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The Ins and "Outs" of Domestic Forum Selection Clauses in ICSID Arbitral Disputes

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The Ins and "Outs" of Domestic Forum Selection Clauses in ICSID Arbitral Disputes

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Abstract: Bilateral investment treaties, known as BITs, are treaties between two nations that include a set of protections to encourage investment between the two signatories. Among these protections, BITs often include an arbitration provision to allow states to seek a remedy in front of the International Centre for Settlement of Investment Disputes [ICSID] or another international arbitral tribunal. However, parties may waive the right to arbitrate certain claims, effectively superseding the international treaty, if a State and foreign investor sign a private contract containing a forum selection clause. Often, these clauses call for initial or exclusive resolution of claims in the State's domestic courts. ICSID tribunals have held that such clauses may eliminate the tribunal's ability to hear part or all of an international investment dispute, undermining the purpose and effectiveness of BITs. Further, because foreign investors often face prejudice and other disadvantages in State domestic courts, these investors may effectively be denied any legal remedy. This article seeks to explore the inherent contradiction in allowing parties to supersede an international treaty via private contract, the strategies an investor may use to evade an unfavorable forum selection clause once signed, as well as the ways in which arbitrators can respond to this contradiction to ensure a legal remedy for foreign investors.

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I. Introduction

Bilateral investment treaties are agreements between two nations, usually a developed nation and a developing nation, which include a set of rules and protections designed to encourage investors in the developed nation to invest in the economy and infrastructure of the developing nation.[1] One such protection typically included in these treaties is an arbitration provision that allows the investor to seek a remedy in front of an international arbitral tribunal.[2] A remedy from an international arbitral institution is preferable to ordinary domestic adjudication because generally, an arbitral hearing will take place in a disinterested, third-party State in front of an international panel of impartial arbitrators.[3] The

1 *See* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105, 105–06 (1986).

2 *Id.* at 109–10; ORG. FOR ECON. CO-OPERATION & DEV. [OECD], INV. DIV, DIRECTORATE FOR FIN. & ENTERPRISE AFF'S, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 9 (2012), http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf [https://perma.cc/32V2-2PT8] [hereinafter OECD SURVEY] ("Over time, [Investor-State Dispute Settlement] through international arbitration has become a common feature of investment treaties – only 108 treaties, or 6.5% of the sample, do not provide for international arbitration.").

3 *See Number of Arbitrators and Method of Their Appointment – ICSID Convention Arbitration*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS. ("ICSID"), https://icsid.worldbank.org/en/Pages/process/Number-of-Arbitrators-and-Method-of-Appointment-Convention-Arbitration.aspx [https://perma.cc/P6BF-P2DN] (last visited

arbitral rules in such proceedings are accessible, often in different languages,[4] and the final award is enforceable and binding against states that have joined the New York Convention.[5]

The right to seek arbitration, however, may be signed away by parties in a private contract. This occurs when the private contract between the State or State entity and the foreign investor contains a forum selection clause, usually for the domestic courts of the developing nation.[6] This is problematic for the investor, who may find itself seriously disadvantaged in those foreign courts because of a language barrier, lack of local counsel, simple prejudice, or any combination of those factors.

All three factors seem to be present in the case of *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*,[7] an ongoing dispute before the International Centre for Settlement of Investment Disputes ("ICSID"). In 2008, Unionmatex won a public tender for contracts for construction of grain mills and bakeries in Turkmenistan totaling € 144 million.[8] However, after a series of alleged breaches on the part of the Turkmen government, negotiations broke down and construction stopped.[9]

Nov. 24, 2019) [hereinafter *Number of Arbitrators*].

4 *See, e.g.*, *ICSID Convention in Other Languages*, ICSID, https://icsid.worldbank.org/en/Pages/resources/ICSID-Convention-in-other-Languages.aspx [https://perma.cc/Q2K3-ZY55] (last visited Nov. 24, 2019) (providing copies of the ICSID Convention in twenty different languages).

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 3 (entered into force June 7, 1959) [hereinafter New York Convention]; *see also* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 88 (2005).

6 *See, e.g.,* Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35 [hereinafter *Unionmatex*] (showing how a German company may have signed away its right to bring certain claims under the arbitration and umbrella clauses of the Germany-Turkmenistan BIT by signing a private contract containing a forum selection clause for the domestic courts of Turkmenistan).

7 *Id.*

8 Jack Ballantyne, *Turkmenistan Faces Two New ICSID Claims*, GLOB. ARB. REV. (Oct. 17, 2018), https://globalarbitrationreview.com/article/1175731/turkmenistan-faces-two-new-icsid-claims [https://perma.cc/9KSS-FJFN].

9 *See id.* (alleging that Turkmenistan's breaches included failure to provide visa and customs clearances, make agreed advance payments, provide access to gas, water, and electricity at worksites, and provide acceptable groundwater levels at the work sites).

In accordance with the forum selection clause contained in the construction contracts, Unionmatex sought a remedy in the Turkmen domestic courts, but received only "farcical court proceedings"[10] rank with alleged due process violations that, not surprisingly, resulted in a decision in favor of the Turkmen government.[11] Unionmatex filed a request for ICSID arbitration hearings in late 2018, but Turkmenistan has objected to the arbitral tribunal's jurisdiction over the dispute.[12] To add insult to injury, Unionmatex, a German company with a successful history of 96 years in business,[13] filed for bankruptcy in 2014 as a result of its dealings with Turkmenistan.[14]

If the tribunal finds that it cannot hear Unionmatex's case because of a forum selection clause that grants exclusive jurisdiction to the Turkmen courts, then the German company will have no remedy. Even more concerning, should ICSID find no jurisdiction, is the reality that parties may supersede an international treaty via a private contract, eliminating both parties' right to seek a remedy for certain causes of action from an international arbitral tribunal. This paper seeks to explore this contradiction, enumerate the issues inherent in hearing cases in the domestic courts of developing nations, and consider the options that investors[15] and

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10 Alison Ross, *ICSID Claim in the Oven Against Turkmenistan*, GLOB. ARB. REV. (Dec. 20, 2016), https://globalarbitrationreview.com/article/1079152/icsid-claim-in-the-oven-against-turkmenistan [https://perma.cc/DHB4-PPT7].

11 *See* Ballantyne, *supra* note 8 (stating that the foreign investor was prevented from bringing a translator, that its local representative resigned from the case facing extreme pressure from the Turkmen government, and that its further filings either failed or were ignored).

12 *Case Details, Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan (ICSID Case No. ARB/18/35)*, ICSID, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/35 (click "Procedural Details" tab) [https://perma.cc/M7YT-SZ83] (last visited Nov. 24, 2020) (reporting that the Respondent filed a request to address the objections to jurisdiction as a preliminary question on Sept. 13, 2019 and again on Sept. 28, 2020).

13 Ross, *supra* note 10.

14 *See* Luke Eric Peterson & Zoe Williams, *Turkmenistan Update: Award Rendered in Garanti Koza's BIT Arbitration; German Investor Files a Notice of Dispute*, INV. ARB. REP. (Dec. 21, 2016), https://www.iareporter.com/articles/turkmenistan-update-award-rendered-in-garanti-kozas-bit-arbitration-german-investor-files-a-notice-of-dispute/ [https://perma.cc/LY7D-CZ87].

15 Note that the term "investor" as it applies to investment disputes does not exclusively refer to a single individual investor, nor does "investment" exclusively refer to cash contributions. More commonly, "investor" refers to a corporation or group of

arbitrators can pursue to prevent foreign parties from becoming trapped by problematic forum selection clauses.

The most obvious solution is, of course, to not sign a contract that contains an unfavorable forum selection clause. However, for parties that do not appreciate the significance of such clauses, feel they lack bargaining power to negotiate the contract, or overestimate the reliability of the courts in the foreign jurisdiction they submit themselves to, there may still be ways to get a dispute in front of an arbitral tribunal.

Depending on the specific language of the clause, a tribunal may interpret a weakly-worded forum selection clause as being limited in either scope or jurisdiction, thus exempting some or all causes of action from the agreement.[16] The doctrine *forum non conveniens* may be used to argue that a case should move to a more convenient forum than the one identified by the forum selection clause.[17] Finally, arbitrators can address the problem by treating the right to seek dispute resolution in front of an arbitral tribunal as non-waivable, or by introducing a standard by which to measure the equitability of a forum selection clause. Each of these solutions comes with its respective strengths and weaknesses, as explored below.

