure appeared in the form of "mixed commissions."[309] These commissions were created to resolve disputes between one country's citizens and another country.[310] The Jay Treaty between the United States and Great Britain marked a pivotal moment in the development of this new structure. By establishing three such commissions, it set a precedent for future dispute resolution mechanisms. Following this model, similar commissions proliferated, primarily through treaties between European nations and Latin American countries, though later also among European States themselves. The rise of these commissions was driven by several major historical events that generated a need for formal dispute resolution, including the wars of independence in the Americas, the Napoleonic conflicts, French interventions in Mexico, the war between Chile and its neighbors Peru and Bolivia, internal conflicts in Peru, World War I, and the Mexican revolution.[311]

**1.116** A more contemporary example of this approach is the Iran-United States Claims Tribunal,[312] established in 1981 to resolve disputes arising from the

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308 Alejandro Linares, *El Derecho Aplicable en el Arbitraje de Inversión: La Tensión con el Derecho Interno* (Universidad Externado 2019) 113–216.

309 Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens', in Ignacio de la Rasilla and Jorge E Viñuales, *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press 2019) 127–49.

310 Edoardo Stoppioni, 'Landmark Decisions for a Pre-History of International Investment Law', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022).

311 *See* Edoardo Stoppioni, 'Landmark Decisions for a Pre-History of International Investment Law', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 9–20. *See also* Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021) 36–38.

312 *See* Bruno Simma and Cristina Hoss, 'The Contribution of the Iran-United States Claims Tribunal', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 59–78.

Iranian Revolution and the subsequent hostage crisis, whether between the two States or between one state's nationals and the other state. Among the claims asserted by nationals of one state against the other state, the Tribunal has adjudicated disputes over debts, contracts, expropriations, and property rights. As for inter-state claims, it has handled official claims between the two governments related to the purchase and sale of goods and services, as well as disputes over the interpretation or performance of the Algiers Declarations (the treaty that created the Tribunal). Yet, there is a lack of consensus on whether the claims asserted by nationals of one state against the other state before this Tribunal should be understood as a form of investor-state arbitration or as a reflection of the classical diplomatic protection doctrine involving claims by one state against another.[313] Regardless of its classification, it is undisputed that the Tribunal was an *ad hoc* mechanism created by the mutual consent of the two States, to address a specific situation. Its primary aim was to resolve a crisis that was not principally about foreign investment, while also providing a forum for settling disputes between the States.[314]

**1.117** Surprisingly, threats of force were still used in a few instances in the second half of the 20th century.[315] However, the prevalence of such threats as a means of investor protection decreased significantly following World War II, amidst rising global aspirations for peace and initiatives to reject war as a means of resolving disputes between States. Growing dissatisfaction with the existing paradigm of reliance on state action and diplomatic protection eventually produced a widespread desire to develop a new system that would enable investors to pursue claims against host States independently. Coupled with the formation of newly independent States following their separation from former colonial powers or historically larger States, this desire for change led to a new era marked by the increasing proliferation of international investment agreements.[316] Following a slow start, the end of the Cold War sparked a surge in new international agreements in the early 1990s aimed at promoting and protecting foreign investments. The new treaties brought with them significant growth in investor-state arbitration. Notably, only a single publicly reported treaty-based investor-state arbitration had been initiated prior to the

313 David D Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 [1] The American Journal of International Law 104.

314 John R Crook, 'Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience' (1989) 83 [2] The American Journal of International Law 278.

315 Robert Mandel, 'The Effectiveness of Gunboat Diplomacy' (1986) 30 [1] *International Studies Quarterly* 59. David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 11.

316 *See* § B.2.(a).1 *supra*.

conclusion of the Cold War,[317] while over 1,331 public cases were registered after 1990, with more than 1,288 of those occurring since 2000.[318]

**1.118** Like all forms of arbitration, treaty-based arbitration requires the parties' consent. More specifically, it depends on the host state's consent to allow foreign investors (*i.e.*, private individuals and entities) to compel the sovereign host state to submit to the jurisdiction of a panel of individuals lacking any state-sanctioned official authority.[319] The host state's consent stems from a treaty commitment to offer arbitration to any protected investor, which the investor may, but need not, choose to accept.

