
The intersection of public procurement law and policy, and international investment law

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There is substantial scholarship on the limitations that international investment agreements (IIAs) place on States' authority to regulate in the public interest. An area of fundamental importance that has not received scholarly attention in connection with IIAs is public procurement regulation. Given that public procurement is about the needs of States and their citizens, States would want to retain their authority within municipal public procurement laws to decide with whom to contract to meet those needs, and to pursue socioeconomic and industrial policies through procurement. However, most States are parties to IIAs, which impose obligations on them with respect to the protection of foreign investment. This article explores this seminal issue of whether IIAs stand to limit the authority of States in the implementation of procurement legislation and policies. Based on textual analysis and arbitral case study, it argues that treaty-based standards of investment protection can limit States' authority on the implementation of methods of procurement (such as national competitive tendering or restricted tendering) and socioeconomic policies in procurement. A question that needs fuller engagement is the extent of conflict between specific IIAs and public procurement laws and policies, either regionally or globally, and how to reconcile conflicting obligations to promote foreign investment and sustainable development. This article provides the foundation for such future research.

Keywords: international investment agreements, investment treaties, methods of procurement, national treatment, procurement, socioeconomic policies, standards of investment protection, sustainable development

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1. Introduction

International investment agreements (IIAs), the major source of international investment law, provide for the legal standards of investment protection. The stated aim of investment treaties is to create favourable conditions to attract foreign investors to bring about increased economic prosperity and development, stimulate productive use of resources and strengthen cooperation between the contracting parties.¹ There is voluminous literature on the standards of investment protection by treaty.² The objective of attracting and retaining foreign investment in IIAs and economic partnership agreements with investment provisions (EPAs) generally requires States to abide by treaty terms such as national treatment, most-favoured-nation treatment, fair and equitable treatment, and full protection and security, among others.³ Through these standards, investment treaties have provided legal security for foreign investment but they have also become the basis for investors to challenge policies and measures adopted domestically to protect the public interest through investor–State dispute settlement (ISDS) provisions under these treaties. According to the United Nations Conference on Trade and Development (UNCTAD), in 2019 the number of IIAs reached 3,317 (consisting of 2,932 bilateral investment treaties [BITs] and 385 treaties with investment provisions [TIPs]), of which at least 2,658 IIAs were in force between 1980 and 2018.⁴ ISDS

¹ See the preambles to Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (signed 31 March 1989, entered into force 1 July 1991); Agreement between the Kingdom of Denmark and the Government of the Republic of Ghana Concerning the Promotion and Protection of Investments (signed 13 January 1992, entered into force 6 January 1995); Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments (signed on 8 November 1996, entered into force 18 April 1997); Agreement between the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (signed 12 October 1989, entered into force on 22 November 1991).

² Jeswald Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008); and Reinisch August (ed), *Standards of Investment Protection* (Oxford University Press, 2008).

³ Agreement between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, signed 25 May 1998, entered into force 1 January 1999, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2277/download>; Agreement between the Government of the Hellenic Republic and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments signed 19 November 1998, entered into force 6 September 2001, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1480/download>; and Agreement between the Government of the Republic of Finland and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, signed 14 September 1998, entered into force 3 October 1999, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1215/download>.

⁴ UNCTAD, *World Investment Report 2019: Special Economic Zones* (United Nations, 2019) p. 99.

claims by foreign investors against States, mostly developing countries, reached 942 between 1987 and 2018, out of which 602 were concluded.⁵ The majority of these ISDS cases, decided on the merits, ended up in favour of foreign investors.⁶

The range of issues that foreign investors have challenged and the amount of compensation that has to be paid out of public funds support the proposition that claims for breach of standards of investment protection involves elements of the public interest. Foreign investment, in the words of Amokura Kawharu, “is linked to protection of the environment, human rights and public welfare.”⁷ The challenge that investment protection by treaty and arbitration poses to regulatory autonomy has raised concerns among advocacy groups, academic commentators and governments about the extent to which investment treaties “tip the balance too far in favour of freer capital flows and against the ability of governments to regulate in the public interest.”⁸ Therefore, there is good reason for each State that is party to investment protection agreements to be concerned about their consequences for its autonomy to regulate in the public interest.

In this connection, there is extensive research on the intersection of investment treaties and States’ right to regulate in the public interest under municipal laws and policies in the areas of development policy, environment and human rights.⁹ However, the potential limitations of investment treaties on domestic policy space in the area of procurement law and policy has not been explored in the literature. This article addresses this issue by examining the nature of conflicting legal obligations in public procurement law and policy and international investment law on the basis of textual analysis and case studies of procurement measures that foreign investors have challenged in investor-State arbitration relying on the terms of investment treaties.

⁵ Ibid pp. 103 and 104.

⁶ Ibid p. 104.

⁷ Amokura Kawharu, “International Law’s Protection of Foreign-Owned Property against Uncompensated Expropriation: Preserving Host State Regulatory Freedom” in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Brill, 2011) p. 345

⁸ Ibid p 47.

⁹ See, for example: Jane Kelsey, “Global Economic Policy-Making: A New Constitutionalism?” (1999-2000) 9 *Otago Law Review* 535; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); M. Sornarajah, *The International Law on Foreign Investment* (3d ed, Cambridge University Press, 2010).

Public procurement constitutes a large proportion of public expenditure in most States and involves very important public projects such as those on health, education, infrastructure, energy, utilities and waste management.¹⁰ Accordingly, the achievement of value for money, maximizing the economy and efficiency are critical in most public procurement systems.¹¹ The attainment of these objectives depends on the conduct of procurement by means of a number of methods and tendering procedures including restricted tendering, request for quotations, request for proposals without negotiation, national competitive tendering, international competitive tendering and single-source procurement, depending on the procurement system.¹² Some of these methods and tendering procedures under applicable legislation not only allow, but actually require, States to pursue their domestic policy objectives and interests such as promoting development by supporting domestic businesses through the award of procurement contracts to them. These are reflected, for example, in section 217 of the Constitution of the Republic of South Africa 1996 and section 3(t) of The Public Procurement Act 2003 (Act 663, as amended) of Ghana. However, a State may pursue such an interest of domestic nature through procurement only to the extent that doing so does not conflict with its international legal commitments such as IIAs.

