A PLAYBOOK FOR INTERNATIONAL RISK MITIGATION: INVESTOR-STATE TREATIES AND CONTRACTUAL PROTECTIONS

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International energy ventures are frequently long-term, costly, and risky endeavours. Because the opportunities they offer are immense, one must go where the resource or prospect is, often in challenging jurisdictions. This can put those looking to pursue opportunities in the difficult position of having to balance commercially lucrative opportunities while mitigating risk and protecting project viability in unfamiliar environments. This challenge is compounded by many recent changes in Canada, and globally, concerning protections available for energy companies (for example in bilateral investment treaties or multilateral investment treaties such as the Energy Charter Treaty) and how traditional protections are applied in a modern context. This article will explore recent developments in investor-state disputes and what those trends mean for companies involved in extractive resources and energy sectors.

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I. INTRODUCTION

International energy companies have, for decades, been able to rely on a fairly stable system of investor-state treaties to protect their rights around the world. Those treaties generally contain protections[1] for investors[2] coupled with a route to bring claims directly against states (investor-state dispute settlement, or ISDS), usually before an international arbitral tribunal. Recently, states have been moving away from what traditionally were unqualified protections for foreign investors in the energy sector, whether in Bilateral Investment Treaties (BIT), Free Trade Agreements with investment protections (FTA) or Host Government Agreements, or even at times under national laws. This coincides with a move toward higher expectations around responsible planning, due diligence, and environmental and human rights compliance by companies in resources and extractive industries.

An even more extreme, yet far from uncommon, occurrence has been the termination of BITs and FTAs.[3] Indeed, BIT terminations have exceeded new signatures for the third year running, and many new BITs being signed do not provide for access to ISDS.[4] Exits from existing multilateral treaties (such as the Energy Charter Treaty)[5] are being made in

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1 As discussed below, these are generally: (1) a right to treatment that is non-discriminatory and the same treatment as nationals of the state ("national treatment"); (2) treatment as good as that provided by the state to nationals of any other third party ("most-favoured nation treatment"); (3) a right to a minimum standard of treatment; (4) a right to full protection and security; (5) a right to freely move funds into and out of the country; and (6) a prohibition against expropriation without compensation: see e.g. *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 at arts 1102–1106 (entered into force 1 January 1994) [*NAFTA*].

2 While the entity benefitting from these treaty protections is frequently referred to as the "investor," that "investor" may be a public or private company, a subsidiary of such a company, an investment fund, an individual entrepreneur, a shareholder, or any entity that meets the definition of "investor" with an "investment" under a treaty: For NAFTA investor qualifications see e.g. Global Affairs Canada, "Trader/Investor," online: [perma.cc/JYJ5-JX4X].

3 We note that the terms BIT and FTA are used interchangeably throughout, unless otherwise indicated.

4 For example, of the 17 international investment agreements signed that year, only two (Hungary–Kyrgyzstan and Japan–Morocco) directly provide for arbitration in investor-state disputes, while others merely include commitments to further negotiate in this respect: United Nations Trade and Development, "Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition" (2023) 2 IIA Issues Note 1 at 1. For example, of the 17 international investment agreements signed that year, only two (Hungary–Kyrgyzstan and Japan–Morocco) directly provide for arbitration in investor-state disputes, while others merely include commitments to further negotiate in this respect (*Agreement Between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments*, 29 September 2020, 2020 évi 268 szám, art 11; *Agreement Between Japan and the Kingdom of Morocco for the Promotion and Protection of Investment*, 8 January 2020, art 16).

5 *The Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 [ECT].

favour of new agreements that are premised on allowing states greater policy and regulatory flexibility (such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[6]) alongside contractual protections in agreements with states and state-owned entities being harder fought (for example, once fairly common, stabilization clauses are in many instances more difficult to obtain and more limited in their scope and effect).[7]

This is not, however, a "doom and gloom" outlook. There are many tools available to those operating internationally to manage and mitigate risk through a combination of contractual and, in particular, treaty protections. The key, as with many things, is careful consideration in advance and routine monitoring as the web of available BITs and FTAs remains in flux. Not only can considered investment structuring provide armor through the protections available in investment treaties, but having the investment structured to take advantage of a treaty offers real opportunities to find a commercial solution before or during a dispute and opportunities to de-risk the dispute if an investor needs to proceed to investor-state arbitration.

In this article, we cover the types of protections generally available to energy companies operating internationally, transactional considerations, and ways to best leverage contractual protections to mitigate future risk, in particular with respect to newer initiatives in critical minerals and technologies developed as part of the energy transition. We will examine both developments in Canada with respect to the treaties impacting Canadian energy and resources companies operating internationally (for example, the CPTPP, and the replacement of the North American Free Trade Agreement (NAFTA) with the Canada-United States-Mexico Agreement).[8] We also discuss the related impacts for international energy companies pursuing opportunities in Canada, in particular those seeking opportunities to invest in newer technologies as part of the energy transition. Next, we canvas recent developments and perspectives from around the world to highlight changes in treaty protections available to energy companies that stakeholders should be aware of over the next few years. Lastly, this article will discuss strategies for addressing a potential dispute while in its early stages based on typical requirements under investor-state treaties.

II. WHAT PROTECTIONS HAVE CROSS-BORDER ENERGY INVESTORS TRADITIONALLY RELIED UPON?

Given the value and duration of their investments, international investors at all points across the energy exploration, development and production chain have long sought to

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6 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Austl, Brunei, Canada, Chile, Japan, Malaysia, Mexico, NZ, Peru, Sing, US, and Viet Nam, 8 March 2018, 3337 UNTS (entered into force 30 December 2018) [*CPTPP*].

7 See e.g. Nicholas A Lawn, Isabel San Martin & Margaux Bergère, "UK Withdrawal from the ECT – What Next for Investors?" (23 February 2024), online: [perma.cc/BVQ9-U5TC]. For a discussion on possible limitations on stabilization clauses, see Evaristus Oshionebo, "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 Asper Rev Int Bus & Trade L 1.

8 *Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020) [*CUSMA*] (also known as the United States–Mexico–Canada Agreement ("USMCA") in the US, and as the Tratado entre México, Estados Unidos y Canadá (T-MEC) in México).

ensure protection for their investments against state interference by alternative means of recourse to the domestic courts of the host state.[9] With the risk of bias, delay and potential unfamiliarity of the domestic legal system (even where there is favourable national legislation regarding foreign investment), this is unsurprising. This sort of interest has been the catalyst of the development of the global ISDS framework.[10]

Traditionally, many of the protections needed have been secured through contract — by way of direct agreements with the host government containing specially negotiated guarantees such as stabilization clauses, selection of a governing law favourable to international commerce, and dispute resolution provisions that ensure efficiency and neutrality. Depending on the circumstances, guarantees around performance requirements, representations or warranties unique to the industry and its regulatory environment, and choosing a neutral seat for the dispute may all be desired. However, given the respective negotiating positions and increasing unwillingness of many host governments to make concessions to international investors where their natural resources are concerned, contractual protections can be (and are increasingly) difficult to secure.[11]

Investors have thus sought alternative means of protection against unexpected political interference. Investment treaties, whether bilateral or multilateral, can provide such protection and have become increasingly prominent over the past few decades, with the number of international investment agreements increasing from just 72 in 1969 to 2,844 in July 2021.[12] The most dramatic increase in BITs took place in the 1990s, with an increase from 385 at the end of the 1980s to a total of 1,857 at the end of the 1990s.[13]

These treaties, which operate as a mechanism of international law, typically contain protections for investors that go beyond what may be contained in domestic laws. For instance, a common provision is a guarantee of "fair and equitable treatment" for investments, which has developed in some jurisprudence into a multi-faceted standard ensuring that where a state has engendered "legitimate expectations" those are respected, and that a stable and predictable investment environment is created (without for instance unexpected or arbitrarily applied legislative developments in the investor's sector).[14] Most investment treaties prohibit discriminatory treatment by the state, and many guarantee that foreign investors enjoy the same status and benefits as the host state's nationals.[15] A large number of treaties also contain so-called "umbrella" clauses which have the effect of elevating breaches of contract by the host state to treaty breaches — a powerful mechanism

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9 See generally Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25:1 Intl Rev L & Econ 107.

10 Akinwumi Ogunranti, "Between the Devil and the Deep Blue Sea: Towards Access to Justice for Local Communities in Investor-State Arbitration or Business and Human Rights Arbitration" (2022) 59:3 Osgoode Hall LJ 707 at 720.

11 Matthias Herdegen, "Concessions and Investment: Agreements between States and Foreign Companies," in Matthias Herdegen, *Principles of International Economic Law*, 3rd ed (Oxford: Oxford University Press, 2024) 453.

12 United Nations Human Rights Office of the High Commissioner, "Reforming International Investment Agreements" (2022), online (pdf): [perma.cc/R3BZ-HXLL].

13 United Nations Trade & Development, Press Release, TAD/INF/PR/077, "Bilateral Investment Treaties Quintupled During the 1990s" (15 December 2000), online: [perma.cc/9AM4-ZQWJ].

14 See e.g. *Silver Ridge Power BV v Italian Republic* (2021), ICSID at paras 390, 423 (International Centre for Settlement of Investment Disputes) (Arbitrators: Bruno Simma J, O Thomas Johnson J, Bernando M Cremades) [*Silver Ridge*].

15 See e.g. *NAFTA*, *supra* note 1, arts 1102–106.

for widening access to ISDS in circumstances where recourse may otherwise only be to the host state's courts.[16]

Political risk insurance has provided another route to compensation for energy investors who find themselves without other options. However, such policies frequently contain limitations on the scope of political risks covered (short of outright expropriation), and on the sums recoverable.

The value of investment structuring and planning is tangible. To examine a brief hypothetical, Resources Co. is a Canadian entity, with investments globally in exploration and production (through joint ventures and subsidiaries), including in a large project in "Resource Rich State A." Resources Co. took investment treaty structuring advice at the time of its investment, is aware there is a BIT between Canada and Resource Rich State A, and structured its investment so that it could benefit from the treaty's protections. Over a number of years, the government of Resource Rich State A takes a series of measures including imposing retrospective taxes, requirements to increase spending in the local community, and changes in the regulatory regime that make Resources Co.'s operations substantially more difficult and expensive, resulting in a near complete loss of the investment's value. Resources Co. is able to commence an ISDS claim under the BIT, in which it succeeds. It adduces expert evidence in the arbitration as to the value of its investment prior to the expropriatory measures using a discounted cash flow model, to which the tribunal has regard, resulting in an award of damages at or near the total expected lifetime revenue of the investment of approximately US$500 million.

Consider, by contrast, the scenario in which Resources Co. invests in Resource Rich State B, which has signed a BIT with Canada, but that treaty has never entered into force. If it suffered those same expropriatory measures, Resources Co. would (depending on domestic laws) likely have the option of bringing a claim in the host state's courts, but this may be unattractive for the reasons discussed above. It might have taken out political risk insurance but may well find the level of damages is limited (for instance, to a percentage of the initial investment or "sunk costs"), leaving Resources Co. to bear a proportion of the lost investment itself and inadequately compensating for future losses. Its position would therefore be markedly different — likely to the tune of hundreds of millions of dollars less in compensation — than the first situation where it enjoyed BIT protection. Resources Co. would have no recourse to ISDS unless it had: (1) specifically provided for this in an agreement with the host government (which is extremely rare); or (2) structured its investment by way of an intermediary third state which did have a BIT in force with Resource Rich State B.

Integrating structuring advice, alongside tax and corporate considerations, is critical to safeguard the expenditures made by entities operating in the energy space. This is particularly so when operating in newer technology or critical minerals exploration and production where the local economy in any one state may be highly regulated and

[16] See e.g. *SGS Société Générale de Surveillance SA v Republic of the Philippines* (2004), 8 ICSID Rep 518 at paras 115–32 (International Centre for Settlement of Investment Disputes) (Arbitrators: Dr Ahmed S El-Kosheri, Antonio Crivellaro, James Crawford) (dealing with an umbrella clause in a bilateral Agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments).

politicized. The regulatory environment in these areas is frequently developing and may be struggling to keep pace with the technologies. Additionally, changes in regulation are perhaps more frequent, and the attractiveness of investing may be based on political motivations that are subject to changes in government.