**1.119** Under this mechanism, investors may resort to arbitration without entering into a direct contractual relationship with the host state. This unique feature distinguishes treaty-based arbitration from contract-based arbitration (the other principal form of international investment arbitration).[320] In a contract-based arbitration,[321] the parties' consent to arbitrate derives from a contractual dispute resolution clause. As a result, the state's consent to arbitrate typically is not a major issue in contract-based arbitrations.

**1.120** However, in treaty-based investment arbitration, identifying the source of the state's consent is not always as straightforward. Subject to the particular treaty's specific wording and the unique circumstances of each case, the state's consent generally derives from its entry into a treaty in which it agrees to submit to investor-state arbitration and "offers" this option to investors, an offer which at a minimum stands so long as the treaty itself. The investor, in turn, provides reciprocal consent by "accepting" the state's offer when it submits the dispute to the specified forum.[322] This framework has often been analogized to a contractual arrangement between the two States, pursuant to which each state's investors enjoy third-party beneficiary status with respect to their

317 Julien Berger, *International Investment Protection within Europe: The EU's Assertion of Control* (Routledge 2021).

318 UNCTAD, *Investment Dispute Settlement Navigator* (Investment Policy Hub) <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

319 *See* Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press 2012).

320 *See* Christoph Schreuer, 'Landmark Investment Cases on State Consent', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 259–74.

321 Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) paras 11.32, 11.36.

322 *See* Christoph Schreuer, 'Landmark Investment Cases on State Consent', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 259–74.

activities in the other state.[323] Nonetheless, regardless of *how* a state consents to the investment arbitration process—whether by contract, treaty, or even through domestic legislation[324]—the act of agreeing to such dispute resolution mechanisms, which allow investors to bring claims directly against the state to protect their rights, signifies the state's willingness to cede certain aspects of its sovereignty. In short, it is a form of *voluntary servitude*.

(b) The role of national courts

**1.121** Investment arbitration was conceived as an alternative to litigation in domestic state courts. However, the emergence of this new form of dispute resolution did not signify the disappearance of traditional litigation, which continues to serve as the primary avenue for resolving disputes arising in each country, in accordance with the prevailing local rules. In this context, investors' recourse to arbitration procedures to resolve investment disputes remains the exception to the otherwise plenary jurisdiction of domestic courts, which, in most cases, retain the exclusive authority to adjudicate state actions (despite the principle of state sovereignty). This shift represented a departure from the traditional concept of *rex non potest peccare* (the king can do no wrong),[325] as it allowed for external review of state actions, challenging the notion that sovereign States are immune from accountability.

**1.122** In some cases, the jurisdiction of domestic courts and investment arbitration procedures may intersect. Stated differently, domestic courts and international tribunals may "compete" for jurisdiction over a specific matter. For example, one of the parties may argue that a different forum has jurisdiction over the dispute. This situation, which often results in parallel proceedings, may arise from a party's desire to resolve distinct controversies in each forum (*e.g.*, a treaty violation before an investment tribunal and contractual breaches before a domestic court), from a concerted strategy to pursue the same claim in multiple venues, or from a party's aim to undermine the other party's chosen forum.[326]

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323 Alejandro Linares, *El Derecho Aplicable en el Arbitraje de Inversión: La Tensión con el Derecho Interno* (Universidad Externado 2019) 63–112.

324 *See* Christoph Schreuer, 'Landmark Investment Cases on State Consent', in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 259–74.

325 *See* Wanli Ma and Michael Faure, 'Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes' (2022) 48 [1] Brooklyn Journal of International Law 1.