Part II provides background information on bilateral investment treaties, their history, and purposes. Part III describes international arbitration as a legal mechanism and provides more specific information on ICSID and the requirements for ICSID jurisdiction. Part IV examines the disadvantages that a foreign investor might encounter if forced to adjudicate an investment claim in the domestic courts of a foreign State. Part V explores the various solutions that both lawyers defending investors and arbitrators faced

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shareholders. In the case of *Unionmatex*, the "investor" was a construction company and the "investment" was building mills and grain factories in Turkmenistan for the benefit of the Turkmen population. *See* Melissa María Valdez García, *The Path Towards Defining "Investment" in ICSID Investor-State Arbitrations: The Open-Ended Approach*, 18 PEPP. DISP. RESOL. L.J. 27, 30 (2018) (noting that many BITs and trade agreements with investment chapters have broad, nonexclusive definitions for investment terms).

16 *See generally* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791 (2019) (elaborating on how U.S. courts interpret specific terms and phrases contained in choice-of-forum clauses in determining the scope and exclusivity of such clauses).

17 *See* Sinochem International Co. Ltd. v. Malaysia International Shipping Corp., 549 U.S. 422, 428 (2007).

with an investment claim can use to prevent the miscarriage of justice in ICSID cases. Finally, Part VI concludes this piece.

II. Bilateral Investment Treaties

A bilateral investment treaty ("BIT") is a treaty involving two States, often a capital-exporting (developed) and capital-importing (developing) state.[18] BITs tend to be reciprocal, meaning that the rights and responsibilities of the treaty apply equally to investors of both States.[19] These treaties deal almost exclusively with investment-related issues, extending a common core of substantive promises to investors, with the term "investment" typically defined broadly.[20] Since the creation of the first BIT in 1959,[21] the instrument has grown in popularity with over 2,500 broadly similar agreements currently in existence.[22] The United States is no exception; since the 1980s, the country has signed over 40 BITs, primarily with developing nations.[23] Until recently, the North American Free Trade Agreement, better known as NAFTA,[24] also

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18 Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 402 (2011).

19 *Id.*

20 *Id.*

21 *See id.* at 401 (citing the 1959 treaty between Germany and Pakistan as the first BIT). *But see* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 327 (explaining that BITs were preceded by Friendship, Commerce and Navigation treaties, which worked similarly to protect the interests of U.S. nationals doing business overseas).

22 Yackee, *supra* note 18, at 401.

23 The United States has signed BITs with Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bolivia, Bulgaria, Cameroon, the Democratic Republic of the Congo (Zaire), Croatia, the Czech Republic, Ecuador, Egypt, El Salvador, Estonia, Georgia, Grenada, Haiti, Honduras, Jamaica, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Mozambique, Nicaragua, Panama, Poland, the Republic of the Congo, Romania, Russia, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, Ukraine, Uruguay, and Uzbekistan. *United States Bilateral Investment Treaties*, U.S. DEP'T OF ST. (Apr. 29, 2019), https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/ [https://perma.cc/AKC5-2SHU].

24 The US-Mexico-Canada Agreement (USMCA), also known as the "New NAFTA," entered into force on July 1, 2020. Under the USMCA's Investment Chapter, investors from Canada or the United States will no longer have access to investor State dispute settlement mechanisms against those countries. Catherine Amirfar et al., *From NAFTA to USMCA: Main Changes to the Investor-State Dispute Settlement System*, DEBEVOISE & PLIMPTON (May 7, 2020), https://www.debevoise.com/insights/publications/2020/05/from-nafta-to-usmca-main-changes-to-the-investor [https://perma.cc/DC29-

acted as a trilateral investment treaty between the United States, Canada, and Mexico.[25]

Three primary goals motivate nations to enter into BITs: foreign investment protection, market liberalization, and foreign market promotion.[26] The first two goals work largely in the interest of the investors of the developed nation, while the third goal primarily benefits the investee developing nation.[27] The "grand bargain" of BITs is that, if a developing nation enters into a BIT creating protections and a hospitable environment for foreign investors, the developing nation will benefit by receiving an increase of foreign capital invested in the State.[28] The foreign investor then benefits by having access to previously inaccessible[29] or high risk markets that it could not or did not feel comfortable investing in prior to the creation of the BIT.[30] When the protections of BITs are either not enforced or simply "contracted around" by agreements between private parties, the concern is that the grand bargain comes undone; foreign investors no longer feel comfortable investing in the developing nation and the developing nation no longer enjoys the benefits of capital coming from foreign investors.

III. International Arbitration

The word arbitration may send up red flags to readers who immediately think of big corporations sneaking arbitration clauses into fine print, forcing helpless customers to resolve disputes through the corporation's specially created arbitration system. International arbitral tribunals, however, operate quite differently and may in fact provide a more equitable alternative to adjudication of international investment disputes in State courts.

Established in 1966 by the ICSID Convention,[31] ICSID is an

SC4Y].

25 Salacuse & Sullivan, *supra* note 5, at 74.

26 *Id.* at 68.

27 *See id.* at 75–77.

28 *See id.* at 77.

29 *Id.* at 76 (arguing that BITs facilitate the entry and operation of investments by inducing host countries to remove various impediments in their regulatory systems).

30 *See id.* at 77.

31 Formally known as the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

independent dispute-settlement institution specifically devoted to international investor-state dispute settlement ("ISDS").[32] A dispute is typically heard by a panel of three arbitrators: one arbitrator chosen by each of the parties and a third arbitrator to serve as President of the Tribunal, either (1) agreed upon by both parties, or (2) appointed by the Secretary-General of ICSID.[33] The tribunal operates very much like a court, hearing evidence and legal arguments from both parties before reaching its binding, enforceable decision.[34] While ICSID exclusively hears investment disputes, parties entering into international contracts may (and often do) include an arbitration clause for one of the dozens of arbitral institutions that operate around the globe which are competent to hear all claims arising out of international disputes.[35]

Resolving an international investment dispute in arbitration provides many advantages over having a dispute heard in domestic courts. The first and most obvious is that arbitration presents an opportunity for parties to have a dispute settled in a neutral forum.[36] Parties in arbitration are encouraged to choose a third-party forum (*i.e.*, not the home State of either party) and most institutions require their arbitrators to sign a declaration of independence and impartiality.[37] Arbitrations tend to be resolved more quickly than disputes in court—the average length of arbitral proceedings is twenty-four months[38] and there is no system for appeal.[39]

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32 *About ICSID*, ICSID, https://icsid.worldbank.org/en/Pages/about/default.aspx [https://perma.cc/E9LC-2GZS] (last visited Nov. 24, 2019).

33 *See Number of Arbitrators*, *supra* note 3.

34 *See About ICSID*, *supra* note 32.

35 *Juris International - Dispute Resolution Centres*, INT'L TRADE CTR., http://www.intracen.org/itc/trade-support/arbitration-and-mediation/ [https://perma.cc/XG9M-M7QY] (last visited Nov. 24, 2019) (listing 175 institutions around the globe that offer commercial arbitration, mediation, conciliation, and other alternative dispute resolution services).

36 Guy Robin, *The Advantages and Disadvantages of International Commercial Arbitration*, 2014 INT'L BUS. L.J. 131, 138 (2014).

37 *Id.*

38 *Id.* at 137.

39 ICSID has no formal system of appeal. However, if a party believes that the tribunal has erred, it may request a supplementary decision, rectification, revision, or annulment. *See Post-Award Remedies - ICSID Convention Arbitration*, ICSID, https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies-Convention-Arbitration.aspx [https://perma.cc/FQS9-VNC7] (last visited Nov. 24, 2019). For comparison, civil cases in the U.S. district court have a median length of 27 months from

Further, the process itself is tailored to meet businesses' needs.[40] For example, for businesses who want to keep scientific know-how or a strategic interest out of the public eye, arbitration is a private, confidential method to resolve business disputes.[41] The lack of interference by the press and the public allows the parties to focus on the merits of the dispute and thus preserve future business relations.[42] Finally, arbitral awards are much more easily enforceable than judgments from domestic courts, as the New York Convention provides that an arbitral award may be recognized and enforced in the domestic courts of any of the 166 signatories to the Convention.[43] ICSID arbitral awards are particularly attractive to investors because, since ICSID is affiliated with the World Bank Group, a host State is more likely to comply with an ICSID award as failure to comply may jeopardize the State's access to World Bank funding or international credit generally.[44] That is not to say that arbitration is a faultless alternative to international litigation, but that it provides a method to avoid many of the problems presented by adjudication of such cases in domestic courts, as

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filing to the start of a trial, with roughly 10% of cases pending for more than three years. *See* CONG. RES. SERVS., LAWSUITS AGAINST THE FEDERAL GOVERNMENT: BASIC FEDERAL COURT PROCEDURE AND TIMELINES 1 (2020), https://fas.org/sgp/crs/misc/IF11349.pdf [https://perma.cc/8A76-BLCC]. An appeal to a federal circuit court on average takes another ten months. *See* U.S. COURTS, U.S. COURT OF APPEALS SUMMARY – 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020 2 (2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0930.2020.pdf [https://perma.cc/EY9C-Z5ZK]. Thus, on average, assuming two parties commence an action on the same date, the party who submits a dispute to international arbitration will have its dispute completely resolved before a party who submits its dispute to a U.S. district court has even begun trial.

