

Challenges to International Investment Protection: Austria's and Mexico's Investment Treaties

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1. Depoliticization

Mexico's early history as an independent state is full of military interventions, many of them by the United States. March 18th 1938 is an important date for Mexico, it is known as "Oil Expropriation Day" and is a national holiday.¹ On this day, the federal Mexican government seized control of the country's oil resources thereby implementing Article 27 paragraph 4 of the 1917 Constitution of Mexico.² This first led to private sanctions against Mexican products and, when they failed, to diplomatic

¹ The civic holiday "Día de la Expropiación Petrolera" is celebrated annually on March 18th, see official website of the President of the Mexican Republic <https://www.gob.mx/presidencia/articulos/18-de-marzo-dia-de-la-expropiacion-petrolera>, accessed 18 April 2018.

Noel Maurer, 'The Empire Struck Back: Sanctions and Compensation in the Mexican Oil Expropriation of 1938, 71' (2011) *The Journal of Economic History* 590-615, pp. 590.

² In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands; of all minerals or substances, which in veins, ledges, masses or ore pockets, form deposits of a nature distinct from the components of the earth itself, such as the minerals from which industrial metals and metalloids are extracted; deposits of precious stones, rock-salt and the deposits of salt formed by sea water; products derived from the decomposition of rocks, when subterranean works are required for their extraction; mineral or organic deposits of materials susceptible of utilization as fertilizers; solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons; and the space above the national territory to the extent and within the terms fixed by international law.



protection by the United States on behalf of the affected companies.³ Among other measures, the US suspended treasury purchases of Mexican silver and later the Silver Purchase Act of 1934.⁴ In 1946 the Truman administration blocked the extension of loans to Mexico until Mexico had settled with Mexican Eagle.⁵ Fortunately, this time, the exercise of diplomatic protection did not lead to military intervention.

This leads me to an often-overlooked goal of investment arbitration – depoliticization.⁶

In the late 19th and early 20th century, diplomatic protection led to numerous military interventions, often by European States in Latin America. Diplomatic protection was often accompanied by ‘gunboat diplomacy’.⁷

The weaker the host State, the more exposed it is to unilateral, often arbitrary, determinations of the claiming State. While strong States can violate aliens’ rights with impunity, weak states have to pay even unjust claims. The claiming State makes *ex parte* determinations on the validity of the claim often driven by domestic political influences. Politics rather than the rule of law govern the case.⁸

Even after the use of force as means to enforce public international law had been prohibited by the UN Charter, disputes about foreign investments had, at times, the potential to turn into military conflicts. In 1956 the dispute arising from the nationalization of the Suez Canal led to a military invasion in Egypt by the United Kingdom and France.⁹ Also, the 1962 Cuba missile crisis which brought the world

³ Maurer, ‘The Empire Struck Back’, pp. 603ff.

⁴ Maurer, ‘The Empire Struck Back’, pp. 606.

⁵ Maurer, ‘The Empire Struck Back’, pp. 607.

⁶ On the Depoliticization of Investment Disputes in general see in more detail: Ursula Kriebaum, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes’ (2018) ICSID Review, pp. 1-15.

⁷ See e.g.: Edwin M. Borchard, ‘Limitations on Coercive Protection’ (1927) 21 AJIL 303-306, pp. 303; Miriam Hood, *Gunboat Diplomacy, 1895-1905: Great Power Pressure in Venezuela* (New York, A.S. Barnes 1975); C. Lipson, *Standing Guard, Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley, University of California Press 1985); Noel Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013* (Princeton University Press 2013); O. Thomas Johnson Jr and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ (2012) Yearbook on International Investment Law & Policy 2010-2011 649-692, pp. 650-657.

⁸ Borchard, ‘Limitations’, p. 303ff.

