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## The Legal Landscape

One must begin by considering the objects and expectations of both investors and host States in international investment. A foreign investor aspires to effect an investment in order to realise (and, often, to repatriate) a profit under rule of law. The host State hopes to enjoy various benefits of capital inflows while free from harm. These come in the form of general economic activity and development and all that these may entail, including employment and enrichment of local human capital, technology transfer, and export revenues realised in the sale of extracted resources or value-added goods and services. Other benefits might directly satisfy local demands as in the case of, for example, power generation from a hydroelectric mega-project.

There is presently a patchwork of existing judicial and other machineries for the safeguarding of these expectations under the law. In drawing the legal landscape, this volume focuses only upon those which are (in theory) competent and capable to render a binding result. In other words, this volume foregoes discussion of grievance procedures or of such methods as negotiation, mediation, and conciliation.<sup>1</sup> These topics are excluded not because they are not useful (indeed, they are essential) but rather because the very premise of this book ultimately requires the existence (but not necessarily the use) of a binding mechanism. Such a mechanism's mere existence is essential separate and apart from the question of whether it is ultimately resorted to by any party.

<sup>1</sup> Further, the advent of regional and international human rights courts (such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights) is largely omitted, as these fora enable the bringing of claims by individuals as against sovereign States. The ability to bring such claims undoubtedly marks a commendable advance in the individual right of access to justice, particularly where States may be held accountable for their acts or omissions with regard to non-State actors. The focus of this volume is upon the relationship of host States and their nationals vis-à-vis the foreign investor.

### Host State National Courts

The first port of call is in the national courts of the State to host the investment. While the precise governing principles will vary with the constitutional laws of the State in question, any given host State presumably possesses courts of general jurisdiction which are empowered to adjudicate the contractual and extra-contractual rights and obligations of parties to an investment relationship as to events falling within its territorial sovereignty.<sup>2</sup>

Host State courts offer certain considerable advantages. Relevant contractual instruments will often be designated as governed by the host State's body of law. Where a claim seeks to impose liability of an extra-contractual nature for harms that have transpired within the host State's territorial jurisdiction, the host State's laws are commonly preferred.<sup>3</sup> In these matters, the State's own judges are presumably unrivalled in their expertise.

National courts suffer a deficiency not of their own doing. The limited reach of treaties for the recognition and enforcement of foreign court judgments is a known phenomenon in international law.<sup>4</sup> Concerns of extraterritorial enforceability may not arise where the foreign investor in

<sup>2</sup> This jurisdiction vests by virtue of the territorial principle. The proposition presumes that the parties have not concluded a valid and exclusive arbitration agreement or choice of court agreement specifying otherwise. Even in such a case, such agreement might cause only the inadmissibility of the claims in the courts of the host State and not truly derogate from such courts' jurisdiction, depending upon how these concepts are defined in the relevant laws.

<sup>3</sup> In addition to outliers to this general principle, there also exist various international and uniform law instruments which regulate extra-contractual liability according to international rather than national norms, particularly in industries (for example, transport) whose activities are highly international by nature and dependent upon a high degree of certainty. These exceptions nevertheless capture a very small fraction of cases of extra-contractual liability in general, and even less so in respect of activities related to foreign direct investment as opposed to international trade in goods and services.

<sup>4</sup> The United States, for example, is not party to a single treaty in force for the recognition and enforcement of foreign court judgments. In 1976 the United States and the United Kingdom initialled a Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 16 ILM 71 (1977), but negotiations over the final text ended in 1981 without agreement. As such, enforcement of foreign judgments remains largely governed by the laws of the fifty federated states and the District of Columbia. For a view into this phenomenon, see, e.g., L. J. Silberman and A. F. Lowenfeld, 'A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute', 75 *Indiana Law Journal* 2 (2000). A large number of the states have enacted into law the Uniform Foreign-Country Money Judgments Recognition Act, either as is or with variations. This model law was first drafted in 1962 and most recently revised by the National Conference of Commissioners on Uniform State Laws in 2005.