326 *See* Mees Brenninkmeijer, 'Jurisdictional Overlap Between Domestic Courts and Investment Arbitration: An Occasion for Judicial Dialogue' (2023) 39 [3] Arbitration International 379, 379–400. Luke Nottage and Robert Stendel, 'Concurrent Investor-State Claims before Domestic Courts and Investment

**1.123** State courts may also play a role in determining whether an investment treaty is even allowed to take effect, such as by establishing conditions for the treaty's ratification. In 2019, for example, the Colombian Constitutional Court determined that the Colombia – France and Colombia – Israel BITs were constitutional and could be ratified, provided that the parties signed a joint interpretative note as to certain treaty provisions, including with regard to FET, national treatment, most favored nation status, and expropriation.[327] There are many other ways that domestic courts may become involved with investment disputes. A detailed discussion of these is beyond the scope of this chapter, but examples include litigation of foreign investment claims against a sovereign state in another state's domestic courts, or the commencement of proceedings against investors in a state other than where the investment was made, for breaches of standards and obligations applicable under human rights law or international treaties.

**1.124** However, in many cases, the involvement of domestic courts in investment disputes is not the result of any (alleged) concurrent jurisdiction. Rather, even where they are not called upon to adjudicate the merits of an investor-state dispute, domestic courts regularly play a supporting role both during and after an investment arbitration. As discussed immediately below, domestic courts may be called upon to intervene in a pending investment arbitration in a "positive" or "negative" way. The "positive" category refers to judicial assistance to supplement the limited evidentiary powers of an investment arbitration tribunal. In the second, "negative" category are judicial orders designed to enjoin or block the arbitration from proceeding. Finally, after the arbitration has concluded, domestic courts may be called upon to recognize or enforce the resulting arbitral award, thereby according it binding effect as a judicial judgment, or, conversely, to set aside or nullify the award.

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Treaty Arbitration Tribunals: Philip Morris, Vattenfall and Beyond' (2024) 64 [3] Virginia Journal of International Law 475.

327 *See* Alejandro Linares, 'The Intervention of Constitutional Courts in International Investment Law: The Case of Colombia' (2021) 54 [1] *Cornell International Law Journal* 47. Eduardo Zuleta and María Camila Rincón, 'Colombia's Constitutional Court Conditions Ratification of the Colombia-France BIT to the Interpretation of Several Provisions of the Treaty' (*Kluwer Arbitration Blog*, 4 July 2019) <https://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/>. Carolina Olarte-Bacares, Enrique Prieto-Rios and Juan Pontón, 'Are Interpretative Declarations Appropriate Instruments to Avoid Uncertainty? The Cases of the Colombia–France BIT and the Colombia–Israel FTA' (International Institute for Sustainable Development, 19 December 2020) <https://www.iisd.org/itn/en/2020/12/19/are-interpretative-declarations-appropriate-instruments-to-avoid-uncertainty-the-cases-of-the-colombia-france-bit-and-the-colombia-israel-fta-carolina-olarte-bacares-enrique-prieto-rios-juan-ponton-se/>.

*(i) The role of national courts during the arbitration*

**1.125** During the pendency of ongoing international arbitration proceedings, the involvement of domestic courts is usually confined to providing judicial assistance to facilitate the production of evidence for use in those proceedings. As an illustration, Article 27 of the UNCITRAL Model Law on International Commercial Arbitration provides that:

> [t]he arbitral tribunal or a party, with the approval of the arbitral tribunal, may request assistance from a competent court of this State in taking evidence. The court may fulfill the request within its jurisdiction and in accordance with its own rules on evidence.

**1.126** Until recently, the United States, which has not adopted the Model Law, was one of the jurisdictions where requests for judicial assistance in the production of evidence for use in international investment arbitrations were most common. The basis for United States courts' judicial assistance was a provision of the United States Code, 28 U.S.C. Section 1782 ("§ 1782"), which authorizes federal district courts to order discovery from any person found within the judicial district in which the court sits for use in a proceeding before a *foreign* or *international* tribunal. However, a series of decisions within the past few years appears to have foreclosed the use of § 1782 in connection with international investment arbitrations.