⁹ See e.g.: Thomas T.F. Huang, ‘Some International and Legal Aspects of the Suez Canal Question’ (1957) 51 AJIL 277-307, p. 277; Maurizio Arcari, ‘Suez Canal’, in *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) vol IX, p. 675.

to the brink of nuclear war between the super powers had its root cause in nationalizations of US investors by Cuba.¹⁰ The US-Iran conflict started out as a conflict between the Anglo-Iran Oil Company and Iran, before it turned into a conflict between the UK and Iran after the nationalization of Anglo Iranian Oil Company and later between the US and Iran because of widespread nationalizations and expropriations of US companies after the Iranian Revolution.¹¹

With this legacy in mind, the idea of depoliticization played a prominent role in the drafting of the Convention on the settlement of investment disputes between States and nationals of other States, the ICSID Convention^{12, 13}. The goal was to replace diplomatic protection, which was rightly perceived as being dominated by politics, by a direct judicial remedy for investors.

This would have advantages for all of the three protagonists of investment protection: host states, home states and investors.¹⁴

As to host States, depoliticization protects them by saving them from diplomatic protection, including gunboat diplomacy.

Some of the conflicts just mentioned had occurred shortly before the ICSID Convention had been negotiated and must have inspired the drafters of the

¹⁰ See e.g.: William LeoGrande and Peter Kornbluh, *Back Channel to Cuba* (Chapel Hill: University of North Carolina Press, 2014), p. 164: "Viewed from Washington, the nationalization of U.S. property in 1960 was the proximate cause for imposing the embargo, so it could not be lifted until the compensation issue was addressed." See also literature on the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (otherwise known as the Helms-Burton Act).

¹¹ See e.g.: Brendan F. Brown, 'The Juridical Implications of the Anglo-Iranian Oil Company Case' (1952) *Washington University Law Quarterly* 384-397, p. 384; Alexander Orakhelashvili, 'Anglo-Iranian Oil Company Case', *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) vol I, 396; Sundya Pahuja, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses, Essays in Honour of Djamchid Momtaz* (Leiden; Boston: Brill 2017) 53-74, p 53.

¹² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention').

¹³ Aron Broches, the General Counsel of the World Bank pointed several times to the importance of depoliticization for the elaboration of the ICSID Convention.

¹⁴ Already Borchard (Borchard, 'Limitations', p. 305) has expressed the idea that arbitration would be advantageous for all three parties since it would be law and not politics that would determine the outcome. 'Were this done, all three parties to the issue would be assured of the protection of law for the determination of its rights and for protection against unjust intervention, and the plaintiff state would be relieved from the pressure of politics inducing intervention, from the danger of war and from the charge of imperialisms and naked might.'

Convention. Certainly, the adoption of the UN Charter with its prohibition of the use of force and the threat to use force¹⁵ except in self-defense¹⁶ brought about an important change in the legal framework concerning the available means to respond to violations of investors' rights. But even without the threat of violence, being sued by an investor is a far lesser evil than being pressurized by a powerful country on behalf of its national.

But depoliticization also relieves home States of an unpleasant burden. As *Vandevelde*, a famous US negotiator, explained: the US sought the inclusion of investor-state arbitration in investment protection treaties to 'provide investors with a remedy that would not depend upon the involvement of the investor's government in the dispute.'¹⁷ He describes this dependence as unsatisfactory not only for the investor but also for the government since it complicates or even impedes US foreign policy interests.¹⁸

The US government has acknowledged depoliticization as the principal rationale for the establishment of investor-State dispute settlement. In a recent PCA investment arbitration, the *Ecuador v United States* case, the US government explicitly mentioned the goal of depoliticization. It referred to it as: '... a principal rationale for investor-State dispute mechanisms, which is to depoliticize investment disputes and permit neutral and binding arbitration between the State and the investor.'¹⁹

For an investor, diplomatic protection means it needs to petition the home country to pursue the claim on its behalf.²⁰ Whether the home state is willing to pursue the investor's claim depends on many factors. Big players are more likely than small companies to obtain diplomatic protection. The relative political strength of the home and host State will enter into the equation, as well as various foreign policy considerations of the home State. By providing the investor with direct access to an

¹⁵ UN Charter, Article 2, para 4 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'

¹⁶ UN Charter, Article 51 'Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security.'

