TREATY PLANNING AND INSURANCE TO PROTECT ASSETS IN EMERGING MARKETS

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I. SUMMARY AND INTRODUCTION

A. Understanding and mitigating political risk.

Counsel to firms in the energy and mining industry are from time to time called upon to plan, structure, assess the risks of, and implement a project involving the direct investment of capital, goods, or other things of value into an emerging market, often a market other than that in which the firm ordinarily does business. Among the principal concerns counsel must evaluate in this situation are credit risk, trade risk and political risk. All are real, but it is the last of these which is the subject of this paper.

Firms in the energy and mining sector regularly find themselves confronting political risk. The industry deals with the extraction or development of strategic natural resources often owned or managed by the government or by a state-owned entity. Significant resource deposits happen to be located in emerging markets, and the recovery of these play a significant role in the state economy. The stakes are high, government involvement is intense, and the potential for interference is high. The first step is therefore to identify these risks and quantify their effect.

Counsel will of course deal with contentious issues and potential liabilities as well as is possible within the confines of the commercial agreements. The firm will of course do its best to maintain its reputation as a good local corporate citizen. But given the high profile of direct investment in energy and mining projects and the resulting risk of government interference, additional steps can be taken. Two of those steps to be discussed here are investment treaty protections and political risk insurance.

However, in the process of risk mitigation other corporate goals can be achieved as well. Careful tax planning can optimize project income while at the same time dealing with the possible tax effects of expropriation losses or arbitration awards. Creative ownership chain structures can be used to comply with local laws requiring foreign investment through certain vehicles and yet still maintain protection. Corporate parent/shareholder structures can serve to

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shield upstream entities from project liabilities. Proper corporate governance can be preserved.

Ownership structure by itself can reduce political risk. Negotiating power with local governments can be strengthened, sometimes by having a local, host-state-incorporated entity. The ability to recover losses is improved. Moreover, this structure will influence the availability and cost of political risk insurance.

Structuring project ownership for political risk protection is best done when first entering an emerging market or when acquiring an entity in an emerging market. It can and should be done in concert with tax planning. But if a dispute is looming, it can be done later, at a point where the benefits of structure planning can still be realized. Defenses against government action can still be built late in the game, and exposure of upstream owners limited.

Of course, plans for a possible dispute are put in place with the hope and expectation that they will never be needed, or that they may not be used even in the event of a dispute. If disaster strikes, however, the plans should be reassessed, adjusted if necessary, and the trial team assembled. Estimated overall costs, potential liability exposure and timeline of the dispute can then be taken into account and discussed with the client before going forward.

B. Risk context and tools

1. Introduction

Companies working in the energy and mining sectors of lesser-developed nations encounter a range of political risks—from high-impact but low-frequency events such as confiscation and war, to higher frequency risks such as discriminatory regulations and taxation, license cancellation, forced renegotiation of concession terms, strikes, civil unrest, and terrorism. The first step in managing these risks is identifying specific risk events that have the potential to undermine project returns and/or cash flow.

There are a number of good sources of country risk analysis that can provide a basic understanding of the political risk environment businesses face in a particular country. However, this general information needs to be translated for a particular company, since the specific characteristics of an investment project can dramatically impact political risk levels. For instance, data on expropriation losses show that wholly owned projects are more than three times as risky as minority joint ventures. Low-tech projects face substantially higher risks than high-tech ones. An investor's access to remedies available under a bilateral or multilateral investment-protection treaty should also be factored into the equation. An assessment of political risk should therefore take into account both macro analysis and project factors, including operational, financial, legal/contractual, geographical and reputational aspects of the project.

Once a thorough review is completed, a strategy for mitigating political risks can be developed. Financial measures of political risks, such as maximum probable loss and risk severity, will highlight key areas of exposure for a company and provide the exposure analysis against which the costs associated with implementing risk transfer and risk mitigation techniques can be evaluated. Understanding the financial impact of political risks within the context of a company's specific business activities is critical to establishing the goals and objectives of a political risk management program. Care should also be taken to determine the impact of political risks at different times (showing both seasonal changes, if applicable, and changes in the business profile over time), and at various levels of cash-flow and liquidity, net income and net worth.

2. Risk mitigation strategies

There are a number of strategies companies have employed successfully to mitigate their exposure to political risk. Some of these involve legal, financial and operational considerations and require a fairly sophisticated understanding of the structures of investments and contracts. Furthermore, to be effective they must be applied at an early stage before the investment is made (and then reapplied continually). A few basic techniques to mitigate political risk include:

- *Contractual undertakings with government*

  Although contracts cannot prevent a government from exercising its sovereign rights to change laws and policies, they can establish a right to compensation if the government does make such changes to the detriment of investors. Enforcement may be assisted by an agreement to refer disputes to international arbitration. Governments may also waive sovereign immunity to the enforcement of and execution on such awards in national courts.

- *Involving local private interests*

  Local joint venture partners can help to navigate the local political scene and may be in a position to exercise more influence over government policy-making. More importantly, governments are less likely to act to the detriment of enterprises if doing so would harm significant local interests.

  Joint venturing with the government is less desirable. Historical analysis suggests that public/private joint ventures are more, not less, likely to be subject to expropriation and that such joint ventures may perform less efficiently than even wholly government-owned enterprises. Also, the government's roles as owner, operator and regulator are easily blurred.

- *Community relations*

  Common measures include educating the public on the benefits of foreign investment and the role of the private sector in providing previously public services. Schemes to promote social welfare (schools, hospitals etc.) and rural development can be helpful.

C. Tools to mitigate political risk

1. Political Risk Insurance

In addition to the risk mitigation techniques described above, many companies have looked to political risk insurance as an effective means of managing their political risk exposures. Political risk insurance encompasses a very broad family of related insurance products designed to insure against government acts (or failures to act) that affect a company's normal business operations adversely. Policies are often written to address specific concerns of investors or lenders.

Political risk insurance is available from both private-sector companies and government agencies (Export Credit Agencies or ECAs). ECAs include the US Overseas Private Investment Corporation (OPIC), Canada's Export Development Corporation (EDC), the UK's Export Credit Guarantee Department (ECGD), etc., and the Multilateral Investment Guarantee Agency (MIGA), under the aegis of the World Bank.

The key advantage of the private-sector companies is underwriting flexibility. Many of the underwriting criteria governing the government-sponsored insurance programs (such as nationality of the insured, developmental impact of the investment, and status of investment at time of application) do not apply to commercial market placements. Also, generally speaking, the commercial market is considered to be more flexible in terms of policy wording. There are several different definitions of "expropriation," for example. The expropriation coverage, moreover, will often be tailored to include risks not normally insurable under government-sponsored programs, such as: license restrictions and sanctions, forced withdrawal orders by the home government, forced divestiture, and implementation of domestic content or other trade restrictions by either the foreign or home-country governments.

Yet there are also distinct advantages to buying political risk insurance from an ECA or MIGA. Perhaps the key benefit available to ECA policyholders is diplomatic assistance in resolving conflicts and/or potential claims with the host government. In many cases, the ECA's or MIGA's involvement in a project will be sufficient to deter a host government from interfering with a project.

2. Treaty protections to mitigate political risk.

Many investors in energy and mining-sector projects have discovered and availed themselves of the vast network of specialized treaties, which protect assets ("investments") of one country's investors against improper actions by the other signatory country's government, organs, or instrumentalities. By creating a code of conduct for investment-receiving ("host") states, backed by solid procedural protections, these treaties reduce some elements of political risk, increasing investors' (and lenders') confidence, unlock private capital, and spur development.

Recent and recurrent political shifts around the world make clear the importance of these treaties for the energy and mining sector. Backlash against the treaty framework has further complicated the picture. Most notably, Bolivia, Ecuador, and Venezuela have denounced or attempted to unilaterally amend their treaty obligations, making the treaty planner's task more complicated, but more immediately necessary. These issues are particularly complex for US parties dealing with the People's Republic of China ("China" or the "PRC"). Although China has concluded BITs with 120 countries (more than any country other than Germany),[2] China has not yet concluded a BIT with the United States.[3]

This investment-protection treaty network now includes at least 2,573[4] bilateral investment treaties ("BITs") and the investment-protection chapters of various bilateral and multilateral free trade agreements ("FTAs").[5] BITs and FTAs (collectively "IIAs") offer investors substantive protections under international law—largely independent of a contract's specific provisions and local, host-state law. Substantive protections guard investors against illegal expropriation (*i.e.*, discriminatory takings without due process and appropriate compensation); various types of discrimination; and unfair treatment. Many IIAs have "umbrella clauses" that ensure host states comply with "all other obligations" regarding an investment. Finally, IIA's allow investors free repatriation of profits and gains from investments. As a procedural protection to enhance foreign investors' substantive protections, recourse to international arbitration, at the investor's choice, held outside the host country, may allow bypassing local courts. Awards resulting from such arbitrations are enforceable *directly against the host state itself* under treaties that strongly limit recourse against the award.

But these powerful treaty protections accrue only to investors who fulfill an IIA's requirements. In general, an "investor" must have (i) the nationality of a country that is a party to the IIA, and (ii) an investment in the host country's territory. For companies, this frequently entails holding an investment through one or more entities that are party to one or more IIAs with the host state.

