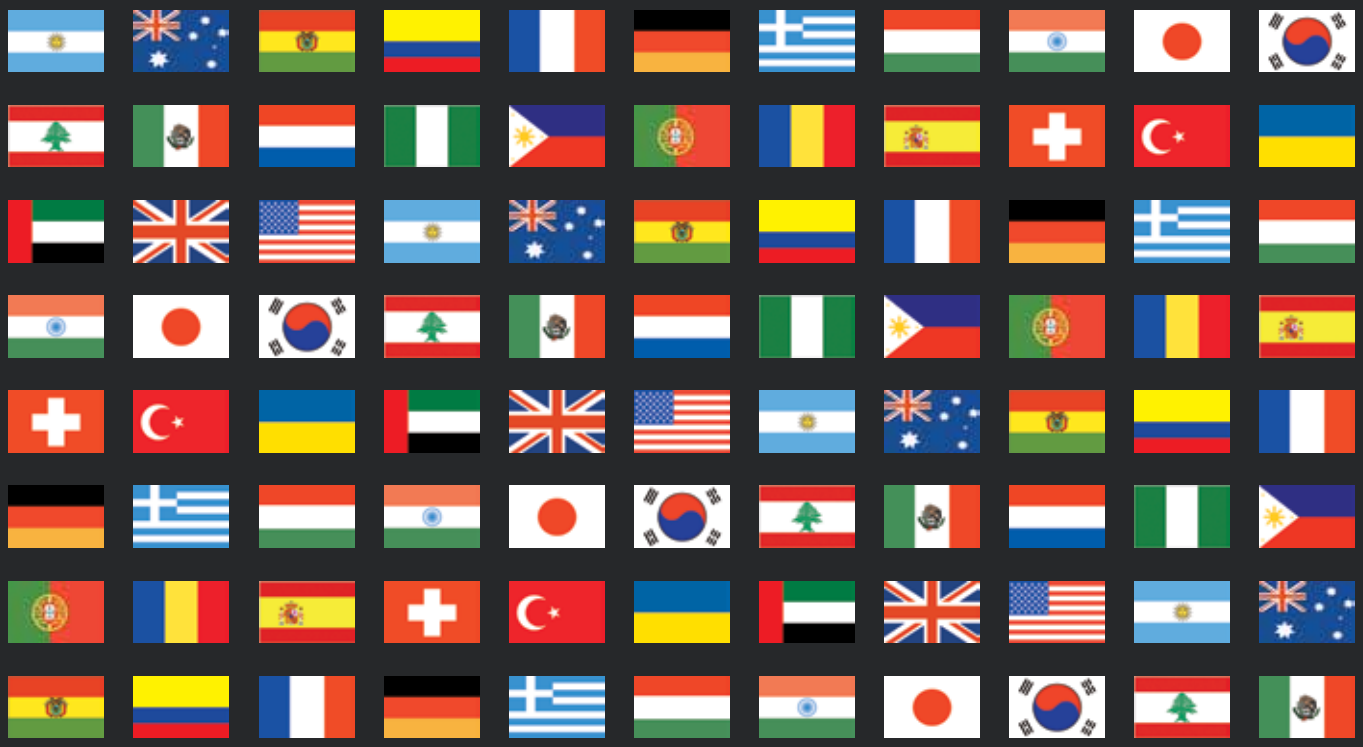
Investment Treaty Arbitration

In 25 jurisdictions worldwide

Contributing editors
Stephen Jagusch and Epaminontas Triantafilou



2015

GETTING THE DEAL THROUGH

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United States

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Background

1 What is the prevailing attitude towards foreign investment?

Foreign direct investment in the United States represents an essential aspect of the United States economy. Accordingly, the US government strives to create favourable conditions to maintain its status as one of the leading global recipients of FDI. The United States has been a global leader in negotiating and entering into numerous international investment treaties, free trade agreements, and double taxation treaties to promote foreign investment, and has many initiatives from local government to national levels designed to preserve and enhance the United States' position as a top investment destination.

