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# Justice for Nazi and Communist Era Property Expropriation Through International Investment Arbitration

KATHRYN LEE BOYD, THOMAS WATSON AND KARLY VALENZUELA\*

## I. INTRODUCTION

In the more than seventy years since the end of World War II and the more than twenty-five years since the fall of the Iron Curtain, Poland has not passed comprehensive legislation to provide restitution or just compensation for property that the Nazis or Communists unlawfully expropriated. As a result, the vast majority of the surviving property owners and their heirs, including Holocaust survivors, have not had any measure of justice. Poland is not alone in its failure. Other former Communist countries, including Romania, have implemented legislation to address unlawful expropriation, but this legislation has failed to provide justice because of corruption in the judiciary, the government, and the legal profession. Neither restitution nor just compensation has been provided to the victims consistently.

To date, most legal efforts to address these failures have been either through use of the existing domestic legal regimes or through the European Court of Human Rights. Both of these avenues have yielded limited success. Yet one potential remedy—arbitration under states' bilateral investment treaties—has been entirely overlooked. For select cases that meet the legal and practical criteria for bilateral investment treaty arbitration, this international remedy should provide a valuable means to address the continuing failure by Poland and other countries to provide restitution or just compensation for Nazi and Communist era takings.

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## II. BACKGROUND: PROPERTY EXPROPRIATION

During and after World War II, many countries in Central and Eastern Europe engaged in mass expropriations of property. As is well-documented, as the Nazis seized power, they persecuted disfavored groups, including political activists, the handicapped, homosexuals, Jehovah's Witnesses, the Roma, and the Jews, whom they particularly targeted for "utter annihilation."<sup>1</sup> The Nazis and their agents confiscated real property, businesses, art, jewelry, and anything else of value. Others took over property after its owners fled from, or were killed by, the Nazis.

Following World War II, some survivors or their heirs returned to reclaim their property. In Poland, for example, many Jews who had fled to Russia or elsewhere returned to Warsaw, filing claims for their real property under the Bierut Decree. At the same time, Communists in Poland seized and consolidated their power. Once they took control, Poland rejected or never acted upon most post-war claims for the return of property under the Bierut Decree. Instead, Poland simply took control of most of the properties previously expropriated by the Nazis.

Communist governments in Poland and elsewhere in Central and Eastern Europe also targeted portions of their populations and expropriated additional real estate and businesses that had not been taken by the Nazis. For example, in Romania, the Communist takeover that started in 1945 and consolidated in 1947 when Romania was declared a "people's democracy," brought with it a concerted state-led campaign designed to change the entire property structure of the State. The Romanian government sought to eradicate foreign property (other than Soviet-Romanian joint forums), reduce private property ownership to a minimum, and greatly expand state property (equated with "the property of all people"). The Romanian government's policies actively targeted and discriminated against businesses owned and operated by foreigners, and ethnic or religious minorities. Expropriation of private property was codified in a series of legislation, including Law 187/1945, Law 119/1948, and Decree 303/1948.

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1. See Yad Vashem World Holocaust Remembrance Ctr., *Frequently Asked Questions*, UN.ORG, <http://www.un.org/en/holocaustremembrance/docs/FAQ%20Holocaust%20EN%20Yad%20Vashem.pdf> (last visited Oct. 8, 2018). For more information on the background of Holocaust-era stolen property in Eastern Europe, see EUROPEAN SHOAH LEGACY INST., *IMMOVABLE PROPERTY RESTITUTION STUDY 2014–2017*, <http://www.shoahlegacy.org/storage/app/media/2.1/2.1.4.2%20Immovable%20Property%20Restitution%20Study.pdf>; MICHAEL BAZYLER, *HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* (2016).

Thus, property in Poland, Romania, and in much of the rest of Central and Eastern Europe was often subjected to two confiscations.

### III. POST-COMMUNISM RESTITUTION EFFORTS HAVE LARGELY FAILED

Despite having enshrined rights to property in their new constitutions, many post-Soviet Bloc countries still struggle to address restitution of private property belonging to citizens who (i) were killed in the Holocaust, (ii) were killed in the War, (iii) were forced to flee, or (iv) had their property nationalized by the Communists. Failing to address these wrongful takings perpetuates the injustices of the War and Communist era. This failure is particularly egregious in Poland, the pre-War home of millions of Jews who were killed or displaced during the War. Poland now benefits from its use of billions of dollars of property that is lawfully the property of the Jewish survivors and their families.

The failure to provide restitution or just compensation for these takings violates international norms. International law generally requires countries to provide restitution or just compensation for unlawful takings of property of foreign citizens by a state. Restatement (Second) of Foreign Relations Law § 185 (1965) provides that:

The taking by a state of property of an alien is wrongful under international law if either:

- (a) it is not for a public purpose,
- (b) there is not reasonable provision for the determination and payment of just compensation, as defined in § 187, under the law and practice of the state in effect at the time of taking, or
- (c) the property is merely in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction, and is not required by the state because of serious emergency.<sup>2</sup>

Similarly, Section 186 provides that: “[f]ailure of a state to pay just compensation for taking the property of an alien is wrongful under international law, regardless of whether the taking itself was wrongful under international law.”<sup>3</sup>

In the context of the Holocaust, all takings violate international law. As held by the United States Court of Appeals, District of Columbia Circuit, genocidal expropriations constitute “tak[ings] in violation of international law.”<sup>4</sup>

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2. Restatement (Second) of Foreign Relations Law § 185 (1965).

3. *Id.* § 186.

4. *Simon v. Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016) (quoting 28 U.S.C. § 1605(a)(3)).