**1.127** In 2022, the United States Supreme Court held in *ZF Automotive US, Inc. v. Luxshare, Ltd*.[328] that neither private commercial international arbitrations, nor most *ad hoc* panels in investment arbitration qualify as a "foreign or international tribunal" under § 1782 because they do not "exercise governmental authority conferred by one nation or multiple nations."[329] Prior to the Supreme Court's groundbreaking decision, while the availability of § 1782 discovery for use in international commercial arbitrations had long been controversial, there was "a consistent line of case law supporting the view that section 1782 was applicable in relation to investor–state arbitration."[330]

**1.128** However, *ZF Automotive* did not completely resolve the applicability of § 1782 in international arbitration.[331] In particular, the Supreme Court's

328 *ZF Automotive US Inc v. Luxshare Ltd 596 US 619 (2022).*

329 *ZF Automotive US Inc v. Luxshare Ltd 596 US 619, 638 (2022).*

330 Nigel Blackaby, Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 7.47.

331 Manuel Valderrama, 'Section 1782 Discovery in International Arbitration', in Elora Neto Godry Farias and others (eds), *"Pro-Arbitration" Revisited: A Tribute to Professor George Bermann from his Students Over the Years* (JurisNet, LLC 2023).

decision appeared to leave open the possibility that § 1782 discovery might be available in aid of treaty-based investment arbitrations. However, in 2024, the United States Court of Appeals for the Second Circuit appeared to foreclose that possibility as well, holding that an ICSID tribunal also does not qualify as an "international tribunal" under Section 1782.[332] Relying on the Supreme Court's reasoning in *ZF Automotive*, the Second Circuit found that ICSID tribunals were not meaningfully distinguishable from other private tribunals constituted pursuant to agreements to arbitrate, and appointed and funded by the parties. While sovereign States may help to fund the ICSID Centre, these sovereign contributions do "not fund the Tribunal, directly or indirectly," which is "instead funded through advances on arbitrator fees and expenses paid by the parties."[333]

**1.129** In addition to facilitating the production of evidence, national courts have also, on occasion, become involved in investment arbitrations where one of the parties petitioned the court for an anti-arbitration injunction, *i.e.*, a court order enjoining another party from commencing or continuing the arbitration.[334] On the other hand, parties have also asked investment tribunals to issue anti-suit injunctions to enjoin another party from initiating or continuing "proceedings in another forum, be they arbitration, civil, criminal, bankruptcy, or enforcement proceedings."[335]

*(ii) The role of national courts after the arbitration*

**1.130** The most significant interaction between domestic courts and investment arbitration typically arises after the arbitration has concluded. At that stage, the prevailing party may seek to have the resulting award recognized and enforced in various jurisdictions, while the loser may seek to have it annulled. The reality is that debtor States have not always complied with adverse awards where

332 *Webuild S.P.A. v. WSP USA Inc.*, 108 F4th 138 (2d Cir 2024).

333 *Id.* at 143.

334 Aniruddha Rajput, 'National Courts as Actors in Investment Arbitration', in Catharine Titi (ed), *European Yearbook of International Economic Law* (Springer 2021) 45: "Whether national courts are able to act in relation to investment arbitration proceedings depends on whether they follow the practice of issuing anti-arbitration injunctions and on what grounds. Anti-arbitration injunctions are not governed by international law, and there is no standard provided by international law; instead, the framework for these injunctions is developed within the domestic legal system. Thus, the practice regarding the issuance of anti-arbitration injunctions differs between national jurisdictions. Even national legislation on arbitration normally does not contain provisions addressing anti-arbitration injunctions. National courts that issue anti-arbitration injunctions have considered the authority to issue them to emanate from their inherent powers."

335 Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer International Publishing 2020).

they have disagreed with the tribunal's decision.[336] As previously discussed,[337] States generally enjoy sovereign immunity, which typically exempts them from the jurisdiction of foreign courts. While the debtor state's immunity from jurisdiction may eventually hinder enforcement proceedings, the main obstacle is the immunity of state assets from execution, which can prevent actual seizure despite the award.

