Construction of a new stadium near Lusail, Qatar. Credit: Philip Lange / Shutterstock.com

Who might have investment treaty claims in infrastructure projects?

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Introduction

On 2 December 2010, Qatar was announced as the host of the 2022 Fédération Internationale de Football Association (FIFA) World Cup. This event is anticipated to draw millions of tourists and billions of television viewers. As expected, an event of this scale requires significant infrastructure and development in the form of major rail transit, highways, stadia and accommodation facilities. In fact, the sum of $200bn is expected to be spent in pursuit of this goal.

However, such projects are not without risks. The threat of negative interference from a host state in the form of discrimination or expropriation can significantly impact the value of an investment. Therefore, given the huge scale of these projects, and their sensitivity to this interference, all involved parties should be cognisant of possible ways to protect their investments. One common avenue of protection involves investment treaties and/or laws.

The purpose of this paper is not to examine *what* investment treaties offer in the infrastructure space,[2] but rather *who* is protected by them. An alternative way to frame this topic is to ask 'who might have investment treaty claims in infrastructure projects?' Moreover, it is important to consider the question from various perspectives, given that a diverse range of participants intervene in any major international project and each of them may have distinct standing and interests. Five categories of parties that are frequently involved in international construction projects are as follows:

1. The enterprise or developer engaged to complete the project ('the main enterprise'): this is typically a head contractor who is responsible for engineering, centralising the resources involved, negotiating with other parties and assuming the requisite risk. The main enterprise is not uncommonly structured as a joint venture or construction consortium.
2. The subcontractors engaged by the main enterprise to complete specific parts of the project: their engagement could be limited to tasks as specific as the laying of concrete to tasks as broad as overseeing environmental design.
3. The equity owners and shareholders who own the main enterprise, and therefore the project: this could take the form of a sole owner (typically existing as a corporate entity), a few shareholders (in the case of consortium funding) or many shareholders (in the case of a public company).
4. The creditors who have contractual claims on the investment: this could take the form of a secured loan (eg, a loan from a bank) or the purchase of bonds issued by the main enterprise.
5. The insurers who have insured the investment.

Each of these parties is financially exposed to the risk of negative interference into its investment from the host state, albeit in different ways and to varying extents. Take the dire example of a complete nationalisation of the project without compensation: this will eliminate all returns for the main enterprise that assumed the relevant risk, deprive the equity owners of the value of their investment in the main enterprise, leave the creditors with an unsecured loan and expose the insurer to a significant policy liability.

However, not all of these parties will have recourse to the protections available under investment treaties. This is a predicament worthy of examination. The first part of this paper considers the traditional qualifying criteria which must be met in order for a party to access the protections available under the majority of investment treaties. The paper will then consider the unique standing of each of the five parties identified above. It will analyse who is protected, in what circumstances they may have a claim and what obstacles they may face in bringing this claim. The paper will examine how an interested party can structure their relationship in order to take advantage of these protections, while avoiding legal pitfalls such as the often-seen jurisdiction-defeating finding of 'abuse of process'.

Background

As seen above, international events such as the World Cup generate significant infrastructure spending. However, these events drive spending regardless of the developmental status of the host state. As such, they should be clearly distinguished from investment directed toward establishing essential facilities, such as power and water infrastructure, in developing nations. These latter projects carry major benefits for the host state through the provision of much-needed resources, local employment and technological capital.[3]

Thankfully for the nations involved, the flow of foreign direct investment from the developed world to the developing world has been increasing, reaching a high of $681bn in 2015.[4] This strong growth is expected to accelerate further in the future.[5] However, such growth should not disguise the risk involved for the relevant investors. It is commonly the case that developing nations are high risk environments for investors, carrying a greater likelihood of unpredictable political and legal actions.[6] This unpredictability, and the risks posed for investments, is highlighted by recent reports that President Mugabe of Zimbabwe was planning on cancelling the licenses of every private diamond mining company in the country and nationalising them into a single state entity.[7]

Unless this actual and perceived risk is addressed, investors may be reluctant to commit the millions or billions of dollars required to undertake and complete infrastructure projects. Recognising this problem, many nations have signed investment treaties, which contain a list of obligations and protections that the host state will offer to all investments in that state whether or not those investments derive from contracts concluded with the government. These investment treaties can of course be bilateral (eg, between the United States and Venezuela) or multilateral (eg, the Energy Charter Treaty (ECT)).

The protections offered to construction parties by these investment treaties vary. Ordinarily, however, they involve protection against uncompensated expropriation, a guarantee of fair and equitable treatment, an obligation to treat foreign investments no less favourably than those of domestic nationals and a promise to administer justice.[8] These treaties are designed to create a predictable and stable environment for investors to commit their capital and resources, and are therefore highly relevant (and potentially determinative) in assessing international investment opportunities.

When the protections offered by a treaty containing an investor–state dispute resolution clause are violated by the host state, the investor will often be entitled to commence independent arbitration against the host state, typically according to the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID). Independent arbitration offers distinct benefits to investors, chief among which is the enforceability of awards, neutrality of forum, access to specialised decision-makers and transparent procedures.[9] This explains why arbitration is the preferred forum for dispute resolution for construction disputes. Indeed, in 2014–2015, eight per cent of new investment disputes registered with ICSID were construction disputes.[10]

Looking more broadly, the perceived benefits of these treaties for investors are clear. In 2014, there were 42 new investor–state arbitration cases, bringing the total number of known treaty-based claims to 608.[11] Forty-six per cent of these claims by investors were upheld either in part or in full.[12] Further, the relief offered by tribunals in these cases can be substantial: in the 2012 award of *Occidental v Republic of Ecuador*, the tribunal awarded damages of $1.77bn for actions by the host state that were considered breaches of the obligation of fair and equitable treatment and were 'tantamount to expropriation'.[13] Thus, the investor can, in theory, invest with confidence that this right of recourse effectively protects its investment from negative interference.