Fulfilling these requirements seems simple enough. Indeed, anyone can locate online most of the IIAs to which a particular host state is party. However, in practice, careful examination of treaty texts is required because subtle variations in treaty language count, especially given the application of that language in the continually evolving, non-binding, arbitral tribunal practice, which is still thin in many areas. Moreover, because the network of treaty protection is not universal and changes from one generation of IIA to the next, pitfalls abound. And, as noted, countries conclude (and, now, denounce) treaty obligations every quarter. Of final importance to a foreign investor, nationality planning for investment protection is only one element in corporate and deal structures, where tax and other business considerations

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[2] United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements (2006-June 2007)*, IIA MONITOR NO. 3, (UNCTAD/WEB/ITE/IIA/2007/6), *available at* http://www.unctad.org/en/docs/webiteiia20076_en.pdf (last visited Aug. 5, 2008) (hereinafter "UNCTAD Recent Developments 2007").

[3] China and the United States have, however, begun to discuss a BIT with China. *E.g.*, http://www.state.gov/e/eeb/rls/fs/2008/106132.htm.

[4] UNCTAD Recent Developments 2007, *supra* note 2 at 2 (as of the end of 2006).

[5] Of special relevance to investment in China is the new Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China. Apr. 7, 2008, *available at* http://www.chinafta.govt.nz/ (last visited Aug. 5, 2008) (hereinafter "China-New Zealand FTA").

demand attention. In this context, IIA protection in an individual deal may need to be weighed against or may complement these other considerations, and be reassessed more frequently than before.

This paper provides a brief overview of political risk insurance, the substantive and procedural protections in IIAs; the prerequisites for protection, including pitfalls and cautions; and some principal guidelines for structuring or restructuring the ownership chain for a project in a host state, with special emphasis on investing in China.

D. International Investment Agreements and what they do.

IIAs are treaties between nations ("state parties") that establish standards of conduct for the government or instrumentalities of one state party toward investments of persons and companies of the other state party. There are bilateral treaties like the Argentina-US BIT which regulates how the US will treat Argentine investors' investments in the United States, and vice versa. Other treaties, like the multilateral NAFTA and CAFTA/DR, deal with free trade and investment protection. Bilateral trade agreements like the one between China and New Zealand generally contain provisions on investment protection.

BITs and the investment chapters of FTAs typically cover the scope and definition of foreign investment; criteria to determine an investor's eligibility for protection; admission and establishment of investments; treatment protections including national and most-favored-nation status, fair and equitable treatment, various sorts of non-discrimination, compensation for improper expropriations, and compensation in the event of war and civil unrest; guarantees of fund transfers; and dispute resolution provisions. According to the United Nations Conference on Trade and Development ("UNCTAD"), BITs constitute "the most important protection of international foreign investment" to date.

1. IIAs protect investments of persons or companies from one signatory country against improper measures by the other signatory government's authorities or entities.

IIAs protect foreign investments in the host state against improper governmental measures of that state, its agencies and, in some instances, its instrumentalities.[6] The protections offered do not stem from contract provisions or local, host-state law; rather, protection stems from the treaty itself and international law.[7] The IIA protections of importance to energy and mining projects include the following:[8]

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[6] *See generally* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 91-106 (2002) (describing when conduct of state's organs and instrumentalities creates responsibility under international law).

[7] For a very good overview of contractual protection schemes, see NOAH RUBINS & N. STEPHAN KINSELLA: INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 31-69 (2005) ("RUBINS & KINSELLA").

[8] We include here a very short description of the protections offered, as an exhaustive treatment would exceed the scope of the present paper. Studies on substantive standards have occupied volumes. Studies include CHRISTOPH SCHREUER & RUDOLF DOLZER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007) ("MCLACHLAN"); M.

- *expropriation or measures tantamount to expropriation;*
- *fair and equitable treatment;*
- *full protection and security;*
- *most-favored-nation treatment*
- *national treatment;*
- *non-discrimination; and*
- *observance of other obligations (i.e., the "umbrella clause").*

These will be addressed in order as follows:

a. Expropriation and Compensation.

IIAs protect investors against non-compensated, discriminatory expropriations without due process. Article 13(1) of the Energy Charter Treaty contains a typical definition, which is, however, more detailed than many in expressly setting out its compensation standard:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
>
> for a purpose which is in the public interest;
>
> not discriminatory;
>
> carried out under due process of law; and
>
> accompanied by the payment of prompt, adequate and effective compensation.

SORNRAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, CAMBRIDGE UNV. PRESS, (2D ED.2004) ("SORNRAJAH"); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1991 at 269 ("Sacerdoti"); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995) ("DOLZER & STEVENS"); UNITED NATIONS CONFERNCE ON TRADE & DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES VOLUME I, UNCTAD/II3/IIT/2004/10 (2004) (HEREINAFTER "UNCTAD KEY ISSUES"); UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT; KEY TERMS AND CONCEPTS IN IIAS: A GLOSSARY (UNCTAD/ITE/IIT/2004/2) (2004). For a good review of the standards under the North American Free Trade Agreement's investment protection provisions, *see* MEG. N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (KLUWER LAW INTERNATIONAL 2006) ("KINNEAR").

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment….

The expropriation prohibition extends not only to direct takings of property but also to any series of measures that deprive an investor of a substantial part or all of the value of its investment, called indirect or "creeping" expropriation. Although formulations differ, the nub of the expropriation inquiry looks at the effect the measures have on the investor's investment. Expropriation occurs if the measures deprive "in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[9]

b. Fair and Equitable Treatment.

This is a broad protection whose contours are still being clarified in individual arbitrations. The wording providing this protection in individual BITs is generally straightforward. Article 3.1 of the Sino-Dutch BIT,[10] for example, states: "Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party."[11] The decisive issue in determining whether an investment has received fair and equitable treatment is the impact of the host state's acts on an investor's legitimate expectations. Fair and equitable treatment "requires the Contracting Parties [*i.e.*, the state parties] to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[12] A state violates this protection when its acts "eviscerat[e] . . . the arrangements in reliance upon with [sic], which the foreign investor was induced to invest."[13]

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[9] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000, 40 I.L.M. 36 (2001), ¶ 103. *See also, e.g.*, KINNEAR ET AL. at 1110-27 TO 1110-32.

[10] Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands, Nov. 26, 2001 (entry into force Aug. 1, 2004) [hereinafter "Sino-Dutch BIT"]. The BIT between China and Germany may also reflect a viable option for foreign investors in China, as the language is substantively similar to the Sino-Dutch BIT. *See* Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, Dec. 1, 2003 (entry into force Nov. 11, 2005) [hereinafter "China-German BIT"].

[11] *See also* Agreement Between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union (B.L.E.U.) Concerning the Reciprocal Promotion and Protection of Investments, Jan. 1, 2002 (entry into force June 11, 2004) [hereinafter "Belgium-Saudi Arabia BIT"], art. 3.1.

[12] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award of May 29, 2003, 43 I.L.M. 133 (2004), ¶ 154.

[13] *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of September 13, 2001, ¶ 611; [hereinafter "CME"], *available* at http://www.cme.cz/doc10/en/pdf/cme-cr_eng.pdf (last visited Mar. 12, 2006); *see also Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, (Award of February 6, 2007), ¶ 309 (finding Argentina breached fair and equitable standard in re-negotiating agreement for a national identification card system: "initiation of the renegotiation of the [agreement] for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment"; coupled with delay in payment without legal basis and refusal to give investor information in Argentina's renegotiation offer.).

As an empirical matter, claims for denial of fair and equitable treatment have recently tended to prevail when claims for expropriation failed,[14] rendering it an especially important protection.

c. Full Protection and Security.

Full protection and security originally aimed at the physical protection of installations. A typical provision is found in article 3.1 of the Sino-Dutch BIT:

> Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.

The standard requires the state to exercise reasonable diligence in protecting foreign investments.[15] In addition to physical security (*e.g.*, protection from local law enforcement officers' taking over a factory) this has also been held to cover intangible rights as well, requiring the host state to protect investments from harmful laws or acts perpetuated by its entities.[16]

d. Most-Favored-Nation Treatment, National Treatment and Non-Discrimination.

IIAs commonly offer three types of related but distinct guarantees of what is essentially equal protection to investments of foreign investors: "most-favored-nation" ("MFN") treatment, "national" treatment, and equal treatment above the minimum standard of customary international law. For instance, article 3.3 of the Sino-Dutch BIT[17] states

> Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that *accorded*

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[14] *See* United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR NO. 4, UNCTAD/WEB/ITE/IIA/2006/11, at 5 (noting that of the seven decisions rendered in 2006, only one decided in favor of the investor, but of the six rejecting expropriation, three found violations of the fair and equitable treatment standard).

[15] *E.g.* UNCTAD KEY ISSUES at 136; s*ee also Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, 4 ICSID Rep. 246 (1997) (Sri Lankan government did not provide adequate protection and security when the government's security forces in counterinsurgency operations destroyed investor's investment); *see also Siemens A.G. v. Argentina*, *supra* note 8.

