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United States

Investment Treaty Arbitration

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This country-specific Q&A provides an overview of investment treaty arbitration laws and regulations applicable in United States.

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United States: Investment Treaty Arbitration

1. Has your home state signed and / or ratified the ICSID Convention? If so, has the state made any notifications and / or designations on signing or ratifying the treaty?

Yes, the United States signed the ICSID Convention on August 27, 1965, and deposited its instrument of ratification on June 10, 1966. The Convention entered into force for the United States on October 14, 1966. The United States has designated the federal district courts as competent courts to hear petitions recognizing and enforcing ICSID awards. See 22 U.S.C. 1650a(b).

2. Has your home state signed and / or ratified the New York Convention? If so, has it made any declarations and / or reservations on signing or ratifying the treaty?

Yes, the United States ratified the New York Convention on September 30, 1970. The Convention entered into force in the United States on December 29, 1970. The United States has made two declarations to the New York Convention: (i) the reciprocity reservation, whereby the Convention only applies in the United States to awards made in the territory of other Contracting States to the Convention; and (ii) the commercial reservation, whereby the Convention only applies to disputes "arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

3. Does your home state have a Model BIT? If yes, does the Model BIT adopt or omit any language which restricts or broadens the investor's rights?

Yes, the United States developed its first Model Bit in 1983 (hereinafter the "U.S. Model BIT"). The U.S. Model BIT was subsequently revised in 1984, 1987, 1991, 1992, 1994, 1998, 2004, and 2012. All versions of the U.S. Model BIT guarantee a minimum standard of treatment for investments, which includes fair and equitable treatment (FET) and full protection and security (FPS), in addition to provisions guaranteeing national and most-favored nation (MFN) treatment and protection from illegal expropriation (direct and indirect).

As the practice of investor-state dispute settlement (or ISDS) has evolved, the United States has introduced greater regulatory authority for itself and its treaty counterparties. Particularly, the 2004 Model BIT increased the state's regulatory authority in the areas of financial services, national security, and public policy. The 2012 Model BIT continued this trend by introducing further refinements regarding the state's ability to regulate, particularly in the areas of the environment and labor law.

The FET and FPS standards, as reflected in the 2012 U.S. Model BIT, are generally designed to provide a basic level of security and stability for foreign investors. While the FET standard is not explicitly defined, the BIT clarifies that FET does not require treatment in addition to or beyond the customary international law minimum standard of treatment. The minimum standard is considered a narrower formulation of the FET standard compared with other autonomous FET standards not tied to customary international law. The United States typically takes the position that this narrow standard does not protect an investor's "legitimate expectations," nor does it protect investors from acts of court unless there is a denial of justice, e.g. a lack of due process.

The FPS standard in the U.S. Model BIT is also interpreted narrowly and in line with the customary international law minimum standard of treatment. The FPS standard under the Model BIT is generally understood as a duty of the host state to protect investments from physical harm (physical protection), rather than regulatory changes, political risk, or economic instability (legal protection).

The National Treatment and MFN clauses in the U.S. Model BIT are designed to protect investors against nationality-based discrimination by the government, including state and local government. Under the National Treatment clause, the host state cannot treat foreign investors less favorably than their own (domestic) investors; and under the MFN clause, the host state cannot treat foreign investors less favorably than investors from other states (not party to the treaty).

Some MFN clauses are written with broad language and have been interpreted to allow investors to benefit from more favorable provisions found in other investment treaties between the host state and third countries. The United States does not share this view and limits the import of more favorable provisions from other treaties. The United States's interpretation of the MFN clause was further reinforced by the United States-Mexico-Canada Agreement (USMCA), which explicitly excluded the use of extraneous treaty provisions that establish international dispute resolution procedures or impose substantive obligations.

The U.S. Model BIT adopts the general expropriation standard while maintaining the host state's right to regulate within its police powers. In general, the standard protects both direct and indirect expropriation. However, in the USMCA, the United States and Canada limited investors' rights to raise ISDS claims for indirect expropriation.

Article 14 of the 2012 U.S. Model BIT addresses non-conforming measures. Under Article 14, the treaty parties may maintain or adopt measures in specific sectors or industries that would otherwise violate the previously stated treaty obligations on national treatment, MFN treatment, performance requirements, and senior management rules, provided these measures and sectors are identified in an annex to the treaty. This provision is designed to ensure policy flexibility for governments while maintaining transparency for investors.

