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Investment Arbitration: Jurisdiction and Admissibility

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II. Investment Arbitration: Jurisdiction and Admissibility

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Lars Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen: Zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investitionsschiedsverfahren* (Nomos, 2010); Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen, Karl-Heinz Böckstiegel, Paolo Michele Patocchi and Anne Marie Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing, 3005) 601–617;; Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 830–867;; David A. R. Williams, 'Jurisdiction and Admissibility' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 919–929; 'Gerold Zeiler, Jurisdiction, Competence, and the Admissibility of Claims in ICSID Arbitration Proceedings' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International investment law for the 21st century: essays in honour of Christoph Schreuer* (Oxford University Press 2009) 76–91.

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A. Introduction

Jurisdiction refers to 'the power of a court or judge to entertain an action, petition or other proceeding'.[2] State consent provides the basis of the jurisdiction of international courts and tribunals generally, and for investment tribunals in particular. In the *Corfu Channel* case**,** the International Court of Justice (ICJ) laid down the foundational rule that consent provides the cornerstone for the exercise of jurisdiction by any international court or tribunal, including itself.[3] There are no international tribunals with general compulsory jurisdiction. State consent is central to international adjudication. The State parties need to vest power in a tribunal to decide a case, either before or after a dispute arises. In investment arbitration, consent is typically given by the host State on the basis of investment treaties[4], in national legislation or through negotiated arbitration clauses in investor-State contracts.

By contrast, admissibility concerns the power of a tribunal to decide a case at a particular point in time in view of possible temporary or permanent defects of the claim. With admissibility, the question is whether the claim is ready for decision at this stage. Whereas jurisdiction typically looks at the dispute as a whole, admissibility is concerned with

[2] John Burke, *Jowitt's Dictionary of English Law* (Sweet & Maxwell, 1977), vol. 1, 1034; Bryan A. Garner, *Black's Law Dictionary* (West, 1999); Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) para. 293 (distinguishing the existence of an adjudicative power (*l'attribution de la juridiction*) and the scope of adjudicative power (*l'étendue de la juridiction*)).

[3] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, ICJ Rep. 194815, see Michael Waibel, 'Corfu Channel Case' in Wolfrum Rüdiger (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2010) Vol. II, pp. 792-797,http://www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e118.pdf?stylesheet=EPIL-display-full.xsl).

[4] Most cases are based on BITs, but others arise out of multilateral investment treaties such as NAFTA, CAFTA and the ECT.

particular claims. Even though the distinction between jurisdiction and admissibility is a longstanding one in international law, the delimitation of the two is not always straightforward, and in addition the terminology is sometimes inconsistent.[5] In investment arbitration, the boundary between jurisdiction and admissibility is particularly fluid.

After introducing the central concepts – jurisdiction, admissibility and applicable law, Section B examines different modalities of how states and investors consent to the adjudication of their investment disputes. The focus is on BIT-based arbitration (arbitration without privity between the investor and the host state). BITs contain general offers to qualifying investors at large to arbitrate their investment disputes with the host state. As givers of consent and masters of the BITs, states can also revoke their consent, provided the position of investors is sufficiently safeguarded.

Section C turns to three general jurisdictional questions: first, *Kompetenz-Kompetenz* – the idea that it is arbitral tribunals themselves which are the ultimate arbiters of their own jurisdiction, rather than domestic courts; second, the existence of a legal dispute - a present disagreement between the parties on law or fact, or conflict of interest -, and third, counterclaims – claims brought by the respondent, typically against the investor, which are sufficiently connected to the investor's principal claim such their joint adjudication is feasible and in the interest of justice.

Section D turns to the extent of jurisdiction, and looks the four dimensions of jurisdiction (personal, territorial, temporal and subject matter). Special attention is given to most favoured nation clauses as instruments that could multilateralize preferential benefits given to investors of third states. It is now widely accepted that MFN clauses extend the preferential benefits with regard to substantive provisions in BITs. The extent to which they also apply to procedural provisions remains controversial.

[5] Zachary Douglas (n. 2) para. 291, para. 295, n. 16 (noting that the ECtHR refers to all preliminary objections as relating to 'admissibility'; e.g. *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 6 ICSID Rep. 181, 58 (the tribunal held that it had 'jurisdiction' over 'Mondev's claims concerning the decisions of the United States courts' and explained that 'to this extent only, Mondev's claims are admissible'); *Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, ICJ Rep. 1996, 595, para. 120. Yugoslavia characterised the objection that the acts concerned took place prior to the creation of Yugoslavia as simultaneously one of jurisdiction *ratione temporis* and admissibility – the court characterised it as the former.

Section E distinguishes issues of admissibility from issues jurisdiction, and explains how jurisdiction and admissibility interact. Specific issues pertaining to admissibility taken up in this chapter are procedural prerequisites, fork in the road clauses, the investor's failure to exhaust local remedies and derivative claims by shareholders. Section F concludes.

1. Jurisdiction: The Consent-based Mandate of Investment Tribunals

States are free to resolve their disputes by peaceful means in any way they choose. Article 33(1) of the UN Charter provides: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' The ICJ has affirmed the principle of freedom of choice in methods of dispute settlement and consistently applied it in cases such as *Congo v. Rwanda* and *Spain v. Canada* (Preliminary Objections).[6]

States consent to the jurisdiction of the ICJ either (i) ex post and ad hoc by concluding a special agreement after a dispute has arisen, (ii) ex post by means of *forum prorogatum*, whereby jurisdiction is established by a State participating in the proceedings without raising an objection as to the court's lack of jurisdiction[7], (iii) ex ante by accepting the court's jurisdiction through optional clause declarations under Article 36(2) of the ICJ Statute, or (iv) ex ante by virtue of a treaty that contains a compromissory clause.

Investment treaty arbitration is usually founded in general offers to arbitrate contained in bilateral investment treaties (BITs) and Article 25 of the ICSID Convention. These offers are akin to optional clause declarations in dispute settlement before the ICJ. In both cases, there are overlapping unilateral consents by States to dispute settlement. In the case of investment arbitration, because of the bilateral character of investment treaties, this offer to arbitrate is limited to investors with the nationality of a particular State.

The ICSID Convention offers a general procedural framework for investment arbitration. It does not come into play without subsequent consent, by treaty or otherwise. In other words, the ICSID Convention offers only a procedural framework and not an offer for investment

[6] *Armed Activities on the Territory of the Congo (Congo v. Rwanda),* Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ Rep. 2006, 6, paras. 65–68; *Fisheries Jurisdiction (Spain v. Canada)*, Preliminary Objection, ICJ Rep. 1998, 432, para. 55.

[7] Claude Humphrey Meredith Waldock, 'The Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court' (1948) 2 ICLQ 377–391, 378.

arbitration. States consent to ICSID arbitration through a subsequent act, unilaterally or through a negotiated agreement such as a BIT.

Like optional clause declarations before the ICJ, once a State and the investor have given their consent, submitting the dispute to arbitration is no longer optional in the sense that once the investor accepts the offer, the host State cannot revoke its consent. We can therefore think of investment arbitration as involving bilateral islands of quasi-compulsory jurisdiction. This move towards a lesser degree of voluntarism in dispute settlement is also found in other areas of international law, most notably in human rights law. In the European system of human rights protection, the commitment to dispute settlement is embedded in a regional treaty.[8]

That said, as long as the investor has not accepted the host State's offer to arbitrate, the host State can revoke the offer. Host states are not obliged to keep BITs in place indefinitely. However, even nce parties have terminated a BIT, survival clauses in BITs may prolong the BIT's applicability for 20 years or more. During that period, investors can continue to bring investment claims against the host state concerned.[9]

In both human rights law, and to a lesser degree, investment treaty arbitration, access to impartial fora is seen as essential to the realisation of the substantive legal obligations that States have undertaken[10] – so much so that the traditional distinction between a State's obligations and their adjudication has started to become blurred. Investment arbitration sits at an intermediate position compared to international dispute settlement on the basis of ex post consent for a specific case and compulsory dispute settlement in trade matters under the WTO agreements.

2. Admissibility: The Conditions for the Exercise of Jurisdiction

Admissibility refers to the power of the tribunal to examine a case at a given point in time.[11] It concerns the exercise of the tribunal's adjudicative power in relation to one or several specific claims submitted to it (*conditions de recevabilité*).[12]

The Rules of the ICJ Statute contain the basis for distinguishing between two categories of

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[8] Dinah Shelton, *Remedies in international human rights law* (Oxford University Press, 2004) 189–202.

[9] James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 JWI *928-950.*

[10] Stephan Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Michael Waibel, Asha Kaushal, Liz Kyo-Hwa Chung and Claire Balchin (eds), *The backlash against investment arbitration: perceptions and reality* (Kluwer Law International, 2010) 29-50.

[11] *Waste Management, Inc. v. Mexico,* ICSID Case No. ARB (AF)/98/2, Dissenting Opinion of Keith Highet, 2 June 2000, para. 58. Admissibility of evidence is an unrelated topic, see Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) para. 6.89 *et seq*.

[12] Zachary Douglas (n. 2) para. 293; *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion, 28 October 2011, para. 18.

preliminary objections, namely objections as to the lack of the tribunal's jurisdiction and as to the inadmissibility of the claims brought before the tribunal. Article 79 of the Rules provides:

> Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application (…)
> Notwithstanding paragraph 1 above, following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately. (...)

The ICJ has also relied on this distinction, most prominently in the *South West Africa* case. Ethiopia and Liberia sought to enforce provisions of the mandate for South West Africa under the mandate's jurisdictional provision. The distinction between objections to jurisdiction and admissibility was at the heart of the ICJ's controversial decision. Even though the ICJ affirmed its jurisdiction, it found that Ethiopia and Liberia had no legal interest in the subject matter of the claim. They therefore lacked standing, and their claims were hence inadmissible.[13]

Standing concerns the claim's admissibility, rather than the ICJ's jurisdiction. In *Oil Platforms*, the ICJ cast objections as to the admissibility in the following terms:

> Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.[14]

Neither the ICSID Convention nor the ICSID Rules refer expressly to 'admissibility'. Arguably, Article 41(2) of the ICSID Convention introduces the distinction between jurisdiction and admissibility to ICSID arbitration.[15] It provides:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the tribunal, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Other tribunals see no need to distinguish between jurisdiction and admissibility, based in part on the lack of express differentiation between the two concepts in the ICSID Convention.[16] They questioned the meaning and the usefulness of a separate notion of admissibility in ICSID arbitration, given that the ICSID Convention expressly mentions only jurisdiction and

[13] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, First Phase, ICJ Rep. 1962, 319; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, ICJ Rep. 1966, 6.
[14] *Oil Platforms (Iran v. USA*), Judgment, ICJ Rep. 2003, 161, para. 29.
[15] *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6 (referring to Article 41(2) as including issues of admissibility).
[16] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 131 *et seq*. (counsel for either side also seemed to attach little weight to the distinction); Article 23 of the UNCITRAL Rules; in *Methanex Corporation v. USA*, UNCITRAL (NAFTA), Partial Award on Jurisdiction and Admissibility, 7 August 2002, 7 ICSID Rep. 239, 264–267, an UNCITRAL tribunal held that the similar predecessor provision of Article 21 does not cover issues of admissibility.

competence.[17] For example, the *CMS* tribunal noted in the context of shareholder claims that the 'distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence.'[18] The *Bayindir* tribunal noted that Pakistan had raised both objections to the tribunal's jurisdiction and the admissibility of the claim, yet proceeded to examine without distinguishing between them. Section E. below explores admissibility in greater detail.

3. The Distinction between Admissibility and Jurisdiction

The distinction between jurisdiction and admissibility is a longstanding and important one in international dispute settlement. Yet the distinction between jurisdiction and admissibility is not altogether easy to articulate, for international law in general and for investment arbitration in particular. Whether a matter pertains to admissibility or jurisdiction may also vary by field. For example, the nationality of claims concerns admissibility in diplomatic protection, but is jurisdictional in investment arbitration.[19] Both jurisdictional objections and objections as to admissibility are grouped together under the heading of 'preliminary objections'.

Issues of admissibility may be dealt with in a separate phase of a case, whether or not a party has also raised jurisdictional objections. They may be addressed alongside questions of jurisdiction, or they may be addressed together with the merits.[20] It is very rare for there to be three phases to investment arbitrations, the first focusing on objections to jurisdiction, the second focusing on objections as to admissibility and the third focusing on the merits.

Fitzmaurice explains the conceptual distinction in the following terms:

> an objection to the substantive admissibility of the claim is plea that the tribunal should rule the claim inadmissible on some ground other than its ultimate merit; an objection to the jurisdiction of the tribunal is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim.[21]

Arbitrator Highet in *Waste Management v. Mexico* put the difference between jurisdiction and admissibility thus:

> [j]urisdiction is the power of the tribunal to hear the case; admissibility is whether the

[17] *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 41; *Bayindir v. Pakistan*, ICSID Case No. ARB/02/29, Decision on Jurisdiction, 14 November 2005, paras. 85–87.
[18] *CMS v. Argentina* (n. 17) para. 41.
[19] *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, ICJ Rep. 1955, 4, 16, 20. Zachary Douglas (n. 2) para. 605; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 514.
[20] ICJ Rules, Article 79.
[21] Ian Laird, 'A Distinction Without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 201–222, 204.

> case itself is defective – whether it is appropriate for the tribunal to hear it.[22]

The term 'admissibility' is found neither in the ICSID Convention nor in the UNCITRAL Arbitration Rules. In investment arbitration the boundaries between jurisdiction and admissibility are a 'twilight zone'.[23] The *Methanex* tribunal underscored that the distinction between jurisdiction and admissibility was important even though 'it [was] perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, while the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.'[24]

Admissibility covers a wide range of matters: issues relating to standing (whether the plaintiff has the right to bring a particular case or to seek particular relief)[25]; whether the claim is 'new' with respect to the dispute submitted;[26] issues relating to the judicial/arbitral function (e.g. whether a court can give a merely 'advisory' opinion; settlement of a dispute after seisin; whether a court can express an opinion on an 'abstract' issue unrelated to the present rights and obligations of the parties); mootness of a claim[27]; the failure to exhaust local remedies[28]; the tribunal's discretion not to hear a dispute on the ground that the same (or similar) claim is allocated to or pending in another – *lis alibi pendens* or *forum non conveniens*;[29] the claim implicates a necessary third party[30] and *res judicata*.

Some objections to admissibility give tribunals considerable discretion. There are two types of objections to admissibility, abstention and preclusion doctrines. A good example of an abstention doctrine is *lis alibi pendens*. Tribunals have considerable room for manoeuvre. By contrast, discretion plays no role with respect to r*es judicata*, which as a legal impediment

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[22] *Waste Management Inc. v. Mexico*, Dissenting Opinion Arbitrator Highet (n. 11) para. 58.

[23] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen, Karl-Heinz Böckstiegel, Paolo Michele Patocchi and Anne Marie Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing, 2005) 601–617.

[24] *Methanex v. United States* (n. 16) para. 139; Jan Paulsson (n. 23).

[25] *Elettronica Sicula SpA (ELSI) (USA v. Italy)*, ICJ Rep. 1989, 15; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International investment arbitration: substantive principles* (Oxford University Press, 2007) para. 6.93.

[26] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, ICJ Rep. 1992, 240.

[27] *Northern Cameroons (Cameroon v. United Kingdom*), Judgment, ICJ Rep. 1963, 15; *Nuclear Tests Case (Australia v. France)*, Judgment, ICJ Rep. 1974, 253.

[28] *Interhandel (Switzerland v. USA)*, Judgment, ICJ Rep. 1959, 6, 28; see Articles 14–15 of the ILC Articles on Diplomatic Protection 2006.

[29] *MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3, (2003) 126 ILR 310.

[30] *East Timor Case (Portugal v. Australia)*, Judgment, ICJ Rep. 1995, 90; *Monetary Gold Removed from Rome (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment,ICJ Rep. 1954, 19 (a determination of the legal rights and obligations of a third State, not of a binding character, is a prerequisite to determination); contrast *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, First Phase, Judgment, ICJ Rep. 1984, 392; *Nauru Case* (n. 25) (mere reflection or implications for a third State).

precludes sequential claims, or the exhaustion of local remedies. If the criteria for *res judicata* are met, the tribunal cannot proceed and simply decide the case. *Res judicata* is hence an example of preclusion rather than an abstention doctrine.

