Commentaries on Selected Model Investment Treaties

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2. Austria

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I. Austria's Investment Policy

As a relative late-comer compared to Germany and Switzerland, Austria seriously initiated its bilateral investment treaty ('BIT') policy only in the mid-1980s after a start with a BIT with Romania in 1976[1] and one with Bulgaria in 1981 which was never ratified. Austria's early BIT policy was based on the concept of protecting its own investors abroad and focussed on Eastern European, then Communist, States in which Austria had economic interests for historic reasons.[2] Gradually, developing countries were also chosen as treaty partners. This early BIT policy was clearly government-driven.[3] Even up to the present, it seems that business is more interested in double-taxation treaties than in BITs, at least when planning investments abroad. Nevertheless, the Austrian BIT programme is officially regarded as an important support for Austrian investors abroad aiming at protecting them against foreign risk.[4]

Since the fall of the Iron Curtain in 1989, the foreign investment activities of Austrian investors in Eastern Europe have markedly increased. In some countries like Bulgaria or Romania Foreign Direct Investment ('FDI') from Austria is very high in both relative and absolute terms.[5] On the whole, the importance of Austrian foreign investment

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[1] Austria–Romania BIT (1976).

[2] Many Communist countries in Eastern Europe were, at least partially, successor States to the Austro-Hungarian Empire, among them Czechoslovakia, Poland, Yugoslavia, Hungary, and Romania. In the 1970s/1980s, Eastern European countries were the third most important trading partners for Austria after EC and EFTA States.

[3] O Maschke, 'Investitionsschutzabkommen. Neue vertragliche Wege im Dienste der österreichischen Wirtschaft' (1986) 37 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 201, 210 (hereafter Investitionsschutzabkommen).

[4] See the standard phrase in the legislative materials to Austrian BITs, eg, Austria–Ethiopia BIT (2004) according to which 'Austria has been seeking for some time to conclude Agreements on the Promotion and Protection of Investments with other States. The primary object of such agreements is to support Austrian firms in their investment activities abroad and to protect them against potential risks' (author's translation) ('Österreich ist seit geraumer Zeit bestrebt, Abkommen über die Förderung und den Schutz von Investitionen mit anderen Staaten abzuschließen. Ziel dieser Abkommen ist es vor allem, österreichische Firmen bei ihren Investitionsbemühungen im Ausland zu unterstützen und sie gegen dabei allenfalls auftretende Risiken abzusichern'), 778 der Beilagen XXII. GP, available in German at <www.parlament.gv.at/PAKT/VHG/XXII/I/I_00778/fname_031726.pdf> (last accessed 14 August 2011).

[5] In 2009, a considerable proportion of Austria's FDI was made in Central and Eastern Europe. Austria was the biggest investor in Slovenia, Croatia, Bosnia-Herzegovina, and Serbia; it ranked second in Bulgaria and Romania. See Österreichische Nationalbank, Statistiken Sonderheft 'Direktinvestitionen 2009. Österreichische Direktinvestitionen im Ausland und ausländische Direktinvestitionen in Österreich', available in German at <www.oenb.at/de/img/shst_2011_09_direktinvestitionen_tcm14-237567.pdf> (last accessed 8 September 2012). See also M Schekulin, J Mayer, and F Müller, 'Eine Strategische Außenwirtschaftspolitik für Österreich', in Bundesministerium für Wirtschaft und Arbeit (ed), *Austrian Foreign Trade Yearbook* (2003/2004), 205–25.

abroad is high in the region. In the official statistics used by the Austrian National Bank, FDI is defined as cross-border investment with the objective of establishing a lasting interest in an enterprise, similar to definitions used by the OECD or the IMF.[6]

With regard to investment flows into Austria, the Austrian legal system has fully liberalized them vis-à-vis its other EU partners as part of the EU's core provisions on freedom of establishment[7] and of capital.[8] At the same time, this liberal approach was also extended to third parties. There is no legislation in force which would permit the government to block inward foreign investment for political reasons. Equally, Austria does not have any general foreign investment legislation.

The Austrian legal system has contained explicit property rights guarantees for a considerable time. Already the 1811 General Civil Code provided in Article 365 that '[i]f the common good so requires, a citizen of the state must cede even the complete ownership of property for a suitable compensation'.[9] This property guarantee was elevated to constitutional law rank by the 1867 Basic Law declaring that '[p]roperty is inviolable. Expropriation against the will of the owner can only occur in cases and in the manner determined by law'.[10] In addition to Article 1 Additional Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[11] which forms part of Austrian constitutional law, the 1867 Basic Law still provides the cornerstone of property rights protection in Austria. On this basis, the Austrian Supreme Court and the Constitutional Court have elaborated a number of principles, relating to 'public interest', proportionality, compensation and restitution,[12] which apply also in the field of investments.

II. Austria's BIT Programme

Austria has never had treaties comparable to the Friendship, Commerce and Navigation ('FCN') treaties of other States. Instead, some treaties on establishment ('Niederlassungsverträge'), dating back to the 19th century contained provisions that may be regarded as functionally equivalent to some of the FCN guarantees.[13]

[6] See *OECD Benchmark Definition of Foreign Direct Investment* (4th edn, April 2008), para 11, available at <www.oecd.org/industry/internationalinvestment/investmentstatisticsandanalysis/40193734.pdf> (last accessed 8 September 2012).

[7] Treaty on the Functioning of the European Union (TFEU), Art 49.

[8] TFEU, Art 63.

[9] General Civil Code, Art 365; translation in P L Baeck, *The General Civil Code of Austria* (1972) 67 (§ 365 Allgemeines Bürgerliches Gesetzbuch: 'Wenn es das allgemeine Beste erheischt, muß ein Mitglied des Staates gegen eine angemessene Schadloshaltung selbst das vollständige Eigenthum einer Sache abtreten').

[10] Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm, *Imperial Law Gazette* (RGBl) 1867/142 (Artikel 5 Staatsgrundgesetz: 'Das Eigenthum ist unverletzlich. Eine Enteignung gegen den Willen des Eigenthümers kann nur in den Fällen und in der Art eintreten, welche das Gesetz bestimmt').

[11] First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11, signed 20 March 1952, ETS No 9 (entered into force 19 May 1954): 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[12] See K Korinek, D Pauger, and P Rummel, *Handbuch des Enteignungsrechts* (Springer, 1994).

[13] See, eg, Vertrag vom 7 Dezember 1875 zwischen der Schweiz und der österreichisch-ungarischen Monarchie zur Regelung der Niederlassungsverhältnisse, Befreiung vom Militärdienst und den Militärsteuern,

Austria started concluding BITs at a comparatively late stage. Its first BIT was with Romania (1976) which entered into force in 1977, and has now been replaced by a new one signed in 1996, in force since 1997; it was followed by those with China (1985), Malaysia (1985), and Turkey (1988). The conclusion of BITs was intensified during the 1990s, leading to a wave of BITs with mostly developing countries, but also Eastern European countries in transition. During the first decade of the 21st century, a further 30 BITs were concluded. As of July 2010 there are 65 BITs.[14]

Since the late 1980s, Austrian treaty negotiators have started to rely on previous BITs in their dealings with new partners. Sometimes also foreign BITs were used as templates.[15] In 1997/98, a Model treaty was agreed upon. However, this model was used for internal purposes and never officially published. The same is the case with a second internal Model BIT of 2004. In the early 2000s public interest in BITs increased. In 2004, a parliamentary '*enquete*' took place on the purpose and content of future BITs.[16] In 2008, a new Model BIT was adopted[17] which provides the current template for BIT negotiations. It takes into account some developments in investment treaty arbitration as well as discussions in such investment-focussed forums like UNCTAD and OECD.

Austria has not entered into FTAs with investment chapters. Since its accession to the EU in 1995,[18] Austria has transferred the power to conclude trade agreements to the EU (at that time the EC). According to EC law, the Common Commercial Policy,[19] which comprised the power to conclude trade agreements, was a so-called exclusive Community competence depriving Member States of their treaty-making power in this field.[20]

The division of powers between the EU/EC and its Member States has again become highly relevant for the issue of investment treaties with the entry into force of the Lisbon Treaty in December 2009. According to the new Common Commercial Policy

gleichmässige Besteuerung der beiderseitigen Staatsangehörigen, gegenseitige unentgeltliche Verpflegung in Krankheits- und Unglücksfällen und gegenseitige kostenfreie Mitteilung von amtlichen Auszügen aus den Geburts-, Trauungs- und Sterberegistern, *Imperial Law Gazette* (RGBl) 1876/70. Such treaties of establishment typically provided for national treatment to nationals of the other treaty party with regard to establishment, the right to engage in commerce and taxation.

[14] See Ch Knahr and A Reinisch, 'Bilateral Investment Treaty Overview—Austria', Investment Claims Online (Oxford University Press, 2011).

[15] For instance, in its negotiations with China Austria heavily relied on the China–Germany BIT (1983). See Maschke, 'Investitionsschutzabkommen'.

[16] 'Enquete Über Ziele und Inhalte Künftiger Investitionsschutzabkommen: Bartenstein—Bilaterale Abkommen wichtig für Mittelstand' (Parlamentskorrespondenz, Nr 668, 06.10.2004), available in German at <www.parlament.gv.at/PG/PR/JAHR_2004/PK0668/PK0668.shtml> (last accessed 14 August 2011).

[17] 'Agreement for the Promotion and Protection of Investment between the Republic of Austria and [. . .]', (2008) 13 *Austrian Review of International and European Law* 143–56.

[18] EU Accession Treaty (Beitrittsvertrag), *Federal Law Gazette* (BGBl) 1995/45.

[19] Treaty Establishing the European Community ('TEC'), 25 March 1957, 298 UNTS 11, Art 133(1), as amended by Treaty of Amsterdam, 2 October 1997, 1997 OJ (C 340) 1, as amended by Treaty of Nice, 26 February 2001, 2001 OJ (C 80) 1, consolidated version reprinted in 2002 OJ (C 325) 33: 'The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.'

[20] S Meunier and K Nicolaidis, 'Who Speaks for Europe? The Delegation of Trade Authority in the EU' (1999) 37 *Journal of Common Market Studies* 477–501; S Meunier and K Nicolaidis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906–25; S Billiet, 'From GATT to the WTO: The Internal Struggle for External Competence in the EU' (2006) 44 *Journal of Common Market Studies* 899–919; J Steiner, L Woods, and Ch Twigg-Flesner (eds), *EU Law* (9th edn, 2006) 45; P Craig and G De Burca (eds), *EU Law, Text, Cases and Materials* (3rd edn, 2003), 130–1; cf Opinion 1/75 [1975] ECR 1355; Opinion 1/78 [1979] ECR 1271.

provision, the EU now also has the power to conclude treaties in the field of 'foreign direct investment'.[21] The amendment to this provision did not attract much attention during the debate on the drafting of the Constitution Treaty. However, it has raised much concern in Member States circles after the signing of the Lisbon Treaty, which has kept the suggested wording. While it is possible to interpret the new FDI power of the EU as one limited to the conclusion of investment liberalization agreements (providing for access or admission of investments only, leaving the protection or post-establishment phase to be regulated by Member States),[22] it appears that the prevailing view is the one maintained by the EU Commission. In its opinion, the power to enter into investment agreements, regulating all aspects of investment law, including the protection of investments through substantive standards and investment dispute settlement, was transferred to the EU and has now become an exclusive EU power.[23]

Although this view would imply that EU Member States have lost their treaty-making power in the field of investment law, some of them, including Austria, have continued to enter into BITs. In 2010, Austria signed BITs with Kosovo and Kazakhstan. This practice has been accepted by the EU on a temporary basis.[24] It is likely that Austria will continue to enter into BITs with non-EU States. With regard to so-called intra-EU BITs, ie BITs concluded between EU Member States, which have multiplied as a result

[21] Treaty on the Functioning of the European Union, 30 March 2010, 2010 OJ (C83) (entered into force 1 December 2009), Art 207(1). Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 9 May 2008, 2008 OJ (C 115): 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

[22] M Klamert and N Maydell, 'Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law' (2008) 13 *European Foreign Affairs Review*, 493–513; M Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (2006) 30 *European University Institute ('EUI') Working Papers: LAW*, 2932; H G Krenzler, 'Die Gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrags—ein Schritt in die richtige Richtung' (2005) 11 *Recht der Internationalen Wirtschaft* 801–11; T Müller-Ibold, 'Gemeinsame Handelspolitik, Vorbemerkungen zu Art 206–207', in C Otto Lenz and K D Borchardt (eds), *EU-Verträge. Kommentar nach dem Vertrag von Lissabon* (5th edn, 2010) 2215; R. Streinz, Ch Ohler, and Ch Herrmann (eds), *Der Vertrag von Lissabon zur Reform der EU: Einführung mit Synopse* (2010) 149–55.

