Chapter 4

Keeping Interpretation in Investment Treaty Arbitration ‘on Track’: The Role of State Parties

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1 Introduction

Recent investment arbitration cases suggest a tendency towards an ever-broader subject-matter jurisdiction of tribunals over disputes between investors and host States. First, in a series of cases bearing on government debts/debts of a State-owned enterprise, tribunals confirmed that security entitlements deriving from sovereign bonds, and rights under derivative contracts, fall within the scope of an ‘investment’ covered both by Article 25(1) of the ICSID Convention and the relevant investment treaties: Abaclat v. Argentina, Ambiente v. Argentina and Deutsche Bank v. Sri Lanka. Although cases on public financial instruments are not new in investment arbitration (e.g. Fedax v. Venezuela and CSOB v. Slovak Republic), the debt instruments at issue in the former category of cases are distinguished from those in the latter category, because for such debt instruments, the host State stood on an equal footing.

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** Postscript: On 17 November 2014, the tribunal in Giovanni Alemanni & Others v. Argentine Republic (ICSID Case No. ARB/07/8), the third ICSID case arising from Argentina’s 2001 default and based on the Argentina-Italy Bilateral Investment Treaty (BIT), rendered its decision on jurisdiction and admissibility. As to the issue of whether the Claimants’ assets “were investments ‘made in the territory of Argentina’”, which is discussed in Section 2.1 of this chapter, the tribunal decided to join this question to the merits, as it was “so closely entwined with the substantive disagreement between the Parties” (paras. 293, 297).

1 Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) [hereinafter Abaclat].
2 Ambiente Ufficio S.p.A. & Others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) [hereinafter Ambiente].
3 Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award (23 October 2012) [hereinafter Deutsche Bank].
with the creditor in the contractual relationship (as will be examined in Section 2). Secondly, in the recent *EDFI v. Argentina* case, an ICSID tribunal allowed an investor to ‘incorporate’ an umbrella clause into the applicable investment treaty via the most-favored-nation (MFN) clause in the treaty.

As will be demonstrated in Section 4, the combination of these developments in investment arbitration indicates that there is now a real possibility for allegations of a breach of *any* obligation of the host State, including an obligation that the State undertook as a party to commercial contracts or as a market actor, to satisfy subject-matter jurisdictional requirements. A natural question follows: is this in line with the intention of the contracting State parties to the relevant investment treaty? The existence of the controversy over these cases itself indicates that there may well be situations where such dramatic expansion of the subject-matter jurisdiction goes beyond the treaty framework ‘acceptable to both of the State parties.’ Against this background, this chapter addresses the question of what States may—and should—do in order to avoid such consequences. The structure of this chapter is as follows. Section 2 examines the treatment of two issues by recent arbitral tribunals that points to a tendency towards broad jurisdiction in investment arbitration: the scope of the term ‘investments’ and the scope of the application of an MFN clause. It first provides an overview of the approach of the majority of the *Abaclat, Ambiente* and *Deutsche Bank* tribunals on the question of whether the financial instruments at issue qualify as ‘investments’ under Article 25(1) of the ICSID Convention and the relevant investment treaties, and criticisms of this approach by dissenting arbitrators as well as by scholars (Sections 2.1 and 2.2). It then examines the approach adopted by the *EDFI* tribunal to broadening the scope of a treaty through an MFN clause (Section 2.3). Section 2 concludes by arguing that the combination of the interpretation of the term ‘investments’ and of an MFN clause by these tribunals may well result in a dramatic expansion in the scope of subject-matter jurisdiction in investment treaty arbitration (Section 2.4). Section 3 turns to the examination of the vexing question of whether such consequences are in line with the intentions of the contracting States. It demonstrates the difficulty in finding ‘objectified intentions’ of the contracting States in investment treaty arbitration, and argues that there

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6 *EDF International S.A., SAUR International S.A. & León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) [hereinafter *EDFI v. Argentina*].

7 The *Abaclat, Ambiente* and *Deutsche Bank* decisions are accompanied by strong dissenting opinions, an indication of their controversial nature.

8 *Daimler Finance Services. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 161 (22 August 2012) [hereinafter *Daimler Finance Services v. Argentina*].