Several consequences flow from the distinction into jurisdiction and admissibility. For example, as a rule, the tribunal assesses jurisdiction at the date of seisin, whereas admissibility may take into account later facts. Second, tribunals enjoy greater procedural flexibility in respect of cases over which they have jurisdiction but the claims may be inadmissible.[31] It is an open question whether tribunals are under a greater duty to satisfy themselves that the claim is admissible, compared to assessing their own jurisdiction *ex officio*.[32]

4. The Distinction between Jurisdiction and Applicable Law

Jurisdiction concerns whether a tribunal is competent to adjudicate a particular case submitted to it. The question of the applicable law – which rules should the tribunal apply – is a separate one.[33] In the *Pulp Mills* case, the ICJ's jurisdiction was based on a compromissory clause contained in the 1975 Statute on the River Uruguay. The court explained that the 'applicable law has no bearing on the scope of the jurisdiction conferred on the Court (…) which remains confined to disputes concerning the interpretation or application of the 1975 Statute'.[34]

In the case of international investment tribunals, consent in conjunction with Article 25(1) of the ICSID Convention governs the scope of the tribunal's jurisdiction. By contrast, the applicable law provision – Article 42(1) of the ICSID Convention – provides that a tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. The applicable law tells us what law a tribunal is bound to apply in deciding disputes. The tribunal is not necessarily limited to applying one particular law. In ICSID arbitrations, the applicable law is typically a hybrid of international and domestic law (usually of the host State). Different laws might apply to different aspects of the case. For example, the contours of property rights are found in the domestic law creating the property right; the existence of a contractual right is determined by the law governing the contract and the existence of a corporation by the *lex societatis*.[35]

As we have seen above, the consent of the parties determines the scope of a tribunal's

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[31] *MOX Plant* (n. 29); *SGS Société Générale de Surveillance S.A. v. Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, 157, 175–176.
[32] For details on the consequences of the distinction see below Section E.1.
[33] See contribution by Ole Spiermann, 'Investment Arbitration: Applicable Law', ch. 11.IV., #xx–yy#.
[34] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Rep. 2010, 14, para. 66.
[35] Zachary Douglas (n. 2) para. 809.

jurisdiction. States can submit disputes where the applicable law is domestic law or purely commercial disputes to an international forum. Article 38 of the ICJ Statute that sets out the sources of law to be applied in adjudication before the ICJ is only a default rule on the applicable law. There is no *a priori* limit on the ICJ's subject matter jurisdiction.

Article 38 concerns applicable law, not jurisdiction. In the absence of *a priori* jurisdictional imitations, the ICJ has exercised jurisdiction over disputes involving purely domestic law in the *Serbian* and *Brazilian Loans* cases.[36] The court did not see fundamental obstacles to jurisdiction over debt instruments governed by domestic law. However, these cases have been exceptional, as the vast majority of cases that reach the ICJ involve subject matter that is properly international.

Under ICSID, jurisdiction can also be based on a contract, and it can extend *ratione materiae* to contractual disputes. Whether it does cover such disputes is a matter for interpretation of the instrument of consent. What matters is whether the parties submitted purely contractual disputes to arbitration. There is no bar against them doing so, but the evidence needs to be clear that they desired arbitration in relation to purely contractual claims.[37]

There is not necessarily a one-to-one relationship between applicable law and a tribunal's subject matter jurisdiction. It is a characteristic feature of specialised tribunals, such as investment tribunals, that their subject matter jurisdiction is limited to disputes arising in one particular area of international law. As the International Law Commission (ILC) noted in its Fragmentation Report, 'a limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties.'[38]

Even though jurisdiction and applicable law are conceptually distinct, in practice compromissory clauses sometimes function as the gatekeepers of the law to be used by the court. The dispute passes through the gate of the jurisdictional clause, which in turn influences the tribunal's determination of the applicable law.[39] At the same time, the applicable law can influence how a particular tribunal conceives of its own jurisdictional mandate.

[36] In the *Case of Certain Norwegian Loans (France v. Norway)*, Judgment, ICJ Rep. 1957, 9, the ICJ declined jurisdiction on a prior ground.

[37] *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS v. Philippines* (n. 31); see generally James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb. Int'l 351–374.

[38] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006, para. 45.

[39] Matina Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be 'Used' in the ICJ and the PCIJ' (forthcoming, on file with the author).

In practice, the important distinction between jurisdiction and applicable law is often blurred. They interact in complex ways. As Judge Greenwood stated

> Because there is no real system of compulsory jurisdiction in international law, jurisdictional disputes occupy a quite disproportionate part of the Courts' time. (…) [This] also gives rise to real difficulties in great many cases in trying to squeeze a case that is really about one subject into a jurisdictional clause that was designed to deal with something else. (...) Suffice it to say that there is one legal authority which beautiful encapsulates the problem. That is the well known legal authority of Cinderella. (...) Most of the time in international law you find that you have to try and squeeze a rather large, perhaps ungainly force, into the glass slipper of a jurisdictional clause that really is far too small for the case you want to bring.[40]

Arguably, from a theoretical point of view, consent needs to be explicit and if the consent to arbitrate does not refer to contractual disputes, then the tribunal lacks jurisdiction over contractual disputes. Yet when the scope of consent to arbitrate is ambiguous, the parties often refer to the applicable law clause in order to determine the scope of the tribunal's jurisdiction. In such cases tribunals also use the applicable law clause to favour one interpretation of the jurisdictional clause over another. So the content of the applicable law clause (extending to some domestic law) can have a feedback effect on the scope of jurisdiction, by way of interpretation.

Even though international tribunals primarily apply international law, domestic law, at least in some cases, forms part and parcel of the tribunal's applicable law. This is especially the case in investment treaty arbitration. The applicable law before international courts and tribunals is often more nuanced than the dichotomy between international and domestic law would suggest.[41]

B. Giving and Withdrawing Consent to Arbitrate

1. Consent-Based Jurisdiction of Investment Tribunals

Investment arbitration, like all other forms of international dispute settlement, is based on consent. The competence of tribunals to adjudicate derives from the consent of the parties – the host State and the foreign investor. This section first examines the modalities for States to consent for investment disputes to be adjudicated by international arbitral tribunals (B.1–3), before turning to the conditions under which States can withdraw such consent should they so desire (B.4–5).

We can distinguish three modalities of consent. First, just like in commercial arbitration,

[40] Sir Christopher Greenwood, Friday Lunchtime Lecture, Lauterpacht Centre for International Law, *Challenges of International Litigation*, Friday 7th October 2011, at 30:31', available at http://itunes.apple.com/itunes-u/lcil-international-law-seminar/id472214191.

[41] See the nuanced discussion in Zachary Douglas, 'The hybrid foundations of investment treaty arbitration' (2003) 74 BYIL 152, 194–213.

investors and host States can negotiate arbitration clauses to be included in their investment contracts. Second, host States may offer arbitration in their domestic legislation, often in investment codes. Third, the host State's consent to arbitrate may be set out in bilateral or multilateral investment treaties. The two latter modalities of consenting to arbitration together are known as 'arbitration without privity' – a form of arbitration in which the host State's consent to arbitrate is given generally ex ante, and where the host State's consent to arbitrate is detached from the contractual relationship between the host State and the investor.

2. Arbitration without Privity

From the mid-1970s onwards, a new type of arbitration based on treaty became prominent. In this type of arbitration, consent is one layer removed from particular investment transactions. Paulsson has famously described modern investment arbitration as 'arbitration without privity'.[42] Investors are not in privity with the host State, given that the BIT is concluded by their State of nationality and the host State, or national investment code represents a unilateral offer to arbitrate. Notwithstanding, investors have powerful procedural/and or substantive rights. Under one theory, obligations under BITs are owed to investors; under another they are owed jointly to the home State and their investors.[43]

The first decision where the investor and the host State were not in privity was *SPP v. Egypt* in 1985[44], in which an aggrieved investor successfully initiated arbitration proceedings under ICSID on the basis of a general offer to arbitrate contained in Egypt's investment promotion law. This arbitration, though comparatively new, matured rapidly. It now accounts for the great majority of cases submitted to investment tribunals.[45]

'Arbitration without privity' differs from traditional arbitration. In *Anglo-Iranian Oil Company*, the UK sought to rely on the 1933 concession contract between the government of Iran and the Anglo-Persian Oil Company, contending that this agreement had: 'a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments'. The court refused to entertain the idea that a concession contract could have two beneficiaries. As the UK was not in privity to the concession contract, it had no standing to enforce the contract.

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[42] Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Rev.–FILJ 232–256.

[43] Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Theory of Independent Rights and Shared Interpretive Authority' (forthcoming, on file with the author) 18; Zachary Douglas (n. 2) 13–23; Michael Reisman, Expert Opinion in *Chevron v. Ecuador,* 14–15 ('investment treaties, like human rights treaties, create rights for third party beneficiaries. The BIT is part of a species of treaties for the benefit of third parties (...)').

[44] *Southern Pacific Properties (Middle East) Ltd* (*SPP) v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 April 1985.

[45] Jan Paulsson (n. 42) 232–256.

> The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the concession. It does not regulate in any way the relations between the two Governments.[46]

Investment treaty arbitration is arbitration 'without privity' in the sense that there is no need for the investor to have concluded an agreement to arbitrate ex ante with the host State. The investor simply accepts the host's State offer to arbitrate, contained in a BIT or a domestic investment code, after a dispute has arisen. Note that it is only the modality of giving consent that has changed. Consent itself remains central. Accordingly, in *Mihaly v. Sri Lanka*, an ICSID tribunal found that a US subsidiary of a Canadian investor could not invoke the ICSID Convention against Sri Lanka, given that Canada was not a party to the ICSID Convention. The tribunal explained that 'a Canadian claim which was not recoverable, nor compensable or indeed capable of being invoked before ICSID could not have been admissible or able to be entertained under the guise of its assignment to the US claimant.[47]

With both national legislation and investment treaties, investors consent to the host State's offer to arbitrate by way of submitting a request for conciliation or arbitration. In *Zhinvali v. Georgia* an ICSID tribunal found that the claimant accepted the host State's offer to arbitrate, contained in its investment law, when it filed its request for arbitration.[48] In *Generation Ukraine v. Ukraine*, the tribunal held that the claimant validly consented to ICSID arbitration by requesting ICSID arbitration that the Ukraine had offered in the Ukraine–USA BIT.[49]

3. Instruments of Consent

a) Arbitration Clauses in Investor-State Contracts

The first modality for the parties to mutually consent to submit investment disputes to arbitration is by way of arbitration clauses. This was the traditional method of expressing consent to jurisdiction of tribunal or court, but, in recent times, host States have increasingly

[46] *Anglo-Iranian Oil Co (United Kingdom v. Iran)*, Judgment, ICJ Rep. 1952, 93.
[47] *Mihaly v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 26 July 2001, para. 4.
[48] *Zhinvali Development Ltd. v. Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, para. 342.
[49] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 12.2, 12.3.

consented by way of investment treaties, and to a lesser extent, investment codes. To a considerable degree, arbitration without privity has taken the place of negotiated arbitration clauses. Most ICSID cases up to the end of the 1980s relied on negotiated arbitration clauses.

Well-known investment cases brought on the basis of arbitration clauses include *Holiday Inns v. Morocco*, *World Duty Free v. Kenya* and *RSM Production v. Grenada*.[50] In theory, arbitration clauses could be negotiated by the parties ex post. Invariably, however, the parties negotiate arbitration clauses in advance when they enter into investor-State contracts. Whether the parties include arbitration clauses in their investor-State contracts, and the terms under which any arbitration may be available, depends on the respective bargaining power of the host State and the foreign investor. For instance, prospective long-term investors in natural resources with a very significant capital commitment are far more likely to be able to negotiate a specific arbitration clause for inclusion in the investor-State contract than a medium-size enterprise that operates an agricultural plant or develops a resort. Investment treaties, respond to the potentially uneven availability of investor-State arbitration by negotiating reciprocal offers to arbitrate at the inter-State level for the benefit of all investors, irrespective of their sector or the size of their capital commitment.

b) Investment Codes

The second modality for host States to consent to the jurisdiction of investment tribunals is on the basis of investment codes. Investment codes are standalone, unified codes setting out all rules relevant for inward foreign investment in a single piece of legislation.[51] They typically specify the types of admissible capital, the sectors open and closed to foreign investors (in contrast to most BITs which focus on post-establishment protection), as well other conditions under which investors may commit capital to the host country.

With this modality of consent, the basis for the tribunal's jurisdiction is national law. For example, in *Tradex v. Albania*[52] in the mid-1990s and *Sudapet v. South Sudan* in 2012, Albania's and South Sudan's national investment legislation contained a standing offer to

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[50] *Holiday Inns S.A. and others v. Morocco*, ICSID Case No ARB/72/1, Decision on Jurisdiction (unpublished), 12 May 1974, for a detailed description see Pierre Lalive, 'The First "World Bank" Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems' (1981) 51 BYIL 123–162 ; *World Duty Free Company v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006; *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009.

[51] Markus Burgstaller and Michael Waibel, 'Investment Codes' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) (http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1532?rskey=bq9HuE&result=2&prd=EPIL).

[52] *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996; *Sudapet Company Limited v. South Sudan*, ICSID Case No. ARB/12/26 (pending).

foreign investors to arbitrate. In both cases, the investors accepted this offer by initiating arbitration. Domestic legislation also constituted the basis for some of the earliest ICSID cases.[53]

However, national investment legislation comes in various forms. It may not unambiguously contain the host State's consent to arbitrate. The key question is whether the legislation simply acknowledges the existence of a certain dispute resolution forum or whether in and of itself it contains a unilateral and binding promise to arbitrate. The usage of investment codes has declined markedly in the past two decades with the rapid advent of investment treaties, the third modality of consent.

c) Investment Treaties

Investment treaties are framework treaties for the encouragement and protection of investment in the territory of each contracting State. This third modality for consenting to investment arbitration has nowadays become the most important. In contrast to investment codes promulgated unilaterally by host States, they are consensual in that the home and host country agree jointly on the treatment standards guaranteed to cross-border investment and on the terms, if any, on which they reciprocally, offer investor-State arbitration to investors of the other contracting party.

Even though the ICSID preparatory materials do not refer to the possibility of consent to be given by treaties, they do mention the option of host States consenting unilaterally to arbitration and for investors to accepting such offers.[54] Conceptually, then, investment treaties rely on the offer-and-acceptance model inspired by similar models in domestic contract law. On this view, BITs do not themselves consent to ICSID jurisdiction, but rather, offer arbitration. In turn, investors accept this offer by initiating arbitration.[55]

4. Denunciation of the ICSID Convention

States are not bound to arbitrate disputes forever, even if they have consented to investment arbitration according to one of the three modalities discussed above. States are prior to dispute

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[53] *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983; *AGIP v. Congo*, ICSID Case No. ARB/77/1, Final Award, 30 November 1979, (1993) 1 ICSID Rep. 306, 313; (1984) 67 ILR 318; *SPP v. Egypt* (n. 44).

[54] Executive Directors of the International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, (1993) 1 ICSID Rep. 28, paras. 9, 12, 393.

[55] E.g. *American Manufacturing & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 5.17–5.23; *Lanco International Inc. v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998, paras. 8, 28–33, 43, 44; *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, paras. 67, 81; *CSOB v. Slovakia* (n. 55) paras. 37–38; *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 29 June 1999; *Salini v. Jordan* (n. 16) para. 65.

settlement. Given that consent by the primary subjects of international law is the foundation of all international dispute settlement; such consent may also be withdrawn. The State's capacity to bind itself by consent (and as a corollary, to unbind itself) is a function of international law. Determined States may withdraw from the regimes they create, even if such withdrawals may have high economic and political costs.

Yet the conditions under which States can withdraw are often regulated by the treaty from which the State seeks to withdraw, and in case such treaty is silent, by the general rules on withdrawal in Articles 54 and 56 of the Vienna Convention on the Law of Treaties. The capacity to withdraw is thus not pre-legal. States remain the masters of the treaties, and can pull out if they so choose, though they can quit treaty regimes only pursuant to the terms of their consent. Sovereignty does not entail an implied power to override consent previously given. Thus consent given prior to the withdrawal taking effect in line with the treaty or general international law is not nullified.[56]

Once validly given, consent is irrevocable. The principle that consent is irrevocable is reflected in the text of Article 25(1) of the ICSID Convention: '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.' Likewise, the Report of the Executive Directors reaffirms the same principle: '[c]onsent to jurisdiction (...) once given cannot be withdrawn unilaterally'.[57] The principle not only applies to denunciations of the Convention plain and simple, but also to new limitations to consent given.

Notification under Article 25(4) of the ICSID Convention, including notifications in respect of the Convention's territorial scope of application, is a mechanism whereby States cam let ICSID know of certain types of disputes that they are unwilling to submit to ICSID jurisdiction. Such notifications are also subject to the same principle of irrevocability. They apply only prospectively. Otherwise States could simply withdraw or limit their consent ex post.[58]

The irrevocability of consent notwithstanding, States have the option on the one hand of withdrawing from the ICSID Convention – and hence terminate their membership in the international organisation that provides a self-contained procedural machinery for investment arbitration. On the other hand, they can also withdraw their consent to arbitrate (see 5. below).