The majority of IIAs do not provide for pre-establishment protection. This raises the question of how public procurement comes within the purview of IIAs in the first place. This article does not seek to argue that IIA protections are mostly, always or even at all available to investors irrespective of whether they have been admitted and established their investments in the host country. Most IIA protections are available after the establishment of the investment. Therefore, this article is written principally against the backdrop of protections available to foreign investors under IIAs upon the establishment of their investments in the host State. The seminal question of the intersection of investment treaties and procurement law and policy has not been pursued in the literature. The predominant focus of this article is situations in which *covered* investors use their substantive rights under investment treaties to challenge the implementation of national procurement laws and policies. The fact that most IIAs do not provide for pre-establishment protections does not mean that covered investors may not use their post-establishment rights under IIAs to challenge procurement decisions that are adverse to their investment interests in the host country. Focusing on how covered investors might use IIA standards

¹⁰ G. Quinot and S. Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013); and Dominic Dagbanja, *The Law of Public Procurement in Ghana: Law, Policy and Practice* (Saarbrücken: Lap Lambert Academic Publishing AG & Co Kg, 2011).

¹¹ Quinot and Arrowsmith, note 10 above.

¹² *Ibid.*

to challenge the implementation of public procurement laws and policies raises an interesting and real legal question of the intersection of investment treaties and public procurement laws and policies and sustainable development.

The specific question to address is the extent to which national competitive tendering, international competitive tendering, restricted (limited) tendering, single-source procurement and socioeconomic and environmental policies in procurement might lead to conflict with standards of investment protection in IIAs such as national treatment, fair and equitable treatment, most-favoured-nation treatment and prohibition against performance requirements. These substantive standards of investment protection apply when the investor has been admitted. Therefore, the discussion focuses on how covered investments and investors may use these standards to challenge the implementation of procurement legislation and policies by relying on the terms of IIAs. Nearly all IIAs obligate contracting parties to *promote and encourage* investments in their territories.¹³ In rare cases, this obligation may constitute a basis for an investor to challenge a contracting State prior to the establishment of an investment.¹⁴ However, this right may not arise in the context of procurement because unless a foreign investor is admitted, it may not be able to claim that it is entitled to the protection of an investment treaty intended for the protection of established investments.

Methodologically, these issues are explored through a review and textual analysis of the substantive standards of investment protection and arbitral decisions involving procurement measures, and implications are drawn therefrom for the implementation of methods and socioeconomic policies in procurement in Australia, Ghana and South Africa. The analysis focuses on these procurement systems in view of the content of applicable procurement legislation, rules and policies that raise potential conflict with standards of investment protection. In the case of Australia, the issue has come up for national debate and legislation as analysed below. Familiarity with these jurisdictions also informed the choice of these public procurement regimes. Ghana borrowed¹⁵ from the 1994 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services,¹⁶ as did most other African countries.¹⁷ Thus, findings on the intersection

¹³ Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, signed 27 November 2009, entered into force 15 October 2010, art .1, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2281/download>.

¹⁴ *Nordzucker AG v The Republic of Poland*, Adhoc, Second Partial Award, 28 January 2009 [2-8]; and *Luigiterzo Bosca v The Republic of Lithuania*, Award, PCA Case No 2011-05, 17 May 2013.

¹⁵ Dagbanja, note 10 above.

¹⁶ UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (Adopted by UNCITRAL ON 15 June 1994) (A/RES/49/54 17 February 1995).

¹⁷ Arrowsmith and Quinot, note 10 above.

of procurement laws and international investment law can be applicable to other countries in Africa that adopted the UNCITRAL Module Law on Procurement.¹⁸ Analysing these three jurisdictions allows for a wider and comparative determination of the implications of standards of investment protection for public procurement regulation based on the experiences of both developed and developing countries. On the basis of these case studies, this article argues that IIAs and ISDS stand to limit the authority of States to acquire goods, services and works and to pursue socioeconomic policies in the manner justified under national procurement laws and policies.

2. The methods of procurement and treaty-based standards of investment protection

An objective of the public tender procedure in procurement “is to reduce the possibility of favoritism and corruption [in the procurement] decision-making process and to maintain integrity in Government’s transactions with private players.”¹⁹ The public tender mechanism is also meant to preserve integrity and deal effectively with the principal agent problem.²⁰ The public tender procedure ultimately ensures that best value for money is achieved.²¹ Best value in the procurement context, “is the provision of economic, efficient and effective services, of a quality that is fit for purpose, which are valued by their customers, and are delivered at a price acceptable to the taxpayers who fund them.”²² A procurement method that invites nationals only can lead to the achievement of this objective. The method defines and shapes the extent to which procurement proceedings will be open for participation. Procurement proceedings may be open for participation by as many prospective bidders as interested, or they may be limited to one or a specified number of suppliers.

¹⁸ For example, many African countries have included socioeconomic and environmental considerations in their procurement legislation. See Geo Quinot, “Promotion of Social Policy through Public Procurement in Africa”, in Arrowsmith and Quinot, note 10 above, pp. 320-403.

¹⁹ Omer Dekel, “The Legal Theory of Competitive Bidding for Government Contracts” (2008) 37(2) *Public Contract Law Journal* 237, 241.

²⁰ *Ibid* 267.

²¹ Australian Government, *Commonwealth Procurement Rules* (Department of Finance, 20 April 2019, Authorised Version F2019L00536 registered 05/04/201) (CPRs herein) rule 4.4 stating: “[a]chieving value for money is the core rule of the CPRs. Officials responsible for a procurement must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome.”

²² Badcoe, P. *Best Value – A New Approach in the UK* in S. Arrowsmith and M. Trybus, (eds), *Public Procurement: The Continuing Revolution* (Kluwer Law International, 2003) p. 197.

2.1 National treatment in IIAs and national competitive tendering and restricted tendering in procurement

Here, national competitive tendering and restricted tendering in procurement are analysed along with the national treatment standard in IIAs to ascertain the extent to which national treatment can limit how governments may go about implementing their procurement legislation. It is important to explain these tendering methods and analyse the implications of national treatment for their implementation.

2.1.1 National competitive tendering and restricted tendering explained

Where national competitive tendering is employed, only national prospective bidders may be invited to participate in the procurement process.²³ Normally, procurement legislation provides for thresholds for national competitive tendering to be used.²⁴ If the cost of procurement falls within the specific threshold, then the use of national competitive tendering becomes mandatory. National competitive tendering by its very nature is exclusionary in the sense that it limits participation in procurement to nationals. This may be justified in the interest of national development and other national priorities. However, as explained below, national competitive tendering when required purely under national procurement regulation can conflict with national treatment requirement under IIAs.