40 *Robin*, *supra* note 36, at 136.

41 *Id.*; *Publication of ICSID Decisions and Awards with the Parties' Consent*, ICSID (May 5, 2010), https://icsid.worldbank.org/news-and-events/news-releases/publication-icsid-decisions-and-awards-parties-consent [https://perma.cc/Y2RV-SHBD] [hereinafter *Publication of ICSID Decisions*] (noting that consent of both parties is required for publication of ICSID decisions).

42 Robin, *supra* note 36, at 136.

43 New York Convention, *supra* note 5. The New York Convention's website reports that, as of 2020, 166 nations are party to the convention. *See Contracting States – List of Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/list+of+contracting+states [https://perma.cc/5JTV-6X3C] (last visited Dec. 15, 2020).

44 *Glossary: Umbrella Clause*, THOMSON REUTERS PRAC. L., https://uk.practicallaw.thomsonreuters.com/8-519-0939?transitionType=Default&contextData=(sc.Default)&firstPage=true [https://perma.cc/FSZ7-GH6K?type=image] (last visited Dec. 15, 2020).

discussed *infra* Part IV.

A. ICSID Jurisdiction

As of 2020, 155 States have ratified the ICSID Convention.[45] Article 25(1) of the Convention provides:

> 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[.][46]

Article 25(3) of the Convention adds that consent by a constituent subdivision or agency of a State requires approval of that State, unless the State notifies the Centre that no such approval is required.[47] However, signing the ICSID convention on its own cannot amount to consent to ICSID jurisdiction by the parties in an ICSID dispute, since an ICSID arbitral dispute is not between States, but between a host State and a foreign investor.[48] Therefore, it has become common practice to consent to ICSID jurisdiction through a BIT.[49] Ninety-three percent of BITs contain language about ISDS, with ninety percent of those treaties mentioning ICSID as either the exclusive or a permissible forum for ISDS.[50]

In addition to the jurisdictional requirements of Article 25(1) and (3) and consent via a BIT, international arbitral tribunals also have limited subject matter, or *rationae materiae*, jurisdiction.[51]

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45 For a complete list of signatory and contracting states, see *About ICSID: Database of ICSID Member States*, ICSID, https://icsid.worldbank.org/about/member-states/database-of-member-states [https://perma.cc/Q2T2-Q68C] (last visited Dec. 12, 2020) (reporting that 163 countries have signed the ICSID Convention and that 155 countries have ratified it).

46 ICSID Convention, *supra* note 31, art. 25(1).

47 *Id.* art. 25(3).

48 U.N. CONF. ON TRADE & DEV. ("UNCTAD"), DISPUTE SETTLEMENT: INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, 2.3 CONSENT TO ARBITRATION 17 (2003), https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf [https://perma.cc/4E95-ANJD].

49 *Id.*

50 OECD SURVEY, *supra* note 2, at 18–19 (showing that approximately 90% of treaties containing ISDS provisions mention ICSID, while another 60% mention ad hoc tribunals under UNCITRAL rules).

51 Katia Yannaca-Small, *OECD Working Papers on International Investment 2006/03: Interpretation of the Umbrella Clause in Investment Agreements*, OECD PUBL'G 3 (Oct. 2006), https://www.oecd.org/investment/internationalinvestmentagreements/WP-

This means that an arbitral tribunal is not necessarily competent to hear any claim arising out of an investment agreement. Rather, the tribunal may only hear treaty claims—those claims arising from the violation of protections guaranteed by the BIT.[52] For investors, this typically means bringing an expropriation claim (as this is the most common protection afforded by BITs, often earning its own clause in a BIT),[53] or a claim for violation of the standard(s) of protection guaranteed by the BIT.[54] The most common standards contained in BITs include: protection against expropriation, fair and equitable treatment, national treatment, and most-favored nation treatment.[55] Therefore, under ordinary circumstances, a foreign investor cannot simply sue a State for breach of contract if the State fails to fulfill its obligations under the contract. Instead, the foreign investor must characterize its harm either as an expropriation or as a failure to meet the standard(s) of protection as guaranteed by the BIT for an ICSID tribunal to have jurisdiction to hear the claim.[56]

B. Umbrella Clauses

While early models of BITs typically only provided for protection against expropriation, more recent BITs tend to allow parties to bring a greater variety of claims under the BIT.[57] It has become common practice among certain nations to include an umbrella clause in their BITs.[58] Umbrella clauses are broadly-written clauses that act as a catch-all provision to pursue claims

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2006_3.pdf [https://perma.cc/UC4A-BETR].

52 *See id.*

53 *See generally* OECD SURVEY, *supra* note 2 (noting throughout the report that information about ISDS remedies in BITs is typically found either in an expropriation clause or in a separate ISDS clause).

54 Ezgi Ceren Aydoğmuş, *Bilateral Investment Treaties ("BIT") and Standards of Protection in Energy Sector*, HERDEM ATT'YS AT L. (Aug. 2, 2015), *available at* https://www.lexology.com/library/detail.aspx?g=91a5d19b-63e5-427d-ba45-b3f7a533fea2 [https://perma.cc/K79C-P9JH].

55 *See id.* (providing more information on these standards and the different levels of protection they guarantee).

56 Yannaca-Small, *supra* note 51, at 3.

57 *See* OECD SURVEY, *supra* note 2, at 8 ("Of low frequency in the sample is a first category of treaties (mostly early treaties) that only provide access to domestic courts, and only to bring claims arising under the expropriation clause.").

58 *See* Yannaca-Small, *supra* note 51, at 5–6.

where a host State's actions might not normally breach the BIT.[59] While violating a contract would not ordinarily invoke treaty protection under international law, the presence of an umbrella clause in a BIT can elevate a contract claim to the level of a treaty claim, meaning that an investor should in theory be able to bring a breach-of-contract claim before an international arbitral body like ICSID.[60]

Of the roughly 2,500 BITs currently in existence, approximately forty percent contain an umbrella clause.[61] Certain nations tend to favor the inclusion of umbrella clauses in their BITs, including Switzerland, the Netherlands, the United Kingdom, and Germany.[62] The language and appearance of umbrella clauses varies,[63] but an example appears in Article 8(2) of the Germany-Turkmenistan BIT:

> Each Contracting State shall observe any other obligation that it may have entered into with regard to investments in its territory by nationals or companies of the other Contracting State.[64]

Because a contract between a German corporation and the Turkmen State (or vice-versa) fits within the broad language of Article 8(2), an ICSID tribunal should in theory have jurisdiction to hear both traditional BIT claims as well as any other claims arising out of investor-State contracts.

IV. Issues of Domestic Adjudication

A. Prejudice Against Foreign Parties

Lawyers and legislators have long recognized a certain "home field advantage" for those parties having their case heard on their own turf. The American government recognized this issue early in the nation's history and addressed it by including a provision in the

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59 *Glossary: Umbrella Clause*, *supra* note 44.

60 *Id.*

61 OECD SURVEY, *supra* note 2, at 5.

62 *Id.* (reporting that while certain nations tend to favor umbrella clauses, others, such as France, Australia, Japan, and Canada, tend to draft BITs without umbrella clauses).

63 *See id.* at 4–5 (demonstrating several ways an umbrella clause might be phrased).

64 Treaty Between the Government of the Federal Republic of Germany and the Government of Turkmenistan Concerning the Encouragement and Reciprocal Protection of Investments, Germ.-Turkmenistan, art. 8(2), *opened for signature* Aug. 28, 1997 (entered into force Feb. 19, 2001), (quoting the English translation of the BIT, *available at* https://www.italaw.com/sites/default/files/laws/italaw11244.pdf [https://perma.cc/8CAY-QZU6]).

U.S. Constitution allowing diverse parties to file in federal court under diversity jurisdiction[65] to prevent bias towards the local party in state court.[66] If the framers of the Constitution were worried about preference in the courts for Americans from one state over Americans from a neighboring state, imagine how the problem becomes exacerbated when the parties hail from different nations. Additionally, because all ICSID cases by definition arise from a dispute with a State or State-owned entity, the battle is not just between citizens of different nations; it is a battle between a foreign citizen and the government in whose courts it is seeking a remedy.[67]

In addition to overcoming the simple prejudice of being an "other," investors who do business with developing nations may be forced to bear the burden of political tensions working against them in the courtroom. A prime illustration of this issue occurred in the aftermath of the Iranian Revolution of 1979. In 1979, Islamic organizations overthrew the American-backed Shah of Iran and installed a theocratic government that was openly anti-American.[68] A large number of American businesses and investors had contracts with the Iranian government that they did not or could not perform after the revolution.[69] Many American companies were forced to leave their assets behind or had them seized by the Iranian government and in retaliation, the United States seized any Iranian assets that it could.[70] This created a legal standoff; parties from the

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65 U.S. CONST. art. III § 2 ("The judicial Power shall extend to . . . Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

66 Linda S. Mullenix, *Creative Manipulation of Federal Jurisdiction: Is There Diversity After Death*, 70 CORNELL L. REV. 1011, 1012 n.7 (1985) ("The often articulated rationale for diversity jurisdiction is to prevent state court prejudice against out-of-state litigants.")