[16] *CME*, *supra* note 13, ¶ 613; *See also Siemens A.G. v. Argentina*, *supra* note 13, ¶ 309 (same acts that violated fair and equitable provision also constituted failure to protect contract rights).

[17] Note, however, that the Sino-Dutch BIT Protocol limits Articles 3.2 and 3.3:

> In respect of the People's Republic of China, Paragraphs 2 and 3 of Article 3 do not apply to:
>
> a) any existing non-conforming measures maintained within its territory;
>
> b) the continuation of any non-conforming measure referred to in subparagraph a);
>
> c) an amendment to any non-conforming measure referred to in subparagraph a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
>
> It will be endeavoured to progressively remove the non-conforming measures.

> *to investments and activities by its own investors* or <u>investors of any third State</u>.[18]

The italicized text embodies "national" treatment. The underlined portion embodies MFN treatment. NAFTA further expressly qualifies this protection by requiring national treatment (or MFN) be extended to investors "in like circumstances."

As for the third type of equal treatment, non-discrimination, article 3.2 of the Sino-Dutch BIT provides:

> Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

As a recent example of the application of this latter standard, a Japanese investor succeeded in its discrimination claim against the Czech government because it proved that the government had created a market environment where the Japanese-owned Czech bank (held through a Dutch subsidiary) could not compete with the local Czech banks.[19]

e. Umbrella Clauses

Umbrella clauses anchor in a BIT the "other obligations" that a state undertakes with regard to investments. The Argentina-US BIT is one typical formulation:

> Each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.

Article 3.4 of the Sino-Dutch BIT provides similar language:

> Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party with regard to their investments.

In certain circumstances, investors have used the umbrella clause to seek to transform into BIT claims their breach of contract claims arising from state contracts. In one case, the Swiss party to a pre-shipment inspection services contract with the Philippines customs authorities claimed that the umbrella clause in the Switzerland-Philippines BIT elevated the government's contract breaches to BIT violations.[20] Although the ICSID case over the claim

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[18] *See also, e.g.*, Agreement Between the Government of the Republic of France and the Government of the Kingdom of Saudi Arabia on the Mutual Encouragement and Protection of Investments, June 26, 2002 (entry into force Mar. 10, 2004) [hereinafter "France-Saudi Arabia BIT"], art. 3.3.
[19] *See Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award of Mar. 17, 2006, ¶ 498.
[20] *SGS Société Générale de Surveillance v. Philippines* S.A., ICSID Case No. ARB/02/06, Decision on Objections to Jurisdiction of Jan. 29, 2004, 8 ICSID Rep. 518 (2005), ¶ 113.

faltered on the contract's forum selection clause, the tribunal ruled that the umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."[21]

In another case involving the same claimant and a similar contract with Pakistan, with an umbrella clause with different wording, the tribunal rejected the argument that an umbrella clause could "elevate" breaches of state contracts into BIT claims.[22] The controversy on whether treaty-based arbitral tribunals can hear claims arising under BITs when a state contract has its own, separate forum selection clause continues to rage without a clear consensus.[23] The bottom line for those planning and structuring investments is that, although the umbrella clause is a very powerful tool, its effect is not yet consistently predictable.

2. IIAs allow the investor to bypass local courts for international arbitration of claims against the host state.

An IIA's substantive remedies, however, may be only as good as the forum in which it can be pursued. Investors may fear hostile, host-state courts. For that reason, IIAs give investors their choice of forum, the most significant of which is international arbitration.

a. BITs allow investors to choose international arbitration for investor/state disputes: the ICSID option.

(1) Typical formulation allows many forums, including ICSID.

IIAs offer an investor its choice among a number of forums to press its BIT claims. The dispute resolution provision in the Argentina-US BIT, Article VII, is typical:

> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
>
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
>
> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

[21] *See id.* ¶ 128. The current state of the law on this point, however, remains somewhat uncertain as other tribunals have come to an opposite conclusion. *See SGS Société Générale de Surveillance v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of Aug. 6, 2003, 18 ICSID Rev.-FILJ (2003), ¶ 166; *Joy Mining Machinery Co. v. Egypt*, ICSID Case No. ARB/03/11, Award of Aug. 6, 2004, 19 ICSID Rev.-FILJ (2004), ¶¶ 81-82.
[22] *SGS Société Générale de Surveillance v. Pakistan*, *supra* note 21, ¶ 166.
[23] UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR NO. 4, UNCTAD/WEB/ITE/IIA/2006/11, at 5 (noting continuing divergence in umbrella clause cases).

> (c) in accordance with the terms of paragraph 3.
>
> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
>
> > (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or
> >
> > (ii) to the Additional Facility of the Centre, if the Centre is not available; or
> >
> > (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL): or
> >
> > (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
>
> (b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

Under this BIT the investor may choose local courts or administrative tribunals, *ad hoc* arbitration under the UNCITRAL Rules, ICSID arbitration or such other institutional arbitration as the parties to the dispute mutually agree.

(2) Forum selection options in China's BITs.

In comparison to the Argentina-US BIT, the Sino-Dutch BIT is more restrictive. Investors under the Sino-Dutch BIT are limited to two primary means of dispute resolution: (1) ICSID arbitration; and (2) ad hoc arbitration.[24] Perhaps most importantly the Sino-Dutch BIT

[24] Article 10.3 of the Sino-Dutch BIT provides:

allows the investor to choose arbitration under the ICSID Convention.[25] In the view of many investors, ICSID arbitration offers significant advantages over arbitration under the New York Convention of 1958, the treaty governing enforcement of many commercial arbitration agreements and awards. Foremost among ICSID's advantages is the enforcement mechanism under Convention Article 54, which requires each of the 143 ICSID state parties to:

> recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

(3) Why ICSID?

Further, in contrast to the New York Convention, the ICSID Convention provides for a mechanism of very restricted recourse against awards (called "annulment") that remains entirely within the confines of the Convention and outside the purview of national courts. By contrast, the New York Convention provides for some review (a "second look") by national courts when they enforce awards. That second look may offer an enforcing host state to plausibly avoid its obligation to enforce an arbitral award under the New York Convention. As a consequence, ICSID arbitration awards are more enforceable than are arbitral awards under the New York Convention.[26] Greater enforceability is one principal reason that investors choose ICSID. Furthermore, perhaps because of ICSID's affiliation with the World Bank,[27] or for other reasons, no state has yet expressly failed to comply with an ICSID arbitration award.

But there are some important limitations on an investor's ability to gain recourse to international arbitration that merit brief mention.

> If the dispute has not been settled amicably within a period of six months, from the date either party to the dispute requested amicable settlement, each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to:
>
> > a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or
> >
> > b) an ad hoc arbitral tribunal, unless otherwise agreed upon by the parties to the dispute, to be established under the Arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

However, China:

> [r]equires that the investor concerned exhausts the domestic administrative review procedure specified by the laws and regulations of the People's Republic of China, before submission of the dispute to international arbitration under Article 10, paragraph 3. The People's Republic of China declares that such a procedure will take a maximum period of three months.

Sino-Dutch BIT, Protocol.

[25] *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, Entry into Force Oct. 14, 1966 (hereinafter "ICSID Convention"), http://www.worldbank.org/icsid/basicdoc/basicdoc.htm, (last visited May 11, 2008).

[26] *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1100-01 (2001) ("SCHREUER COMMENTARY").

[27] *Report of the Executive Director on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 18, 1965, 1 ICSID Rep. 23, 28 (1993).

b. Limitations on the ICSID forum choice: the case of China

Regardless of the substantive protections offered, some IIAs limit the kinds of disputes that can be submitted to investor-state arbitration. This has to do with the scope of the state's consent to arbitration.[28]

China's accession to ICSID in 1993 reflected a narrow consent to ICSID jurisdiction, China's notification to ICSID[29] when it joined the treaty reflected its intent at that time to limit the subject matter that it would agree to arbitrate under ICSID. That notification to ICSID provides, "the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization."[30] This reflects consent to a far narrower category of disputes than other accessions to ICSID or consents in BITs, which generally extend to "any legal dispute arising directly out of a legal dispute." For example, under China's notice, would disputes about the facts whether a series of measures amounted to expropriation be arbitriable?

Until very recently, China's BITs reflected this narrow consent to international arbitration. For example, the China-UK BIT limits arbitration to disputes "concerning an amount of compensation."[31] But a dispute about the "amount of compensation," say for expropriation, does not necessarily comprise the *fact of* expropriation, or the legality of expropriation. The China-Switzerland BIT is to similar effect.[32] Absent any other indicia of broader consent or agreement to the contrary, such an apparently limited submission to arbitration would appear to leave many investment disputes to local Chinese courts or some other mechanism. Some investors may perceive limited recourse to international arbitration as a disadvantage.

However, this has arguably changed. The recent China-German and Sino-Dutch BITs may well have expanded the types of issues that may be arbitrated in ICSID. Article 10.1 of the Sino-Dutch BIT provides that, "[d]isputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the Parties concerned." The language "concerning an investment," appears more to cover a broader spectrum of disputes than other, previous Chinese BITs, which restricted consent to disputes over the amount of compensation for expropriation. The broader, "concerning an investment" language is carried through in the next paragraph of the Sino-Dutch BIT:

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[28] See SCHREUER COMMENTARY at 191-218 (on modes of state consent to ICSID jurisdiction).