4. Please list all treaties facilitating investments (e.g. BITs, FTAs, MITs) currently in force that your home state has signed and / or ratified. To what extent do such treaties adopt or omit any of the language in your state's Model BIT or otherwise restrict or broaden the investor's rights? In particular: a) Has your state exercised termination rights or indicated any intention to do so? If so, on what basis (e.g. impact of the Achmea decisions, political opposition to the Energy Charter Treaty, or other changes in policy)? b) Do any of the treaties reflect (i) changes in environmental and energy policies, (ii) the advent of emergent technology, (iii) the regulation of investment procured by corruption, and (iv) transparency of investor state proceedings (whether due to the operation of the Mauritius Convention or otherwise). c) Does your jurisdiction publish any official guidelines, notes verbales or diplomatic notes concerning the interpretation of treaty provisions and other issues arising under the treaties?

Treaties in Force:

1. Australian Free Trade Agreement (Jan. 1, 2005)
2. Bahrain Free Trade Agreement (Jan. 11, 2006)
3. Central American/Dominican Republic Free Trade Agreement (DR-CAFTA) (March 1, 2006)
4. Chile Free Trade Agreement (Jan. 1, 2004)
5. Colombia Trade Protection Agreement (May 15, 2012)
6. Israel Free Trade Agreement (Sept. 1, 1985)
7. Jordan Free Trade Agreement (Dec. 17, 2001)
8. Korea Free Trade Agreement (March 15, 2012, revised Jan. 1, 2019)
9. Morocco Free Trade Agreement (Jan. 1, 2009)
10. Oman Free Trade Agreement (Jan. 1, 2009)
11. Panama Free Trade Agreement (Feb. 1, 2009)
12. Peru Trade Promotion Agreement (Feb. 1, 2009)
13. Singapore Free Trade Agreement (Jan. 1, 2004)
14. United States-Mexico-Canada (USMCA) (July 1, 2020)
15. US-Albania BIT (Jan. 4, 1998)
16. US-Argentina BIT (Oct. 20, 1994)
17. US-Armenia BIT (March 29, 2001)
18. US-Azerbaijan BIT (Aug. 2, 2001)
19. US-Bahrain BIT (May 30, 2001)
20. US-Bangladesh BIT (July 25, 1989)
21. US-Bulgaria BIT (June 2, 1994)
22. US-Cameroon BIT (April 6, 1989)
23. US-Republic of the Congo BIT (Aug. 13, 1994)
24. US-Democratic Republic of the Congo BIT (July 28, 1989)
25. US-Croatia BIT (June 20, 2001)
26. US-Czech Republic BIT (Dec. 19, 1992)
27. US-Egypt BIT (June 27, 1992)
28. US-Estonia BIT (Feb. 16, 1997)
29. US-Georgia BIT (Dec. 11, 1999)
30. US-Grenada BIT (March 3, 1989)
31. US-Honduras BIT (July 11, 2001)
32. US-Jamaica BIT (March 7, 1997)
33. US-Jordan BIT (June 12, 2003)
34. US-Kazakhstan BIT (Jan. 12, 1994)
35. US-Kyrgyzstan BIT (Jan. 12, 1994)
36. US-Latvia BIT (Dec. 26, 1996)
37. US-Lithuania BIT (Nov. 22, 2001)
38. US-Moldova BIT (Nov. 26, 1994)
39. US-Mongolia BIT (Jan. 1, 1997)
40. US-Morocco BIT (May 29, 1991)
41. US-Mozambique BIT (March 3, 2005)
42. US-Panama BIT (May 30, 1991)
43. US-Poland BIT (Aug. 6, 1994)
44. US-Romania BIT (Jan. 15, 1994)
45. US-Rwanda BIT (Jan. 1, 2012)
46. US-Senegal BIT (Oct. 25, 1990)
47. US-Slovakia BIT (Dec. 19, 1992)
48. US-Sri Lanka BIT (May 1, 1993)
49. US-Trinidad and Tobago BIT (Dec. 26, 1996)

50. US-Tunisia BIT (Feb. 7, 1993)
51. US-Turkey BIT (May 18, 1990)
52. US-Ukraine BIT (Nov. 16, 1996)
53. US-Uruguay BIT (Nov. 1, 2006)

These BITs and investment agreements typically adopt the terms of the model BIT prevailing at the time. For example, the US-Rwanda BIT (2012) incorporates the language of the 2004 U.S. Model BIT with only minimal changes to reflect Rwanda's status as a developing nation. The US-Uruguay BIT (2006) also follows the 2004 model closely, with some modifications to reflect Uruguay's commitment to upholding high labor protections.