To that end, the United States has adopted a model bilateral investment treaty that is utilised by many countries as a standard for treaty negotiations, and has also entered various multilateral investment treaties including the North American Free Trade Agreement (NAFTA) and the Dominican Republic and Central American Free Trade Agreement (CAFTA-DR), which was modelled on NAFTA but with some important variations.

The United States also has various bilateral free trade agreements, most recently with South Korea, Colombia and Panama. The Obama administration has regularly reaffirmed the government's commitment to an open investment policy with an aim towards maintaining the United States' position as a destination of choice for foreign investors. (for example, the White House, 'Remarks by the President at Select USA Investment Summit', speech, 31 October 2013, available at www.whitehouse.gov/the-press-office/2013/10/31/remarks-president-selectusa-investment-summit.)

2 What are the main sectors for foreign investment in the state?

Foreign direct investment in the United States spans a wide spectrum of industry sectors. At over one-third of total FDI in the United States economy, the manufacturing sector continues to attract the largest percentage of total inward FDI flows, followed by the services sector at nearly 30 per cent of the inward FDI stock.

Within the manufacturing sector, there have been major FDI investments in both traditional (oil and gas) and new (shale, renewables) energy sources as well as strong growth in the chemical, automobile, steel and other transportation sectors. This trend should continue to grow with the large deposits of shale and other renewable energy deposits that have been discovered within the United States in recent years.

FDI investments in the services sector range across depository institutions (banking); information, scientific, technical, and professional services; and the finance and insurance industries, among other services categories.

3 Is there a net inflow or outflow of foreign direct investment?

Although the United States remains the leading recipient for FDI flows within the OECD, with net inflows totalling approximately $187 billion in 2013, outward FDI flows still exceed inward FDI by a large measure. In 2013, net FDI outflows from the United States totalled $328 billion, preserving the United States' place as the world's largest investing economy (UNCTAD, World Investment Report 2014, Global Value Chains, United States Country Fact Sheet, available at http://unctad.org/sections/dite_dir/docs/wir2014/wir14_fs_us_en.pdf).

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

There are no requirements over the form of contracts particular to foreign investors in the United States, whether contracting with the government or with private parties. Nevertheless, as noted in question 9, the US government will review certain foreign investments to ensure that they do not present national security concerns and they comply with various national security laws in place in the United States. In recent years, such national security concerns have impacted attempted FDIs in strategic areas such as ports and telecommunications. Government contractors, whether domestic or foreign, will also typically be subject to whatever procurement rules govern the particular state instrumentality (see www.whitehouse.gov/omb/procurement_default for information on federal procurement guidelines).

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

The United States is party to multiple bilateral, regional and multilateral investment treaties.

As of September 2014, the United States has concluded 48 BITs, of which 41 are in force (United States Bilateral Investment Treaties, US Department of State, www.state.gov/e/eb/ifd/bit/117402.htm).

The United States has also entered into 14 free trade agreements (FTAs) with 20 countries, including the NAFTA, between the United States, Canada and Mexico; and the Dominican Republic-Central American Free Trade Agreement, between the United States and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic (*Free Trade Agreements*, Office of the US Trade Representative, www.ustr.gov/trade-agreements/free-trade-agreements).

Many of the United States FTAs contain investment chapters with core investor protections and dispute resolution sections similar to those contained in the BITs. Recent FTAs include those with South Korea, Panama and Colombia. The United States is also in negotiations concerning a regional, Asia-Pacific trade agreement, known as the Trans-Pacific Partnership (TPP) Agreement with the objective of shaping a high-standard, broad-based regional pact. It also is in negotiations with the European Union (for the Transatlantic Trade and Investment Partnership (T-TIP)), which is a comprehensive, high-standard trade and investment agreement that, if passed, will increase access to European markets for American companies, goods and services. Further information on the status of the negotiations of these treaties is available at www.ustr.gov/trade-agreements/free-trade-agreements.

The United States is not a member of the Energy Charter Treaty (ECT).