[56] *Cf. Nicaragua* (n. 30) 415–421 (letter by US Secretary of State Schultz).
[57] Report of the Executive Directors (n. 54) para. 23.
[58] *Alcoa Minerals v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, 6 July 1975; *Kaiser Bauxite v. Jamaica*, ICSID Case No. ARB/72/3, Decision on Jurisdiction and Competence, 6 July 1975; *Reynolds v. Jamaica*, ICSID Case No. ARB/74/4, Decision on Jurisdiction and Competence, 6 July 1975.

Crucially, however, in keeping with general international law and the terms of the ICSID Convention and investment treaties, they cannot do so at will, but only subject to the terms of their consent to be bound in respect of the ICSID Convention and the offer to arbitrate in their investment treaties.

The central provision on denunciation is Article 72 of the ICSID Convention. According to this provision, when an ICSID member State denounces the ICSID Convention, consent to the jurisdiction of ICSID tribunals previously given is unaffected by such denunciations under Article 71. Article 72 provides that

> Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Despite this seemingly straightforward rule, the difficulty is to determine what counts as 'consent' for purposes of Article 72 and when exactly a State's denunciation of the ICSID Convention takes effect.[59] Does 'consent' require the investor to have accepted the host State's offer to arbitrate, or does it suffice for the host State on its own to have consented to arbitration?

We can distinguish four scenarios: (i) a State withdraws from the Convention before a dispute has arisen; (ii) a State withdraws from the Convention after a dispute has arisen but before the investor has accepted the host State's offer to arbitrate; (iii) the investor has accepted the host State's offer to arbitrate but has yet to file a claim; (iv) the investor accepted the host State's offer to arbitrate and has initiated the arbitration.

Applying Article 72 of the ICSID Convention, scenario (iii) and (iv) are straightforward. In both cases there is consent to ICSID jurisdiction, which is hence irrevocable. The debate has centred on scenario (i) and especially (ii). Arguably, the irrevocability of consent coupled with the investor's commitment of capital with the expectation that investment arbitration would be available in case of a dispute implies that investors in scenario (i) and (ii) should still be able to initiate arbitration. However, Schreuer concludes that 'consent must be perfected through an acceptance by the investor before the date of the denunciation in order to preserve rights and obligations under the ICSID Convention. A mere offer of consent to

[59] Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (n. 10) 353-368; Oscar Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 251–277 ; Emmanuel Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237 NYLJ, 26 June 2007.

arbitration contained in a treaty or in national legislation cannot have this effect.'[60]

The denunciation of the ICSID Convention by Bolivia[61], Ecuador[62] and Venezuela[63] in 2007, 2010 and 2012 prompted a series of arbitrations in cases where the investor had not accepted the host State's offer to arbitrate at the time of the denunciation of the Convention.[64] An award has yet to be rendered on the proper interpretation of Article 72 of the ICSID Convention.[65]

Article 72 of the ICSID Convention only applies to unilateral attempts to withdraw. The parties – that is the foreign investor and the host State – are able to withdraw their consent by mutual agreement, including for pending cases.[66] The more difficult question is whether the host State and the investor's home State can settle, or otherwise withdraw a case without the investor's agreement. The traditional answer is that States retain a degree of control to settle property claims by lump sum agreement or in a peace treaty following international armed conflicts. However, this position may have changed because investors, according to some accounts, are the bearers of their own rights.

5. Withdrawal of the Consent to Arbitrate

This subsection focuses on the second and third modality for host States to consent to arbitration: investment codes and investment treaties. As regards the first modality of negotiated arbitration clauses, effective (unilateral) withdrawal is typically not a workable option. Host States can terminate investor-State contracts only in accordance with such contracts, and under the principle of separability, arbitration clauses will generally survive such termination. Hence, without the agreement of the investor, host States cannot, as a rule, withdraw from negotiated arbitration clauses.

In *Ruby Roz v. Kazakhstan*, the investor invoked the jurisdiction of an UNCITRAL tribunal

[60] Christoph Schreuer, 'Denunciation' (n. 59) 361.

[61] ICSID received Bolivia's denunciation on 2 May 2007. It became effective on 3 November 2007.

[62] ICSID received Ecuador's denunciation on 6 July 2009. It became effective on 7 January 2010.

[63] ICSID received Venezuela's denunciation on 24 January 2012. It became effective on 25 July 2012.

[64] *Transban v. Venezuela*, ICSID Case No. ARB/12/24 (registered 27 August 2012); *Tenaris v. Venezuela*, ICSID Case No. ARB/12/23 (registered 21 August 2012); *Venoklim Holding v. Venezuela*, ICSID Case No. ARB/12/22 (registered 15 August 2012); *Fábrica de Vidrios Los Andes and Owens-Illinois de Venezuela v. Venezuela*, ICSID Case ARB/12/11 (registered 10 August 2012); *Blue Bank v. Venezuela,* ICSID Case No. ARB/12/20 (registered 7 August 2012); *Rusoro Mining v. Venezuela*, ICSID Case ARB(AF)/12/5 (registered 1 August 2012); *Valle Verde v. Venezuela*, ICSID Case No. ARB/12/18 (registered 25 July 2012); *Saint-Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13 (registered 25 June 2012); *Gambrinus v. Venezuela*, ICSID Case No. ARB 11/31 (registered 24 April 2012).

[65] The only case to raise this issue to date settled, *E.T.I. v. Bolivia*, ICSID Case No. ARB/07/28, discontinued, 21 October 2009.

[66] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention* (Cambridge University Press, 2009) Article 25, para. 603.

on the basis of a 1994 Kazakh statute on foreign investment.[67] Kazakhstan had repealed this law in 2003 and enacted a new law which did not contain an offer to foreign investors to arbitrate. The investor initiated the arbitration in 2010 only. Ruby Roz argued that it could still request arbitration with Kazakhstan as the statute contained a standing offer to arbitrate and it had invested in Kazakhstan prior to the statute's repeal.[68]

The tribunal rejected Ruby Roz's argument that it had an 'accrued right' to arbitration. All it had was an 'unaccepted offer to arbitrate', which Kazakhstan validly repealed. The investor would have needed to accept the offer to arbitrate in writing prior to the law's repeal. The tribunal found that the

> arbitration clause in the [Kazakh Foreign Investment Law] calls for the right to arbitration to be perfected by the investor's written consent, not by an investment or by a claim arising (…) the Claimant had no 'accrued right' to arbitration *until* it accepted in writing the offer of arbitration set forth in the [Kazakh Foreign Investment Law] – and this occurred no earlier than the Claimant's letter seeking to negotiate the dispute.[69]

The finding in *Ruby Roz v. Kazakhstan* contrasts with the position in *Telsim & Rumeli v. Kazakhstan* in respect of the same Kazakh statute. The arbitrators found that the statute provided a valid basis for its jurisdiction in respect of a dispute arising out of an investment made prior to the repeal of the 1994 law. The tribunal denied that the repeal affected its jurisdiction. It explained that

> [it] is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium.[70]

Turning to investment treaties, similar considerations apply for unilateral withdrawals from investment treaties by States. States are free to terminate investment treaties if they no longer regard such treaties, or particular provisions therein, such as umbrella clauses or investor-State arbitration, as in their interest[71], but they are held to the agreement as long as it continues in force. Investment arbitration treaties often survive for 10 or 20 years following their termination on the basis of survival clauses they contain. These survival clauses are the

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[67] *Ruby Roz Agricol LLP v. Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013.
[68] *Ruby Roz v. Kazakhstan* (n. 67) para. 152.
[69] *Ruby Roz v. Kazakhstan* (n. 67) para. 156 (emphasis in original); Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 25, para 618 ('an offer of consent contained in national legislation (…) that has not been taken up by the investor will lapse when the legislation is repealed').
[70] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 335.
[71] An alternative is to leave the existing treaties in place, but negotiate different terms for future treaties, such as Australia's decision no longer to include investor-State arbitration in its investment agreements, Jürgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication' (2012) 27 ICSID Rev. –FILJ 65–86.

key difference compared to repealing domestic investment codes, whose repeal is not subject to any delay.

The crucial question, like for investment codes, is when the withdrawal takes effect. What matters is whether the investor accepted the host State's offer to arbitrate prior to the withdrawal plus any applicable survival period. The better view, just like for investment codes, is that a standing offer to arbitrate that the investor has not accepted is not irrevocable.[72]

In addition to survival clauses, many investment treaties include minimum periods of application which typically range from 5–20 years. Some investment agreements combine minimum period of application clauses with automatic renewal.[73] They, alongside survival clauses, aim to guarantee that investors who have committed capital to the host country are not suddenly deprived of the benefit of an investment treaty following termination.[74]

A good example of a survival clause is Article 47(3) of the Energy Charter Treaty (ECT) that provides for a twenty year survival period in respect of existing investments, and similarly, Article 45(3)(b) provides for a similar survival period with respect to provisional application of the ECT.

One of the few existing cases is the *Hulley* case arising out of Yukos' nationalisation, which centred on whether the ECT provisionally applied to the Russian Federation.[75] Russia signed the ECT in 1994 but its parliament never ratified it. Under ECT Article 45(1), a party, like Russia that has signed but not ratified the ECT is bound '(…) to apply [the] [t]reaty provisionally (…) to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.'

The tribunal concluded that the principle of provisional application was consistent with Russia's Constitution, laws and regulations. Accordingly, the tribunal found that the whole of the ECT applied provisionally in the Russian Federation until 18 October 2009 when Russia ceased the provisional application of the ECT and withdrew from the ECT, provisionally applied.

[72] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66), Article 25, 259, para. 619 ('It is only after its acceptance by the investor that an offer of consent contained in a BIT or other international instrument becomes irrevocable and hence insulated from attempts by the host State to terminate the treaty or instrument.').

[73] Article 12(2), *Agreement between Belgium and Indonesia on the encouragement and reciprocal protection of investments*, 15 January 1970.

[74] James Harrison (n.9), , 930.

[75] *Hulley Enterprises (Cyprus), Yukos Universal Limited, Veteran Petroleum Limited v. Russia*, PCA Case No. AA 226-228, Interim Decision on Jurisdiction and Admissibility, 30 November 2009, paras. 88–145.

Importantly, however, under the survival clause of ECT Article 45(3), for energy investments made prior to 18 October 2009, Russia remains bound to the ECT for 20 more years, allowing investors to arbitrate disputes with Russia concerning those investments. In sum, the tribunal had jurisdiction even though Russia never ratified the treaty. Moreover, investors who committed capital prior to 18 October 2009 benefit from the ECT's substantive guarantees until October 2029.

Separate from the question of unilateral termination is the effect of termination of investment agreements by mutual consent of all the States. The traditional answer would be that States, as the masters of the treaties, enjoy complete freedom to terminate or modify treaties.[76] A possible counterargument may be found in the protection of third-party rights, assuming that such rights vest in investors. Even though the terms of Article 37(2) of the Vienna Convention on the Law of Treaties speak only of rights of third *States*, this provision could be seen as reflective of a general principle that the rights of third parties, including private parties, cannot be abrogated at will.[77]

C. Jurisdiction in General

1. Kompetenz-Kompetenz: Tribunals determine their own Jurisdiction

The doctrine of *Kompetenz-Kompetenz* denotes the authority of arbitral tribunals to determine the scope of their own jurisdiction. *Kompetenz-Kompetenz* denotes the arbitral tribunal's 'power to be the ultimate arbiter of disputes concerning the extent of those limited competences.'[78]

Kompetenz-Kompetenz is a corollary of arbitration's character as binding, third-party dispute settlement. It is a necessary precondition for arbitral tribunals to be able to properly exercise their arbitral function. In the absence of the power to determine the scope of their own competence, the effectiveness of arbitral tribunals would suffer. The power to determine the scope of jurisdiction would need to reside elsewhere, such as with the State parties to a dispute. As a result, States would be able to frustrate dispute settlement before arbitral tribunals ex post, even once they have consented. Removing such authority from the parties and delegating it to an independent tribunal to decide on its own competence is an essential

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[76] VCLT Article 54(b); ILC, *Reports of the International Law Commission on the work of the second part of its seventeenth session*, 249.

[77] James Harrison (n.9) 42–49.

[78] Joseph H.H. Weiler, 'The Autonomy of the Community Legal Order: Through the Looking Glass' in Joseph H.H. Weiler, *The Constitution of Europe 'Do the New Clothes have an Emperor?' and other Essays on European Integration* (Oxford University Press, 1999) 286-323 (distinguishing legislative and judicial *Kompetenz-Kompetenz*); Chester Brown, *A common law of international adjudication* (Oxford University Press, 2007) 61–63.

attribute of third-party adjudication. The absence of *Kompetenz-Kompetenz* would undermine the effectiveness of third party adjudication.

The *Betsey* case (1797) decided by a British–US Commission established pursuant to the Jay Treaty was the first to establish this important principle for international dispute settlement.[79] The case dealt with the capture of the *Betsey*, a ship belonging to American nationals, by a British privateer. US Commissioner Gore, in dismissing a British preliminary objection, held that the Commission does not only have the power, but it also has the duty to decide on its competence.[80] In the *Sally* case (1798), also under the Jay Treaty, US Commissioner Pinkney, in rejecting another British objection to jurisdiction, said: 'In one word, the Commission has the competence to determine its own jurisdiction.'[81] This short epithet has since become a time-honoured principle of international adjudication. International arbitral tribunals are the ultimate arbiter of their own jurisdiction.

The absence of the principle of *Kompetenz-Kompetenz* would imply that tribunals need to declare themselves incompetent whenever one of the parties disputed the tribunal's jurisdiction, even on spurious grounds. It is an inherent feature of the international judicial function. The principle of *Kompetenz-Kompetenz* is found in several bilateral and multilateral treaties. Article 73 of the 1907 Hague Convention establishes:

> The Tribunal is authorized to declare its competence in interpreting the compromis, as well as the other Treaties which may be invoked, and in applying the principles of law.[82]

Article 36 of the Permanent Court of International Justice (PCIJ) Statute similarly provided: '(…) In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.' Article 36(6) of the ICJ Statute provides for the ICJ's *Kompetenz-Kompetenz* in identical terms. Both the PCIJ and the ICJ have fleshed out the principle of *Kompetenz-Kompetenz* in their case law. In the *Interpretation of the Greco-Turkish Agreement* advisory opinion, the court establishing the general principle of *Kompetenz-Kompetenz*, extending to any international court or tribunal held that: 'As a general rule, any body possessing jurisdictional powers has the right in the first place to determine the extent of its jurisdiction.'[83]

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[79] Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and The United States of America ('Treaty of London of 1794').

[80] James Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture' (2010) 1 JIDS 3–24, 16.

[81] *Sally case* (1798), for extracts see Albert Geouffre de la Pradelle and Nikolaos Politis, *Recueil des Arbitrages Internationaux*, vol. I (Pedone, 1905) 131, 132.

[82] *Cf.* also Article 48 of the 1899 Convention I (identically worded but for 'principles of international law').

[83] *Interpretation of the Greco-Turkish Agreement*, Advisory Opinion, (1928) PCIJ (Ser. B) No. 16 (19) 20.

In *Nottebohm*, the ICJ interpreted Article 36(6) so as to encapsulate a broad competence for tribunals to decide on their own competence:

> Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the Alabama case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction (…) The Rapporteur of the Convention of 1899 had emphasized the necessity of this principle, represented by him as being of 'the very essence of the arbitral function and one of the inherent requirements for the exercise of this function'. This principle has been frequently applied and at times expressly stated.[84]

The same principle of *Kompetenz-Kompetenz* applies in investment arbitration. Article 41(1) of the ICSID Convention provides that '[t]he Tribunal shall be the judge of its own competence' in respect of arbitration.[85] Article 23(1) of the UNCITRAL Arbitration Rules, as revised in 2010, similarly provides:

> The Tribunal is authorized to declare its competence in interpreting the compromis, as well as the other Treaties which may be invoked, and in applying the principles of law.

The principle of *Kompetenz-Kompetenz* works both ways. Arbitral tribunals are also bound to respect the authority of national courts and of other international courts and tribunals. For example, an ICC arbitral tribunal deferred to the *Kompetenz-Kompetenz* of a national court and reasoned as follows:

> The Arbitral Tribunal would, however, have had serious reservations about ruling on the lack of jurisdiction of a state Court and issuing a decision, which could purport to deny a party access to justice before such a state Court. It is a fundamental principle that each Court and Arbitral Tribunal has jurisdiction to rule on its own jurisdiction or, in other words, has Kompetenz-Kompetenz.[86]

In theory, there is some tension between the principle of *Kompetenz-Kompetenz* and challenges to arbitral decisions before national courts on the ground that the arbitral tribunal exceeded its jurisdictional mandate. In practice such tension rarely materialises because it is the arbitral rules themselves that provide for such oversight by national courts, including the power to set aside awards.[87] However, national courts have no such role in ICSID arbitration. The only way for jurisdictional determinations by tribunals to be reviewed is by way of

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[84] *Nottebohm* (n. 19) 111, 119.