Further, restitution or just compensation is a moral imperative. Among other moral bases for restituting property, particularly in the context of the takings during and right after the War, the theory of restorative justice provides a conceptual framework for repairing the harms caused by the mass crimes of the Holocaust and post-war property thefts by Soviet Bloc regimes.<sup>5</sup> Restorative justice makes central the experiences and needs (material, emotional, and moral) of victims—and the heirs of the victims—and returns ownership over the resolution of the wrong, crime and harm to those primarily affected (i.e., survivors) and those who are in a position to make meaningful reparations (i.e., post-Communist governments). Restorative justice emphasizes material and practical solutions to address victims' losses, and restitution and compensation in a restorative framework play instrumental and symbolic roles in repairing relationships from the perspective of the victims.<sup>6</sup>

Now, decades after the transition to democracy, there still has been little or no justice for many pre-War property owners and their heirs. No adjudication by impartial tribunals. No restitution to the original owners or their heirs. No compensation paid under internationally-acceptable standards of "just compensation."<sup>7</sup> And the time to provide even a small measure of justice to the survivors is quickly vanishing, as it is more than seventy years since the end of the War.

It is true that, following the fall of the Iron Curtain, many former Eastern Bloc countries have instituted property restitution or compensation schemes or allowed civil court proceedings that address restitution or compensation. These efforts, however, have in many cases provided no effective remedy at all for at least three reasons. First, most survivors and their heirs never learn of their rights because the schemes include inadequate provisions for notifying potential claimants. Second, the restitution schemes fail to provide adequate procedural and substantive provisions. For example, many contain severe limitations on the ability of claimants to seek restitution or compensation, such as time limitations, citizenship requirements or other legal hurdles to proving a claim, and most also severely limit the remedies available. Third, the

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5. See generally Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377 (2006).

6. See 1 JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION* § 2:39 (4th ed. 2017); see generally Lee Taft, *When More Than Sorry Matters* 13 PEPP. DISP. RESOL. L.J. 181 (2013). See also CENTRE FOR JUSTICE & RECONCILIATION, <http://restorativejustice.org/#sthash.VDQ1wa5s.dpbs> (last visited May 20, 2018).

7. See MICHAEL J. BAZYLER, LEE CRAWFORD BOYD, KRISTEN L. NELSON, AND RAJKA L. SHAH, *SEARCHING FOR JUSTICE: FULFILLING THE TEREZIN DECLARATION AND POST-HOLOCAUST IMMOVEABLE PROPERTY RESTITUTION* (forthcoming 2019).

schemes fail because of the: (i) weakness of the newly-established democratic institutions, including incompetence and corruption in the government and judiciary, (ii) opportunism by those who found themselves in political leadership post-communism, (iii) fraud by opportunists posing as pre-war owners, or (iv) difficulty in balancing the competing interests of the tenants occupying stolen real estate and the original owners who were illegally deprived of their private property.<sup>8</sup>

Poland has allowed restitution and compensation claims to be brought in its court system. For example, the remedy of restitution (via a perpetual usufruct) is provided for by the 2016 Small Reprivatization Statute and the 1945 Bierut Decree for confiscated private property in Warsaw. But these processes are deeply flawed and wholly inadequate; claims take years to be addressed, are subject to cumbersome, if not corrupt, court procedures, and often result in the denial of objectively valid claims.

Moreover, Poland, alone among major European countries, has failed to pass comprehensive legislation to address restitution and compensation. While the Polish government has recently published proposed “comprehensive” legislation to address confiscations,<sup>9</sup> the proposed law would in fact prevent most persons, including Holocaust survivors, from obtaining any restitution or compensation.

The proposed “reprivatization” law fails to meet basic standards of international law requiring non-discrimination, due process, and fair and equitable treatment of foreign nationals before courts and administrative tribunals. Most egregiously, as described below, this newly proposed law would (i) extinguish all pending cases where property owners are attempting to enforce their rights to some remedy under Polish law, and (ii) exclude most foreigners from restitution, specifically Jewish survivors of the Holocaust (who fled Poland or were sent to concentration camps outside of Poland) and their heirs (who settled outside of Poland after communism).<sup>10</sup>

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8. See generally Brian Kramer, *A Crusading Lawyer’s Battle for Restitution*, HAMODIA (Oct. 24, 2017), <http://hamodia.com/features/crusading-lawyers-battle-restitution/>.

9. See Duża Ustawa Reprywatyzacyjna [Large Reprivatisation Act] Ministerstwo Sprawiedliwości [Ministry of Justice] (Oct. 20, 2017) <https://www.ms.gov.pl/pl/informacje/news,9903,duza-ustawa-reprywatyzacyjna.html>.

10. See Yitz Wiener, *World Jewish Restitution Organization “Profoundly Disappointed” at Proposed Polish Property Legislation that would Exclude Vast Majority of Holocaust Survivors and Their Families*, WORLD JEWISH RESTITUTION ORG. (Oct. 23, 2017), <https://wjro.org.il/world-jewish-restitution-organization-profoundly-disappointed-proposed-polish-property-legislation-exclude-vast-majority-holocaust-survivors-families/>.

The experience in Romania is similar. While Romania did pass restitution legislation, there is documented corruption within the restitution mechanisms put in place. Romania's legal system does not operate independently of the government, and the judiciary is not functional or independent. In the 2001 Regular Reports, the European Commission noted the disappointing implementation of the restitution laws.<sup>11</sup> As the 2016 European Union's monitoring report reiterated, "[t]here are improved steps to tackle general corruption, but not on the scale and with the political will required to address what is widely recognised as a systemic problem."<sup>12</sup>

A common tactic that is used in Romania is to unreasonably prolong restitution proceedings through a seemingly never-ending cycle of appeals and reviews.<sup>13</sup> The European Court of Human Rights ("ECHR") has found Romania in violation of the Convention on Human Rights on several occasions, "in view of the ineffectiveness of the restitution system and, in particular, of delays in the procedure for payment of compensation."<sup>14</sup> According to the Annual Report of the National Property Restitution Authority, ten years after the entry into force of Romania's first property restitution law, Law 10/2001, forty percent of over 200,000 claims registered under that law remained unresolved.