Jurisdictional requirements to bring a claim

Importantly, this paper does not seek to offer advice on the relative merits of any claim, but rather it canvasses what is required to gain standing to commence proceedings under investment treaties. As a general rule, three criteria must be met:

1. The relevant person or organisation must be a foreign 'investor' within the meaning of the treaty.
2. That investor must have made an 'investment' within the meaning of the treaty.
3. The host state must have acted in breach of the treaty obligations with regards to that investment.

This paper will also consider some other common jurisdictional requirements, such as limitations under the ICSID Rules, which can create further jurisdictional obstacles.

Before commencing the subsequent analysis, it is critical for the construction practitioner to remember that there are currently over 2,900 bilateral investment treaties (BITs) in operation, each with unique terms and scope.[14] This means that the resolution of the issues presented in this paper will invariably be influenced, and often be determined, by the specific wording of the applicable treaty, and so specific attention must always be paid to those terms. Nevertheless, many treaties assume an essentially common form as concerns their definitions of investor and investment, and this paper will consider the case law in light of this. It will draw upon extracts from various BITs, the North American Free Trade Agreement (NAFTA), Trans-Pacific Partnership (TPP) and ECT to demonstrate the analysis that is required in this process.

Definition of investor

The dispute has to be between a contracting state and a national of another contracting state. This means that a state cannot bring a claim against another state in relation to a particular investment. The first hurdle that any prospective claimant must pass is being classified as an 'investor'. This refers to satisfying the nationality requirements inherent in an investment treaty. Thus, in order for a developer completing a project in Belize to be protected by the BIT between the Netherlands and Belize, it would need to be considered an investor of the Netherlands.

That treaty relevantly defines 'investor' as follows:[15] '(ii) legal persons constituted under the law of [the Netherlands]'. Provisions to this effect are common. Under investment treaties, a claimant only needs to be incorporated in one of the contracting states in order to be considered an investor, and hence be able to take advantage of the protections offered.[16] This creates significant potential for investment structuring. Consider, for example, the circumstance where an Australian firm wishes to contract with the Mongolian government to construct and maintain a major highway in Mongolia. No BIT exists between Australia and Mongolia; however, a BIT does exist between Japan and Mongolia. The Australian firm is generally permitted to set up an investment vehicle in Japan to control the investment in Mongolia in order to take advantage of this investment treaty.

The tribunal in *Aguas del Tunari v Bolivia* said:[17] '[i]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, *including the availability of a BIT*' [emphasis author's own].

This conclusion is particularly relevant to the interests of equity owners and shareholders, which are considered below.

Notwithstanding this general principle, it is important to note that enterprises cannot attempt to reroute an investment after a dispute has arisen in order to attract the protection of an investment treaty.[18] Attempts to do so have been denied on many occasions by tribunals as an abuse of process. In this regard, the tribunal in *Pac Rim v El Salvador* said:[19]

> '[t]o this extent, the tribunal accepts the Respondent's general submission that: "... it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration." In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith and fully aware of an existing or future dispute, as also submitted by the Respondent'.

The abuse of process doctrine has been extended to cover circumstances where a specific future dispute is foreseeable with a high degree of probability.[20]

An alternative way to guard against the potential for treaty shopping through investment structuring is through imposing stricter limitations on who qualifies as an 'investor'. For example, the Australia–Mexico BIT relevantly restricts the status of investor to:[21] '(ii) an enterprise of a Contracting Party that *has substantive business operations* in the territory of the Contracting Party under whose laws it is constituted or organised' [emphasis author's own].

In contrast to the earlier example, where the treaty in question is so worded, mere incorporation in Australia is not alone sufficient to secure the protection. Rather a substantive business connection must be established. This type of treaty wording poses obstacles in creating investment vehicles to take advantage of an investment treaty's protections due to the modifications to business operations required. These differences again emphasise the importance of understanding the exact scope of the applicable treaties.

In summary, in order to satisfy the nationality requirements, a construction developer or contractor would either need to be incorporated in a contracting state, or alternatively, have a substantial business connection with that state, depending on the terms of the relevant treaty. Although the genuine structuring of an investment to take advantage of treaty protections is a matter of commercial prudence, an attempt to take similar advantage through restructuring when a claim becomes apparent will likely be rejected as an abuse of process.

Definition of investment

The second jurisdictional requirement is for the relevant enterprise to have made an 'investment'. Although definitions vary, 'investment' is typically defined in broad language with inclusive examples. TPP, for example, defines an 'investment' as:[22] '... every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.

The TPP subsequently lists some examples of investments, the exact scope of which will be considered further below. The general characteristics of investments were discussed in the decision in *Salini v Morocco.*[23] In that case, the tribunal stated that an investment should have four main elements: a contribution of money or assets, a certain minimum duration,[24] an element of risk and a contribution to the economic development of the host state. Although doubt has been placed on the final indicator,[25] the remaining three criteria have been applied consistently[26] and should not be considered individually but globally. Many infrastructure projects have the potential to satisfy these jurisdictional criteria.

This is not, however, always the case. By way of example, a contract to lay concrete for a fixed fee lacks the requirements of risk and length, and is simply a commercial contract, not an investment contract. Warning against this trap of conflating commerciality with investment, the tribunal in *Joy Mining Machinery v Egypt* said:[27]

> 'if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a state agency would qualify as an investment... Those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many state contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?'