To date, the United States has not concluded any BITs based on the 2012 Model BIT. However, the investment chapter of the USMCA (Chapter 14), which entered into force in 2020, reflects many of the principles from the 2012 Model BIT, but with certain variations. For example, the procedural requirements for arbitration and the substantive protections available under the USMCA vary depending on whether the dispute arises from a "covered government contract" in a "covered sector". Annex 14-E establishes that "covered sectors" include oil and gas, power generation, telecommunications, transportation and other infrastructure. While investors with covered government contracts enjoy protection similar to investors under its predecessor NAFTA and the 2012 Model BIT, those without such contracts must pursue domestic remedies in the host state before submitting to arbitration. Separately, the USMCA includes more explicit language affirming a states' right to adopt and enforce measures to protect legitimate public welfare objectives, such as health, safety, and the environment.

BITs in force for the United States often include annexes that offer exceptions, clarifications, and reservations to the states' obligations under each BIT. For example, Annex II of the US-Rwanda BIT describes specific sectors for which a party may adopt new or more restrictive measures that do not conform with national treatment or MFN treatment.

a. Has your state exercised termination rights or indicated any intention to do so? If so, on what basis (e.g. impact of the Achmea decisions, political opposition to the Energy Charter Treaty, or other changes in policy)?

The United States has not indicated an intention to withdraw from any BIT to which it is a party, nor has the United States indicated an intention to withdraw from any other investment agreement to which it is a party. All BITs currently in force for the United States provide that the BIT will remain in force initially for 10 years and will continue to remain in force indefinitely, unless one of the parties chooses to terminate the BIT at the end of the initial 10-year period or at any other point thereafter by providing one-year's written notice to the other party. The U.S. is not a party to the Energy Charter Treaty.

b. Do any of the treaties reflect (i) changes in environmental and energy policies, (ii) the advent of emergent technology, (iii) the regulation of investment procured by corruption, and (iv) transparency of investor state proceedings (whether due to the operation of the Mauritius Convention or otherwise).

Both the 2004 and 2012 U.S. Model BITs include explicit language preserving a state's right to regulate for environmental protection without violating the protection against expropriation.

The U.S.-Peru Trade Promotion Agreement contains a novel annex titled "Understanding Regarding Biodiversity and Traditional Knowledge" whereby the parties recognize the importance of biodiversity and endeavor to share information that "may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources." The United States is party to several other free trade agreements (FTAs) that include chapters on the environment, e.g., the US-Australia-FTA, CAFTA-DR, US-Chile-FTA, and US-Korea FTA (KORUS), in which each party commits to not weaken its environmental laws to encourage trade or investment.

In terms of transparency, NAFTA played a pivotal role in incorporating greater transparency mechanisms in ISDS proceedings by requiring that the proceedings be open to the public, that key arbitration documents (awards, decisions and party submissions) be published, and that third-party submissions (amicus curiae) be allowed. The new USMCA builds upon NAFTA's earlier transparency initiatives by requiring arbitrators to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. Additionally, the agreement forbids arbitrators from acting as counsel or as party-appointed expert or witness in any pending arbitration under the USMCA.

The evolution of transparency provisions in United States treaties has encouraged greater transparency in non-U.S. BITs and under other authorities such as ICSID's arbitration rules, which were revised in 2022 to increase transparency and broaden public access to those proceedings.

c. Does your jurisdiction publish any official guidelines, notes verbales or diplomatic notes concerning the interpretation of treaty provisions and other issues

arising under the treaties?

Yes, when needed, the United States has published notes and statements to clarify treaty interpretation. In 2001, the NAFTA Free Trade Commission issued a Note of Interpretation, which confirmed that the standard applicable to FET and FPS under Article 1105 of Chapter 11 was the minimum standard of treatment under customary international law.

In early 2025, the Free Trade Commission of the Colombia-USA Trade Promotion Agreement issued an interpretive note on the investment provisions within the TPA. The note clarified the TPA's national treatment and MFN provisions, the interpretation of the minimum standard of treatment, and the TPA's provision on environmental protection, among other issues.