[85] *Cf.* also Article 32(1) of the ICSID Convention in respect of conciliation: 'The Commission shall be the judge of its own competence'.

[86] Unreported ICC Case, Procedural Order of November 2000 (refusing to grant an anti-suit injunction against the exercise of jurisdiction by a national court), quoted from Laurent Lévy, 'Anti-Suit Injunctions Issued by Arbitrators' in Emmanuel Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (Juris, 2005).

[87] Anne van Aaken, 'Control Mechanisms' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014 (forthcoming)).

annulment application. In exercising their oversight function, national courts effectively review the arbitral tribunal's exercise of its *Kompetenz-Kompetenz*, albeit with a large margin of appreciation.

A good example is *BG v. Argentina.*[88] BG, the investor, had filed the arbitration without first litigating in Argentinean courts, even though the Argentina–UK BIT provided that only if the dispute is not resolved before the domestic courts within eighteen months, may the investor initiate arbitration. Argentina sought to vacate the UNCITRAL arbitral award before the US courts. In the exercise of its *Kompetenz-Kompetenz*, the arbitral tribunal had found that it had jurisdiction to decide the dispute.[89] On appeal, the United States Court of Appeal for the District of Columbia vacated the award on the grounds that the arbitral tribunal ignored the terms of the BIT – the award, according to the Court of Appeal lacked any foundation in law. This case goes to the heart of whether it is the arbitral tribunal that has the exclusive say on its own competence or whether national courts have a limited role in ensuring that arbitral tribunals cannot egregiously depart from the consent of the parties.[90]

2. Existence of a Dispute

The existence of a legal dispute is a prerequisite for jurisdiction to exist, both in general international law and international investment arbitration. Neither the ICJ, nor investment arbitration tribunals, decide hypothetical dispute. The ICJ defines a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties'.[91] The dispute must have practical relevance to the parties and cannot be purely hypothetical in character. It is a flexible formulation – but a party cannot create a dispute merely by asserting that one exists. Tribunals objectively determine whether a dispute exists.

Article 25 of the ICSID Convention refers to the existence of a 'legal dispute'. The Report of Executive Director explains

> 26. (...) The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.[92]

Accordingly, disputes need to be capable to be formulated as a legal claim and subject to

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[88] *BG Group Plc v. Argentina*, UNCITRAL, Award on the Merits, 24 December 2007.
[89] *Argentina v. BG Group plc*, 665 F 3d 1363 (certiorari granted, 10 June 2013).
[90] See contribution by Lars Markert and Helene Bubrowski, 'National Setting Aside Proceedings', ch. 11.VI.B., #xx–yy#.
[91] *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Judgment No. 2, (1924) PCIJ (Ser. A) No. 2, 11; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, first phase, ICJ Rep. 1950, 65, 74.
[92] Report of the Executive Directors (n. 54) 28.

dispute settlement on the basis of law.[93] They need to be amenable to being settled on the basis of law, unless the parties have explicitly authorised settlement on some other basis, such as *ex aequo et bono*. Disputes are legal if the investor presents one or more claims formulated as alleged breaches of the procedural and substantive guarantees the host State owes to it.

Under Article 42(3) of the ICSID Convention, the tribunal may decide a dispute *ex aequo et bono* with the express authorisation of the parties. The parties in such cases ask tribunals to decide on the basis of what they consider to be fair and equitable. Such instructions to decide the case *ex aequo et bono* straddles jurisdiction and applicable law. On the one hand, an explicit direction to the tribunal to decide the case *ex aequo et bono* is a necessary condition for the tribunal to have jurisdiction to base its award on such grounds. On the other hand, it also tells the tribunal what rules and principles it ought to apply in adjudicating the dispute, and hence pertains to the applicable law. It illustrates how jurisdiction and applicable can interact.[94]

3. Counterclaims

Counterclaims are claims raised by respondents. In investment arbitration, the term refers to counterclaims by the host State in proceedings initiated by investors, given that host States are almost invariably the respondent. Counterclaims are distinct from defences on the merits, the purpose of which is to ensure to defeat the claims brought by the claimant on their merits. Rather, counterclaims are the host State's own claims against the investor for the latter's breach of the obligations it may owe to the host State.[95]

In principle, host States may raise counterclaims in arbitrations initiated by investors.[96] Potentially, counterclaims play an important role in investment arbitration, as they are often the only way for the host State to bring claims, albeit subject to stringent conditions, against the investor. They could open up the possibility of an award against the claimant simultaneous to the determination of the investor's claims. The device of counterclaims could increase the efficiency of investment arbitration by ensuring that the tribunal decides closely related claims by the investor and the host State in a single proceeding.

Various international courts and tribunals have expressed their jurisdiction to hear

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[93] *Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 94; *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 106; *AES* v. *Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 43.

[94] See Section A.4. above.

[95] See contribution by Karsten Nowrot, 'Obligations of Investors', ch. 10, #xx–yy#.

[96] Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds) (n. 9) 577-602.

counterclaims as an emanation of their inherent powers, even if their constitutive instruments do not expressly refer to counterclaims.[97] In the *Genocide* case, the ICJ liberally allowed counterclaims[98], while in other cases, such as in the *Jurisdictional Immunities* case, the court found that counterclaims were inadmissible.[99]

The ICSID Convention expressly provides for counterclaims in Article 46. However, successful counterclaims in investment arbitration are few and far between. Counterclaims raise more challenges in investment arbitration than in international dispute settlement more generally, and the attendant risks to the jurisdiction of investment tribunals becomes highly asymmetrical. The possibility for counterclaims is especially limited in arbitration without privity. Once the investor accepts the offer by instituting an arbitration, the consent is limited to deal with the claims raised by the investor.

Counterclaims raise special problems in investment arbitration. One difficulty the host State faces in bringing counterclaims is that investment treaties are usually asymmetrical in that they set out obligations only for the host State. As a result, they generally need to be grounded in another legal basis than the investment treaty itself. If the investor can bring a claim for breach of an investment contract that amounts to an 'investment dispute', should the host State not be able to bring a counterclaim for breach of the same contract in the same proceedings? For instance, the host State may wish to raise the counterclaim that the work carried out by the investor did not meet the specifications set out in the contract, and demand damages.

In *Reineccius*, a dispute arose between the Bank for International Settlement (BIS) and some of its private shareholders. The dispute arose from a decision by the BIS' Board of Directors to restrict the right of private parties to hold shares in the BIS and to amend the Bank's Statute, so as to exclude private shareholders by paying them compensation.[100]

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[97] See Art. 63 of the 1936 Rules of the PCIJ; Art. 80 of the 2000 Rules of the ICJ; Art. 98 of the Rules of ITLOS; Claims Settlement Declaration establishing the Iran–US Claims Tribunal, Art. II: the tribunal's jurisdiction covers counterclaims and extends to those 'which arise out of the same contract, transaction or occurrence that constitutes the subject matter of the claim.' The original Rules of Procedure of the PCA of 1899 and 1907 were silent on counterclaims.

[98] *Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Counter-claims, ICJ Rep. 1997, 243 (counterclaims declared admissible but subsequently withdrawn); see also *Case concerning the Oil Platforms (Iran v. USA)*, Counter-claim, ICJ Rep. 1998, 190; *Land and Maritime Dispute (Cameroon v. Nigeria)*, Order, ICJ Rep. 1999, 983.

[99] *Jurisdictional Immunities of the State (Germany v. Italy)*, Counterclaim, Order of 6 July 2010, ICJ Rep. 2010, 310, paras. 26–30 (Italian counterclaim inadmissible).

[100] *Dr Horst Reineccius, First Eagle SoGen Funds, Inc., Pierre Mathieu and la Société de Concours Hippique de la Châàtre v. Bank for International Settlements*, PCA, Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares, 22

The private shareholders, dissatisfied with the amount of compensation the BIS proposed, invoked Article 54(1) of the BIS Statute by virtue of which disputes shall be submitted to the arbitral tribunal established under Article XV of the Hague Convention on the Complete and Final Settlement of the Question of Reparations (1930). The Rules of Procedure of this tribunal are to be found in Annex XII of the Hague Convention, whose Article 6 paragraph 2, (4) provides that Counter-Cases '(…) may include counter-claims, in so far as the latter come within the jurisdiction of the Tribunal'.

The claimants sought relief for its alleged financial loss in the courts of the United States. The BIS raised a counterclaim alleging that the claimants had breached Article 54 of the Bank's Statutes as submission of claims against it to arbitration was mandatory and precluded any recourse to the courts of the United States. The tribunal allowed the counterclaim of the BIS and ruled that

> (…) First Eagle violated its obligations under the Bank's Statutes and unlawfully required the Bank to expend a considerable amount in defending its rights under the Statutes, giving the Bank a right of reparation (…)[101]

Counterclaims generally are subject to two general conditions. There must be (a) a sufficient connection to the principal claim, and (b) the counterclaim must be within the tribunal's jurisdiction.[102] These two prerequisites for counterclaims in general international law are reflected in Article 46 of the ICSID Convention which provides

> [e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

a) Within the Scope of the Tribunal's Jurisdiction

The first prerequisite is that investment tribunals need to have jurisdiction over counterclaims under Article 46. Counterclaims thus need to fall within the parties' consent to arbitrate. The particular terms of consent are important.

For example, consent to arbitration in relation to 'all disputes arising out of an investment', for example, provides a basis for the tribunal's jurisdiction over counterclaims. Conversely, the respondent cannot bring counterclaims where consent to arbitration is expressed in narrow terms, such as in Articles 1116 and 1117 of the North American Free Trade Agreement (NAFTA). These two provisions in the NAFTA limit primary claims to breaches of (the host

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November 2002; Final Award on the Claims for Compensation for the Shares formerly Held by the Claimants, Interest Due Thereon and Costs of the Arbitration and on the Counterclaim of the Bank against First Eagle Sogen Funds, Inc, 19 September 2003.

[101] *Reineccius v. BIS* (n. 100) para. 119.

[102] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 46.

State's) international obligation under the investment chapter of the NAFTA. They thus limit the scope of the tribunal's subject matter jurisdiction such that the tribunal is only competent to decide on alleged breaches of one of the Chapter 11 obligations (which are owed only to the investor). In such cases, counterclaims by the host State will invariably fail.

Consent to arbitration in wide terms can vest jurisdiction over counterclaims in investment tribunals. In *Saluka*, the tribunal decided that, as a matter of principle, where the consent to arbitration is expressed in wide terms in the investment treaty, the tribunal had subject matter jurisdiction over counterclaims by the host State.[103] Article 8 of the Netherlands–Czech Republic BIT conferred jurisdiction over 'all disputes between a Contracting Party and an investor of the other Contracting Party concerning an investment of the latter'. The tribunal did not address the particular problem presented by Article 19(3) of the UNCITRAL Rules, which governed the arbitration.[104]

In *Roussalis*, the majority of the tribunal declined jurisdiction over counterclaims on the following grounds:

> 869. Pursuant to the interpretation rules of Article 31 of the Vienna Convention (...) the Tribunal in its majority considers that the references made in the text of Article 9(1) of the BIT to '*disputes (...) concerning an obligation of the latter*' undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the 'dispute' is the issue of compliance by the State with the BIT.
> 871. As mentioned above, the BIT imposes no obligations on investors, only on contracting States. Therefore, where the BIT does specify that the applicable law is the BIT itself, counterclaims fall outside the tribunal's jurisdiction. Indeed, in order to extend the competence of a tribunal to a State counterclaim, 'the *arbitration agreement should refer to disputes that can also be brought under domestic law for counterclaims to be within the tribunal's jurisdiction*'.[105]

Arbitrator Reisman, in his dissent, took the view that such a restrictive approach to counterclaims was counterproductive and at odds with the objectives of international investment law:

> when the States Parties to a BIT contingently consent, inter alia, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is ipso facto imported into any ICSID arbitration which an investor then elects to pursue. It is important to bear in mind that such counterclaim jurisdiction is not only a concession to the State Party: Article 46 works to the benefit of both respondent state and investor. In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal – which was, in fact, selected by the claimant – perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside

[103] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 17 May 2004, para. 81.
[104] See discussion in the next subsection.
[105] *Spyridon Roussalis v. Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011.

> the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.[106]

In *Goetz*, the tribunal affirmed jurisdiction over a counterclaim, though the counterclaim failed on the merits.

> 277. Il n'est pas contesté que le différend opposant à titre principal les consorts Goetz au Burundi est en relation directe avec des investissements opérés par ceux-ci, en particulier dans ABC à la suite de la délivrance par le Burundi d'un certificat d'entreprise franche autorisant la banque à exercer ses activités selon les modalités fixées au certificat. La demande reconventionnelle est relative aux conditions dans lesquelles ABC aurait exercé ses mêmes activités en méconnaissance du certificat d'entreprise franche dont elle bénéficiait. Elle est donc relative, elle aussi, à un investissement tel que defіné dans le TPI.[107]

b) Sufficient relationship to the Principal Claim

Article 46 of the ICSID Convention also provides for a second prerequisite for the host State to raise counterclaims, namely that the counterclaim needs to be closely related to the principal claim(s).[108] For example, in *Amco v. Indonesia* (resubmitted) the government formulated a counterclaim for tax fraud.[109] The tribunal held it lacked jurisdiction because the counterclaim was not sufficiently connected to the principal claims, as it did not arise directly out of an investment in accordance with Article 25(1).

The Executive Director's Report sheds some light on the meaning of the term 'arising directly out of the subject-matter of the dispute' that encapsulates the need for a sufficient relationship between the principal claim and the counterclaim:

> to be admissible such claims must arise 'directly' out of the 'subject-matter of the dispute'. The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter.[110]

Another expression of this requirement for a sufficient relationship between the investor's principal and the host State's counterclaim was found in the 1976 UNCITRAL Arbitration Rules. Its Article 19(3) provided

> (...) the respondent may make a counter-claim arising out of the same contract [as the claim] or rely on a claim arising out of the same contract for the purpose of a set-off.

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[106] *Roussalis v. Romania* (n. 105) Dissent by Arbitrator Reisman.
[107] *Antoine Goetz & Consorts et S.A. Affinage des Metaux v. Burundi*, ICSID Case ARB/01/2, Sentence, 21 June 2012, para. 277.
[108] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 25, para. 76.
[109] *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Resubmitted Case), 10 May 1988.
[110] Note B(a) to Arbitration Rule 40 of 1968, 1 ICSID Rep. 100.

This formulation of the older UNCITRAL Arbitration Rules seems to permit counterclaims only when they ‘arose out of’ the same contract as the claim. It was insufficient for the counterclaim to merely ‘relate to’ the contract. Because a tort claim does not ‘arise out of’ a contract but merely ‘relates to’ it, counterclaims generally failed. This applied even when the fact pattern that gave rise to the counterclaim was closely linked to the subject matter of the contract containing the arbitration clause and when the jurisdiction of the tribunal over primary claims may well extend to claims in tort.

The difficulty with transposing this provision into the investment treaty context was the reference to ‘contract’. How is the reference to ‘contract’ in Article 19(3) to be interpreted in the context of investment arbitrations? A teleological interpretation might say that the purpose of the reference to ‘contract’ is to identify the instrument that creates the tribunal’s jurisdiction. As a result, it can be read to refer to the ‘investment treaty’. As the investor is not a party to the investment treaty, the host State’s counterclaims will invariably fail. According to a second interpretation, Article 19(3) is to be read as a reference to an investment transaction. In the latter case, there may be some scope for the host State to bring counterclaims against the investor.

In *Saluka*, after affirming that it had jurisdiction over counterclaims, the tribunal declined the Czech counterclaim for lack of a sufficient connection between the primary claim and the counterclaims. It considered that a contractual arbitration clause prevented it from ‘entertain[ing] a counterclaim based on a dispute arising out of or in connection with, or the alleged breach of, an agreement’.[111] It emphasised that the Czech Republic’s counterclaims involved ‘non-compliance with the general law of the CZ’[112], or ‘rights and obligations which are applicable, as a matter of general law of the CZ, to persons subject to the CZ’s jurisdiction’.[113] According to the tribunal, the proper forum for such disputes was the Czech courts, rather than investment treaty arbitration.

The *Saluka* tribunal thus required a high degree of connection between the principal and the counterclaim. The downside of construing the need for a sufficient connection between the two claims strictly is that investment tribunals will invariably be unable to decide on counterclaims whenever the investor brings a treaty claim against the host State. By definition, the host State’s counterclaims are not based on the same instrument. Arguably,

[111] *Saluka v. Czech Republic* (n. 103) para. 57.
[112] *Saluka v. Czech Republic* (n. 103) para. 78.
[113] *Saluka v. Czech Republic* (n. 103) para 79.

such a restrictive approach to the second prerequisite undermines a broadly formulated consent to investment arbitration, 'all disputes concerning an investment' that is sufficiently broad to cover at least some counterclaims.[114]

In recognition of some of the difficulties outlined above, the UNCITRAL Arbitration Rules 2010 no longer refer to 'arising out of the contract'. The reformulated Article 23(3) is more permissive with respect to counterclaims. It provides:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

Under the revised rules, UNCITRAL tribunals can adjudicate counterclaims provided they have jurisdiction over them. The only prerequisite is that the counterclaim fall within the tribunal's jurisdiction. Given that this is often a major hurdle in investor-State cases, this prerequisite alone is deemed to be sufficient. The new rules hence dispense with a separate requirement of a sufficiently close relationship between the principal claim and the counterclaims.