The breach

A claim can only be brought for a breach of a treaty obligation, not for a general breach of contract. According to the Annulment Committee held in *Vivendi,*[28] 'whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract'.

Indeed, a state may breach a treaty without breaching a contract and vice versa.[29] The breach of a treaty must have occurred after an investment is made because the protection offered by investment treaties is prospective.[30] The common scenario of a breach of a treaty entails a state taking advantage of its sovereign power at the expense of its relatively powerless counterparty.[31] For example, the host state's discriminatory use of licensing powers, or arbitrary zoning regulations could more likely be the basis of an investment treaty claim than a simple non-payment. Practically, this means that the ordinary claimants in investor–state arbitration in the construction sector are the main contractors or the project owners because they are more exposed to the risk of host state interference. Subcontractors are instead commonly relying on a contractual relationship with the main enterprise and the host state.

An exception to the strict treaty/contract breach distinction arises when an investment treaty contains an 'umbrella clause'. These provisions ordinarily contain a general obligation by the host state to observe any undertaking it has made, and may have the practical effect of elevating breaches of contract into breaches of the treaty. An examination of the limitations and interpretations of these clauses is beyond the scope of this paper.[32]

Other jurisdictional requirements

There exist various other jurisdictional considerations relevant to the construction sector worthy of brief exploration. As a matter of practical reality, the majority of investment treaty disputes are resolved in arbitration proceedings conducted according to the ICSID Arbitration Rules.[33] Under Article 25 of the ICSID Rules, tribunals have jurisdiction over a legal dispute arising directly out of an investment between a contracting state and a national of another contracting state.[34]

Some short points may be made on the jurisdiction of ICSID tribunals.[35] The limitation of legal disputes means that political questions are non-arbitrable. Further, the dispute has to arise out of an investment. Although the term investment is deliberately not defined by the ICSID Rules,[36] tribunals have consistently applied the *Salini* criteria outlined above. Even if an investment complies with the provisions of the applicable treaty, it still needs to comply with the ICSID Rules.

Additionally, before bringing a claim, it is

Construction of a new stadium in Doha for the 2022 World Cup, Qatar. Credit: Philip Lange / Shutterstock.com

important to consider whether there exists in the investment treaty any conditions precedent to commencing an arbitration against the host state. For instance, the BIT provisions may require a minimum time to lapse between the notification of the dispute and the commencement of arbitration, or compliance with an alternative dispute resolution method, such as mediation, to be undertaken before arbitration proceedings are commenced.

It is also important to note the presence of 'fork-in-the-road' provisions. These are provisions that allow an enterprise to submit the dispute to either the domestic courts *or* arbitration. Once a choice is made, it becomes final and binding on the parties involved.

An understanding of these underlying legal concepts in investment treaty law is important, but beyond this, it is useful to examine the application of these principles to the distinct parties that are frequently involved in international construction projects. As outlined earlier, these parties include the main enterprise, subcontractors, company shareholders, creditors and insurers. It is intended to explore the unique position of each of these parties in turn.

Who is protected by investment treaties

The position of the main enterprise

In this paper, the term 'main enterprise' will be used to refer to the primary organisation responsible for the completion of the project, whether that enterprise takes the form of a developer, head contractor, joint venture or construction consortium. This engagement could arise through an engineering, procurement and construction (EPC) contract, where the main enterprise needs to commit the required capital and knowledge, and assume the requisite risk. As part of this process, the main enterprise could also subcontract parts of the construction to other firms.

The availability of protection to the main enterprise is particularly important. International construction projects invariably require the commitment of vast amounts of capital. They are also highly susceptible to host state interference.[37]

The main enterprise will be entitled to make an investment treaty claim if their contribution to the relevant project can be classified as an investment within the meaning of that treaty and the ICSID Convention. The determination of this will be guided by the criteria described in the paragraphs above.[38]

Naturally, not every construction project is an investment. That much becomes clear when the example of a contract to construct a house is considered; such a contract could not sensibly be called an investment deserving of host state protection.[39] By contrast, a major international engagement to construct nationwide water infrastructure would normally be considered such an investment.

The difference between these two results, and what the relevant standard to constitute an 'investment' is, can be found within the tribunal's analysis in the leading case of *Salini v Morocco*. In that case, the tribunal directly applied the above investment analysis to an infrastructure project: the construction of a major highway. Due to its relevance, it is worth setting out the somewhat lengthy reasoning of the tribunal in reaching this conclusion:[40]

> 'The contributions made by the Italian companies [included the fact] that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees… The Italian companies, therefore, made contributions in money, in kind, and in industry. Although the total duration for the performance of the contract was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years. With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. [A]mong others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price'.

It was the above *combination* of factors that led the tribunal to conclude that the main enterprise's construction constituted an investment. This same reasoning also demonstrates why the prior example of the house does not amount to an investment; constructing a house does not involve major contributions, nor does it have a suitably long duration, nor does it involve the assumption of anything more than standard commercial risk.

In light of this analysis, although remaining a matter of fact and degree, it seems that most major infrastructure projects with a length over two years would be considered investments.[41] Relevant considerations that will bear upon the final result include the risks and uncertainties the main enterprise has assumed in completing the project,[42] the extent of their contribution (including the personnel and equipment required), and the length of the project.