III. RECENT DEVELOPMENTS IN CANADA

Canada has pursued investor-state protections through BITs — officially called Foreign Investment Promotion and Protection Agreements (FIPAs) — and FTAs with investment protections since the early 1990s.[17] Currently, Canada is a party to 15 FTAs and 38 FIPAs that are in force.[18] There are many more in various stages of negotiation.[19] These agreements, combined with the BITs and FTAs entered into between other countries, create a spiderweb of coverage around the world that companies operating internationally can leverage. One of the most well-known examples of an FTA with investment protections was NAFTA, which contained investor-state protections as between Canada, the US, and Mexico.[20]

When NAFTA first came into force, few were aware of the investment chapter or the effect the processes therein could have on public policy.[21] Once discovered, investors began to take advantage of their ability to apply for relief directly against a foreign state in their own name.[22] This led to many significant investor-state claims between investors in North America and the states in which they were investing that are relevant to the energy and resources industries.[23]

For example, in *Mobil Investments Canada Inc. v. Canada*, Mobil Investments Canada Inc. (Mobil) and Murphy Oil Corporation (Murphy), both incorporated in the United States, submitted a claim under NAFTA against the Government of Canada, regarding certain guidelines imposed for offshore petroleum projects in Newfoundland and Labrador (the Guidelines).[24] Murphy and Mobil took issue with portions of the Guidelines which required their offshore projects to contribute a percentage of their revenue toward research and development in Newfoundland and Labrador as part of the authorization process.[25] In particular, Murphy and Mobil argued the Guidelines breached NAFTA articles 1106 and 1105, which prohibited performance requirements and prescribed a minimum standard of treatment, respectively.[26] The Tribunal found the Guidelines violated NAFTA article 1106,

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17 The first FIPA Canada entered into was the *Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 5 November 1991, Can TS 1993 No 11.

18 Government of Canada, "Trade and Investment Agreements," online: [perma.cc/7F2H-BDH9].

19 *Ibid*.

20 *NAFTA*, *supra* note 1.

21 Scott Sinclair, *The Rise and Demise of NAFTA Chapter 11* (Ottawa: Canadian Centre for Policy Alternatives, 2021) at 6.

22 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (New York: Oxford University Press, 2009) at 64.

23 *Ibid* at 65.

24 *Mobil Investments Canada Inc v Canada* (2012), ICSID at para 1 (International Centre for Settlement of Investment Disputes) (Arbitrators: Hans van Houtte, Merit E Janow, Philippe Sands) [*Mobil Investments* 2012]; Global Affairs Canada, "Mobil Investments Inc. and Murphy Oil Corporation v Government of Canada" (19 December 2017), online: [perma.cc/8ZVB-ZED7].

25 *Mobil Investments* 2012, *ibid* at para 100.

26 *Ibid* at para 1.

and at the damages hearing awarded CDN$13.8 million to Mobil, and CDN$3.4 million to Murphy for the period of 2004 to 2012.[27] Mobil subsequently brought a further claim against the Government of Canada for damages incurred in relation to the Guidelines from 2012 to 2015.[28] Ultimately, a consent award was issued for this latter claim, providing a credit of CDN$35 million to Mobil's Canadian subsidiary to apply against the Guidelines' research and development requirements.[29]

In *Windstream Energy LLC v. Canada*, Windstream Energy LLC (Windstream), a company incorporated in the US, submitted a claim under NAFTA against the Government of Canada with respect to an offshore wind electricity generation project in Ontario.[30] Windstream was awarded a contract to develop an offshore wind energy facility, but claimed the Government of Ontario's actions, which delayed approval of the required permits and authorizations and eventually placed a moratorium on the development of offshore wind in order to conduct further scientific research, breached NAFTA protections on expropriation without compensation, minimum standard of treatment, national treatment, and most-favoured nation treatment.[31] The Tribunal found the Government of Canada breached the minimum standard of treatment, and awarded Windstream CDN$25 million in damages and CDN$2.9 million in costs.[32]

In *Bilcon of Delaware v. Canada*, a dispute arose between Bilcon of Delaware Inc. (Bilcon), a company incorporated in the US, and several individual investors (collectively with Bilcon, the Investors) regarding the Investors' proposed operation of a quarry and marine terminal in Nova Scotia (the Project).[33] The Project was ultimately rejected when a Joint Review Panel found there would be significant adverse environmental effects on "community core values" such that the Project did not pass a necessary environmental assessment.[34] As a result, the Investors submitted a claim under NAFTA, alleging the Government of Canada's actions breached its NAFTA obligations on national treatment, most-favoured nation treatment, and minimum standard of treatment.[35] The Tribunal concluded the Government of Canada breached its national treatment and minimum standard of treatment obligations and awarded US$7 million plus interest, not for denying

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27 *Ibid* at para 490; *Mobil Investments Canada Inc v Canada* (2015), ICSID at para 178 (International Centre for Settlement of Investment Disputes) (Arbitrators: Hans van Houtte, Merit E Janow, Philippe Sands) [*Mobil Investments* 2015].

28 *Mobil Investments* 2015, *ibid* at paras 4–5.

29 *Mobil Investments Canada Inc v Canada* (2020), ICSID at 6 (International Centre for Settlement of Investment Disputes) (Arbitrators: Dr Gavan Griffith, William Rowley) (Award).

30 *Windstream Energy LLC v Canada* (2016), PCA at paras 2, 5 (Permanent Court of Arbitration) (Arbitrators: Dr Veijo Heskanen, R Doak Bishop, Dr Bernardo Cremades).

31 *Ibid* at paras 5–7.

32 *Ibid* at para 515. A second, and related, claim was recently submitted by Windstream in 2020 (Global Affairs Canada, "Windstream Energy LLC v Government of Canada (II)," online: [perma.cc/MD82-Z43T]).

33 *Bilcon of Delaware v Canada* (2015), PCA at para 5 (Permanent Court of Arbitration) (Arbitrators: Bruno Summa J, Donald McRae, Bryan Schwartz) [*Bilcon of Delaware*].

34 Global Affairs Canada, "Clayton/Bilcon v Government of Canada" (24 May 2023), online: [perma.cc/BR5W-989F].

35 *Bilcon of Delaware*, *supra* note 33 at paras 5, 11, 109.

the Project but for denying the opportunity to have a fair and non-arbitrary environmental assessment.[36]

To provide two further examples in ongoing claims,[37] Silver Bull Resources (Silver Bull) recently announced it has submitted a claim under NAFTA against Mexico, seeking approximately US$178 million in damages it alleges it has suffered due to "Mexico's unlawful expropriation and other unlawful treatment of Silver Bull and its investments resulting from the illegal blockade of Silver Bull's Sierra Mojada project."[38] As of February 2024 a tribunal has been appointed, with the arbitration hearing to begin in October 2025.[39] In *First Majestic Silver Corp. v. Government of United Mexican States*, First Majestic Silver Corp. (First Majestic), a Canadian mining company, submitted a claim under NAFTA against Mexico for the Government's actions with respect to a tax dispute between the two parties.[40] First Majestic's allegations include reference to articles 1102 (national treatment), 1103 (most-favoured-nation treatment), 1104 (standard of treatment), 1105 (minimum standard of treatment), 1109 (transfers), and 1110 (expropriation and compensation).[41] This claim is ongoing.[42]

The above are examples of where investors have been able to utilize the ISDS regime to their benefit; because the investments were structured correctly, they were able to bring a claim under a treaty and had the benefit of the protections thereunder, such as neutrality, speed and efficiencies of ISDS as a dispute resolution mechanism. This can be contrasted with the recent scenario in *Koch Industries, Inc. v. Canada*, where the Tribunal found that it did not have jurisdiction over the claims (alleged losses in the form of the price of emission allowances obtained at an auction as a result of the Province of Ontario cancelling a cap and trade program).[43] Specifically, the Tribunal found the type of investment, the emission allowances, were not on their particular facts sufficient to meet the requirement of being "interests," which are included in the definition of "investment" under NAFTA.[44] The Tribunal found it did not have jurisdiction to hear the dispute.[45]

Importantly, while the general standards and protections offered between treaties are similar, there are unique and, at times, critical differences. These differences can impact the definition of and what is required for one to qualify as an "investor" and leverage treaty

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36 *Ibid* at para 742. This was lower than the US$443,350,772.00 claimed. The investors have applied to set aside this award on damages and is currently under appeal (*Clayton v Attorney General of Canada*, 2022 ONSC 6583).

37 Submitted under the "sunset period," discussed in further detail below.

38 Tim Barry, "Silver Bull Announces Filing of Request for Arbitration with International Centre for settlement of Investment Disputes," *GlobeNewswire* (29 June 2023), online: [perma.cc/3PHY-3TJH].

39 Silver Bull Resources Ltd, News Release, "Silver Bull Provides Update on Its Arbitration Claim Against Mexico" (27 February 2024), online: [perma.cc/5PFY-AG72].

40 *First Majestic Silver Corp v Mexico* (2021), ICSID at paras 1, 11, 20, 87 (International Centre for Settlement of Investment Disputes).

41 *Ibid* at para 88.

42 *First Majestic Silver Corp v Mexico* (2021), ICSID (International Centre for Settlement of Investment Disputes) (Revised Procedural Calendar as of 21 July 2023), online (pdf): [perma.cc/S6SH-5DRH].

43 *Koch Industries, Inc v Canada* (2024), ICSID at para 2 (International Centre for Settlement of Investment Disputes) (Arbitrators: Andrea K Bjorklund, Henri C Alvarez, Eduardo Zuleta).

44 *Ibid* at para 354.

45 *Ibid* at paras 417–18.

protections,[46] what exact protections are offered,[47] and whether the host state has carved out from the treaty's application specific industries, sectors, or issues.[48] While some differences may be regional, or specific to approaches of different countries, it is possible for there to be variation in approaches by the same country based on when the treaty is concluded. This underscores the need for investment structuring, as rarely will any two situations (investments and applicable treaties) be exactly the same.

A. NEW "MODERN" TREATIES

In addition to the usual variation between treaties, newer agreements concluded between countries, or "modern" treaties, tend to contain greater differences in how specific protections are articulated. For example, in 2021 Canada updated its Foreign Investment Promotion and Protection Agreement Model (Model FIPA) — the template text for negotiations of future BITs.[49] Some key differences encouraged by this new model are the removal of reference to "fair and equitable treatment" in favour of an obligation to provide a "minimum standard of treatment," clarifications that the obligation to provide "national treatment" applies only as between the same levels of government, and greater emphasis on early dispute resolution.[50] These changes are motivated by Canada's desire to have a greater ability to regulate areas that it views important at present and into the future.[51] What is relevant for Canadian investors is the resulting difference between what is contained in more traditional treaties, the language promulgated by Canada's Model FIPA along with newer BITs around the globe, and certain other high-profile agreements that Canada has recently entered into. These are discussed below.

B. CANADA-UNITED STATES-MEXICO AGREEMENT

On 18 May 2017, the Trump Administration notified the US Congress of its intention to renegotiate NAFTA to support higher paying jobs in the US and grow its economy.[52] The Trump Administration noted NAFTA was negotiated 25 years prior, and contained

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[46] For example, in *Gold Reserve Inc v Venezuela*, [2016] EWHC 153 (Comm) at paras 30–40 (UKHCJ), it was stated that the definition of "investor," in a BIT between Venezuela and Canada, was to be ascertained in its context and having regard to the object and purpose of the BIT. In doing so, the High Court of Justice of England and Wales focused on the term's reference to, and definition of, "investment," and particularly, what it meant to "make the investment."

[47] In *Silver Ridge*, *supra* note 14 at paras 390, 423, the Tribunal held that, with respect to the article under the Energy Charter Treaty obligating a state to grant foreign investors fair and equitable treatment, specific commitments by a state may give rise to legitimate expectations of investors (which are then protected under the fair and equitable treatment standard) and in the absence of such commitments, investors are still protected from fundamental or radical modifications to the legal framework their investment was made within.

[48] Generally, treaty exceptions were designed with a focus on exempting host-state liability for justifiable measures seeking public welfare objectives. Examples of such clauses may include: (1) general public policy exceptions; (2) security exceptions; and (3) carve-outs, among others (Bakry Ahmed, "Treaty exclusions" (26 February 2024), online: [perma.cc/C7E9-THNQ]).