question holds assets sufficient for the satisfaction of an adverse judgment within the host State's jurisdiction, and may reliably be prevented from withdrawing those assets during the pendency of a non-frivolous claim.<sup>5</sup> But where an investor does not hold assets sufficient to satisfy an adverse judgment for injury caused, or where the assets are of such a nature that they may be expeditiously expatriated, a judgment of the host State's courts as against the foreign investor is at risk never to be executed in full.<sup>6</sup>

### Home State National Courts

Unlike the host State national courts, which will presumably be vested of jurisdiction to adjudicate disputes arising out of the investment on the basis of the territorial principle, the national courts of the investor's home State may or may not enjoy sufficiently broad reach. If either party wishes

Whether under this law or any other, enforcement of foreign court judgments remains considerably more burdensome than enforcement of foreign arbitral awards.

<sup>5</sup> There is an element of anticipation in this calculation. In other words, the appropriate question is whether the investor holds assets sufficient for the satisfaction of an adverse judgment, whether actual or anticipated, foreseen or foreseeable. However, the impact of large-scale and widespread injury within the host State is often not fully foreseeable at the time of the investor's entry, or is assessed at a low level of probability.

<sup>6</sup> One recent development must be noted in this regard. On 1 October 2015, the 2005 Hague Convention on Choice of Court Agreements entered into force, three months after its ratification by the European Union. See Convention on Choice of Court Agreements, 44 ILM 1294 (2005). The Convention provides for recognition of express choice of court agreements as between disputant parties (often known in the United States as forum selection clauses) and for the recognition and enforcement of resulting final judgments by the courts of contracting States without review on the merits, subject only to limited exceptions. See Arts. 5, 6, 8, and 9 of the Convention on Choice of Court Agreements. Significantly, the United States has signed (but not ratified) the Convention, as has Ukraine. Beyond the member States of the European Union (all except for Denmark), the Convention presently binds only Mexico and Singapore. Its future thus remains uncertain, particularly where the super-jurisdiction of the European Union already possesses its own freestanding mechanism for the enforcement of national court judgments as amongst its member States. See Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. Eur. Comm. (L 12) 1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33054> (replaced by Regulation (EC) No 1215/2012, commonly known as the 'Brussels I bis Regulation'). However, it is observed that under a first-to-file or first-seized rule such as that of the Brussels I bis Regulation (as opposed to an express choice of court, or an exclusive arbitration agreement), other difficulties may arise. On the dangers of the 'Italian torpedo', see, e.g., R. Brand and S. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (2007) 127.

to bring a claim in the home State's courts, that party is at the mercy of the governing principles that establish the outer bounds of those courts' jurisdiction.

Many States require a close factual connection to their territory in order for such jurisdiction to vest, imposing a minimum threshold for the opening of their courts, even where the parties might expressly select them by a choice of court agreement.<sup>7</sup> As to extra-contractual liability, once again, the home State's jurisdictional principles would have to permit the reach of its courts into matters where harmful events, although perhaps perpetrated or caused by its own national, have occurred outside its territory. Such is far from guaranteed.<sup>8</sup>

One further obstacle is observed in the common law doctrine of *forum non conveniens*.<sup>9</sup> Even where jurisdiction is established, this doctrine permits a court of the home State to stay or dismiss a claim where it determines that the claim is best heard elsewhere. Under the jurisprudence of this doctrine, cases wherein the injurious events have occurred inside the territory of another State are often dismissed in favour of that State's courts owing, amongst other things, to proximity of evidence.<sup>10</sup>

<sup>7</sup> See, e.g., *Titan Corporation v. Alcatel CIT S.A.*, Case No. T 1038-05, Svea Court of Appeal, Stockholm (2005).