5. Does your home state have any legislation / instrument facilitating direct foreign investment. If so: a) Please list out any formal criteria imposed by such legislation / instrument (if any) concerning the admission and divestment of foreign investment; b) Please list out what substantive right(s) and protection(s) foreign investors enjoy under such legislation / instrument; c) Please list out what recourse (if any) a foreign investor has against the home state in respect of its rights under such legislation / instrument; and d) Does this legislation regulate the use of third-party funding and other non-conventional means of financing.

Historically, the United States has maintained a generally open investment environment. While the United States does not have a single overarching foreign investment law, there are a variety of laws, treaties, and institutions that encourage and facilitate foreign investment.

a. Please list out any formal criteria imposed by such legislation / instrument (if any) concerning the admission and divestment of foreign investment;

There are no specific formal criteria for the admission or divestment of foreign investment in the United States. However, the Foreign Investment and National Security Act of 2007 outlines national security review procedures for foreign investment, and the Committee on Foreign Investment in the United States (CFIUS) reviews foreign investment for national security risks. Certain transactions involving foreign control of U.S. businesses must be reviewed by CFIUS, particularly when the investments involve critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens. Critical technologies include items relating to national security, chemical and biological weapons, and emerging technologies. Critical infrastructure includes data centers, airports, maritime points, and certain aspects of telecommunication. Sensitive personal data includes geolocation data, biometrics, genetic testing, and personal information used for insurance, among other categories.

If CFIUS determines that a foreign investment presents unacceptable national security risks, it may recommend mitigation measures, or, in extreme cases, order divestment of the investment.

In 2018, the United States Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA) with the aim of strengthening and modernizing CFIUS. FIRRMA significantly expanded CFIUS's jurisdiction to review a wider range of foreign transactions, such as purchases of real estate near military bases or other government facilities.

b. Please list out what substantive right(s) and protection(s) foreign investors enjoy under such legislation / instrument;

While not protected under a specific piece of national legislation, foreign investors enjoy the legal protections offered to them through applicable foreign investment instrument(s). They also enjoy protections against discrimination and access to the United States court system to pursue any right to relief under U.S. law.

c. Please list out what recourse (if any) a foreign investor has against the home state in respect of its rights under such legislation / instrument; and

Foreign investors can possibly seek recourse against the United States under a bilateral or multilateral investment treaty, should one apply. They can also challenge adverse regulatory decisions in United States courts or challenge decisions through regulatory agencies such as the Securities and Exchange Commission, Federal Trade Commission, and the International Trade Commission.

d. Does this legislation regulate the use of third-party funding and other non-conventional means of financing.

Third-party funding in international arbitration is not regulated in the United States. However, some individual states of the United States encourage attorneys to disclose funding arrangements when used in connection with state court proceedings. In 2018, Wisconsin became the first state to require the disclosure of third-party funding agreements. Indiana and West Virginia passed similar disclosure laws in 2024. Many arbitral institutions, such as the International Chamber of Commerce (ICC) and the International Centre for the Settlement of Investment Disputes (ICSID), require the disclosure of third-party funding arrangements in their arbitration rules.

6. Has your home state appeared as a respondent in any investment treaty arbitrations? If so, please outline any notable practices adopted by your state in such proceedings (e.g. participation in proceedings, jurisdictional challenges, preliminary applications / objections, approach to awards rendered against it, etc.)

Yes, the United States has appeared as a respondent in numerous investor-state arbitrations initiated under agreements like the USMCA, NAFTA, CAFTA-DR, and several others. The Office of International Claims and Investment Disputes within the U.S. Department of State is the office that represents the United States in these arbitrations. The United States has prevailed in all the investor-state arbitrations in which it has appeared as respondent and there are no publicly known investment treaty awards against the United States.

The United States also actively participates as a non-disputing treaty party (NDP) in investor-state arbitrations arising under treaties to which the United States is a party. To date, it has filed nearly 100 NDP submissions addressing its interpretation of these investment treaties. In this capacity, the United States frequently addresses jurisdictional topics, such as its interpretation of the three-year limitations period found in certain BITs. It also makes submissions on the interpretation of substantive provisions such as the minimum standard of treatment, MFN treatment, and expropriation.