[49] Government of Canada, "Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model," online: [perma.cc/5476-P63R].

[50] Global Affairs Canada, *2021 Model FIPA* (Ottawa: Global Affairs, 2021), online: [perma.cc/EU6W-QFC4] [*2021 Model FIPA*].

[51] Government of Canada, "2021 FIPA model — Summary of Main Changes," online: [perma.cc/U8MD-PVLD].

[52] Letter from Robert E Lighthizer to Charles E Schumer (18 May 2017), online (pdf): [perma.cc/8NVL-5XGZ].

outdated chapters that did not reflect modern standards.[53] As a result, seven rounds of renegotiations commenced between Canada, the US, and Mexico, from August 2017 until September 2018.[54] Although the parties ultimately reached an agreement in September 2018 in the form of CUSMA, the US and Mexico had reached a proposed bilateral agreement just one month prior which would have excluded Canada entirely.[55]

As set out in article 14.2 of CUSMA, investors may only submit CUSMA claims under three Annexes:

1. Annex 14-C (Legacy Investment Claims and Pending Claims);

2. Annex 14-D (Mexico-United States Investment Disputes); or

3. Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).[56]

Under Annex 14-C, investors were allowed to bring certain claims under the legacy provisions of NAFTA up to three years after NAFTA's termination, so long as those claims related to investments established or acquired while NAFTA was in force and that were in existence on the date of CUSMA's entry into force.[57] This interim period was commonly referred to as the "sunset period,"[58] which expired at the end of June 2023, and as a result, legacy claims can no longer be initiated.[59] However, for those legacy claims initiated before the sunset period's expiration, arbitrations may still proceed to their conclusion, and the Tribunal's jurisdiction is not affected by the sunset period or NAFTA's termination.[60]

While claims may still be brought under Annex 14-D and 14-E, neither of these apply to the Government of Canada or Canadian investors. As a result, the termination of NAFTA and the expiration of the sunset period means investor-state claims can no longer be brought by Canadian companies or against Canada under CUSMA.[61] In contrast, both the US and Mexico continue to enjoy the respective foreign investment protections afforded under

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53 *Ibid*.

54 Foreign Trade Information System, "Renegotiation of the Agreement," online: [perma.cc/JDG5-EGAD].

55 Global Affairs Canada, Statement, "Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland" (30 September 2018), online: [perma.cc/9LJP-97X6]; Ana Swanson, Katie Rogers & Alan Rappeport, "Trump Reaches Revised Trade Deal With Mexico, Threatening to Leave Out Canada," *The New York Times* (27 August 2018), online: [perma.cc/VDR9-B8YW].

56 *CUSMA*, *supra* note 8, art 14.2(4).

57 "Legacy investment" is defined as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement" (*ibid* at Annex 14-C(6)(a)); Government of Canada, "Canada-United States-Mexico Agreement — Canadian Statement on Implementation," art 14.2, online: [perma.cc/PHC6-G8HE] [Government of Canada, "Canadian Statement on Implementation"].

58 Robert Li, "NAFTA Deadline Looming" (22 March 2023), online: [perma.cc/NMG4-GBRP].

59 *CUSMA*, *supra* note 8 at Annex 14-C(3).

60 *Ibid* at Annex 14-C(4)–(5); Government of Canada, "Canadian Statement on Implementation," *supra* note 57, art 14.2.

61 Government of Canada, "CUSMA Dispute Settlement," online: [perma.cc/3BXF-2YUF].

Annexes 14-D and 14-E.[62] The end of the sunset period under NAFTA, with only the protections of CUSMA going forward, eliminates the potential for investor-state claims between investors of either Canada or the US into the other country, unless there is some other agreement that applies to those investments.

C. COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP

The CPTPP is a free trade agreement in force between Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[63] On 30 December 2018, the CPTPP entered into force for Canada, Australia, Japan, Mexico, New Zealand, and Singapore, with the remaining signatories following between 2019 to 2023.[64]

On 16 July 2023, the United Kingdom officially signed an accession protocol; article 5 of the CPTPP allows for any state or "separate customs territory" to accede to the agreement.[65] As a result, the UK will be the twelfth party to the CPTPP, with its Government expecting entry into force to occur sometime in the second half of 2024.[66] As of July 2023, six other countries have also submitted formal requests for accession consideration.[67]

Chapter 9 of the CPTPP sets out the investment protections under the treaty and investor-state arbitration regime.[68] Within Chapter 9, various investment protections are set out for investors of parties to the CPTPP and their covered investments.[69] Investors under the CPTPP include a party, or a national or enterprise of a party, that attempts to make, is making, or has made, an investment in the territory of another party.[70] An "investment" under the CPTPP is similarly broad, encompassing "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[71]

Investments which satisfy this definition, and which were in existence as of the CPTPP's date of entry into force or were established, acquired, or expanded thereafter, will

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62 For example, investors in the US and Mexico continue to enjoy protections in the form of national treatment, most-favoured-nation treatment, and no expropriation without compensation under Article 14.D.3(1) against each other.

63 *CPTPP*, *supra* note 6; Government of Canada, "CPTPP Explained," online: [perma.cc/RWK5-GZ6V].

64 Government of Canada, "View the Timeline," online: [perma.cc/4NU2-P79Z] [Government of Canada, "View the Timeline"].

65 *CPTPP*, *supra* note 6, art 5; Department for Business and Trade, Statement, "UK signs Accession Protocol to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (17 July 2023), online: [perma.cc/F2KK-T8WR].

66 Department for Business and Trade & Department for International Trade (UK), "The UK and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)" (31 March 2023), online: [perma.cc/6ABW-ZXC6].

67 Government of Canada, "View the Timeline," *supra* note 64. Note: the six other countries who have submitted formal requests for accession consideration between 2021 and July 2023 include: (1) Taiwan; (2) China; (3) Ecuador; (4) Costa Rica; (5) Uruguay; and (6) Ukraine.

68 *CPTPP*, *supra* note 6.

69 *Ibid*, art 9.2(1).

70 *Ibid*, art 9.1 (defines "investor of a Party").

71 *Ibid*, art 9.1 (defines "investment"); Lars Markert & Shimpei Ishido, "The Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (15 June 2022), online: [perma.cc/8W2T-73EP].

be covered (referred to in the CPTPP as "covered investments").[72] While appearing broad, this is counterbalanced by CPTPP parties' right to deny the investment protections under Chapter 9 to investors or their investments.[73] Specifically, article 9.15 allows a party to the CPTPP to deny the benefits of Chapter 9 to an investor of another party that is an enterprise of that other party and to investments of that investor in certain situations.[74]

Once an investor, and their investment, satisfy the definition requirements in the CPTPP, protections are afforded to them, which include: (1) protections against discrimination (through national treatment and most-favoured nation treatment);[75] (2) a prescribed minimum standard of treatment in accordance with the customary international law minimum standard of treatment of aliens for covered investments;[76] (3) a prohibition on expropriation or nationalisation on covered investments not for a public purpose, without due process and compensation;[77] and (4) prohibitions on imposing certain performance requirements, among others.[78] Additionally, the CPTPP provides for an ISDS process.[79]

While Chapter 9 sets out the above noted protections, which include an arbitration regime for ISDS, parties to the CPTPP have suspended the operation of several provisions through side letters.[80] Although Canada is not a party to any of the side letters, it has made a "Joint Declaration on Investor State Dispute Settlement" with New Zealand and Chile, where those parties indicated their intention to implement the procedure set out in Chapter 9.[81] This Joint Declaration includes a caveat that the parties "[i]ntend to consider evolving international practice and the evolution of ISDS including through the work carried out by multilateral international fora."[82]

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72 *Ibid*, art 9.1 (defines "covered investment").

73 Markert & Ishido, *supra* note 71.

74 *CPTPP*, *supra* note 6, arts 9.15(1)–(2) (where "the enterprise: (a) is owned or controlled by a person or a non-Party or of the denying Party; and (b) has no substantial business activities in the territory of any Party other than the denying Party" or "persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of [Chapter 9] were accorded to the enterprise or to its investments").

75 *Ibid*, arts 9.4–9.5. Note: the most-favoured nation treatment provision does not encompass international dispute resolution procedures or mechanisms, such as those included in section B (Investor-State Dispute Settlement).

76 *Ibid*, arts 9.6, 9.8. Note: the concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond what is required by this standard, nor do they create additional substantive rights (Government of Canada, "How to Read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)," at 9, online: [perma.cc/G2WY-TANP]).

77 *Ibid*, art 9.8.

78 *Ibid*, art 9.10.

79 *Ibid* at ch 9, s B.

80 See e.g. the side letter between New Zealand and Australia which prohibits ISDS under Chapter 9 Section B by New Zealand investors: Letter from David Parker to Steven Ciobo (8 March 2018), online (pdf): [perma.cc/K7CV-CJM8].

81 Government of Canada, Statement, "Joint Declaration on Investor State Dispute Settlement" (2 March 2018), online: [perma.cc/QMK6-MTMN].

82 *Ibid*.

D. CANADA-EUROPEAN COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

The Canada-European Comprehensive Economic Trade Agreement (CETA)[83] is a bilateral free trade agreement between Canada and the European Union that aims to eliminate or reduce barriers to trade.[84] CETA removes 99 percent of customs and duties between the EU and Canada and includes provisions related to investment protection, the establishment of a tribunal to hear ISDS disputes thereunder, an appellate tribunal, the relationship between these tribunals, and how CETA will interact with domestic law.[85]

The finalization of CETA has been time-consuming, not without difficulty, and its full entry into force remains uncertain. In 2013, Canada and the EU announced an agreement in principle.[86] The complete text of the Canada-EU Trade Agreement was announced and later published in September 2014.[87] Two years later, Canada and the EU signed the trade agreement during the EU-Canada Summit.[88] In July 2016, the EU referred CETA to the EU Council with a proposal for its approval and signature.[89] In October of that same year, Canada and the EU signed off on CETA during the EU-Canada Summit.[90] A year later, CETA entered into force provisionally. Finally, in September 2018, the inaugural CETA Joint Committee meeting occurred in Montreal, Canada.[91]

While provisional acceptance of CETA between Canada and the EU occurred in September 2017, certain provisions about investor-state disputes and investment protections were not provisionally applied due to legal complications.[92] These provisions were subject to requests for review by the Court of Justice of the European Union which ultimately found no issue with the text of the agreement.[93] Ten remaining EU member states have not yet ratified CETA: (1) Belgium; (2) Bulgaria; (3) Cyprus; (4) France; (5) Greece;

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83 Canada and EU, (a final signed text is expected after completion of the Parties' internal processes). Government of Canada, "Text of the Comprehensive Economic and Trade Agreement," online: [perma.cc/X426-N7QB] [CETA].

84 Government of Canada, "Learn about CETA Benefits for Businesses," online: [perma.cc/M5WX-839W].

85 Xavier Van Overmeire, "Dentons Lawyers Shed Light on Comprehensive Economic and Trade Agreement Between Canada and the European Union" (29 March 2016), online: [perma.cc/3ZZH-8FZ6]; European Commission, Press Release, "CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement" (28 February 2016), online (pdf): [perma.cc/C3VH-GTQ9].

86 Government of Canada, "View the Timeline," online: [perma.cc/AQ4Q-FD5U] [Government of Canada, "View the Timeline"]. Prior to this, CETA was first ideated in June 2007 at the EU-Canada Summit in Berlin, Germany. At this summit, Canadian and EU leaders agreed to conduct a joint study to examine the costs and benefits of pursuing a closer economic relationship. In 2008, Canada and the EU published a joint study titled "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership" (Global Affairs Canada, "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership," online: [perma.cc/8M93-B7PE]). Later that year, notice was published in the Canada Gazette seeking input from Canadians on the possibility of a European-Canadian trade agreement. In 2009, Canada and the EU announced the launch of trade negotiations at the Canada-EU Summit in Prague, Czechia. Negotiations continued until 2011, when nine formal rounds of negotiations were completed.

87 Government of Canada, "View the Timeline," *ibid*.

88 *Ibid*.

89 *Ibid*.

90 *Ibid*.

91 *Ibid*.