[23] M Bungenberg, 'Außenbeziehungen und Außenhandelspolitik', in J Schwarze and A Hatje, *Der Reformvertrag von Lissabon, Eur-Beiheft 1* (2009) 195–216; M Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (2005) 42 *Common Market Law Review* 91–127; J Monar, 'Die Gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen' (2005) 1 *Außenwirtschaft* 99–117; Müller-Ibold, 'Gemeinsame Handelspolitik, Vorbemerkungen zu Art 206–207', 2215; R Streinz, Ch Ohler, and Ch Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 149–55; D Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade' (2006) *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 186, Part III, 289–304.

[24] Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, Brussels, 7.7.2010, COM(2010) 344 final, Art 11, available at <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf> (last accessed 14 August 2011); 'Towards a Comprehensive European International Investment Policy', Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and The Committee of the Regions, Brussels, 7.7.2010, COM(2010) 343, available at <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (last accessed 14 August 2011).

of the accession of Eastern European States in 2004 and 2007, the EU Commission has voiced concern over their compatibility with EU law. It is likely that Member States will have to terminate them in the future. For Austria this has implications on its BITs with Bulgaria (1997), the Czech and Slovak Republic (1990) (now succeeded to by both the Czech Republic and the Slovak Republic), Estonia (1994), Hungary (1988), Latvia (1994), Lithuania (1996), Malta (2002), Poland (1988), Romania (1996), and Slovenia (2001).

III. The Practice of Concluding BITs in Austria

Treaty negotiations fall within the competences of Austria's foreign ministry, the Federal Ministry for European and International Affairs. Within the Austrian Government, the Federal Ministry of Economy, Family and Youth has its own Export and Investment Policy Division which is in charge of bilateral investment protection agreements. Ultimate responsibility for the negotiation and conclusion of BITs rests, however, with the foreign ministry.[25]

The decision to open and to conduct BIT negotiations is taken by the government in the form of a decision of the Council of Ministers. Parliament has to be immediately informed about the start of BIT negotiations.[26]

Once a BIT has been signed it has to undergo ratification.[27] Since BITs are usually regarded as treaties amending or supplementing existing legislation they also have to be approved by the Austrian Parliament before formal ratification through the Head of State, the Federal President. In practice the period between signature and entry into force varies. On average, it appears to be less than two years. Because BITs are considered to enjoy the rank of legislation they are regularly published in the Federal Law Gazette ('Bundesgesetzblatt'), Part III where treaties concluded by Austria are usually made public. With publication and the notification of their entry into force, BITs become part of the Austrian legal order and, to the extent that their provisions are self-executing, they can be directly applied by Austrian courts and administrative agencies. Because BITs regularly contain dispute settlement mechanisms enabling international tribunals to decide over treaty violations, domestic court decisions relying on BITs appear to be rare.

All Austrian BITs are published in the Federal Law Gazette in all authentic languages, which usually means in German plus the official language(s) of the treaty partner. Often also English is an authentic language.[28] In addition to the treaty text, short annotated draft bills as introduced by the government after negotiating ('Regierungsvorlagen'), outlining the purpose, content and economic and financial implications of BITs are equally made public.[29] These legislative materials form part of the *travaux préparatoires*.

[25] See, s 15 Law on the Federal Ministries (§ 15 Bundesministeriengesetz 1986).

[26] Austrian Federal Constitution, Art 50(5).

[27] See also, Model BIT (2008), Art 29(1).

[28] Austria–Iran BIT (2001), Art 15, even provides: 'This Agreement is done in duplicate in the German, Persian and English languages, all texts being equally authentic. In case of divergence of interpretation the English text shall prevail.' See also the final provision of the Austrian Model BIT 2008, below at Art 29.

[29] Published in hard copy as 'Beilagen zu den Stenograph. Prot. des NR' (Annexes to the stenographic protocols of the National Assembly); online: 'Republik Österreich—Parlament, Regierungsvorlagen und Gesetzesinitiativen', available at <www.parlament.gv.at/PAKT/RGES> (last accessed 14 August 2011).

Both the final texts and the draft bills can be also accessed online via the Federal Chancellery's Legal Information System RIS ('Rechtsinformationssystem').[30]

In addition to publication in the Austrian Federal Law Gazette, the Austrian Federal Ministry for European and International Affairs regularly registers Austrian BITs that have been signed in Austria with the UN Secretary-General. Also the UNCTAD search page, 'Investment Instruments Online', contains many Austrian BITs though often not all authentic languages are available.[31]

IV. The Austrian Model BIT 2008

The Austrian Model BIT 2008 is currently used for BIT negotiations. It is structured in three chapters. Chapter One, entitled 'General Provisions', contains definitions, provisions on promotion and admission, as well as the main standards of treatment. Chapter Two, entitled 'Dispute Settlement' contains detailed rules on investor-State as well as inter-State disputes. 'Final Provisions' are found in a short Chapter Three.

Preamble

The REPUBLIC OF AUSTRIA and the . . . , hereinafter referred to as 'Contracting Parties',

RECALLING that foreign direct investments are vital complements to national and international development efforts, as expressed at the United Nations International Conference on the Financing of Development held in Monterrey, Mexico, in March 2002 (the 'Monterrey Consensus');

RECOGNISING that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;

EMPHASISING that fair, transparent and predictable investment regimes based on the rule of law both complement and benefit the world trading system;

DESIRING to strengthen their ties of friendship and to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Contracting Party in the territory of the other;

REAFFIRMING the commitments under the 2006 Ministerial Declaration of the UN Economic and Social Council of Full Employment and Decent Work;

REFER[R]ING to the international obligations and commitments concerning respect for human rights;

RECOGNISING that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable;

COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards;

EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries;

EMPHASISING the necessity for all governments and civil actors alike to adhere to UN and OECD anti corruption efforts, most notably the UN Convention against Corruption (2003);

TAKING NOTE OF the principles of the UN Global Compact;

[30] Bundeskanzleramt—Rechtsinformationssystem, available at <www.ris.bka.gv.at/defaultEn.aspx> (last accessed 14 August 2011).

[31] Investment Instruments Online, Bilateral Investment Treaties, available at <www.unctadxi.org/templates/DocSearch____779.aspx> (last accessed 14 August 2011).

ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection;

HAVE AGREED AS FOLLOWS:

As opposed to previous practice when Austrian BITs contained merely a few preambular paragraphs stressing the contribution of investment protection to increase economic cooperation between the treaty parties, the new Model BIT includes a lengthy preamble referring to economic as well as non-economic goals. The inclusion of such 'non-economic' objectives follows a trend in recent BIT practice.[32]

As with other treaties the question of the normative value of preambles is not wholly clear. Preambles are expressly mentioned in Article 31(2) of the Vienna Convention on the Law of Treaties[33] as part of the relevant context[34] which is one of the elements for the interpretation of a treaty.[35] In investment arbitration practice they are often invoked and relied upon in order to ascertain the object and purpose of specific treaty provisions.[36] What is remarkable is the fact that some of the non-economic goals, such as environment and labour, have been also expressly included in separate treaty provisions of the Austrian Model BIT.[37] It remains to be seen whether the mentioning of non-economic goals in BIT preambles will have an actual impact on the interpretation of BIT standards.

A. Chapter One: General Provisions

Chapter One of the Austrian Model BIT contains the main substantive standards of investment protection typically found in BITs, among them fair and equitable treatment as well as full protection and security together with MFN and national treatment in Article 3, rules on expropriation in Article 7, on compensation for losses in Article 8, and on transfers in Article 9. In addition, it contains the typical definitions section opting for a broad, asset-based definition of investment in Article 1, and a subrogation clause in Article 7. Following the European tradition, the Austrian Model BIT does not provide for any admission obligation, retaining control for the host State in Article 2. Its Article 11 contains a wide-reaching umbrella clause, while Article 12 permits hosts States to deny treaty benefits to investors who have only tenuous links to the other Contracting

[32] See, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-corruption Issues', in OECD (ed), *International Investment Law. Understanding Concepts and Tracking Innovations* (2008), 135; K Gordon and J Pohl, 'Environmental Concerns in International Investment Agreements: A Survey', *OECD Working Papers on International Investment*, No 2011/1, OECD Investment Division.

[33] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980). See also, I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984); R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008).

[34] Vienna Convention, Art 31(2): 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . .'

[35] Vienna Convention, Art 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[36] See, eg, *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* (ICSID Case No ARB/97/3, Award of 20 August 2007), para 7.4.4; MTD Equity Sdn Bhd & MTD Chile SA v Chile (ICSID Case No ARB/01/7, Award of 24 May 2004), para 113; *LG&E Energy Corp v Argentine Republic* (ICSID Case No ARB/02/1, Decision on Liability of 26 September 2006), para 124.

[37] Model BIT (2008), Arts 4, 5.

State. Articles 4 and 5 contain clear commitments against environmental and labour standard 'dumping'.

Article 1: Definitions

For the purpose of this Agreement

(1) 'investor of a Contracting Party' means:
- **(a) a natural person having the dominant and effective nationality of a Contracting Party in accordance with its applicable law, or**
- **(b) an enterprise constituted or organised under the applicable law of a Contracting Party, making or having made an investment in the other Contracting Party's territory.**

(2) 'investment by an investor of a Contracting Party' means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party.

Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk, and include:
- **(a) an enterprise as defined in paragraph (3);**
- **(b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived there from;**
- **(c) bonds, debentures, loans and other forms of debt instruments and rights derived there from;**
- **(d) any right or claim to money or performance whether conferred by law or contract, including turnkey, construction, management or revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity;**
- **(e) intellectual property rights and intangible assets having an economic value, including industrial property rights, copyright, trademarks, trade dresses; patents, geographical indications, industrial designs and technical processes, trade secrets, trade names, know-how and goodwill;**
- **(f) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.**

(3) 'enterprise' means any entity possessing at least partial legal personality, constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, e.g. a corporation, partnership, joint venture or any other association, as well as a trust, a sole proprietorship, or a branch located in the territory of a Contracting Party and carrying out substantive business there.

(4) 'returns' means the amounts yielded by an investment and, in particular, profits, interests, capital gains, dividends, royalties, licence fees, management fees, technical assistance fees and other fees.

(5) 'without delay' means such period as is normally required for the completion of necessary formalities for the payments of compensation or for the transfer of payments. This period shall commence for payments of compensation on the day of expropriation and for transfers of payments on the day on which the request for transfer has been submitted. It shall in no case exceed one month.

(6) 'territory' means with respect to each Contracting Party the land territory, internal waters, maritime and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where the Contracting Party exercises jurisdiction, in conformity with international law.

(7) 'measure' means a regulatory action and includes any law, regulation, decision, procedure, requirement, or practice.