[29] *See generally id.* at 341-43.

[30] Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable For Submission to the Centre (as of April 2008), *available at* http://icsid.worldbank.org/ICSID (last visited, May 12, 2008).

[31] Agreement concerning the promotion and reciprocal protection of investments, P.R.C.-U.K., May 15, 1986, 1986 U.K. T.S. No. 33, art. 7(1).

[32] Accord entre le Gouvernement de la Confédération suisse et le Gouvernement de la République populaire de Chine concernant la promotion et la protection réciproques des investissements, P.R.C.-Switz., Nov. 12, 1986, http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_chine.pdf, art. 12.

> An investor may decide to submit a dispute to a competent domestic court. In case a *legal dispute concerning an investment in the territory of the People's Republic of China* has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands, an investor may choose to submit a dispute to international dispute settlement at any time.

Art. 10.2 (emphasis added). Under both the Dutch and substantially identical German BITs with China, consent to ICSID now extends to a "[d]ispute between [China] and an investor of the [Netherlands] concerning an investment of [the Dutch] investor in [China]." This definition is arguably broader than in previous Chinese BITs. Under principles of treaty construction, these later and more specific provisions arguably expand the scope of disputes that can be submitted to ICSID.

c. Limitations on forum: the "fork in the road"

IIAs may also contain other procedural hurdles to arbitration. The most potentially perilous of them is the so-called "fork in the road" provision, an example of which is in article X(3) of the Argentina-US BIT: "Provided that the national or company concerned has not submitted the dispute for resolution in local courts or as set out in a previously agreed dispute resolution procedure." An investor that submits its claim to a local court or an administrative tribunal loses its right to international arbitration. A comprehensive and lucid review of the fork in the road clause by leading ICSID expert Professor Christoph Schreuer led Professor Schreuer to conclude that

> "the picture emerging from this consistent case-law is reasonably clear. The fork in the road provision and the consequent bar to international arbitration applies only if the same dispute between the same parties has been submitted to domestic courts or administrative tribunals of the host State before the resort to international arbitration."[33]

In sum, the fork in the road should caution investors contemplating redress in the host state. To paraphrase US baseball great, Yogi Berra, investors should pause before choosing local redress, lest, having come to a fork in the road, they find they have taken it.

One other restriction —waiting periods— also may have some small effect on investors' arbitration choice.[34]

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[33] Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 247 (2004).
[34] *See id.* at 232-39 (detailing the case law).

d. Most-favored-nation clause to the rescue? Questionable.

It is not unusual for investors to seek to employ a BIT's MFN provisions as a means to access the dispute resolution procedures from another BIT of which the host state is a party. Particularly, investors have sought dispute resolution provisions from other BITs which have shorter waiting periods. In one arbitration, Luxembourg claimants, seeking to avoid the 18-month cooling-off period in the Argentina-Luxembourg BIT, took advantage of its broadly worded MFN clause to gain the shorter, six-month period of the Argentina-US BIT.[35] This practice is far from reliable. While tribunals in some recent arbitrations[36] permitted investors to avail themselves of a third BIT's more favorable waiting period, others have denied such attempts.[37]

A recent jurisditional decision—in a case brought by UK investors in Yukos against the Russian Federation—did allow the investors to use the MFN clause in the UK-USSR BIT in combination with a broad jurisdictional clause in the Denmark-Russia BIT to broaden consent to arbitration. The tribunal, however, emphasized that it was not seeking to "develop[] further the general discussion on the applicability of MFN clauses to dispute-settlement provisions."[38] Thus, even though other cases have decided similar questions differently,[39] the tribunal in *RosInvest* stressed that "the … wording … is not identical to that in any other treaties considered in these other decisions." In short, when considering the MFN as a tool to expand jurisdiction, tribunal practice shows great caution in allowing such a move. For advance planning purposes, the lesson is clear: all things equal, use a treaty with a broad submission to arbitration, and do not depend on an MFN.

II. HOW CAN A COMPANY ACCESS THESE TREATIES?

A. IIA protection requires a qualified "Investment" in the other state's territory.

An investor gains access to IIA protections only if it has an "investment" and it is a national of one of the state parties to the IIA. Because these requirements are jurisdictional, and are most susceptible to planning, we address them at some length.

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[35] *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/02, Decision on Objections to Jurisdiction (May 11, 2005), ¶¶ 120-21 *available* at http://www.worldbank.org/icsid/cases/pending.htm (last visited Mar. 15, 2006).

[36] *Suez, Sociedad de Aguas de Barcelona S.A., et al v. Argentina*; ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006), ¶¶ 54-66; *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction (June 20, 2006), ¶¶ 81-94.

[37] *Vladimir Berschader and Michael Berschader v. Russian Federation* (Arbitration Institute of the Stockholm Chamber of Commerce); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Decision on Jurisdiction (September 13, 2006).

[38] *RosInvestCo UK Ltd v. Russian Federation*, Stockholm Chamber of Commerce No. V 079/2005, Award on Jurisdiction (October 2007), ¶ 137.

[39] *See* United Nations Conference on Trade & Development, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1 (2008), No. UNCTAD/WEB/IET/IIA/2008/3, at 6 & n.28.

If an investor wants the protection of ICSID Convention arbitration, it must also fulfill the jurisdictional requirements of that treaty.[40] Those requirements are set out in ICSID Convention Article 25:

> The jurisdiction of the Centre shall extend to any legal dispute *arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a *national of another Contracting State*, which the parties to the dispute *consent in writing*[41] to submit to the Centre.

(1) What is an 'investment'? The broad definition.

The broad definition generally applies to "all assets" with specific illustrative subcategories. IIAs generally define "investment" broadly as "every kind of asset" or "all types of assets" owned or controlled by an investor from the other state.[42] For example, the Czech-Egypt BIT defines investment as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party."[43] Even more broad is the definition from the Belgium-Korea BIT: "every direct or indirect contribution of capital and any other kind of assets."[44] The planning implications of broad "investment" language are clear — broader language increases the possible range of assets subject to IIA protection, which is especially important if the asset invested is not four-square in one of the illustrative categories below.

On the other hand, some treaties are much more restrictive. Canada's Model BIT is an example of a so-called "closed list" approach. The Canada Model BIT specifically lists "enterprise"[45], "equity security of an enterprise" and other examples of investments. For example, the BIT specifies which types of "loans" qualify as investments, and heavily restricts

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[40] Article 25 of the ICSID Convention also requires that the claim involve an investment and that there exist differential nationality between the parties. Where jurisdiction was based on a BIT, some tribunals have found that the parties' consent to jurisdiction was controlling also for the question of whether there was an investment. *See Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (July 11, 1997), 37 ILM 1378, ¶ 31. (1998).

[41] The dispute resolution section of a BIT represents state party's written consent to arbitrate. *E.g.*, Argentina – US BIT, art. VII(4). The investor consents in writing, as established in the BIT, *e.g. id.* Art. VII(4)(a). Frequently, the investor's written consent will accompany its demand for ICSID arbitration.

[42] Other BITs do not use the "every type of asset" language but otherwise identify investments with substantial identity for example by substituting the terms "any holding of any kind." France-Saudi Arabia BIT, *supra* note 18, art. 1.1.

[43] Agreement between the Czech Republic and the Arab Republic of Egypt for the promotion and protection of investments, Czech Rep.-Egypt, May 29, 1993, http://www.unctad.org/sections/dite/iia/docs/bits/czech_egypt.pdf, art. 1.1.

[44] Agreement between the Republic of Korea, on the one hand, and the Belgo-Luxemburg Economic Union, on the other hand, on the encouragement and reciprocal protection of investments, Belg.-Korea, Dec. 20, 1974, http://www.unctad.org/sections/dite/iia/docs/bits/korea_belg_lux.pdf, art. 3(1).

[45] Defined as "any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally -owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and (ii) a branch of any such entity."

the types of "claims to money" that may be deemed investments.[46] Most fundamentally, Canada's list is a closed list; *i.e.*, if an asset is not listed, it is not covered as an investment. Canada's Ministry of Foreign Affairs and International Trade calls this new, closed list, which replaced an open, asset-based definition, "comprehensive, but finite."[47]

As for the interpretation of the broad, "open list" definition of investment, arbitral tribunals have interpreted the phrase "every kind of asset" very broadly. For instance, in one dispute that arose out of a Turkish construction company's investment in a highway project in Pakistan, an ICSID tribunal ruled that the Turkish company's contribution "in terms of know how, equipment and personnel" to the construction project "clearly ha[d] economic value within the meaning of 'any kind of asset,'" thus qualifying as an investment under the Turkey-Pakistan BIT.[48] On the other hand, another ICSID tribunal recently concluded that an option to purchase an interest in a venture did not qualify as an investment.[49]

Most BITs also require that the investment be "in the territory" of the host state. The meaning of "in the territory" for purposes of determining jurisdiction was clarified by one ICSID tribunal in a dispute involving a Swiss company's agreement with the government of the Philippines to provide import certification and inspection services.[50] Although the company's activities took place abroad, the Tribunal ruled that inspections abroad and a small office in country enabled the company to provide import inspection services *in* the Philippines.