The United States Department of State's 'Treaties in Force' database includes a list of United States bilateral and multilateral treaties on record as being in force from 1 January of each year (www.state.gov/documents/organization/218912.pdf).

6 Is the state party to the ICSID Convention?

The United States signed the ICSID Convention on 27 August 1965, and deposited its instrument of ratification on 10 June 1966. The ICSID

Convention entered into force with respect to the United States on 14 October 1966.

7 Does the state have an investment treaty programme?

The United States launched a BIT programme in 1977, entered its first BIT (with Panama) in 1982 and has since concluded BITs with 48 countries. As noted above, many of the United States FTAs also contain investment chapters that mirror protections found in many United States BITs.

The United States BIT programme aims to protect private investment, to develop market-orientated policies in partner countries and to promote United States exports.

Its central goals are:

- to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements);
- to encourage the adoption of market-orientated domestic policies that treat private investment in an open, transparent and non-discriminatory way; and
- to support the development of international law standards consistent with these objectives.

As discussed in question 12, United States BITs are negotiated by representatives of the United States Department of State and its FTAs by the United States Trade Representative (USTR) on the basis of a model BIT text developed by the United States. The most recent United States model BIT was adopted in 2012 and replaced the earlier model BIT adopted in 2004 (www.state.gov/e/eb/ifd/bit/). As international treaties, negotiated BITs require advice and consent of two-thirds of the United States Senate to enter into force under United States law.

Regulation of inbound foreign investment

8 Does the state have a foreign investment promotion programme?

The United States actively promotes foreign investment at multiple levels and across various government agencies. In addition to its active BIT and FTA negotiation programmes, and regular reviews of legislation and regulatory policy in the trade, tax, technology and other spheres to ensure competitiveness in the global marketplace, the government has instituted various initiatives specifically designed to maintain, attract and support foreign investment.

For example, SelectUSA, a programme established by the President, and housed within the United States Commerce Department, strives to showcase the United States' attributes as a premier business destination, and provide easy access to governmental programmes and services related to foreign investment.

Among other features, SelectUSA maintains a website containing a searchable guide of federal programmes and services available to businesses operating in the United States, including grants, loans, loan guarantees and tax incentives, and provides industry and regional snapshots that describe the competitive landscape (http://selectusa.commerce.gov).

There are also a vast array of state and local economic development organisations and chambers of commerce, which work to attract and retain foreign investment by offering information on matters such as financing and incentive programmes, business tax structure, workforce and demographic attributes and available properties. State and municipal governments, together with their economic development agencies, sometimes offer various tax and other incentive structures to attract foreign investors.

9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

For the most part, United States law treats foreign-owned businesses identically to United States-owned businesses, and state laws impacting FDI are not implemented as they would be pre-empted by the federal congressional and executive prerogatives to legislate within this sphere. There are no economic sectors restricted to United States nationals or requiring specific holdings based on nationality. There are no restrictions of foreign ownership of real estate and there are no exchange control or currency regulations affecting foreign investment.

Generally, there are relatively few hurdles that need to be cleared in order to incorporate and register a business in the United States, although this varies from state to state. For example, in Delaware, one of the leading sites for business incorporation, only the following steps must be completed:

- choose a business entity type;
- obtain a registered agent in the state of Delaware;
- reserve your entity name;
- complete a certificate of incorporation; and
- request a certificate of status or good standing for certain financial institution requirements (http://corp.delaware.gov/howtoform.shtml).

Certain foreign investments, however, are subject to governmental review for potential national security implications. Pursuant to the Exon-Florio Amendment to the Defense Production Act of 1950, as amended, the Committee on Foreign Investment in the United States (CFIUS) is authorised to review foreign investments in United States businesses for potential effects on national security. Although CFIUS rarely suspends or blocks foreign investment activity, it is nevertheless empowered to require foreign investors to agree to various measures designed to mitigate national security concerns, such as notification obligations relating to changes in products or services, and the establishment of internal compliance monitoring measures.

Further, foreign investors in United States entities are, of course, subject to the full panoply of domestic business, antitrust, securities, tax and other legislation governing domestic entities, and, when contracting with government agencies, any relevant state or federal procurement laws or regulations.