The 2008 Austrian Model BIT contains a restrictive definition of natural persons that may qualify as investors. Only persons 'having the dominant and effective nationality of

a Contracting Party in accordance with its applicable law' qualify.[38] This contrasts with most of the existing Austrian BITs which simply require citizenship or nationality.[39] The qualification indicates that, in case of multiple citizenships, an Austrian citizen with another more 'dominant and effective' nationality will not be protected under the BIT.

With regard to legal persons, it is interesting to note that the Model BIT does not follow the seat theory, prevalent in continental European and also Austrian private international law.[40] Rather, it refers to 'an enterprise constituted or organised under the applicable law of a Contracting Party', thus following the incorporation approach. Again this departs from previous Austrian BIT practice which often required, in addition to constitution 'in accordance with national legislation', that the legal person has its seat in the territory of a contracting Party.[41]

As to the definition of 'investment' the 2008 Model BIT qualifies the traditionally used, broad, asset-based definition in Austria's BITs. While keeping the wide notion of 'every kind of asset', the new provision inserts criteria inspired by the discussion on an inherent investment notion under Article 25 of the ICSID Convention,[42] sometimes referred to as *Salini*-criteria.[43] Since the language of the Model BIT omits some of the more controversial aspects, like 'contribution to the host State's development',[44] it may in practice not really limit the broad scope of investment under Article 1(2). However, it is clear that these criteria may impose an additional jurisdictional hurdle for investors wishing to pursue BIT claims before an arbitral tribunal pursuant to Article 14 of the Model BIT. Usually, the ICSID requirement of an 'investment' pursuant to Article 25 and the 'investment' notion under an applicable BIT are considered to constitute a

[38] Model BIT (2008), Art 1(1)(a).

[39] See, eg, Austria–Ethiopia BIT (2004), Art 1(1)(a): 'a natural person having the nationality of a Contracting Party in accordance with its applicable law'; Austria–Iran BIT (2004), Art 1(2)(a): 'natural persons who, according to the laws of a Contracting Party, are considered to be its nationals'.

[40] Cf Statute on Private International Law, Art 10, IPR Gesetz, Federal Law Gazette (BGBl) 1978/304: 'Das Personalstatut einer juristischen Person oder einer sonstigen Personen- oder Vermögensverbindung, die Träger von Rechten und Pflichten sein kann, ist das Recht des Staates, in dem der Rechtsträger den tatsächlichen Sitz seiner Hauptverwaltung hat', ie: 'The personality of a legal person or another association of persons or property, which may possess rights and obligations, is determined by the law if the State in which the entity has the actual seat of its central administration' (author's translation).

[41] See, eg, Austria–Malaysia BIT (1986), Art 1(2)(a); Austria–Bulgaria BIT (1997), Art 1(3)(b); Austria–Turkey BIT (1988), Art 1(2)(b).

[42] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention'), Art 25(1): 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.'

[43] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001), para 52. In ICSID cases the following elements have been identified as indicative of an investment: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State's development. See also, C Schreuer, L Malintoppi, A Reinisch, and A Sinclair (eds), *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009) 128–9.

[44] See *Patrick Mitchell v Democratic Republic of the Congo* (ICSID Case No ARB/99/7, Decision on Annulment of 1 November 2006); *Malaysian Historical Salvors, Sdn Bhd v Malaysia* (ICSID Case No ARB/05/10, Award on Jurisdiction of 17 May 2007, and Decision on Annulment of 16 April 2009); *Phoenix Action, Ltd v Czech Republic* (ICSID Case No ARB/06/5, Award of 15 April 2009); *Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20, Award of 14 July 2010).

'two-fold test [to determine whether an ICSID] Tribunal has the competence to consider the merits of [a] claim'.[45] Non-ICSID tribunals, however, normally do not have to satisfy themselves whether an investment also meets the Article 25 ICSID Convention test; their jurisdictional scrutiny is limited to the investment definition of the applicable BIT.[46] The new 'integrative' approach of Article 1(2) Model BIT may change this.

Some further aspects of the definitions article merit attention.

Against the background of a policy discussion on whether investment protection should be available for debt instruments,[47] it is interesting to note that Article 1(2)(c) specifically includes 'bonds, debentures, loans and other forms of debt instruments'. Article 1(3) broadly defines 'enterprise' as any entity 'possessing at least partial legal personality', 'whether or not for profit, and whether private or government owned'. This clarifies that, in addition to legal entities, unincorporated branches and even enterprises which are based on the cooperation of individual businesspersons without their own legal personality may ultimately qualify as 'investors' pursuant to Article 1(1)(b) of the Model BIT. The inclusion of 'not for profit' entities would allow NGOs and similar actors to raise claims under the Model BIT and the clarification that enterprises may be 'private or government owned' demonstrates that even government owned investors may be entitled to pursue investment claims against host States—a contested issue that has been similarly addressed in recent ICSID arbitration.[48] Finally, the Model BIT's definition of 'measure' may be of interest. While it seems intended to be all-encompassing, the fact that it is cumulatively limited to 'regulatory action' could give rise to controversial interpretations.

Article 2: Promotion and Admission of Investments

(1) Each Contracting Party shall, according to its laws and regulations, promote and admit investments by investors of the other Contracting Party.

(2) Any alteration of the form in which assets are invested or reinvested shall not affect their character as an investment provided that such alteration is in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made.

The 2008 Model BIT retains the traditional European approach which leaves the admission of investment to the discretion of the host State. Though the language chosen has hardened compared to softer versions in earlier BITs,[49] it still does not appear to impose a duty to admit foreign investments.[50] Thus, the obligations in the Austrian Model BIT only apply in the so-called 'post-establishment' phase.

[45] See *Ceskoslovenska Obchodni Banka, As v The Slovak Republic* (ICSID Case No ARB/97/4, Decision on Jurisdiction of 24 May 1999), para 68.

[46] See *Mytilineos Holdings SA v 1 The State Union of Serbia & Montenegro, 2 Republic of Serbia*, (UNCITRAL, Partial Award on Jurisdiction of 8 September 2006), paras 117–18.

[47] M Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 *American Journal of International Law* 711–59.

[48] See *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan* (ICSID Case No ARB/05/16, Award of 29 July 2008).

[49] Cf Austria–India BIT (2000), Art 2(1): 'Each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and . . .'

[50] See, however, with regard to the similarly worded provision in the German Model BIT, O Sandrock, 'The Right of Foreign Investors to Access German Markets: The Meaning of Art 2(1) of the German Model Treaty for the Promotion and Protection of Foreign Investments' (2010) 25 *ICSID Review—Foreign Investment Law Journal* 268.

Article 3: Treatment of Investments

(1) Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.

(2) A Contracting Party shall not unduly or discriminatorily impair the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party.

(3) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments or returns treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments or returns with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favourable to the investor.

(4) No provision of this Agreement shall be construed

(a) as to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security; or

(b) as to prevent a Contracting Party from fulfilling its obligations as a member of an economic integration agreement such as a free trade area, customs union, common market, economic community, monetary union, e.g. the European Union, or as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference or privilege by virtue of its membership in such an agreement or any multilateral agreement on investment; or

(c) as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference or privilege resulting from obligations of a Contracting Party under an international agreement, international arrangement or domestic legislation regarding taxation.

All central investment protection standards are contained in one article of the Model BIT 2008. Article 3(1) combines the two absolute treatment standards of 'fair and equitable treatment' and 'full protection and security', the latter formulated as 'full and constant protection and security'. As opposed to other investment agreements, there is no indication that the fair and equitable treatment standard is meant to be limited to the customary international law minimum standard of treatment.[51] While there does not appear to be any official Austrian Government view on this matter, it appears that the fact the new Austrian Model BIT is silent on this issue and has retained the unqualified standard of 'fair and equitable treatment' indicates that this standard goes beyond the

[51] Cf US Model BIT (2004), Art 5: '1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights'; NAFTA, Art 1105(1): 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.' See also, NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11 (2001): '1. Art 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'

minimum standard of treatment under customary international law. Regarding the full protection and security standard, the deviation from the usual formulation by the addition of the word 'constant' does not appear to have any impact on the interpretation of this standard. What is often referred to as a prohibition of arbitrary and discriminatory treatment is found in the Austrian Model BIT as a prohibition to unduly or discriminatorily impair the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party in Article 3(2). Finally, the third paragraph of Article 3 combines national and MFN treatment both to investors of the other Contracting Party and to their investments and returns.

Unlike in some earlier Austrian BITs,[52] the combined MFN and national treatment clause of paragraph 3 specifies some fields in respect of which non-discriminatory treatment is owed. These are 'management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns'.

This formulation follows the predominantly used templates of other BITs.[53] It includes, however, one more unusual element. When listing in what respect such non-discrimination treatment is owed it expressly mentions 'dispute settlement'. This is a new feature that cannot be found in earlier Austrian BITs and it is likely to reflect an affirmation of the jurisprudence of investment tribunals which have gradually permitted to 'import' various aspects of dispute settlement from third party BITs via an MFN clause. Starting with the ICSID decision in *Maffezini*[54] waiting periods,[55] and subsequently even jurisdictional hurdles,[56] were by-passed by some tribunal decisions.[57]

[52] See, eg, Austria–Czech and Slovak Federal Republic BIT (1990), Art 3(1): 'Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third State and their investments.'

[53] See, OECD, Directorate for Financial and Enterprise Affairs, 'Most-Favoured-Nation Treatment in International Investment Law', *Working Papers on International Investment* (2004/2) 3; UNCTAD, *Most Favoured-Nation Treatment, United Nations Conference on Trade and Development*, UNCTAD Series on Issues in International Investment Agreements (1999) 13; A Ziegler, 'Most-Favoured-Nation (MFN) Treatment', in A Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 59.

[54] *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7, Decision on Jurisdiction of 25 January 2000).

[55] *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/08, Decision on Jurisdiction of 3 August 2004); *Gas Natural SDG SA v Argentine Republic* (ICSID Case No ARB/03/10, Decision on Jurisdiction of 17 June 2005); *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v Argentine Republic* (ICSID Case No ARB/03/17, Decision on Jurisdiction of 16 May 2006); so far only the tribunal in the *Wintershall* case denied this: *Wintershall Aktiengesellschaft v Argentine Republic* (ICSID Case No ARB/04/14, Award of 8 December 2008).

[56] *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No Arb V079/2005, Award on Jurisdiction of 5 October 2007).

[57] See also, K Hobér, 'MFN Clauses and Dispute Resolution in Investment Treaties: Have We Reached the End of the Road?', in C Binder, U Kriebaum, A Reinisch, and S Wittich (eds), *International Investment Law for the 21st Century* (2009) 31; Y Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse' (2007) 18 *European Journal of International Law* 757; A Reinisch, '*Maffezini v Spain* Case', in *Max-Planck-Encyclopedia of Public International Law* (2009); A Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 *Journal of International Dispute Settlement* 115; B Stern, 'ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the *Maffezini* Case', in S Charnovitz (ed), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005) 246; S D Sutton, '*Emilio Agustin Maffezini v Kingdom of Spain* and the ICSID Secretary-General's Screening Power' (2005) 21 *Arbitration International* 113; R Teitelbaum, 'Who's Afraid of *Maffezini*? Recent Developments in the Interpretation of Most Favored Nation Clauses' (2005) 22 *Journal of International Arbitration* 225; S Vesel, 'Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral

The need for such an express mentioning of dispute settlement has been recently confirmed by the first (publicly known) Austrian BIT case. A majority in *Austrian Airlines v Slovakia*[58] held that an unqualified MFN clause did not extend to dispute settlement.[59] The new formulation of the MFN clause, expressly including dispute settlement, leaves it open whether it is to be regarded as codification or progressive development of the law.