D. Scope of Jurisdiction

The scope of jurisdiction of investment tribunals can conceptually be split into four dimensions: subjects (*ratione personae*); geography *(ratione loci*); time (*ratione temporis*); and subjects-matter (*ratione materiae*). Since international jurisdiction depends on consent as to all its elements, and failure to meet any of these four is fatal to jurisdiction of a given tribunal, the division into these four elements of jurisdiction is descriptive.

Article 25(1), the jurisdictional provision of the ICSID Convention, contains four requirements for ICSID tribunals to have jurisdiction: (i) the dispute is a legal dispute; (ii) the dispute arises directly out of an 'investment'; (iii) the dispute is between a contracting State and a national of another contracting State; and (iv) the parties to the dispute have consented in writing to submit it to the ICSID.

1. Personal Jurisdiction

ICSID's jurisdiction *ratione personae* is limited to disputes 'between a contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State'.[115] Investors can be individuals or companies. As an empirical matter, a large majority of claimants in investment arbitration are

[114] Pierre Lalive and Laura Halonen, 'On the availability of Counterclaims in Investment Treaty Arbitration' (2011) 7 Czech Yearbook of International Law 141–156.

[115] Article 26 of the ICSID Convention.

corporate entities.

ICSID tribunals have jurisdiction over disputes involving a non-State investor and a host State. Both the investor's State of nationality and the host State need to be parties to the ICSID Convention. The Convention also contains a mechanism that allows parties to designate constituent subdivisions or agency as possible respondents (and by implication, as possible claimants).

a) A Contracting State

The respondent State needs to be an ICSID member country. States become ICSID member States by depositing their instrument of ratification, acceptance or approval with ICSID. Under Article 68(2) of the ICSID Convention, States become members thirty days after such deposit. When the ICSID Convention entered into force on 14 October 1966, ICSID had 20 member States.[116] By July 2013, the number of ICSID member States had grown to 149.[117] On 18 April 2012, the Republic of South Sudan signed and ratified the ICSID Convention and subsequently the 148th ICSID member country. The newest and 150th ICSID member country Canada which deposited its instrument of ratification on 1 November 2013.

b) Constituent Subdivisions and Agencies of a Contracting State

Sometimes, it is not the (central) government that enters into investment contracts with foreign investors, but rather publicly-owned corporations, State agencies with separate legal personality or sub national entities such as provinces or, more potentially even municipalities.[118] The ICSID Convention uses the generic terms 'constituent subdivision' and 'agencies' to refer to a variety of entities that exercise public functions and may enter into contracts with foreign investors.

As their organisation and importance varies across ICSID member States, the drafters of the ICSID Convention opted for a mechanism that allows member States to designate subdivisions and agencies that could appear as a respondent, or by extension, claimant in ICSID arbitrations.[119] The first effect of such designation is that investors may initiate

[116] Antonio R. Parra, *The History of ICSID* (Oxford University Press, 2012) 1.
[117] An additional 9 States have signed the Convention but not deposited their instrument of ratification, among them Canada, Russia and Thailand.
[118] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) para. 230; *Generation Ukraine v. Ukraine* (n. 49) paras. 10.5–10.6 (considering the hypothetical situation of a claim directly against the Kyiv City Administration).
[119] Article 25 speaks of 'any constituent subdivision or agency of a Contracting State designated to the Centre by that State.'

arbitrations against such entities, in addition to the host State.[120] The second consequence is that it allows such entities to bring investment arbitrations themselves.

There was considerable debate on the desirability of allowing constituent subdivisions or agencies to be respondents in ICSID arbitration. The Indian delegate voiced concern about a broad notion of instrumentality that was not limited to agents of the State.[121] He noted that in some jurisdictions the notion of 'instrumentality' was broad and comprised state-owned enterprises (SOEs) with their own legal personality. His concern was that such an approach would unduly widen the scope of ICSID's jurisdiction. Chairman Broches replied that the term 'instrumentality' referred only to governmental agencies. Often these governmental agencies were legally part of and indistinguishable from the government. Other times they were legally separate entities, which were nevertheless entrusted with governmental functions, as distinguished from SOEs.[122]

Pursuant to this designation mechanism under Article 25(4) of the ICSID Convention, Nigeria for example has designated the Nigerian National Petroleum Corporation; Turkey the Turkish Electricity Generation and Transmission Corporation and Petroleum Pipeline Corporation and Australia its five states and two territories. No State has thus far designated a sovereign wealth fund.[123]

Designation under Article 25 is important because it gives the entities so designated the capacity to bring arbitrations on their own, providing incentives for States to designate entities that may at some stage bring their own arbitrations against other host States.

ICSID jurisdiction in respect of constituent subdivisions and agencies of ICSID member States is subject to two cumulative requirements:

> 1. The member state must have designated the subdivision or agency in accordance with Art. 25(1).
> 2. The host state must have specifically approved the sub-division or agency's consent to arbitration (though host states can waive this need for specific approval by so notifying ICSID).

The first requirement, the designation to ICSID, is crucial.[124] Its function is partly to give

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[120] ICSID, *Documents Concerning the Origin and the Formulation of the Convention* (1968) 566; *Maffezini v. Spain* (n. 93) para. 74.

[121] 'Instrumentality' is a term of art under the US Foreign Sovereign Immunities Act, see Restatement (Third) of Foreign Relations, § 452, Comment a: 'A state instrumentality includes a corporation, association or other juridical person a majority of whose shares or other ownership interests are owned by the state, even when organized for profit.'

[122] History (n. 120) 507.

[123] See contribution by Christian Tietje, 'Investment Law and Sovereign Wealth Funds', ch. 13.XI., #xx–yy#.

[124] *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009; *cf.* also *Cable Television of Nevis, Ltd. and Cable*

legal certainty to foreign investors that they are dealing with an authorised entity. The second requirement acts as 'a screening process, so that governments could withhold their approval where the "instrumentality" should really not be considered as a governmental agency but an ordinary company'.[125] Once a host State has designated a constituent subdivision or agency, consent can only be withdrawn in accordance with its terms.[126] A designation does not imply that the host State has consented to ICSID jurisdiction. The host State allows its subdivision or agencies to consent on their own behalf to arbitration before or after the consent itself.[127]

In the *East Kalimantan* case, the tribunal declined to exercise its jurisdiction over a case brought by the Indonesian Province of East Kalimantan.[128] Crucially, Indonesia had not designated East Kalimantan in accordance with Article 25 (4) of the ICSID Convention. This lack of designation led the tribunal to decline its jurisdiction over the dispute.[129] Similarly, in *Cambodian Power Company*, the tribunal found it lacked jurisdiction because against the second respondent, *Electricité du Cambodge*, had not been designated as an agency or subdivision of Cambodia.[130]

c) National of Another Contracting Party

The second party to an investment arbitration is the investor. It is an absolute jurisdictional criterion that the investor's State of nationality be a member of ICSID. The parties cannot waive this requirement.[131] In *Mihaly v. Sri Lanka*, an ICSID tribunal held that a US subsidiary of a Canadian investor could not invoke the ICSID Convention against Sri Lanka, given that Canada was not a party to the ICSID Convention.[132]

Article 25(2) of the ICSID Convention defines 'national of another Contracting State'. There are three alternatives to fulfil the requirement of being a 'national of another Contracting State':

> (a) a natural person having a nationality of a Contracting State other than that of the State party on the date on which the parties consented to submit such dispute to conciliation or arbitration and on the date on which the request was registered,
> (b) a juridical person having the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute

Television of Nevis Holdings, Ltd. v. St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award, 16 December 1996 (no designation of Island of Nevis).

[125] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 338, para. 904.
[126] See Section #B.4# above.
[127] *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, paras. 179–182.
[128] Mehmet Toral and Thomas Schultz (n. 96).
[129] *East Kalimantan v. PT Kaltim Prima Coal* (n. 124).
[130] *Cambodia Power Company v. Cambodia*, ICSID Case No. 09/18, Decision on Jurisdiction, 22 March 2011.
[131] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 144, para. 213.
[132] *Mihaly v. Sri Lanka* (n. 47) para. 4.

> to arbitration, or
> (c) a juridical person which had the nationality of the Contracting State party to the dispute on the date on which the parties consented to submit such dispute to arbitration and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention.

Both (a) and (b) use the negative formulation 'other than the State party' – this wording suggests that the drafters intended both provisions to be interpreted broadly. 'Any' natural or juridical person is eligible, unless it falls into the residual category of 'State party'. However, State parties cannot act as claimants in ICSID arbitrations.[133] The residual category is likely to be narrow, and does not include, development agencies, State-owned enterprises or sovereign wealth funds.

Article 25(2) distinguishes between individuals and companies. Individuals under Article 25(2)(a) need to have the nationality of an ICSID member State on the date when this host State and the investor consented to arbitration and on the date when the arbitration is registered. By contrast, companies under Article 25(2)(b) need to fulfil the nationality requirement at a single point in time only, namely when the parties consented to ICSID arbitration.

With respect to individuals, the terms of Article 25(2)(a), 'a natural person having a nationality of a Contracting State other than that of the State party on the date on which the parties', underscores that ICSID tribunals lack jurisdiction *ratione personae* over individuals who have the nationality of the host State, alongside one or several other nationalities.[134] However, there is no similar exclusionary rule for individuals who have several nationalities, provided none of their nationalities are the nationality of the host State.

The three claimants in *Champion Trading v. Egypt* were subject to Article 25(2)(a)'s exclusionary rule.[135] All three claimants had dual Egyptian–US nationality. They unsuccessfully attempted to circumvent the exclusionary rule by invoking *Nottebohm* in reverse, arguing that their Egyptian nationality was only a bar to them initiating an investment arbitration if their Egyptian nationality was effective. The tribunal refused to read a requirement of effective nationality into the clear language of Article 25(2)(a).

Nottebohm's requirement of an 'effective' or 'genuine link' has no application in investment

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[133] ICSID, *Analysis of Documents Concerning the Origin and the Formulation of the Convention* (1970) 122. One delegate suggested that the expression '*publique ou privée*' be added in the French version. The drafters did not take it on board, 285.

[134] Zachary Douglas (n. 2) 321 (Rule 37), para. 602. NAFTA Article 201 is more permissive by including 'a natural person who is a citizen or permanent resident of a Party'.

[135] *Champion Trading Company and Ameritrade International, Inc. v. Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003.

arbitration.[136] It suffices for the investor to be a national of one or several other ICSID contracting parties, without at the same time being a national of the host State in view of the exclusionary rule in Article 25(2)(a). In *Soufraki*, the United Arab Emirates raised the jurisdictional objection that Soufraki's Italian nationality was not effective or dominant.[137] The tribunal's decision to decline jurisdiction did not, however, hinge on whether Soufraki's Italian nationality was effective.[138]

In *Soufraki*, the investor – allegedly a dual Canadian–Italian national – could not rely on the Italy–United Arab Emirates BIT as the tribunal concluded that Soufraki lacked Italian nationality, even though he had provided several certificates to that effect to the tribunal. As far as the ICSID Convention was concerned, the tribunal had jurisdiction *ratione personae*; yet given his lack of Italian nationality, he did not fall within the personal scope of application of the BIT in question. Though the attribution of nationality is a matter for the State of alleged nationality, the tribunal did not take Italian certificates of nationality at face value, but reached its own determination as to Soufraki's Italian nationality.

In respect of legal entities, the concept of national is not limited to privately owned companies, and public ownership is not an obstacle for an entity to initiate ICSID arbitrations.[139] The *CSOB* tribunal underscored that the expression of 'national of another Contracting State' is to be interpreted broadly. 65 percent of CSOB's shares were owned by the Czech Republic, and another 24 percent were owned by Slovakia. The Czech Republic controlled CSOB as the majority shareholder.[140] The tribunal affirmed that SOEs are eligible claimants if they act in a commercial and not a governmental capacity.[141]

Individual can request ICSID arbitrations only if they have the nationality of an ICSID member State. However, Article 25(2)(c) provides for an exception for legal entities. The parties can agree that a national of the host State be deemed a national of another ICSID member State because of foreign control. Foreign control leads to the legal fiction that the investor is in fact a national of another ICSID member State. The Report of the Executive Directors explains:

> 30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A

[136] *Nottebohm* (n. 19) 24.
[137] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004. See contribution by Lucy Reed and Jonathan Davis, 'Who is a Protected Investor?', ch. 6.III.A., #xx–yy#.
[138] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 25, para. 650.
[139] Markus Burgstaller, 'Nationality of corporate investors and international claims against the investor's own state' (2006) 7 JWI 857–882.
[140] *CSOB v. Slovakia* (n. 55) para. 18.
[141] *CSOB v. Slovakia* (n. 55).

> juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

The relevant test for foreign control is whether the investor exercises a controlling interest.[142] In *Vacuum Salt v. Ghana* the tribunal concluded that a 20 percent shareholding was insufficient for the purposes of Article 25(2)(c).[143] In *Autopista v. Venezuela*, Aucoven, a Venezuelan company wholly or majority owned by a US company through a chain of subsidiaries, was a contractor charged with constructing and maintaining a central highway in Venezuela.[144] Venezuela argued that despite the nominal transfer of the shares to the US company, the Mexican holding company remained the beneficial owner and had full control over the operations of Aucoven in Venezuela. Control was at all times with Mexican nationals, rather than the US national who initiated the arbitration. There was thus a 'fictional control relationship' and Venezuela urged that due to the 'pervasive control by Mexican nationals over, and involvement in the affairs of, Aucoven should lead the Tribunal to decline jurisdiction.'[145] The tribunal found that the parties had decided to define 'foreign control' only in relation to a foreign shareholder. The tribunal was bound to respect this choice of the parties. As a result, it did not uphold Venezuela's jurisdictional objection based on a need for effective foreign control.[146]

Tokios Tokelės involved a wholly owned subsidiary of a publishing company incorporated in Lithuania. The Ukraine raised the jurisdictional objection that Tokios Tokelės' 'true' nationality, by reference to its predominant shareholders and managers, was Ukrainian rather than Lithuanian. It invited the tribunal to pierce Tokios Tokelės' corporate veil and disqualify it as a national of another country under Article 25 of the ICSID Convention. Noting the absence of a denial of benefits provision for entities controlled by third-party nationals in the Lithuania–Ukraine BIT, the tribunal found that the claimant met the nationality requirement of the ICSID Convention.[147]

President Weil dissented on this ground.[148] He took the view that given that 99 percent of the shareholders of Tokios Tokelės were Ukrainian, the dispute did not qualify as one between

[142] Zachary Douglas (n. 2) para. 597.
[143] *Vacuum Salt Products Ltd. v. Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994.
[144] *Autopista Concesionada de Venezuela, C.A. ('Aucoven') v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, *cf.* also *Amco v. Indonesia* (n. 109) and *Société Ouest Africaine des Bétons Industriels (SOABI) v. Sénégal*, ICSID Case No ARB/82/1, Décision du Tribunal Arbitral sur le Déclinatoire de Compétence, 19 July 1984.
[145] *Aucoven v. Venezuela* (n. 144) para. 52.
[146] *Aucoven v. Venezuela* (n. 144) paras. 110–122.
[147] *Tokios Tokelės* (n. 93) paras. 27–52.
[148] *Tokios Tokelės*, Dissenting Opinion Prosper Weil.

Ukraine and a foreign investor. To hold otherwise was to disregard the purpose of the ICSID Convention which was to facilitate foreign investment.

In the *Yukos* interim award, Russia had objected to the tribunal's jurisdiction on the grounds that Hulley was incorporated in Cyprus merely for tax reasons, and had no real business activity on the island. The tribunal refused to read Article 1(7) in a way that incorporated more than the requirement for the investor to be incorporated in the State of nationality.[149] In support of its conclusions, the tribunal referred to a line of similar decisions on this point.[150]

The recognised exception is when the investor is abusing the process. Thus, tribunals have recognised that it is abusive if the claimant brings the claim to circumvent the nationality requirement. For example, in *Phoenix Action*, an Israeli investor incorporated two Czech companies solely to avail himself of protection under the Israeli–Czech BIT, and to gain access to ICSID arbitration. The tribunal held that the 'investment' had not been made '*bona fide*'.[151]

Even though Article 25(1) refers to 'a national of another Contracting State' in singular, several tribunals affirm that this does not necessarily mean that only one party may be admitted to ICSID proceedings on the investor's side. For example, in *Goetz and others v. Burundi* six shareholders instituted proceedings jointly. Whether the same rationale extends to mass claims, however, is controversial. The majority decision in *Abaclat* affirmed that ICSID tribunals have jurisdiction to hear cases brought by tens of thousands of investors, a mass claim. .[152]

2. Territorial Jurisdiction

The third dimension of jurisdiction concerns jurisdiction *ratione loci*. Though Article 25 of the ICSID Convention is silent on the need for a territorial link, it is implicit in the notion of investment.[153] Importantly, this territorial link requirement differs from the separate territorial link requirements frequently found in BITs, and applies in addition as an emanation of the double review for jurisdiction.

a) A Territorial Link as a Jurisdictional Condition

[149] *Hulley v. Russia* (n. 75) paras. 411–417.