10 Identify the state agency that regulates and promotes inbound foreign investment.

As noted in question 8, the United States Department of Commerce, as well as a wide spectrum of regional, state and local economic development organisations and chambers of commerce, work actively and often in coordination to promote inward FDI. Again, state laws impacting foreign direct investment are not implemented as they are pre-empted by the federal congressional and executive prerogatives to legislate within this sphere.

Responsibility for the scrutiny of potential foreign investments for national security concerns resides with the CFIUS, an interagency committee chaired by the United States Treasury.

11 Identify the state agency that must be served with process in a dispute with a foreign investor.

In investment treaty disputes with the United States or its agencies and instrumentalities, the procedures for proper notice on the United States will be set forth in the relevant treaty. NAFTA, the 2012 model BIT and the United States BITs with Uruguay and Rwanda, for instance, all provide that notices and other documents shall be served on the United States by delivery to the Executive Director within the Office of the Legal Adviser at the United States Department of State, in Washington, DC.

To the extent that a foreign investor brings an action against the United States in the United States courts, the requirements for process will be found in the relevant rules of procedure. Specifically, Federal Rule of Civil Procedure 4 provides that service upon the United States is made by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or to an Assistant United States Attorney or designated employee, and by sending a copy of the summons and complaint to the Attorney General of the United States in Washington, DC. 28 USC section 2410(b) establishes identical procedures for service of process on the United States in suits against the United States in state courts.

Investment treaty practice

12 Does the state have a model BIT?

In April 2012, upon the conclusion of a three-year review of the prior 2004 version, the US government released a revised 2012 model BIT, which negotiators in the Office of the United States Trade Representative and the United States Department of State use as a template in negotiating bilateral investment treaties and the investment chapters of United States free trade agreements.

Like the 2004 model, the 2012 model BIT attempts to maintain a balance between providing strong investor protections and preserving the government's ability to regulate in the public interest. Targeted changes, however, have been made to the 2012 text to enhance transparency and

public participation; improve protections for United States firms investing in state-led economies; and strengthen protections relating to labour and the environment.

The full text of the 2012 model BIT is available online at www.state.gov/documents/organization/188371.pdf.

13 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

The Office of the Assistant Legal Adviser for Treaty Affairs, within the United States Department of State, serves as the principal United States government repository for United States treaties and other international agreements. The treaty office advises other offices under the Legal Adviser, other Department bureaus (including posts overseas), and other government agencies on all aspects of treaty law and procedure, including constitutional questions, and provides guidance and assistance in the authorisation, drafting, negotiation, application, and interpretation of hundreds of agreements annually. It also responds to treaty-related inquiries from Congress, academia, members of the public, and officials of foreign governments and international organisations.

The Legal Adviser office also publishes *Treaties in Force* (TIF), which details over 10,000 United States treaties and international agreements in force as of 1 January of each year, and is charged with publication of treaties and international agreements in the Treaties and Other International Acts Series (TIAS). An electronic edition of *Treaties in Force* is available in text-searchable PDF format, here: www.state.gov/documents/organization/218912.pdf.

Copies of United States treaty materials are widely available at many libraries across the country, including state, academic, public, federal depositories, and the Library of Congress and through online services such as Lexis, Westlaw and HeinOnline. See also http://fletcher.archive.tusm-oit.org/multilaterals/ (including over 200 multilateral treaties and related instruments, divided into subject categories, such as human rights, trade and commercial relations, marine and coastal, and diplomatic relations). The text of treaties, as published as Senate Treaty Documents, may also be accessed through the Library of Congress' THOMAS website (http://thomas. loc.gov/home/treaties/treaties.html) and from the U.S. Government Printing Office (www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC).

The Office of the United States Trade Representative also maintains an online repository of United States trade-related agreements, organised into the following categories: WTO and multilateral affairs, free trade agreements, trade and trade investment framework agreements, and bilateral investment treaties (www.ustr.gov/trade-agreements).