However, the formulation of the new Model BIT may give rise to interpretation problems of its own. Unlike some other BITs,[60] it is unclear whether this clause will give rise to an *e contrario* interpretation, proving that all other MFN clauses in Austrian BITs do not refer to dispute settlement, or whether it should be seen as reaffirming the attitude that MFN clauses in general include dispute settlement.

The non-discrimination clause does not include any reference to 'establishment, acquisition, expansion'.[61] The fact that pre-establishment is not listed follows the approach of BITs which maintain the discretion of host States to permit access to foreign investors pursuant to their own rules and abstain from making any commitments in this regard.[62]

Paragraph 4 of Article 3 contains a broad group of exceptions, combining a security clause, a REIO (Regional Economic Integration Organization) clause and a tax exemption. It does not appear to be appropriately placed within Article 3 since it expressly refers to the entire 'agreement' and not specifically to Article 3, though the REIO[63] and the tax exception in substance mainly apply to MFN treatment.

The security clause is more narrowly construed than that of many other BITs which refer to national security in general and sometimes even permit the State to invoke security reasons to decide on its own whether the threshold of such a situation has been reached (so-called self-judging clauses).[64] The security clause of the Austrian Model BITs

Investment Treaties' (2007) 32 *Yale Journal of International Law* 125; A Ziegler, 'Most-Favoured-Nation (MFN) Treatment', in A Reinisch (ed), *Standards of Investment Protection* (2008) 59.

[58] *Austrian Airlines AG v Slovak Republic* (UNCITRAL, Final Award of 9 October 2009).

[59] Ibid, para 135: 'Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause.'

[60] See, eg, UK–Armenia BIT (1993), Art 3(3): 'For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Arts 1 to 11 of this Agreement'; See also P Acconci, 'Most-Favoured Nation Treatment', in P Muchlinski, F Ortino, and Ch Schreuer (eds), *The Oxford Handbook of International Law* (2008) 387.

[61] *North American Free Trade Agreement*, 32 ILM (1993) 289, Art 1103: '1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.'

[62] Austria–India BIT (2000), Art 2(1).

[63] United Nations Conference on Trade and Development ('UNCTAD'), *The REIO Exception in MFN Treatment Clauses*, UNCTAD Series on International Investment Policies for Development (2004).

[64] See eg, US Model BIT (2004), Art 18: 'Nothing in This Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests 2. To preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'

is literally based on the security exception of Article XXI(c) GATT, exempting any measures adopted in implementation of UN Security Council measures,[65] as it has also been integrated in the 2004 Canadian Model BIT.[66] Thus, it would not be available in the case of autonomous EU sanctions not based on an UN resolution. There, only the REIO clause may be applicable.

Indeed, the current formulation of the REIO clause in Article 3(4)(b) of the Model BIT appears sufficiently wide to cover also economic sanctions adopted by the EU. Though it is primarily aimed at preventing an intended widening of reciprocal advantages such as national treatment (often contained in REIOs and certainly binding on the EU Member Austria vis-à-vis the other EU Members) through the operation of MFN, it refers to 'any obligations' as a member of economic integration agreements, specifically mentioning the EU. Thus, restrictive economic measures for political purposes adopted by the EU institutions also appear to be covered by this clause. This implies that Austria may invoke the clause vis-à-vis its BIT partner in order to justify implementation measures otherwise inconsistent with the BIT.

In fact the text of this new REIO clause was specifically drafted in order to avoid problems Austria and some other EU Member States had encountered with their BITs under scrutiny of the EU Commission. The EU's supervisory organ had instituted infringement proceedings against Austria, Sweden, and Finland in 2006, arguing that certain transfer obligations of some of their BITs concluded before their accession to the EU in 1995 (pre-accession BITs) could impede the application of capital and payment restrictions imposed by the then European Community in the exercise of its economic sanctions powers under the Treaty Establishing the European Community (TEC).[67] Indeed, a Grand Chamber of the European Court of Justice (ECJ)[68] had upheld this

[65] GATT, Art XXI(c) provides: 'Nothing in this Agreement shall be construed . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

[66] Canada Model BIT (2004), Art 10(4) provides: 'Nothing in this Agreement shall be construed: (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests: (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non proliferation of nuclear weapons or other nuclear explosive devices; or (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

[67] In particular Treaty Establishing the European Community, 25 March 1957, 298 UNTS 11, Arts 57(2), 59 and 60(1), as amended by Treaty of Amsterdam, 2 October 1997, 1997 OJ (C 340) 1, as amended by Treaty of Nice, 26 February 2001, 2001 OJ (C 80) 1, consolidated version reprinted in 2002 OJ (C 325) 33 ('TEC').

[68] Case C-205/06, *Commission of the European Communities v Republic of Austria*, 3 March 2009, [2009] ECR I-1301; and C-249/06, *Commission of the European Communities v Kingdom of Sweden*, 3 March 2009, [2009] ECR I-1335; Case C-118/07, *Commission of the European Communities v Republic of Finland*, [2009] ECR I-10889; See also A Reinisch, 'European Court of Justice: Commission of the European Communities v. Austria and Sweden, March 3, 2009, Introductory Note' (2009) 48 *International Legal Materials* 470; N Lavranos, 'Commission v. Austria; Commission v. Sweden' (2009) 103 *American Journal of International Law* 716; H Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 *International and Comparative Law Quarterly* 297–320; M Wierzbowski and A Gubrynowisz, 'Conflicts of Norms Stemming from intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions', in Binder, Kriebaum, Reinisch, and Wittich (eds), *International Investment Law for the 21st Century*, 544–60; M Potesta, 'Bilateral Investment Treaties and the European Union recent

view and ruled in 2009 that by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in their BITs Austria and Sweden had failed to fulfil their obligations under Article 307(2) TEC, a provision which mandated EC Members to take all appropriate steps to eliminate incompatibilities between pre-accession treaties and the obligations under the EC Treaty. This ruling was controversial because it imposed a Community loyalty obligation on Member States to remove even hypothetical, future incompatibilities and not only actual ones. Already during the ECJ proceedings Austria and other EU Members in a similar situation attempted to devise broader REIO clauses which would withstand ECJ scrutiny.[69] The REIO clause in Article 3(4)(b) of the Model BIT is the outcome of this process aimed at reserving certain powers to REIO institutions.

Article 4: Investment and Environment

The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic environmental laws.

Article 5: Investment and Labour

(1) **The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic labour laws.**
(2) **For the purposes of this Article, 'labour laws' means each Contracting Party's statutes or regulations, that are directly related to the following internationally recognised labour rights:**
   (a) **the right of association;**
   (b) **the right to organise and to bargain collectively;**
   (c) **a prohibition on the use of any form of forced or compulsory labour;**
   (d) **labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour;**
   (e) **acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;**
   (f) **elimination of discrimination in employment and occupation.**

Articles 4 and 5 of the 2008 Model BIT contain features that are novel to Austria's BITs. For the first time, the environment and labour rights are mentioned in the treaty text itself, and not only in the preamble.[70] For purposes of treaty application and interpretation this clearly increases their relevance. However, both Articles 4 and 5 are normatively 'weak' in so far as they do not impose any substantive obligations on the Contracting Parties. Rather, they contain expressions of opinion as to the inappropriateness to engage in

Developments in Arbitration and before the ECJ' (2009) 8 *The Law and Practice of International Courts and Tribunals* 225–45; P Koutrakos, 'Case C-205/06, *Commission v Austria*, judgment of the Court of 3 March 2009; Case C-294/06, *Commission v Sweden*, judgment of the Court of 3 March 2009' (2009) 46 *Common Market Law Review* 2059; A Ali Chouri, 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with EC Treaty: Individual and Collective Options' (2010) 16 *European Law Journal* 806–30; E Denza, 'Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland' (2010) 35 *European Law Review* 263.

[69] See also Case C-205/06, *Commission of the European Communities v Republic of Austria*, para 41.

[70] See, eg, Austria–Malta BIT (2002), Preamble: 'Reaffirming their commitment to the observance of internationally recognized labour standards, in striving to achieve the objectives of this Agreement'; Austria–Slovenia BIT (2001), Preamble: 'Reaffirming their commitment to the observance of internationally recognised labour standards.'

so-called environmental or social dumping, ie the lowering of standards in order to attract foreign investment.[71] The formulation, '[t]he Contracting Parties recognize that . . .', is similar to Article III(1) of the GATT in which the Contracting Parties recognize that internal taxation and regulation should not be applied in a protectionist fashion.[72]

While both articles thus may not lead to directly enforceable treaty obligations they are likely to be invoked in a contextual interpretation of the Model BIT. The importance attached to domestic environmental as well as labour laws may thus be relevant for interpreting fair and equitable treatment when national measures are challenged or for assessing the legitimacy of domestic regulatory measures in indirect expropriation cases.

The clarification in Article 5(2) that 'labour laws' means legislation directly related to 'internationally recognised labour rights' is supplemented by a list based on the 1998 ILO definition of such internationally recognized labour rights.[73] In addition acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health are mentioned. A corresponding clarification is also included in the US Model BIT 2004.[74]

Article 6: Transparency

(1) Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures, as well as international agreements which may affect the operation of the Agreement.

(2) Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on any measures and matters referred to in paragraph (1).

(3) No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws and regulations protecting confidentiality.

The Model BIT contains a general transparency clause relating to the public availability of domestic law (as well as treaty law) that 'may affect the operation' of the BIT. It follows the usual content of such clauses calling for the official publication or other forms

[71] T Pollan, *Legal Framework for the Admission of FDI* (2006) 245–50; K R Gray, 'Foreign Direct Investment and Environmental Impacts—Is the Debate Over?', *World Investment Report* (UNCTAD, 1999) 306–13, available at <www.worldtradelaw.net/articles/grayfdi.pdf> (last accessed 14 August 2011); P P Barros and L Cabral, 'Competing for Foreign Direct Investment' (2000) 8 *Review of International Economics* 360–71.

[72] However, GATT, Art III(1) which is mainly regarded as a programmatic statement relied upon for interpretation purposes is complemented by two normative paragraphs prohibiting discriminatory taxation and regulation, GATT, Art III(2) and (4); cf H P Hestermeyer, 'Article III', in R Wolfrum, P-T Stoll and H P Hestermeyer (eds), *WTO—Trade in Goods. Max Planck Commentaries on World Trade Law* (Springer, 2011) 128.

[73] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its eighty-sixth session, Geneva, 18 June 1998, Art 2 ('Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation').

[74] US Model BIT 2004, Art 13(2).

of public availability, eg through electronic media, of domestic legislation relevant to foreign investments.

In countries like Austria, where all national laws and regulations as well as international agreements have to be published in the official Law Gazette, and are equally available through official government websites,[75] this formal transparency obligation is generally fulfilled.

In addition to the publication requirement, paragraph 2 contains an obligation to respond to specific requests from the other contracting party. Such requests cannot come directly from investors but have to be channelled through their home States. The Austrian Model BIT does not contain any further reaching specific obligation to 'consult' which would give not only the other contracting party but also private persons a possibility to comment on regulatory changes.[76]

Some of Austria's older BITs already contained such transparency clauses. The Model BIT now adds a confidentiality disclaimer according to which requested States may refuse to furnish information 'concerning particular investors or investments' for law enforcement and privacy purposes. This provision was added *ex abundante cautela* since technically speaking the transparency obligation including the obligation to respond to specific requests is restricted to 'laws, regulations, procedures, as well as international agreements'.

Article 7: Expropriation and Compensation

(1) A Contracting Party shall not expropriate or nationalise directly or indirectly an investment of an investor of the other Contracting Party or take any measures having equivalent effect (hereinafter referred to as expropriation) except:
- **(a) for a purpose which is in the public interest,**
- **(b) on a non-discriminatory basis,**
- **(c) in accordance with due process of law,**
- **(d) accompanied by payment of prompt, adequate and effective compensation in accordance with paragraphs (2) and (3) below.**

(2) Compensation shall:
- **(a) be paid without delay. In case of delay any exchange rate loss arising from this delay shall be borne by the host country.**
- **(b) be equivalent to the fair market value of the expropriated investment before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.**
- **(c) be paid and made freely transferable to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.**
- **(d) include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.**

(3) An investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party shall have the right to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

[75] See Model BIT (2008), Art 29(1).