67 *See* Robin, *supra* note 36, at 138.

68 *See* Janet Afary, *Iranian Revolution*, BRITANNICA, https://www.britannica.com/event/Iranian-Revolution [https://perma.cc/Y4YQ-FJP7] (last updated Sept. 20, 2019).

69 *See, e.g.,* Am. Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979) ("The action arises from the recent revolution in Iran and its impact upon contracts made with the ousted Imperial Government of Iran[.]"); Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982).

70 *See* Suzanne Maloney, *The Revolutionary Economy*, IRAN PRIMER, http://iranprimer.usip.org/resource/revolutionary-economy [https://perma.cc/PGW3-BKEP] (last visited Nov. 24, 2019) ("Iran's constraints intensified after the November 1979 seizure of the U.S. Embassy in Tehran, when Washington froze approximately $11

United States were unwilling to file suit in Iran and vice versa, because parties from both nations recognized the extreme political prejudice they would face in the other nation's courts.

The problem was only resolved by the creation of the U.S.-Iran Claims Tribunal, an arbitral tribunal mediated by Algeria, a neutral third party, to ensure that parties from both nations could have their claims heard without prejudice by an independent, non-prejudicial tribunal—[71] sound familiar?

B. Lack of Access to Counsel

For investors with enough capital and connections to expand to foreign markets, it may seem that finding legal counsel or representation to assist them in proceedings before domestic courts would not pose much of an issue. However, it is the unfortunate reality that in some countries, lawyers may refuse to represent a party opposing the government in court. This tends to be more prevalent in countries like Turkmenistan,[72] where the head of state rules with relatively unlimited power, citizens may have limited access to information or free speech, and governments are known perpetrators of human rights violations.[73]

In *Unionmatex*, the company alleged that when the project got behind schedule due to failures on the part of the Turkmen government, the officials onsite "appeared to fear political and personal consequences from their negligence and interference and therefore reported that Unionmatex was to blame."[74] The company was initially able to obtain local representation, but "it is alleged that its lawyer resigned in response to government pressure."[75]

Unionmatex is neither the first nor the only case in which a

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billion in Iranian assets and imposed other sanctions.").

71 *See About the Tribunal*, IRAN-U.S. CLAIMS TRIB., https://www.iusct.net/Pages/Public/A-About.aspx [https://perma.cc/F75W-AA4F] (last visited Nov. 24, 2019).

72 This paper will frequently use Turkmenistan as an example to show the issues inherent in adjudicating investment disputes in developing countries. That is not to say Turkmenistan is the only country where these problems exist or these issues are implicated. At least some of these issues will be present in any given case where claims are adjudicated in a remote, developing nation with a weak legal system.

73 *See* Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, ¶¶ 4.3.5–4.3.21 (July 2, 2013) (elaborating on the various reports providing evidence that Turkmenistan lacks an independent judiciary).

74 Ross, *supra* note 10.

75 *Id.*

foreign investor was unable to find local representation for its case in Turkmenistan. The claimant in the 2013 ICSID case *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*[76] alleged similar issues to those in *Unionmatex*:

> Claimant contends in its submissions that it was unable to find a single Turkmen lawyer who was willing to testify against the government of Turkmenistan. It is said that, on each occasion the refusal was followed by the same explanation: a fear for the security of the lawyer and his/her family of reprisals by Respondent. Claimant also submits it has communicated about this with other investors with claims against Respondent and understands that its experience is universal.[77]

Even if an investor seeks to litigate its claim in a remote developing nation where the level of corruption does not rise quite to the level of that seen in *Kiliç*, the investor may still be disadvantaged by having to bring on local counsel to litigate. An investor will be most comfortable working with a law firm with which it already has a strong business relationship and which is already familiar with the investor's operations and needs, or alternatively, a firm with an office located nearby whose lawyers speak the investor's language. However, in cases adjudicated in far-off developing countries, investors must settle for representation by local counsel with whom they may have no relationship or past dealings.[78] In this situation, investors and their lawyers may run into linguistic and cultural barriers when communicating with local counsel, or may have no way of determining the quality or trustworthiness of counsel in the developing nation.[79] Alternatively, in ICSID disputes, the investor may be able to use its ordinary go-to law firm—if that firm has an international arbitration practice group—or at least be represented by a firm that specializes in international arbitration, has an office located near the investor, and

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76 ICSID Case No. ARB/10/1.

77 *Kiliç*, ICSID Case No. ARB/10/1, Award, at ¶ 4.3.12.

78 *See, e.g.,* Steven C. Nelson*, International Commercial Arbitration*, 24 INT'L L. 599, 602 (1990) (describing a case in which one party needed to involve local counsel on issues related to Barbados law).

79 *See generally* Anna Stolley Persky, *The New World: Despite Globalization of the Economy, Lawyers Are Finding New Barriers to Practice on Foreign Soil*, 97 A.B.A. J. 34, 38 (2011) (explaining the difficulties of working with and finding qualified local counsel in international disputes).

speaks the investor's language.[80]

C. Lack of Access to Law

In addition to the difficulty of finding counsel to represent them, investors may also run into difficulty finding out what the law of a developing nation is. This problem may arise as early as the signing of the contract. If the investor is presented with a choice-of-law clause for, say, Turkmen law, or a forum selection clause for the Turkmen courts (most likely submitting itself to Turkmen law),[81] the investor may have no way of figuring out what substantive law it has in fact bound itself to.[82] This is not entirely the fault of the investor—translations of the laws of the developing nation might not be available in any widely-spoken language.

Say, for example, that an investor is presented with a contract that selects Turkmen law and wants to research the law before signing. The official language of Turkmenistan is Turkmen,[83] and as such the constitution and all codes of law are written in Turkmen.[84] Microsoft Translator currently offers translation

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80 Many of the world's top arbitration firms have offices located all over the world, especially in the wealthy, developed nations that investors in ICSID disputes tend to call home. *See Best Law Firms for International Arbitration – Commercial*, U.S. NEWS & WORLD REP., https://bestlawfirms.usnews.com/international-arbitration-commercial [https://perma.cc/C9CN-7RLX] (last visited Nov. 24, 2019).

81 This is because a forum selection clause for one jurisdiction also tends to accompanied by a choice-of-law clause selecting the law of that jurisdiction. In the case that a contract includes a forum selection clause but fails to include a choice-of-law clause, the prevailing view is to apply the law of the forum. *See* Coyle, *supra* note 16, at 1793–94 n.5 (2019).

82 Robin, *supra* note 36, at 138 ("A foreign company will be put at a disadvantage over the 'home party' when faced with a complex legal and court system; in these circumstances, it may be difficult for a foreign party to have access to information about the local law and this party may thus be impeded from fully grasping the risks that it is exposed to.").

83 *People and Society: Turkmenistan, The World Factbook,* CENT. INTELL. AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/tx.html [https://perma.cc/YJT8-V25G] (last visited Nov. 24, 2019) [hereinafter *People and Society*] (reporting that Turkmen is the official language of Turkmenistan, with 72% of the population speaking the language).

84 *See, e.g., Türkmenistanyň Konstitusiýasy [Constitution of Turkmenistan]*, HUKUK MAGLUMATLARY MERKEZI [LEGAL INFO. CTR.], http://www.minjust.gov.tm/tm/mmerkezi/doc_view.php?doc_id=8124 [https://perma.cc/QG2R-4PM3] (last updated Nov. 1, 2019).

between eighty world languages,[85] but it does not offer translation of Turkmen.[86] Google Translate just added Turkmen to its list of translatable languages in 2020.[87] Fortunately, as Russian is Turkmenistan's second most widely-spoken language,[88] a variety of legal resources are also available in Russian and are thus more readily translatable, both by automatic web translation services and official translators.[89]

If the investor wants an English translation of the Turkmen Code, Wolters Kluwer currently sells a hardcopy print version of the Code on its website.[90] This publication is not an official English translation of the code, and the website description warns that there are parts of the law which are inconsistent depending on whether the Turkmen or Russian translation is used.[91] This may be the best (and perhaps only) way for the investor to try to determine what the law of Turkmenistan is before submitting itself to the law in a contract. Therefore, it may be difficult even for an investor who conducts due diligence or for a lawyer with experience in foreign legal research to figure out what the laws of certain remote, developing nations are. Further, as can be seen from the dealings of foreign investors in Turkmenistan, laws on paper do not necessarily translate into laws in practice for developing nations with weak legal systems.[92]

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85 Including two dialects of Klingon, a fictional language from the Star Trek universe.