¹⁷ Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009), p. 576.

¹⁸ Vandevelde (n 17) 577.

¹⁹ *Republic of Ecuador v. United States of America*, PCA Case No 2012-5, Award (29 September 2012) para 201 (quoting the US statement of defence).

²⁰ See Article 1 ILC Draft Articles on Diplomatic Protection, 2006, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf accessed 6 September 2017.

international dispute settlement forum, the latter is no longer subjected to the political considerations of its home State²¹ and the dispute between a private Party and a State is not transformed into an inter-State dispute.

There are several ways to transfer investment disputes from the political arena of diplomatic protection to a judicial forum with objective, previously agreed standards and a pre-formulated dispute settlement process. They achieve different degrees of depoliticization.

Treaties of Friendship, Commerce and Navigation and especially older Free Trade Agreements or Bilateral Investment Treaties often contain dispute settlement clauses that only provide for the jurisdiction of the ICJ and/or an interstate arbitral tribunal.²² In these treaties, the dispute is clearly before a judicial forum but not completely depoliticized, since the basis for the legal proceedings is still diplomatic protection.

Nearly all modern Bilateral Investment Treaties or investment chapters in Free Trade Agreements provide for two forms of arbitration: investor-State and State-State.²³ So far, interstate arbitration clauses have been invoked only in a very limited number of cases.²⁴

²¹ Daniel M. Price, 'Some Observations on Chapter Eleven of NAFTA' (1999-2000) 23 *Hastings International Comparative Law Review* (2001), p. 427 also points to this fact 'Investors also welcomed this development because it gave them the opportunity to seek redress without being held hostage to their own government's political will or whim. The investor's claim would be decided on the merits and would not be subsumed within a larger political or foreign relations dialogue between its government and the host government.'

²² See e.g.: Treaty of Friendship, Commerce and Navigation Between the United States of America and The Italian Republic (signed 2 February 1948, entered into force 26 July 1949) Article XXVI.

²³ The Mapping Project conducted by the UNCTAD Investment Policy Hub mentions that 2429 out of 2575 mapped treaties provide for both investor-State and interstate arbitration, 2558 out of 2575 mapped treaties provide for interstate arbitration and 2444 out of the 2575 mapped treaties provide for investor-State arbitration (<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> accessed 3 September 2017).

²⁴ On the issue of interstate investment arbitrations see e.g.: Christoph Schreuer, 'Investment Protection and International Relations' in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Utrecht: Eleven International Pub 2007) 345-358, pp. 348-52; Michelle Potestà, 'State-to-State Dispute Settlement pursuant to Bilateral Investment Treaties: Is there Potential?' in Nerina Boschiero and Tullio Scovazzi (eds), *International Courts and the Development of International Law - Essays in Honour of Tullio Treves*, (The Hague: Springer, 2012) 753-768, p. 753; Anthea Roberts 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 *Harvard International Law Journal* 1, pp. 1-70; Clovis J. Trevino 'State-to-State Investment Treaty Arbitration

In cases relying on an interstate arbitration clause, the depoliticization is partly achieved with the transfer of the dispute to a neutral forum. But a dispute that originally existed between an investor and a State is still transformed into an inter-State dispute with all the potential negative side effects.

Only in the investor-State arbitration setting can the depoliticization of the dispute be fully realized. This goal can be achieved in different ways. As has already been mentioned, it was an explicit goal of the states negotiating the ICSID Convention to depoliticize investment disputes. For this purpose, they adopted Article 27 of the ICSID Convention.²⁵

Article 27 ICSID of the Convention²⁶ prohibits any recourse to diplomatic protection as soon as there is an agreement between an investor and the host State to submit a case to ICSID arbitration. Therefore, the ICSID Convention achieved what Latin American countries unsuccessfully tried to achieve with constitutional provisions prohibiting diplomatic protection.²⁷

Diplomatic protection of an investor by its home State is not totally banned. But the possibility to exercise diplomatic protection is suspended from the moment of

and the Interplay with Investor-State Arbitration Under the Same Treaty' (2014) 5 Journal of International Dispute Settlement 199-233, p. 199.