<sup>8</sup> See, e.g., *The Globe & Mail*, 'Defeat of responsible mining bill is missed opportunity', 3 November 2010. The proposed bill 'would have required [as a matter of Canadian law] extractive companies operating in developing countries to comply with certain international human rights and environmental standards widely accepted by the industry as best practice'. *Ibid.* The measure thus would have exercised a sort of limited extraterritorial jurisdiction over Canadian firms operating abroad. Even this failed bill would hardly have opened the doors of the Canadian courts. Rather, failure to comply 'would have resulted in, among other things, Export Development Canada withdrawing financial support and Canadian trade commissions and embassies ceasing to support and promote those companies' activities'. *Ibid.*

<sup>9</sup> See generally R. Brand and S. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (2007). See also Z. Douglas, *The International Law of Investment Claims* (2009) 395-396 (noting that '[a]lthough the doctrine of *forum non conveniens* is a creature of the common law, some commentators have observed that the flexibility built into jurisdictional rules in civilian systems is such that the gulf between the two legal traditions in the respect is more apparent than real'), citing A. Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) 72 (further citations omitted).

<sup>10</sup> This obstacle is readily observed in the case of *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, S.D.N.Y. (2001). Once a case is dismissed in favour of the host State's jurisdiction on grounds of *forum non conveniens*, the question of enforceability of any resulting judgment of the host State courts arises anew. This is so even where the foreign investor does not challenge the quality of such sovereign courts by seizing an international tribunal to invoke a denial of justice. For the authoritative modern monograph on this doctrine, see J. Paulsson, *Denial of Justice in International Law* (2005). Furthermore, certain treaty

Lastly, the enforcement risk described in regard to judgments of host State national courts holds true in mirror image with regard to home State national courts. While the investor may be more likely to hold assets sufficient for the satisfaction of an adverse judgment in his home State, the same may not hold true as to assets of the host State or its nationals in the event of, for example, a counterclaim (or costs claim) by the investor over which the court accepts jurisdiction and renders judgment in the investor's favour.

These truths are symptomatic of a larger structural deficiency in the architecture for settlement of international investment disputes, namely the presently persisting potential for a multiplicity of parallel proceedings oftentimes yielding conflicting results only some or none of which can be effectively enforced.<sup>11</sup>

It is a landscape that is ripe for abuse.

### International Arbitration

Where desired, gains may be made in legal certainty, efficiency, and finality by the establishment of a forum vested of exclusive jurisdiction for the final and binding resolution of investment disputes, accompanied by robust avenues of enforcement. To seek such a mechanism portends a shift from the present proliferation towards a unified forum for the settlement of all disputes arising from an investment. Where properly consented, constituted, and availed, such a forum may lie at international arbitration.

Arbitration holds a long history as the preferred mechanism for the pacific settlement of international disputes.<sup>12</sup> The modern era of international arbitration is often traced to Jay's Treaty of 1794, as between the

provisions are interpreted as imposing upon host States a substantive obligation as to quality of justice that rises above and beyond the mere threshold of denial of justice at general international law. See, e.g., *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2007-2, Partial Award on the Merits, 30 March 2010, paras. 241–248.

<sup>11</sup> In the parallel world of international commercial arbitration, Mr. Gary Born has opined that 'parties face the threats of parallel or multiplicitous litigation in different national court systems, often located on one another's home territory, often facing local courts that may have parochial predispositions against one party or the other, and often producing judgments that cannot be effectively enforced'. G. Born, *BITs, BATs, and Buts: Reflections on International Dispute Resolution* (2014) 10, available at: [www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/News/Documents/BITs-BATs-and-Buts.pdf](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITs-BATs-and-Buts.pdf).

<sup>12</sup> See, e.g., Introduction by S. M. Schwebel, in U. Franke, A. Magnusson, and J. Dahlquist (eds.), *Arbitrating for Peace: How Arbitration Made a Difference* (2016).

United States and Great Britain.<sup>13</sup> By the creation of the Permanent Court of Arbitration, which is born from the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, which remain in force amongst more than one hundred States, international arbitration is recognised as the ‘most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle’.<sup>14</sup>

In 1934, when accepting the administration of its first arbitration involving a non-State party, the then-Secretary-General of the Permanent Court of Arbitration ‘noted . . . that Article 26 of the 1899 Hague Convention (which became Article 47 of the 1907 Hague Convention) permits the [Permanent Court of Arbitration] to “place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration”, a flexible formulation that was interpreted as encompassing disputes between a State and a non-State actor’.<sup>15</sup> Twenty-five years later, what is recognised as the first bilateral investment treaty was signed by West