#### IV. INVESTMENT TREATY ARBITRATION PROVIDES A VALUABLE REMEDY FOR STATES' FAILURE TO PROVIDE RESTITUTION OR JUST COMPENSATION FOR NAZI AND COMMUNIST ERA EXPROPRIATIONS

An overlooked mechanism for seeking justice for property expropriated by the Nazis or Communists is international arbitration under bilateral investment treaties ("BITs"). Claimants who meet certain

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11. See Comm'n of the Eur. Communities, *Regular Report on Romania's Progress Towards Accession*, SEC (2001) 1753 (Nov. 13, 2001).

12. *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism*, at 13, COM (2016) 41 final (Jan. 27, 2016).

13. See European Commission Press Release Speech/13/677, Justice Commissioner, The EU and the Rule of Law – What next? (Sep. 4, 2013); *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*, at 6, COM (2015) 35 final (Jan. 28, 2015) (making a number of additional recommendations in judicial reform, independence and integrity, as well as the fight against corruption, meant "to make the justice more efficient and accountable and to increase its quality.").

14. *Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, Final Judgment, Eur. Ct. H.R. ¶ 183 (Oct. 12, 2010) (citing *Viașu v. Romania*, App. No. 75951/01, Judgment, Eur. Ct. H.R. ¶¶ 71-72 (Dec. 9, 2008)). See *Matache and Others v. Romania*, App. No. 38113/02, Decision, Eur. Ct. H.R. ¶ 42 (Oct. 19, 2006).

jurisdictional requirements may commence an international arbitration against countries that have failed to provide remedies for illegally confiscated properties, or countries where there are remedies but no effective means to obtain them, by utilizing the provisions of relevant BITs. Through the use of BITs' dispute resolution procedures, claimants may bring claims where, for example, the state has failed to provide effective means through which the claimant could pursue her claims or where the claimant has not been accorded fair and equitable treatment by the state's courts. BITs can thus provide a means for righting some of the wrongs of past illegal confiscations and a solution for the ongoing failure to provide compensation and restitution.

The now-ubiquitous BITs are agreements made between two countries that establish the terms and conditions, including rights and protections, for private investment by nationals and companies of one signatory in the territory of the other. Poland has approximately sixty BITs currently in force, entered into in the late 1980s and 1990s, including ones with Israel, the United Kingdom, and the United States.<sup>15</sup> Similarly, Romania has seventy-eight BITs currently in force.<sup>16</sup> Other Central and Eastern European nations also have entered into numerous BITs.<sup>17</sup>

Many BITs contain broad substantive protections and compulsory arbitration clauses that offer a method of resolving disputes that may prove to be quite effective for claimants facing the barriers of corrupt governments and ineffective or non-existent restitution laws. Most BITs are separated into several sections. The following are the most relevant for the topics discussed in this article: (1) a definition section, which often includes a broad definition for the "investments" covered by the BIT; (2) a list of the obligations, protections, and prohibitions the contracting states have agreed to adhere to with regard to the foreign investments of investors from the other signatory; (3) standards for expropriation and compensation; and (4) dispute resolution provisions.

The following sections briefly discuss how claimants might have jurisdiction to raise an investment treaty claim and the types of claims that could be brought under the various provisions of typical BITs.

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15. See *Poland—Bilateral Investment Treaties*, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/168> (last visited Mar. 29, 2018).

16. See *Romania—Bilateral Investment Treaties*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/174> (last visited Mar. 29, 2018).

17. See *generally International Investment Agreements Navigator*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Mar. 29, 2018).

### A. Important Definitions

#### 1. "National" of a Contracting State

The investment arbitration regime is based on the principle that its protections extend to investors who are nationals of a state other than the state in which the investment is made (i.e., the host state).<sup>18</sup> As a preliminary matter, the claimant's nationality determines whether the investment may benefit from protection under a BIT and which BIT applies.

The term "national" is typically defined in the relevant BIT. For example, in the U.S.-Poland BIT, "national" is defined as "a natural person who is a national of a Party under its applicable law."<sup>19</sup> The United States Model BIT defines "national" of the United States as "a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act."<sup>20</sup> The U.S. Immigration and Nationality Act defines "national of the United States" as: "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."<sup>21</sup> Thus, a U.S. citizen could bring an investment claim against Poland under the U.S.-Poland BIT.

Without going into too much detail, the ability to bring investment claims under BITs becomes more complicated if the claimant is a dual national. The general rule is that when the claimant is an individual with dual nationality of the two contracting parties, the individual: (i) is precluded from pursuing a claim at the International Centre for Settlement of Investment Disputes ("ICSID"),<sup>22</sup> but (ii) may not be precluded, in the non-ICSID context, from pursuing a claim against the state where the investment is found, "but to do so must demonstrate that her home state nationality is predominant both at the date of the alleged injury and at the date of the submission of the claim."<sup>23</sup>

In the case of private property restitution, BITs thus provide an avenue for diaspora who had their investments expropriated by their

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18. See CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 156 (2017).

19. Treaty Concerning Business and Economic Relations, U.S.-Poland, art. I, Mar. 21, 1990, 29 I.L.M. 1194 (entered into force Aug. 6, 1994) [hereinafter U.S.-Poland BIT].

20. 2012 U.S. Model Bilateral Investment Treaty, art. 1 (model treaty).