92 Anna Crevon-Tarassova et al, "Investment Court Clears Key Legal Hurdle with Court of Justice of the European Union (CJEU) Opinion 1/17" (6 June 2019), online: [perma.cc/WB8V-TCQZ].

93 *Ibid*.

(6) Hungary; (7) Ireland; (8) Italy; (9) Poland; and (10) Slovenia.[94] Further, the French Senate recently voted not to ratify these provisions and did so with a large majority,[95] and in November 2022, the Irish Supreme Court held the proposed ratification of CETA was unconstitutional because ISDS provisions would compromise judicial sovereignty in Ireland (but that amendments to the *Irish Arbitration Act* would enable ratification).[96] The Irish Government has indicated it will introduce those legislative changes,[97] but such developments are demonstrative of the likely delays and obstacles to full ratification of the treaty, raising questions around whether the investment protections will ever enter into force.

E. PROTECTIONS IN CANADA'S INVESTMENT TREATIES

Canada's more traditional FIPAs with various nations often mirror or quite closely resemble one another. This is particularly true where the trade relationship appears to revolve around natural resources and when looking at FIPAs negotiated at similar times. For example, the Canada-Senegal FIPA and the Peru-Canada FIPA are very similar to that of the Canada-Côte d'Ivoire FIPA.[98]

The Canada-Côte d'Ivoire FIPA, "Agreement Between the Government of Canada and the Government of the Republic of Côte d'Ivoire for the Promotion and Protection of Investments,"[99] aims to promote and protect investments between Canada and Côte d'Ivoire through the cultivation of economic co-operation and sustainable development.[100] This agreement contains familiar investment provisions between the nations and obligations for how investors from the other nation must be treated. Specifically, article 4 obligates each party to treat investors from the other nation no less favourably than its own investors.[101] Article 5 obligates each party to treat investors from the other nation no less favourably than investors from any other nation.[102] Similarly, article 4 obligates the same treatment for the investments themselves, as does article 5.[103] In addition to these two articles, article 6 sets out that each party must treat investments "in accordance with the customary international law minimum standard of treatment of aliens, including fair and

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94 European Council, "Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part," online: [perma.cc/68CL-LR2B] [European Council, "CETA"].

95 Hugo Struna, "French Senate Rejects EU-Canada Free Trade Deal" (21 March 2024), online: [perma.cc/TU4G-65D4].

96 *Costello v Ireland*, [2022] IESC 44 (Ireland).

97 Pat Leahy & Tim O-Brien, "Coalition Expected to Ratify EU-Canada Trade Deal in New Year," *The Irish Times* (14 November 2022), online: [perma.cc/L76X-EEEZ].

98 *Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments*, 27 November 2014, E105438, online: [perma.cc/PNL4-ARAK]; *Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, 14 November 2006, Can TS 2007/10; *Agreement between the Government of Canada and the Government of the Republic of Côte d'Ivoire for the Promotion and Protection of Investments*, 30 November 2014, Can TS 2015/19 [*Canada-Côte d'Ivoire FIPA*].

99 *Canada-Côte d'Ivoire FIPA*, *ibid*.

100 *Ibid* at 1.

101 *Ibid*, art 4(1).

102 *Ibid*, art 5(1).

103 *Ibid*, arts 4(2), 5(2).

equitable treatment and full protection and security."[104] Additionally, article 7 sets out the compensation for losses requirement, which states that each party shall treat investors and investments from the other nation no less favourably than it would, in like circumstances, its own or any non-party's investors or investments concerning "measures it adopts or maintains relating to compensation for losses incurred by investments in its territory as a result of armed conflict, civil strife or natural disaster."[105] The agreement also sets out guidelines for expropriating an investment and the corresponding process for compensation.[106] Further, it mandates that each party shall permit all transfers related to a covered investment to be made freely and without delay (unless they are subject to bankruptcy or criminal offences).[107]

Some of this language, which was standard in Canadian FIPAs, is different from what is set out under Canada's new Model FIPA and recent treaties. One of the key developments that came with Canada's Model FIPA is the codification of the right of each party to regulate within its territory to achieve legitimate policy objectives.[108] This update from previous iterations more closely mirrors language in the CETA and CPTPP.[109] Another difference is the way that Canada's Model FIPA approaches the minimum standard of treatment protection. In contrast to what is in the Canada-Côte d'Ivoire FIPA, article 8 of the Model FIPA sets out the minimum standard of treatment without any reference to "fair and equitable treatment," and further delineates a list of what constitutes a breach of the minimum standard of treatment.[110] There are further differences in how CETA and CPTPP have approached the minimum standard of treatment.[111] On the more modern treaty side, in addition to some differences in language around the protections offered, both CPTPP and CETA have key differences that are important to highlight.

The first of these is that CETA's investment protection provisions (if implemented)[112] refer disputes to a relatively novel investor-state court system.[113] In contrast, disputes under the CPTPP would proceed to traditional investor-state arbitration.[114] Another difference lies in the fact that CPTPP sets out consultation and negotiation as mechanisms that must be utilized prior to entering an arbitration.[115] In comparison, CETA merely suggests that consultation and negotiation should be part of attempting to resolve disputes amicably.[116] The concept of attempting to settle a dispute, formally or informally, before advancing

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104 *Ibid*, art 6(1). Article 6 notes expressly that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' … do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens" (*ibid*, art 6(2)).

105 *Ibid*, art 7(1).

106 *Ibid*, art 10.

107 *Ibid*, art 11.

108 *2021 Model FIPA*, *supra* note 50, art 3.

109 *Ibid*; CETA, *supra* note 83 at Preamble; *CPTPP*, *supra* note 6 at Preamble.

110 Specifically: "(a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs; (e) abusive treatment of investors, such as physical coercion, duress and harassment; or (f) a failure to provide full protection and security" (*ibid*, art 8).

111 CETA, *supra* note 83, art 8.10; *CPTPP*, *supra* note 6, art 9.6.

112 European Council, "CETA," *supra* note 94.

113 CETA, *supra* note 83, arts 8.27, 8.28.

114 *CPTPP*, *supra* note 6 at ch 9, s B; Government of Canada, "About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership," online: [perma.cc/FR26-L8ZN].

115 *CPTPP*, *supra* note 6, art 9.18.

116 CETA, *supra* note 83, art 8.19.

proceedings is not new, but in the resources context it can add a unique issue of timing. Specifically, whether the additional time could assist in additional changes that assist the parties in reaching a commercial resolution, potentially shoring up funding for the dispute, and whether it will assist with assessing potential damages (in particular, where a project is in its early stages).

The unique nuances among treaties require individual assessment in any structuring review. It may also be possible, or desirable, in some situations to structure an investment so that it is covered by more than one treaty. To examine a brief hypothetical, let's return to Resources Co., a Canadian entity, with investments globally in exploration and production (through joint ventures and subsidiaries), including in a large project in Resource Rich State A. Not only is there a BIT between Canada and Resource Rich State A, Resource Rich State A is also a party to the CPTPP. Resources Co. structured its investment so that it could benefit from the protections in both the BIT and the CPTPP.

Over a number of years, the government of Resource Rich State A takes a series of measures including imposing retrospective taxes, requirements to increase spending in the local community, and changes in the regulatory regime that make Resources Co.'s operations substantially more difficult and expensive, resulting in a near complete loss of the investment's value. The BIT and CPTPP contain different language with respect to the minimum standard of treatment. This opens up the possibility for Resources Co. to successfully argue a breach of protections under one treaty, but not the other.

Taking this one step further, assume at the outset of the investment that Resources Co. learns that under the CPTPP, Resource Rich State A exempted the industry or resource at issue from treaty protection, effectively removing the possibility of an investor-state claim under that treaty. The BIT contains some helpful language, but Resources Co. would still like options. Resources Co. then learns during the structuring inquiry that a state in which it has a subsidiary, which could be the entity to make the investment, is party to both a BIT and an FTA with Resources Rich State A. This adds an additional layer to the inquiry into whether that second BIT and FTA could provide advantageous treaty protections.

IV. INTERNATIONAL DEVELOPMENTS AND THEIR IMPACTS FOR CANADIAN INVESTORS

A. QUALIFIED PROTECTIONS IN NEWER BITS

We have seen a number of recent BITs signed by Canada qualify the protections it provides to investors, particularly in areas concerning national security and environmental, social, and governance (ESG) issues. For example, in September 2023, Canada signed the Canada-Ukraine Modernized FTA.[117] This Modernized FTA has not entered into force yet, but it, alongside the Model FIPA, gives an indication of how Canada aims to approach investment protections going forward. Article 17.15 of the Modernized FTA provides:

> 1. The Parties reaffirm that investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, the rights of

[117] *Canada-Ukraine Free Trade Agreement*, 22 September 2023, CTS 2024/16, online: [perma.cc/LRX6-7CTC].

> Indigenous peoples, gender equality, environmental protection, labour, anti-corruption, and taxation.
>
> 2. Each Party reaffirms the importance of internationally recognized standards, guidelines, and principles of responsible business conduct that have been endorsed or are supported by that Party, including the OECD *Guidelines for Multinational Enterprises* and the United Nations *Guiding Principles on Business and Human Rights*, and shall encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards, guidelines, and principles into their business practices and internal policies. These standards, guidelines, and principles address areas such as labour, environment, gender equality, human rights, community relations, and anti-corruption.
> 3. Each Party should encourage investors or enterprises operating within its territory to undertake and maintain meaningful engagement and dialogue, in accordance with international responsible business conduct standards, guidelines, and principles that have been endorsed or are supported by that Party, with Indigenous peoples and local communities.[118]

Similarly, article 17.18(2) states that National Treatment and Most-Favored Nation protections do not apply to measures related to activities set out in Annex 17-A.[119] Annex 17-A then excludes from ISDS procedures any "measure adopted or maintained relating to a review under the *Investment Canada Act* … with respect to whether or not to permit an investment that is subject to review."[120]

This exclusion gives Canada a great deal of control over the specific investments that ultimately receive investment protection. The *Investment Canada Act*[121] allows the Canadian Government to review foreign investments of any size for compliance with the state's national security and economic policies. The *ICA*'s review of certain foreign investments includes a review from a "net benefit" perspective,[122] evaluating investments according to a number of factors:

> (a) [T]he effect of the investment on the level and nature of economic activity in Canada, including … the effect on employment, on resource processing, on the utilization of parts, components and services …;
> (b) the degree and significance of participation by Canadians in the Canadian business …;
> (c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
> (d) the effect of the investment on competition …;
> (e) the compatibility of the investment with national industrial, economic and cultural policies …; and
> (f) the contribution of the investment to Canada's ability to compete in world markets.[123]

Moving forward, the Canadian Government has signalled that issues of labour and gender equality, environmental protection, and other ESG-related topics are of great concern. Investors can no longer expect that investments will be protected where those

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118 *Ibid*.
119 *Ibid*.
120 *Ibid*.
121 RSC 1985, c 28 (1st Supp) [*ICA*].
122 *Ibid*, s 21.
123 *Ibid*, s 20.

investments do not support ESG initiatives — or at a minimum do not harm ESG initiatives.

It would come as no surprise to see these sorts of procedures gain increased traction globally, and, in fact, we have seen recent efforts in the US to expand the review mechanisms for US foreign investment under The Committee on Foreign Investment in the United States — which is authorized to review foreign investment in the US for national security purposes — to include a review of investments made by US investors abroad.[124]

Canada has also signed recent BITs that more expressly exclude measures taken in furtherance of resource conservation or other environmental goals. For example, in the Canada-Moldova BIT entered into force in late 2019, article 17 lays out the following exceptions:

> 1. For the purpose of this Agreement:
>
> (a) *a Party may adopt or enforce a measure necessary to:*
>
> (i) *protect human, animal or plant life or health*,
>
> (ii) ensure compliance with domestic law that is not inconsistent with this Agreement, or
>
> (iii) conserve the living or non-living exhaustible natural resources;
>
> (b) provided that the measure referred to in subparagraph (a) is not:
>
> (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or
>
> (ii) a disguised restriction on international trade or investment.[125]

Again, Canada indicates a clear goal of ensuring that investments in Canada support ESG-related policies. The Canada-UK Trade Continuity Agreement, which entered into force in January 2021, likewise provides exclusions or carve-outs for environmental-related issues.[126] Section 2 of the Joint Interpretive Instrument for the Trade Continuity Agreement states:

> The TCA preserves the ability of the United Kingdom and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity.[127]

Section 9(b) also states:

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[124] See e.g. President of the US, *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, (Executive Order), 87:181 Federal Register 57369 (Washington, DC: POTUS, 15 September 2022).