86 *See* MICROSOFT TRANSLATOR, https://www.bing.com/translator [https://perma.cc/65BA-GYRF] (last visited Nov. 24, 2019).

87 Nick Statt, *Google Translate Supports New Languages for the First Time in Four Years, Including Uyghur*, VERGE (Feb. 26, 2020), https://www.theverge.com/2020/2/26/21154417/google-translate-new-languages-support-odia-tatar-turkmen-uyghur-kinyarwanda [https://perma.cc/8TBQ-R92F].

88 *People and Society*, *supra* note 83 (reporting Russian as Turkmenistan's second-most spoken language, with 12% of the population speaking the language).

89 *See generally Индекс [Index]*, ЦЕНТР ПРАВ ИНФОРМАЦИИ [INFO. RTS. CTR.], http://www.minjust.gov.tm/ru/mmerkezi/index.php [https://perma.cc/428V-ZM5L] (last updated Nov. 1, 2019) (offering translations of the Turkmen constitution and various codes of law in both Russian and Turkmen).

90 *Turkmenistan Civil Code of Saparmurat Turkmenbashi*, WOLTERS KLUWER, https://lrus.wolterskluwer.com/store/product/turkmenistan-civil-code-of-saparmurat-turkmenbashi/ [https://perma.cc/Y3BS-QW7F] (last visited Nov. 24, 2019).

91 *Id.*

92 *Compare* TÜRKMENISTANYŇ RAÝAT KODEKSI [CIVIL CODE] art. 10 (Turkm.) (guaranteeing various judicial protections for civil rights, including the right to an appeal), *with* Ballantyne, *supra* note 8 (reporting that Unionmatex faced various barriers in the

V. Solutions

A. Just Stop Signing These Contracts[93]

Of course, the easiest and most intuitive way to not be bound by a forum selection clause is to never sign a contract that contains one. While this is a valid point, the reality is that parties continue to sign these agreements and do not show any signs of stopping.[94] The

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Turkmen domestic courts, including that its request for an appeal was ignored).

93 While in Japan, I once spilled a bucket of water onto a tatami (woven straw) mat floor. A frantic online search for "what to do when you spill water on tatami" turned up a series of articles that all advised in some form, "whatever you do, don't ever spill water on tatami." While it should be clear by now that the easiest way to avoid forum selection clauses is to never sign contracts that contain them, the primary purpose of this article is to explore the options of parties who have already entered into such contracts and for arbitrators who encounter such contracts.

94 Investment Treaty Arbitration Law, a popular database for investment-related arbitral decisions, shows that at least ten investment arbitration disputes dealing with contracts containing forum selection clauses have been published since 2018. Because both parties must consent for an arbitral award to be published, it is likely that the number of cases heard involving forum selection clauses is much, much higher. *See* INT'L ARB. L., https://www.italaw.com/ [https://perma.cc/MF3G-JPLT] (last visited Dec. 14, 2020); *Publication of ICSID Decisions*, *supra* note 41. For recent, published international arbitral cases involving forum selection clauses, see Anglo Am. PLC v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/14/1, Award, ¶ 214 (Jan. 18, 2019) (involving a mining concession contract containing an exclusive forum selection clause for the courts of Venezuela); Glencore Fin. (Berm.) Ltd v. Plurinational State of Bol., UNCITRAL PCA Case No. 2016-39/AA641, Claimant's Rejoinder on Jurisdictional Objections, ¶¶ 248–49 (Jan. 20, 2019) (involving contracts containing mandatory ICC arbitration clauses); Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, ¶ 157 (Aug. 6, 2019) (involving a forum selection clause conferring jurisdiction upon Rome courts); Greentech Energy Sys. A/S et al. v. The Italian Republic, SCC Arbitration V (2015/095), Final Award, ¶ 214 (Dec. 23, 2018) (involving contacts containing exclusive forum selection clauses for the Court of Rome); Nissan Motor Co., Ltd. (Japan) v. The Republic of India, UNCITRAL PCA Case No. 2017-37, Decision on Jurisdiction, ¶ 219 (Apr. 29, 2019) (involving a contract calling for Chennai, India as the exclusive forum for dispute resolution); Glencore Int'l A.G. & C.I. Prodeco S.A. v. Republic of Colom., ICSID Case No. ABR/16/6, Award, ¶ 948 (Aug. 2, 2019) (involving a mining concession contract containing a forum selection clause for the Colombian courts); CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. et al. v. Republic of Mozam., ICSID Case No. ARB/17/39, Award, ¶ 237 (Oct. 24, 2019) (involving a forum selection clause for a tribunal constituted pursuant to the Cotonou Convention Arbitration Rules); Casinos Austria Int'l GmbH & Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Caso No. ARB/14/32, Decision on Jurisdiction (June 29, 2018) (involving a forum selection clause for the courts of the Province of Salta, Italy); Gavrilović & Gavrilović d.o.o. v. Republic of Croat., ICSID Case No. ARB/12/39, Award, ¶ 416 n.575 (July 26, 2018) (involving a forum selection clause providing for resolution of disputes in the Regional Commercial Court in Zagreb); Unión Fenosa Gas, S.A. V. Arab Republic of Egypt, ICSID Case No. ARB/14/4,

reasons for parties entering into these contracts are varied and may depend on the unique facts of each individual case.

As seen in *Unionmatex*, many of the disputes that end up in front of ICSID tribunals arise out of contracts worth millions of dollars that were entered into after a lengthy and competitive bidding process.[95] Perhaps investors who have won a contract through a bidding war feel that their negotiating power is limited and that the government may move on to the next lowest bidder should the winning company push too hard for terms in the contract that are overly favorable to the investor. Investors might also not appreciate the gravity of signing a forum selection clause for a foreign jurisdiction.[96]

The courts of the world are as diverse as the countries that host them,[97] and there is no database or objective ranking system to tell parties which nations' judicial systems they can and cannot trust.[98]

Award, ¶ 3.18 (Aug. 31, 2018) (involving a Sale and Purchase Agreement containing a mandatory arbitration clause for resolution of disputes in accordance with the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration [CRCICA Arbitration]).

95 Unionmatex's €144 million contract was the result of winning a 2008 public tender, a bidding war for a contract from a public sector organization. *See* Ballantyne, *supra* note 8 ("The company says it was directly invited to bid by the Turkmen government and that its selection as winner of the tender was personally approved by President Berdimuhamedow.").

96 Both because they might over-estimate the reliability of the courts they submit themselves to, or because they believe that those treaty claims guaranteed by the BIT, such as the protection against expropriation, will not be subject to any choice-of-forum clause(s). For an extended discussion of the latter, see *infra* Part V.C.

97 WORLD JUST. PROJECT, RULE OF LAW INDEX 2019 8 (2019), https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf [https://perma.cc/48YT-HZHR] ("The Index has been designed to be applied in countries with vastly different social, cultural, economic, and political systems. No society has ever attained—let alone sustained—a perfect realization of the rule of law. Every country faces the perpetual challenge of building and renewing the structures, institutions, and norms that can support and sustain a rule of law culture.").

98 Currently, the closest thing to such a database is the World Justice Project's Rule of Law Index. While the compilation is one step in the right direction, the publishers themselves acknowledge that "the rule of law is notoriously difficult to define and measure." The report is designed to look at the experience of an everyday citizen in each country, placing weight on individual testimony related to topics like the nation's ability to control crime. These factors likely have little impact on a wealthy overseas investor and as such, the report is not a dependable reference for determining a nation's investment climate. Additionally, the report is incomplete, containing data for only 126 countries. Reports for many African, Middle Eastern, and Central Asian countries (including

Additionally, the definition of what an "equitable" system looks like may differ depending on who you ask.[99] Finally, if two parties have had prior successful dealings in the past, the investor may be less hesitant to sign a contract with a forum selection clause if it feels that there is a low risk that the other party will breach. However, the focus of this paper is not to elaborate on the many reasons why investors should not sign contracts containing forum selection clauses or to try to justify the actions of those who do. Instead, this paper aims to present and analyze the different routes that an investor who has signed such a contract or an arbitrator who finds herself arbitrating a dispute involving such a contract may pursue to ultimately achieve an equitable outcome.