7. Has jurisdiction been used to seat non-ICSID investment treaty proceedings? If so, please provide details.

Yes, the United States is regularly used as the seat of non-ICSID investment treaty proceedings, including ad hoc arbitrations under the rules of the International Chamber of Commerce ("ICC"), UNCITRAL, and the ICSID Additional Facility. See, e.g., BG Group plc v. Republic of Arg., 572 U.S. 25, 30 (2014) (concerning investor-state arbitration under the UNCITRAL Rules seated in Washington, D.C.); Beijing Shougang Mining Inv. Co. v. Mongolia, 11 F.4th 144, 147 (2d Cir. 2021) (concerning investor-state arbitration seated in New York).

Unlike parties to ICSID proceedings, parties to non-ICSID proceedings seated in the United States have access to remedies under the New York Convention and the Federal Arbitration Act ("FAA"). See State of Libya v. Strabag SE, 2021 WL 4476771 (D.D.C. Sept. 30, 2021) (parties and tribunal determined the "legal seat" of the arbitration to be Washington, D.C., "as allowed by the Additional Facility Rules of the ICSID, and thus both parties agreed that the [FAA] would govern the Arbitration").

The New York Convention mandates the recognition and enforcement of foreign arbitration awards, ensuring that U.S. courts give effect to arbitration decisions made in other signatory countries. The FAA is a domestic statute that also authorizes U.S. courts to enforce arbitration awards in the United States with limited grounds for challenging the awards or their enforcement. Pursuant to these authorities, U.S. courts are not authorized to review the merits of an award. The review is limited to the grounds stated in the New York Convention and in the FAA.

8. Please set out (i) the interim and / or preliminary measures available in your jurisdiction in support of investment treaty proceedings, and (ii) the court practice in granting such measures.

In litigation not involving investor-state disputes, courts in the United States have discretion to grant various forms of interim relief, including pre-award attachments, preliminary injunctions, and anti-suit injunctions. Access to such provisional measures in connection with investment treaty proceedings is extremely limited. Federal courts that have considered requests for interim relief in the context of investment treaty proceedings have been reluctant to issue such remedies out of concern for disturbing accepted principles of comity and out of respect for the independence of the arbitration process.

In one notable decision, the Court of Appeals for the District of Columbia Circuit allowed Spain to pursue anti-suit relief in Dutch and Luxembourg courts even though a lower court had previously enjoined Spain from doing so. See Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088, 1115 – 1116 (D.C.Cir. 2024). The Court of Appeals emphasized injunctions against foreign sovereigns "strain the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations." The Court further emphasized that that courts should focus on whether the foreign litigation "threatens a vital United States policy" and whether "domestic interests outweigh concerns of international comity."

In the context of pending ICSID arbitrations, U.S. courts are equally reluctant to interfere with the arbitral process by granting interim relief. However, courts may grant interim relief to enforce decisions made in the arbitration. For example, when provisional stays have been entered by ICSID, U.S. courts have granted stays in their own proceedings on the condition that such stays last only as long as reasonably necessary in light of the ICSID proceedings. See, e.g., Tethyan Copper Co. Pty v. Islamic Republic of Pak., 590 F. Supp. 3d 262, 266 (D.D.C. 2022).

9. Please set out any default procedures applicable to appointment of arbitrators and also the Court's practice of invoking such procedures particularly in the context of investment treaty arbitrations seated in your home state.

In the context of commercial arbitration, the courts of the United States have the power to appoint arbitrators under Section 5 of the FAA, including when the arbitration agreement at issue does not specify the method of arbitrator selection, the selection process fails, or an arbitrator resigns while an arbitration is pending. See, e.g., Northrup Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez., 2003 U.S. Dist. LEXIS 29844, *4-5 (S.D. Miss. Apr. 10, 2003). As regards ISDS proceedings, however, we have not found a case of a U.S. court appointing an arbitrator.

Apart from arbitrator selection, U.S. courts generally defer to the applicable arbitral rules of procedure e.g. ICSID's Additional Facility Rules. See, e.g., Stati v. Republic of Kaz., 302 F. Supp. 3d 187, 207-208 (D.D.C. 2018) (dismissing argument that Stockholm Chamber of Commerce failed to comply with its own rules relating to the appointment of arbitrators); see also Belize Bank Ltd. v. Gov't of Belize, 191 F. Supp. 3d 26, 36-37 (D.D.C. 2016) (rejecting Belize's argument that arbitral tribunal was not properly constituted under the rules of the London Court of International Arbitration). This practice is consistent with the United States' general respect for the independence of the arbitral institution and the institution's authority to appoint its own arbitrators and govern the arbitration. See, e.g., Mundiales v. Bolivarian Republic of Venez., 2023 WL 3453633, at *6 (D.D.C. May 15, 2023) (ad hoc annulment committee properly appointed by ICSID "acted in accordance with ICSID's procedural rules"); see also Pao Tatneft v. Ukraine, 2020 WL 4933621, *7-9 (D.D.C. Aug. 24, 2020) (rejecting argument of arbitrator partiality in context of undisclosed appointment).