In restricted tendering, only those economic operators invited to submit a tender after the contracting authority has assessed the information provided by the economic operators may make a submission. The underlying reasons for the use of restricted tendering are economy and efficiency. In other words, if using competitive tendering or other methods of procurement will not be the most viable considering the time and resources required, then restricted tendering should be used. Put differently, if the transaction cost associated with the use of a method other than restricted tendering will be disproportionate to the value of the actual procurement, then restricted tendering should be used. This method could, therefore, be described as a *transactional cost-saving method of procurement*.²⁵

²³ The Public Procurement Act 2003 (Act 663) of Ghana s 25, as amended by The Public Procurement (Amendment Act) 2016 (Act 914) (Act 663 herein) s 44(1).

²⁴ Ibid Schedule 3.

²⁵ On transaction cost, see Mikko Ketokivi and Joseph Mahoney, "Transaction Cost Economics as a Theory of the Firm, Management, and Governance", in *Oxford Research Encyclopedia, Business and Management* (Oxford University Press, 2018), <http://business.oxfordre.com/view/10.1093/acrefore/9780190224851.001.0001/acrefore-9780190224851-e-6?print=pdf>.

The use of this method in Ghana is conditioned upon goods, works or services being available from only a limited number of prospective tenderers²⁶ or upon the time and cost required for examining and evaluating a large number of tenders being disproportionate to the value of the goods, works or services to be procured.²⁷ Where restricted tendering is used, invitation for tenders must be made to prospective tenderers who can provide the goods, works or services.²⁸ To ensure effective competition, the procurement entity is required to select, in a non-discriminatory manner, a number of prospective tenderers .²⁹

National competitive tendering and restricted tendering methods by their nature are preferential and exclusionary to the extent that they require procurement entities to exclude prospective participants in procurement. These restrictions or exclusions may very well be justified, taking into consideration the nature of the procurement and applicable legislation involved. Yet, these methods become problematic with respect to compliance with standards of investment protection under IIAs when they become the bases for the selection of nationals against non-nationals. Indeed, apart from international competitive tendering, which obligates procurement entities to open the procurement process for the participation of non-nationals, limiting participation in procurement to nationals can be legally justified under procurement laws and regulations. Decisions made on the basis of national competitive tendering and restricted tendering may nevertheless be found to be in breach of national treatment under IIAs.

2.1.2 National treatment in IIAs and the implementation of national competitive tendering and restricted tendering in procurement

The *national treatment* standard requires that *covered* foreign investors and investments be treated no less favourably than domestic investors and their investments.³⁰ The standard thus focuses on nationality. It seeks to prevent differential treatment that is adverse to the investor; for example, where governments provide assistance, such as tax exemptions, to domestic businesses or other advantages through laws, policies, regulations or administrative actions that are not made available to foreign businesses protected under the applicable investment treaty.

²⁶ Act 663, note 23 above, s 38(a).

²⁷ Ibid s 38(b). *Model Law*, above n 16, art 29(1) and 34(1)(b).

²⁸ Ibid s 39(1)(a).

²⁹ Ibid s 39(1)(b).

³⁰ Ghana–United Kingdom BIT, note 1 above, art. 4(1); Ghana–Netherlands BIT, note 1 above, art. 3(2) and Ghana–Denmark BIT, note 1 above, art. 4(1); and Ghana–United Kingdom BIT, note 1 above, art. 4(2). Ghana–Denmark BIT, note 1 above, art. 4(2).

The goal is to place covered investors and their investments on at least the same footing in terms of competition or some other business advantage as domestic investors.

The application of national treatment depends on the articulation of the obligation in the treaty and facts of each case. To determine whether the host State has breached the national treatment clause, the tribunal in *Total SA v. Argentina* said the investor:³¹

(i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators ... Different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality driven. Accordingly, a foreign investor who is challenging measures of general application as *de facto* discriminatory has to show a *prima facie* case of nationality-based discrimination.

Some investment tribunals also consider the policy justification for measures that have a discriminatory effect. If the measure is not intended to give preferential treatment to domestic investors, a tribunal may find no breach of national treatment.³² The tribunal in *Pope and Talbot Inc. v. Canada* stated that³³

Differences in treatment will presumptively violate [national treatment] unless they have a reasonable nexus to rational government policies that (1) do not distinguish on their fact or *de facto*, between foreign-owned and domestic companies, and (2) not otherwise unduly undermine the investment liberalizing objectives.

The national treatment standard is extremely broad in terms of the scope of investments it seeks to protect, the nature of the treatment of the investments that is prohibited and the subject matter of governmental regulation that may come under the standard. The typical provision as reflected in Article 4(1) of the Ghana–United Kingdom investment treaty states that “[n]either contracting party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party ... to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments” or “as regards their management, maintenance, use, enjoyment or disposal of their investments.” The investment treaties also entitle foreign investors as regards

³¹ *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010 [211-212].

³² *Pope & Talbot v Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001 [79].

³³ *Ibid* at para. [78].

restitution, indemnification, compensation or other settlement to treatment no less favourable than that accorded to nationals whose investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot.³⁴

The phrases “no less favourable treatment” and consequential “losses suffered” have been interpreted by arbitral tribunals very broadly. In *Asian Agricultural Products Ltd. v. Sri Lanka*,³⁵ for example, a claim was made for compensation for the total loss of the investor’s investment in Sri Lanka. It was alleged that the loss resulted from a military operation by governmental forces against an insurgent group. The claim was made under the 1980 Sri Lanka–United Kingdom investment treaty. Article 4 of the treaty required compensation or settlement on terms *no less favourable* than the host country accorded its own nationals for *losses suffered* from the specified events. The tribunal interpreted the phrase “losses suffered” as including “all property destruction which materializes due to any type of hostilities enumerated in the text”.³⁶ According to the tribunal, the mere fact that such losses existed was by itself sufficient to render the provision “applicable, without any need to prove which side was responsible for said destruction, or to question whether the destruction was necessary or not.”³⁷ The investment treaty had no restriction on the scope of application of national treatment. The tribunal interpreted “no less favourable treatment” under the treaty to “cover all possible cases in which the investments suffer losses owing to events identified as including ‘a state of national emergency, revolt, insurrection, or riot’”.³⁸

The national treatment requirement in investment treaties does not specify the industry or subject matter in respect of which it may apply. Therefore, by the national treatment standard, a procurement that is open to nationals must be open to established foreign investors in the host State under the applicable IIA. This can lead to a situation in which any form of regulation in favour of the domestic industry can be attacked by foreign investors established in the host country if

³⁴ Ghana–China BIT, note 1 above, art. 4; Ghana–Malaysia BIT, note 1 above, art. 4; Ghana–Denmark BIT, note 1 above, art. 7; Ghana–Netherlands BIT, note 1 above, art. 7; and Ghana–United Kingdom BIT, note 1 above, art. 5.

³⁵ *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, brought under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, signed 13 February 1980, entered into force 18 December 1980.