<sup>13</sup> Jay’s Treaty, Arts. V, VI, and VII (1794), reprinted in H. Miller, *II Treaties and Other International Acts of the United States of America 1776–1863* (1931) 245. See J. Ralston, *International Arbitration from Athens to Locarno* (1929) 191 (‘the modern era of arbitral or judicial settlement of international disputes, by common accord among all writers upon the subject, dates from the signing on 19 November 1794 of Jay’s Treaty’); see also G. A. Raymond, ‘Demosthenes and Democracies: Regime-Types and Arbitration Outcomes’, 22 *International Interactions* 1 (1996) 3 (‘interstate arbitration prior to the Jay Treaty of 1794 remained more of an episodic occurrence in world affairs than a patterned regularity’).

<sup>14</sup> Art. 38 of the Convention for the Pacific Settlement of International Disputes of 1907. As to inter-State disputes, the Treaty of Versailles and the emergence of the League of Nations would later see the inter-war reign of the Permanent Court of International Justice (PCIJ). The succeeding International Court of Justice (ICJ) came into being with the Charter of the United Nations following the end of the Second World War. Like the PCIJ before it, the ICJ is a court whose jurisdiction generally vests from the consent of the States. See Art. 34 of the Statute of the ICJ.

<sup>15</sup> C. Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012) 40. The arbitration referred to is that of *Radio Corporation of America v. The National Government of the Republic of China*, PCA Case No. 1934-01, Award, 13 April 1935, 3 UNRIAA 1621, 8 ILR 26, (1936) 30 AJIL 535. More recently, in a 1997 report to its Administrative Council, a steering committee found that disputes involving non-State parties could be accepted on two grounds: ‘(i) article 49 of the 1907 Convention [for the Pacific Settlement of International Disputes] could be interpreted as giving the Administrative Council the power to authorize the establishment by the International Bureau of optional rules, even those that expand the mandate of the PCA, or (ii) pursuant to Article 47, State-non-State arbitration could continue to take place on an *ad hoc* basis, outside the express scope of the Conventions.’ Permanent Court of Arbitration, 1999 Steering Committee, *Final Report and Recommendations to the Administrative Council* (June 1997), para 48. The report was accepted by the Administrative Council at its 156th

Germany and Pakistan.<sup>16</sup> It is often overlooked that this treaty served only, in a sense, to codify the content of the substantive protections to be reciprocally afforded by each State to investor-nationals of the other. The treaty did not establish a direct investor-State arbitration mechanism.

Such would come nearly ten years later, following the establishment of a procedural architecture in the ICSID Convention of 1965 (itself inspired by the Permanent Court of Arbitration's early experience with mixed arbitration)<sup>17</sup> and within, for example, the Netherlands-Indonesia Agreement on Economic Cooperation of 1968.<sup>18</sup> In that instrument, it was provided that '[t]he Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national' to submit given disputes to arbitration.<sup>19</sup> This is the familiar language of the so-called standing offer to arbitrate that is reciprocally extended by the States party to thousands of international investment agreements.<sup>20</sup>

meeting in October 1997. Two sets of such optional rules are the 1996 Optional Rules for Arbitration between International Organizations and Private Parties and the 2001 Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (the PCA Environmental Rules), the latter of which is available even in disputes between private parties. Further, under Art. 1(1) of the PCA Environmental Rules, '[t]he characterization of the dispute as relating to natural resources and/or the environment is not necessary for jurisdiction where all the parties have agreed to settle a specific dispute under these Rules.'

<sup>16</sup> Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed on 25 November 1959 (entered into force on 28 April 1962), 457 UNTS 23.

<sup>17</sup> The institutional structure of ICSID and its first set of arbitration rules were modelled upon those of the Permanent Court of Arbitration, including the latter's 1962 rules for arbitration of mixed disputes. A. R. Parra, *The History of ICSID* (2012) 16–17, 51–52.

<sup>18</sup> Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968), signed on 7 July 1968 (entered into force on 17 July 1971), 799 UNTS 13.

<sup>19</sup> *Ibid.* Art. 11.