21. 8 U.S.C. § 1101(a)(22) (1993).

22. ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other

States, art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.

23. MCLACHLAN ET AL., *supra* note 18, at 183.

original homeland, as well as for their heirs who have begun new lives outside of the original homeland, to bring claims.

## 2. Expropriated Property as BIT “Investments”

A threshold question to the jurisdiction of an investment treaty tribunal is whether the claimants have an “investment” in the territory of the respondent state that is covered by the definition provided in the BIT. Most BITs with western countries that were entered into post-communism—and therefore decades after the confiscations at issue—have broad definitions of “investment,” which include *claims* to property and money.

For example, the U.S.-Romania BIT expressly covers “every kind of investment in the territory” of one state owned or controlled directly or indirectly by nationals or companies of the other state, “such as equity, debt, and service and investment contracts; and includes:”

(i) movable and immovable, property and tangible and intangible property, including rights such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interest in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, including concessions to to [sic] search for, extract, or exploit natural resources, and any license and permits pursuant to law.<sup>24</sup>

The plain language encompasses the typical types of private property being sought by the victims of the Nazi and communist regimes, such as buildings and companies. In many instances, several of the categories enumerated in the BITs may cover claims to such property. For example, where the Communists took over ownership of a factory seized by the Nazis, the owners would have (i) an investment in “property,” i.e., ownership of the factory building (since the seizure itself was unlawful and therefore not a lawful change of title) and (ii) an

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24. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Rom.-U.S., art. I, May 28, 1992, S. TREATY DOC. No. 103-26 (entered into force Jan.15, 1994) [hereinafter Rom.-U.S. BIT].

investment in that they have a “claim to money” for the expropriation. Similarly, the factory may have been owned by a company, giving the owners an investment in “a company or shares of stock or other interests in a company or interest in the assets thereof.”<sup>25</sup>

Further, each of these investments would therefore have been in existence at the time the BIT became effective, usually in the 1990s, and accordingly should be covered under the BIT’s jurisdictional provisions. For example, the U.S.-Poland BIT provides, “[t]his Treaty shall apply to investments and associated activities and to commercial activities existing at the time of entry into force as well as to investments made or acquired and commercial activities undertaken while this Treaty is in force.”<sup>26</sup>

Nonetheless, countries may argue that the actual wrongful conduct predated the BITs and therefore should not be covered. However, a claim to restitution of the factory discussed above, for example, is arguably one where original ownership never lawfully passed to the Communists because the original taking violated international law. Thus, the wrongful act, i.e., possession in violation of international law, continues to the present day and therefore falls within the BITs’ purview.

Similarly, claims to money were in existence “at the time of entry into force” so they too should be covered “investments.” Importantly, a claim to money persists even if the original investment no longer exists.<sup>27</sup> This means that, even if the original property has been destroyed, a claimant could still bring a claim under the BIT because her claim to money still exists as a valid investment.

Survivors and their heirs may have another “investment” as a result of a state’s actions in connection with restitution. A state may create a new right to property, or revive a right, by passage of a restitution law or, where claims are brought in a state, by acknowledging the claim to the property or compensation. The state thereby recognizes a proprietary interest that is an “investment” since it is a “claim to money” or a “claim

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25. See *e.g.*, *id.*

26. U.S.-Poland BIT, *supra* note 19, art. XIV.

27. See, *e.g.*, *Jan de Nul N.V., Dredging Int’l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 135 (June 16, 2006) (agreeing with the proposition that “not only is it stated ‘nowhere . . . that the investment should still be in existence when the dispute arises’ but also and more importantly, ‘should this be the case the entire logic of investment protection treaties would be defeated’”); *Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, ¶¶ 191-193 (Dec. 1, 2008) (interpreting definition of “investment” to “resolve[] the concern expressed in . . . *Jan de Nul* that an investor whose investment was definitely expropriated would hold a claim to compensation but would technically no longer hold any existing ‘investment’”).

to performance having economic value.”<sup>28</sup> An agency or administrative decision by the local authority recognizing that a previous owner of property is entitled to reparation for a pre-BIT expropriation may also create a proprietary interest that is an “investment” under the BIT in the form of a claim to money or claim to performance. If the state then expropriates that claim to money or claim to performance or denies the owner of the claim protections afforded by the BIT and customary international law, this gives rise to an expropriation claim under the BIT that post-dates the enactment of the BIT.<sup>29</sup>

The ECHR has found that these types of actions by the state are sufficient to give rise to a proprietary interest protected by the Convention on Human Rights. “An administrative decision by the local authority recognizing the applicant’s entitlement to compensation was sufficient to give rise to a ‘proprietary interest’ protected by Article 1 of Protocol No. 1 [of the Convention on Human Rights and] consequently, the failure to enforce that decision amounted to interference with the meaning of the first paragraph of that Article.”<sup>30</sup> The ECHR has also found that “failure to enforce an administrative decision recognizing entitlement to compensation and fixing the amount”<sup>31</sup> and that “failure to enforce a court

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28. Rom.-U.S. BIT, *supra* note 24, art. I(iii).

29. *ATA Construction, Industrial & Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010) is instructive here. The claims in *ATA v. Jordan* related to the annulment by the Jordanian courts of a final arbitral award rendered in favor of claimant, following a dispute over the collapse of a dike constructed by the claimant for an entity controlled by the Jordanian state. The claimant submitted that the violations of the applicable BIT included, among other things, the unlawful expropriation of the claimant’s claims to money and rights to legitimate performance under the construction contract and the final arbitral award. *Id.* ¶ 37. The tribunal had no difficulty deciding that the claims to money arising out of the construction contract, including the arbitration dispute, constitute an investment. The tribunal based its rationale on the fact that “an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.” *Id.* ¶ 96. For this reason, the tribunal concluded that the right to arbitration is a distinct “investment” within the meaning of the BIT because [the BIT] defines an investment *inter alia* as “claims to . . . any other rights to legitimate performance having financial value related to an investment.” The right to arbitration could hardly be considered something other than a “right . . . to legitimate performance having financial value related to an investment.” *Id.* ¶ 117.