**1.131** The distinction between arbitrations conducted under the ICSID Convention framework, on the one hand, and *ad hoc* investment arbitrations or arbitrations administered by other institutions, on the other hand, is critical in this context.[338] The national court procedures for recognition and enforcement of non-ICSID investment arbitration awards are generally no different than for the recognition and enforcement of any other international arbitral award and are likely to be governed by the New York or Panama Conventions.[339]

**1.132** However, the ICSID Convention is different. It establishes four principles to facilitate enforcement of ICSID awards:[340] (i) the Convention provides that

336 A 2024 report prepared by ICSID reflected that compliance and enforcement of ICSID awards was proven effective: "few Awards go to enforcement proceedings, as in the majority of cases parties voluntarily comply with Awards or reach post-award settlements […] award creditors obtained satisfaction through voluntary compliance or post-award settlements in 66% of cases, while 31% went to enforcement and in 3% enforcement was not pursued [and] satisfaction was obtained in 97% of Damages Awards." Therefore, the study noted that "the ICSID Convention's compliance and enforcement regime is highly effective. Parties voluntarily comply with, or reach post-award settlements of, the majority of Awards. Enforcements in domestic courts are largely successful, subject only to immunity from execution." ICSID Secretariat, *Compliance and Enforcement of ICSID Awards* (2024) <https://icsid.worldbank.org/resources/publications/compliance-and-enforcement-icsid-awards> or <https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf>.

337 *See* § B.1.(b).

338 This refers exclusively to investment arbitrations conducted under the ICSID Convention (where both states are parties to it) and does not apply to all investment arbitration proceedings administered by ICSID as an institution.

339 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

340 ICSID Secretariat, Compliance and Enforcement of ICSID Awards, ICSID, World Bank Group, 17 June 2024, available at <https://icsid.worldbank.org/resources/publications/compliance-and-enforcement-icsid-awards> or <https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf>. *See also*, Nigel Blackaby and Constantin Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, Oxford University Press 2022) para 11.133 (citing "Micula v. Romania [2018] EWCA Civ 1801, [258]."): The special way in which ICSID awards are treated for the purposes of enforcement as compared with arbitral awards being enforced under the New York Convention is summarized by the English Court of Appeal in the following terms: It is an important feature of the ICSID Convention that it does not permit an award to be impugned or its enforcement to be resisted in national courts even in circumstances where a foreign judgment, or even a domestic judgment, could be challenged. Thus, in contrast, for example, to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a contracting state cannot decline to enforce an ICSID award even on the ground that its enforcement would be contrary to public policy in that state. Under the scheme of the ICSID Convention the only powers to contest the validity or enforceability of an award are those contained in the ICSID Convention itself (in Articles 50–52). Subject to those provisions, enforcement is intended to be automatic.

ICSID Awards are final, binding, and enforceable, with no appeal allowed except as specified in the Convention (Art. 53(1)); (ii) parties may seek recognition and enforcement in any ICSID member state, where awards must be treated as if they were final judgments of that state's courts (Art. 54(1)); (iii) although only monetary obligations are enforceable in all member States, the parties are deemed to have committed to comply with the award as a whole (Art. 53(1)); and (iv) the execution of awards follows the domestic laws of the country where it is sought, including as to any potential state immunity protections for sovereign assets (Art. 55).

**1.133** Therefore, the jurisdiction of national courts to scrutinize ICSID awards is more constrained than in cases involving the enforcement of foreign arbitral awards against sovereign States under the New York or Panama Conventions.[341] This limitation stems from the ICSID Convention, which requires that member States treat an arbitral award governed by the ICSID framework "as if it were a final judgment of a court in that State."[342] If a dissatisfied party wishes to challenge an ICSID award, it may do so only as permitted within the ICSID system and may not resort to state courts. As a result, United States courts, for example, have held that they are not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award."[343] Hence, the defenses to recognition and enforcement enumerated in Article V of the New York and Panama Conventions do not apply to ICSID award enforcement proceedings.

**1.134** By contrast, non-ICSID awards subject to the New York or Panama Conventions afford national courts greater authority to scrutinize awards before converting them into local court judgments. Importantly, such non-ICSID awards are also subject to annulment procedures in the courts of the arbitral seat, allowing domestic courts to review grounds such as jurisdictional overreach, procedural irregularities, public policy conflicts, and issues of arbitrability.[344] This review process provides broader judicial oversight than is available for ICSID

341 Andreas A Frischknecht and others, *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 307.

342 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) art 54.1.