³⁶ *Ibid* [65].

³⁷ *Ibid*.

³⁸ *Ibid* [66].

such favourable regulation is not extended to the foreign investors, who may feel disadvantaged. Thus, as Anthony VanDuzer, Penelope Simons and Graham Mayeda argue:³⁹

National treatment is one of the most significant obligations found in IIAs, in part because host state measures that discriminate in favour of domestic firms are often tied closely to national development goals and are politically very sensitive. Most host states have some programmes that grant advantages exclusively to domestic businesses in order to encourage their growth and their ability to compete with foreign investors.

It follows from the preceding analysis that the implementation of procurement legislation can conflict with national treatment under IIAs because both norms impose contradictory obligations. The conflict can also arise because of the adverse impact of implementing procurement legislation on rights accorded to admitted foreign investors and their investments under IIAs even if the procurement measure is not directly prohibited by an IIA. This conflict may narrow the policy space for the pursuit of socioeconomic policies in procurement that can promote sustainable development.

3. Socioeconomic policies in procurement and treaty-based standards of investment protection

3.1 Ghana

The use of procurement to promote the social and economic policies protecting domestic industry, through, for example, the employment of single-source procurement, may also lead to conflict with standards of investment protection such as national treatment, fair and equitable treatment, and prohibition against performance requirements in IIAs. Procurement laws are commonly used to promote objectives other than the primary objective of best value for money. These policies may range from “environmental concerns to labour and equality, industrial development and economic growth, crime prevention and social concerns such as poverty alleviation and wealth distribution.”⁴⁰ These objectives are variously described as *social* policies, *secondary* policies, *horizontal* policies or *collateral* policies in procurement.⁴¹

³⁹ Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, August 2012) p. 112.

⁴⁰ Quinot, note 18 above, 320.

⁴¹ Ibid; Cibinic Jr., J., and Nash Jr., R. *Formation of Government Contracts* (Kluwer Law, 3d. ed., 1998) at 1403; and Sue Arrowsmith, *Social and Environmental Policies in European Community Procurement Law* (Cambridge University Press, 2009).

In Ghana single-source procurement applies when procurement is made from only one prospective tenderer.⁴² The use of single-source procurement is justified where any of the following is established:

- a) Where goods, works or services are available only from a particular prospective tenderer.
- b) If a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists.⁴³
- c) Where there is an emergency or catastrophic event.⁴⁴
- d) For purposes of standardization,⁴⁵ compatibility with existing goods, equipment and technology.⁴⁶
- e) Where the proposed procurement is limited in comparison with the original procurement.⁴⁷
- f) For research and development contracts.⁴⁸
- g) For national security reasons.⁴⁹

Another requirement for the use of single-source procurement is “where there is an urgent need for the goods, works or services and engaging in tender proceedings or any other method of procurement is impractical due to unforeseeable circumstances giving rise to the urgency which is not the result of dilatory conduct on the part of the procurement entity.”⁵⁰ The requirements for the use of single-source procurement are thus three: (1) there must be urgent need for the subject matter of the intended procurement; (2) engaging in tender proceedings or any other method of procurement must be impractical; and (3) the impracticality of engaging in tender proceedings or using any other method of procurement must be due to urgency resulting from unforeseeable circumstances (the urgency must not result from delay on the part of the procurement entity).

A procurement entity may also engage in single-source procurement where procurement from a particular supplier or contractor is necessary in order to promote a specific policy allowed in the public procurement legislation and procurement

⁴² Model Law, note 16 above, art 29(2) and 34(2).

⁴³ Act 663, note 23 above, s 40(1)(a).

⁴⁴ *Ibid* s 40(1)(c).

⁴⁵ *Ibid* s 40(1)(d)(i).

⁴⁶ *Ibid* s 40(1)(d)(ii).

⁴⁷ *Ibid* s 40(1)(d)(iii).

⁴⁸ *Ibid* s 40(1)(e).

⁴⁹ *Ibid* s 40(1)(f).

⁵⁰ *Ibid* s 40(1)(b).

from another supplier or contractor cannot promote that policy.⁵¹ The determination of the lowest evaluated tender must, in those circumstances, be based on the effect the acceptance of the tender will have on⁵²

- a) The balance of payments position and foreign exchange reserves of the country.⁵³
- b) The countertrade arrangements offered by suppliers or contractors.⁵⁴
- c) The extent of local content.⁵⁵
- d) The economic development potential offered by tenders, including domestic investment or other business activity.⁵⁶
- e) The encouragement of employment.⁵⁷
- f) The reservation of certain production for domestic suppliers.⁵⁸
- g) The transfer of technology.⁵⁹
- h) The development of managerial, scientific and operational skills.⁶⁰
- i) National security considerations.⁶¹

The underlying objective of such an approach is to promote national developmental, technological, employment and financial goals. This suggests that procurement is not just a system of substantive laws and procedures for the procurement of works, services or goods, or the disposal of governmental property, but that it may be used as a tool for the promotion and achievement of national development goals. This objective is further reflected in section 3(t) of The Public Procurement Act, which says that the Public Procurement Authority shall “assist the local business community to become competitive and efficient suppliers to the public sector”.⁶²

⁵¹ *Ibid* s 40(2).

⁵² *Ibid* s 59(4)(c).

⁵³ *Ibid* s 59(4)(c)(i) and 69(2)(c)(i).

⁵⁴ *Ibid* s 59(4)(c)(ii).

⁵⁵ *Ibid* s 59(4)(c)(iii).

⁵⁶ *Ibid* s 59(4)(c)(iv).

⁵⁷ *Ibid* s 59(4)(c)(v).

⁵⁸ *Ibid* s 59(4)(c)(v).

⁵⁹ *Ibid* s 59(4)(c)(vi).

⁶⁰ *Ibid* s 59(4)(c)(vii).

⁶¹ *Ibid* s 59(4)(d).

⁶² Dominic Dagbanja, “Promoting a Competitive Local Business Community in Ghana: The Role of the Legal Framework for Public Procurement” (2014) 58(2) *Journal of African Law* 350.

3.2 South Africa

Section 217(2) of the Constitution of the Republic of South Africa grants organs of the State and other institutions identified in national legislation power relating to “implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.” Section 217(3) requires the enactment of legislation to “prescribe a framework within which” this preferential policy “must be implemented”. Pursuant to these provisions, South Africa enacted the Preferential Procurement Policy Framework Act 2000 (No. 5). As interpreted by Geo Quinot, this enactment “aims to implement the constitutional mandate of using public procurement towards distributive justice, in particular redressing past discriminatory practices in terms of the government’s Black Economic Empowerment Policy”.⁶³ This legislation was followed by other regulations and enactments such as the Preferential Procurement Regulations 2001 and Broad-Based Black Economic Empowerment (BEE) Act 2003 (Act 53), both of which touch on preferential procurement.