30. *Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, Final Judgment, Eur. Ct. H.R. ¶ 183 (Oct. 12, 2010) (citing *Viașu v. Romania*, App. No. 75951/01, Judgment, Eur. Ct. H.R. ¶¶ 71-72 (Dec. 9, 2008)). See *Rădulescu v. Romania*, App. No. 15851/06 Eur. Ct. H.R. ¶¶ 20-22 (May 27, 2010), <https://hudoc.echr.coe.int/eng/#%7B%22itemid%22:%5B%22001-98870%22%5D%7D>; Protocol to the Convention for the Protection on Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 2889 (“[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”).

31. *Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, Final Judgment, Eur. Ct. H.R. ¶ 181 (Oct. 12, 2010) (citing *Elias v. Romania*, App. No. 32800/02, Judgment, Eur. Ct. H.R. ¶ 21 (May 12, 2009)).

decision recognizing entitlement to compensation, even where the amount of the award has not been fixed” constitute violations of Article 1 of Protocol No. 1 to the Convention on Human Rights.<sup>32</sup>

Thus, depending on the definition of “investment” in the relevant BIT, an investment may exist when a state acknowledges an individual’s entitlement to compensation for the expropriated property. If those new interests are then expropriated or not provided with the fair and equitable administrative and judicial treatment required under the applicable BIT, a BIT claim arises and jurisdiction would be satisfied.

### *B. Obligations and Protections Provided for in BITs*

The substantive rules guaranteed to “investors” and applicable to their expropriation claims are grounded in the text of the relevant bilateral treaty. Generally, the obligations undertaken by the signatories to a BIT require these countries to provide the investments of the state’s investors with the following: (1) fair and equitable treatment; (2) full protection and security; (3) treatment no less favorable than that required by international law; (4) national treatment, which means treatment as favorable as that provided to the nationals of its own country; (5) most favored nation treatment, which means treatment as favorable as that given to nationals of third-party countries; and (6) effective means of asserting claims and enforcing rights when disputes arise out of their investments.<sup>33</sup>

Additionally, BITs generally include provisions that prohibit the states from engaging in conduct or implementing measures that are arbitrary or discriminatory to foreign investments.<sup>34</sup> Some BITs also require that a government observe its own obligations established by the state to protect investors, a provision commonly referred to as an “umbrella clause.”<sup>35</sup>

With respect to Nazi and Communist era takings, potential BIT claims may invoke some or all of these investment protections depending on the facts of a given case. For example, a Holocaust survivor who brought claims for an expropriation in the Polish national courts but who did not receive fair and equitable treatment by those courts may have a

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32. *Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, Final Judgment, Eur. Ct. H.R. ¶ 182 (Oct. 12, 2010) (citing *Denes and Others v. Romania*, App. No. 25862/03, Judgment, Eur. Ct. H.R. ¶¶ 46-47 (Mar. 3, 2009)).

33. *See, e.g.*, U.S.-Poland BIT, *supra* note 19, arts. 1-2.

34. *See, e.g.*, Rom.-U.S. BIT, *supra* note 24, art. II(2)(b).

35. *See, e.g., id.*, art. II(2)(c) (“Each Party shall observe any obligation it may have entered into with regard to investments.”).

claim for breach of the fair and equitable treatment and effective means provisions of the applicable BIT.

Breach of one or more treaty obligations by the state triggers its international responsibility and liability to compensate the investor for damages resulting from the breach.

### 1. Obligation to Accord Investments Fair and Equitable Treatment

Foreign investors are typically entitled to “fair and equitable treatment,” which generally means that the host state assumes an obligation to protect the investors’ “legitimate and reasonable expectations” to treatment above the minimum standard of international law.<sup>36</sup>

The fair and equitable treatment standard is broad, and at least some tribunals have concluded that its meaning depends on the specific circumstances of the case at issue. As pointed out by the *Mondev v. United States* tribunal, a “judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”<sup>37</sup> Similarly, the *Waste Management v. Mexico* tribunal noted, “the standard is to some extent a flexible one which must be adapted to the circumstances of each case.”<sup>38</sup>

It is generally agreed, however, that the recurrent elements of the fair and equitable treatment clause are the following: (i) protection of the investor’s legitimate expectations; (ii) transparency; (iii) compliance with contractual obligations; (iv) protection against denial of justice (i.e., procedural propriety and due process); (v) good faith; and (vi) freedom from coercion and harassment.<sup>39</sup>

#### a. Judicial: Denial of Justice

The requirement for fair and equitable treatment encompasses claims for denial of justice.<sup>40</sup> This means that a denial of justice in the

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36. See *Saluka Inv. B.V. (The Netherlands) v. Czech Republic*, Case No. 2001-04, Partial Award, ¶ 302 (Perm. Ct. Arb. 2006). See also *Saluka Inv. B.V. (The Netherlands) v. Czech Republic*, Case No. 2001-04, Partial Award, ¶¶ 285-309 (Perm. Ct. Arb. 2006) (discussing the FET standard as protecting an investor’s legitimate expectations).

37. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 118 (Oct. 11, 2002).

38. *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, ¶ 99 (May 26, 2000).

39. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 145 (2012); Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Development* 118, in August Reinisch, *Standards of Investment Protection* (2008); Ioana Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* 154 (2008).