[150] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Petrobart Limited v. Kyrgyzstan*, SCC ARB No. 126/2003, Award, 29 March 2005; *Saluka v. Czech Republic* (n. 103); *Tokios Tokelės* (n. 93).

[151] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 137–142.

[152] *Abaclat and others v. Argentina* (n. 12); Hans van Houtte and Bridie McAsey, '*Abaclat and others v Argentine Republic*: ICSID, the BIT and Mass Claims' (2012) 27 ICSID Rev.–FILJ 231–236.

[153] Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press, 2011) 238–242.

Article 1101 of the NAFTA contains an explicit territorial limitation. Its coverage of *ratione loci* is limited to 'investments in the territory of another party'. For the ECT, Article 1(10) also incorporates an express territorial link:

> (10) 'Area' means with respect to a state that is a Contracting Party:
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
> (b) subject to and in accordance with the international law of the sea: the sea, seabed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

It is a characteristic feature of 'investment' as contemplated in Article 25 of the ICSID Convention, and other instruments of investment protection, that the investment be made in the territory of the ICSID State. Only in such cases does the investment fall directly under the control of the host State's legislative, executive and judicial power and requires the protection afforded by the Convention.[154] In keeping with principles of jurisdiction in international law, States cannot reasonably be expected to protect investments outside their territorial jurisdiction, unless they have expressly undertaken such duties of extending investment protection extraterritorially.

The premise underlying Article 25's conception of an investment is that the investor is physically present in the host country. Investment law is designed to counterbalance political risk and the host State's regulatory authority over investments in its territory or areas under its control. With respect to intangible rights, the jurisdictional criterion is met if the rules of private international locate the right in the territory of the host State.[155]

A territorial link as a jurisdictional condition finds support in the Report of the Executive Directors on the Convention which explains that the creation of ICSID was 'designed to facilitate the settlement of disputes between States and foreign investors' with a view to 'stimulating a larger flow of private international capital *into those countries* which wish to attract it' and to 'stimulate a larger flow of private international investment *into territories*.'[156]

There is comparatively little case law on jurisdiction *ratione loci*. One example of an award affirming the need for a territorial link is *LESI v. Algeria*:

> investments are often effected in the country concerned, but this is also not an absolute condition. Nothing prevents investments from being undertaken at least in part from

[154] *Deutsche Bank v. Sri Lanka*, ICSID Case No. ARB/09/02, Dissenting Opinion Arbitrator Ali Kahn, 23 October 2012, para. 37; Zachary Douglas, (n. 2) 161; Zachary Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014 (forthcoming)).
[155] Zachary Douglas (n. 2) 171.
[156] Report of the Executive Directors (n. 54) paras. 9 and 12 (emphasis added).

> the country where the investor resides, as long as this is done in the framework of a project to be implemented abroad.[157]

However, other tribunals pay little attention to jurisdiction *ratione loci*, or adopt a very expansive view of 'in the territory'. Both *Renta 4* and the majority in *Abaclat* used an extremely broad construction of the requisite territorial link. In *Renta 4*, an UNCITRAL tribunal affirmed that it had jurisdiction over American Depository Receipts issued by a US bank and held by a US depository.[158] Both tribunals adopted the territorial link requirement ad hoc, so as to accommodate financial instruments issued and traded outside the territorial jurisdiction of the host country. In *Abaclat*, the tribunal similarly found that it had jurisdiction over global bonds issued by Argentina within the territory of several other States, governed by their law and subject to the jurisdiction of their courts.[159]

Due to the paucity of jurisprudence, the outer limits of the jurisdiction *ratione loci* of investment tribunals are unclear. Is the jurisdiction congruent with the scope of the host State's territorial jurisdiction? Seemingly straightforward cases are investments in the host State's continental shelf and exclusive economic zone.[160] The answer is a lot less clear for areas where sovereignty is disputed, or territories over which a State exercises control without exercising sovereignty. Presumably, tribunals would give great weight to the host State's own definition of its national territory, though without being bound to such definition.

For example, do investments in the territorial sea of the Falklands (Malvinas) fall under the territorial scope of application of British BITs (or, for that matter, under the scope of Argentine BITs)? Both States claim sovereignty to the Falklands (Malvinas), and both States have incentives to include the Falklands (Malvinas) within the territorial scope of application of their BITs.[161]

b) The Territorial Extension to Overseas Territories

The UK Model BIT 2005 provides the following in relation to territorial scope:

> (i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which

[157] *LESI, S.p.A. and Astaldi, S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Award on the Merits, 10 January 2005, para. 14 (translation by the author).

[158] *Renta 4 v. Russia*, SCC Arbitration, Award on Preliminary Objections, 20 March 2009, para. 144; *cf.* also *CSOB v. Slovakia* (n. 55) para. 78.

[159] *Abaclat and others v. Argentina* (n. 12).

[160] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, paras. 107–146 (salvage a shipwreck in Malaysian territorial waters).

[161] Michael Waibel, 'Oil exploration around the Falklands (Malvinas)', EJIL: Talk!, 13 August 2012, available at http://www.ejiltalk.org/oil-exploration-around-the-falklands-malvinas.

> the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12.

Article 12 of the Model BIT, entitled Territorial Extension, provides

> [a]t the time of [signature] [entry into force] [ratification] of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

For the UK, the following overseas territories are currently covered: Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Falkland Islands (Malvinas) Dependencies, Gibraltar, Montserrat, Anguilla, St. Helena, St. Helena Dependencies, Turks & Caicos Islands. British BITs do not currently extend to the British Indian Ocean Territory, the Pitcairn Islands, British Antarctic Territory and the Sovereign Base Areas of Cyprus.

Article 70 of the ICSID Convention contains an extension provision for cases where a member State has assumed responsibility for international relations of a territory (such as the UK for the Falklands (Malvinas)):

> This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.[162]

Under this default rule, territories for whose international relations a State is responsible fall under the territorial scope of application of the Convention, unless explicitly excluded. Notwithstanding, the UK's current investment treaty practice includes express extension clauses in its BITs, which also include the Falklands (Malvinas). Similar issues of territorial scope arise in relation to other sovereignty disputes.

Whether overseas territories fall within the geographic scope of application has not, thus far, been relevant for respondent States. However, it is also relevant for the claimants incorporated in overseas territories. An investor incorporated in Gibraltar or La Réunion can only invoke their home State's BITs if the territorial scope of British (French) BITs and of the ICSID Convention extends to the overseas territory in question.

In *SPP v. Egypt*, SPP was incorporated in Hong Kong and brought the arbitration at a time when the UK was still responsible for Hong Kong's international relations. The tribunal found that it had jurisdiction *ratione loci* under Article 25 and the BIT. In reaching this conclusion, it referred among others to Article 70 of the ICSID Convention on the territorial extension to overseas territories. The reason why SPP could rely on the Egypt–UK BIT was because the

[162] *Cf.* also Article 40 of the ECT.

UK had extended its territorial scope of application to Hong Kong.[163]

In *Petrobart v. Kyrgyzstan*, Petrobart was a corporation incorporated in Gibraltar. Even though the UK had extended the provisional application under Article 45 of the ECT to Gibraltar, the instrument of ratification stated that the ECT's territorial scope of application as regards the UK was limited to the 'United Kingdom of Great Britain and Northern Ireland, the Bailwick of Jersey and the Isle of Man.' At a late stage in the proceedings, Kyrgyzstan raised the jurisdictional objection that Petrobart was not a qualified investor (though a better way of framing this jurisdictional objection would have been to say that the dispute fell outside the BIT's geographical scope of application. The tribunal dismissed the jurisdictional objection on the grounds that the extension to Gibraltar under the regime for provisional application, in the absence of a statement on ratification to the contrary, carried over once the ECT entered into force.[164]

3. Temporal Jurisdiction

As we have seen in subsection C.1.a), the ICSID Convention designates the dates at which the claimant needs to fulfil the nationality requirement. Aside from such provision, the ICSID Convention is silent on the subject of temporal jurisdiction.[165] As Article 25 does not include conditions as regards the temporal jurisdiction of ICSID tribunals, any provision for temporal jurisdiction in the instrument of consent controls. However, the position in general international law still matters in all those cases in which the instrument of consent is silent on temporal jurisdiction.

Recourse to general international law is thus necessary to determine the jurisdiction *ratione temporis* of ICSID tribunals. Do tribunals have jurisdiction over 'legacy' investments, i.e., investments pre-dating the date of consent to the tribunal's jurisdiction? Are pre-existing investment disputes covered? No general answer may be given. It hinges on the formulation of the instrument of consent.

An important distinction for purposes of temporal jurisdiction is between the consent to arbitration, on the one hand, and the substantive guarantees contained in investment treaties. As the tribunal in *Impregilo v. Pakistan* underscored 'care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability

[163] *SPP v. Egypt* (n. 44).
[164] *Petrobaert v. Kyrgyzstan,* SCC Arb No. 126/2003, Arbitral Award, 29 March 2005.
[165] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 95, para. 48; see generally Zachary Douglas (n. 2) 328–343.

ratione temporis of the substantive obligations contained in the BIT.'[166] We first look at the scope of temporal jurisdiction of ICSID tribunals, before turning to the temporal scope of application of the substantive guarantees contained in a BIT. Finally, we address the issue of temporal reservations.

a) Seisin as the Critical Date for Jurisdiction

In international dispute resolution, the general rule is that jurisdiction needs to exist on the date when the proceedings are instituted (at the time of seisin). As the ICJ affirmed in the *Arrest Warrant* case:

> The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.[167]

In investment arbitration too, the date when the investor's request for arbitration is registered is decisive for the tribunal's determination whether it has jurisdiction. Events after that date do not affect the tribunal's jurisdiction.[168] The Executive Director's Report stated in this respect:

> Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given.[169]

ICSID tribunals have relied on the rule that jurisdiction must exist at the time of seisin on many occasions.[170] The *Tradex* tribunal found that it lacked temporal jurisdiction under the BIT, as jurisdiction must exist on the date when the arbitration is filed.[171] For example, in *Rumeli v. Kazakhstan*, Kazakhstan objected to the tribunal's jurisdiction on the ground that the real party in interest was not Rumeli, but rather TSDIF, an agency of Turkey, and the Turkish State.[172] Following Rumeli's bankruptcy, the Turkish deposit insurance scheme seized all of Rumeli's assets. Ex post, the dispute approximated a State-to-State dispute, pitting the Turkish deposit insurance scheme against Kazakhstan. Kazakhstan submitted that

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[166] *Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 309.

[167] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*), ICJ Judgment, ICJ Rep. 2002, 3, para. 26.

[168] *Amco v. Indonesia* (n. 109) 184–185.

[169] Report of the Executive Directors (n. 54) 28.

[170] *Goetz v. Burundi* (n. 55) para. 72; *Zhinvali v. Georgia* (n. 48) para. 407; *Bayindir v. Pakistan* (n. 17) para. 178; *Lucchetti v. Peru*, ICSID Case No. ARB/03/4, Annulment Decision, 5 September 2007, paras. 34–44; *SGS v. Philippines* (n. 31) paras. 165–168; *Generation Ukraine v. Ukraine* (n. 49) paras. 11.1–11.4; *Salini v. Jordan* (n. 16) paras. 167–177; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, paras. 71–98, 199–259; *Tradex v. Albania* (n. 52) (no jurisdiction *ratione temporis* under the BIT); but see *The Loewen Group, Inc. and Raymond L. Loewen v. USA*, ICSID Case No. ARB(AF)/98/3, Award on the Merits, 26 June 2003, 42 ILM 811 (2003) as a rare counterexample.

[171] *Tradex v. Albania* (n. 52) 178–180.

[172] *Rumeli and Telsim v. Kazakhstan* (n. 70) paras. 241–258.

'Claimants' existence is perpetuated as vehicles for the TSDIF and the Turkish State to abuse the ICSID arbitration mechanism and evade its clear jurisdictional requirements,'[173] and brought by TSDIF pursuant to its statutory and sovereign powers.[174] Ordinarily such a setup would have raised serious jurisdictional questions, but not in this case because of the timing. Rumeli came into public ownership only after it had submitted the request for arbitration. All events subsequent to seisin could not affect the tribunal's jurisdiction.

b) Substantive Obligations in Force

The only limitation on temporal jurisdiction in general international law is the entry into force of the substantive obligation on which the claim is based. This is one of several principles established in the *Mavrommatis Palestine Concessions* case.[175] It is now reflected in Article 13 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which provides that

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.[176]

Under customary international law, treaties do not as a general rule apply retroactively. Article 28 of the Vienna Convention and the Law of Treaties provides:

> Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entering into force of Treaty with respect to that party.

In accordance with Article 28, investment treaties apply to acts, omissions, facts or conduct which take place or continue to exist after it enters into force. Conversely, the general rule is that treaties do not apply retroactively to any acts or facts which occur or cease to exist before their entry in force. Non-retroactivity in investment treaties is generally implied, but Article 2(3) of the US Model BIT (2012) says so expressly:

> [f]or greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

A peculiarity of NAFTA and the ECT (Article 26(1)) is that the the tribunal's temporal jurisdiction coincides with the treaty's entry into force because the only substantive guarantees that investors can invoke are those provided by the NAFTA and the ECT.

In this context, another important element is the intertemporal rule. Judge Huber in the *Island*

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[173] *Rumeli and Telsim v. Kazakhstan* (n. 70) para. 263; Zachary Douglas (n 2) paras. 134–138 (the *lex societatis* determines the claimant's capacity to sue).

[174] *Rumeli and Telsim v. Kazakhstan* (n. 70) para. 300.

[175] *Prevention and Punishment of Genocide* (n. 5) para. 34.

[176] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 131.

of Palmas arbitration, explained that this rule holds that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'[177] Consequently, tribunals should assess cases before them in light of contemporaneous law, binding on the host State at the time of alleged breach.

The intertemporal principle in Article 44 of the ICSID Convention freezes the procedural law applicable to ICSID arbitration to the State of the law in force when the proceedings were instituted.[178] Changes to the procedural rules subsequent to the initiation of the proceedings are immaterial. The Arbitration Rules as they existed at the time of consent govern the proceedings.

Accordingly, an investment treaty, in order to provide the basis for ICSID jurisdiction and the yardstick with its substantive guarantees against which the tribunal judges the conduct of the host, must be in force at the relevant time. In *CSOB v. Slovakia*, the tribunal found that the BIT between the Czech and Slovak Republics had not entered into force and hence did not provide a basis for its jurisdiction.[179]

Similarly, in *Tradex v. Albania*, a Greek investor relied on the Greek–Albania BIT of 1995 as one of two bases for invoking the tribunal's jurisdiction. Tradex had filed the request for arbitration on 17 October 1994, whereas the BIT entered into force only on 4 January 1995. Albania objected to the tribunal's jurisdiction by pointing out that the treaty was not in force at the time of seisin. Article 8 of the Greek–Albania BIT provides that 'the Treaty shall also apply to the investments made prior to its entry into force.' The question raised by the fact that the BIT only entered into force subsequently was different. The tribunal asked whether

> the later entry into force of the Bilateral Treaty could, with delay, still be a sufficient ground to justify jurisdiction from there on for this procedure. Such a conclusion would be unusual insofar as both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim. To divert from this usual result, here one might arguably rely on the provision in Art. 8 that the Treaty also applies to investments made prior to its entry into force. But this could as well be interpreted to the effect that such application to prior investments can only take place if the claim is filed after the entry into force.[180]

In *Mondev*, the tribunal partly upheld its jurisdiction over the only issue that survived the

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[177] *Island of Palmas Case (Netherlands v. United States)*, 2 UNRIAA 831, 845. *The Minquiers and Ecrehos Case (France v. United Kingdom)*, ICJ Judgment, ICJ Rep. 1953, 47 (endorsing the intertemporal doctrine of the *Island of Palmas*).

[178] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 686.

[179] *CSOB v. Slovakia* (n. 55) paras. 37–43.

[180] *Tradex v. Albania* (n. 52) para. D.1.6.

entry into force of the NAFTA, *i.e.* whether domestic court proceedings violated the treaty.[181] The tribunal held that

> events or conducts prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.