South Africa also has the Broad-Based Socioeconomic Empowerment Charter for the Mining and Minerals Industry 2018.⁶⁴ The Mining Charter was made pursuant to section 100 (2) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for the mining and minerals industry. The object of this Act is “to redress historical socio-economic inequalities, to ensure broad-based economic empowerment and the meaningful participation of Historically Disadvantaged Persons in the mining and minerals industry”.⁶⁵ To further this object of the Act, the Mining Charter aims, among other things, at enabling “growth and development of the local mining inputs sector by leveraging the procurement spend of the mining industry.”⁶⁶

The Mining Charter recognizes that procurement of “South African manufactured goods and services provide[s] opportunities for expanding economic growth, creating decent jobs and widening market access to the country’s goods and services.”⁶⁷ Therefore, the Charter requires inclusive procurement. To achieve inclusive procurement, a mining right holder is required to identify goods and services that will be required in its operations and ensure that its procurement

⁶³ Quinot, note 18 above, p. 94.

⁶⁴ Department of Mineral Resources, Broad-based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018 (No. 1002, 27 September 2018).

⁶⁵ *Ibid.* The Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) defines “historically disadvantaged person as “any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect”.

⁶⁶ Mining Charter, note 64 above, item 1(h).

⁶⁷ *Ibid.* item 202.

policies adhere to specified criteria.⁶⁸ In the case of the procurement of *mining goods*,⁶⁹ the Mining Charter states the criteria for inclusive procurement as follows:⁷⁰

A minimum of 70% of total mining goods procurement spend (excluding non-discretionary expenditure) must be on South African manufactured goods. The 70% shall be allocated as follows: 21% to be spent on South African manufactured goods produced by a Historically Disadvantaged Persons owned and controlled company; 5% to be spent on South African manufactured goods produced by a women or youth owned and controlled company; and 44% to be spent on South African manufactured goods produced by a BEE compliant company.

In the case of procurement of services, the Mining Charter specifies the criteria for inclusive procurement as follows:⁷¹

A minimum of 80% of the total spend on services (excluding non-discretionary expenditure) must be sourced from a South African based company. The 80% shall be allocated as follows: 50% must be spent on services supplied by Historically Disadvantaged Persons owned and controlled compan[ies]; 15% must be spent on services supplied by women owned and controlled companies; 5% must be spent on services supplied by youth; and 10% must be spent on services supplied by BEE compliant company.

These requirements of the Mining Charter constitute performance requirements because they seek to achieve social and economic outcomes by requiring the procurement of goods and services by mining companies with relevant South African content or connection. These requirements dictate how investors go about making their procurements in order to contribute to the South African economy. To the extent that *established* foreign investors in the mining industry are required to follow these requirements in their procurements, they may argue that the Mining Charter is inconsistent with South Africa's investment treaty obligation not to accord foreign investors unreasonable treatment.

The specification of percentages that must be used to procure specific goods and services determines for investors in the mining industry where to procure the goods and services from and the percentage of the procurement budget that must be used to acquire the goods and services. These requirements, therefore, limit or narrow managerial decision-making on procurement that may not always be in

⁶⁸ Ibid.

⁶⁹ The Mining Charter defines mining goods as referring to "to capital goods and consumables used by a right holder or by a contractor on behalf of a right holder".

⁷⁰ Ibid item 2.2.1.

⁷¹ Ibid, item 2.2.2.

consonance with profitable decision-making by those responsible for managing the affected mining companies. This may well be inconsistent with fair and equitable treatment and the right to enjoy full protection and security under the South Africa–Sweden investment treaty, South Africa–Finland investment treaty, South Africa–China investment treaty and South Africa–Nigeria investment treaty. These investment treaties prohibit the contracting parties from impairing by unreasonable and discriminatory measures in the management, use or enjoyment of investments.⁷² The pre-determination of specified procurement budgets that must be used to procure goods and services made or manufactured in South Africa under the Mining Charter does not always take into consideration how such procurements are profitable to companies that are required to comply with these requirements. Thus, these requirements in the Mining Charter may well be found to be unreasonable measures contrary to the South Africa’s investment treaties. Compulsory equity divestiture measures were the subject of investor–State suit in *Foresti v. South Africa*⁷³ brought under the South Africa–Italy investment treaty⁷⁴ and South Africa–Belgo-Luxembourg Economic Union investment treaty.⁷⁵ This litigation brought about the termination of these two investment treaties and others and the enactment of the Protection of Investment Act 2015 (Act 22).⁷⁶

The authority and discretion vested in procurement entities or contracting authorities in the selection of one prospective tenderer for contract award and the imposition of national interest policy goals could be in breach of provisions on performance requirements and fair and equitable treatment standards in IIAs. Performance

⁷² Agreement between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, signed 25 May 1998, entered into force 01 January 1999, art 3(2); Agreement between the Government of the Republic of Finland and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, signed 14 September 1998, entered into force 03 October 1999, art 2(2); Agreement between the Government of the People’s Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments, signed 30 December 1997, entered into force 1 April 1998, art. 3(1), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3359/download>; and Agreement between the Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, 29 April 2000, entered into force 27 July 2005, art. 4(1), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3554/download>.

⁷³ *Foresti v. South Africa*, Case No ARB(AF)/07/1, Award, 4 August 2010.

⁷⁴ Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic on the Promotion and Protection of Investments, signed 09 June 1997, entered into force 16 March 1999.

⁷⁵ Accord entre l’Union économique belgo-luxembourgeoise et la République d’Afrique du Sud concernant l’encouragement et la protection réciproques des investissements, signed 14 August 1998, entered into force 14 March 2003

⁷⁶ Malebakeng Agnes Forere, “The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies” in Fabio Morosini (ed), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press, 2017) 251

requirements impose obligations on investors and other business entities to ensure that their activities or participation in government contracts achieve specified outcomes in host countries.⁷⁷ They are specifications in government contracts or investment contracts regarding⁷⁸

strengthening the industrial base and national added value, developing national expertise in a given sector, creating upstream and downstream economic links in a given economic sector, ensuring technology transfer, achieving better environmental or social outcomes, reducing unemployment, avoiding restrictive trade practices, preserving a significant part of national enterprises in key sectors, or guaranteeing security in the industrial sector.