²⁵ Article 27 of the ICSID Convention pursues two goals as the drafting history shows. On the one hand the host State shall be protected against multiple claims emanating in parallel from the home State and the investor and on the other hand it aims to depoliticize investment disputes 'As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed—and this was an important innovation—that an investor's national State would no longer be able to espouse a claim of its national. In this way it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants. The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.' (Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, December 16-20, 1963, in *History of the ICSID Convention* (1968) vol II-1 242).

²⁶ Article 27 ICSID Convention

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

²⁷ Manuel R. Garcia-Mora 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33 Marquette Law Review 205-219, pp. 205ff.

consent between the investor and the host State unless an award is not honored by a host State.²⁸

The ban of the exercise of diplomatic protection as soon as consent between the investor and the host State is perfected does not mean that diplomatic involvement is excluded altogether. This is highlighted by paragraph 2 of Article 27 of the ICSID Convention. It says that informal diplomatic exchanges for the purpose of facilitating a settlement of a dispute are permitted.²⁹

While Article 27 ICSID does not ban diplomatic exchanges to facilitate the settlement of an investment dispute, its clear intention is to prevent the outbreak of an interstate conflict.

Austria ratified the ICSID Convention in May 1971 and it entered into force in June 24, 1971. Mexico signed the Convention on January 11 of this year. So far it has not ratified the Convention. Therefore, Austria is shielded from diplomatic protection by home States of investors as soon as consent for ICSID arbitration exists; so far, Mexico has not been able to profit from this shield.

Outside the ICSID system, arbitration rules do not deal with the issue of diplomatic protection and therefore do not contain an explicit prohibition of the espousal of claims by the home State as soon as an investor consented to investor-State arbitration.

There is no consensus as to whether a customary law provision analogous to Article 27 ICSID Convention exists in investment arbitration in general.³⁰

²⁸ Christoph Schreuer and others *The ICSID Convention: A Commentary*, 2nd edn. (Cambridge: Cambridge University Press 2009), p. 425, para 30.

²⁹ The case *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL (formerly *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*), Award (1 July 2009) paras 5.54, 5.63, 5.77, 5.78, 5.85, 6.15, 6.19. 15.1 offers an example for this type of diplomatic involvement, that happened before the investor started the investor-State arbitration. The case that was not an ICSID but an UNCITRAL case and the Germany-Thailand BIT does not contain a clause similar to Article 27 ICSID Convention.

³⁰ See for different opinions on the subject matter: Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, 2nd edn. (Cambridge: Cambridge University Press 2004), p. 275. '... [i]t would be reasonable to infer that, once the procedures directly involving the investor are invoked, the treaty does not permit the resort to diplomatic protection directly with the involvement in arbitration of the investor's national state. Otherwise, the settlement procedures provided for would duplicate rather than simplify the procedures for the settlement of disputes which would not be a logically consistent result.'; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79

According to an OECD study of 2012, around 20% of international investment protection treaties contain a provision that is similar to the one provided for in Article 27 of the ICSID Convention.³¹ The scope of these provisions varies slightly.³² Their

British Yearbook of Internationale Law 264-352, pp. 281-87; Michelle Potestà 'Republic of Italy v. Republic of Cuba' (2012) 106 AJIL 341-347, p. 346.

³¹ Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) 2 OECD Working Papers on International Investment <http://dx.doi.org/10.1787/5k8xb71nf628-en> accessed 3 September 2017.