1. The specific subcategories of "investment"

An IIA's definition of "investment" is further illustrated by subcategories of the term "investment." Those include the following, which are most relevant for the energy and mining industry.[51]

2. The subcategories of investment in China's BITs

The Dutch and German BITs with China do not materially differ from the broad general definition of investments. The Sino-Dutch BIT provides:

> 1. The term "investment" means every kind of asset invested[52] by investors of one Contracting Party in the territory of the other

[46] Foreign Affairs and International Trade Canada, *Canada's Model Foreign Investment Protection and Promotion Agreements*, *available at* http://www.international.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf, art. I.

[47] See the Ministry's website, www.clfait-maeci.gc.ca/tna-nac/what_f.pal-en.asp#structure, last visited February 23, 2007.

[48] *Bayindir Insaat Turizm Ticaret Ve Sanyai A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (November 14, 2005), ¶¶ 111-17.

[49] *Duke Energy International Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (February 1, 2006).

[50] *SGS v. Philippines, supra note* 14, *at* ¶ 12.

[51] The subcategory related to intellectual property rights (intellectual property rights, including copyrights, patents, industrial designs, know-how, trade-marks, trade and business secrets, trade names and good-will) are beyond the scope of this paper.

[52] The German BIT allows for "investments" "invested *directly or indirectly*" in China. "Directly or indirectly" is further defined to mean investment "through a company which is fully or partially owned by the investor and having

> Contracting Party, and in particularly [sic], though not exclusively, includes:
>
> (a) movable and immovable property and other property rights such as mortgages and pledges;
>
> (b) shares, debentures, stock and any other kind of participation in companies;
>
> (c) claims to money or to any other performance having an economic value associated with an investment;
>
> (d) intellectual property rights, in particularly [sic] copyrights, patents, trade-marks, trade-names, technological process, know-how and goodwill; and
>
> (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

The broad definition of "investment" and the subcategories in the German BIT are substantially identical. However, the Sino-German BIT does depart from the norm in one respect. A protocol attached to the BIT defines investments as "those made for the purposes of establishing lasting economic relations in connection with an enterprise, especially those which allow to exercise effective influence in its management." That definition seem to favor equity

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its seat in the other Contracting Party." Protocol, Ad Article 1. Thus, a Chinese company fully or partially owned by a German company may qualify as a German investment in China. But a Chinese company owned fully or partially by a German company through subsidiaries in third countries may not necessarily qualify, at least not without further specifics.

The Dutch BIT provides for indirect ownership of local Chinese companies (or other "investments") as follows:

> The term ''investments'' mentioned in Article 1 (1) *includes investments of legal persons of a third State* which are owned or controlled by investors of one Contracting Party and which have been made in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. The relevant provisions of this Agreement *shall apply to such investments only when such third State has no right or abandons the right to claim compensation* after the investments have been expropriated by the other Contracting Party.

Protocol, Ad Article 1 (emphasis added).

This unusual language italicized above does seem to allow for indirect Dutch ownership of assets through companies in third jurisdictions, but only if the third country has no BIT with China providing for compensation for expropriation. The end of the second sentence ("or abandons the right . . .") suggests that indirect ownership through a third-country subsidiary counts as an investment only when the event giving rise to the claim sounds in expropriation. This lack of clarity may have an impact on a holding structure.

participation over debt participation, for example.

a. "investment, shares and bonds in companies . . . and other forms of rights or investments in said companies, even minority or indirect rights" [53]

Under subsection (b) of the Sino-Dutch BIT, shares in a company constitute an investment. This very important subcategory allows shareholders — direct or indirect participants in companies — to bring claims through or on behalf of those companies located or incorporated in the host state. For instance, in one ICSID case, a Luxembourg investor brought claims under the Luxembourg-Argentina BIT for harm to the locally incorporated company. The Luxembourg investor was allowed to bring the claim because the BIT includes in its definition of "investment" "shares, stocks and any other form of holding, including minority or indirect holdings, in the companies" of one or the other state. The Luxembourg investor owned shares in a local Argentine holding company which in turn owned shares in local Argentine companies that held licenses to distribute natural gas. Those licensee companies claimed they were harmed when, among other things, their rates were frozen. The Luxembourg investor's interest in shares of the local Argentine holding company was protected under the BIT.[54] Tribunal practice on this point is extensive and has uniformly protected as an "investment," shares in locally incorporated companies.[55] But an option to acquire ownership interest in the future does not qualify as an investment.[56]

b. "debts or liabilities, or rights to all services having an economic value"[57]

The long reach of this subcategory has proven to be very beneficial to investors. The broad language from the France-Saudi Arabia BIT, for example, allows for a variety of business ventures to fall into the "investment" definition.[58]

Arbitral tribunals have, for the most part, given this definition a broad interpretation. One tribunal decided that a loan fell under the definition of investment in the Czech-Slovakia BIT, which includes the "any asset" language, with categories "monetary receivables or claims to any performance related to an investment" and "rights under an act or any contract."[59] A contract for construction has been deemed an "investment" under the Italy-Morocco BIT that

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[53] Accord entre le gouvernement de la rēpublique française et le gouvernement du royanne d'arabie sáoudite sur l'encouragement et la protection rēciproques des investisements, Jan. 1, 2002, art. 1.1(b) (hereinafter "France-Saudi Arabia BIT").

[54] *Camuzzi International SA v. Argentina*, *supra note* 35, *at* ¶ 81,

[55] *See CMS Gas Transmission Co. v. Republic of Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004, ¶ 48; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of Dec. 8, 2003, 43 I.L.M 262, ¶ 64.

[56] *PSEG Global Inc., The North American Coal Corp. and Konya Ilgin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction of June 4, 2004, ¶¶ 188-194.

[57] France-Saudi Arabia BIT, *supra* note 55, art. 1.1(c).

[58] Equally expansive is the Belgium-Saudi Arabia BIT. *See* Belgium-Saudi Arabia BIT, art. 1.1(c).

[59] *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction of May 24, 1999, 14 ICSID Rev.—FILJ 251 (1999) [hereinafter "CSOB"].

includes "any right of an economic nature conferred by law or by contract."[60]

The Chinese BIT language, "claims to money or to any other performance having an economic value associated with an investment," is similarly important. An ICSID tribunal has ruled that a services agreement with a government ministry for customs pre-inspection of cargo satisfied the BIT's definition of investment as including "*claims to money* or to any *performance having economic value*." [61] The contract at issue involved extensive performance outside of Pakistan, and only a small bit of expense inside Pakistan (for a liaison office). Nonetheless, the issue whether the claimant's rights under the contract constituted an investment was uncontroversial.

The Sino-Dutch BIT differs from the Pakistani BIT at issue *SGS* case because the Dutch BIT requires "claims to money" to be "associated with" an investment. Research in investment cases has not revealed a case interpreting the "associated with" requirement of a BIT. A tribunal faced with an objection that a foreign investor's injection of assets into China is not "associated with" an investment will resort to the ordinary meaning of the term in light of the object and purpose of the BIT.[62] Here, the "claims to money or performance" with which the investment is associated must refer to the broad "any asset" category in BIT Dutch Paragraph I(1). It would seem that a "claim to money or performance" must be connected with an "asset invested by" the foreign investor in China in order to meet the subsection 1(c) definition.[63]

c. "business concessions under public law, including concessions to search for, extract and exploit natural resources"[64]

Obviously, this subcategory is extremely important to the oil and gas and mining industries. This clause allows particular service contracts and concessions to qualify as investments.[65] Many BITs specifically include exploration of natural resources as qualifying concessions. For instance, the Nicaragua-UK BIT "includes concessions to search for, cultivate,

[60] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶ 45.
[61] *SGS Société Générale de Surveillance v. Pakistan*, ICSID Case No. ARB/01/03, Decision on Jurisdiction of Aug. 6, 2003, *available at* 18 ICSID REV.-FILJ (2003).
[62] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, http://www.un.org/law/ilc/texts/treatfra.htm.; *Canfor Corp. and Terminal Forest Products Ltd. v. United States*, UNCITRAL/NAFTA, Decision on Preliminary Question (June 6, 2006), ¶¶ 177-79.
[63] *See SGS v. Pakistan*, ¶ 135 (contract "gave rise" to claims to money). Also, in *Salini v. Morocco*, it was not disputed that a highway construction contract was an investment under the Italy-Morocco BIT because it created a right to a "contractual benefit having economic value" and a "right of an economic nature conferred…by contract." *Salini v. Morocco*, ¶ 45. *But cf Joy Mining v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (Aug. 6, 2004) (holding that because contractually agreed-upon performance guarantee was not an "investment" because it was not an "asset," claimant's contractual right to return of performance guarantees was not an investment).
[64] Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments, F.R.G.-Sri Lanka, Feb. 7, 2000, http://www.unctad.org/sections/dite/iia/docs/bits/germany_srilanka.pdf, art. 8(1)(e).
[65] *See, e.g.*, *Salini v. Morocco*, *supra* note 47, ¶ 45 (respondent Morocco did not dispute that highway construction contract was an investment under the Italy-Morocco BIT because it created a right to a "contractual benefit having economic value" and a "right of an economic nature conferred…by contract.").