3.3 Australia

The issue of the relationship between IIAs and public procurement regulation has also come under the attention and consideration of the Government of the Commonwealth of Australia. In Australia, procurement by public sector entities is done under the Commonwealth Procurement Rules of April 2019. The Government has integrated Australia's obligations under FTAs relating to procurement into the Procurement Rules.⁷⁹ During the 44th Parliament (November 2013–May 2016), proposals were made to the effect that government procurement rules should be revised to include a “buy Australian” preference, particularly for steel products; a redefinition of the “value for money” principle to include “secondary and social benefits to communities” and the assessment of future FTAs in terms of the “impact on manufacturing jobs”.⁸⁰ A central issue that came up for consideration in Parliament was how these proposals could stand in the face of Australia's obligations under FTAs. The Government's response to a senate committee's recommendation that the Department of Finance should provide a detailed explanation of the barriers to a preferential scheme in Australian procurement was that “international agreements limit the extent to which the Government can preference local suppliers”.⁸¹ The Government categorically stated that it⁸²

⁷⁷ Suzy H. Nikièma, *Performance Requirements in Investment Treaties* (IISD Best Practices Series - December 2014) 2.

⁷⁸ *Ibid* 1.

⁷⁹ CPRs, note 21 above, rule 2.16.

⁸⁰ Commonwealth of Australia, *Government procurement and free trade agreements*, http://www.ap.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/GovernmentProcurement.

⁸¹ Australian Government, *Australian Government response to the Senate Finance and Public Administration References Committee Report: Commonwealth Procurement Procedures* (April 2015) p. 4, <file://uniwa.uwa.edu.au/userhome/staff5/00092945/Downloads/Government%20response.pdf>.

⁸² *Ibid* p 3.

cannot support the committee's recommendations to implement initiatives that preference local suppliers when procuring goods and services valued above the procurement thresholds ... Any recommendation to treat suppliers inequitably through schemes that preference local suppliers, beyond those that are specifically included in the 17 exemptions listed at Appendix A of the [Commonwealth Procurement Rules], would be inconsistent with Australia's international obligations.

Nicholas Seddon's opinion on the same subject was that "[b]ecause of the commitments made in the Australia–United States Free Trade Agreement chapter 15, the Commonwealth is not free to pursue a buy Australian policy unless an exemption applies."⁸³ Australia is a signatory to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11),⁸⁴ which has a chapter on government procurement. To ensure compliance with TPP, the Government made provision in the 2016–17 Budget for: A\$12.4 million to upgrade information technology communications systems to bring about greater transparency in tender procurements; and A\$2.9 million for the Federal Court of Australia to set up a settlement mechanism for procurement disputes.

In recognition of the limitations that IIAs place on government procurement regulation, the Australia Labour Party included a clause 9 in A Fair Go for Australians in Trade Bill 2018 to prohibit the Government of Australia from entering into FTAs that restrict Australia having preferential procurement. The clause specifically states that⁸⁵

The Commonwealth must not, on or after the commencement of this Act, enter into a trade agreement with one or more other countries that includes provisions relating to government procurement which have the effect of restricting the Commonwealth's procurement arrangements from any form of preference for the purpose of: (a) protecting Australia's essential security interests; or (b) benefiting local small and medium enterprises; or (c) protecting national treasures; or (d) implementing

⁸³ Nick Seddon, Submission To The Senate Standing Committee on Finance and Public Administration References Committee, file://uniwa.uwa.edu.au/userhome/staff5/00092945/Downloads/Sub_01.pdf.

⁸⁴ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed in Santiago, Chile, on 8 March 2018. See also *Agreement between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments*, signed 9 January 2013, entered into force 12 May 2014, art. 10 which provision exempts various forms of regulatory measures from being treated as performance requirements including measures that require an investment to use a technology "to meet generally applicable health, safety or environmental requirements".

⁸⁵ The Parliament of the Commonwealth of Australia, A Fair Go for Australians in Trade Bill 2018 (2016-2017-2018), https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1146_first-senate/toc_0pdf/1821620.pdf;fileType=application/pdf.

measures for the health, welfare and economic and social advancement of Indigenous people; or (e) promoting ethical standards and sustainable development through ethical procurement; or (f) providing for the full, fair and reasonable participation of local enterprises in government contracts as outlined in Commonwealth, State and Territory industry participation policies and successor programs and policies; or (g) maintaining the Australian industry cap.

Another illustration of how investment treaties can constrain the implementation of procurement rules is reflected in the qualification of the requirement in the Commonwealth Procurement Rules⁸⁶ to implement the rules to bring about broader benefits to the Australian economy. According to clause 4.7 of the Commonwealth Procurement Rules, “[i]n addition to the value for money considerations ... for *procurements* above A\$4 million (or A\$7.5 million for *construction services*) (except *procurements* covered by Appendix A and *procurements* from *standing offers*), *officials* are required to consider the economic benefit of the *procurement* to the Australian economy.” This requirement is subject to clause 4.8, which states that the policy on the economic benefit of a procurement to the Australian economic “operates within the context of relevant national and international agreements and *procurement* policies to which Australia is a signatory, including free trade agreements and the Australia and New Zealand Government Procurement Agreement.”

This analysis shows in practical terms how IIAs can have an impact on the making and implementation of domestic procurement laws and policies. While opening up procurement markets for foreign investors may come with its own blessing, especially in areas where domestic businesses are not well placed to provide the needed goods, services or works, it also comes with limitations being placed on legitimate preferential treatment that governments could otherwise extend to domestic suppliers or that governments might want to impose on investors in the national interest. These tensions between social policies in procurement can be addressed by reconciling standards of investment protection with constitutional and legislative obligations with respect to the protection of the public interest using public procurement. This means that exceptions must be made in IIAs for social policies in public procurement so that the adoption of those policies at the national level does not lead to investor–State arbitration. Another way is to expressly limit the authority of governments to enter into IIAs that limit the adoption of social policies in procurement. This is what Australia sought to do with the A Fair Go for Australians in Trade Bill 2018. Investment tribunals must also interpret IIAs

⁸⁶ CPRs, note 21 above.

liberally to accommodate bona fide and legitimate policies that promote national development. Investment treaties must not be allowed to stand in the way of the national development objective supposedly underlying IIAs.⁸⁷

4. Socioeconomic policies, methods of procurement and investor-State arbitration: a case study

The *ADF Group Inc. v. United States of America*⁸⁸ case analysed here and others involving procurement measures, such as *Foresti v. South Africa*,⁸⁹ *Mercer International Inc. v. Canada*,⁹⁰ *United Parcel Service of America Inc. v. Canada*,⁹¹ support the proposition that unless an IIA exempts procurement measures from its coverage, established foreign investors can use IIAs to challenge measures that exclude them from participating in procurement or impose local content, preferences and performance requirements in the procurement process.