Although there is no central repository of treaty preparation materials for all United States treaties, the Yale University Law Library has collected the available travaux preparatoires for international treaties online and in its collection: http://library.law.yale.edu/collected-travaux-preparatoires.

14 What is the typical scope of coverage of investment treaties?

United States BITs tend to cover a broad range of investments (including, for instance, stocks, bonds, various loan and debt interests, futures, options and other derivatives, contracts, intellectual property rights, licences, permits and similar rights conferred pursuant to domestic law, and moveable and immoveable property) and offer protection to both foreign nationals and enterprises. Recent United States BITs also often contain a denial of benefits clause that allows a party to deny the benefits of the treaty to an investor of the other party if that investor does not maintain substantial business activities in the territory of the other party, and where investors of a non-party or the denying party own or control the enterprise.

15 What substantive protections are typically available?

Although there are variations among them, United States BITs typically provide investors with the following core benefits, which apply to foreign investments and govern the conduct of both the federal US government and the government of any state within the United States:

- the better of national treatment or most-favoured nation treatment for the full life cycle of investment – from establishment or acquisition, through management, operation, and expansion, to disposition;
- clear limits on the expropriation of investments and provisions for payment of prompt, adequate, and effective compensation when expropriation takes place;
- treatment that is in accord with customary international law, including fair and equitable treatment and full protection and security;
- the transferability of investment-related funds into and out of a host country without delay and using a market rate of exchange;
- protection from the imposition of trade-distorting performance requirements, such as local content targets or export quotas;
- the right to engage the top managerial personnel of the investor's choice, regardless of nationality; and
- the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

To date, all investor claims against the United States have arisen under the NAFTA treaty which, under article 1120, provides investors with the option of bringing claims under the ICSID Convention rules, the ICSID Additional Facility Rules or the UNCITRAL Rules. Of the 16 former or pending cases, four have used the ICSID Additional Facility Rules and 12 have employed the UNCITRAL Arbitration Rules.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

No. In fact, the United States Department of State links to a large volume of materials concerning investor arbitrations against the United States on its website at www.state.gov/s/l/c3433.htm. In addition to pages describing the cases against state parties, the website contains pleadings, awards (where applicable) and certain other documents that are publicly available under the rules and confidentiality agreements applicable in each case.

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

The United States has faced 16 investor claims under NAFTA. The United States has also received official notices of intent to file claims under certain other FTAs and BITs, including alleged failures by United States regulators to sufficiently protect foreign investors against suspected frauds at the Texas-based Stanford Financial group of companies (the 'Stanford Ponzi Scheme notices'), but so far no such claims have passed the notice stage. To date, the United States has never lost an investment dispute brought against it.

Information pertaining to treaty arbitrations where the United States has been named as a respondent is publicly available on the Department of State's website at www.state.gov/s/l/c3433.htm.

Although many of these cases have been withdrawn, or dismissed on jurisdictional grounds before reaching a merits hearing, several notable NAFTA cases which reached a final award are identified below.

Glamis Gold Ltd v United States of America

Glamis Gold Ltd, a publicly-held Canadian mining corporation, submitted a claim to arbitration against the United States under the UNCITRAL Arbitration Rules. Glamis alleged injuries relating to a proposed gold mine in California.

Glamis contended that certain federal government actions and California regulations regarding open-pit mining operations resulted in the expropriation of its investments in violation of article 1110, and denied its investments the minimum standard of treatment under international law in violation of article 1105. Glamis claimed damages of not less than $50 million. On 8 June 2009, the Tribunal released an award dismissing Glamis's claim in its entirety and ordering Glamis to pay two-thirds of the arbitration cost in the case.

Methanex Corp v United States of America

Methanex Corporation, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on its own behalf for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE.