[125] *Agreement Between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments*, 12 June 2018, CTS 2019/16 [emphasis added].

[126] *Agreement on Trade Continuity Between Canada and the United Kingdom of Great Britain and Northern Ireland,* 9 December 2020, CTS 2021/6.

[127] Global Affairs Canada, Statement, "Joint Interpretative Instrument on the Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada," online: [perma.cc/N5U8-UBYZ].

> The TCA explicitly recognises the right of Canada and of the United Kingdom, to set their own environmental priorities, to establish their own levels of environmental protection and to adopt or modify their relevant laws and policies accordingly, mindful of their international obligations, including those set by multilateral environmental agreements. At the same time in the TCA the United Kingdom and Canada have agreed not to lower levels of environmental protection in order to encourage trade or investment and, in case of any violation of this commitment, *governments can remedy such violations regardless of whether these negatively affect an investment or investor's expectations of profit*.[128]

Here, the directive is even clearer: expectations of profits can legitimately be negatively impacted where Canada (or the UK) enacts measures in furtherance of environmental protection.

In short, Canada, like most states, is taking a serious look at the level of discretion it allows in pursuit of environmental goals. As a result, investors are receiving more limited investment protections under newer BITs in circumstances where state damage to those investments is a result of regulatory measures validly related to the environment or exceptions to protections under the treaty. A clear order of priority is becoming apparent. While Canada (and many other states) obviously still seek foreign investment, those foreign investments will not be exempt from broader policy initiatives involving the environment or other ESG-related matters.

B. DEATH KNELL FOR THE ENERGY CHARTER TREATY?

A further area of tumultuous debate in recent months involves the ECT.[129] Whilst Canada is not party to this treaty, its widespread ratification and comprehensive investment protection provisions nevertheless make it a highly useful instrument for investors from any jurisdiction with international investments, many of which have been structured to take advantage of the ECT's protections and access to ISDS. Recent developments mean, however, that going forward, long-term investments in ECT contracting states may well require alternative structuring. In particular, a number of states have withdrawn or intend to withdraw from the ECT, and the proposed modernisation of the treaty to better accommodate energy transition goals faces seemingly insurmountable difficulty.[130]

C. THE ECT AND ASSOCIATED CLAIMS

The ECT was concluded in 1994 and has 48 signatories and contracting parties,[131] predominantly (but not exclusively) European and Central Asian states, but also including

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[128] *Ibid* [emphasis added].

[129] ECT, *supra* note 5.

[130] See e.g. Lawn, San Martin & Bergère, *supra* note 7; Council of the EU, "Energy Charter Treaty: EU Notifies its Withdrawal" (27 June 2024), online (pdf): [perma.cc/9KXE-9XB3]; Bart-Jaap Verbeek, "The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?" (2023) 8:1 Bus & Human Rights J 97.

[131] Pursuant to Article 1 of the ECT, a "Contracting Party" is "a state or Regional Economic Integration Organisation which has consented to be bound by [the ECT] and for which [the ECT] is in force" (ECT, *supra* note 5, art 1(2)). A 'signatory' is not defined in article 1 but can be taken to mean a state who has signed the ECT that has not ratified it and therefore is not legally bound by the ECT's provisions.

the EU and European Atomic Energy Community.[132] Following the collapse of the Soviet Union, the idea was to provide mutual protection between contracting states for foreign investors in the energy sector.[133]

The ECT has been relied upon by investors in over 160 known cases in efforts to obtain compensation (in some cases, in the billions of dollars) for measures such as unlawful expropriation, nationalization and breach of the fair and equitable treatment standard.[134] Around two-thirds of these claims have been filed in the past ten years.[135] Approximately 52 percent of those cases that resulted in an award have been decided in the investor's favour.[136] Notably, 60 percent of claims have been brought by investors in renewables — for instance, there have been 14 and 51 claims against Italy and Spain, respectively, mostly regarding their rollback of previous incentives for investments in renewables.[137]

Notwithstanding this high proportion of claims brought in the renewables sectors, the vast majority of damages have been awarded to fossil fuel investors.[138] The largest-ever award under the ECT was in favour of the former shareholders of Yukos against Russia, as a result of the state's expropriation of their shareholdings through a series of measures including arrests, large tax assessments and liens, and the auction of Yukos' main facilities, which led to the bankruptcy of the company and eliminated all value of the shares. In 2014, a tribunal awarded the investors in excess of US$50 billion.[139]

More controversially, claims brought by fossil fuel investors in relation to measures designed to reduce reliance upon those fuels have led to allegations that the ECT prevents states from tackling climate change. For instance, in August 2022, Italy was ordered to pay UK-based oil and gas company Rockhopper €190 million as a result of its denial of an exploitation licence for an offshore oilfield — despite the fact this denial was in line with legislation aimed at facilitating the energy transition.[140] Similarly, in February and April 2021, two companies, RWE and Uniper, commenced ISDS proceedings against the

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132 A list of ECT signatories and contracting parties is available at: International Energy Charter, "Contracting Parties and Signatories of the Energy Charter Treaty," online: [perma.cc/4QUE-ABZU] (note the list references Slovenia and Luxembourg. As specified in footnote 185 below, Slovenia and Luxembourg's respective notices of withdrawal have now taken effect and they are no longer considered Contracting Parties under article 47(2) of the Energy Charter Treaty).

133 International Energy Charter, "The Energy Charter Treaty," online: [perma.cc/V82X-4DJ8].

134 International Energy Charter, "Statistics of ECT Cases" (5 January 2023), online (pdf): [perma.cc/28CG-88L8].

135 *Ibid* at 5.

136 *Ibid* at 11.

137 *Ibid* at 4, 7.

138 As of 1 December 2023, 96.7 percent (including Yukos cases) (*ibid* at 2).

139 *Hulley Enterprises Limited (Cyprus) v Russia* (2014), PCA (Permanent Court of Arbitration) (Arbitrators: Hon L Yves Fortier, Dr Charles Ponset, Stephen M Schwebel J); *Yukos Universal Limited (Isle of Man) v Russia* (2014), PCA (Permanent Court of Arbitration)(Arbitrators: Hon L Yves Fortier, Dr Charles Ponset, Stephen M Schwebel J); *Veteran Petroleum Limited (Cyprus) v Russia* (2014), PCA (Permanent Court of Arbitration) (Arbitrators: Hon L Yves Fortier, Dr Charles Ponset, Stephen M Schwebel J).

140 In October 2022, Italy submitted an application to ICSID to annul the award under article 52 of the ICSID Convention and requested a provisional stay of enforcement. The provisional stay was lifted in July 2023. The annulment proceedings are ongoing (*Rockhopper Mediterranean Ltd (British), Rockhopper Exploration Plc (British), Rockhopper Italia SpA (Italian) v Italy* (2022), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Klaus Reichert, Charles Ponset, Pierre-Marie Dupuy and ad hoc Committee: Michael D Nolan, Eva Kalnina, Carita H.Wallgren-Lindholm).

Netherlands, alleging that its decision to phase out all coal-fired power plants by 2030 violates the state's obligations under the ECT.[141]

As Langley & Gilfedder note, the ECT's "broad definition of 'investor' also attracts negative commentary in that it enables claims to be brought by 'mailbox' companies domiciled in signatory states, thus potentially extending ECT protections to parent companies and shareholders that are not ECT signatory state nationals."[142] As such, notwithstanding Canada not being party to the ECT, Canadian investors have been implicated in a number of claims under the treaty.[143] In all four of these cases, the respondent states have tried, and failed, to rely on article 17(1), which allows ECT states to deny a legal entity the benefits of ECT protection "if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized."[144] Efforts by states to rely on article 17(1) have had limited success, usually because the exercise of their rights has come too late.[145] While the case law is somewhat inconsistent as to precise timing, it is clear that to effectively rely on article 17(1), a state must act promptly, ideally addressing the "mailbox" issue and jurisdictional concerns before the relevant breach, rather than after a claim has been initiated. A state may also make a blanket article 17 application to specific citizens or nationals or investments.[146] To give some background on the nature of claims involving Canadian investors:

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141 The Netherlands have since been successful in inadmissibility proceedings in the German Court, with the Court declaring in September 2022 that the arbitral clause in the ECT was incompatible with EU law and therefore invalid in intra-EU arbitrations. The German government announced in September 2022 that it would take over Uniper in return for Uniper dropping the claim. Uniper dropped the claim in March 2023 (*Uniper SE, Uniper Benelux Holding BV v Netherlands* (2023), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Tina Cicchetti, Jean Kalicki, D Brian King)); Bundesregierung, Press Release, "Clear Terms for the Takeover of the Energy Company Uniper" (21 December 2022), online: [perma.cc/V3FH-4DR3]; *RWE AG and RWE Eemshaven Holding II BV v Netherlands* (2024), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: James H Boykin and Toby Landau) (the RWE proceedings were discontinued on 12 January 2024).

142 James Langley & Catherine Gilfedder, "Modernising the Energy Charter Treaty: Agreement in Principle Reached on a 'Greener' Treaty" (27 July 2022), online (blog): [perma.cc/J6FY-7A7G].

143 *Plama Consortium Ltd v Bulgaria* (2005), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Carl F Salans, Albert Jan van den Berg, VV Veeder) [*Plama Decision on Jurisdiction*]; *Liman Caspian Oil BV v Kazakhstan* (2010), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Karl-Heinz Böckstiegel, Kaj Hobér, James Crawford) [*Liman Caspian Oil*]; *Isolux Infrastructure Netherlands, BV v Spain* (2016), SCC (Stockholm Chamber of Commerce) (Arbitrators: Yves Derains, Guido Santiago Tawil, Claus Von Wobeser) [*Isolux*]; *Khan Resources Inc v Mongolia* (2012), PCA (Permanent Court of Arbitration) (Arbitrators: Dr Bernard Hanotiau, L Yves Fortier, David AR Williams) [*Khan Resources Decision on Jurisdiction*].

144 ECT, *supra* note 5 at 67.

145 *Plama Decision on Jurisdiction*, *supra* note 143 at para 162.

146 On 24 September 2024, the ECT Secretariat received a communication from the EU notifying it of their exercise of the right under article 17 to deny advantages of Part III of the ECT on behalf of the EU, EURATOM, and listed member states to: (1) any legal entity owned or controlled by citizens of nationals of the Russian Federation or the Republic of Belarus; and (2) any investment of an investor of the Russian Federation or of the Republic of Belarus: Energy Charter Treaty, Press Release, "The European Union, Euratom, and Member States Deny Advantages of Part III under Article 17 of the ECT" (25 September 2024), online: [perma.cc/HR44-SJ3A]. The UK similarly exercised its right under article 17 on 29 September 2023 in regard to legal entities owned by citizens or nationals of the Russian Federation and investments of Investors of the Russian Federation who are included in the UK Sanctions List (Energy Charter Treaty, Press Release, "The United Kingdom Denies Advantages of Part III under Article 17 of the ECT" (29 September 2023), online: [perma.cc/ R3TY-5Q86]).