The *ADF Group Inc. v. United States of America*⁹² dispute related to the construction of the Springfield Interchange Project in the United States. The Springfield interchange is a highway junction in northern Virginia.⁹³ The project involved major changes to the original design of the structures and highways and constructing additional structures, approaches and highways.⁹⁴ The bridges to be constructed required the use of steel girders.⁹⁵

Shirley Contracting Corporation submitted the lowest bid in response to an invitation for bids placed by the Department of Transportation of the Commonwealth of Virginia (DTCV). Accordingly, Shirley Contracting Corporation was awarded the

⁸⁷ D. Dagbanja, 'The Development Objective as an Imperative in Interpretation of International Investment Agreements' (2018) 44(2) *University of Western Australia Law Review* 145.

⁸⁸ *ADF Group Inc. v. United States of America* ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003. This case was brought under North American Free Trade Agreement (NAFTA) signed by Canada, Mexico and United States in 1992 and entered into force 01 January 1994. It has since been replaced by Canada-United States-Mexico Agreement, signed in November 2018, and entered into force 1 July 2020.

⁸⁹ *Foresti v. South Africa*, note 73 above.

⁹⁰ *In Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para 2.19. This case was brought under NAFTA, note 88 above.

⁹¹ *Ibid* [121].

⁹² *ADF Group Inc. v. United States of America*, note 88 above.

⁹³ *Ibid* [44].

⁹⁴ *Ibid* [45].

⁹⁵ *Ibid*.

main contract for the project.⁹⁶ It then awarded a subcontract to ADF International Inc.,⁹⁷ a subsidiary of ADF Group Inc., established under the laws of Canada. The Government of the United States funded the project.

The United States measures that ADF complained about comprised statutory provisions, implementing administrative regulations and contractual provisions.⁹⁸ Under these statutory and regulatory provisions, the Secretary of the Federal Department of Transportation was not to obligate any funds authorized to be appropriated for the project if the steel, iron and manufactured products used in the project were not *produced in* the United States. No federal-aid highway construction project was to be authorized for advertisement or authorized to proceed unless the project included no permanently incorporated steel or iron materials. Permanently incorporated steel or iron materials could be used only if all manufacturing processes occurred in the United States. The statutes and regulations also required standard contract provisions at the state level to require the use of domestic materials and products when federal funds were involved in a project.⁹⁹

ADF International had proposed to perform its obligations under the subcontract by using steel produced in the United States and to carry out certain fabrication work on this steel using facilities owned by its parent, ADF Group Inc., based in Canada.¹⁰⁰ However, the DTCV advised Shirley Contracting Corporation that ADF International's proposed operations did not comply with the provisions of the applicable statutes and regulations and the terms governing the main contract.¹⁰¹

ADF instituted arbitral proceedings against the United States, arguing that the measures precluded ADF International or ADF Group Inc. themselves from using United States-origin steel fabricated in Canada in the projects.¹⁰² ADF argued that by requiring investors of another party to the North American Free Trade Agreement (NAFTA) to use only domestically-produced goods, the measures effectively prohibited the use of imported goods in certain contracts, which adversely affected the management, conduct and operation of its investment in the United States through the subsidiary. It argued that the measures also restricted the free transfer of goods and services between a parent corporation and its subsidiary, such as

⁹⁶ Ibid [46].

⁹⁷ Ibid [47].

⁹⁸ Ibid [56].

⁹⁹ Ibid 56] and [57].

¹⁰⁰ Ibid [48].

¹⁰¹ Ibid [49].

¹⁰² Ibid [90].

between ADF International and ADF Group Inc. These measures, the investor argued, placed ADF International at a competitive “disadvantage vis-à-vis domestic fabricators”,¹⁰³ contrary to Article 1102.¹⁰⁴

Under Article 1108(b) of NAFTA, the national treatment obligation did not apply to procurement by a contracting party of NAFTA or a State enterprise. To avoid the effect of this provision, the investor argued that the present case was *not a procurement* and that the investor did not complain about the conduct of any federal procurement. ADF argued that the measures imposed the purchase of goods and services on the DTCV in connection with the project. If the federal government had not imposed those measures, ADF would have been able to supply steel products fabricated at its facilities in Canada. ADF argued that the DTCV’s “activities and operations ... did constitute procurement by the Commonwealth of Virginia” because although the federal Government “did not purchase or otherwise acquire any goods and services for the Springfield Interchange Project,” the DTCV “did, for the Commonwealth of Virginia.”¹⁰⁵ According to ADF, “unlike the U.S. Federal Government, the Commonwealth of Virginia is not subject to the disciplines” of Chapter 10 of NAFTA, which covered procurement, and “has not voluntarily assumed any obligations in respect of procurement under Chapter 10.”¹⁰⁶ Therefore, if the United States’ measures “do constitute procurement, they would constitute violation by the United States Government of the prohibitions of Chapter 10”.¹⁰⁷ If the “measures do not constitute procurement by the Federal Government, then they are not saved by Article 1108(8)(b)”.¹⁰⁸ While conceding that Article 1108(7)(b) permitted a contracting party to NAFTA “to derogate from the national treatment obligation when making grants and subsidies”,¹⁰⁹ the investor argued that the provision did not permit a party “to continue infinitum to require that grant recipients in turn violate the national treatment obligation when they spend ... funds”.¹¹⁰

ADF also argued that the Buy America measures violated Article 1106(1)(b) of NAFTA by imposing performance requirements, namely (1) the imposition of a 100 per cent United States domestic content requirement; and (2) the preference requirements for United States-produced steel materials and products if ADF were to provide fabricated steel products to highway projects receiving federal aid.¹¹¹

¹⁰³ Ibid [66].

¹⁰⁴ Ibid [55].

¹⁰⁵ Ibid [87].

¹⁰⁶ Ibid

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid [88].

¹¹⁰ Ibid.

¹¹¹ Ibid [82].