To take another illustrative example, in *Bayindir v Pakistan*, the tribunal noted that the contractor had trained 63 engineers for the project, as well as provided significant know-how, equipment and personnel.[43] It further noted that the contractor was exposed to significant risks such as the existence of a defect liability period of one year and a maintenance period of four years against payment.[44] Thus, the contractor's contribution to the project 'clearly [had] an economic value and [fell] within the meaning of "every kind of asset" according to Article I(2) of the BIT' as well as Article 25 of the ICSID Convention. Other guiding examples to demonstrate the application of the term 'investment' in the construction sector include a contract to complete a hydroelectric project[45] and a contract to dredge part of the Suez Canal.[46]

The protection offered by an investment treaty extends to all investments in the host state and it does not matter whether the construction contract is concluded with the government or otherwise. However, as a matter of practical reality, the large-scale nature of the projects covered would ordinarily be major infrastructure projects, which are generally contracted by the government.

The position is the same with regards to a joint venture structuring of the main enterprise, as each party will still be assuming the risk inherent in the project, and making an investment in similar terms to the above analysis. Each party to the joint venture may have standing to a claim against the host state (ie, the joint venture as a whole does not need to commence a claim). However, each claiming party can only recover to the extent of their participation in the joint venture and cannot claim on behalf of the other investors.[47]

Pre-contractual expenditures

In light of the above analysis, construction associated with major infrastructure projects will often be considered investments worthy of protection. However, the position is less clear with regards to pre-contractual expenditure. This refers to the financing, negotiation, engineering work and environment studies required to be undertaken before a contract is concluded, and these costs can amount to millions of dollars.[48] Are these costs also covered investments, such that the host state cannot arbitrarily discriminate and so forth?

In concluding that they are not included, the tribunal in *Nordzucker v Poland* explained:[49]

> 'It is not surprising that the host States that waive a part of their sovereign rights by their agreement to arbitrate the disputes concerning the investments made and admitted in accordance with their legislation do not agree to arbitration of disputes related to pre-investment relations with persons merely intending to invest. Taking into account the fact that tenders open for privatization of State's assets… attract usually a large number of foreign bidders only one of whom can be successful, the state would be exposed to many international arbitration proceedings commenced by unsuccessful bidders. For this reason the States in principle… agree to grant the full Treaty protection only with regard to investments actually made and admitted in accordance with the law of the host state and not to intended investments'.

Notably, although this is the general position, over 100 BITs now include these expenditures within the scope of 'investment', and extend national treatment and most favoured national obligations to the 'establishment, acquisition and expansion' of investments.[50]

Subcontractors

The position of subcontractors is, however, less promising. This is because the subcontractor has been engaged on a contractual basis by the main enterprise to carry out specific tasks for a fixed fee. The requisite characteristics of investment, such as the assumption of risk, are not present in a more significant capacity than any normal commercial operation. Thus, the subcontractor's operations are not captured by investment treaties.

Further, the subcontractor's work exists entirely independently of the host state, and any associated risks fall to be resolved via contractual means. This will almost invariably mean that they lack standing against the host state.

The position of equity owners of the main enterprise

Behind any construction enterprise are the equity owners of that enterprise. In some circumstances, there could be a sole owner, in others, the project could be owned by a consortium of parties or multiple shareholders. Indeed, tribunals have expressly commented on 'the likelihood of consortium funding for large-scale projects',[51] recognising the reality that international infrastructure projects involve significant capital output.

Often the party interested in bringing the claim will not own the investment directly, but rather will hold an indirect interest as a shareholder of an entity that itself has a direct interest in the project. There can be no doubt that the financial repercussions of negative externalities are ultimately borne by shareholders. Recognising this reality, the majority of investment treaties worldwide extend protection to shareholders. For example, the US–Ukraine BIT provides:[52]

> '"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:…
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof'.

In this context, the relevant investment is the investment in the main enterprise, rather than the project itself. This raises an interesting question as to what exactly the shareholder is protected from, as a shareholder can suffer two distinct forms of loss:

1. direct loss: action taken by the state that directly impacts the value of the shares such as removing the capacity to vote or expropriating the share itself; and
2. indirect or reflective loss: action taken by the state that impacts the value of the main enterprise, which subsequently impacts the value of the shares.

Thus, in the *CMS* case, Argentina attempted to argue[53] that 'an investment in shares is indeed a protected investment under the Treaty, but this would only allow claims for measures affecting the shares as such, for example, expropriation of the shares or interference with the political and economic rights tied to those shares. Such interpretation would not allow, however, for claims connected to damage suffered by the corporate entity'.

Essentially, the *CMS* case raised the question: can a shareholder bring a claim for indirect or reflective losses?

Most domestic legal systems would answer this question with a 'no'. In direct contrast, the balance of investor–state jurisprudence suggests that the answer is 'yes'. Tribunals have further extended this protection to even minority and non-controlling shareholders. Thus, any host state interference with the main enterprise in breach of treaty obligations not only grants the main enterprise a right to claim, but also grants the shareholders an autonomous right to bring a personal claim independent from that of the company.

The availability of damages for reflective losses

It is interesting to understand why most domestic systems bar the standing of a shareholder to bring a claim for reflective loss independently of the main enterprise. Limiting standing to claim to the main enterprise alone avoids the excessive costs

Heavy construction machinery at work on harbour alterations with the city's high-rise skyline behind, in Doha Bay, Doha, Qatar. Credit: Paul Cowan / Shutterstock.com

of an opponent having to defend multiple proceedings, as well as the risk of double recovery, and the challenges of allocating damages. Importantly, as the loss is merely reflective, all the shareholder's loss 'will be made good if the wronged company… enforces in full its claims against the wrongdoer'.[54]

In *Johnson v Gore Wood*, Lord Bingham stated the rule categorically:[55] 'Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company'.

Statements to this effect have been made by other courts in both civil and common law countries.[56] By contrast, in *CMS v Argentina*, the tribunal said:[57] 'The tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders'.