[76] See, eg, US Model BIT 2004, Art 11(2)(b).

(4) **Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.**

This provision combines a straightforward expropriation clause as it can be found in many other BITs and multilateral investment agreements in paragraph 1, an extended explanation of the precise standard of compensation in paragraph 2 and of the due process standard in paragraph 3, as well as a 'police powers' clause carving out regulatory measures from the notion of indirect expropriation in paragraph 4.

Paragraph 1 relies on a broad concept of expropriation which clarifies that also 'indirect expropriations' or 'measures having equivalent effect' must conform to the legality criteria listed in subparagraphs (a) to (c) and trigger an obligation to compensate. The duty to compensate is couched in the terminology of the *Hull* formula[77] demanding 'prompt, adequate and effective compensation'. The legality criteria of public interest, non-discrimination and due process are equally found in most international investment agreements ('IIAs').[78] The last element, due process, is made more specific in paragraph 3. In general, such a clarification of the due process criterion is rare in BITs. Austria, however, had already included similar provisions in other BITs, stipulating the right of investors to have expropriations including the valuation of compensation assessed by independent host State authorities.[79]

Paragraph 2 contains a number of explanations concerning the compensation due in case of expropriation. While it does not directly define the *Hull* criteria of a 'prompt, adequate and effective compensation', the elements contained in paragraph (2)(a)–(d) relate to them. Paragraph (2)(a) clarifies that a 'prompt' compensation shall be 'paid without delay' and that in case of delay exchange rate losses shall not be borne by the investors. Paragraph (2)(d) further clarifies that late payment triggers an obligation to pay interest at a commercial rate. It does no longer contain the addition found in some Austrian BITs that such prevailing commercial rate shall be in no event less than the LIBOR rate.[80] In paragraph (2)(b) the adequacy of the compensation is circumscribed as the fair market value before public knowledge about the expropriation. Finally the criterion of an 'effective' compensation is made more precise by the requirement of compensation in a 'freely convertible currency' in paragraph (2)(c). These criteria conform to similar ones found in many other IIAs[81] and resemble the more detailed provisions in the World Bank Guidelines.[82]

Paragraph 4 is the most important substantive novelty in the 2008 Model BIT. It incorporates the clarification used in the 2004 Canadian Model BIT according to which

[77] G Hackworth, *Digest of International Law*, Vol III (US Government Printing Office, 1942), 658–9, 288 ('[N]o government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore').

[78] See A Reinisch, 'Legality of Expropriations', 171.

[79] See, eg, Austria–Georgia BIT (2001), Art 5(3).

[80] See, eg, Austria–FRY BIT (2002), Art 4(2).

[81] Eg, NAFTA, Art 1110(2)–(6); similarly, US Model BIT (2004), Art 6(2)–(4); Canada Model BIT (2004), Art 13(2)–(3).

[82] World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) 31 *International Legal Materials* 1363 IV (3)–(8).

non-discriminatory regulatory measures for public welfare objectives are normally not to be considered expropriatory.[83] This language was in turn based on the so-called police powers theory according to which 'bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states'[84] are not to be considered expropriatory. It can also be seen as a repercussion of arbitral case law like the NAFTA decision in the *Methanex* case[85] or the *Saluka* award.[86] It remains to be seen whether arbitral tribunals will regard these textual changes as mere clarifications of an already existing 'police powers' exception to regulatory expropriations or whether they would apply a stricter standard to earlier Austrian BITs that do not contain such language, based on an *e contrario* interpretation.

Article 8: Compensation for Losses

(1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.

(2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:

(a) requisitioning of its investment or part thereof by the authorities or forces acting on the territory of the other Contracting Party, or

(b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 7 (2) and (3).

Article 8 is a typical 'compensation for losses' clause which figures in many BITs though such provisions are rarely addressed in investment arbitration. Paragraph 1 contains a specific non-discrimination obligation. It mandates national treatment or MFN treatment with regard to compensation for losses provided by host States in case of war or other emergency situations. The second paragraph contains a non-contingent restitution or compensation obligation of host States for requisitioning measures or the destruction of property, not justified by necessity. The compensation standard applicable in such cases corresponds to the one provided for in case of expropriation under Article 7.

Article 9: Transfers

(1) Each Contracting Party shall guarantee that all payments relating to an investment by an investor of the other Contracting Party may be freely transferred into and out of its territory without delay. Such transfers shall include, in particular:

(a) the initial capital and additional amounts to maintain or increase an investment;

[83] Canada Model BIT (2004), Annex B 13(1) on the clarification of indirect expropriation; see also the similar formulation of Annex B (4)(b) of the US Model BIT (2004).

[84] Restatement (Third) of the Foreign Relations Law of the United States (1986) § 712 Comment 'g'.

[85] Methanex Corporation v United States of America (NAFTA, Arbitral Tribunal, Final Award of 3 August 2005), Part IV, Chapter D, para 7.

[86] *Saluka Investments BV (The Netherlands) v The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 262.

(b) returns;
(c) payments made under a contract including a loan agreement;
(d) proceeds from the sale or liquidation of all or any part of an investment;
(e) payments of compensation under Articles 7 and 8;
(f) payments arising out of the settlement of a dispute;
(g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.

(2) Each Contracting Party shall further guarantee that such transfers may be made in a freely convertible currency at the market rate of exchange prevailing on the date of transfer in the territory of the Contracting Party from which the transfer is made. The bank charges shall be fair and equitable.

(3) In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.

(4) Notwithstanding paragraphs (1) to (3) and without prejudice to measures adopted by a Contracting Party in pursuance of its international obligations as mentioned in Article 3(4), a Contracting Party may also prevent a transfer through the equitable, non-discriminatory and good faith application of laws and regulations on bankruptcy, insolvency or the protection of rights of creditors, on the issuing, trading and dealing in securities, futures, options and derivatives, on reports or records of transfer, on the prevention of money laundering or terrorist financing, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.

Article 9 guarantees investors the free transfer and repatriation of funds. Paragraph 1 contains a broad list of transfers covered by this liberalization which includes transfers of funds which are arguably pre-establishment, ie the initial transfer of capital in Article 9 (1)(a). Paragraphs 2 and 3 clarify some modalities of transfers. This largely follows earlier Austrian BIT practice. The exception clause of paragraph 4 is based on more recent treaty practice.[87] It permits non-discriminatory, bona fide measures relating to insolvency, securities trading, criminal offences, and the enforcement of orders and judgments. The text of the 2008 Model BIT also added measures 'on the prevention of money laundering or terrorist financing' which appears to be a reaction to the increased obligations of anti-money laundering campaigns and the freezing of funds in order to combat the financing of terrorism under both OECD and UN Security Council obligations. This transfer provision does not contain any exception for economic purposes like some BITs that permit restrictions in case of serious balance of payments difficulties.[88] Its cross-reference to Article 3 implies that also the broad exceptions of Article 3(4), combining a security clause, a REIO clause and a tax exemption, are relevant for purposes of transfers. This latter emphasis was probably triggered by the infringement proceedings against Austria and other EU Member States that were pending at the time of the adoption of the Model

[87] See, eg, Austria–Slovenia BIT (2001), Art 7(4).

[88] See, eg, Greece–Mexico BIT (2000), Art 7(4): 'In case of serious balance of payments difficulties or the threat thereof, each Contracting Party may temporarily restrict transfers, provided that such a Contracting Party implements measures or a programme in accordance with the International Monetary Fund's standards. These restrictions would be imposed on an equitable, non-discriminatory and in good faith basis'; Japan–Vietnam BIT (2003), Art 16(1) provides: 'A Contracting Party may adopt or maintain measures not conforming with its obligations under paragraph 1 of Art 2 relating to cross-border capital transactions and Art 12: (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof . . .'

BIT.[89] In fact, Austria's position was that a REIO clause enabled it to act in conformity with EU obligations.

Article 10: Subrogation

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment by an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise without prejudice to the rights of the investor under Chapter Two Part One the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

This subrogation clause provides in a standard way that in case a contracting party compensates its national investors in the other contracting party under a guarantee or the like the latter shall recognize the assignment ('subrogation') of rights of the investors to the compensating State. Such obligation is 'without prejudice to the rights of the investor under Chapter Two Part One' which implies that investors may still pursue treaty arbitration against the host State. This is equally safeguarded by Article 17 of the Model BIT.

Article 11: Other Obligations

(1) **Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party. This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.**
(2) **If the laws of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by nationals or enterprises of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.**

Article 11 consists of two different provisions. Its first paragraph contains an umbrella clause[90] with a clarification as to its effect and its second paragraph provides for most favoured treatment.

The umbrella clause based on similar clauses in earlier Austrian BITs[91] is wide in so far as it relates to 'any' obligation. However, the qualification of obligations 'entered into

[89] Case C-205/06, *Commission of the European Communities v Republic of Austria* (3 March 2009) [2009] ECR I-1301; see UNCTAD, *The REIO Exception*.

[90] See, among others, Ch Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *Journal of World Investment & Trade* 231; R Dolzer and Ch Schreuer, *Principles of International Investment Law* (2008) 153; T Wälde, 'The Umbrella Clause in Investment Arbitration. A Comment on Original Intentions and Recent Issues' (2005) 6 *Journal of World Investment & Trade* 183; J Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes' (2007) 14 *George Mason Law Review* 135; A Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 *Arbitration International* 411; A Reinisch, *Recent Developments in International Investment Law* (2009) 59.

[91] See also Austria–United Arab Emirates BIT (2001), Art 9(1); Austria–Jordan BIT (2001), Art 9; Austria–Yemen BIT (2003), Art 9.

with regard to specific investments' may be regarded as a limitation to contractual undertakings excluding obligations assumed under domestic legislation and possibly under unilateral acts.[92] The second sentence of paragraph 1 is an important clarification which must be understood against the background of a divergence of interpretation of umbrella clauses in investment arbitration. Some tribunals have held that an umbrella clause elevates contractual breaches to BIT breaches with the implication that a host State violating a contractual obligation is automatically in breach of its BIT obligation to observe such obligations.[93] Other tribunals have held that this is not the consequence of an umbrella clause.[94] The new language in the Austrian Model BIT according to which a 'breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty' clearly sides with the first approach.

Paragraph 2 ensures that the BIT provisions do not prevail over any other more favourable laws or treaties. It thus prevents the application of the *lex specialis* or *lex posterior* rules which are normally relied upon in Austria to solve conflicts between treaty provisions and domestic law.

Article 12: Denial of Benefits

A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organised.

The last substantive provision of the BIT is a denial of benefits clause which has the potential of limiting the broad definition of corporate investors according to Article 1(1)(b). While this definition does not require any effective link between the enterprise 'constituted or organised under the applicable law of a Contracting Party' and that State party, the denial of benefits clause enables a host State to exclude such an enterprise from the benefits of the BIT if it is owed or controlled by investors of a third State and if it does not have any 'substantial business activity' in the State of incorporation. Though a denial of benefits clause is closely related to the definition of 'investor', it is usually contained in a separate treaty provision because it enables a Contracting Party to withhold some treaty benefits without doing so automatically. A denial of benefits clause has not been regularly included in Austrian BITs before the adoption of the Model BIT, though it is not a total novelty.[95]

[92] See M C Gritón Salias, 'Do Umbrella Causes Apply to Unilateral Undertakings?', in Binder, Kriebaum, Reinisch, and Wittich (eds), *International Investment Law for the 21st Century*, 490.