Update and trends

The United States Model BIT was recently amended in 2012 to respond to emerging changes such as the ongoing shift away from a bipolar 'capital exporting/host state' paradigm, the global financial crisis and the rise of state-owned enterprises in many potential host states. While the 2012 model BIT has not yet formed the basis of any new concluded agreement, it will inform ongoing negotiations for BITs with China and India, as well as other reported bilateral talks with Pakistan, Mauritius, Cambodia and Vietnam. The United States is also expected to focus on developing BITs in regions where it has fewer established relationships, such as sub-Saharan Africa , MENA and Latin America. The new template will also likely inform negotiations for a multilateral Trans-Pacific Partnership Free Trade Agreement (FTA) and the ongoing negotiations for a potential Transatlantic Trade and Investment Partnership (T-TIP) with the European Union.

At the same time, however, there has been a trend of greater hostility towards investment arbitration and BITs in Latin America. Bolivia terminated its BIT with the United States in 2012, and it is possible that Venezuela and Ecuador may follow suit after their withdrawals from the ICSID Convention. (Bolivia and Venezuela have both terminated their BITs with the Netherlands. In October 2013, the Government of Ecuador announced that it had established a commission to audit the majority of BITs to which it is party, to determine whether the country will seek to annul its participation. Reports indicate that the commission is planning to recommend that Ecuador terminate 26 BITs.) The United States–Ecuador BIT recently gave rise to one of the only state–state arbitrations concerning its scope interpretation, highlighting tensions between the United States and its current and prospective Latin America BIT partners.

In other developments, the United States remains a prominent jurisdiction for actions to enforce investment awards, including against sovereign debtors. Federal courts in the United States have demonstrated a lack of receptiveness to both procedural and tactical defences to enforcement based on sovereign immunity, the standing of third-party assignees of award creditors, and res judicata or statute of limitations defences. In particular, the US Supreme Court's landmark March 2014 decision in *BG Group v Argentina*, in which the Court determined that the arbitrators, not the courts, were the proper decision makers for gateway considerations about whether prerequisites to international arbitration under the United Kingdom–Argentina BIT had been satisfied, has been viewed as reaffirming the United States' pro-arbitration reputation.

Methanex contended that a California Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of article 1110, denied it fair and equitable treatment in accordance with international law in violation of article 1105, and denied it national treatment in violation of article 1102. Methanex claimed damages of $970 million.

Following hearings on jurisdiction and admissibility, a hearing on the merits was held in June 2004. On 9 August 2005, the tribunal released the final award, dismissing all of the claims. The tribunal also ordered Methanex to pay the United States' legal fees and arbitral expenses in the amount of approximately $4 million.

***Mondev International Ltd v United States of America*, NAFTA Arb. No. ARB(AF)/99/2**

Mondev International Ltd, a Canadian real-estate development corporation, submitted a claim under the ICSID Additional Facility Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates (LPA), a Massachusetts limited partnership it owned and controlled. Mondev alleged its losses arose from a decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law.

Mondev alleged that Massachusetts' statutory immunisation from intentional tort liability of the Boston Redevelopment Authority was incompatible with international law, and that the decision of the Massachusetts court upholding that law was arbitrary and capricious and amounted to a denial of justice. Mondev also alleged that the United States failed to meet its Chapter Eleven obligations by not according LPA national treatment (article 1102); by not according it treatment in accordance with international law (article 1105); and by expropriating its investment without compensation (article 1110). Mondev claimed damages of not less than $50 million.

On 11 October 2002, the tribunal issued an award dismissing all claims against the United States.

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Investment treaty claims against the United States have involved a large number of industries and sectors, ranging from the United States regulation of the mining, pharmaceutical and lumber industry to its rules on gasoline additives.

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

To date, the United States has participated actively in the defence of all investment treaty claims brought against it, including in the selection of arbitrators.

21 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

The Department of State is the lead agency representing the United States government in investment treaty cases. The State Department works closely with other governmental agencies to develop United States government positions in these cases. The United States has defended all claims brought against it.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The United States is party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, in force as of December 1970) and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention, in force as of October 1990), a similar regional treaty among certain members of the Organization of American States. The New York and Panama Conventions are codified into United States law pursuant to Chapters 2 and 3 of the United States Federal Arbitration Act (1925), 9 USC section 201 et seq.