343 *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F3d 96, 102 (2d Cir. 2017).

344 Gary B Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2012) 522.

awards, reflecting the more extensive role of national courts in non-ICSID enforcement actions.

**1.135** For example, in 2022, the Brussels court of first instance annulled an award in favor of a United States investor and against Poland under the United States – Poland BIT resulting from an UNCITRAL investment arbitration conducted before the Permanent Court of Arbitration. The court annulled the award on the ground that it violated public policy.[345] In the arbitration, the tribunal had found Poland liable for breaching the treaty due to a denial of justice, citing arbitrary, inconsistent, and discriminatory decisions by the Polish Supreme Court.[346] However, in April 2024, Belgium's *Cour de Cassation* overturned the lower court's judgment, concluding that it had impermissibly reviewed the merits of the dispute and the tribunal's findings. The *Cour de Cassation* remanded the matter to the Liège court of first instance, instructing it to re-examine the investor's claim under the proper legal framework.[347]

**1.136** While the differences between ICSID and non-ICSID awards are significant at the recognition stage, there is little if any practical difference between the two when it comes to enforcement and execution.[348] As noted, under Article 55 of the ICSID Convention, state immunity from execution remains subject to each member's State's domestic law.[349] Consequently, the award creditor must still establish an applicable exception to immunity from execution before it will be permitted to seize any assets of the debtor state in satisfaction of the award.[350]

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345 *Republic of Poland v. Manchester Securities* (Judgment of the French-speaking Court of First Instance of Brussels, Civil Section, 2019/3390/A, 18 February 2022).

346 *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015–18, Award (7 December 2018).

347 *Manchester Securities v. Republic of Poland* (Judgment of the Belgian Court of Cassation, C.22.0348.F, 12 April 2024).

348 The concepts of recognition, enforcement, and execution of an award are distinct, though they vary in interpretation and practice across jurisdictions. Generally, "recognition" grants the award legal effect, confirming it as final and binding with res judicata effects. "Enforcement" typically involves a court or authority ordering compliance, sometimes by converting the award into a local judgment, allowing it to serve as a valid basis for execution. Finally, "execution" refers to the actual seizure or attachment of assets to satisfy the award. However, some jurisdictions use these terms interchangeably, further complicating their precise distinction. *See* ICSID Secretariat, *Compliance and Enforcement of ICSID Awards* (2024) <https://icsid.worldbank.org/resources/publications/compliance-and-enforcement-icsid-awards> or <https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf>.

349 *See* Andreas A Frischknecht and others, *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 321–22. *See also*, Stefanie Schacherer, *State Immunity and the Execution of Investor-State Arbitration Awards* (Seminar Paper 2018).

350 *See* Jana Linetzky, Andres Keil and Johanna Kranenberg, 'La Convención de Nueva York y el CIADI: Reconocimiento y Ejecución de Laudos Arbitrales bajo la Convención de Washington', in Guido Tawil and Eduardo Zuleta (eds), *El Arbitraje Comercial Internacional: Estudio de la Convención de Nueva York*

## 4. Key challenges and solutions

**1.137** The investor-state dispute settlement system is not exempt from sometimes intense criticism.[351] While this is not a new phenomenon, these criticisms have become increasingly forceful and, importantly, have had real consequences for the system. However, this is not a system likely to vanish overnight; it is deeply embedded in the legal community as a mechanism for resolving investment disputes, and there is no clear, viable alternative on the horizon. Additionally, the system's existing structure precludes its sudden elimination, as most treaties that provide for investor-state dispute resolution include sunset clauses extending the treaty's protections past any unilateral denunciation. For example, the ECT includes a sunset clause that extends the force of its provisions for a period of 21 years following any denunciation of the treaty.