<sup>20</sup> The theory of the standing offer is meticulously articulated in the case of *Lanco International Inc. v. The Republic of Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998, para. 40 ('[i]n our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in favor of ICSID arbitration, without having first to exhaust domestic remedies. In effect, once valid consent to ICSID arbitration is established, any other forum called on to decide the issue should decline jurisdiction. The investor's consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of OCTOBER 1, 1997, and the consent of the State which comes directly from the ARGENTINA U.S. Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties. It should be recalled that Article 25(1) *in fine* establishes: "When the parties have given their consent, no party may withdraw its

In text that appears to be now forgotten, it was further provided that ‘*any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to [ICSID] any dispute that may arise in connection with the investment.*’<sup>21</sup>

The driving factor in the acceleration of the international arbitration régime over the past half-century, since the entrance into force of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) and the ICSID Convention of 1965, lies in the superior enforceability of arbitral awards beyond the boundaries of national jurisdictions.<sup>22</sup> While enjoying this auspicious advantage, arbitration also knows an austere limitation: the closely confined jurisdiction of the tribunal.

In the case of an arbitration agreement within an investment contract offered or awarded by the host State, the scope of jurisdiction of any ultimately constituted tribunal naturally derives from the *clause compromissoire* itself.<sup>23</sup> As such, these tribunals are very often vested of jurisdiction for the adjudication of those rights and obligations arising under the

consent unilaterally,” in our case by the Republic of Argentina after the investor has accepted ICSID arbitration”) (emphasis added).

<sup>21</sup> Art. 11 of the Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968), signed on 7 July 1968 (entered into force on 17 July 1971), 799 UNTS 13 (emphasis added). The agreement was ultimately terminated and replaced by a bilateral investment treaty bearing a more standard provision regarding investor-State dispute settlement. See Art. 9 of the Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment, signed on 6 April 1994 (entered into force on 1 July 1995), 2240 UNTS 323. This latter treaty has itself now been terminated by Indonesia.

<sup>22</sup> While international commercial arbitration has a longer history, the advent of treaty-born investor-State arbitration would take time, with numbers of cases achieving a rapid increase by the late 1990s on the backs of the myriad investment instruments concluded over the preceding decades.

<sup>23</sup> Perhaps the most significant examples of such contracts include concession agreements granting rights of exploration and development over hydrocarbon or mineral resources, contracts for the provision of public services, or contracts for the construction of State infrastructure. See, e.g., Art. 1 of the US Model BIT (2012) (“Investment agreement” means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party . . . that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government”).



contract alone. Such limitation may operate to the derogation of rights or obligations arising from extra-contractual sources,<sup>24</sup> and to the exclusion of claims by all save for the parties to the contract.<sup>25</sup> In other words, such a clause affords, by agreement of the parties, a privileged juridical space for adjudication of the rights and obligations of the contract, ensuring for these alone a unique and exclusive forum empowered to render a result that is final, binding, and widely enforceable.

In the case of treaty-born investor-State arbitration, the scope of a tribunal's jurisdiction is more heavily circumscribed still.<sup>26</sup> As with contractual rights and obligations falling within the scope of a contractual arbitration agreement, the scope of a treaty-born tribunal's jurisdiction is often limited to the adjudication of those rights and obligations enumerated within the treaty instrument itself.<sup>27</sup> Further, in sharp contrast to a typical bilateral or synallagmatic contract, there is a failure of mutuality or reciprocity in the treaty model. Where the disputant parties in an arbitration are not the States party to the treaty, but rather one of those States and an investor-national of

<sup>24</sup> Where the parties so agree, nothing bars a contractual arbitration agreement from vesting arbitral jurisdiction over the adjudication of rights or obligations arising at their origin from an extra-contractual source. See, e.g., *Perenco Ecuador Ltd. v. The Republic of Ecuador et al.*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 and *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, paras. 60–62. Indeed, the broad language used in most model arbitration clauses often encompasses extra-contractual claims insofar as they bear a sufficient nexus to the contractual relationship in question, especially under pro-arbitration interpretative presumptions regarding the scope of an arbitration agreement. See G. Born, *International Commercial Arbitration* (2014) 1348–1366. See also Annex, Model 2 (Contractual Arbitration Agreement).