40. See MCLACHLAN ET AL., *supra* note 18, at 297.

national courts itself constitutes a violation of the fair and equitable treatment standard under the BIT. Denial of justice can take different forms; the most common claims made are denial of access to courts, unreasonable delay, lack of due process, and bias, fraud, dishonesty, or lack of impartiality by the judiciary.<sup>41</sup>

#### b. Legislative: Lack of Regulatory Stability

The requirement for fair and equitable treatment is breached by (i) the introduction of regulations that operate in a discriminatory or arbitrary fashion against the foreign investor,<sup>42</sup> or (ii) state regulatory changes that have a cumulative effect of completely altering the regulatory framework in such a way that virtually eliminates the investor's reasonably expected benefits.<sup>43</sup>

#### c. Executive: Lack of Due Process and Substantive Unfairness

The requirement for fair and equitable treatment may be breached by (i) "a complete lack of transparency and candour in an administrative process" or otherwise by "a manifest failure of natural justice"<sup>44</sup> or (ii) where the impugned measures are substantively "arbitrary, grossly unfair, unjust or idiosyncratic . . . discriminatory [or] exposes the claimant to sectional or racial prejudice."<sup>45</sup>

### 2. Prohibition Against Discriminatory Treatment

Many BITs guarantee non-discriminatory treatment of foreign investments. In the context of investment arbitration, the relevant discrimination is with regard to nationality. Poland, for example, would be in violation of this basic standard if it were to enact restitution laws that only benefit Polish citizens.

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41. See, e.g., JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 176-206 (2005); Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 654 (July 28, 2008); Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶¶ 102-103 (Nov. 1, 1999).

42. See, e.g., Merrill & Ring Forestry LP v. Canada, ICSID Case No. UNCT/07/1, Award, ¶ 233 (Mar. 31, 2010).

43. See, e.g., El Paso Energy Int'l Co. v. Argentina, ICSID Case No. ARB/03/15, Award, ¶ 517 (Oct. 31, 2011).

44. See, e.g., Waste Management, ICSID ARB(AF)/98/2 ¶ 98.

45. *Id.*

### 3. Prohibition Against Arbitrary and Discriminatory Measures

Whether an arbitrary and discriminatory measure has been employed by the state's judicial or administrative process overlaps to some extent with the standard of fair and equitable treatment. Therefore, one particular set of facts may violate both the fair and equitable treatment standard and the prohibition against arbitrary and discriminatory measures.

#### a. Arbitrary Measures

An arbitrary measure has been characterized as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”<sup>46</sup> “[T]he underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.”<sup>47</sup>

#### b. Discriminatory Measures

There are different types of protection against discrimination available in most BITs. For example, the U.S.-Romania BIT provides:

Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable.<sup>48</sup>

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.<sup>49</sup>

The BIT language specifically provides for protection against discrimination on the basis of nationality by stating that the investments of the contracting parties cannot be treated less favorably than national investments (often called the “national treatment” standard); it also provides protection against discrimination on the basis of nationality by stating that the investments of the contracting parties cannot be treated less favorably than any third country investments (often called the “most favored nation” standard).

In *BG Group Plc. v. The Republic of Argentina*, the tribunal noted that a measure in breach of the national treatment or most favored nation

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46. *Elettronica Sicula SpA (ELSI) v. Italy*, Judgment, 1989 I.C.J. Rep. 15, ¶ 128 (July 20, 1989).

47. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision, ¶ 263 (Mar. 28, 2011).

48. Rom.-U.S. BIT, *supra* note 24, art. II(1).

49. *Id.* art. II(2)(b).

standards would inevitably be discriminatory in relation to the provision on arbitrary or discriminatory measures.<sup>50</sup> Thus, the prohibition against arbitrary and discriminatory measures should encompass all forms of discrimination, including discrimination on the basis of nationality.

#### 4. The State's Obligation to Provide Effective Means to Assert Claims and Enforce Rights

The effective means clause is a guarantee that investors and their investments all be granted actual and proper mechanisms to assert their claims and enforce their rights when necessary. Article II(6) of the U.S.-Romania BIT provides an example: "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."<sup>51</sup> The language in this clause envisions not only the existence of the proper mechanisms for asserting claims and enforcing rights, but also that these mechanisms be effective.

While the right to effective means is an independent and specific treaty obligation, claims for denial of justice go hand in hand with claims that a state has failed to provide effective means to assert claims and enforce rights.<sup>52</sup> Thus, it seems to be the case that many of the same claims can be brought under both provisions. In *Chevron v. Ecuador*, for example, the tribunal compared the effective means standard with the rules on denial of justice.<sup>53</sup> The tribunal found that the effective means standard is "distinct and potentially less demanding" than the denial of justice standard.<sup>54</sup> Accordingly, "a failure of domestic courts to enforce rights 'effectively' will constitute a violation of the effective means standard, which may not always be sufficient to find a denial of justice under customary international law."<sup>55</sup>

The effective means standard applies to a variety of state conduct having an effect on the investor's ability to assert claims or enforce rights.<sup>56</sup> In *Chevron*, the tribunal applied the effective means standard to

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50. See *BG Grp., Plc. v. Republic of Argentina*, Final Award, ¶ 355, (Perm. Ct. Arb. 2007).

51. Rom.-U.S. BIT, *supra* note 24, art. II(6).

52. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 391 (Aug. 18, 2008) (noting that the effective means clause "guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice.").

53. See *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, Partial Award on the Merits, ¶ 244, IIC 421 (Mar. 30, 2010).

54. *Chevron Corporation*, ¶ 244.