10. In the context of awards issued in non-ICSID investment treaty arbitrations seated in your jurisdiction, please set out (i) the grounds available in your jurisdiction on which such awards can be annulled or set aside, and (ii) the court practice in applying these grounds.

U.S. courts rarely set aside arbitration awards in general, including non-ICSID arbitration awards. The United States has a strong and supportive policy toward arbitration pursuant to which U.S. courts apply a very limited and narrow standard when reviewing and potentially vacating arbitration awards.

Section 10 of the FAA permits U.S. courts to vacate an award if any of one of the following four grounds exists: (i) the award was "procured by corruption, fraud, or undue means"; (ii) there was "evident partiality or corruption in the arbitrators"; (iii) the arbitrators refused to postpone the hearing "upon sufficient cause shown", refused to hear relevant and material evidence, or otherwise prejudiced the rights of any party; or (iv) the arbitrators exceeded their powers or "so imperfectly executed them that a mutual, final, and definite award . . . was not made." 9 U.S.C. § 10. These grounds have been interpreted as follows:

<u>Corruption, Fraud, or Undue Means</u>: To vacate an award for corruption, fraud or undue means, a movant must show by "clear and convincing evidence" that the award resulted because its opponent "actually engaged in fraudulent conduct or used undue means during the course of the arbitration." Importantly, a movant must show that the alleged misconduct could not have been discovered before or during the arbitration by means of reasonable diligence, and that the misconduct "materially related" to an issue in the arbitration. See, e.g., ARMA, S.R.O. v. BAE Sys. Overseas, 961 F. Supp. 2d 245, 254 (D.D.C. 2013).

<u>Evident Partiality</u>: Evident partiality as a basis for vacatur carries a "heavy" burden. The movant must "establish specific facts that indicate improper motives on the part of the arbitrator." Al-Harbi v. Citibank, 85 F.3d 680, 683 (D.C. Cir. 1996). Although arbitrators are not to be held to the same standards as court judges because arbitrators are often "of the marketplace," they still must avoid the "appearance of bias." Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 151 (1968).

Accordingly, the "onerous standard for vacatur" is not met when, for example, a claim of evident partiality rests entirely on an arbitrator's temporary position as a non-executive member of the board of a global financial institution that had invested in entities related to the arbitration. See Republic of Arg. v. AWG Grp. Ltd., 211 F. Supp. 3d 335, 352 (D.D.C. 2016)

Prejudice to Rights: An award may potentially be vacated if a tribunal refused to hear "material evidence, or otherwise employed an improper procedure." The focus of the inquiry is limited to whether the arbitral tribunal granted the parties "a fundamentally fair hearing" and does not mean that an arbitrator must "follow all of the niceties of the federal rules of evidence." Mesa Power Grp., LLC v. Gov't of Can., 255 F. Supp. 3d 175, 184 (D.D.C. 2017).

Excess of Arbitrator Power: To vacate an award for an excess of power, a party must show that an arbitrator has strayed so far from the interpretation and application of the relevant agreement that the arbitrator has "effectively dispensed his [or her] own brand of industrial justice." This is a very difficult standard to meet as it is accorded "the narrowest of readings." U.S. courts do not have the power to substitute their own "judicial resolution of a dispute for an arbitral one," even if that arbitrator has committed "serious error." AWG Grp. Ltd., 211 F. Supp. 3d at 357 (D.D.C. 2016).

11. In the context of ICSID awards, please set out: (i) the grounds available in your jurisdiction on which such awards can be challenged and (ii) the court practice in applying these grounds.

The standard for setting aside ICSID awards is narrower than the standard for non-ICSID awards. Indeed, there is little basis to challenge or set-aside an ICSID award in the United States. Under Article 53 of the ICSID Convention, a party may challenge an ICSID award "only through proceedings at the Centre and not collaterally in the courts of member states." Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez., 863 F.3d 96, 101-102 (2d Cir. 2017). ICSID awards must be enforced pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650a(a), which states in relevant part: "An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."