**1.138** The ISDS critics rely on several allegations: inconsistent tribunal decisions, lack of an appeals body, and limited transparency due to confidential proceedings.[352] Further concerns include the potential override of state sovereignty by arbitrators,[353] and also worries about potential corruption and arbitrators' lack of independence. Critics also argue the system excludes affected voices and hinders progress in environmental and human rights regulations, as countries risk penalties for adjusting their domestic laws.[354] These concerns have sparked divergent views on how to address ISDS, with some advocating for reforms to improve the system, while others propose moving away from ISDS altogether.

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(Tirant lo Blanch 2021) 1021–70. Kamal Huseynli, 'Enforcement of Investment Arbitration Awards: Problems and Solutions' (2017) 3 [1] Baku State University Law Review 40; Olga Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' (2015) 26 [1] American Review of International Arbitration 47.

351 *See* Sundaresh Menon, 'Tale of Two Systems: The Public and Private Faces of Investor-State Dispute Settlement' (2022) 37 [3] ICSID Review: Foreign Investment Law Journal 619.

352 *See* Jansen N Calamita and Ewa Zelazna, 'The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention' (2017) 2016 *Austrian Yearbook on Int'l Arbitration* 271.

353 *Sustainable Investment Facilitation Agreement Between the European Union and the Republic of Angola* (signed 17 November 2023, entered into force 31 August 2024). *See* Filipe Vaz Pinto and Joana Granadeiro, 'The Sustainable Investment Facilitation Agreement Between the EU and Angola: A New Model for Investment Agreements?' (*Kluwer Arbitration Blog*, 23 September 2024) <https://arbitrationblog.kluwerarbitration.com/2024/09/23/the-sustainable-investment-facilitation-agreement-between-the-eu-and-angola-a-new-model-for-investment-agreements/>. *See also*, David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2016) 328–8.

354 *See e.g.*, UNHRC, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, David R. Boyd, in accordance with Human Rights Council resolution 46/7* (UN Doc A/78/168, 13 July 2023).

**1.139** Moreover, recent events have shown that these criticisms are no longer merely theoretical and are beginning to play out in practice. Beyond the denunciations of ICSID by certain countries, some of which have subsequently rejoined the Convention, a number of jurisdictions have begun exploring alternatives to the investment arbitration system, at least in its current form. The European Union exemplifies this trend with its termination of all intra-EU BITs, widespread denunciation of the ECT, and the signing of new extra-EU investment treaties that exclude ISDS chapters. Some of these new treaties also include provisions aiming for sustainable investment, such as the Sustainable Investment Facilitation Agreement Between the EU and Angola.[355] In the recent USMCA agreement, which replaced NAFTA, Canada chose to opt out of ISDS, meaning that investment claims should be pursued through domestic litigation. This shift reflects one proposal for moving away from ISDS altogether. However, Canada and Mexico still have the option for investor-state arbitration through the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Meanwhile, the United States and Mexico have retained ISDS provisions for certain sectors, with specific limitations in place.[356] Illustrating the diverging approaches being explored, ranging from reforming ISDS to moving away from it entirely.

**1.140** It is not the purpose of this introductory chapter to defend the ISDS system or expand on its potential reform. That said, much like Churchill's frequently cited observation about democracy being "the worst form of Government except all those other forms that have been tried from time to time,"[357] investor-state arbitration, despite its imperfections, stands as the most viable mechanism among the currently available alternatives. Key subjects of the system—*i.e.*, the States—continue signing international treaties containing investor-state arbitration as a method of dispute resolution.

**1.141** Of particular note in this context is the ongoing work of UNCITRAL Working Group III on ISDS Reform,[358] which since 2017 has been systematically addressing concerns about procedural consistency, arbitrator independence, and

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355 *Sustainable Investment Facilitation Agreement Between the European Union and the Republic of Angola* (signed 17 November 2023, entered into force 31 August 2024).

356 Jerry L Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 Emory International Law Review 259.

357 Churchill made this remark in a broader parliamentary speech about the importance of continuous popular rule and the danger of unchecked power. *See* Parliament Bill HC Bill (1947) 11 November 1947, vol 444, cols 206–327 (UK) <https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill>.