³² Here are some random examples: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments (signed 13 January 2000, entered into force 20 November 2001) ('UK-Sierra Leone BIT'), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Slovenia for the Promotion and Protection of Investments (signed 3 July 1996, entered into force 27 March, 1999) ('UK-Slovenia BIT') and the Agreement between the Government of the Republic of Korea and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (signed and entered into force 4 March, 1976) ('UK-South Korea BIT') exclude any form of diplomatic protection but only after referral to arbitration.

See e.g. Article 8 (4) of the UK-Sierra Leone BIT: 'Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless:

- (a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or
- (b) the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.'

The same provision is contained in Article 10(2) of the UK-Slovenia BIT or Article 8(2) of the UK-South Korea BIT.

Another slightly different example for such a provision is Article VII of the Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (signed 3 December 1985, entered into force 18 May 1990):

'ARTICLE VII

1. The Parties shall seek in good faith and in the spirit of cooperation a rapid and equitable solution to any disputes between them concerning the interpretation or application of this treaty. ... If such negotiations are unsuccessful, the dispute may be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. ...

7. This Article shall not be applicable to a dispute which has been submitted to and is still before the Centre pursuant to Article VI.'

A further variation can be found in Article 9(4) of the Agreement between the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments (signed 21 July 1996, entered into force 17 January 2000):

'4- Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to an arbitration procedure or judicial procedure underway until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the Center or the Court of Law within the period envisaged by the ruling, - or else within the period which can be



common goal is to block or limit diplomatic protection in case of a pending investor-State dispute.³³

However, neither Austria's about 65 nor Mexico's about 50 investment protection treaties contain such clauses. While Austria is a Party to the ICSID Convention and does not necessarily need to rely on such clauses, they could provide an important shield against diplomatic protection for Mexico.

By means of these clauses, an espousal of claims by the home State of an investor is prevented once an investor-State arbitration is pending. This achieves the complete depoliticization of the dispute.

2. Challenges

Let me now turn to two issues that have led to frequent criticism of investment arbitration in public opinion and how they are dealt with in Austria's and Mexico's investment treaties and in investment arbitration: one is transparency and the second is regulatory space.

a. Transparency

As a reaction to public criticism that investment arbitration would take place behind closed doors, investor-State arbitration was adapted. Procedural provisions which try to make investment arbitrations more easily accessible to the public (publication of arbitration documents, access to hearings, *amicus curiae* submissions, etc.) have been adopted step by step.³⁴

determined on the basis of the international or domestic law provisions which can be applied to the case.'

Article 9(4) of the Italy-Armenia BIT (2003) contains a nearly identical provision.

³³ On these clauses see: Ben Juratowitch 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 ICSID Rev - FILJ 10-35, 16-22; Schreuer, 'ICSID Convention', paras 34-37.

³⁴ United Nations Conference on Trade and Development (UNCTAD) (2012), *Transparency*, UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva: United Nations) 37ff, United Nations publication, http://unctad.org/en/PublicationsLibrary/-unctaddiaeia2011d6_en.pdf accessed 18 April 2018.

In the case of NAFTA, and most of the Mexican cases were NAFTA cases, all three NAFTA parties agreed to the publication of all documents that are submitted to an investment arbitration tribunal or issued by the tribunal.³⁵

Therefore, Mexico is among the countries that have for some time subscribed to transparency of arbitration proceedings. We can find explicit transparency provisions

³⁵ North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001:

'Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
 - a. In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
 - b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
 - i. confidential business information;
 - ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
 - iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
 - c. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
 - d. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.'



also in the treaty between UAE and Mexico³⁶ that has not entered into force so far as well as in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership CPTPP³⁷ and Mexico's Free Trade Agreement with Panama³⁸.

Recently, transparency rules have been adopted under the auspices of the UN Commission on International Trade Law UNCITRAL. So far, there is no parallel rule under the ICSID Convention.

Even outside the scope of application of the UNCITRAL Rules on Transparency awards are published, unless both parties agree that they shall not be published, which is seldom the case. In all the cases where either Mexico or Austria has been a party, the awards are publicly accessible.