Pursuant to Section 1650a, the courts of the United States are "not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award." Mobil Cerro, 863 F.3d at 102. Courts "may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." Id. The way to set aside an ICSID award is through ICSID's the annulment process. See Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela, 87 F.4th 510 (D.C. Cir. 2023).

12. To what extent can sovereign immunity (from suit and/or execution) be invoked in your jurisdiction in the context of enforcement of investment treaty awards.

The concept of sovereign immunity in the United States is governed exclusively by the Foreign Sovereign Immunities Act ("FSIA"). See 28 U.S.C. § 1602 et seq.; Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989). The FSIA establishes a default rule that foreign states are immune from the jurisdiction of U.S. courts unless the action falls within one of the specific exceptions set out in the statute. 28 U.S.C. §§ 1604-1607; Belize Soc. Dev., Ltd. v. Government of Belize, 794 F.3d 99, 101 (D.C. Cir. 2015).

Such immunity exceptions arise in cases in which: "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1); the action is based on a "commercial activity" in the United States or on activity of the foreign state "elsewhere and that act causes a direct effect in the United States," § 1605(a)(2); and "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment," § 1605(a)(5).

Importantly, for purposes of the enforcement of arbitration awards rendered in connection with ISDS proceedings, the FSIA also provides the following exception to sovereign immunity:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is brought to confirm an award made pursuant to an agreement to arbitrate, if [the] award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards[.]

> 28 U.S.C. § 1605(a)(6).

To satisfy the FSIA's arbitration exception, a party must show (i) the existence of an arbitration agreement, (ii) an arbitration award, and (iii) a treaty governing the award. See Zhongshan Fucheng Indus. Inv. Co. v. Fed. Republic of Nigeria, 112 F.4th 1054, 1058 (D.C. Cir. 2024). If this showing is met and jurisdiction is established under the arbitration exception, the award holder may enforce both ICSID and non-ICSID awards.

13. Please outline the grounds on which recognition and enforcement of ICSID awards can be resisted under any relevant legislation or case law. Please also set out any notable examples of how such grounds have been applied in practice.

In the United States, the ICSID Convention implementing statute provides:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act shall not apply to enforcement of awards rendered pursuant to the convention.
>
> 22 U.S.C. § 1650a(a).

The grounds on which the recognition and enforcement of ICSID awards can be resisted are extremely limited because the statute requires that federal courts grant ICSID awards "the same full faith and credit" as a final judgment of a court of general jurisdiction of one of the several U.S. states, and expressly precludes the kind of judicial review available under the FAA. Courts in the United States typically can "do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." Mobil Cerro Negro, 863 F.3d at 102.

However, defenses to the application of the full faith and credit requirement exist and could potentially be asserted to resist recognition and enforcement. Such defenses include those that are generally available to challenge state court awards, including the rendering court's lack of jurisdiction over the judgment debtor and the expiration of the applicable statute of limitations within which a judgment must be enforced, which is a matter governed by state law. Furthermore, an award debtor potentially has other defenses at its disposal when the award creditor seeks to execute the judgment such as those set forth in the FSIA and state execution laws. See, e.g., Article 52 of the New York Civil Practice Law and Rules (governing enforcement of money judgments).

14. Please outline the practice in your jurisdiction, as requested in the above question, but in relation to non-ICSID investment treaty awards.

In the United States, the enforcement of non-ICSID awards can be resisted to the same extent as commercial arbitration awards. As such, enforcement of non-ICSID awards may be challenged on the grounds contained in the New York Convention, which is incorporated into Chapter 2 of the FAA. Although enforcement of an award under the New York Convenient is legally distinct from enforcement under the FAA, the grounds for refusing enforcement are largely the same.

Apart from the grounds expressly provided for in the New York Convention, parties may challenge enforcement based on the award creditor's failure to comply with the requirements of the New York Convention. To obtain the recognition and enforcement of an award under the New York Convention, a party must provide the "duly authenticated original award or a duly certified copy thereof", and the "original agreement [in which the parties agreed to arbitration] or a duly certified copy thereof." New York Convention, Article IV(1). If either the award or the agreement is not "made in an official language of the country in which the award is relied upon," the party seeking recognition and enforcement must provide a translation that is "certified by an official or sworn translator or by a diplomatic or consular agent." Failure to comply with these requirements could render the award unenforceable or at least delay enforcement until a new enforcement petition is submitted.