The *ATA* tribunal, by contrast, adopted an idiosyncratic approach. In *ATA*, two questions in relation to the tribunal's jurisdiction *ratione temporis* arose: the first concerned the violation of the BIT through the annulment of an international commercial arbitration award, and the second the violation of the BIT through the extinguishment of the arbitration agreement which under Jordanian law had the effect of annulling the arbitral award. The tribunal decided, after quoting the holding of *Mondev* above, that it lacked *jurisdiction ratione temporis* in respect of the first claim, whereas such jurisdiction existed in respect of the second claim.

Even though the annulment proceedings started before the entry into force of the relevant BIT, the final decision was given by the Supreme Court following an appeal after the BIT entered into force.[182] The tribunal explained that '[s]ince the first legal confrontation between the parties over the Final Award occurred prior to the entry into force of the Turkey–Jordan BIT (...) the Tribunal cannot claim jurisdiction *ratione temporis* over any issue concerning the annulment of the Final Award.'[183] In contrast to the *Mondev* tribunal, the *ATA* tribunal did not consider when the investment dispute in relation to the annulment of the award had arisen. Instead it took into consideration the date where a dispute had arisen on the validity of the final award of the commercial arbitral tribunal. This dispute however differed from the investment dispute that was brought before the *ATA* tribunal.

c) Temporal Reservations

The use of temporal reservations to avoid or limit the otherwise 'retrospective' effect of declarations accepting jurisdiction over all disputes raise interpretive difficulties.[184] In investment arbitration, the ability of tribunals to hear claims operates retrospectively unless there is an express stipulation to the contrary. A typical limitation is that tribunals only enjoy jurisdiction in relation to disputes that arose after the treaty's entry into force. When the

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[181] *Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, (2003) 42 ILM 85, para. 70; John P. Gaffney, 'The Jurisdiction Ratione Temporis Of ICSID Tribunals' (2007) 22 Mealey's Int'l Arb. Rep. 1–12.

[182] *ATA Construction, Industrial and Trading Company v. Jordan*, ICSID Case No ARB/08/2, Award, 18 May 2010, paras. 35–36.

[183] *ATA v. Jordan* (n. 182) para. 115.

[184] James Crawford, *Brownlie's Principles* (n. 19) 729.

instrument of consent is silent, the presumption is that the tribunal's jurisdiction is limited to future disputes.[185]

Carving out past disputes is a common practice in accepting jurisdiction of an international court or tribunal. With respect to the ICJ, a common form of temporal reservation is to accept the jurisdiction in respect of all disputes arising after a certain date 'with regard to situations or facts subsequent to the dispute.' This formulation is ambiguous, especially for disputes with a long history. The ICJ has interpreted this formulation to cover only situations or facts that are the real cause of the dispute.[186]

In *Electricity Company of Sofia*, the Bulgarian government disputed the PCIJ's jurisdiction by relying on the temporal limitation contained in the Belgian declaration.[187] By agreement of the parties, the dispute arose in 1937, which was 11 years after the two States had submitted optional clause declarations under Art 36 of the PCIJ Statute in 1926. The Bulgarian government maintained that although the facts that the Belgian government complained of occurred after 1926, the situation with regard to which the dispute arose was pre-existent. This situation resulted from the arbitral awards of the Belgo–Bulgarian Mixed Arbitral Tribunal in 1923 and 1925, establishing electricity prices.

The PCIJ found that the arbitral awards established between the Belgian Electricity Company and Bulgaria concerned a situation dating from before 1926 that persisted at the time when Belgium seized the PCIJ. However, the dispute did not arise with regard to this situation or to the awards which established it: '[t]he only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute.'

The PCIJ found that no such relation existed between the present dispute and the arbitral awards.

> It is not enough to say, as it is contended by the Bulgarian Government, that if it had not been for [the arbitral awards], the dispute would not have arisen, for the simple reason that it might just as well be said that, if it had not been for the acts complained of, the dispute would not have arisen. It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to which a dispute is said to have arisen must be the real cause of the

[185] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n 66) Article 25, para. 49; *Tradex v. Albania* (n. 52) 68.

[186] *Phosphates in Morocco (Italy v. France),* PCIJ Judgment, (1938) PCIJ (Ser. A/B) No. 74, 10; *Legality of the Use of Force (Yugoslavia v. Belgium)*, Order of 2 June 1999, Provisional Measures, ICJ Rep. 1999, 124; *Case concerning Certain Property (Liechtenstein v. Germany)*, Judgment, ICJ Rep. 2005, 6.

[187] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria),* PCIJ Judgment of 4 April 1939, (1939) PCIJ (Ser A/B) No. 77, 64.

dispute.[188]

In *Right of Passage*, the ICJ explained that

> The Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court.[189]

Similarly, in *Jurisdictional Immunities of the State*, the Court found that 'the facts and situations it must take into consideration are those with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its "real cause" rather than those which are the source of the claimed rights'.[190]

In *Phosphates in Morocco,* the PCIJ upheld an objection *ratione temporis*.[191] In relation to the temporal reservations, which limited the Court's temporal jurisdiction, the PCIJ explained that not only were they clear but

> the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise.[192]

In the *Case Concerning Application of the Genocide Convention*, Yugoslavia submitted that the court lacked jurisdiction to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide with respect to acts which had occurred prior to the Genocide Convention entering into force between the parties. Yugoslavia argued that 'according to the rule of customary international law, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide would not be operative between the parties prior to 29 December 1992 and, accordingly, this would not confer jurisdiction on the Court in respect of events occurring prior to 29 December 1992'.[193] Yugoslavia in other words based its argument on the principle of non-retroactivity. The Genocide Convention's jurisdictional clause provides that

> [d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

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188 *Electricity Company of Sofia and Bulgaria* (n. 187) 82.
189 *Right of Passage (Portugal v. India)*, Judgment, ICJ Rep. 1960, 6, 33, 35; see also *Certain Property* (n. 186) 48.
190 *Jurisdictional Immunities of the State (Germany v. Italy)* (n. 99) para. 23.
191 *Phosphates in Morocco* (n. 186) 24; *cf.* also *Certain Property* (n. 186).
192 *Phosphates in Morocco* (n. 186) 24.
193 *Prevention and Punishment of Genocide* (n. 5) para. 15.

On its jurisdiction *ratione temporis*, the court pronounced:

> Yugoslavia, basing its contention on the principle of the non retroactivity of legal acts, has (...) asserted (...) that, even though the Court might have jurisdiction on the basis of the [Genocide] Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the Parties themselves make any reservation to that end, either to the Convention or on [a later possible opportunity]. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina.[194]

In sum, the position in general international law is that the jurisdiction of the ICJ '*does* have retrospective effect (…) unless this is specifically excluded by a reservation to the general acceptance of jurisdiction.'[195] By contrast, the position before the ECtHR is more restrictive. The general rule is that the ECtHR lacks jurisdiction *ratione temporis* in cases concerning facts antecedent to the State's ratification.[196]

Temporal reservations in the instrument of consent are also not uncommon in investment arbitration. The jurisdiction of ICSID tribunals may relate to existing disputes only, it may be limited to future disputes or it may extend to any existing or future dispute. The ICSID Convention leaves this determination to the instrument of consent. What is the default position on jurisdiction *ratione temporis* if the instrument of consent is silent?

Article 25's broad formulation ('any legal dispute') suggests that absent contrary specification in the instrument of consent, ICSID tribunals have jurisdiction *ratione temporis* for all existing and future disputes, as well as for existing and new investments.

Thus, in absence of an express agreement to the contrary, ICSID tribunals enjoy jurisdiction *ratione temporis* in relation to any dispute that has arisen after the BITs entry into force or indeed any dispute existing at the date of the BIT's entry into force even if that dispute were deemed to have originally arisen prior to that date. If a claim submitted to ICSID centres around an 'existing' dispute, even if that dispute arose prior to the BIT's entry into force, no issue of retroactivity arises. Several cases, relying on Article 28 of the Vienna Convention affirm that BITs apply to measures and disputes that continue to exist after the treaty's entry

[194] *Prevention and Punishment of Genocide* (n. 5) para. 34.

[195] Rosalyn Higgins, *Themes & Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) vol. II, 876.

[196] ECtHR, *Moldovan v. Romania*, Application Nos. 41138/98 and 64320/01, 13 March 2001; ECtHR, *Jovanovic v. Croatia*, Application No. 59109/00, ECHR 2002–III.

into force.[197]

4. Subject Matter Jurisdiction: Existence of an Investment

Article 25 of the ICSID Convention vests subject matter jurisdiction in ICSID tribunals for 'any legal dispute arising directly out of an investment'. How to construe the undefined term 'investment' has triggered a lively debate. The case law and the literature are divided on whether the definition of investment typically found in the instrument of consent, nowadays typically in BITs, should be the sole determinant or whether the reference to 'investment' in Article 25 establishes an objective jurisdictional threshold. The controversy about whether a double review – both in terms of the instrument of consent and Article 25 – has been a live one only for some time. It only arose over the last two decades with the rise of arbitration without privity, where consent to arbitration is at one removed from the investor-State contract.

In contrast to Article 25 of the ICSID Convention, ICSID's Additional Facility does not require a dispute arising out of an 'investment'. However, as most of the ICSID Additional Facility cases concern the NAFTA, NAFTA Article 1101 is a relevant jurisdictional limitation. It refers to 'investments of investors of another Party in the territory of the Party.' No substantive requirement of an investment apart from any such requirement that may be applicable on the basis of the instrument of consent applies in non-ICSID arbitration. The UNCITRAL tribunal in *Romak v. Uzbekistan*, noted that outside ICSID arbitrations, 'contracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection'.[198] For UNCITRAL arbitrations, the agreement of the parties is the sole determinant of the tribunal's jurisdiction.

a) The Need for a Double Review

According to one school, the inclusion of the term 'investment' in Article 25 implies that there are objective limits to ICSID subject matter jurisdiction. Tribunals need to look to the ordinary meaning of the term 'investment', as evidenced by the preparatory works, subsequent practice (including BITs), arbitral awards and the literature. In this view, ICSID jurisdiction has 'outer limits'[199], and the parties cannot engage ICSID jurisdiction without regard for the objective core of ICSID subject matter jurisdiction. A double review for ICSID

[197] Stanimir A. Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis' (2005) 4 LPICT 19–59.

[198] *Romak SA (Switzerland) v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 205.

[199] Aaron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 132 (8) RC 330–410, 330 uses this term; *Global Trading Resource Corporation and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 55.

subject matter jurisdiction is thus needed.[200] Accordingly, the first question is whether the dispute arises out of an investment under Article 25, as opposed to an ordinary commercial transaction, followed by the question of whether the dispute arises out of an investment as defined in the BIT.

In 2001, the *Salini* tribunal set out criteria for 'investment'.[201] It considered the following factors in deciding whether a commercial transaction amounted to an 'investment', building on the typical characteristics of an investment mentioned in the 1st edition of the ICSID Commentary:[202] contribution, duration, participation by the investor in the risks of the transaction, and contribution to the economic development of the host State. Later tribunals referred to these as the '*Salini test*', though some tribunals and writers have expressed misgivings that the *Salini* criteria have been converted, contrary to the erstwhile intentions of the *Salini* tribunal itself, into jurisdictional criteria, rather than being treated as factual indicators of whether a commercial transaction amounts to an investment.

As Schreuer noted in the 1st edition of the Commentary '[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention'.[203] He considers it 'unfortunate' that tribunals went on to formulate normative criteria from what was originally 'a descriptive list of typical features'.[204] In the 2nd edition of the ICSID Commentary, the authors explain the cumulative effect of the jurisprudence on the typical characteristics in the following terms:

> [t]ribunals have applied these criteria in a number of cases. In the majority of cases tribunals were satisfied that the facts before them actually met these criteria. In these cases it is not entirely clear whether the tribunals regarded the criteria as essential requirements for the existence of investments or merely as typical characteristics or indicators. It would seem that the repeated application of these criteria has strengthened the perception of tribunals that they were not merely features indicative of investments but mandatory standards.[205]

The *Joy Mining* tribunal underscored that the notion of 'investment' has inherent limits:

> [t]hat the Convention has not defined the term 'investment' does not mean, however, that anything consented to by the parties might qualify as an investment under the

[200] *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, paras. 43 and 48; *Malaysian Historical Salvors v. Malaysia* (n. 160) paras. 43, 54–55 (the 'double-barrelled test' for jurisdiction).

[201] *Salini Costruttori SpA and Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

[202] Christoph Schreuer, *The ICSID Convention: a commentary* (Cambridge University Press, 2001) Article 25, para. 122, lists duration, regularity of profit and return, risk, substantial commitment and development of the host State as 'features that are typical to most of the operations in question'.

[203] Christoph Schreuer (n. 202) Article 25, para. 122.

[204] Christoph Schreuer (n. 202) Article 25, para. 170.

[205] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 25, para. 159 (case citations omitted).

> Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated (…) there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals (…). Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.[206]

The *SGS v Philippines* tribunal explains that the 'jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention.'[207] Following this line of reasoning, the annulment committee in *Mitchell v. Congo* explained that 'the special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged.'[208]

The tribunal in *Romak v. Uzbekistan* justified the objective approach in the following terms:

> (…) the term – investments under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk (...) By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of investment the fact that it falls within one of the categories listed in Article 1 does not transform it into an investment.[209]

In accordance with this approach, the tribunal found that a wheat supply contract did not amount to an 'investment', despite the broadly-worded definition of 'investment' in Article 1(2) of the Switzerland–Uzbekistan BIT. The tribunal took the view that 'investment' has an 'inherent meaning', based on the BIT's object and purpose. Investments are characterised by a contribution, a certain duration and the acceptance of risk. A wheat supply contract met none of these three indicia, and was properly regarded as a one-off commercial transaction.[210]

The tribunal in *Phoenix Action v. Czech Republic* also emphasised the specialised and limited subject matter jurisdiction of ICSID tribunals: 'There is nothing like a total discretion, even if the definition [of investment] developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything –

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[206] *Joy Mining v. Egypt* (n. 200) para. 49.
[207] *SGS v. Philippines* (n. 31) para. 154.
[208] *Patrick Mitchell v. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 31; *Tokios Tokelės* (n. 93) Dissent by Prosper Weil, esp. paras. 28–30; Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 117; Antonio Parra, 'The Institutions of ICSID Arbitration Proceedings' (Winter, 2003) 20 (2) News from ICSID 12-13; Aron Broches (n. 199) 351–352; Zachary Douglas (n. 2) para. 342 ('*The term "investment", however, is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope')*; *Globex v. Ukraine* (n. 199) para. 43; *Société Générale de Surveillance S.A. v. Pakistan* (n. 37) para. 133 ('(...) investment (...) embod[ies] certain core meaning which distinguishes it from "an ordinary commercial transaction"'); Michael Waibel (n. 153) 212–243.
[209] *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, paras. 180 and 207.
[210] Ho Jean, 'The Meaning of "Investment" Arbitration' (2010) 26 Arb. Int'l 633–647, 645.

like a sale of goods or a dowry for example – is an investment.'[211] The tribunal considered that the object and purpose of the ICSID Convention was, specifically, the adjudication of investment disputes. Parties could not submit a whole range of commercial disputes to the Centre that had no connection with to an investment.

In the words of the *Phoenix Action* tribunal:

> (…) BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement.[212]

The second school holds that the definition of the investment in the instrument of consent is of overarching importance. Concurrently, there are no substantive investment requirements in Article 25.[213] In other words, it suffices that the instrument of consent includes the transaction in question in its investment definition. For example, the Annulment Committee in *Malaysian Historical Salvors* annulled Sole Arbitrator Hwang's decision to decline jurisdiction for the 'gross error' of not independently evaluating the BIT. The arbitrator had given 'equal weight' to Article 25 and the BIT.

The annulment committee took issue with the tribunal's approach of examining 'virtually exclusively'[214] Article 25, and found fault in the arbitrator's failure to analyse the instrument of consent more thoroughly. The committee affirmed the need for the transaction to be primarily, or even exclusively, evaluated in light of the investment definition in the BIT.[215] It gave the following reasons for according absolute primacy to the instrument of consent:

> It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather embroider upon questionable interpretations of the term 'investment' as found in Article 25 (1) of the Convention, risks crippling the institution.[216]

The annulment ad hoc committee approvingly quoted *Biwater Gauff*'s flexible approach to

[211] *Phoenix Action v. Czech Republic* (n. 151); *Mitchell v. Congo* (n. 208) para. 40 (referring to the 'special arbitration system of ICSID'); Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 117, para. 122.

[212] *Phoenix Action v. Czech Republic* (n. 151) para. 96. *Cf*. Report of the Executive Directors (n. 54) para. 27 ('[n]o attempt was made to define the term "investment" given the essential requirement of consent by the parties').