<sup>25</sup> Within international commercial arbitration, to which a contractual dispute as between an investor and a host State is perhaps more akin than treaty-born investor-State arbitration, there have developed a limited number of grounds for jurisdiction over non-signatory parties, sometimes known as extension of the arbitration agreement. See G. Born, *International Commercial Arbitration* (2014) 1418–1484.

<sup>26</sup> This is illustrated by the 'disappearance' of certain text of the 1968 Netherlands-Indonesia Agreement on Economic Cooperation, 799 UNTS 13. It has been written that '[t]he language referring to the national's compliance with a host state demand for arbitration quickly disappeared from the provision.' K. Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010) 458.

<sup>27</sup> A treaty may of course incorporate by reference rights or obligations arising from a domestic source, thus elevating those claims to the international plane. Perhaps the most common example comes in the form of the so-called umbrella clause, whereby a State's contractual undertakings may be, in a sense, transformed into treaty commitments. Indeed, the very first investment treaty contained such a clause (but not an investor-State dispute settlement mechanism). See Art. 7 of the Federal Republic of Germany-Pakistan BIT (1959) ('[e]ither Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party'). Such a clause merely effects a reversion to the contractual constraint.

another, the substantive rights typically flow in a singular direction.<sup>28</sup> The treaty gives rise to obligations in the host State alone, with corresponding rights arising in the foreign investor.<sup>29</sup> Insofar as any ‘obligations’ might fall upon the investor, these are typically addressed via rules of admissibility or jurisdiction. In other words, an investor may face the need to satisfy certain conditions in order to avail his right to enforce the treaty’s substantive guarantees, to gain access to the arbitration mechanism,<sup>30</sup> but there is no justiciable obligation imposed upon the investor.<sup>31</sup> The forum often operates as a one-way street.

There is thus little prospect under the text of present investment treaties for host State claims, or indeed even a host State counterclaim once an investor has elected to launch his own.<sup>32</sup> In the case of a host State counterclaim lodged in response to an investor’s claim which is founded upon the

<sup>28</sup> The reciprocity rather takes the form that each State party reciprocally extends the same substantive guarantees to investor-nationals of the other State party (or parties). Historically, efforts to forge a multilateral treaty instrument have failed, and of the web of some 3,300 international investment agreements presently in force, the overwhelming majority remain bilateral treaties. The investment chapter of the NAFTA (with its three States party) and the Energy Charter Treaty mark early multilateral successes. Most recently, a text of the proposed Trans-Pacific Partnership was agreed in October 2015 as amongst a dozen States, and includes an investment chapter featuring investor-State dispute settlement. At the time of writing, this text remains subject to national parliamentary ratification processes, and the withdrawal of the United States has plunged the initiative into uncertainty. The People’s Republic of China is presently in pursuit of its own proposed sixteen-nation Regional Comprehensive Economic Partnership, which would extend across China, India, and other member States of the Association of Southeast Asian Nations. This proposal would not require its members to take steps to protect environmental standards or labour rights.

<sup>29</sup> The most common of these treaty protections feature, for example, guarantees of fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment, and the guarantee of expropriation only for a public purpose upon payment of compensation. See generally C. MacLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2008).

<sup>30</sup> See, e.g., *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 and Dissenting Opinion of Mr Bernardo M. Cremades, 19 July 2007; *Hulley Enterprises Limited v. The Russian Federation*, PCA Case No. 2005-03, UNCITRAL, Final Award, 18 July 2014.

<sup>31</sup> This omission is sometimes justified by a sense that the host State enjoys a privileged position to directly enforce its interests via the machinery of the State, including, if necessary, its police powers. Yet such reasoning rests once again upon a flawed assumption of international enforceability that undermines the effectiveness of national courts.

<sup>32</sup> This latter statement is not made without a degree of hesitation. For example, Professor Michael Reisman strongly advocated an efficiency rationale in his separate declaration in the case of *Spyridon Roussalis v. Romania*. In that declaration, he wrote that arbitral jurisdiction over host State counterclaims