[93] *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6, Decision on Jurisdiction of 29 January 2004), para 128; Eureko v Poland (Partial Award of 19 August 2005), para 244; Noble Ventures, Inc v Romania (ICSID Case No ARB/01/11, Award of 12 October 2005), paras 52, 53; *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8, Award of 12 May 2005), para 302; *Siemens AG v Argentina* (ICSID Case No ARB/02/08, Award of 6 February 2007), para 206.

[94] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13, Decision on Jurisdiction of 6 August 2003), para 128; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15, Decision on Jurisdiction of 27 April 2006), para 85; *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic* (ICSID Case No ARB/03/13, Decision on Jurisdiction of 27 July 2006), para 113.

[95] See, eg, Austria–Ethiopia BIT (2004), Art 10; the Austria–Kosovo BIT (2010) and the Austria–Kazakhstan BIT (2010) contain a denial of benefits clause.

B. Chapter Two: Dispute Settlement

1. Part One: Settlement of Disputes between an Investor and a Contracting Party

The second main chapter of the Austrian Model BIT is divided into two parts, the first setting out rules on investor-State dispute settlement, with a heavy focus on the option of investment arbitration, and the second dealing with the, in practical terms, less frequently used option of inter-State dispute settlement.

The investor-State dispute settlement part starts with a provision on the scope of dispute settlement available under the BIT (Article 13). Article 14 is the core provision concerning investor-State dispute settlement in general. It is complemented by a number of provisions specifically dealing with arbitration relevant issues, addressing consent to arbitration (Article 15), the place of arbitration (Article 16), applicable law (Article 18), and the finality and enforceability of arbitral awards (Article 19). Article 17 relates to the subrogation problem under investment insurance and is meant to ensure that payment under such an insurance contract cannot be used to shield from an investment claim.

The investor-State dispute settlement provisions of the Model BIT no longer contain the narrow dispute settlement clauses of some previous BITs concluded with Eastern European States. These clauses typically provided for investor-State arbitration concerning the 'amount and methods of compensation in case of expropriation'.[96] In the first investment award involving an Austrian BIT that has become publicly available, *Austrian Airlines v Slovakia*,[97] such a clause proved fatal to an Austrian investor because an UNCITRAL tribunal held that 'only disputes "concerning the amount or the conditions of payment of a compensation" can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation'.[98] One should note, however, that the proper interpretation of such narrow dispute settlement clauses is currently highly disputed.[99]

[96] See, eg, Austria–Czech and Slovak Federal Republic BIT (1990), Art 8: '1. *Any dispute* arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, *concerning the amount or the conditions of payment of a compensation* pursuant to Art 4 of this Agreement, or the transfer obligations pursuant to Art 5 of this Agreement, shall, as far as possible, be settled amicably by the parties to the disputes' 2. If a dispute pursuant to para 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, as effective at the date of the motion for the institution of the arbitration proceedings' (emphasis added).

[97] *Austrian Airlines AG v Slovak Republic* (UNCITRAL, Final Award of 9 October 2009).

[98] Ibid, para 96.

[99] Compare the outcome in *Vladimir and Moise Berschader v Russian Federation* (SCC Case No 080/2004, Award of 21 April 2006), and *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No Arb V079/2005, Award on Jurisdiction of October 2007), similar to *Austrian Airlines AG v The Slovak Republic* with the expansive interpretation in Renta 4 SVSA et al v Russian Federation (SCC No 24/2007, Award on Preliminary Objections of 20 March 2009), Tza Yap Shum v Republic of Peru (ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence of 19 June 2009), and *European Media Ventures SA v Czech Republic* [2007] EWHC 2851 (Comm) (Judgment of the High Court of England and Wales of 5 December 2007). See also A Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 *Journal of International Dispute Settlement* 115.

Article 13: Scope and Standing

This Part applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment.

Article 13 outlines the scope of investor-State dispute settlement under the 2008 Model BIT. In general, BITs provide for three different categories of disputes. Some refer broadly to the settlement of any 'investment disputes'[100] which would include both 'treaty' and 'contract' claims;[101] others permit claims arising from the specific BIT and other treaties and/or even customary international law;[102] finally, some BITs only permit claims arising from their own provisions.[103] The Austrian Model BIT appears to belong to the last category permitting investment dispute settlement only within the narrow confines of alleged breaches of its own substantive provisions. However, the fact that the Model BIT contains an umbrella clause, even with clarifying language stating that 'the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty',[104] suggests that, to some extent, also contract disputes may be subject to the dispute settlement provisions of Chapter Two. A broad formulation referring to investor-State disputes, without the qualification 'concerning an

[100] See, eg, Netherlands–South Africa BIT (2005), Art 9(1): 'Any legal dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former which has not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes'; Mauritius–Singapore BIT (2000), Art 13(1) provides: 'Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give written notice to the other of its intention'; Hong Kong–United Kingdom BIT (1998), Art 8 provides: 'A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute'; Austria–Ukraine BIT (1996), Art 9(1), referring to any 'dispute between a Contracting Party and an investor of the other Contracting Party in relation to an investment'. This latter provision was the jurisdictional basis for the tribunal's award in *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16, Award of 8 November 2010).

[101] See on this distinction, among others, S Alexandrov, 'Breaches of Contract and Breaches of Treaty' (2004) 5 *Journal of World Investment & Trade* 556; Wong, 'Umbrella Clauses'; P Bernardini, 'Investment Protection under Bilateral Investment Treaties and Investment Contracts' (2001) 2 *Journal of World Investment and Trade* 235; J Gill, 'Contractual Claims and Bilateral Investment Treaties' (2004) 21 *Journal of International Arbitration* 397.

[102] See, eg, Jordan–United States BIT (1997), Art IX provides: 'For purposes of this Treaty, an investment dispute is between a Contracting Party and a national or company of the other Contracting Party arising out of or relating to an investment authorization, and investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment . . .'

[103] See, eg, Japan–Vietnam BIT (2003), Art 14(1): 'For the purposes of this Art, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to investments of investors of that other Contracting Party'; Mexico–United Kingdom BIT (2006), Art 11(1) provides: 'An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II of this Agreement, and that the investor has incurred loss or damages by reason of, or as a consequence of such breach'; Japan–Korea BIT (2002), Art 15(1) provides: 'For the purposes of this Art, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to an investment of an investor of that other Contracting Party'. There are, of course, even narrower dispute settlement clauses. See above text at n 96.

[104] Model BIT, Art 11(1).

alleged breach of an obligation . . . under this Agreement', would have avoided such interpretation problems.

Article 14: Means of Settlement, Time Periods

(1) A dispute between a Contracting Party and an investor of the other Contracting Party shall, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:
- **(a) to the competent courts or administrative tribunals of the Contracting Party, party to the dispute;**
- **(b) in accordance with any applicable previously agreed dispute settlement procedure; or**
- **(c) in accordance with this Article to:**
  - **(i) the International Centre for Settlement of Investment Disputes ('the Centre'), established pursuant to the Convention of the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington on 18 March 1965 ('the ICSID Convention'), if the Contracting Party of the investor and the Contracting Party, party to the dispute, are both parties to the ICSID Convention;**
  - **(ii) the Centre under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, if the Contracting Party of the investor or the Contracting Party, party to the dispute, but not both, is a party to the ICSID Convention;**
  - **(iii) a sole arbitrator or an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL');**
  - **(iv) the International Chamber of Commerce, by a sole arbitrator or an ad hoc tribunal under its rules of arbitration.**

(2) A dispute may be submitted for resolution pursuant to paragraph 1(c) of this Article after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute, but not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.

Article 14 broadly follows a traditional pattern of investor-State dispute settlement provisions. According to the first sentence of paragraph 1, the disputing parties shall resort to negotiations and consultations before turning to third party dispute settlement. Unlike in other BITs, there is no clear waiting period indicating for how long parties have to try to find an 'amicable' solution to their dispute. In practice the short 60-day period after notice of intent to resort to third party dispute settlement in paragraph 2 will provide the only durational obstacle to proceed for investors.

The second sentence of Article 14(1) expressly gives investors the right to choose between different options typical for so-called 'fork-in-the-road' clauses[105]: (a) domestic courts or administrative tribunals, (b) previously agreed dispute settlement procedures, or (c) various forms of international dispute settlement under the ICSID Convention, the ICSID Additional Facility, or arbitration pursuant to the UNCITRAL or ICC Rules. Unlike genuine fork-in-the-road clauses this provision does not contain any language that would indicate that the choice once made is final. Further, the second sentence of Article 15(1) suggests that a dispute may be submitted to international arbitration even if it was first brought to domestic courts as long as no judgment has been rendered.

[105] See Ch Schreuer, 'Travelling the BIT Route'; Dolzer and Schreuer, *Principles of International Investment Law*, 216; A Reinisch, 'Die Beilegung von Investitionsstreitigkeiten', in Ch Tietje, *Internationales Wirtschaftsrecht* (2009), 814.

However, the language of the second sentence of Article 14(1), pursuant to which the investor may 'choose' to submit a dispute to different forms of dispute resolution, may be interpreted as a true fork-in-the-road provision.

The potential negative effect of this provision for investors, precluding them from resorting to international arbitration in case their dispute has already been litigated before domestic courts, is however likely to be reduced by the fact that the scope of dispute settlement under the Austrian Model BIT appears to be limited to so-called BIT or treaty claims under Article 13. Since investment tribunals generally distinguish between treaty claims alleging a violation of an investment agreement and breaches of domestic law litigated before domestic courts or tribunals, they tend to avoid the preclusive effect of genuine fork-in-the-road provisions.[106] Also the fact that domestic proceedings will often concern different parties and different causes of action will reduce the likelihood that investment tribunals will consider claims under the BIT to be identical and thus precluded by domestic law disputes. Under this approach, even prolonged domestic court litigation would not deprive an investor of its right to resort to international arbitration. Tribunals may, however, take a more literal approach to fork-in-the-road clauses.[107] The second sentence of Article 15(1) may support their reasoning.

As opposed to some other dispute settlement provisions offering a choice of options,[108] the Austrian Model BIT does not contain any logical order in which any of the options have to be resorted to. Thus, an investor is free to choose any of the different forms of dispute settlement. The only inherent limitation may stem from the availability of ICSID or ICSID Additional Facility dispute settlement both of which are available only under certain *ratione personae* requirements. Like many other dispute settlement clauses, Article 14(1)(c)(i) and (ii) reproduces them. Austria has been a Member of ICSID since 1971.[109] Thus, both ICSID and ICSID Additional Facility dispute settlement is in principle available under Austrian BITs depending on ICSID membership of the other BIT contracting party. When both parties are ICSID Members, ICSID Additional Facility dispute settlement is not available.

The availability of domestic 'courts or administrative tribunals' for the settlement of 'disputes' under Part One of Chapter Two of the Model BIT may appear problematic given that 'disputes' as defined in Article 13 seem to be limited to treaty claims (claims

[106] Dolzer and Schreuer, *Principles of International Investment Law*, 217.

[107] See, eg, *Pantechniki SA Contractors & Engineers v Republic of Albania* (ICSID Case No ARB/07/21, Award of 30 July 2009), para 62.

[108] See, eg, Canada–Venezuela BIT (1996), Art XII(4): 'The dispute may, by the investor concerned, be submitted to arbitration under: (a) the International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or (b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or (c) in case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).'

[109] The Austrian ratification of the ICSID Convention was deposited with the World Bank on 25 May 1971, the Convention thus entered into force for Austria on 24 June 1971: Austrian *Federal Law Gazette* 1971/357.