extract or exploit natural resources."[66] French and German BITs generally use the same language. Several claims have been filed by investors who invested in Argentina's newly privatized upstream and downstream oil and gas industry. Such concessions and licenses have been ruled to be an investment under BITs which use the same or similar language as the ones discussed in this section.[67]

Note that the BIT at the center of many of the Argentina arbitrations presently underway, the Argentina-US BIT, does not specifically use the term "concessions" or "natural resources," instead using "any right conferred by law or contract, and any licenses and permits pursuant to law."[68] Tribunals have ruled that licenses for distribution and transportation or concessions for hydrocarbon production qualify as investments under this subcategory of the BIT.[69]

d. Movable and immovable property, including "all other rights such as mortgages, liens, usufruct, surety bonds and all similar rights"[70]

The property described here covers a wide range of investment types. In particular instances, tribunals have concluded that promissory notes and loans were investments, even though the BITs in those cases did not refer to either specifically as investments.[71]

B. IIA protection requires the investor to have the nationality of one of the treaty's state parties.

1. Investor must have proper nationality.

The foreign investor must have the nationality of the other state party to the IIA. This requirement applies to natural persons and companies.[72] IIAs set out the nationality requirements for companies. The France-Saudi Arabia BIT has the typical requirement "any corporate person established in the territory of one of the Contracting Parties, in compliance with the laws of said party, having its headquarters there, or being directly or indirectly controlled by nationals of one of the Contracting Parties."[73] Arbitral tribunals have adhered closely to the text of the state parties' definition of nationality.

Arbitral tribunals are extremely reluctant to "pierce the corporate veil" of a corporation to

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[66] Agreement for the promotion and protection of investments, Nicar.-U.K., Dec. 4, 1996, 2002 U.K. T.S. No. 19, art. 1(a)(v).
[67] *See Pan American Energy LLC & BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (July 27, 2006); *Enron and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (January 14, 2004).
[68] Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf, art. I(a)(v).
[69] *See* E*nron v. Argentina, PAE v. Argentina supra* note 67.
[70] France-Saudi Arabia BIT, *supra* note 53, art. 1.1(a).
[71] *See Fedax N.V. v. Republic of Venezuela*, *supra* note 40.
[72] This paper does not deal with natural persons.
[73] France-Saudi Arabia BIT, *supra* note 53, art. 1.2. But not all BITs include the "directly or indirectly controlled" criterion..

any third-nation shareholders to deprive a party of BIT protection. In one ICSID case, claims were brought by a company organized under the laws of Lithuania, 99% of which was owned by nationals of Ukraine.[74] The Lithuanian company created a wholly-owned Ukrainian subsidiary, an "investment," which published reports critical of the Ukrainian government, and Ukraine allegedly treated the investment badly. Ukraine urged the Tribunal to look through the Lithuanian place of incorporation to the nationality of the Ukrainian owners. The Tribunal found that the Lithuania-Ukraine BIT's definition of nationality ("any entity established" in Lithuania) was met and there were no reasons to depart from the state parties' agreed definition.[75]

As for the timing of the nationality determination in ICSID proceedings, and unless the BIT specifies otherwise, a party's status as an "investor" of a certain country is determined when the investor consents to arbitrate. This is usually when arbitration proceedings are instituted, even if the party subsequently sells its investment while the case is pending.[76]

2. Locally incorporated companies can also bring claims in their own right.

The ICSID Convention expressly recognizes the issue that may arise because many host states require foreign investors to create local, host-state-incorporated companies. The potential problem lies in the Convention's requirement that one party to an investment dispute is the host country and the other is a "national of another Contracting State."[77] Under this rule, a local, host-state-incorporated company could not bring an ICSID claim on its own behalf, because it is not a "national of another Contracting State." ICSID remedies this situation by allowing local, host-state-incorporated companies ("juridical persons") to claim against the host state under the following condition:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, *because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention*.

(ICSID Convention Art. 25(2)(b) (emphasis added).

The France-Saudi Arabia BIT,[78] like many others, contains such an agreement to treat local, host-state-incorporated companies under French (or Saudi) control as nationals of the other

[74] *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of Apr. 29, 2004, 20 ICSID Rev.-FILJ 205 (2005), at ¶ 22.
[75] *See id.* Although some BITs do have a "denial of benefits clause"—a requirement that an entity has to have a substantial business presence in the investor's country—such was not the case there.
[76] *See National Grid v. Argentina*, *supra* note 36, ¶¶ 118-22.
[77] ICSID Convention, Art. 25(1).
[78] *See* note 53, *supra*.

state party. These BITs set the specific conditions under which a local-host-state-incorporated company controlled by foreigners can be treated as nationals of the *other* state party to the BIT.[79] In one case brought under the Netherlands-Bolivia BIT, a locally incorporated Bolivian company was allowed to bring a claim *as a Dutch company* because it was controlled by Dutch (Netherlands Antilles) companies.[80] The application of these criteria in specific regard to China would have to begin with the nationality requirements in China's BITs' definition of "investor."

3. Some IIA's nationality provisions are restrictive, requiring incorporation, seat and control in an IIA party state.

However, in order to qualify as a company deserving of its protections, some IIAs require the entity to be incorporated in the IIA party state, have its principle place of business there, and that all control of the entity reside in that location and not in a company in a third state. For example, the Switzerland-Peru BIT requires that companies constituted under its laws also have their seat in Switzerland as well as "effective economic activities" in its territory.[81] The France-United Arab Emirates BIT's definition of investor leaves no wiggle room for companies controlled by actors in third-nation countries. It sets forth the following requirements for an entity to qualify as a protected "company": "Any corporate entity established on the territory of either contracting party pursuant to legislation of that party," "whose management headquarters is in that party's territory or controlled directly or indirectly by nationals of either of the contracting parties, or by corporate entities whose management headquarters is in the territory of either of the contracting parties, which were established pursuant to the legislation of that party."[82]

This means that, in order to qualify for this BIT's protections, to count as "French," a company would have to be incorporated in France under French law, with its management based there or by related companies in that state. This definition would seem to exclude the structure at issue in a recent dispute between a Cypriot company and a Hungarian state agency where the Cypriot entities were controlled by Canadian companies.[83]

This is a far cry from some BITs' far less restrictive provisions on the location of the controlling entity. For example, the Netherlands-Poland BIT allows for control by nationals or

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[79] For example, the Argentina-Netherlands BIT defines an investor of either state as

> iii. legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.

Thus, a local Argentine company can count as Dutch if it is controlled by a Dutch company or by a Dutch national.

[80] *See Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Jurisdictional Award of Oct. 21, 2005, at ¶ 264.

[81] Convenio entre la Republica del Peru y la Confederacion Suiza sobre Promocion y Proteccion Reciproca de Inversiones, Peru-Switz., Nov. 22, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/peru_suiza_esp.pdf, art. 1.

[82] L'accord entre la Republique francaise et l'Etat des Emirats arabes unis sur l'encouragement et la protection reciproques des investissements, France-U.A.E., Sept. 9, 1991, http://www.unctad.org/sections/dite/iia/docs/bits/france_uae_fr.pdf, art. 1.

[83] *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award of October 2, 2006.

companies of either party, not constituted under the law of that party, "wherever located."[84] Compared with the Switzerland-Peru BIT, this latter provision clearly allows greater flexibility in structuring, to account, for example, for tax planning or other business considerations.

A vague definition of control can also generate insecurity. Such is the case with the Australia-Vietnam BIT which defines control as "a substantial interest" in the company.[85] Further complicating this is the BIT's unhelpful solution to questions arising from the question of control: "Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties."[86]

4. Shareholders can bring claims for damages to the value of a company (an "investment") in which they hold shares.

a. Shareholders have a "direct right" to claim for damage to an investment in the form of a locally incorporated company.

In a large number of recent ICSID awards, tribunals have accepted that shareholders have a "direct right of action" to bring claims for damages to a local company on the basis that any damage to the local company also damages its shareholders.[87] As explained by one ICSID tribunal:

> ICSID jurisprudence does not hold that only the legal persons directly concerned by the measures at issue have the capacity to act as claimant; rather, it extends this capacity to the shareholders of these legal persons, who are the real investors.[88]

In one case, a US shareholder of an Argentine license-holder for downstream gas was allowed to bring claims, in its own name, for damage to the license and the license-holding entity, both of which were located in Argentina.[89] The tribunal found that there exists "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."[90]

b. BIT protections have been held to extend to indirect shareholders.