1. A Cypriot company (Plama) brought a claim against the Bulgarian government under the ECT in December 2002. Plama alleged that the government, national legislative and judicial authorities had caused material damage to its oil refinery in Bulgaria.[147] The Respondent objected to the tribunal's jurisdiction on the basis that this Cypriot company was a "mailbox company" with no substantial business activities in Cyprus and that it was in fact owned by a Canadian national and a Bahamian company.[148] The tribunal decided in its jurisdictional award that Bulgaria's purported exercise of its article 17(1) rights, more than four years after Plama's investment, came too late.[149] This went against the spirit of the ECT, which required that an investor have "legitimate expectations" of its protections before investing and therefore would require "reasonable notice" of whether article 17(1) had been exercised. Such notice would then only have prospective effects.[150]

2. The Republic of Kazakhstan (ROK) similarly failed in its efforts to rely on its article 17(1) right of denial of protection in a hydrocarbon case.[151] Two Dutch companies, Liman Caspian Oil and NCL Dutch Investments, brought a claim in June 2007 against ROK alleging breach of the right to fair and equitable treatment in Article 10(1) of the ECT.[152] This was following the invalidation by the ROK courts of a licence for exploring and extracting hydrocarbons which had been assigned to Liman Caspian Oil.[153] ROK lodged a jurisdictional objection on the basis that Liman Caspian Oil, which was in turn owned by NCL Dutch Investments, was wholly owned by a Canadian company.[154] As with *Plama*, the tribunal denied this article 17(1) application on the basis that the state had acted too late. ROK had raised the article 17(1) defence more than a year after the claimants had filed their request for arbitration.[155] Again, the two claimants had a "legitimate expectation" when they invested in the ROK that they would come under ECT protection.[156]

3. Canadian investors have been similarly involved in ECT claims in the renewables sector. In October 2013, Dutch company Isolux Infrastructure Netherlands, which held majority shares in 117 Spanish solar companies, brought a claim against Spain.[157] Like many such cases, the investor alleged it had relied on Spain's pro-renewable regime, in particular the promise of "feed in tariffs" which were later abolished, destroying the value of the investments.[158] Spain tried to rely on article 17(1) having found through the claimant's annual accounts that a Luxembourg company, PSPEUR, S.á.r.l, (PSPEUR) held 19 percent of the

147 *Plama Consortium Ltd v Bulgaria* (2008), ICSID at para 72 (International Centre for Settlement of Investment Disputes) (Arbitrators: Carl F Salans, Albert Jan van den Berg, VV Veeder).
148 *Plama Decision on Jurisdiction*, *supra* note 143 at para 34.
149 *Ibid* at paras 158–62.
150 *Ibid* at paras 161–62.
151 *Liman Caspian Oil*, *supra* note 143.
152 *Ibid* at paras 3, 51.
153 *Ibid*, Factual Background.
154 *Ibid*.
155 *Ibid* at paras 225–26.
156 *Ibid*.
157 *Isolux*, *supra* note 143 at para 1.
158 *Ibid* at paras 117–39.

claimant's shares.[159] PSPEUR was in turn owned by two Canadian companies, the Public Sector Pension Investment Board and its subsidiary, Infra-PSP Canada Inc.[160] The tribunal again dismissed this application for timing reasons, as Spain only notified the claimant of its intention to rely on article 17(1) a year after the first Notice of Arbitration had been received.[161] The investor's claim was ultimately unsuccessful, with the tribunal holding the claimant could not have had a "legitimate expectation" that the regulatory framework would have remained unchanged (particularly given there were public studies available at critical decision points suggesting the regime would be modified) and in any event the actual revenue of the solar plants under the claimant's control had increased following the regime changes.[162]

4. Khan Resources' case against the Government of Mongolia was brought under both the ECT and Mongolia's foreign investment law (Foreign Investment Law).[163] Khan Resources Inc., incorporated in Canada (Khan Canada), Khan Resources B.V., incorporated in the Netherlands (Khan Netherlands), and the CAUC Holding Company Limited (CAUC), incorporated in the British Virgin Islands, brought a claim in January 2011 alleging that the Mongolian Government and Court had tried to expel the claimant companies from a uranium extraction joint venture.[164] They alleged breaches of both the Foreign Investment Law (in the case of Khan Canada and CAUC) and of articles 10(1) and 13(1) of ECT (in the case of Khan Netherlands).[165] At the time, the joint venture was between CAUC and MonAtom (owned and controlled by Mongolia), with Khan Canada owning all shares in CAUC.[166] A state agency had inspected the uranium site in the northeast of Mongolia and alleged violations of Mongolian law, temporarily suspending the joint venture's licence to extract uranium.[167] By a decree in 2009, the Mongolian Nuclear Energy Agency, with the aim of reducing harmful radioactive exposures, revoked the joint venture's licence.[168] Whilst Khan Canada was covered by the Foreign Investment Law, in the hearing on jurisdiction, Mongolia attempted to deny ECT protections to Khan Netherlands under article 17(1), again arguing that Khan Netherlands was in fact owned by Canadian nationals and was a "mailbox company" with no substantial business activities in an ECT state.[169] Referring to *Plama*, the tribunal confirmed that this denial does not operate automatically but must be exercised actively, so as to create a "predictable legal framework for investments in the energy field."[170] In the final award, the tribunal found that Mongolia had illegally expropriated the

159 *Ibid* at paras 182–89.
160 *Ibid* at paras 140–62.
161 *Ibid* at paras 306–309, 715.
162 *Ibid* at paras 784–815, 837–54.
163 *Khan Resources Inc v Mongolia* (2015), PCA (United Nations Commission on International Trade Law) (Arbitrators: Dr Bernard Hanotiau, Hon L Yves Fortier, David AR Williams) at para 4 [*Khan Resources Final Award*].
164 *Ibid* at paras 1, 4, 91.
165 *Ibid* at para 106.
166 *Ibid* at paras 44, 47.
167 *Ibid* at paras 77–82.
168 *Ibid* at para 82.
169 *Khan Resources Decision on Jurisdiction*, *supra* note 143 at para 252.
170 *Ibid* at paras 412, 426.

claimants' mining and exploration licences and had therefore breached both the Foreign Investment Law and the ECT.[171] The claimants were awarded US$80 million in damages.[172]

As such, the ECT has had impacts beyond the borders of its contracting states, and its protections continue to be relied on by energy investors worldwide.

D. A GREENER TREATY? THE (STALLED) MODERNIZATION PROCESS

The perceived chilling effect on states' ability to regulate in pursuit of the energy transition discussed above was the catalyst for a "modernization" process aiming to bring the treaty in line with current priorities, making it more able to support the global energy transition by allowing states greater policy and regulatory space to fulfil their commitments under the Paris Agreement and other international environmental instruments.

Following years of negotiation, an "agreement in principle" on a revised text was reached in June 2022.[173] However, unanimity is required to amend the ECT,[174] and a series of postponed votes and ongoing discontent on the part of the EU in particular signal decreasing likelihood that the amended agreement will ever be ratified.[175]

The modernization discussions and agreement in principle have been premised on a number of "pillars."[176] First, the list of energy materials and products covered is updated in the proposed revised agreement. The ECT applies to "Economic Activity in the Energy Sector," which is defined by reference to a list of "Energy Materials and Products."[177] A number of new such materials and products, largely renewables and other sources considered important to the energy transition, are to be expressly covered by the modernized ECT and its investment protection provisions (removing any uncertainty regarding the coverage of these solutions). These include: (1) hydrogen (notably the agreement in principle does not distinguish between fossil-based and renewable hydrogen); (2) anhydrous ammonia; (3) biomass; (4) biogas; and (5) synthetic fuels.[178]

Second, the modernized treaty would create a "flexibility" mechanism enabling states to exclude or limit protections for fossil fuels. Indeed, a number of contracting parties (and observers) had called for the phasing out of fossil fuels from the scope of the treaty's protections altogether.[179] This proved too controversial to attract the necessary support;

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171 *Khan Resources Final Award*, *supra* note 143 at para 451.

172 *Ibid*.

173 Energy Charter Secretariat, *Decision of the Energy Charter Conference*, (Brussels: International Energy Charter, 2022), online (pdf): [perma.cc/2TLF-45AF] [*Decision of the Energy Charter Conference*]; Council of the European Union General Secretariat, "Energy Charter Treaty Modernisation" (2022) European Commission, Working Document WK 9218/2022 INIT, online: [perma.cc/S78A-VSX9].

174 ECT, *supra* note 5, art 36(1)(a).

175 Jack Ballantyne, "ECT Parties Delay Vote on Treaty Reform" *Global Arbitration Review* (22 November 2022), online: [perma.cc/WC5G-3UWL].

176 For further discussion, see Langley & Gilfedder, *supra* note 142.

177 ECT, *supra* note 5, art 1(5), Annex EM I.

178 *Decision of the Energy Charter Conference*, *supra* note 173 at 3.

179 European Parliamentary Research Service, Briefing, "EU Withdrawal from the Energy Charter Treaty" (4 December 2023), online (pdf): [perma.cc/3AQX-9DL8].

instead, the "flexibility" mechanism will allow states to adopt bespoke carve-outs.[180] For instance, the EU and UK indicated during negotiations they would carve out fossil fuel-related investments from protection: (1) for new investments made after 15 August 2023, with limited exceptions; and (2) for existing investments, after ten years from the entry into force of the relevant provisions in the new ECT which permit the carve-out.[181]

Third, the text contains a number of provisions that would clarify and focus the scope of the investment protections themselves, with a view to increasing greater certainty of outcomes in ISDS and reducing the risk of wasted time and cost. In particular, there is a requirement for an investor to have "substantial business activities" in its home state, which is aimed at removing so-called "mailbox" companies from the ECT's scope, ending effective protection for non-ECT state nationals who hold investments via such companies.[182]

Votes among the treaty parties were scheduled for November 2022, then April 2023, and are now tabled for the thirty-fifth meeting of the Energy Charter Conference. The voting will be unanimous and there must be a quorum of at least half of all treaty parties.[183] This delay has been reportedly due to the inability of EU member states to reach a common position.[184] When combined with the withdrawals, as discussed below, the future of the modernized treaty does not look bright.

E. SUCCESSIVE WITHDRAWALS

In parallel with the modernization process, and further reflecting the backlash against the ECT, we have seen a series of announcements of withdrawals from the ECT by EU member states and calls for others to do so. Italy was the first state to withdraw, serving its notice in December 2014 which took effect in January 2016, with France, Germany, and Poland then serving notices in March 2023 effective in December 2023.[185] Others followed, with most recently the EU and the Netherlands serving a notice of withdrawal in July 2024.[186] This followed a vote from the EU Parliament in April 2024 in favour of the Commission's proposal and the EU Council then approving this on 30 May 2024 (although

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180 *Decision of the Energy Charter Conference*, *supra* note 173 at 3.

181 Langley & Gilfedder, *supra* note 142.

182 *Decision of the Energy Charter Conference*, *supra* note 173 at 4–5.

183 EU Monitor, "Explanatory Memorandum to COM(2024)527" (11 November 2024), online: [perma.cc/D8SA-73WC].

184 Sullivan & Cromwell LLP, "Update on Modernization of the Energy Charter Treaty" (19 July 2023), online (pdf): [perma.cc/WE4X-RQZX].

185 European Parliamentary Research Service, *supra* note 179.

186 *Ibid*; International Energy Charter, News Release, "Written Notification of Withdrawal from the Energy Charter Treaty" (12 July 2024), online: [perma.cc/K9J4-DZ4B]. States which have announced their intention to withdraw: Belgium in October 2022 and Denmark in April 2023. States which have served official notice to the ECT: France (which served its notice on 22 March 2023 with withdrawal taking effect on 8 December 2023), Germany (which served its notice on 22 March 2023 with withdrawal taking effect on 20 December 2023), Poland (which served its notice on 22 March 2023 with withdrawal taking effect on 29 December 2023), Luxembourg (which served its notice on 30 August 2023 with withdrawal taking effect on 17 June 2024), Slovenia (notice served on 26 February 2024, with withdrawal taking effect on 14 October 2024), Portugal (notice served on 7 March 2024 with withdrawal taking effect on 2 February 2025), Spain (notice served on 17 May 2024 with withdrawal taking effect on 17 April 2025), the UK (notice served on 28 May 2024 with withdrawal taking effect on 27 April 2025), and the EU and the Netherlands (notice served on 12 July 2024 with withdrawal taking effect on 28 June 2025).

member states who wish to remain contracting parties will be able to participate freely in any vote on the modernisation process that does take place).[187]

However, the ECT contains a sunset provision, such that existing investments in withdrawing states will continue to be protected (and aggrieved investors can continue to make claims) for 20 years following the withdrawal taking effect.[188] New investments made after the withdrawal is effective will not enjoy the treaty's protection.

F. WHAT NEXT FOR ENERGY INVESTORS IN ECT STATES?

So, what does this state of flux mean for energy investors in ECT states going forward? Case-by-case consideration and a watching brief over investments will be needed.