The United States has attached what is commonly termed the 'reciprocity reservation' to its ratification of the New York and Panama Conventions, such that the United States will apply those Conventions only to the recognition and enforcement of awards made in the territory of another contracting state. The United States' ratification of the New York Convention is also subject to the reservation that the United States will apply it only to differences arising out of legal relationships of a commercial nature.

As noted above, the United States is also party to the ICSID Convention.

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

To date, no investment treaty awards have been rendered against the United States, but the United States has encouraged other countries to comply with investment treaty awards that have been entered against them and in a notable example suspended preferential trade preferences granted to Argentina for failing to comply with such awards. This strongly suggests that the United States would voluntarily comply with an investment treaty award validly rendered against it.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

As noted above, the United States has not been subject to any unfavourable merits awards to date.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

The enforcement of non-ICSID arbitral awards in the United States is governed by the New York and Panama Conventions and the Federal Arbitration Act, 9 USC section 1 et seq, which gives effect to and implements the Conventions.

The FAA, and federal and state law express a strong presumption that international arbitration awards subject to the Conventions will be confirmed. Under section 10(a) of the FAA, an award made in the United States may only be vacated on the following limited grounds:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality or corruption in the arbitrators;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Some United States courts have vacated awards on the additional ground that the tribunal manifestly disregarded the law. Those courts that have employed this ground, however, have used it sparingly, and generally only in instances where the law to be applied is crystal clear and clearly ignored.

For international arbitral awards rendered outside the United States, recognition or enforcement may be refused only on the similar and similarly narrow grounds set forth in article V of the New York and Panama Conventions, which are:

- absence of a valid arbitration agreement (article V(1)(a));
- denial of the opportunity to present one's case (article V(1)(b));
- excess of authority (article V(1)(c));
- violations of arbitral procedures or the law of the arbitral situs (article V(1)(d));
- awards that are not yet binding or have been set aside (article V(1)(e));
- awards that address nonarbitrable issues (article V(2)(a)); and
- awards that violate public policy (article V(2)(b)).

Although (unlike the FAA grounds for vacatur), the Conventions contain an express public policy ground for non-recognition, United States courts have rejected an expansive reading of the public policy defence, and have tended to deny enforcement of awards on that basis only where 'enforcement would violate the forum state's most basic notions of morality and justice.' (For example, *Parsons and Whitmore Overseas Co v Societe Generale de l'Industrie du Papier*, 508 F2d 969, 974 (2d cir 1974).)

While there are only limited and narrowly-construed bases for vacating or denying recognition of arbitral awards under the FAA and the Conventions, United States courts, guided by the US Supreme Court's January 2014 decision in *Daimler v Bauman*, will require that the party seeking enforcement of an international arbitral award establish personal jurisdiction over a judgment debtor. The *Daimler* decision recently informed a decision of the US Court of Appeals for the Second Circuit to refuse enforcement of an ICC award, on the basis that the Turkish award debtor did not have a sufficient connection with the state of New York for the court to exercise personal jurisdiction over it. See *Sonera Holding BV v Cukurova Holdings* AS 750 F3d 221 (2d cir 2014).

Separate procedures apply to the recognition and enforcement of ICSID awards. Although ICSID awards are not subject to ordinary judicial challenge, they still must be brought to a national court for recognition and enforcement if the losing party refuses to voluntarily comply. Article 54 of the ICSID Convention requires national courts of the contracting states to recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. The United States enabling legislation for the ICSID Convention, 22 USC section 1650a, provides that the United States federal courts shall have exclusive jurisdiction over actions to enforce ICSID awards and clarifies that the grounds for vacatur or nonrecognition set forth in the FAA shall not apply to ICSID Convention awards.

Where a judgment debtor is a sovereign, article 55 of the ICSID Convention provides that 'Nothing in article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.' This article is generally perceived to relate to the execution, rather than the judicial recognition phase.

As the United States has never lost an investment arbitration, there is accordingly no case law in the United States directly addressing possible enforcement of a treaty award against the United States under any of the above Conventions.

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