Many IIAs expressly protect indirect shareholdings, meaning that indirect shareholders may bring claims against host States even though the host-State company is held through a series

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[84] Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Neth.-Pol., Sept. 7, 1992, art.1 (b)(iii).
[85] Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments, Austl.-Vietnam, Mar. 5, 1991, art. I (3).
[86] *Id*.
[87] *See Azurix Corp. v. Argentine Republic*, *supra* note 55, ¶ 73.
[88] *Goetz v. Burundi,* ICSID Case No. ARB/95/3, [2001] 26 Y.B. COMM'L ARB. 24, 35, 25 & n.24 (2001).
[89] *See CMS Gas Transmission Co. v. Republic of Argentine Republic, supra* note 55, ¶ 48.
[90] *Id.*

of subsidiaries, even subsidiaries in third jurisdictions. And even when indirect shareholding is not expressly addressed, ICSID and other treaty-based arbitration tribunals recognized the right of indirect shareholders to bring BIT claims. For instance, in one NAFTA case, US investors held rights to an investment in Mexico through a Cayman Islands company. The tribunal ruled that the fact that there were intermediate corporate subsidiaries incorporated in non-NAFTA jurisdictions did not impair the US investors' rights to bring claims against the host state under the NAFTA.[91]

Tribunals have also looked through to a second layer of shareholders to ascertain the requisite nationality of the controlling shareholders in order to hold that there is jurisdiction. Modern tribunals seem to accept the reality that most foreign investors, for various reasons including tax concerns, will often structure their investment in a foreign country through an intermediary holding company or companies in one or more third countries. In one case, Dutch investors held most of the shares of a Panamanian company, which in turn held shares in a company in Senegal.[92] When the Dutch investors brought claims against the Senegalese government on behalf of the local company, Senegal objected on the grounds that the Dutch investors had no rights to bring claims because an intermediate subsidiary, a Panamanian company, held the shares in the Senegalese entity. A tribunal ruled that the Dutch investors had standing to bring this claim because, although the Panama company directly held the shares in the Senegalese company, it was the Dutch company that held the majority of shares in the Panamanian company. The Dutch company thus held ultimate (albeit indirect) control over the Senegalese company. As explained by the tribunal:

> Just as a host state may prefer that investment be channelled [sic] through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct shareholder of the latter.[93]

c. Minority shareholders can generally bring claims.

Tribunals have uniformly accepted that the right to BIT protections also extends to foreign minority shareholders of a locally incorporated company. In one case, a US-incorporated, minority shareholder, which held 29% ownership of a local Argentine company, was not barred from asserting claims under the Argentina-US BIT for damages suffered by the local company.[94] Likewise, another tribunal found that it was irrelevant that a US claimant held only 18.3% of the capital stock in the local Argentine consortium that held a concession to operate port facilities

[91] *See Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Final Award of Apr. 30, 2004,43 ILM 967, 982 (2004).
[92] *See Société Ouest Africaine des Bétons Industriels v. Senegal,* ICSID Case No. ARB/82/1, Award of Feb. 25, 1988, 2 ICSID REP. 164 (1994).
[93] *See id.* at 168.
[94] *See CMS Gas Transmission Co. v. Republic of Argentine Republic*, *supra* note 42, ¶ 48.

there.[95]

d. Special Purpose Vehicles are not *ipso facto* barred.

The creation of special purpose vehicles to hold shares in a foreign investment is a common practice. As is clear from the previous rules, these SPVs are oftentimes protected by IIAs. In 2006, for example, a Japanese investor whose investment in the Czech Republic's bank sector was held through a Dutch SPV succeeded on jurisdiction and in the merits in a case against the Czech Republic for violations of the Dutch-Czech BIT.[96]

5. States may deny treaty protections in "denial of benefits" clauses.

Further limiting the extension of protections to certain investors are the inclusion of "denial of benefits" clauses in several BITs. This clause allows a state party to deny treaty protections when an investor is owned by or controlled by nationals or companies of third-party countries, and there is no "substantial business" in the investor's country. Such a clause is found in the US-Bolivia BIT:

> Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company or…the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.[97]

The United States Department of State interprets the denial of benefits clause to mean that:

> the United States could deny benefits to a company that is a subsidiary of a shell company organized under the laws of Bolivia if controlled by nationals of a third country. However, this provision would not generally permit the United States to deny benefits to a company of Bolivia that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with, Bolivia.[98]

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[95] *See Lanco Int'l Inc. v. Argentine Republic*, ICSID Case No. A12B/97/6, Decision on Jurisdiction (Dec. 8, 1998), 40 INT'L LEG. MAT. 457, 468 (2001).
[96] *See Saluka Investments B.V. v. Czech Republic*, *supra* note 19.
[97] Treaty between the Government of the United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Bol., Apr. 17, 1998, S. Treaty Doc. No. 106-26 (2000) [hereinafter "US-Bolivia BIT"], art. XII(b).
[98] US-Bolivia BIT, at Title and Preamble.

C. But IIAs may exclude certain types of protections, including those relevant to the energy or mining sectors.

a. Excluding some types of interests from some protections

State parties to BITs often carve out exceptions from some of the BIT's substantive protections. Frequently, such exceptions regard "national treatment" obligations. In the Annex to the US-Kazakhstan BIT, for example, the US "reserves the right to maintain limited exceptions to national treatment" in various sectors, including "energy and power production."[99] The US also reserves the right to provide "most-favored-nation treatment" for matters dealing with "mining on the public domain."[100] Kazakhstan reserves the right to provide national treatment to those sectors involving "ownership of land, its subsoil…and other natural resources."[101] Likewise, in Annex to the UK-Panama BIT, Panama excludes from national and most-favored-nation treatment the "energy production" sector.[102] Also, in many BITs, states that grant "special advantages" to investors of any third country by virtue of an agreement establishing a free trade area or customs union are not required to accord such advantages to other nationals or companies from the other BIT country.[103]

b. Limitations on protections in respect of tax matters

The potential for unjust taxation by a host state is chief among the concerns of foreign investors. While most BITs seem to ignore the tax issue, many others, like the US-Russia BIT, severely limit protection from taxation measures. The US-Russia BIT seems to give with one hand and take away with the other, stating that parties "shall strive to accord fair and equitable treatment with respect to taxation of the investments of nationals and companies of the other Party"; then, in the very next paragraph, it states that fair and equitable treatment "shall not apply to taxes" except in very limited circumstances.[104]

The US-Bahrain BIT is more direct in its restriction of BIT protections to tax disputes. "No provision of this Treaty shall impose obligations with respect to tax matters" other than

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[99] Treaty between the United States of America and the Republic of Kazakhstan concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Kaz., May 19, 1992, http://www.unctad.org/sections/dite/iia/docs/bits/us_Kazakh.pdf, Annex, at 1. *See also* Treaty between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Morocco, July 22, 1985, http://www.unctad.org/sections/dite/iia/docs/bits/us_marocco.pdf, protocol, at 2(2).

[100] *Id*. Annex at 2.

[101] *Id*. Annex at 3.

[102] Agreement for the promotion and protection of investments, Pan.-U.K., Oct. 7, 1983, 1986 U.K. T.S. No. 14, at Annex.

[103] *See* Agreement between the Government of the Arab Republic of Egypt and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments, Chile-Egypt, Aug. 5, 1999, http://www.unctad.org/sections/dite/iia/docs/bits/chile_egypt.pdf, art. 4(3).

[104] Treaty between the United States of America and the Russian Federation concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Russ., June 17, 1992, art. XI.

those related to claims of expropriation.[105] This clause would appear to eliminate tax measures from many of the BIT's other substantive protections. First, proving expropriation by a tax assessment can be difficult because most tax assessments, even when substantial, have not been held to affect the value of an investment enough to be deemed an expropriation. Even if an assessment of a tax clearly violated the "fair and equitable" principle, that claim is precluded by the BIT's exclusion. Second, even were an investor to claim for expropriation for a tax assessment, the BIT further requires the claimant to undertake an arduous process of obtaining opinions from both governments' authorities before bringing such a claim.

The significance of this tax restriction is playing out today in at least two disputes between investors in Argentina's oil and gas sector and the government after stamp taxes were assessed on the investors. Had the BITs at issue included the tax-related exceptions to tax protections discussed in this section, these claims would have been virtually impossible to bring.

D. Guidelines In Structuring for IIA Protection

1. For planning purposes, express terms are better than implied terms.

As many energy and mining-related investments arise out of State contracts, it is important to consider whether such an undertaking falls under the relevant BIT's definition of "investment." This may appear to be the case in those BITs which include in their definition of "investment," "rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate or exploit natural resources."[106] Other treaties stretch the definition to the point of encompassing a wide array of contractual rights, even those that are not part of public law. The US-Bolivia BIT's "investment" definition includes "contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts."[107] Such a provision may make it easier to be sure in planning that BIT protections cover all aspects of a contract with a state, or a state-owned company, regarding natural resources.

2. BIT protection can be stacked.

A logical corollary from the rules outlined above is that investors can structure their investment through more than one intermediate holding company, frequently even if those companies are headquartered in third non-BIT-party countries. One US investor was able to bring claims against the Czech Republic for a Czech investment that he indirectly controlled through interests in Bermuda and the Netherlands. In other words, the US investor owned shares in the locally owned Czech company through two layers of intermediate holding companies. The

[105] Treaty concerning the encouragement and reciprocal protection of investment, U.S.-Bahr., Sept. 29, 1999, S. Treaty Doc. No. 106-25 (2000), art. XIII. *See also* Treaty concerning the encouragement and reciprocal protection of investment, U.S.-Jordan, July 2, 1997, S. Treaty Doc. No. 106-30 (2000), art. XIII.