B. Flexible Interpretation[100]

Drafting a quality forum selection clause is somewhat of an art, and a poorly worded contract may present an opportunity to wiggle around or out of an unfavorable forum selection clause. This can be done by reading the clause as either (1) non-exclusive or (2) limited in its scope.[101]

In order for a clause to be read as exclusive, it must contain certain words indicating that the forum listed in the contract is the only forum in which claims may be brought.[102] A mandatory forum selection clause must contain language that indicates exclusivity, such as "sole," "only," "exclusive," or "must."[103] With less of a

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Turkmenistan) are notoriously absent. *See id.* at 7–8, 17.

99 Even the U.S. judicial system, which is considered by many to be a highly developed legal system, is frowned upon in many European countries for its use of jury trials, which some see as being unreliable. *See The Jury Is Out*, ECONOMIST (Feb. 12, 2009), https://www.economist.com/international/2009/02/12/the-jury-is-out [https://perma.cc/8S4T-V6HA] ("Britain, the supposed mother of trial by jury, is seeking to scrap them for serious fraud and to ban juries from some inquests.").

100 Note that the interpretive rules explained here are American interpretive rules. While other jurisdictions likely have similar rules in effect, there is no guarantee that foreign courts will interpret contract language exactly as U.S. courts do.

101 *See* Coyle, *supra* note 16, at 1795.

102 *Id.* at 1799.

103 *Id.* at 1800 ("Courts . . . will look for certain 'magic words' that signal the parties' intent to litigate their disputes in the chosen forum to the exclusion of all other possible venues. The words 'exclusive' or 'sole' are generally recognized to convey this intent. Statements that a claim 'must' be brought in a particular forum or that it may 'only' be brought in that forum also suffice.").

consensus, some courts have interpreted the terms "shall"[104] and "venue"[105] to indicate a mandatory forum selection clause.[106] If the contract in question contains one or more of these terms, it will be difficult for either party to argue that the forum selection clause is non-exclusive.

However, if a contract's drafter neglected to include one of these terms, a forum selection clause may instead be read as being "permissive."[107] A permissive forum selection clause contains phrases like "the court shall have jurisdiction" or "the parties consent to venue."[108] Rather than mandating the forum in which a case must be brought, a permissive clause is understood instead to indicate a party's consent to jurisdiction or venue in the specific forum. This means that the forum selection clause, rather than mandating that the forum is the only place where a case can be brought, is instead read as the party agreeing to submit to the jurisdiction of the forum, making it one permissive place in which a case may be brought.[109] While such clauses on their face may appear to signal binding forum selection, a party presented with a permissive clause may be able to argue its way out of a problematic forum and into a different forum of its choice.

Even if a forum selection clause contains exclusive language making it binding, if the clause is not properly worded, it may still be found to be limited in its scope.[110] U.S. courts have held that a clause referring to disputes "which arise out of this agreement" or "arising hereunder" are limited in their scope and extend only to

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104 *See* Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1328–30 (11th Cir. 2011) (holding the term shall as one of requirement). *But see* Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76–77 (9th Cir. 1987) (holding that the language "[t]he courts of California shall have jurisdiction . . . " did not indicate a mandatory forum selection clause).

105 Gita Sports v. SG Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 436 (W.D.N.C. 2008) ("A crucial distinction between a mandatory clause and a permissive clause 'is whether the clause only mentions jurisdiction or specifically refers to venue.'") (quoting Scotland Mem'l Hosp., Inc. v. Integrated Informatics, Inc., No. Civ. 1:02CV00796, 2003 WL 151852, at *4 (M.D.N.C. Jan. 8, 2003)).

106 Coyle, *supra* note 16, at 1801.

107 *Id.* at 1802.

108 *Id.*

109 *Id.*

110 *See id.* at 1803.

contract claims.[111] However, carefully worded forum selection clauses containing phrases like "all claims or causes of action relating to or arising from this agreement" or "any case or controversy arising under or in connection with this agreement" are broad enough in their scope to cover non-contract claims, such as tort claims.[112] In the context of international investment disputes, an arbitral tribunal may find that an investor is bound to resolve contract disputes according to an exclusive forum selection clause.[113] However, if the exclusive clause is not worded broadly enough with respect to its scope, the investor may be able to bring other, non-contract claims in another forum of its choice.

C. Treat the Arbitration Provisions of BITs as Non-Waivable[114]

As explained *supra* Part III.A, BITs typically extend a number of protections to both parties, such as the protection against expropriation without compensation and a guarantee of certain standards of protection.[115] A forum selection clause, no matter how cleverly worded, will generally not be interpreted as eliminating a tribunal's jurisdiction over those treaty claims enumerated in the

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111 *Id.* at 1805.

112 Coyle, *supra* note 16, at 1804.

113 *See*, *e.g.*, Compañia de Aguas del Aconquija S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 79 (Nov. 21, 2000).

114 The interplay between choice-of-forum provisions, ICSID jurisdiction, BITs, as well as the characterization of treaty versus contract claims, and the role and interpretation of umbrella clauses in ISDS is a complicated and highly specialized area of international arbitration law which many a more qualified author has explored in depth. *See generally, e.g.*, Jude Antony, *Umbrella Clauses Since SGS v Pakistan and SGS v. Philippines – A Developing Consensus*, 29 ARB. INT'L 607 (2013); Stephen Donnelly, *Conflicting Forum-Selection Agreements in Treaty and Contract*, 69 INT'L & COMP. L.Q. 759 (2020); Mary E. Footer, *Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction*, 16 LAW & PRAC. INT'L CTS. & TRIBUNALS 87 (2017). This author does not purport to be an expert on this subject, nor does this section purport to provide an exhaustive or authoritative history of relevant ICSID decisions. Rather than serving as a practical guide, this section seeks to explore the normative implications of several well-known ICSID decisions relating to the issue of choice-of-forum clauses and ICSID jurisdiction.

115 *See* Aydoğmuş, *supra* note 54; Ross, *supra* note 10 ("[Unionmatex] accuses Turkmenistan of the deliberate breach of various protections in the BIT including the protection against expropriation without compensation and against unfair and inequitable treatment . . . ").

BIT.[116] In the case that Unionmatex is found bound to resolve any and all breach of contract claims it has in the Turkmen courts, it should in theory still be able to seek a remedy in front of an arbitral tribunal if it can successfully characterize Turkmenistan's actions as treaty violations under the Germany-Turkmenistan BIT.[117]

However, in certain similar cases, investors have been unable to bring their treaty claims in front of an ICSID tribunal because of a forum selection clause contained in a private contract granting exclusive jurisdiction to domestic courts. *Vivendi v. Argentine Republic*,[118] another case involving the "novel and complex issue . . . relating to the interplay of a bilateral investment treaty, a Concession Contract with a forum-selection clause and the ICSID Convention[,]" provides an example of the injustice Unionmatex may face depending on the decision of the ICSID tribunal.[119]

Similar to *Unionmatex*, *Vivendi* involved a multi-million dollar concession contract between a foreign investor and a State entity, (in the case of *Vivendi*, the Argentine provincial government).[120] After its relationship with the Argentine government soured, the French investor in *Vivendi* sought a remedy from an ICSID tribunal under the Argentine-French BIT, alleging various violations of the BIT and the concession contract.[121] Article 8 of the Argentine-French BIT deals generally with disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party[,]"[122] though scholars are inconclusive as to whether this language constitutes an umbrella clause.[123]

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116 *See Vivendi*, ICSID Case No. ARB/97/3, Award, ¶ 79.

117 *See id.*; *see also* Garanti Koza v. Turkmenistan, ICSID Case No ARB/11/20, Award, ¶ 245 (Dec. 19, 2016) ("The fact that the Contract provides for resolution of disputes arising under the Contract in the Arbitration Court of Turkmenistan does not deprive this Tribunal of jurisdiction over claims pleaded and arising under the BIT.").

118 Compañía de Aguas del Aconquija, S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic, ICSID Case No. ARB/97/3.

119 *Vivendi*, ICSID Case No. ARB/97/3, Award, ¶ 95.

120 *See id.* ¶ 9.

121 *Id.*

122 *Id.* ¶ 55 (quoting Article 8(1) of the Argentina – France BIT).

123 *Argentina – France BIT (1991)*, UNCTAD INV. POL'Y HUB (Mar. 2016), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/127/argentina---france-bit-1991- [https://perma.cc/J3HB-F8U7] (reporting that it is "inconclusive" whether the Argentine-French BIT contains an umbrella clause).