This position has been consistently affirmed by other ICSID tribunals. Thus, the general principle of allowing shareholder recovery for both direct and reflective losses extends to all shareholders, majority or otherwise, who have made an investment. The question of the minimum size of a shareholding required to constitute an 'investment' has not been considered, perhaps due to the excessive cost of ICSID arbitrations which deters minor parties from making a claim.[58]

Further, the shareholder is not suing in a derivative or representative capacity,[59] but rather in a personal capacity. It receives an autonomous right to claim, and can bring a claim simultaneously with the main enterprise. Recognising some obvious concerns such as treaty shopping, some treaties have attempted to temper this general position. For example, the treaty might only extend protection to majority shareholders, or to shareholders that can exercise control over the investment.

Finally, the determining factor of whether the shareholder is an investor under a particular treaty is the nationality of that shareholder, not the character of the investment itself. This means that a foreign shareholder investing in a local enterprise can be protected by an investment treaty. As the tribunal in *Enron v Argentina* explained:[60] 'Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment'.

Concerns regarding shareholder recovery

The broad availability of shareholder recovery raises a number of potential concerns. This paper will briefly consider those of treaty shopping and double recovery.

With regards to treaty shopping, there is an obvious potential for this to result if shareholder claims are allowed. This is because it is much easier to modify shareholder ownership structures than it is to modify company nationality.[61] The Organisation for Economic Co-operation and Development (OECD) gives the example that multiple intermediate holding company subsidiaries can be created in various jurisdictions between the beneficial owner and the operating company, with each being a potential claimant under a different treaty if the operating company suffers loss.[62] This follows from the fact that simple incorporation of a company in a state is sufficient to qualify as a national of that state under many BITs, subject of course to the abuse of process doctrine which was discussed above.

The second primary concern is that of double recovery. Professor Ferran explains how this problem arises:[63]

> '[T]ake a company with a net present value of £1 million and four shareholders, A, B, C and D; £2 million has been extracted from the company by wrongdoers in breach of duties owed to the company and to its shareholders personally. All four shareholders would be fully and equally compensated if the company sued successfully to recover the lost £2 million: the shareholders' loss is *reflective* of the company's loss. What if, say, A, could sue personally to recover its share of the loss as reflected in the value of its shares – £500,000? That £500,000 would be for A's benefit alone. If the company were then to pursue its claim, the wrongdoers could not be held liable for more than £1.5 million since that would offend against basic principles. Should the company succeed, the value of each individual shareholding would

> increase to £625,000, not the £750,000 that would have been recovered if the company had been able to sue for the full £2 million. But in the absence of court orders taking into account what has already occurred, A would end up considerably better off than the others since it holds shares [are] now worth £625,000 plus the £500,000 recovered in its personal action.'

The predicament this poses can be stated as follows: on the one hand, there is the potential for one shareholder to be overcompensated at the expense of the other shareholders; on the other hand, there is the prospect of holding the host state liable for sums beyond the losses for which it is responsible. Rather than bar shareholder recovery as in domestic systems, tribunals have resorted to creative structuring of the award of damages to prevent double recovery and avoid this problem. In *CMS v Argentina*, for example, the tribunal attempted to avoid this problem through structuring the Award in two parts:[64]

'2. The Respondent shall pay the Claimant compensation in the amount of US$133.2 million.

3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$2,148,100'.

The first part provides compensation to the shareholder for the damages they have suffered. The second part provides for a repurchase of the shares from the shareholder at their residual value. Thus the problem of double recovery is avoided; if the main enterprise subsequently exercises its right to bring an autonomous claim to recover the entire loss (including the loss already recovered by the shareholder), the host state will now benefit from this recovery in proportion to its shareholding, and will not be required to pay out more than is appropriate.

The position of insurers of the main company

Most international infrastructure projects are insured from various risks due to three key benefits that insurance offers. First, insurance allows the main enterprise to be immediately compensated for its loss, rather than having to wait multiple years for an ICSID result. Secondly, insurance can be tailored to the specific project, and can provide greater certainty for the main enterprise. Finally, insurance can provide a much broader range of coverage than investment treaties, which are limited in their scope. Due to the large contingent liability that the insurer adopts in the international infrastructure context, many political risk insurers are public bodies with the backing of the government.

However, the position of insurers in investor–state arbitration has not been considered extensively by investor–state arbitral tribunals. This is perhaps a result of the practical reality that many enterprises see insurance and investment treaties as achieving separate goals, and therefore their insurance coverage does not overlap with the investment treaty coverage. Nevertheless, to the extent that there is overlap, the question of whether insurers can bring a claim under an investment treaty is relevant as, if so, they may be able to seek indemnity for claims paid. This could subsequently affect the risk model that insurers operate under.

The provision of insurance would not ordinarily be termed an 'investment', and thus is not prima facie protected. This is because the insurer is simply providing a standard commercial product determined by contract, unconnected to the host state. Despite this, an insurer may be able to bring a claim in lieu of the original investor (in this case the main enterprise) under the principles of subrogation. This can occur either by operation of law or by agreement, and involves an assignment of the right that the investor previously held to the insurer.

Subrogation

Subrogation refers to the long-established doctrine of insurance law by which an insurer who makes payment to an insured in respect of a loss covered under a policy, is entitled to subsequently assume the rights or cause of action of the insured as against any at-fault parties in connection with the loss covered. Subrogation of the right to bring an investment claim is expressly permitted in some treaties. For example, the Netherlands–Jamaica BIT provides:[65] 'If the investments of a national of the other Contracting Party are insured against non-commercial risks under a system established by law, and the insurer or re-insurer makes a payment or agrees to make a payment pursuant to the terms of such insurance, any subrogation of the insurer or re-insurer into the rights of the said national shall be recognised by the other Contracting party.'