[106] Accord entre le gouvernement du Canada et le Gouvernement de law Republique des Philippines pour l'encouragement et la protection des investissements, Can.-Phil., Nov. 10, 1995, http://www.unctad.org/sections/dite/iia/docs/bits/canada_philippines_fr.pdf, article 1(f)(vi).

[107] US-Bolivia BIT, art. I(d)(iii). Arguably, this provision could also grant BIT protections to certain short-term rights such as claims to money and performance. However, contracts requiring immediate payment probably will not be deemed "investments".

US investor met the requisite nationality requirements because he held a majority of the voting capital.[108] This suggests the possibility of creating a chain of ownership to "stack" layers of investment treaty protection. Indeed, the investor in that case brought the same case twice—once in his own name (under the US-Czech BIT), and simultaneously through the Dutch holding company (under the Netherlands-Czech BIT). This illustrates that investors, in certain situations, may potentially combine BIT protections with other investment treaty protections, resulting in more than one bite at the apple.

The consequences, or lucky coincidence, of this plan are striking. While one tribunal ruled that there had been no violations of the US BIT that proximately harmed the US investor, the other found that the Czech authorities had violated the Dutch BIT, ultimately resulting in a US$269 million award for the investor.[109] In sum, the second bite at the apple may be the real bite.

3. The contract caveat

It has been held that a forum selection clause in a state contract, for example, cannot impede arbitration of IIA claims because BIT claims and contract claims have a different legal bases and often involve different parties.[110]

Most, if not all, IIAs contain their own forum selection clause, which generally allows access to international arbitration before ICSID or under some other set of rules. In a case where there is a forum selection clause in a contract, states regularly argue that such a clause prevents a foreign investor from accessing international arbitration. The cases do not generate a consistent winner.

A recent arbitration distilled into a two-part test the recent tribunal practice on the circumstances in which a forum selection clause can prevent access to international arbitration under a BIT. First, a forum selection clause prevails over the international arbitration forum in a BIT if the forum selection clause contains (i) mandatory conflicting obligations on the (ii) same parties with respect to (iii) the same subject matter. Second, if the forum selection clause imposes mandatory obligations on the same parties and the same subject matter, the contractual waiver of access to an international arbitration forum must, under the facts and circumstances, be explicit or clearly implicit. While the variety of forum selection clauses require individual attention and advice, the test provides the beginning of a guideline for increasing the likelihood of retaining access to a treaty's international arbitration forum in the face of a contract selecting another forum.

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[108] *See CME, supra* note *13*.
[109] *See CME Czech Republic B.V. (Netherlands) v. Czech Republic*, UNCITRAL, Final Award of Mar. 14, 2003, *available* at http://www.investmentclaims.com/decisions/CME-Czech-FinalAward-14Mar2003.pdf (last visited Mar. 12, 2006).
[110] *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2007, ¶ 98.

4. Timing and planning.

a. Consider BIT planning at tax-planning stage; but BITs frequently do not impair later restructuring.

IIA planning should be kept in perspective—most importantly, perhaps, the relationship with tax planning. Engineering the possibility to make a claim under an IIA probably does not in most cases outweigh the more certain and immediate benefits under tax treaties. Accordingly, BIT planning may well frequently take a subsidiary position to tax planning; but BIT planning can clearly work within tax-planning constraints. An existing tax structure may offer the menu of possibilities for an IIA-treaty structure. There are times when adding a holding company in an existing tax structure may be tax-neutral, but BIT-advantageous; still other times when the two aims conflict. In addition, there may be contractual, bid-document, or domestic-law restrictions the will restrict changes in the immediate ownership of a local entity in the host state, which may be more difficult to work around later. Thus, for a variety of reasons, it is best to have an IIA plan in place at the tax-planning stage.

However, as noted above, the ICSID Convention fixes the claimant company's nationality at the time the parties "consented to submit such dispute … to arbitration …."[111] The ICSID Convention's date to fix nationality will have an impact on the extent to which companies can engage in nationality planning. When the host-state's offer of arbitration comes in an IIA or national legislation, the parties' nationality is fixed at the time the claimant accepts that offer.[112] That time may be as late as the date on which the claimant institutes proceedings in ICSID,[113] which suggests that changes in the nationality of a claimant can occur up to the date the claimant files its claim. However, the later the shift in nationality, the greater the chances of drawing a claim by the state that the shift constitutes abusive treaty shopping, which would probably take the form of a claim of abuse of rights or bad faith. Even though such challenges have not succeeded, one would not want to be the first claimant where a host state did succeed. It may nonetheless be best to finalize structuring before committing to the investment, to avoid or mitigate such challenges. On the other hand, the "date of consent" rule suggests nationality planning could occur after the deal is signed, for example, in connection with restructuring or sale or purchase of investments.

b. Recent denunciations of ICSID and backpedaling from BIT commitments may require reconsidering existing plans.

Until very recently, the ICSID Convention had been an unmitigated success, at least in terms of increasing state participation. Despite some grumbling by states about the system being too friendly to investors, membership continued to grow. However, on May 2, 2007, Bolivia formally "denounced" the ICSID Convention, *i.e*. it announced its withdrawal.[114] Under the

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[111] ICSID Convention, Art. 25(2).
[112] SCHREUER COMMENTARY, *supra* note 26, at 218-19.
[113] *Id.* at 218-19.
[114] For the announcement of Bolivia's denunciation of the ICSID Convention, see the May, 16, 2007, news release from ICSID, on its home page at www.worldbank.org/icsid. The mode of denunciation is specifically allowed under ICSID Convention Article 71.

terms of the ICSID Convention, the denunciation "took effect" six months after the receipt of Bolivia's notice, *i.e*., on November 3, 2007. Claims brought by investors after that latter date seeking relief in ICSID face some uncertainty. Shortly after Bolivia denunciation, Ecuador—which had recently lost an ICSID arbitration—notified ICSID that it would not consent to ICSID arbitration of disputes involving disputes relating to investments in the area of natural resources such as petroleum, gas, and oil.[115] More recently, the Venezuelan National Assembly in February 2008 urged the executive branch to leave ICSID. Even if the Assembly's action is held to be non binding and has no legal effect, the action may be a significant further step in Venezuela's either formally denouncing the Convention or in attempting to withdraw certain classes of disputes from arbitration. Venezuela's march away from investor protection appears unabated: on April 30, 2008, Venezuela formally notified the Netherlands that it intended to terminate the "oft-used" Dutch-Venezuela BIT.[116]

c. Importance of Timing on ICSID Jurisdiction

As previously discussed, under the ICSID Convention, the claimant's nationality is fixed at the time the parties "consent"[117] to ICSID jurisdiction, i.e. the date both parties have agreed to arbitrate. If the state party's consent to arbitration of disputes is set forth in a BIT (as in the China-Netherlands BIT or the China-Germany BIT), an investor-claimant can accept that invitation as late as when the investor files its notice of arbitration. Of course, the investor can consent in writing earlier by letter to relevant authorities. On the other hand, if the state party and the investors have a direct contract, the date of consent is likely the date of consent in that state contract. The date at which nationality is determined is important because it may allow "post-problem, pre-arbitration" planning; theoretically until the date of claim.

Also important is that once given, a party may not thereafter unilaterally revoke the consent.[118] Accordingly, the parties are bound to the ICSID rules in force at the time of consent,[119] which include limitations on the parties' remedies[120] and removal of diplomatic protection.[121] It also gives an ICSID forum with its enforceability advantages to a state party making (perhaps unlikely) counterclaims.

III. CONCLUSION

Nationality planning cannot alone assure success in an investor-state arbitration. There are, after all, the merits of the claim to be considered. Moreover, other considerations may cause an investor to never bring its claim in order to avoid burning bridges. Indeed, one real benefit of planning may be what it brings in muscular negotiations with a state party. A claim that can be

[115] For the announcement of Ecuador's refusal to arbitrate such disputes in ICISD, see the December 5, 2007, news release from ICSID, on its home page at www.worldbank.org/icsid. Ecuador did not formally denounce the Convention, just its consent to arbitrate natural resources disputes. *See* ICSID Convention Art. 25(4).

[116] Luke E. Peterson, *Venezuela surprises the Netherlands with termination notice for BIT*, I.A. REPORTER (May 16, 2008), http://www.iareporter.com/Archive/IAR-05-16-08.pdf (last visited Aug. 5, 2008).

[117] ICSID Convention, Art. 25(2).

[118] *Id.*, Art. 25(1): "When the parties have given their consent, no party may withdraw its consent unilaterally."

[119] *Id.*, Art. 44.

[120] *Id.*, Art. 26.

[121] *Id.*, Art. 27.

brought can give an investor considerable leverage in such talks. Finally, given that the costs of planning are relatively low, and that planning may complement tax or acquisition strategies, this risk-mitigation and perhaps credit-enhancing mechanism merits further consideration by the savvy foreign investor.

This paper provides information and comments on legal issues and developments of general interest. This is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action on the matters discussed in this paper.