'concerning an alleged breach of an obligation . . . under this Agreement'). It requires that such treaty claims can be directly brought before domestic courts or tribunals which would appear to be precluded in countries following a dualist approach to treaty law. Since Austria adheres to a monist tradition permitting the direct application of treaty provisions, at least claims brought by foreign investors before Austrian 'courts or administrative tribunals' may be raised under BITs following this Model Treaty. This suggests that the Model BIT envisages the following system: (i) disputes under domestic law go to domestic courts, which is where they stay, as they are not 'treaty claims' (unless they result in a denial of justice or otherwise amount to a treaty breach); equally, claims arising from contractual relations between an investor and a State will primarily be litigated before domestic courts; (ii) treaty claims can either go to the domestic courts or to international arbitration, at the choice of the investor, assuming that the domestic courts of both Contracting Parties have, like Austria, a monist system; and (iii) even treaty claims which have been submitted to domestic courts can be referred to international arbitration, so long as no final judgment has been rendered by the domestic court in that matter.[110]

Also 'previously agreed dispute settlement procedures'[111] belong to the often available option in BIT dispute settlement clauses. They are an affirmation of the party autonomy prevailing in international dispute settlement, in general, and in arbitration, in particular. They usually refer to dispute settlement clauses in direct investor-State contracts, like concession agreements or other investment contracts. They normally provide for arbitration pursuant to ICSID, UNCITRAL, or any other arbitration rules in case of disputes arising out of the investor-State contracts in which they are included. These are typical 'contract claims' which are, in spite of the apparent limitation to treaty claims in Article 13 of the Model BIT, relevant as a result of its umbrella clause.[112] An umbrella clause as such does not have a direct effect on jurisdiction. Rather, it relates to the substantive protection under an IIA. However, the fact that a BIT clause provides that a contractual breach can amount to a BIT violation[113] may give an umbrella clause jurisdictional implications. Contractual choice-of-forum clauses providing for domestic courts could also be regarded as 'previously agreed dispute settlement procedures'. However, they are normally considered to relate only to contractual disputes, not affecting the jurisdiction of international tribunals for treaty claims under a BIT.

Article 14(1)(c)(i) and (ii) of the Model BIT permits access to both ICSID or ICSID Additional Facility dispute settlement in general. This implies that both arbitration and conciliation is available. Since the choice is clearly given to the investor a State may not pre-empt investment arbitration by first resorting to conciliation.[114]

The availability of UNCITRAL and ICC arbitration is equally broad. In both cases arbitration may take place either 'by a sole arbitrator or an ad hoc tribunal'—the latter

[110] Model BIT, Art 15(1).

[111] Model BIT, Art 14(1)(b).

[112] Model BIT, Art 11(1).

[113] As in Model BIT, Art 11(1) Second Sentence.

[114] Such risk may result from the formulation of other Austrian BITs which leaves the choice of dispute settlement to the parties. See, eg, Austria–Croatia BIT (1997), Art 9(2): 'If a dispute according to paragraph 1 of this Article cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures: (a) [ICSID conciliation or arbitration] (b) [UNCITRAL arbitration].'

presumably constituted by a three-member tribunal as provided in the respective arbitration rules. While the explicit mentioning of the possibility of having a sole arbitrator to decide such disputes (which would have been available under the respective arbitration rules anyhow) may lead to uncertainties as to who would determine this; it seems that the introductory part of the second sentence of Article 14(1) gives the investor the right to choose.

Article 14(2) contains an interesting 'time period' providing that claims must be brought 'not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute' in order to avoid delayed claims. Such provisions are rare in IIAs.[115]

Article 15: Contracting Party Consent

(1) **Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part. However, a dispute may not be submitted to international arbitration if a court in the first instance in either Contracting Party has rendered its final decision on the merits.**
(2) **The consent referred to in paragraph (1) implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted.**

This provision clarifies that the consent to BIT arbitration on the part of the host State is already found in the BIT itself. Since the 1980s, investment tribunals have held that the required consent to arbitration may be expressed in different instruments/stages (advanced consent on the part of the host State in an investment treaty or in investment legislation and consent on the part of investors often only expressed by instituting arbitration proceedings).[116] Although the 'advance' consent by host States may be expressed in general jurisdictional clauses in investment treaties, it is often expressly mentioned in separate treaty provisions. Article 15(1) of the Austrian Model BIT follows this pattern.

The second sentence of Article 15(1) adds a rather unusual provision that resembles a remnant of a 'fork-in-the-road' clause. Since it does not really relate to consent it rather belongs to the provisions on dispute settlement of Article 14. It precludes access to international arbitration in case a first instance court has rendered a final decision on the merits. It is not quite clear what is meant by a 'final' decision of a court of first instance since such decisions are regularly subject to appeal. Most likely it was intended to signify a decision on the merits, as opposed to mere procedural/interlocutory decisions.

Article 15(2) clarifies an issue that is expressly addressed in the ICSID Convention, rarely however, in investment treaties, namely whether access to investment arbitration implies that the customary international law requirement of exhaustion of local remedies is inapplicable. Article 26 of the ICSID Convention[117] is based on the assumption that,

[115] See, however, NAFTA, Art 1116(2), providing for a three-year period.

[116] See with regard to BITs: *AAPL v Sri Lanka* (ICSID Case No ARB/87/3, Award of 27 June 1990); *Fedax v Venezuela* (ICSID Case No ARB/96/3, Decision on Jurisdiction of 11 July 1997); with regard to national legislation: *SPP v Egypt* (ICSID Case No ARB/84/3, Decision on Jurisdiction I of 27 November 1985, and Decision on Jurisdiction II of 14 April 1988); *Tradex v Albania* (ICSID Case No ARB/94/2, Decision on Jurisdiction of 24 December 1996).

[117] The second sentence of the ICSID Convention, Art 26, provides: 'A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'

unless specifically requested, access to ICSID arbitration does not require the exhaustion of local remedies. Whether this also applies to arbitration outside the ICSID Convention is less clear though; some UNICTRAL tribunals have equally held that access to international arbitration does not require the previous exhaustion of local remedies.[118] Paragraph 2 of Article 15 of the Austrian Model BIT is certainly a helpful clarification in this regard.

Article 16: Place of Arbitration

Any arbitration under this Part shall, at the request of any party to the dispute, be held in a state that is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958. Claims submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.

Article 16 on the place of (investor-State) arbitration is particularly important for the possible enforcement of an award rendered pursuant to the ICSID Additional Facility, UNCITRAL, or ICC arbitration rules. While ICSID awards are subject to the ICSID Convention's own rules on recognition and enforcement,[119] other investment awards need to be recognized and enforced either on the basis of autonomous national rules or pursuant to treaty obligations, in most cases, this means according to the 1958 New York Convention.[120]

The second sentence of Article 16 clarifies that investment awards are to be considered to arise out of a 'commercial' transaction. This is important since the New York Convention permits States to make a reservation to the effect that they apply the Convention 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration'.[121] Because investment arbitration often involves sovereign interests and frequently implies judicial review of State acts its 'commercial' nature is questionable.[122] Following the examples of other investment treaties,[123] the Austrian Model BIT clarifies that investment claims shall be deemed to be 'commercial' ones in order to ensure that the New York Convention's rules on recognition and enforcement apply to awards rendered under this BIT.

[118] See, eg, *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003), para 412; *Mytilineos Holdings SA v 1 The State Union of Serbia & Montenegro, 2 Republic of Serbia* (UNCITRAL, Partial Award on Jurisdiction of 8 September 2006), paras 188–216.

[119] ICSID Convention, Arts 53–5. See, in detail, Schreuer, Malintoppi, Reinisch, and Sinclair, *The ICSID Convention*, 1096–185.

[120] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('New York Convention'); see also A Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards', in Binder, Kriebaum, Reinisch, and Wittich, *International Investment Law*, 302; A Reinisch, 'Enforcement of Investment Awards', in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010) 671.

[121] New York Convention, Art I(3).

[122] Ph Kahn and T W Wälde, *New Aspects of International Investment Law* (2007); G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

[123] Eg, NAFTA, Art 1136(7); Energy Charter Treaty ('ECT'), *International Legal Materials* 34 (1995) 381, Art 26(5)(b).

Article 17: Indemnification

A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

Article 17 is another provision aiming at securing that investor-State arbitration may take place although an investor has been indemnified by either his or her home State directly or any other form of public or private insurer or the like. Though such indemnification leads to the subrogation of rights to the indemnifying entity,[124] the indemnified investor retains the right to pursue investment arbitration. Such a provision is particularly important where the applicable arbitration rules do not permit States to pursue investment claims. Most importantly, the *ratione personae* jurisdiction of the ICSID Convention is limited to disputes between a Contracting State and a national of another Contracting State[125] which implies that a State as insurer may not continue to pursue a claim that has been transferred to it as a consequence of subrogation. Provisions like Article 17 intend to preserve the investor's right to pursue the option of investment arbitration.

Article 18: Applicable Law

(1) **A tribunal established under this Part shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.**
(2) **Issues in dispute under Article 11 shall be decided, absent other agreement, in accordance with the law of the Contracting Party, party to the dispute, the law governing the authorisation or agreement and such rules of international law as may be applicable.**

The applicable law provision of Article 18 has to be read in conjunction with Article 13 which delimits the scope of dispute settlement to so-called treaty claims, referred to as disputes 'concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment'. Because investment claims under the Austrian Model BIT are limited to treaty claims it is also logical that the applicable law is primarily the Model BIT itself. The additional reference to 'applicable rules and principles of international law' is a sensible broadening which is also mandated by rules of treaty interpretation and can be found in many IIAs.[126] It is clearly much narrower than applicable law clauses in other IIAs which permit investment tribunals to decide disputes also on the basis of customary international law, domestic law of the host States, or direct investor-State contracts.[127]

Article 18(2) contains an exception to the limited applicable law pursuant to the first paragraph which is required by Article 11 of the Model BIT. It clarifies that in case treaty

[124] See Model BIT (2008), Art 10.

[125] ICSID Convention, Art 25.

[126] See, eg, NAFTA, Art 1130: 'A Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'; ECT, Art 26(6), provides: 'A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'

[127] See, eg, Argentina–Netherlands BIT (1992), Art 10(7): 'The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.'

arbitration concerns claims based on domestic law either as a result of the umbrella clause in Article 11(1) or the most favourable law provision in Article 11(2) also domestic law and contractual agreements may become the applicable law.

Article 19: Awards and Enforcement

(1) Arbitration awards, which may include an award of interest, shall be final and binding upon the parties to the dispute and may provide the following forms of relief:
- **(a) a declaration that the Contracting Party has failed to comply with its obligations under this Agreement;**
- **(b) pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment;**
- **(c) restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and**
- **(d) with the agreement of the parties to the dispute, any other form of relief.**

(2) Each Contracting Party shall make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is party.

Article 19(1) enshrines the finality and binding nature of arbitral awards rendered in any of the forms of arbitral settlement pursuant to Article 14(c)(i)–(iv). This, as well as the requirement of 'effective enforcement of awards', was also contained in most previous Austrian BITs.

A rather novel feature is the detailed enumeration of different forms of relief in Article 19(1)(a)–(d), though some Austrian BITs in the early 2000s already contained it.[128] It specifies that in addition to the pecuniary compensation, which is the most commonly ordered remedy in investment treaty arbitration, other forms of relief are also possible. Most important among the non-pecuniary remedies is certainly the possibility to order restitution. In cases of unlawful expropriation restitution may be the primary remedy according to principles of State responsibility[129] though it has been rarely ordered by investment tribunals.[130] The fact that the first sentence of Article 54(1) of the ICSID Convention only refers to the 'pecuniary obligations' of ICSID awards[131] does not imply that ICSID tribunals may not order other forms of relief like those mentioned in this paragraph of Article 19 since the limitation only relates to the enforcement obligation of ICSID Contracting States.[132]

[128] See, eg, Austria–Ethiopia BIT (2004), Art 16(1)(a)–(d).