Similarly, Article 9.13 ('Subrogation') of the TPP states:[66]

> 'If a Party, or any agency, institution, statutory body or corporation designated by the Party, makes a payment to an investor of the Party under a guarantee, a contract of insurance or other form of indemnity that it has entered into with respect to a covered investment, the other Party in whose territory the covered investment was made shall recognise the subrogation or transfer of any rights the investor would have possessed under this Chapter with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing these rights to the extent of the subrogation.'

The explicit inclusion of these provisions avoids a potential jurisdictional challenge surrounding the proper parties to the arbitration, and the effectiveness of any consent. This concern arises because a BIT provides that the host state consents to arbitration with *investors*, not with the world at large. It is clear that if the host state consents to subrogation, the insurer will effectively be considered an 'investor' (as the original subrogated party was an investor) and there will be no bars to arbitration. However, what is the position where the relevant investment treaty does not explicitly provide this consent?

Courts in jurisdictions around the world have answered this question in a variety of ways. The Paris Court of Appeal, in considering whether subrogation was effective to 'extend' the original consent between the parties, said:[67] 'The arbitration agreement is transferred to the insurer together with the claim and the rights of the insured, because of the effects of subrogation.'

To similar effect, the English Court of Appeal held:[68]

> 'The insurance company has made no contract with the timecharterers. The insurance company is the assignee or the transferee of the rights of the voyage charterers against the timecharterers. It is submitted on behalf of the insurance company that as a result the insurance company is entitled to enforce the voyage charterers' contractual rights without any obligation to refer the dispute to arbitration. This submission is unsound and contrary to decided authority.'

The Court of Moscow conversely held that an assignment of a contract does not necessarily assign the arbitration agreement contained within that contract.[69]

In my view, the preferred approach is that offered by the English and Parisian courts, which appears to be consistent with the transfer of rights that is affected through subrogation. The host state, by virtue of the investment treaty, has consented to arbitration with a specific investor with regards to a specific investment. The insurer is simply claiming in lieu of that investor and will be asserting the exact same claims and seeking the same remedies.

However, it would be inviting danger to ignore the fact that the issue is far from settled, meaning that a high degree of uncertainty and risk remains. In order to ensure that subrogation remains operative, and to avoid jurisdictional challenges in the event that an insurer desires to exercise a right to claim, the original investor should enshrine the right of subrogation in a specific agreement with the host state. Further, the insurer's rights in this context are derived entirely from the rights of the original investor. Hence, the insurer is only subrogated to the extent that there was a breach by the host state of the investment treaty. An insurance product will, however, often cover contingencies which are outside the scope of the treaty, and there will be no recourse in these circumstances.

Finally, a residual question remains as to whether an investor retains the right to bring a claim after subrogation to the insurer has taken place. The principles of double recovery would preclude the investor from doing so, having already received due compensation under the relevant policy of insurance. It follows that an investor dissatisfied with the amount of its payout compared with the insurer's recovery in an investor–state dispute settlement (ISDS) claim would be left to resolve this issue with the insurer alone.

Issue of jurisdiction

Under the assumption that subrogation is effective to assign the right to arbitrate to the insurer, a residual question of jurisdiction arises in the case of the public insurer (this section is not relevant to private insurers). This follows from the fact that ICSID does not have jurisdiction over state versus state disputes, which is what would eventuate if the right to claim was subrogated to the governmental insurer.[70]

The public insurer can resolve this issue through two potential courses of action. The first option is for the parties to agree to an ad hoc arbitration under either the rules of ICSID or United Nations Commission on International Trade Law (UNCITRAL). This is the approach favoured by the Multilateral Investment Guarantee Agency (MIGA). To the extent that this is not provided by the BIT, specific agreement will need to be reached with the host state. Alternatively, the public insurer could make payout of any claim contingent on the investor bringing a claim in its own name.[71]

The position of other creditors of the main company

The final major player in a standard international infrastructure project are the creditors who have contractually based interests in the company, such as lenders or bondholders. As these relationships arise through the contract, they would typically be seen as standard commercial products rather than investments. The standard remedy for this category of claimant would be contractual, not investment treaty based.

However, there is no general rule that creditors are not making a relevant investment. Indeed, the TPP for example explicitly provides that 'bonds, debentures, other debt instruments and loans' can be considered investments. It goes on to clarify however:[72] 'Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods and services, are less likely to have such characteristics.'

Thus, whether a loan or bond will be an investment is a matter of fact and degree. In NAFTA for example, investment is defined to include:[73]

'(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years'.

It seems therefore that the longer the duration of the loan, and the greater risk that naturally follows, the more likely it will be considered an investment. Indeed, this accords with the general analysis presented above regarding the standard characteristics of an investment.

In *Alpha Projektholding GmbH v Ukraine*, the tribunal said:[74]

> 'Even if the arrangements between Claimant and the Hotel amounted to no more than loan agreements, however, Claimant's economic contribution and interest in the project would still qualify as an investment protected by the UABIT. The tribunal is unaware of any ICSID decision that has held that a loan cannot be an "investment", either standing alone or as one facet of a larger enterprise. The tribunal notes that large infrastructure undertakings regularly involve loans that are part and parcel of a greater endeavor.'

The obligations imposed by the treaty only extend to the relevant investment (in this case, the loan), and so while a creditor's claim may not be defeated by their lack of standing, recovery would be subject to establishing the usual hurdles that arise in any given ISDS case.

Conclusion

Ultimately, given the susceptibility of major infrastructure projects to host state interference, it is critical for all parties with an interest in a given project to understand the protections available and how best to take advantage of them. As a part of this process, parties should consider options such as investment structuring.