55. *Id.*

56. See *id.* ¶ 248.

the claim that the Ecuadorian courts had unreasonably delayed resolving the claimant's lawsuits.<sup>57</sup> The tribunal reasoned that "[f]or any 'means' of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means."<sup>58</sup> Under the effective means standard, Ecuador's legal system was required to provide foreign investors with the means of enforcing legitimate rights *within a reasonable time*.

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57. *See id.* ¶ 249.

58. *Id.* ¶ 250.

## 5. The State's Obligation to Observe Investment Obligations Under Umbrella Clauses

Typically, “umbrella clauses” are thought to address contracts the state has entered into with respect to foreign investments. For example, the U.S.-Romania BIT provides that “[e]ach Party shall observe *any obligation* it may have entered into with regard to investments.”<sup>59</sup> Note, however, that the umbrella clause requirement for governments to observe all obligations undertaken towards investments is not as commonly found in BITs.

While the precise meaning of the types of provisions is not yet the subject of many cases, some tribunals have interpreted broad umbrella clauses like the one found in the Romania-U.S. BIT, to include so-called “unilateral undertakings” by the state reflected in laws, measures, and obligations.<sup>60</sup> Arguably, the various laws enacted by Eastern European countries to protect property and compensate victims from the Communist era are obligations these countries must respect under the umbrella clause. Thus, a failure to abide by these obligations could constitute a breach of a BIT that includes an umbrella clause.

### C. Expropriation Remedies

BITs typically provide that “investments,” defined broadly as discussed above, shall not be expropriated or nationalized. The definition then goes on to list the exceptions to the general rule. Whether an expropriation has occurred is determined on a case-by-case basis by the tribunal. A common BIT provision provides that investments may only be expropriated: “for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in” the section of the BIT outlining the state obligations.<sup>61</sup> Arbitral tribunals have followed the expansion of international law to include other types of expropriatory action by a state other than the outright taking of property, such as legislative or judicial measures tantamount or equivalent to expropriation.<sup>62</sup>

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59. Rom.-U.S. BIT, *supra* note 24, art. II(2)(c) (emphasis added).

60. *See, e.g.*, SGS Societe Generale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision, ¶166 (Aug. 6, 2003); SGS Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision, ¶117 (Jan. 29, 2004).

61. *See, e.g.*, Rom.-U.S. BIT, *supra* note 24, art. III(1).

62. *See* Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, IIC 585, (Apr. 8, 2013); Rudolph Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 73-4 (2002).

States are obliged to make reparations for injuries they cause, including “any damage, whether material or moral, caused by the internationally wrongful act of a State.”<sup>63</sup> The starting point for damages for an expropriation under international law is the obligation of the state committing the international wrong to make reparation by way of restitution or, if this is not possible, to pay monetary compensation for the loss sustained.<sup>64</sup>

Typically, BITs provide a standard for compensation. For example, compensation is sometimes defined as the “equivalent of the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known.”<sup>65</sup> Some BITs provide that the compensation must be payable in a freely usable currency at the market exchange rate, that it be paid without delay, and that it include interest at a reasonable market rate.<sup>66</sup>

Where the BIT claims arise out of an underlying court or administrative proceeding, such as when the “investor” is the holder of a claim for expropriated property and has been denied effective means, tribunals have had to address the question of how to value those underlying proceedings.<sup>67</sup> The *Chorzów Factory* principles have been applied to award compensation if the claimant can prove that she would more likely than not have prevailed on the merits before the state’s courts.<sup>68</sup> Thus, in some instances, the arbitral tribunal must conduct a trial within a trial and ask itself how a competent, fair, and impartial court would have decided the underlying claims.<sup>69</sup>

Arbitral tribunals have substantial discretion when it comes to awarding damages and determining the quantum of compensation. There are various evaluation methods adopted in practice by tribunals, based on the specific facts of the case. For example, if the investment is a business with long-standing profitability, tribunals prefer using the discounted cash flow method (“DCF”); whereas, in cases where the investment does not have apparent profitability, tribunals may prefer to look at an asset-

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63. *Int’l Law Comm’n, Draft Articles on State Responsibility for Internationally Wrongful Acts*, art. 31, U.N. DOC. A/56/10 (2001).

64. *See Factory at Chorzów (Ger. v. Pol.)*, Judgement, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

65. *See, e.g.*, Rom.-U.S. BIT, *supra* note 24, art. III(1).

66. *See, e.g., id.*

67. *See, e.g.*, Saipem S.p.A. v. People’s Republic Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction, (June 30, 2009) (finding that an ICC arbitration award had been expropriated by the actions of the Bangladeshi courts).

68. *See, e.g.*, Chevron Corporation, ¶ 374.

69. *See id.* ¶¶ 374-82.

based approach, such as book value, and apply the relevant interest rate.<sup>70</sup> It should be noted that the question of compensation for expropriation has been a contentious area of international law.<sup>71</sup> However, the general rule that damages should provide “adequate and effective” compensation trends in favor of the investors. Recent tribunal awards have been willing to award damages by way of future profits, applying the discounted cash flow method of valuation.<sup>72</sup>

#### *D. Dispute Resolution Procedures*

Some BITs provide specific dispute resolution procedures, while others contain no specific provisions and offer the opportunity for ad hoc procedures.<sup>73</sup> Some BITs also provide that a case be submitted in the first instance to the host government’s local courts, but if the case has not been resolved within a period of time, then the investor may pursue an international arbitration before ICSID,<sup>74</sup> or some other institution.<sup>75</sup>

Other BITs allow the investor to file an international arbitration proceeding after a specified period of time has elapsed, generally three, six, or twelve months.<sup>76</sup> This is sometimes referred to as a “cooling-off” period. Many BITs prescribe that this time is to be used by the parties to attempt to seek resolution of the investment dispute through consultation and negotiation.<sup>77</sup> To start the cooling-off period, it is advisable that a letter be sent to the relevant parties and to the highest officials of the relevant government agencies to inform them that there is an investment dispute and to invite them to engage in negotiations.