15. To what extent does your jurisdiction permit awards against states to be enforced against state-owned assets or the assets of state-owned or state-linked entities?

In the United States, the enforcement of arbitral awards against state-owned assets under the FSIA is limited. Section 1610(b) provides in relevant part:

> [A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from

execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C. § 1610(b)(1)-(2).

As reflected in the text of the statute, foreign states and state-owned entities are presumed separate. As such, courts of the United States typically prohibit award creditors from enforcing ISDS awards against assets of state-owned entities not involved in the dispute. The presumption of separateness is addressed by the Supreme Court of the United States in First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Banec"), 462 U.S. 611 (1983). Banec established that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

The presumption of separateness can be overcome upon a showing that the state-owned entity is the alter ego of the foreign sovereign. This issue has been litigated extensively, and most recently in a series of landmark cases concerning Petroleos de Venezuela SA ("PDVSA"), in which judgment creditors of Venezuela sought to seize PDVSA's assets in the United States under the theory that PDVSA is the alter ego of Venezuela. Both the District Court for the District of Delaware and the Court of Appeals for the Third Circuit found that PDVSA is the alter ego of Venezuela, thereby making PDVSA's assets available as a potential source of funds from which judgment creditors of both PDVSA and Venezuela can collect. See Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 2024 WL 5244837 (D. Del. 2024); OI Eur. Grp. B. V. v. Bolivarian Republic of Venezuela, 73 F.4th 157, 172-74 (3d Cir. 2023); Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 932 F.3d 126, 140-50 (3d Cir. 2019). To establish that a state-owned entity is an alter-ego for purposes of enforcement, courts typically assess the state's level of control over the state-owned entity.

16. Please highlight any recent trends, legal, political or otherwise, that might affect your jurisdiction's use of arbitration generally or ISDS specifically.

The courts of the United States recently narrowed the opportunity for ISDS parties to acquire evidence located in the United States for use in arbitration proceedings. Up until recently, ISDS parties were often able to conduct U.S.-style discovery pursuant to 28 U.S.C. § 1782, which provides a mechanism by which federal district courts can assist foreign and international tribunals, as well as litigants involved in proceedings before such tribunals, by granting access to information located within the United States.

However, in June 2022, the Supreme Court of the United States held that Section 1782 does not extend to private ISDS disputes, limiting its application to governmental or intergovernmental adjudicative bodies. Since the decision, lower courts have consistently held that Section 1782 assistance was not available for investor-state arbitration administered by ICSID.

In early 2025, President Trump began his second presidential term. The impact, if any, that this administration will have on investor state arbitration is unclear. President Trump's first term, from 2016 to 2020, saw the critical renegotiation of NAFTA. The resulting USMCA eliminated investor state dispute settlement with Canada and substantially limited ISDS with respect to Mexico. The USMCA includes a provision for a joint review by the contracting parties in 2026, during which they will assess the agreement's performance and consider any modifications, though it is not a formal renegotiation.

Broadly speaking, the new administration is expected to continue its focus on domestic priorities, executive actions, and deregulatory measures, which could affect foreign investors and their investment. In January 2025, President Trump issued the Executive Order on Unleashing American Energy, which pauses grants and loans under the Inflation Reduction Act and the Infrastructure Investment and Jobs Act. Foreign investors who entered the United States market based on government incentives under the IRA and IIJA may be affected, which could trigger investor state claims under applicable treaties. Further, unexpected policy changes forecast a somewhat less certain environment for foreign investment in the United States.

17. Please highlight any other investment treaty related developments in your jurisdiction to the extent not covered above (for e.g., impact of the Achmea decisions, decisions concerning treaty interpretation, appointment of and challenges to arbitrators, immunity of arbitrators, third-party funding and other non-conventional means of financing such proceedings).

In August 2024, the Court of Appeals for the District of Columbia addressed the implications of the Court of Justice of the European Union's Achmea and Komstroy decisions in a consolidated appeal involving the enforcement of intra-European Union arbitration awards against Spain. The court's decision reaffirmed that the courts of the United States can assert jurisdiction over intra-EU arbitration awards under the FSIA, despite the Achmea and Komstroy rulings. The court also rejected Spain's jurisdictional objections, ruling that the existence of an arbitration agreement—not its validity—determines jurisdiction under the FSIA's arbitration exception. The decision confirms the willingness of the courts of the United States to enforce intra-EU investment arbitration awards, despite European opposition.

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