In its findings on jurisdiction, the tribunal held that the forum selection clause of the concession contract[124] "does not, and indeed could not, exclude the jurisdiction of the Tribunal under the BIT" because the forum selection clause could only affect those causes of actions deriving from the concession contract, but not those arising under the BIT.[125] However, the tribunal went on to find that, because all of the causes of action the investors alleged under the BIT were "closely linked to the performance or non-performance of the parties under the Concession Contract":

> [I]t is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract . . . To make such determinations the Tribunal would have to undertake a detailed interpretation and application of the Concession Contract, a task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán.[126]

Though the award in *Vivendi* was later challenged and partially annulled, the outcome and logic followed in *Vivendi* foreshadowed the outcome of other, similar cases of ISDS and contracts containing forum selection clauses.[127]

Indeed, several decisions since *Vivendi* have reached similar

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124 "For purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán." *Vivendi*, ICSID Case No. ARB/97/3, Award, ¶ 27 (Nov. 21, 2000).

125 *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 14(b) (July 3, 2002).

126 *Vivendi*, ICSID Case No. ARB/97/3, Award, ¶ 79.

127 The foreign investor in *Vivendi* later challenged the validity of the tribunal's decision and sought an annulment from the ICSID annulment committee. The committee agreed that the tribunal's refusal to interpret the concession contract constituted an excess of power, nullifying that portion of the *Vivendi* decision. The committee reasoned that, "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán." *See Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶14(d); *see also* Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decision on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 839 (2005). However, this decision left unanswered the issue of reliance on a contractual compromissory clause in cases "where the essential basis of a claim brought before an international tribunal is a breach of contract." *Vivendi*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 98; *see also* Shany *supra*, at 839.

outcomes regarding the interplay between ICSID jurisdiction and exclusive forum selection clauses contained in concession contracts. In the 2002 case *SGS v. Pakistan*[128] the tribunal was asked to consider a dispute arising under the Pakistani-Swiss BIT and a contract containing a choice of forum clause that barred ICSID from hearing the dispute.[129] While the tribunal entertained the Swiss investor's traditional treaty claims, it refused to hear any of the company's contract claims—despite the existence of an umbrella clause in the BIT—[130] and upheld the Pakistani arbitrator's exclusive jurisdiction over those claims.[131]

The following year, an ICSID tribunal took things a step further in *SGS v. Philippines*,[132] a case presenting similar jurisdictional issues to *Vivendi* and *SGS v. Pakistan*.[133] Unlike the tribunal in *SGS v. Pakistan*, the tribunal in *SGS v. Philippines* accepted a broader interpretation of the umbrella clause in the Swiss-Philippine BIT (which contained virtually identical language to the one at issue in *SGS v. Pakistan*) and held that the tribunal had broad jurisdiction over both contract and treaty claims. However, channeling *Vivendi*, the tribunal refused to hear the case on the merits, finding both the

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128 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

129 *See SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 43–46 (Aug. 6, 2003).

130 "Either Contacting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party." Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investment, Switz.-Pak., art. 11, *opened for signature* Nov. 7, 1995 (entered into force June 5, 1996), (English translation of the BIT *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2130/download [https://perma.cc/C5ZL-BQG8]); *see also Pakistan-Switzerland BIT (1995)*, UNCTAD INV. POL'Y HUB (Nov. 2016), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2721/pakistan---switzerland-bit-1995- [https://perma.cc/FVX6-XUH4] (reporting that the Pakistan-Switzerland BIT contains an umbrella clause).

131 *See SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 166–74; *see also* Shany, *supra* note 127, at 840–41. It should be noted that Pakistan relied heavily on the *Vivendi* award and subsequent annulment in its submissions, as did the tribunal in its Decision on Objections to Jurisdiction. *See generally SGS v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction.

132 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6.

133 *See* Shany, *supra* note 127, at 841.

treaty and elevated contract claims inadmissible. The tribunal ruled that it:

> 'should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively.' Given the strong links between the contract claim and the treaty claim (whose independent existence [the tribunal] doubted), the majority held that it would be 'inappropriate and premature' to address the treaty claim before the contract claim had been adjudicated by the contractually designated courts. It therefore decided to stay the ICSID arbitration proceedings until the contract claim was sorted out.[134]

Following this same logic, in 2009 the tribunal in *BIVAC v. Paraguay*[135] found that the tribunal had jurisdiction over both traditional treaty claims and contract claims elevated to treaty-claim status by the umbrella clause contained in the relevant BIT.[136] However, the tribunal concluded that claims arising under the umbrella clause were inadmissible because "BIVAC cannot rely on the Contract as the basis of a claim . . . when the Contract itself refers that claim exclusively to another forum."[137]

In practice, this series of ICSID decisions all in some form or another denied the ICSID tribunal jurisdiction to hear treaty claims, despite the tribunals' insistence that forum selection clauses in private contracts may not be read to deprive the tribunal of its ability to hear claims arising under the BIT.[138] This is equally concerning

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134 *Id.* at 842 (quoting *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 155–62 (Jan. 29, 2004)).

135 Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC B.V v. Republic of Paraguay, ICSID Case No. Arb/07/9.

136 *BIVAC*, ICSID Case No. Arb/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶ 159 (May 29, 2009).

137 *Id.*

138 In 2013, Jude Antony published a paper surveying ICSID decisions post-*SGS v. Philippines* involving umbrella clauses and their impact on ICSID jurisdiction. Antony *supra* note 114, at 607. His research uncovered an emerging trend in ICSID decisions in line with the position advocated for in the paper. *Id.* at 625-28 (finding one case post-*SGS v. Philippines* where the tribunal held no jurisdiction because the contractual forum selection clause took precedence (Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12), two cases where the tribunal had jurisdiction but the claims were inadmissible (*SGS v. Philippines*, ICSID Case No. ARB/02/6; *BIVAC*, ICSID Case No. Arb/07/9), and eight cases where tribunals considered their ability to hear a claim under the umbrella clause unaffected by the presence of a contractual forum

both in the case of traditional treaty claims and in disputes arising out of BITs containing umbrella clauses, where ordinary contract claims are elevated to the level of treaty claims. If an ICSID tribunal finds that it does not have jurisdiction to hear BIT claims, or that the tribunal has jurisdiction but that such claims are inadmissible, parties are effectively allowed to contract around international treaties and waive the supposedly non-waivable protections these treaties offer. Arbitrators may address this issue by treating the right to have treaty claims heard by an international tribunal as non-waivable (not just in theory, but in practice) by allowing no part of a treaty claim, whether a traditional treaty claim or a contract claim elevated to treaty status through an umbrella clause, to be removed from the scope of the tribunal's decision by private contract.

D. Forum Non Conveniens

Forum non conveniens is one way in which a party may challenge a court's ability to hear a case, even if the contract signed by the parties contains an exclusive forum selection clause. Literally "an inconvenient forum," *forum non conveniens* is not a challenge to jurisdiction but rather a preliminary determination that another, different forum is more appropriate to hear a case.[139] However, for two reasons, *forum non conveniens* is unlikely to

selection clause in an underlying contract (SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8; Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3; LG&E Energy Corp. et al v. Argentine Republic, ICSID Case No. ARB/02/1; Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8; Salini Costruttori S.p.A. & Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13; Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16; Eureko B.V. v. Republic of Poland)) (excluding non-ICSID decisions). Antony notes that, despite a strong, developing consensus "that the jurisdiction of an international arbitral Tribunal to hear umbrella clause claims is unaffected by the presence of a contractual forum selection clause in an underling contract . . . there have been cases holding either that the Tribunal did not have jurisdiction in this situation, or that it had jurisdiction but the claim was inadmissible[.] *Id.* at 638. While these make up a minority of cases surveyed, "some of these decisions are recent, and this interpretation is also supported by two of the three cases decided since the comprehensive review conducted for this paper, so it is not possible to dismiss this line of jurisprudence as having died out." *Id.* at 638–39 (referring to the decisions in Bosh Int'l, Inc. et al. v. Ukraine, ICSID Case No. ARB/08/11; and Occidental Petroleum Corp. et al. v. Republic of Ecuador, ICSID Case No. ARB/06/11).

139 *See Sinochem*, 549 U.S. at 428.

provide a remedy in international investment disputes.

First, in a *forum non conveniens* analysis, U.S. courts[140] consider a range of factors to determine whether the forum is proper.[141] The court gives particular weight to "the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality."[142] Because forum selection clauses in international investment contracts tend to select the courts of the developing nation where the majority of the events relevant to the dispute likely took place and where the majority of witnesses likely reside, most courts would not feel compelled to send the case elsewhere.[143]

Second, *forum non conveniens* is a doctrine traditionally recognized at common law.[144] This means that a court in the United States, England, Canada, or another common law jurisdiction might entertain a *forum non conveniens* argument, but that the courts of a developing nation likely would not.[145] While *forum non conveniens* might provide an out to a forum selection clause in other circumstances, in the case of investment disputes like that of *Unionmatex*, the doctrine is unlikely to provide any relief whatsoever.