With regard to Austria: only the CETA treaty requires transparency of all the documents submitted to arbitral tribunals or issued by them.³⁹ So far, the investment part of that treaty has not entered into force and it is not provisionally applied. The BIT between Austria and Mexico, which entered into force in 2001, does not contain transparency provisions. This is not surprising, since the issue of transparency became a matter of public interest only after 2001. The developments on transparency demonstrate the capability of investment arbitration to respond appropriately to public concerns.

b. Regulatory Space

Critics argue that investment treaties could undermine the sovereign right of states to regulate activities within their jurisdiction, but also their duty to do so, for example when necessary to protect human rights from business interference.⁴⁰ This concern is

³⁶ Article 20 of the Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, not yet in force).

³⁷ Article 9.24 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, not yet in force).

³⁸ Article 7.5 Tratado de Libre Comercio entre los Estados Unidos Mexicanos y la República de Panamá (signed 3 April 2014, entered into force 1 July 2015).

³⁹ Comprehensive Economic and Trade Agreement Between Canada and the European Union [and its Member States] (CETA) (signed 30 October 2017, not yet in force): 'Article 8.36 Transparency of proceedings.

⁴⁰ See e.g. Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies', <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>.

often called lack of regulatory space and raised in particular in the context of indirect expropriations.

Austria's and Mexico's BITs contain classic expropriation provisions stating that expropriations are legal if they are in the public interest, non-discriminatory, respect due process and are against compensation. They do not contain specific provisions for regulatory measures. Only recent multilateral investment protection treaties that have been negotiated by or in the name of Austria and Mexico, but have not yet entered into force, like the CETA and CPTPP, provide for explicit regulation exceptions.⁴¹

However, we have seen a development in the case law of investment tribunals. This can be well illustrated by cases involving Mexico. The tribunal in *Metalclad v. Mexico*⁴² in 2000 only looked at the effects of a measure to establish whether an indirect expropriation had occurred. Three years later, in *Tecmed v. Mexico*⁴³ the tribunal already applied a balancing approach for this purpose. It balanced the public interest presumably pursued by the interference against the burden imposed on the investor⁴⁴ to establish whether an indirect expropriation had occurred. It drew inspiration from the case law of the European Court of Human Rights for this purpose. Both cases did not concern general legislation, but measures directed at an individual investor.⁴⁵

The problem of regulatory space and indirect expropriations should not be overestimated. It is generally accepted by tribunals that one can only speak of an expropriation if there is a total or at least substantial deprivation of an investment.⁴⁶

⁴¹ Article 8.9 of the Comprehensive Economic and Trade Agreement Between Canada and the European Union [and its Member States] (CETA) (signed 30 October 2017, not yet in force): 'Article 8.9 Investment and regulatory measures

Article 9.16 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, not yet in force):

'Article 9.16: Investment and Environmental, Health and other Regulatory Objectives.

⁴² *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 212.

⁴³ *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 para. 122.

⁴⁴ *Tecmed* (n 43) para 122.

⁴⁵ *Tecmed* (n 43) para 122, based on the judgment in *Matos and Silva: Matos e Silva v Portugal* App no 15777/89 (ECtHR, 27 August 1996) para 92; see U. Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 JWIT 729.

⁴⁶ Ursuöa Kriebaum 'Expropriation' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch (eds.), *International Investment Law* (Baden-Baden: Nomos, 2015), 982 et seq.

In most cases, legitimate regulation will not lead to a substantial deprivation of all or most of the benefits of the investment for a substantial period of time. In these cases, tribunals deny the existence of an expropriation due to a lack of sufficient severity.⁴⁷ Tribunals have found an indirect expropriation in only little more than a dozen cases. None of them concerned general regulation by the host state.⁴⁸

Therefore, there is no immediate need to amend the existing investment protection treaties to which Austria and Mexico are a party to provide for regulatory space.