This paper has sought to illustrate the manner in which investment treaty protections may offer protection through a right of recourse to a range of participants in international construction projects, despite what appears to be a focus by commentaries traditionally on the rights of the main enterprise and owner in a project.

In a construction context, it seems that most major infrastructure projects with a length greater than two years will have the necessary characteristics of risk, capital and duration to qualify as investments. Thus, both the main enterprise, and shareholders who have equity ownership of that main enterprise, gain a simultaneous, autonomous right to bring an investment treaty claim, where a breach has occurred.

The position of insurers is more complex. Their right to claim appears to be determined by the interaction of the doctrine of subrogation and the issue of consent. For the reasons explored above, it would not appear to be the case that insurers are unable to establish standing to make investor-treaty claims. The practical reality remains that experience of claims brought by insurers is limited, and so the point might be regarded as a novel one that may see further exploration in the future. The jurisdictional limitations of ICSID in the case of public insurers should be kept in mind. As for creditors, they are in most cases likely to be considered contractual partners, although there remains potential to attract treaty protection depending on the risk and maturity of their underlying commitment. Finally, it should be noted that the rules of treaty protection discussed in this paper are generalised, and are subject to modification by the mutual consent of investors and state parties. Where major projects are involved, seeking out and negotiating a bespoke investor–state arrangement will likely be the safest option for all involved parties.

Notes

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1 For a detailed analysis, please see Catriona Paterson, 'Investor-to-State Dispute Settlement in Infrastructure Projects (Working Paper No 2006/02, OECD, 2006), as well as Bart Ceenaeme, 'ICSID Arbitration as an Option for International Construction Disputes' (2011) 220 International Construction Law Review 231–242.

2 PwC, *Capital Project and Infrastructure Spending: Outlook to 2025* (PwC, 2015), 7.

3 United Nations Conference on Trade and Development, *World Investment Report 2015 – Reforming International Investment Governance* (2015, United Nations Publications), ix.

4 PwC, *Capital Project and Infrastructure Spending: Outlook to 2025* (PwC, 2015); It was estimated that total investment in infrastructure in Asia is expected to exceed $8tn between 2010 and 2020: Asian Development Bank and Asian Development Bank Institute, *Infrastructure for a Seamless Asia* (2009, Asian Development Bank Institute).

5 The vast majority of investor state arbitration claims are brought against developing countries: Kevin Gallagher and Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal' (Working Paper No 11-01, Global Development and Environment Institute, May 2011), 7–8.

6 Philimon Bulawoyo, 'Zimbabwe's Mugabe says government will take over all diamond operations' Reuters (Online, 4 March 2016) www.reuters.com/article/us-zimbabwe-diamonds-idUSKCN0W52J3.

7 Ronald Chleboski, Michael Duckworth and Kari Horner, 'Overview of Investment Treaty Claims and ICSID Arbitration' (Paper presented at Construction Superconference, California, 7 December 2006), 3.

8 White & Case, *2015 International Arbitration Survey* www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf, 6 accessed 29 September 2016.

9 International Centre for the Settlement of Investment Disputes, *2015 Annual Report* (2015, World Bank), 25.

10 United Nations Conference on Trade and Development, *World Investment Report 2015 – Reforming International Investment Governance* (2015, United Nations Publications), xi.

11 International Centre for the Settlement of Investment Disputes, *2015 Annual Report* (2015, World Bank), 30.

12 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/11, 5 October 2012), [455].

13 United Nations Conference on Trade and Development, *World Investment Report 2015 – Reforming International Investment Governance* (2015, United Nations Publications), 106.

14 *Kingdom of Netherlands – Belize Bilateral Investment Treaty*, signed 29 September 2002, 2376 UNTS 49 (entered into force 1 October 2004), Article 1(b).

15 Eg, in *Plama v Bulgaria*, the claimant simply had to produce a certificate from the Cyprus Registrar of Companies to demonstrate incorporation in Cyprus, and hence be within the investment treaty: *Plama Consortium Ltd v Republic of Bulgaria (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 8 February 2005), [124].

16 *Aguas del Tunari, SA v Republic of Bolivia (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/3, 21 October 2005), [330].

17 *Mobil Corporation, Venezuela Holdings BV et al v Bolivarian Republic of Venezuela (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/27, 10 June 2010), [177]–[206].

18 *Pac Rim Cayman LLC v Republic of El Salvador (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/09/12, 1 June 2012).

19 *Renée Rose Levy and Gremcitel SA v Republic of Peru (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/17, 9 January 2015), [185].

20 *Commonwealth of Australia – Mexico Bilateral Investment Treaty*, signed 23 August 2005, 2483 UNTS 247 (entered into force 21 July 2007), Article 1(c).

21 TPP, opened for signature 4 February 2016 (not yet in force), Article 9.1.

22 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 31 July 2001), [52].

23 This generally refers to a period of two to five years.

24 *İçkale İnşaat Limited Şirketi v Turkmenistan* (Award) (ICSID Arbitral Tribunal, Case No ARB/10/24, 8 March 2016) [291].

25 See, eg, *Saipem SpA v The People's Republic of Bangladesh (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/07, 21 March 2007), [99]; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/04/13, 16 June 2006), [91]; *Joy Mining Machinery Limited v Arab Republic of Egypt (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB 03/11, 6 August 2004), [53].

26 *Joy Mining Machinery Limited v Arab Republic of Egypt (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB

03/11, 6 August 2004), [58].

27 *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (First Annulment)* (ICSID Arbitral Tribunal, Case No ARB/97/3, 3 July 2002), [96].