Investors need to be alive to whether host states for their investments — for example, where projects are based — have withdrawn or announced their intention to withdraw from the treaty. As mentioned above, even after a withdrawal takes effect, existing investments remain protected for 20 years, meaning claims can still be brought within that time (and indeed, we may see an uptick in claims toward the end of relevant sunset periods as investors look to lodge claims they may otherwise have delayed). This position is the same for all types of energy investments, and so ironically in many cases fossil fuel investors will be protected for longer where a state withdraws than if the modernization process were to continue (since in the latter case, states could introduce carve-outs for fossil fuels commencing much sooner).

Notwithstanding the substantial duration of the sunset provision, given the longevity of international energy projects (often extending far beyond 20 years), it will also be advisable to look at alternative means of protection for existing investments to plan for once that period expires (and, of course, for new investments in territories that have withdrawn). Other treaties — whether bilateral or multilateral — may well assist (such as the CPTPP). From an investor's perspective, protection under the CPTPP may well not look very different from the ECT (and interestingly, accession to the CPTPP has already faced criticism of the same nature as the ECT in some states including the UK, namely, on the

[187] MEPs voted 560 to 43 (with 27 abstentions) in favour of the European Commission's proposal: European Parliament, Press Release, "MEPs Consent to the EU Withdrawing from the Energy Charter Treaty" (24 April 2024), online: [perma.cc/PS3J-S4ZQ]; Council of the EU, Press Release, "Energy Charter Treaty: Council Gives Final Green Light to EU's Withdrawal" (30 May 2024), online: [perma.cc/QT8X-X8RM].

[188] ECT, *supra* note 5, art 47(3).

basis that its environmental and regulatory downsides outweigh any minimal economic benefits).[189] CETA may also be an avenue worth exploring, as we discuss below.

Finally, assuming the modernized treaty does not come into force, there will remain uncertainty as to whether new technologies that support the energy transition (such as those proposed to be included in the revised text or developed going forward) are substantively covered by the ECT. As such, investors in projects involving newer technologies may wish to ensure alternative forms of protection for their investments, including by way of heightened contractual protections in agreements with host states which support the development of such novel projects.[190]

G. END OF INTRA-EU INVESTOR-STATE ARBITRATION?

A further area of recent change that is having a profound impact on investors in energy projects is to so-called intra-EU investor-state arbitration, that is, ISDS cases in which the investor's home state and the respondent host state are both in the EU. We have seen a large number of such cases. Again, of particular note have been claims regarding measures taken to reduce incentives for renewable investments by EU investors against EU member states (such as Spain, Italy and the Czech Republic). As discussed above, a great number of these claims have been under the ECT (the *Isolux* case is an example), thus also contributing significantly to the backlash within the EU against that treaty.[191]

Again, Canadian investors holding investments in EU member states have been implicated in intra-EU ISDS cases. One such example is a claim brought by Cypriot companies owned by two Canadian nationals, Mr. Huang and Mr. Danczkay, against Hungary.[192] The claimants had built, renovated and operated the terminals at Budapest airport from 1995 until 2001.[193] As part of the original tender for the project the claimants had agreed to ensure that the Canadian Commercial Corporation (an agent of the

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189 For example, various environmental organisations (including NFU and WWF) have expressed concerns about the impact on food safety, farming, and environmental standard — Government impact assessments estimate a small increase in greenhouse gas emission as a result of joining: Good Food Trade Campaign, "UK Joins Indo-Pacific Trade Bloc, Raising Concerns About Food, Farming and Environment standards" (31 March 2023), online: [perma.cc/MFT4-HGHP]. In March 2023, nine civil groups wrote to Kemi Badenoch (Business and Trade Secretary) calling for a halt to the UK's accession on the basis that it brings minimal economic benefits and major environmental risk (Trade Justice Movement, Press Release, "Civil Society Groups Call for the UK to Halt Accession to Pacific Trade Deal" (31 March 2023), online: [perma.cc/XF44-LFSR]). A joint letter to Justin Trudeau and Rishi Sunak coordinated by Canadian and UK trade justice networks (signed by Greenpeace and others) urges them to take steps to ensure the UKs accession to the CPTPP does not block Canadian environmental policies (by side letters like UK has with Australia and NZ). The risk of legal proceedings from UK fossil fuel companies against Canada could water down environmental policies. There was no response or side letter from either country (Canadian Centre for Policy Alternatives, News Release, "Canada at Risk of Huge Lawsuits if UK Accession to Pacific Trade Deal Not Amended, Warn Civil Society Organizations and Academics" (24 October 2023), online: [perma.cc/6Y6K-VUBS]).

190 As set out above, dispute resolution provisions providing for international arbitration, a seat for that arbitration in a state with developed jurisprudence around arbitration procedures, enforcement and set-aside applications, if possible, a stabilization clause on any key issues, amongst other provisions that may be required based on the investment and industry.

191 United Nations Trade & Development, "Investment Dispute Settlement Navigator," online: [perma.cc/Q3KH-ACAU]

192 *ADC Affiliate Limited v Hungary* (2006), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Hon Charles Brower, Albert Jan van den Berg, Neil Kaplan).

193 *Ibid* at para 118.

Government of Canada) would construct one of the terminals.[194] In 2001, the project came to an end when the Hungarian Minister of Transport issued a decree taking over all the activities relating to the operation of the airport terminals.[195]

The claimants claimed Hungary had expropriated their investments and as such that they were deprived of fair and equitable treatment and full protection and security, guaranteed in the Cyprus-Hungary BIT.[196] Hungary objected to the tribunal's jurisdiction on the basis the claimants were "nothing but two shell companies established by Canadian investors," that is, nationals of a non-party to this BIT, nor a contracting state to the ICSID Convention.[197] The tribunal rejected this, holding that the Cypriot companies had fulfilled applicable jurisdictional requirements since both Cypriot companies had been incorporated in Cyprus and had a "lawful and legitimate" role in the project.[198] The BIT gave protection to any "legal person constituted or incorporated in compliance with the law" of Cyprus (as replicated in the ICSID Convention) and therefore there was no requirement to consider the company's capital and control.[199] The tribunal eventually held that the expropriation of the claimants' investment was a deprivation under article 4 of the BIT (and none of the exceptions applied).[200]

It has long been the position of the EU that the resolution of investment disputes by independent tribunals infringes EU law,[201] and in a 2016 decision in *Slovak Republic v. Achmea B.V.*,[202] the Court of Justice of the European Union agreed, holding that an arbitration clause in the Netherlands-Slovakia BIT effectively placed disputes that could potentially concern the interpretation or application of EU law outside the EU's judicial review mechanism, and therefore contravened EU law.[203] The Court of Justice of the European Union subsequently held in *Moldova v. Komstroy LLC*[204] that this reasoning extended to ECT claims, and intra-EU investment arbitration proceedings under ECT are also contrary to EU law.[205]

Following these decisions, 21 signatory EU member states entered into an agreement terminating all intra-EU BITs, purportedly with immediate effect, which took effect in August 2020.[206] A number of investment treaty tribunals have continued to accept jurisdiction over intra-EU disputes (at least prior to the termination agreement), on the basis

194 *Ibid* at para 104.
195 *Ibid* at paras 179, 186–89.
196 *Ibid* at para 222.
197 *Ibid* at para 335.
198 *Ibid* at para 353.
199 *Ibid* at para 357.
200 *Ibid* at para 476.
201 Katariina Särkänne, "EU Law in Investment Arbitration: A View from International Arbitral Tribunals" (2021) 5:1 Europe & World: A L Rev 1 at 4–5.
202 *Slovak Republic v Achmea BV*, C-284/16, [2018] ECR I-1 [*Achmea*].
203 *Ibid* at paras 58–60
204 *Moldova v Komstroy LLC*, C-741-19, [2021] ECR I-1 [*Komstroy*].
205 *Ibid* at paras 60–66.
206 EU, *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union* [2020] OJ, L 169/1.

that their jurisdictional mandate comes from the relevant treaty, not the EU legal order.[207] Others have declined jurisdiction on the basis of the *Achmea* and *Komstroy* decisions.[208]

Even when an award is obtained, a number of state courts — both in and outside the EU — have refused to enforce intra-EU arbitral awards, leaving successful claimants frustrated. For example, in December 2022, the Svea Court of Appeal annulled an award issued in favour of Luxembourg-based company Novenergia against Spain in December 2022.[209] Relying on the principles from the *Komstroy* ruling, the Svea Court of Appeal agreed that article 26.2(c) of the ECT (the treaty's dispute resolution mechanism) is not applicable to disputes between member states and therefore could not give rise to a valid arbitration agreement between Spain and Novenergia.[210] The same court annulled an award in December 2023 issued in the 2021 ECT case *Festorino Invest Limited v. Poland*[211] and in March 2024 an award issued in the 2022 ECT case *Triodos v. Spain*.[212] Further, in July 2022, Luxembourg's highest court refused an application for enforcement of the approximately US$350 million award in the long-running *Micula v. Romania* dispute, notwithstanding that the award was issued under ICSID Rules and thus should in principle be automatically enforceable.[213]

Courts outside the EU, however, have not universally followed *Komstroy*. The Swiss Federal Supreme Court recently upheld an ECT award against Spain, dismissing Spain's argument that EU law took precedence over article 26 of the ECT (where signatories give unconditional consent to arbitration).[214] The Swiss Federal Supreme Court found that the Court of Justice of the European Union's decision in *Komstroy* could not bind Switzerland as a non-member state, and that article 26 of the ECT was to be taken at face value as unconditional consent to arbitration, with no clear expression in the treaty of limited consent or disapplication.[215] The Commercial Court of England and Wales has similarly taken a consistently favourable stance toward investors enforcing intra-EU awards in the UK. The Court recently held in *Infrastructure Services Luxembourg and Energia*

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207 *Cavalum SGPS, SA v Spain* (2022), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Lawrence Collins, David R Haigh, Daniel Bethlehem); *Triodos SICAV II v Spain* (2022), SCC (Stockholm Chamber of Commerce) (Arbitrators: Alejandro A Escobar, Christophe Bondy, Oscar M Garibaldi).

208 See e.g. *Green Power K/S v Spain* (2022), SCC (Stockholm Chamber of Commerce) (Arbitrators: Hans van Houtte, Dr Inka Hanefeld, Jorge E Viñuales). This was an ECT claim brought by a Danish investor over Spain's repeal of its renewable energy incentive scheme, holding that EU law applies to the determination of the tribunal's power to decide the dispute. The claim was brought under the Stockholm Chamber of Commerce Rules and certain provisions of the Swedish Arbitration Act were important in the tribunal's determination.

209 Svea Court of Appeal, Stockholm, 13 December 2022, *Spain v Novenergia II — Energy & Environment (SCA), SICAR*, T 4658-18 (Sweden) at 43–44 (note that Novenergia's attempt to appeal the annulment to the Supreme Court of Sweden failed on 10 July 2023).

210 *Ibid* at 38.

211 *Festorino Invest Limited v Poland* (2021), SCC (Stockholm Chamber of Commerce) (Arbitrators: Bernardo M Cremades, Kaj Hobér, Zachary Douglas) [*Festorino*], rev'd Svea Court of Appeal, Stockholm, 20 December 2023, *Festorino Invest Limited v Poland*, T 12646-21 (Sweden).

212 *Triodos SICAV II v Spain*, *supra* note 207.

213 *Micula v Romania* (2013), ICSID (International Centre for Settlement of Investment Disputes) (Arbitrators: Dr Laurent Lévy, Dr Stanimir A Alexandrov, Georges Abi-Saab); Luxembourg Court of Cassation, 14 July 2022, *Micula v Romania* [2022], No 116/2022 (Luxembourg).

214 Cour de droit civil du Tribunal fédéral suisse [First Court of Civil Law of the Swiss Federal Supreme Court], Lausanne, 3 April 2024, *EDF Energies Nouvelles SA v Spain* [2024], No 23-7031 (Switzerland) at paras 7.1, 9.

215 *Ibid* at paras 7.6.4, 7.6.5, 7.7.1, 7.7.6.