For Mexico, it will be useful to ratify the ICSID Convention. This would not only send a sign to foreign investors that Mexico pursues an investor friendly policy, but it would also provide a shield against diplomatic protection. This is far easier to achieve than to renegotiate the existing treaties to include such a provision.

Bibliography:

Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, 2nd edn (Cambridge: Cambridge University Press, 2004).

Maurizio Arcari, 'Suez Canal', (Oxford: Oxford University Press, 2013) vol IX.

Edwin M. Borchard, 'Limitations on Coercive Protection' (1927) 21 *AJIL* 303-306.

Brendan F. Brown, 'The Juridical Implications of the Anglo-Iranian Oil Company Case' (1952) *Washington University Law Quarterly* 384-397.

Manuel R. Garcia-Mora 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33 *Marquette Law Review* 205-219.

Miriam Hood, *Gunboat Diplomacy, 1895-1905: Great Power Pressure in Venezuela* (New York: A.S. Barnes 1975).

Thomas T.F. Huang, 'Some International and Legal Aspects of the Suez Canal Question' (1957) 51 *AJIL* 277-307.

O. Thomas Johnson Jr and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' (2012) *Yearbook on International Investment Law & Policy* 2010-2011 649-692.

Ben Juratowitch 'The Relationship between Diplomatic Protection and Investment Treaties' (2008) 23 *ICSID Rev - FILJ* 10-35.

⁴⁷ Kriebaum 'Expropriation', p. 1000.

⁴⁸ Kriebaum 'Expropriation', p. 988 et seq.

Markus Krajewski, Ensuring the Primacy of Human Rights in Trade and Investment Policies, <https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>.

Ursula Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *JWIT* 717-744.

Ursula Kriebaum 'Expropriation' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch (eds.), *International Investment Law* (Baden-Baden: Nomos, 2015) 959-1030.

Ursula Kriebaum, Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes, (2018) *ICSID Review* 1-15.

William LeoGrande and Peter Kornbluh, *Back Channel to Cuba* (Chapel Hill: University of North Carolina Press, 2014).

Charles Lipson, *Standing Guard, Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press 1985).

Noel Maurer, 'The Empire Struck Back: Sanctions and Compensation in the Mexican Oil Expropriation of 1938' 71 (2011) *The Journal of Economic History* 590-615.

Noel Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013* (Princeton: Princeton University Press 2013).

Alexander Orakhelashvili, 'Anglo-Iranian Oil Company Case', *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) vol I.

Sundhya Pahuja, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses, Essays in Honour of Djamchid Momtaz* (Leiden; Boston: Brill, 2017) 53-74.

Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *British Yearbook of Internationale Law* 264-352.

Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) 2 *OECD Working Papers on International Investment* <http://dx.doi.org/10.1787/5k8xb71nf628-en> accessed 3 September 2017.

Michelle Potestà, 'State-to-State Dispute Settlement pursuant to Bilateral Investment Treaties: Is there Potential?' in Nerina Boschiero and Tullio Scovazzi (eds), *International Courts and the Development of International Law - Essays in Honour of Tullio Treves*, (The Hague: Springer, 2012) 753-768.

Michelle Potestà 'Republic of Italy v. Republic of Cuba' (2012) 106 *AJIL* 341-347.

Daniel M. Price, 'Some Observations on Chapter Eleven of NAFTA' (1999-2000) 23 *Hastings International Comparative Law Review* 421-494.

Anthea Roberts 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 *Harvard International Law Journal*, 1-70.

Christoph Schreuer, 'Investment Protection and International Relations' in A. Reinisch and U. Kriebaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (Utrecht: Eleven International Pub, 2007) 345-358.

Christoph Schreuer and others *The ICSID Convention: A Commentary*, 2nd edn (Cambridge: Cambridge University Press, 2009).

Clovis J. Trevino 'State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty' (2014) 5 *Journal of International Dispute Settlement* 199-233.

Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009).