358 United Nations Commission on International Trade Law, 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state>.

cost efficiency. The Working Group has already developed draft proposals for a standing mechanism for the resolution of international investment disputes, a multilateral instrument on ISDS reform, the establishment of an advisory institution on international investment law, as well as an appellate mechanism and a code of conduct for arbitrators, along with additional reforms regarding third-party funding, among others. In addition, recent bilateral initiatives, such as the EU-Canada Comprehensive Economic and Trade Agreement and the EU-Singapore Investment Protection Agreement,[359] have introduced innovations like a permanent investment court system. Furthermore, States have negotiated existing treaties with the objectives of tackling some of the critics against ISDS. Along with input from academia and practitioners, these efforts reflect a commitment to developing a more balanced, transparent, and effective investment law framework that benefits investors, States, and the public.

## C. WHAT TO EXPECT FROM THIS BOOK

**1.142** The remainder of this Treatise explores a range of legal, procedural, and strategic dimensions of arbitrations involving sovereigns. In Chapter 2, Mark A. Cymrot, Mary Kate Wagner, and James J. East, Jr. provide a foundational overview of the key fora for international dispute resolution. They contrast treaty-based and commercial arbitration, unpack the implications of umbrella clauses and parallel proceedings, and explore critical jurisdictional concepts such as veil piercing, alter ego, and agency theories. The chapter also addresses the intersection between arbitral and judicial mechanisms, including discovery under 28 U.S.C. § 1782.

**1.143** Chapter 3, by Samaa Haridi and Elizabeth Wain turns to pre-arbitration engagement with sovereigns, focusing on the dynamics of negotiation and mediation. The chapter examines the strategic incentives and institutional hurdles that shape these processes, as well as the enforcement issues related to mediation and negotiation. It explores when mediation can be effective and when it should not be used. In Chapter 4, Katia Finkel, Lennart Baijer, and Nick Catlin present a guide to conducting an international commercial arbitration with a sovereign. From navigating the bureaucratic obstacles unique to

359 *EU–Canada Comprehensive Economic and Trade Agreement (CETA)* (signed 30 October 2016, entered into force 21 September 2017).

Investment Protection Agreement between the European Union and its member States and the Republic of Singapore (signed 15 October 2018).

state actors to drafting pleadings, preparing witnesses, and delivering persuasive opening and closing statements, the chapter focuses on specialized advocacy and practical advice.

**1.144** Chapter 5, authored by Will O'Brien—who also led the remarkable effort of developing and editing this Treatise—and Levon Golendukhin, and Iti Singh, addresses the process of enforcing and collecting arbitral awards against sovereigns. The chapter explains how the New York Convention operates alongside national laws like the U.S. Foreign Sovereign Immunities Act and provides insight into enforcement strategy. It distinguishes between the treatment of sovereign assets and those of state-owned enterprises, examines defenses commonly raised in enforcement proceedings, such as lack of personal jurisdiction and *forum non conveniens*, and applies enforcement principles to real-world cases. The chapter concludes with a practical discussion of how to draft and file a petition to confirm an arbitral award and obtain judgment.

**1.145** Chapter 6, by John Lomas, Kate Johnston, and Ana Rocio Monzón, addresses performance issues in contracts with sovereigns and emphasizes the role of early intervention in avoiding arbitration. The authors explore the distinction between performance and design specifications, the implications of government-furnished equipment, and the question of what constitutes acceptance. The authors also note the need for effective change management and careful risk allocation, as well as highlighting how institutional culture can shape the resolution of disputes during contract performance.

**1.146** In Chapter 7, Julien Fouret explores the ethical landscape of arbitration and arbitrators. The chapter surveys standards of impartiality and independence across arbitrators, arbitral institutions, and jurisdictions, and addresses the professional obligations of counsel, including issues of authority, disclosure, and representation. The Treatise concludes with Chapter 8, with Josefa Sicard-Mirabel offering key takeaways for sovereigns themselves in relation to preventing and administering arbitration disputes.