Termosolar v. Spain (from the ECT case *Antin v. Spain*) that the UK's obligations under article 54 of the ICSID Convention to recognize and enforce ICSID awards trumped any EU law.[216]

North American courts have also been asked to enforce intra-EU investment treaty awards, and have largely agreed to do so.[217] That said, in March 2023, the US District Court for the District of Columbia (Judge Richard Leon) declined to enforce an intra-EU ECT award against Spain, reasoning that under EU law the state lacked the legal capacity to enter into an arbitration agreement.[218] This was at odds with a judgment issued in February 2023 by a judge in the same US District Court (Judge Tanya Chutkan), which upheld the award made against Spain in two ECT cases (*NextEra Energy Global Holdings B.V. v. Spain; 9REN Holding S.A.R.L. v. Spain*), finding that establishing the existence of an agreement to arbitrate, whether or not it was valid under EU law, was sufficient to withhold jurisdiction under the US Foreign Sovereign Immunities Act (FSIA).[219] The three cases were consolidated, and on 16 August 2024, the US Court of Appeals for the District of Columbia held that the district courts in fact properly had jurisdiction under the FSIA to enforce the awards, but that the district courts would still need to determine the "merits" and whether the arbitration provision extended to EU nationals. The US Court of Appeals also held that the *NextEra* and *9REN* lower court had abused their discretion by granting anti-anti-suit injunctions to enjoin Spain from pursuing court proceedings in foreign courts.[220] On 26 September 2024 , the US District Court for the District of Columbia granted *Blasket* a petition to enforce its ECT award against Spain, noting in the judgment the dozen or so similar pending actions to enforce arbitration awards against Spain that would follow the 16 August *NextEra* decision.[221] If other courts follow suit, the *Achmea* decision will not be a bar to US courts' jurisdiction to enforce intra-EU investment treaty awards, but may pose difficulties for investors if host states are not able to be enjoined from pursuing judicial recourse.

In light of these questions around tribunals' jurisdiction and geography-specific difficulties with enforcement, we expect to see fewer claimants bringing intra-EU ISDS cases, and that investors reliant upon such routes for protection of their investment (whether through now-terminated BITs or through multilateral investment treaties) will look for alternative contractual protections or structures going forward (either structuring via a non-EU state, or potentially relying upon multilateral treaties such as CETA, as discussed above).

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216 *Infrastructure Services Luxembourg SARL v Spain*, [2023] EWHC 1226 (Comm) at paras 80–88.

217 See e.g. *Micula v Gov't of Romania*, 404 F Supp (3d) 265 at 285 (Dist Ct 2019).

218 *Blasket Renewable Invs LLC v Spain*, 665 F Supp (3d) 1 at 10 (Dist Ct 2023).

219 *NextEra Energy Global Holdings BV v Spain*, 656 F Supp (3d) 201 (Dist Ct 2023); *9REN Holding SARL v Kingdom of Spain*, 2023 WL 2016933 (Dist Ct 2023).

220 The US Department of Justice filed an amicus curiae brief in February 2024 disagreeing with Judge Chutkan's February 2023 judgment and arguing that a federal court would first need to determine whether a valid arbitration agreement had existed before considering whether the arbitration exception to the FSIA applied: *NextEra Energy Holdings BV v Kingdom of Spain* (2024), 112 F 4th 1088 (DC Cir); *Nextera Energy Global Holdings BV, 9REN Holding SARL, Blasket Renewable Investments LLC v Spain* (2 February 2024), DC Cir No. 23-7031 (Brief), online: [perma.cc/7TSP-4KSP].

221 *Blasket Renewable Invs, LLC v Kingdom of Spain*, 2024 WL 4298808 (Dist Ct 2024).

V. STRATEGIC CONSIDERATIONS FOR ADDRESSING DISPUTES UNDER INVESTMENT TREATIES

When a potential dispute is on the horizon, or starts to materialize, a principal consideration is having the investment structured in advance to be able to gain the benefits of treaty protections. There are a number of other issues that should also be considered fairly early in the process. These include:

- government and local relationships;
- jurisdiction;
- ancillary claims and counterclaims;
- dispute funding;
- expert engagement; and
- timing.

A. GOVERNMENT AND LOCAL RELATIONSHIPS

Some investor-state disputes involve investments where, by virtue of the nature of the breach (for example, a complete expropriation or forced exit from the jurisdiction), the investor will have no ongoing relationship in the host state that needs to be considered. For all other disputes, however, there will be a delicate line to navigate between pursuing a claim and maintaining the relationships necessary to the investment during and after the dispute. For example, parties can provide for additional notice provisions to ensure that the host state (at all levels of government involved) is given an opportunity to resolve disputes prior to being involved in arbitrations (and even prior to the notice provisions found in the applicable BIT). Ultimately, it is critical to put a plan in place for host state relations, in considering when to bring a claim and how to navigate negotiations to try and find a commercial solution. In addition to their legal advisors, parties often draw on internal or external public affairs specialists to assist with this.

B. JURISDICTION

In many investor-state disputes, early jurisdictional objections are raised based on the definition of "investor" or "investment" in the applicable treaty.[222] While properly considered investment structuring at the time of the investment will take the treaty requirements into account, as matters can and do frequently change over the life cycle of a project it is important to reconsider these issues to ensure you have a clear plan for how you demonstrate compliance. For example, parties can make clear in investment documents that the investment was made in accordance with the particular treaty and by an investor falling within the treaty's definition. There may also be "fork-in-the-road" provisions that require an investor to choose whether to pursue a claim in local courts or in investment

[222] See e.g. *Festorino*, *supra* note 211 at paras 479–95.

arbitration (which choice is then binding), or other preconditions to bringing a claim that may need to be complied with, such as registration or certification of the investment.

C. ANCILLARY CLAIMS AND COUNTERCLAIMS

As with any dispute, alongside investment treaty proceedings there could be the potential for ancillary claims, such as related contractual arbitrations or litigation, local regulatory or other investigations, and for counterclaims in some or all of these. Understanding where these related claims may arise, to which entity they accrue, and forming a plan to address them assists with overall dispute management while also helping to get ahead of what may result from those other proceedings and the extent to which any remedies may overlap with damages sought in investment treaty proceedings. This can include matters such as results from local environmental regulatory proceedings to white-collar or anti-bribery investigations. Matters may also be those of an ESG nature such as those that may be undertaken by the Canadian Ombudsperson for Responsible Enterprise, which could result in findings that may be used in defence (or to assist) a claim under an investment treaty. Aside from local proceedings, there is also the potential for other international proceedings to have an impact, for example other ISDS claims arising from the same measure.

In investor-state arbitration, states can and do bring counterclaims. The potential for a counterclaim may influence timing for bringing a claim and will almost certainly impact the settlement dynamics, including in early negotiations or mediation to try to find a commercial solution.

D. DISPUTE FUNDING

The dispute funding industry globally manages billions of capital in any given year, a substantial portion of which is invested into international arbitrations and in particular investor-state disputes.[223] While often necessary for investors whose entire investment, and the associated cash flow, has been expropriated or impacted by a host state action, dispute funding (also known as third party funding) can equally be helpful to well-capitalized investors who want to pursue their rights but spend their own capital elsewhere. Funding can be obtained early in the process, before formally initiating a dispute, or at almost any point thereafter. Indeed, there is even an entire segment of the funding industry dedicated to award enforcement and insurance against annulment risk.[224] Given that the ability to obtain funding might be a key criterion for an investor when deciding whether or not to pursue a claim, this growing market has already and will continue to expand the sorts of claims that are able to be pursued.

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[223] See e.g. Rachel Howie & Geoff Moysa, "Financing Disputes: Third-Party Funding in Litigation and Arbitration" (2019) 57:2 Alta L Rev 465 at 492.

[224] Antony Crockett, "Inside Arbitration: Risks and Awards: Challenges of Enforcement Against States," *Inside Arbitration* (27 September 2023), online: [perma.cc/X5AP-2HQK].

E. EXPERT ENGAGEMENT

It is generally helpful to engage with experts early in pursuing any claim. This is no different in investor-state arbitration. Identifying early what types of evidence will be helpful and of that which areas will have to be provided by experts, discussing these areas with potential experts to get a sense of what opinions they may have, and in the case of damages experts hear where they are estimating quantum, can greatly assist in strategy. In investor-state disputes, specifically those involving resources and energy industries, there can be many different ways to value a company's loss as a result of a breach of an investment protection. This is particularly so where a potentially lucrative project is in its early stages, and there may be unknowns around how profitable the project will be (when methodologies such as the discounted cash flow model discussed above may be apposite). If the project company is on the brink of some sort of change that could affect the calculation of damages (such as a discovery), there may be a strategic consideration in delaying that claim until more information is attained.

F. TIMING

There can be immoveable bars to investment treaty claims in the form of express time limitations or expiry of treaties. Because these cannot generally be avoided or extended, they need to be taken into account when choosing when to bring a claim.

Where there are no such limitation issues, the investor will enjoy greater flexibility around the timing for bringing a claim and will be more able to take into account local or government changes, or any of the other factors discussed above. As most treaties also require some sort of notice followed by a "cooling-off period" to conduct negotiations,[225] and as formal mediation for investor-state disputes gains traction, there may also be strategic considerations around when the best commercial resolution might be obtained if a claim is threatened. Having the ability to consider these items in advance will help to put an investor in the best possible position to bring a claim when ready and when advantageous to its interests.

G. CONSIDERATIONS FOR STATES

Some of the considerations above, such as ensuring strong ongoing relationships, apply to both states and investors but, practically, are more crucial for investors. A number of specific considerations are worth discussing from the perspective of the state. In reality, many of the steps a state can take to protect its position are in the context of concluding the BIT or contract, rather than when a dispute has arisen. For example, many states include in certain BITs or investment agreements a "stabilization clause" which shields foreign investors from certain subsequent adverse legislative or regulatory change by the host state.[226] Doing so is obviously a way in which to make investments in the host state more attractive. However, such a clause also leaves states with a greater likelihood of becoming involved in ISDS as a result of regulatory changes if those do not comply with the terms

[225] Aatreya Siddharth S, "Cooling-Off Periods" (15 April 2024), online: [perma.cc/NFP3-Q9VZ].
[226] Oshionebo, *supra* note 7.

of the stabilization clause. Whether to include such a provision (and its drafting) thus is a complex decision and should be addressed with the advice of legal counsel.

Likewise, the choice of governing law is an important consideration that warrants serious thought by the state. As explained above, BITs are governed by international law, but they frequently provide for a role for other legal systems (for example, in determining whether a legal entity is an "investor"). Issues of foreign law also arise for states when state-owned utilities or corporations enter into agreements directly with foreign investors. Often, these agreements will specify the investor state's substantive law shall apply in the event of a dispute.[227] Thus, states should ensure they retain counsel with expertise in that substantive law prior to entering into the agreement. Without doing so, the state likely lacks the knowledge to determine whether such law is particularly disadvantageous.

Similarly, the consideration of whether to include cooling-off provisions or longer notice provisions can impact the potential for amicable resolution (and consequently how often disputes turn into arbitrations) and the ability of the investor to conduct work on the investment in the interim period which, of course, can potentially lead to profit for both the investor and state.

Finally, states should also consider whether to include fork-in-the-road provisions, which can prevent investors from getting multiple bites at the apple by bringing claims before both courts and arbitral institutions. Simply put, a state's determination on which of the above to include comes down to the state's weighing of the importance of protecting itself in a potential dispute versus attracting investments in the first place.

VI. CONCLUSION

International energy and resources companies have for years dealt with this significant shift in the way states have approached protections for foreign investors. This shift has seen both a move away from unqualified treaty-based protections and a move toward higher expectations around responsible planning and due diligence, environmental, and human rights compliance by energy companies. As discussed, Canada (and the broader global community) has shown a willingness to water down investment protections in exchange for more flexibility to enact measures in support of domestic policy goals.

As states continue to terminate BITs and FTAs and exit from legacy multilateral treaties, investors will have to adjust the way in which they assess and manage risk. But, at its core, this changing landscape is manageable. Companies have at their disposal a number of mechanisms through which to continue to protect their investment. Key to this protection is to ensure that investments are structured appropriately and that existing dispute resolution mechanisms are utilized to the greatest degree possible.

This changing landscape is not going to stop any time soon. Ultimately, it is up to energy companies to ensure they are positioned appropriately.

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[227] Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration" (2014) 1:1 McGill J Dispute Resolution 1.