[129] Pursuant to ILC, Art 35, Articles on State Responsibility, Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its Fifty-third Session (2001), reproduced in *Report of the International Law Commission on the Work of its Fifty-third Session*, UN Doc A/56/10: '[a] State responsible for an internationally wrongful act is under an obligation to make restitution . . .' The primacy of restitution is conformed by ILC, Art 36(1), Articles on State Responsibility ('The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.')

[130] See, however, the ad hoc award in one of the Libyan oil concession cases, *Texaco Overseas Petroleum Company (Topco)/California Asiatic (Calasiatic) Oil Company v Libya* (Award of 19 January 1977), which ordered restitution of the concession.

[131] The first sentence in ICSID Convention, Art 54(1) provides: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.'

[132] Schreuer, Malintoppi, Reinisch, and Sinclair, *The ICSID Convention,* 1136–9.

2. Part Two: Settlement of Disputes between the Contracting Parties

Article 20: Scope, Consultations, Mediation and Conciliation

Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably or through consultations, mediation or conciliation.

Like most BITs the Austrian Model BIT also provides for inter-State dispute settlement. As opposed to the scope of investor-State dispute settlement under Part One of Chapter Two, the scope of possible disputes relates broadly to the 'interpretation or application' of the BIT. This includes breaches of investment standards that may give rise to investor-State dispute settlement. Article 21(2) aims at avoiding parallel investor-State and State-State proceedings.

Article 20 expresses a preference for amicable, non-adversarial forms of dispute settlement.

Article 21: Initiation of Proceedings

(1) At the request of either Contracting Party a dispute concerning the interpretation or application of this Agreement may be submitted to an arbitral tribunal for decision not earlier than 60 days after such request has been notified to the other Contracting Party.

(2) A Contracting Party may not initiate proceedings under this Part for a dispute regarding the infringement of rights of an investor which that investor has submitted to arbitration under Part One of Chapter Two of this Agreement, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without resolution by an arbitral tribunal of the investor's claim.

Article 21(1) reinforces the preference for amicable forms of dispute settlement by providing for a 60 day waiting period after a request for arbitration. Such a cooling-off period may be used for negotiated settlements.

Article 21(2) is similar to Article 27(1) of the ICSID Convention which enjoins Contracting States to exercise diplomatic protection while ICSID proceedings are under way.[133] In the Model BIT context, it prevents Contracting Parties from exercising diplomatic protection on behalf of their investors by instituting inter-State arbitration.

Article 22: Formation of the Tribunal

(1) The arbitral tribunal shall be constituted ad hoc as follows:
Each Contracting Party shall appoint one member and these two members shall agree upon a national of a third state as their chairman. Such members shall be appointed within two (2) months from the date one Contracting Party has informed the other Contracting Party of its intention to submit the dispute to an arbitral tribunal, the chairman of which shall be appointed within two (2) further months.

(2) If the periods specified in paragraph (1) of this Article are not observed, either Contracting Party may, in the absence of any relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either of the Contracting Parties or if he/

[133] ICSID Convention, Art 27(1), provides: '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.'

she is otherwise prevented from discharging the said function, the Vice-President or in case of his/her inability the member of the International Court of Justice next in seniority should be invited under the same conditions to make the necessary appointments.

(3) Members of an arbitral tribunal shall be independent and impartial.

Unlike in the case of investor-State arbitration pursuant to Chapter Two of Part One, inter-State arbitration is genuine ad hoc arbitration. This requires rather detailed rules on the constitution of an arbitral tribunal in order to prevent a situation where a party could obstruct the establishment of a tribunal. The fallback solution to have the President of the ICJ as appointing authority is often used in BIT provisions on inter-State dispute settlement.[134]

Article 23: Applicable Law, Default Rules

(1) The arbitral tribunal will decide disputes in accordance with this Agreement and the applicable rules and principles of international law.

(2) Unless the parties to the dispute decide otherwise, the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes shall apply to matters not governed by other provisions of this Part.

Since the scope of inter-State arbitration concerns the interpretation and application of the Model BIT it is clear that the applicable law is primarily the BIT itself supplemented by applicable rules and principles of international law.

With regard to procedural law the lack of any established set of arbitration rules, as in the case of investor-State arbitration pursuant to Article 14(1)(c)(i)–(iv), warrants the choice of default rules. The reference contained in Article 23(2) does not appear to be complete since the Permanent Court of Arbitration offers two different sets of 'Optional Rules for Arbitrating Disputes', one 'between Two States'[135] and another one 'between Two Parties of Which Only One Is a State'.[136] Obviously the former must have been intended in this context. These rules are based on the UNCITRAL Arbitration Rules.

Article 24: Awards

(1) The tribunal, in its award, shall set out its findings of law and fact, together with the reasons therefore, and may, at the request of a Contracting Party, award the following forms of relief:

(a) a declaration that an action of a Contracting Party is in contravention of its obligations under this Agreement;

(b) a recommendation that a Contracting Party brings its actions into conformity with its obligations under this Agreement;

(c) pecuniary compensation for any loss or damage to the requesting Contracting Party's investor or its investment; or

[134] See eg, Australia–India BIT (1999), Art 13(4): 'If within the periods specified in paragraph 3 of this Art the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments . . .'; United Kingdom–Morocco BIT (1990), Art 11(4), provides: 'If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments . . .'

[135] Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, 1992; available at <www.pca-cpa.org/showfile.asp?fil_id=195> (last accessed 9 September 2012).

[136] Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, 1993; available at <www.pca-cpa.org/showfile.asp?fil_id=194> (last accessed 9 September 2012).

(d) any other form of relief to which the Contracting Party against whom the award is made consents, including restitution in kind to an investor.

(2) The arbitration award shall be final and binding upon the parties to the dispute.

Article 24 modifies the different forms of investor-State arbitration relief contained in Article 19(1)(a)–(d). Instead of 'any other form of relief' as agreed by the parties,[137] it adds the possibility that an arbitral tribunal recommends action that would bring a State's behaviour 'into conformity with its obligations under this Agreement'. This latter form of relief enshrined in Article 24(1)(b) appears to have been inspired by WTO dispute settlement where 'recommendations' to act in conformity with WTO law are the usual remedy.

Article 25: Costs

Each Contracting Party shall pay the costs of its representation in the proceedings. The costs of the tribunal shall be paid for equally by the Contracting Parties unless the tribunal directs that they be shared differently.

Article 25 follows the practice in international arbitration according to which the parties bear their own costs of representation and equally share the costs of the tribunal unless the tribunal decides otherwise.

Article 26: Enforcement

Pecuniary awards which have not been complied with within one year from the date of the award may be enforced in the courts of either Contracting Party with jurisdiction over assets of the defaulting Party.

Article 26 supplements Article 24(2) according to which arbitral awards are 'final and binding' upon the parties to the dispute, by providing for an enforcement mechanism in case of non-compliance. It provides that after a period of one year the pecuniary obligations of awards which have not been complied with 'may be enforced' in the national courts of both BIT countries. The reference to courts 'with jurisdiction over assets of the defaulting Party' suggests that the rules on State immunity from enforcement measures have not been dispensed with. Under customary international law, as well as under the rules of the 2004 UN State Immunity Convention,[138] a number of assets serving sovereign purposes are regarded to enjoy immunity and thus to be beyond the jurisdiction of State courts.[139]

C. Chapter Three: Final Provisions

Article 27: Scope and Application of the Agreement

(1) This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its legislation by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement.

[137] Model BIT (2008), Art 19(1)(d).

[138] United Nations Convention on Jurisdictional Immunities of States and Their Property, UN GAOR, 59th Session, Supp No 22 (A/59/22), 16 December 2004, Annex I.

[139] See, in particular, the assets listed in United Nations Convention, Art 21. See also A Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 *European Journal of International Law* 803.

(2) **This Agreement shall not apply to claims which have been settled or procedures in accordance with Article 14 (1) (c) which have been initiated prior to its entry into force.**

Article 27 sets out the territorial and temporal scope of application of the Model BIT. The provision that it shall apply to 'investments made in the territory of either Contracting Party' must be read in conjunction with the broad definition of 'territory' in Article 1(6) of the Model BIT comprising 'land territory, internal waters, maritime and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where the Contracting Party exercises jurisdiction, in conformity with international law'. It also employs a wide temporal scope of application ensuring that the BIT applies to investments made not only after the entry into force of the BIT, but also prior to it. The only two exceptions to this temporal scope of application relate to claims that have already been settled prior to the entry into force of the BIT as well as to procedures which have already been initiated before that date. The qualification of procedures 'in accordance with Article 14(1)(c)' is infelicitous because such procedures will be excluded as a result of the non-application of the Model BIT. What was probably meant were procedures corresponding to or similar to those mentioned in Article 14(1)(c). The omission of this qualification in earlier Austrian BITs[140] appears preferable in any event.

Article 27(1) also limits the scope of application and thus the protection offered under the Model BIT. It contains a so-called 'in accordance with host State law' clause.[141] While such clauses are not infrequent in BITs, they have been relied upon in investment arbitration only recently. A number of tribunals have declined to exercise jurisdiction because they considered that the investments were not made in accordance with host State law.[142] Since it is not quite clear whether any incompatibility with the law of a host State will suffice or whether it requires a serious violation of such law,[143] such clauses create considerable uncertainty.

The 'in accordance with host State law' clause of Article 27(1) of the Model BIT must be distinguished from reference to host State law in Article 2(1) where it qualifies and thus limits 'promotion and admission' obligation of investments.[144]

Article 28: Consultations

Each Contracting Party may propose to the other Contracting Party consultations on any matter relating to this Agreement. These consultations shall be held at a place and at a time agreed upon through diplomatic channels.

The general possibility to hold consultations 'on any matter' reinforces the possibility of amicable dispute settlement emphasized in Article 20 of the Model BIT.

[140] See, eg, Austria–Ethiopia BIT (2004), Art 23(2): 'This Agreement shall not apply to claims which have been settled or procedures which have been initiated prior to its entry into force.'

[141] See Ch Knahr, 'Investments "in accordance with host state law"', in A Reinisch and Ch Knahr (eds), *International Investment Law in Context* (2008) 27.

[142] *Inceysa Vallisoletana SL v Republic of El Salvador* (ICSID Case No ARB/03/26, Award of 2 August 2006), para 190; *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (ICSID Case No ARB/03/25, Award of 16 August 2007); *World Duty Free Company Limited v The Republic of Kenya* (ICSID Case No ARB/00/7, Award of 4 October 2006), para 157.

[143] See, eg, *Desert Line Projects LLC v Yemen* (ICSID Case No ARB/05/17, Award of 6 February 2008), para 106.

[144] Model BIT (2008), Art 2(1).

Article 29: Entry into Force and Duration

(1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.

(2) This Agreement shall remain in force for a period of ten years; it shall be extended thereafter for an indefinite period and may be denounced in writing through diplomatic channels by either Contracting Party giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of the present Agreement the provisions of Articles 1 to 27 of the present Agreement shall continue to be effective for a further period of ten years from the date of termination of the present Agreement.

DONE in duplicate at . . . , on . . . in the German, and English languages, all texts being equally authentic. In case of difference of interpretation the English text shall prevail.

The BIT's entry into force provision of Article 29(1) prescribes ratification by the Parties and provides for the entry into force of the BIT three months after exchange of ratification instruments.

The Model BIT contains a standard duration period of ten years. Though the language concerning the extension of the BIT is not wholly unambiguous, it appears that it is automatically extended. Having then become a treaty valid for an indefinite period, it may be denounced any time by giving 12 months' notice.

Article 29(3) contains a typical BIT clause providing for the continued effectiveness of the agreement after termination for a ten-year period.

Finally the Model BIT provides that German, the language of the other BIT Party as well as English shall be equally authentic. Only in case of interpretation differences the English text shall prevail.

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