28 *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic (First Annulment)* (ICSID Arbitral Tribunal, Case No ARB/97/3, 3 July 2002), [95].

29 *Lao Holdings NV v Lao People's Democratic Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/6, 12 February 2014), [76].

30 James Pickavance and Greg Falkof, 'Accessing Foreign Investment Protection for International Construction and Engineering Projects' [2016] International Construction Law Review (forthcoming).

31 For analysis, see Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* (OECD, 2008) as well as Bart Ceenaeme, 'ICSID Arbitration as an Option for International Construction Disputes' [2011] International Construction Law Review 220, 242–245.

32 Of the 42 known disputes filed in 2014, 33 were filed with ICSID: United Nations Conference on Trade and Development, *World Investment Report 2015 – Reforming International Investment Governance* (2015, United Nations Publications), 114.

33 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID Convention')* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966), Article 25(1).

34 See Omar Garcia-Bolivar, *Special Report on ICSID Jurisdiction* (BG Consulting, 2001) for a useful summary of all the relevant issues.

35 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), 121–134.

36 Construction disputes currently make up eight per cent of ICSID caseload: International Centre for the Settlement of Investment Disputes, *2015 Annual Report* (2015, World Bank), 25.

37 The requirements of a contribution of resources, a minimum duration and the assumption of risk: see the 'Investment' section at [3.2] above.

38 See the metro ticket example and subsequent analysis given in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), 163–165.

39 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 31 July 2001), [53]–[55].

40 Bart Ceenaeme, 'ICSID Arbitration as an Option for International Construction Disputes' [2011] International Construction Law Review 220, 255; See also *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 31 July 2001), [56]: 'A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.' Notably, many modern investment treaties explicitly include construction contracts as an example of investments.

41 Such as whether the compensation received was fixed, whether renegotiations are required, whether the engaging party retained capacity to alter the terms of engagement, whether the volume of work required could be changed etc.

42 *Bayindir Insaat Turizm Ticaret Ve Sanayi AA v Islamic Republic of Pakistan (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 14 November 2005), [116]

43 *Bayindir Insaat Turizm Ticaret Ve Sanayi AA v Islamic Republic of Pakistan (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 14 November 2005), [136].

44 *Impregilo SpA v Islamic Republic of Pakistan (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/3, 22 April 2005).

45 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/13, 6 November 2008).

46 *Impregilo SpA v Islamic Republic of Pakistan (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/3, 22 April 2005).

47 For a detailed analysis of this question, please see James Pickavance and Greg Falkof, 'Accessing Foreign Investment Protection for International Construction and Engineering Projects' [2016] International Construction Law Review (forthcoming), 16–21.

48 *Nordzucker AG v Republic of Poland (Jurisdiction)* (UNCITRAL Ad Hoc Tribunal, 10 December 2008), [189].

49 United Nations Conference on Trade and Development, *World Investment Report 2015 – Reforming International Investment Governance* (2015, United Nations Publications), 110. See, eg, *North American Free Trade Agreement*, opened for signature 17 February 1992, 32 ILM 289 (entered into force 1 January 1994), Articles 1102, 1103.

50 *Hochtief Aktiengesellschaft v Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/31, 24 October 2011), [116].

51 *United States of America – Ukraine Bilateral Investment Treaty*, signed 4 March 1994 (entered into force 16 November 1996), Article I.

52 Argument by Argentina in *CMS Gas Transmission Company v The Republic of Argentina (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 17 July 2003), [59].

53 *Gardner v Parker* [2004] EWCA Civ 781, [41].

54 *Johnson v Gore Wood & Co* [2002] AC 1, 19.

55 David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' (Working Paper No 2013/03, OECD, 2013),15–17.

56 *CMS Gas Transmission Company v The Republic of Argentina (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 17 July 2003), [48].

57 David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' (Working Paper No 2013/03, OECD, 2013), 48.

58 See, however, Articles 1116 and 1117 of NAFTA, as well as analysis by David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' (Working Paper No 2013/03, OECD, 2013), 52–55.

59 *Enron Corporation and Ponderosa Assets, LP v Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 14 January 2004), [49].

60 David Gaukrodger, 'Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency' (Working Paper No 2013/03, OECD, 2013), 33.

61 *Camuzzi International SA v The Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB 03/2, 11 May 2005), [30]: To the extent that [a company] meets the requirements of the Convention and of the respective Treaty, that company is eligible to petition ICSID on the basis of its nationality.

62 Eilís Ferran, 'Litigation by Shareholders and Reflective Loss' [2001] 60 Cambridge Law Journal 231, 245.

63 *CMS Gas Transmission Company v The Republic of Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005).

64 *Kingdom of Netherlands – Jamaica Bilateral Investment Treaty*, signed 18 April 1991, 2240 UNTS 3 (entered into force 1 April 1992), Article 8.

65 TPP, opened for signature 4 February 2016 (not yet in force), Article 9.13; see also Article 15 of the Energy Charter Treaty and Article V of the US–Croatia BIT for more examples.

66 *Société Casco Nobel France v Sico Inc. & Kansa (1993) Rev Arb 1993*, 632.

67 *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 297.

68 *IMP Group (Cyprus) Ltd v Aeroimp*, XXIII YBCA 745 (1998).

69 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), 186–187.

70 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), 188.

71 TPP, opened for signature 4 February 2016 (not yet in force), Article 9.1.

72 NAFTA, opened for signature 17 February 1992, 32 ILM 289 (entered into force 1 January 1994), Article 1139.

73 *Alpha Projektholding GmbH v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 8 November 2010), [273]; see also *Fedax NV v The Republic of Venezuela (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/96/3, 11 July 1997).