The United States argued that the claims based on national treatment and breach of the prohibition against performance requirements were “foreclosed by the exceptions” in Article 1108(7)(a) and (8)(b) of NAFTA for procurement.¹¹² The Commonwealth of Virginia carried out procurement when it purchased steel and services from the main contractor. Since Virginia is one of the states of the United States, there was a procurement by a governmental unit of the United States. The United States argued that “purchase of steel and services by a governmental unit of the United States is “plainly ‘procurement by a Party’ within the meaning of Article 1108”¹¹³ of NAFTA. According to the United States, state and provincial government procurement was “not subjected to any national-treatment and performance-requirement obligations.”¹¹⁴

The tribunal held that the investor failed to substantiate its claim of discrimination based on differential treatment between it and United States investors.¹¹⁵ The investor “did not sustain its burden of proving that the ... measures imposed (*de jure* or *de facto*) upon ADF International, or the steel to be supplied by it in the U.S., less favorable treatment *vis-à-vis* similarly situated domestic (U.S.) fabricators or the steel to be supplied by them in the U.S.”¹¹⁶ Therefore, the investor failed to show that the measures were inconsistent with NAFTA Article 1102.¹¹⁷

The tribunal also held that the construction of the project “constituted or involved governmental procurement under Article 1001(1) of NAFTA,¹¹⁸ which stated that Chapter 10 of NAFTA was applicable to measures adopted or maintained by a contracting party relating to procurement by a federal government entity and a state or provincial government entity set out in the relevant annexes.¹¹⁹ It followed that an existing non-conforming measure of a NAFTA party “saved by Article 1108(1) may not only be a federal government measure but also a state or provincial government measure and even a measure of a local government”.¹²⁰ The effect of Article 1108(7)(a) and (8)(b) was that NAFTA provisions on national treatment, most-favoured-nation treatment and performance requirements “are not applicable in respect of procurement ... whether the procurement is carried out by an office or entity of the U.S. federal Government or by an office or entity of the Commonwealth of Virginia”.¹²¹

¹¹² *Ibid* [91].

¹¹³ *Ibid* [92].

¹¹⁴ *Ibid* [93].

¹¹⁵ *Ibid* [156].

¹¹⁶ *Ibid* [157].

¹¹⁷ *Ibid* [158].

¹¹⁸ *Ibid* [162].

¹¹⁹ *Ibid* [164].

¹²⁰ *Ibid* [165].

¹²¹ *Ibid* [170].

According to the tribunal, Article 1001(5)(a) of NAFTA “appears expressly designed to separate the financing or funding of construction or other projects from the procurement operations necessarily entailed by such projects, and thus precisely to make possible the continuation of federal government funding of state or provincial government procurement”.¹²² Based on this reasoning, the tribunal also held that ADF had not shown that the measures challenged were inconsistent with the limitation on imposing performance requirements in NAFTA Article 1106.¹²³

In *Bosca v Lithuania*,¹²⁴ the tribunal held that the decision of a Lithuanian State entity to not award a procurement contract to a foreign investor was made in bad faith and contrary to the investors’ legitimate expectation, which constituted a breach of Lithuania’s obligation to accord the investor just and equitable treatment under the Lithuania–Italy investment treaty.¹²⁵ The effect of this decision, like the *ADF Case*, is that a State party to an investment treaty which does not exempt procurement measures from its scope of application has an obligation to open its procurement proceedings for participation by covered foreign investors. A State’s failure to open such procurement proceedings and to award a procurement contract to a covered foreign investor may well be in breach of the applicable investment treaty.

Generally, national procurement laws do not provide that, when single-source procurement is used or when a socioeconomic policy in procurement is implemented, consideration must be given to foreign nationals. On the contrary, domestic procurement legislation would usually provide for preferences to be given to domestic businesses as reflected in the above analysis. Where national legislation lacks a provision requiring the opening of procurement proceedings for international participation, the obligation may arise only where a State is a party to an international procurement agreement or an investment treaty. Thus, on the one hand under domestic procurement law, procurement entities can decide to select national entities either when the subject of procurement is available only from them or to promote socioeconomic and industrial goals required under procurement legislation. On the other hand, the selection of a national tenderer using a method of procurement to promote a domestic policy may amount to a breach of national treatment under investment treaties, which requires that covered investors and investment be treated in the same way or similar to domestic investors and investments.

¹²² *Ibid.*

¹²³ *Ibid.* [174].

¹²⁴ *Bosca v Lithuania*, above 14.

¹²⁵ *Ibid.*

5. Conclusion

The protection of investment abroad today is largely governed by IIAs. These investment treaties are said to attract foreign investment, which it is claimed leads to development. However, the limitations that IIAs have placed on regulations aimed at protecting human rights and the environment, banking and financial services regulations, and industrial policies have raised reasonable doubt about whether indeed these treaties are capable of leading to the attainment of the supposed development objectives underlying them. Through the substantive standards and ISDS provisions in IIAs, legitimate State measures aimed at protecting the public interest are undermined. In this regard, much ink has been spilled about the consequences of IIAs and arbitration on States' authority to regulate in the public interest. This article adds to the debate on the subject by analysing the limitations that IIAs place on the domestic regulation of government procurement. It has shown that methods of procurement and tendering techniques such as national competitive tendering, restricted tendering, single-source procurement and the pursuit of socioeconomic policies through procurement all stand to be challenged by foreign investors in ISDS if a State adopting any of these methods and policies in procurement is a party to IIAs. A practical example has been shown in the case of Australia, which has integrated its procurement obligations under FTAs with investment clauses into its procurement rules. IIAs also obligate States to extend to foreign investors procurement opportunities that States are legally entitled under municipal law to reserve for domestic businesses, thereby imposing extra financial and regulatory costs on governments.

Governments must reserve absolute autonomy to decide who participates and who does not participate in procurement within the parameters of domestic and applicable international procurement regulations. After all, procurement is about meeting the needs of States and their citizens. The participation of foreign nationals in domestic procurement must be justified solely on the basis that such participation is necessary to meet the national need intended by the particular procurement. Therefore, governments must have the freedom to decide when foreign nationals can participate in procurement, based solely on their own determination in light of the applicable domestic rules on procurement and whether such participation is necessary to meet the needs for initiating the particular procurement. IIA rules must not be allowed to be used as an excuse for foreign nationals to bypass regular market entry rules. Where States are parties to an international agreement on procurement such as the Agreement on Government Procurement, their obligations to open their procurement market must be limited to only those countries that are also parties to the procurement agreement, and not to the world at large.

To address conflict between procurement rules and IIA rules, it is proposed that existing IIAs be re-negotiated to make exception for domestic preferences not expressly aimed at harming foreign investors. Each State exists or should exist for its citizens. Therefore, national treatment and most-favoured-nation treatment must be excluded from future IIAs unless they address national interests in tangible terms. Other ways in which States can shield legitimate and non-discriminatory public welfare regulation (including public procurement) from investor-State claims, are by “reaffirming the importance of public welfare regulation in the preamble, refining and clarifying core investment protections, and sometimes including general exceptions clauses.”¹²⁶

¹²⁶ Anthea Roberts and Richard Braddock (2016), “Protecting Public Welfare Regulation through Joint Treaty Party Control: A ChAFTA Innovation” (Columbia Centre on Sustainable Development, *Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues*, No. 176, June 20) at p 1.

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