If the dispute cannot be settled amicably, the investor may choose to submit the dispute for resolution via binding arbitration once the requisite cooling-off period has elapsed. BITs typically give investors a

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70. See SERGEY RIPINSKY AND KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 406 (2008).

71. See Oscar Schacter, *Compensation for Expropriation*, 78 AM. J. INT’L L. 121, 121 (1984).

72. See World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, in 2 FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (1992).

73. See MCLACHLAN ET AL., *supra* note 18, at 547.

74. See INTERNATIONAL CTR. FOR SETTLEMENT OF INV. DISPUTES, <https://icsid.worldbank.org/en/#> (last visited Mar. 29, 2018).

75. See, e.g., Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, art. 8 (2008) [hereinafter United Kingdom Model BIT] <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

76. See, e.g., Rom.-U.S. BIT, *supra* note 24, art. VI(3)(a) (noting that six months must have elapsed from the day on which the dispute arose before the claimant can submit the dispute for settlement by binding arbitration).

77. See, e.g., *id.* art. VI(2) (noting that “the parties to the dispute should initially seek a resolution through consultation and negotiation”).

list of options as to where the investor may submit the dispute. For example, the U.S.-Romania BIT allows the investor to choose to submit its case to ICSID arbitration, to the ICSID Additional Facility, to an *ad hoc* arbitration using the UNCITRAL Arbitration Rules, or “to any other arbitration institution, or in accordance with any other arbitrations rules, as may be mutually agreed between the parties to the dispute.”<sup>78</sup>

Many U.S. BITs provide that the investor can submit the dispute to only one of the following: (1) to an international arbitration institution; (2) to the local courts or administrative tribunals; or (3) to a previously agreed upon dispute-settlement procedure.<sup>79</sup> This provision is commonly referred to as the “fork-in-the-road” provision because it requires the investor to choose a dispute settlement procedure. However, tribunals have found that this does not preclude investors from bringing all claims, including claims for denial of justice based on the alleged mistreatment at the hands of the local courts.<sup>80</sup>

### *E. Benefits*

International investment arbitration has various advantages over domestic litigation. BITs confer international law rights directly on individual property owners and investors and provide a procedural means for them to take legal action directly against the host state. Claimants may thus pursue their claims in an international forum designed to hold states accountable under the international agreements they have entered into with other states.

This regime provides universal standards in an impartial venue to resolve international investment disputes without the direct involvement of the investor’s home state. A principal advantage of BITs is the ability for individual investors to access a tribunal outside of the host state, taking away the host state’s hometown advantage and bias and replacing it with a neutral forum. Removing the action from the state responsible for perpetrating the expropriation (or that has failed to provide effective means) diminishes the possibility of having the action tainted by corruption or political influence. This is true at least for two of the three arbitrators that make up a three-person arbitration panel, since the state typically has full discretion in the selection of one of the three arbitrators.

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78. See, e.g., Rom.-U.S. BIT, *supra* note 24, art. VI(3)(a)(iv).

79. See, e.g., *id.* art. VI(2).

80. See, e.g., *Pantechniki S.A. Contr. & Eng’r (Greece) v. Rep. of Alb.*, ICSID Case No. ARB/07/21, Award ¶¶ 93-4 (July 30, 2009).

Investment arbitration decisions offer limited avenues for revision and cannot be amended by the domestic legal system.<sup>81</sup> Arbitration under the ICSID rules is wholly exempt from the supervision of local courts, with awards subject only to an internal annulment process.<sup>82</sup>

A final benefit is that awards rendered against states are not only binding under the relevant BIT, but they are also readily enforceable against host-state property worldwide as a result of the widespread adoption of the New York and Washington (ICSID) Conventions.<sup>83</sup>

#### *F. Practical Limitations*

In addition to the jurisdictional limits discussed above, the fees and costs of international BIT arbitrations will limit their usefulness to claimants whose expropriated property has insufficient value to make international arbitration an effective remedy. Typical proceedings may last two to three years and cost hundreds of thousands of dollars in arbitrators' fees and administrative fees. For example, just the filing fee alone to submit a Request for Arbitration before ICSID is 25,000 USD.<sup>84</sup> Thus, including attorneys' fees and costs, bringing an international arbitration under a BIT typically may require a multimillion-dollar investment.

Survivors and their heirs with claims to expropriated property should not, however, fail to seek counsel if they cannot afford such an investment. Some attorneys and public interest groups committed to Holocaust justice will take BIT arbitrations on contingency arrangements and in the case of substantial recovery, third-party litigation funders may consider funding BIT arbitrations. Thus, the opportunity exists to bring BIT claims even though the up-front fees and costs can be substantial.

#### V. CONCLUSION

Providing some measure of restorative justice for survivors and their heirs must be an urgent moral imperative for the international legal community. For many survivors of Nazi and Communist persecution, and for their heirs who have been thwarted by the lack of remedies to recover

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81. See Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 134-35 (2006).

82. See *id.* at 134-55.

83. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38, *codified at* 9 U.S.C. §§ 201-208 (1982); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

84. ICSID Schedule of Fees, <https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx>.

their property through a functioning and fair judicial system in Poland, Romania, and other transitional democracies, investment treaty arbitrations are another means to be used in the quest for justice for mass genocidal theft and restoration. BIT arbitration claims should provide an alternative international remedy to survivors and their heirs. Holding states accountable for their failure to provide meaningful substantive domestic remedies for historical property expropriations may encourage much-needed reform.