E. Introduce a Zapata*-like Standard*

When confronted with a forum selection clause in a contract, an arbitral tribunal may look at the scope and exclusivity of the clause,

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140 Note that the rules explained in this section apply specifically to U.S. courts. The test for a *forum non conveniens* claim may look different in another jurisdiction.

141 *See Sinochem*, 549 U.S. at 428.

142 *Id.* (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996)).

143 *See generally*, *e.g.*, *Unionmatex*, *supra* note 6 (providing one such example, where the majority of events took place in Turkmenistan, the witnesses all reside in Turkmenistan, and the choice clauses in the contract selected both Turkmen courts and Turkmen law).

144 *See id.* (describing *forum non conveniens* as a common law doctrine).

145 Common law jurisdictions include England and most territories that were once British colonies, including the United States. However, as most developing nations were not once British colonies, most do not recognize common law doctrines like *forum non conveniens*. *See Key Features of Common Law or Civil Law Systems,* WORLD BANK GRP., https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law [https://perma.cc/LCU6-6KA8] (last visited Nov. 24, 2019). ICSID tribunals do entertain *forum non conveniens* arguments. *See, e.g.*, Rockhopper Italia S.p.A. et al. v. Italian Republic, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, ¶ 34 (June 26, 2019).

but makes no inquiry into whether the clause should be enforced in the first place. In the case of *M/S Bremen v. Zapata Off-Shore Company*,[146] the U.S. Supreme Court developed a standard by which to measure the equitability of enforcing a jurisdiction clause.

Under the *Zapata* standard, a court inquires whether a "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court" or whether the clause should be found "invalid for such reasons as fraud or overreaching."[147] This sets a high standard which may be difficult for a U.S. plaintiff arguing against a forum selection clause for a U.S. jurisdiction to meet.[148] However, were ICSID to adopt a similar analysis, forum selection clauses for developing nations with weak or corrupt legal systems could possibly be held invalid for effectively depriving parties of their "day in court."[149]

Take *Unionmatex*, for example—how would a forum selection clause for the courts of Turkmenistan hold up to a *Zapata* analysis? The 2018 Human Rights Report of Turkmenistan reveals serious problems within the nation's judicial system.[150] The report states that although Turkmen law provides for an independent judiciary, in reality the branch is controlled by the executive branch; the president has sole power to appoint and dismiss judges with no judicial review.[151] Trials are rife with due process violations, including failure to provide interpreters, no presumption of innocence, a lack of independent lawyers, and general procedural

146 407 U.S. 1 (1972).

147 *Id.* at 15, 18.

148 In *Zapata*, the court went as far as to hold that it would not be overly inconvenient for a Houston-based American company to be bound to a forum selection clause in London. *Id.* at 17 ("[S]election of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation.").

149 Strictly speaking, an ICSID tribunal cannot create common law. While ICSID decisions are not binding, it is common to see one tribunal applying standards that were created by tribunals in previous cases. One of the most common examples is the *Salini* test for determining whether an investment qualifies for ICSID jurisdictional purposes. *See* Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 43–58 (July 23, 2001).

150 *See* U.S. DEPT. OF ST., TURKMENISTAN 2018 HUMAN RIGHTS REPORT 6–9 (2019), https://www.state.gov/wp-content/uploads/2019/03/TURKMENISTAN-2018.pdf [https://perma.cc/VZR3-2DCD].

151 *Id.* at 6.

violations such as not allowing a defendant's lawyer to present exculpatory evidence or question witnesses.[152] Generally, Turkmenistan's judicial branch is "widely reputed to be corrupt and inefficient."[153]

These descriptions match closely with Unionmatex's experience with the Turkmen court system:

> The German company says it was denied due process in the court proceedings, having been hindered from bringing a translator to the oral hearing. It also alleges its local legal representative resigned from the case before the hearing following extreme pressure from the Turkmen government. Further court actions brought by the company failed or were ignored, it says.[154]

Under these circumstances, it would not be a stretch to characterize Unionmatex's experience with the Turkmen judicial system as, for all practical purposes, depriving it of its day in court. One would imagine that, under the *Zapata* standard, a U.S. court would hold a forum selection clause invalid if it condemned a party to adjudicate in a forum where it would have no translator, no representation, and no practical right to appeal. However, arbitral tribunals currently have no such standard.[155] All forum selection clauses are treated as valid, no matter how egregious, and the court's analysis extends only to determining the exclusivity and scope of the clause.

This seems especially concerning in cases involving disputes on an international scale where the forums that may be selected are far more diverse and may be more prone to corruption. The *Zapata* standard was created by and is exclusively used by U.S. courts.[156]

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152 *Id.* at 6–7

153 *Id.* at 6.

154 Ballantyne, *supra* note 8.

155 Currently, the only standard resembling the *Zapata* standard in arbitral tribunals is the futility doctrine, which may be applied to the requirement that certain remedies be exhausted before a tribunal can grant jurisdiction to hear a case. According to principles of international law, the requirement to exhaust other remedies before submitting to arbitration can be waived if it can be shown that no remedy is available, or an attempt at exhaustion would be futile. This is an insurmountably high standard as the tribunal in *Kiliç* held that, despite rampant corruption and due process violations in Turkmen courts, the claimant failed to show that such proceedings would be "futile." Further, the futility doctrine has been applied only in the case of exhaustion requirements, not to the enforceability of forum selection clauses generally. *See Kiliç*, ICSID Case No. ARB/10/1 at ¶¶ 3.4.1–3.4.36.

156 *See generally Zapata*, 407 U.S. 1.

While it is one step in the right direction for U.S. courts to recognize that forum selection clauses can be problematic for parties, the harm and inconvenience that will come from one party litigating in one U.S. forum as opposed to another U.S. forum is insignificant compared to that which can arise from one party being forced to litigate in a remote, developing nation. Under current arbitral rules and precedent, an arbitral tribunal would conduct no analysis of the enforceability of a forum selection clause for the courts of, say, Somalia or North Korea,[157] but would instead only analyze the exclusivity and scope of said clause.

VI. Conclusion

International institutions have developed a solution in response to the increased globalization of commerce, business, and the resulting litigation over the last half a century: international arbitral institutions.[158] The arbitral process is tailor-made to suit the needs of large-scale businesses and investors and to create a neutral forum in which diverse parties can have their disputes resolved in a fair, predictable, and efficient process.[159] The importance of these tribunals is further solidified by their inclusion in the terms of the thousands[160] of BITs which countries have signed.[161] However, when forum selection clauses in private contracts prevent arbitral institutions from hearing the claims they're designed to resolve or prevent BITs from protecting the interests of parties they're designed to protect, the result is inequity.

Unionmatex is still waiting for a determination of whether the ICSID tribunal will grant jurisdiction to hear its case and which claims the forum selection clause does or does not prevent the tribunal from hearing.[162] If the tribunal, following the logic of the

157 Both of which are currently perceived to be two of the most corruption nations in the world. *See Corruption Perceptions Index 2018*, TRANSPARENCY INT'L, https://www.transparency.org/cpi2018 [https://perma.cc/MPF8-5MR5] (last visited Nov. 24, 2019).

158 *See* Robin, *supra* note 36, at 136–38.

159 *See id.*

160 Yackee, *supra* note 18, at 401 ("Since 1959, states have signed over 2500 broadly similar agreements[.]").

161 *See id.* at 403 ("BITs [began] to routinely couple . . . substantive promises with an important procedural guarantee: the right of the investor to initiate binding, enforceable international arbitration against the host state for alleged treaty breaches.").

162 *Case Details*, *supra* note 12.

Vivendi line of decisions, finds that the forum selection clause bars it from hearing any contract claims and that the alleged breaches of the Turkmen government under the BIT are strictly contract claims or too interwoven with the performance of the contract for the tribunal to hear independently, Unionmatex will have no further recourse. It will be bound to the judgment of the Turkmen courts, which decided the outcome of Unionmatex's future with no translator, no legal representation, and no opportunity for appeal.[163]

Lawyers who are asked to represent clients in this situation can do some clever arguing to try to limit the scope or exclusivity of a forum selection clause or try to avoid the clause altogether by characterizing an investor's loss as a breach of treaty, rather than a breach of contract. However, arbitral institutions are in the best situation to resolve this issue. When presented with a case involving a contract containing a forum selection clause, the tribunal might avoid injustice by asking one simple preliminary question: would enforcement of this forum selection clause result in an inequitable outcome? Further, while tribunals might like to characterize protections of BITs as non-waivable, allowing parties to reserve part or all of an ICSID case to be heard in domestic courts in practice creates an effective waiver of supposedly non-waivable treaty protections. Tribunals might avoid this loophole simply by allowing no part of a claim arising under a BIT to be delegated away to domestic courts by a contractual forum selection clause.

163 *See* Ballantyne, *supra* note 8.