[213] Aron Broches, 'The Convention on the Settlement of Investment Disputes: some observations on jurisdiction' (1966) 5 Colum. J. Transnat'l L. 261–80, 268.

[214] *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 61.

[215] *Ibid*.

[216] *Malaysian Historical Salvors* (n. 214) para. 73; Report of the Executive Directors (n. 54) para. 26; *Deutsche Bank v. Sri Lanka* (n. 154).

the characteristics of an investment.[217] The *Biwater* tribunal took the view that the *Salini* test was insufficiently flexible:

> a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.[218]

If typical characteristics of investments were converted into a 'fixed and inflexible test', this would risk excluding 'certain types of transaction from the scope of the Convention'. The *Biwater Gauff* tribunal thus recommended a 'more flexible and pragmatic approach', and urged consideration of the *Salini* characteristics alongside all the circumstances, including the consent to arbitration.[219] The tribunal cited the absence of a 'strict, objective definition' in explaining that arbitral tribunals charged with resolving particular disputes ought not to 'impose one such definition which would be applicable in all cases and for all purposes.'[220]

The tribunal reasoned that using a narrow interpretation would have caused the Convention to contradict the wide scope of the investment definition in the BIT or other forms of consent to arbitration that purported to grant jurisdiction to the Centre, and would have gone against the general consensus on a broad notion of investment. It referred to a 'developing consensus in parts of the world'.[221] Such a consensus does exist with respect to the core meaning of 'investment'. However, the jurisprudence on outer limits of the notion of 'investment' remains divided.

The majority in *Abaclat v. Argentina* also found that Article 25 contained no independent, substantive criteria for an investment:

> [i]f Claimants' contributions were to fail the Salini test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID

[217] *Malaysian Historical Salvors* (n. 214) para. 79.
[218] *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 316.
[219] *Biwater Gauff v. Tanzania* (n. 218) para. 316. The annulment committee in *Malaysian Historical Salvors* (n. 214) para. 79, called *Biwater Gauff*'s approach the 'most persuasive').
[220] *Biwater Gauff v Tanzania* (n. 218) para. 313.
[221] *Biwater Gauff v Tanzania* (n. 218) para. 314.

> Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.[222]

b) Typical Characteristics of Investments under Article 25

Typical characteristics are features that are normally found in 'investments', such as duration, regularity of profit and return, risk, substantial commitment and development of the host State.[223] These typical elements are often intertwined and need to be analysed together. Even though tribunals have formulated different tests based on typical characteristics, there is much common ground.

Accordingly, the tribunal in *RSM v. Grenada* noted 'a broad consensus (...) regarding the characteristics establishing the existence of an investment for the purpose of Article 25 of the ICSID Convention'. This tribunal restated the *Salini* criteria as follows: (i) significant commitment of resources, (ii) economic risk, (iii) sufficient duration of the operation, (iv) regularity of profit and return, and (v) contribution to the economic and social development of the host State. Although the tribunal recognised 'the soundness of these general characteristics', it cautioned that they were not 'the jurisdictional criteria in Article 25(1) of the ICSID Convention' or 'the Article 25(1) test'. Rather, 'they [were] but benchmarks or yardsticks to help a tribunal in assessing the existence of an investment', and should be used with flexibility.[224]

The *Phoenix Action* tribunal, noting that the *Salini* test was incomplete and required elaboration,[225] proposed its own, modified test comprised of six elements: '1 – a contribution in money or other assets, 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets involved *bona fide*.'[226] The application of these six elements did not always require 'extensive scrutiny (...) as they [were] most often fulfilled on their face, "overlapping" or implicitly contained in others'. It also noted that 'they [had] to be analysed with due consideration of all circumstances.'[227]

(1) Positive Impact on Development

[222] Contra *Abaclat and others v. Argentina* (n. 12) para. 364.
[223] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) para. 122.
[224] *RSM v. Grenada* (n. 50) paras. 240–241.
[225] *Phoenix Action v. Czech Republic* (n. 151) para. 82.
[226] *Phoenix Action v. Czech Republic* (n. 151) para. 114.
[227] *Phoenix Action v. Czech Republic* (n. 151) para. 115.

The preamble to the ICSID Convention contains a reference to 'the need for international co-operation for economic development and the role of private international investment therein.' This reference provides one of the bases to say that all investments share the common feature that they have some positive impact on the host country's development.

Tribunals vary in how much weight to accord to this criterion. At one end is *Malaysian Historical Salvors v. Malaysia*, in which Arbitrator Hwang concluded that, the 'weight of the authorities (…) swings in favour of requiring a <u>significant</u> contribution to be made to the host State's economy.'[228] The tribunal explained that a marine salvage contract had a much smaller development impact than a public infrastructure or banking infrastructure project.[229] The transaction failed to satisfy the 'litmus test'.[230]

An increasing number of tribunals take the view that development impact is best evaluated implicitly, if at all. Such an implicit evaluation is also preferable on the pragmatic ground that the development impact of transactions is extremely difficult to evaluate. In other words, if the other typical characteristics are present, development impact is likely to follow.[231]

(2) Long-Term Transfer of Financial Resources

Investments typically involve the transfer of capital for the long term. The *Bayindir v. Pakistan* tribunal called 'duration' a 'paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions (...)'.[232] The *Salini* tribunal involved a transaction that lasted 32 months which the tribunal found to be sufficient. It remarked that 2–5 years was the minimal duration.[233]

No tribunal has thus far found that the duration was insufficient, and that therefore no investment was present. In *Olguín v. Paraguay*, Paraguay argued, without success, that 'speculative financial investments', failed to meet the duration requirement.[234] In *Saluka*, the tribunal dismissed the Czech Republic's contention that short-term share purchases failed to

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[228] *Malaysian Historical Salvors v. Malaysia* (n. 160) para. 123 (underlining in original). The annulment panel annulled the award on this point (n. 214).

[229] *Malaysian Historical Salvors v. Malaysia* (n. 160) para. 144.

[230] *Malaysian Historical Salvors v. Malaysia* (n. 160) paras. 130, 135.

[231] *Victor Pey Casado et Fondation 'Presidente Allende' v. Chili*, ICSID Case No. ARB/98/2, Sentence Arbitrale, 8 May 2008, para. 232; *cf.* also *LESI v. Algeria* (n. 157) para. 72(iv); *Mr Saba Fakes v. Turkey*, ICSID Case No. ARB/09/11, Award, 14 July 2010, para. 111.

[232] *Bayindir v. Pakistan* (n. 17) para. 132.

[233] *Salini v. Morocco* (n. 201) para. 54; Georges R. Delaume, 'ICSID and the transnational financial community' (1986) 1 ICSID Rev.–FILJ 237, 242 (it 'has been assumed from the origin of the Convention that loans, or more precisely those of a certain duration as opposed to rapidly concluded commercial financial facilities, were included in the concept of "investment"').

[234] *Eudoro A. Olguín v. Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 65.

qualify as an investment on this ground.[235]

(3) Risk Sharing

The notion of 'investment' in Article 25 contemplates an element of risk *sharing*. The risk present in the transaction needs to differ from the ordinary risks involved in commercial contracts, such as the risk of non-performance.[236] The need for some risk sharing is linked to the need for the investment to be associated with a commercial undertaking that is examined next. It is a characteristic feature of investment projects that it is uncertain whether the project will succeed, and there is thus a risk of failure. Risk sharing implies that the host country and the investor share the risks of success or failure.

(4) Association with a Commercial Undertaking

A final typical element of an 'investment,' closely linked to risk sharing, is the operation by the investor, or a reasonably close association with, a commercial undertaking.[237] Both *RSM v. Grenada* and *Phoenix Action v. Czech Republic* appear to take the view that a commercial operation is required for an investment.[238] Yet some tribunals, such as *Abaclat v. Argentina* and *Deutsche Bank v. Sri Lanka*, in qualifying security entitlements in a global bond and oil hedging derivatives as an investment, overlook this feature that inheres in the concept of investment.

5. Jurisdiction and Most Favoured Nation Clauses

A major debate on which tribunals are divided concerns the effect and scope of most favoured nation (MFN) clauses. Can the beneficiary of an MFN clause benefit from a more favourable dispute settlement provision contained in a third-party treaty? No *jurisprudence constante* exists on whether investors can use MFN clauses to import more favourable dispute resolution provisions from third-party BITs.[239] The case law is deeply divided and cannot easily be reconciled.

MFN clauses are found in virtually all BITs. They extend the better treatment granted to investors from a third State to the beneficiary of the treaty. The NAFTA in Article 1103 and the ECT in Article 10(7) also contain MFN clauses. International tribunals have been divided over how to reconcile a BIT's specific dispute resolution mechanism with an MFN clause. To a degree, the divided jurisprudence is explained by variations in language among MFN

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[235] *Saluka v. Czech Republic* (n. 103) para. 174.
[236] *Joy Mining v. Egypt* (n. 200) para. 57.
[237] Michael Waibel (n. 153) 242–244.
[238] See above p. 56.
[239] See generally Zachary Douglas (n. 2) 344–362; see contribution by August Reinisch, 'Most Favoured Nation Treatment', ch. 8.IV., #xx–yy#.

clauses contained in the basic BIT. Some MFN clauses explicitly include (or exclude) dispute settlement within their scope. However, difficulties arise whenever MFN clauses are silent as to whether they cover dispute settlement. Investors may seek to import more favourable dispute settlement procedures contained in the comparator BIT on the basis of open-ended MFN clauses.

MFN clauses aim to prevent discrimination amongst investors of different nationalities.[240] A broad reading of MFN clauses that extend to dispute settlement may be in line with the object and purpose of BITs to promote investment flows. Allowing more favourable dispute settlement procedures to be imported into the basic treaty through the MFN clause could further this goal.

A counterargument to extending ambiguous MFN clauses revolves around the preservation of the parties' treaty bargain.[241] The basic treaty contains its own dispute settlement procedures specifically negotiated between the investor's home State and the host State. Did the contracting parties truly intended for the procedures in the basic treaty to be supplanted by a combination of an MFN clause in the basic treaty and some other dispute settlement procedure in an investment treaty between the host State and a third State?

The jurisprudence of ICSID tribunals on this subject divided. According to the *Maffezini* school, MFN clauses also apply to dispute resolution.[242] Many cases in this category involve procedural obstacles to arbitration, such as waiting periods and fork in the road clauses. The leading case is *Maffezini v. Spain.* The tribunals in *Siemens v. Argentina*[243], *Camuzzi v. Argentina*[244] and *Gas Natural v. Argentina*[245] adopted similar positions. Conversely, according to the *Plama* school, MFN clauses cannot be used to import more favourable dispute resolution provisions. The tribunal in *Plama Consortium v. Bulgaria*, and several other tribunals in its wake, declined to apply MFN clause to dispute settlement provisions.[246] These cases mostly dealt with the existence of consent to jurisdiction. Tribunals took the same

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[240] Stephan W. Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clauses' (2009) 27 Berkeley J. Int'l L. 496–596, 520–521.
[241] Michael Waibel (n. 153) 274.
[242] *Maffezini v. Spain* (n. 93).
[243] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.
[244] *Camuzzi International S.A v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005.
[245] *Gas Natural SDG, S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision of Tribunal on Preliminary Questions of Jurisdiction, 17 June 2005.
[246] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

stance in *Telenor v. Hungary*[247] and *Salini v. Jordan.*[248]

A first possible way of reconciling the seemingly conflicting decisions on the issue of whether MFN clauses apply to dispute settlement depends on the wording of the basic treaty.[249] A second is to look closely at what precisely is imported into the basic treaty on the basis of the MFN clause, ranging from procedural preconditions on the one hand to providing consent to jurisdiction on the other hand. However, according to another view, the wording of MFN clauses does not explain the diverging tendencies in the jurisprudence.[250]

For example, can the basic treaty's MFN clause be invoked by its beneficiary to confer a right of access to international arbitration contained in a third-party treaty when the basic treaty contains no dispute settlement provision at all? When the basic treaty contains a dispute settlement clause but no choice is given to the investor as regards the type of arbitration can the MFN clause be invoked to seek the benefit of arbitration options explicitly offered only in the comparator treaty? Second, when the basic treaty provides for international arbitration only as regards the determination of the amount of compensation for expropriation, as in many older Soviet and Chinese BITs, can an investor rely on the MFN clause? Third, when the basic treaty provides for particular conditions before an international arbitration proceeding can be initiated, such as a fork in the road clause or a requirement to exhaust local remedies; can the MFN clause be successfully invoked?

The Maffezini and Plama Schools

The tribunal in *Maffezini v. Spain* was the first to apply the MFN clause to dispute resolution provisions.[251] The investor brought arbitration on the basis of the Argentina–Spain BIT whose dispute settlement clause for investment disputes provided for a six-month negotiation period before the dispute could be submitted to the competent courts of the host State and, failing the settlement of the dispute after the expiration of a period of 18 months, to international arbitration. The claimant invoked the MFN clause of the Argentina–Spain BIT according to which 'in all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third

[247] *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.
[248] *Salini v. Jordan* (n. 16) paras. 102–119.
[249] Yas Banifatemi, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration' in Andrea Bjorklund, Ian A. Laird and Sergey K. Ripinsky (eds), *Investment Treaty Law: Current Issues III* (British Institute of International and Comparative Law, 2009) 249, 271; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2010) 2 JIDS 97, 99–101.
[250] Julie A. Maupin, 'MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?' (2011) 14 J. Int'l Econ. L. 157–190; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2010) 2 JIDS 97.
[251] *Maffezini v. Spain* (n. 93).

country.' On the basis of this clause, the claimant sought to benefit from the more favourable dispute resolution mechanism contained in the Chile–Spain BIT that did not contain an 18-month litigation requirement, but rather allowed investors access to international arbitration after six months of negotiations. The tribunal found that dispute settlement mechanisms form part of the treatment accorded to investors under the BIT.[252] The tribunal thus held that the dispute mechanism provision in the third-party treaty could be imported through an MFN clause:

> [f]rom the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle.[253]

As a counterbalance and to assuage concerns about cherry-picking, the *Maffezini* tribunal developed public policy restrictions on the operation of this principle:

> [n]otwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.[254]

The *Maffezini* tribunal further defined these limitations. They concern such public policy considerations as the exhaustion of local remedies, the stipulation of a fork in the road clause, the provision of a particular arbitration forum such as ICSID, or the agreement of the parties on a highly institutionalised system of arbitration.[255]

Maffezini is generally contrasted with the decision in *Plama v. Bulgaria* five years later.[256] In *Plama*, the claimant invoked the MFN clause contained in the Bulgaria–Cyprus BIT to import the more favourable dispute settlement provision in the Bulgaria–Finland BIT. The latter provided for ICSID arbitration for any type of dispute, whereas the arbitration clause in the former only allowed for ad hoc arbitration for disputes relating to the amount of compensation

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[252] *Maffezini v. Spain* (n. 93) para. 55.
[253] *Maffezini v. Spain* (n. 93) para. 56.
[254] *Maffezini v. Spain* (n. 93) para. 62.
[255] *Maffezini v. Spain* (n. 93) para. 63.
[256] *Plama v. Bulgaria* (n. 246).

for expropriation. The *Plama* tribunal considered that the most favoured nation clause could not apply to the 'procedural provisions' relating to dispute settlement. A specific dispute settlement resolution mechanism negotiated by the parties could not be replaced by a different mechanism by way of an MFN clause:

> [i]t is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria–Cyprus BIT (ad hoc arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.[257]

The tribunal also emphasised the need for a clear and unambiguous agreement of the State to arbitrate as a precondition for international arbitration. Accordingly, the incorporation by reference of dispute resolution provisions had to be express:

> (…) the following consideration is equally, if not more, important. (...) Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.
> Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference. The Claimant argues that the MFN provision produces such effect, stating that in contractual relationships the incorporation by reference of an arbitration agreement is commonplace (...)
> (...) the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous. A clause reading 'a treatment which is not less favourable than that accorded to investments by investors of third states' as appears in Article 3(1) of the Bulgaria–Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. (…)[258]

The tribunal also highlighted that the practical difficulty of determining objectively which dispute resolution mechanism was more favourable to the parties:

> [m]oreover, the doubt as to the relevance of the MFN clause in one BIT to the incorporation of dispute resolution provisions in other agreements is compounded by the difficulty of applying an objective test to the issue of what is more favorable. The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms, and to have the entire dispute resolved by arbitration as provided in the Bulgaria–Finland BIT, than to be confined to ad hoc arbitration limited to the quantum of compensation for expropriation. The Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and

[257] *Plama v. Bulgaria* (n. 246) para. 209.
[258] *Plama v. Bulgaria* (n. 246) paras. 198–200.

> another provides for ICSID? Which is more favorable?[259]

On the basis of the above considerations, the *Plama* tribunal held that the MFN clause could not be interpreted 'as providing consent to submit a dispute under the Bulgaria–Cyprus BIT to ICSID arbitration.'[260] Arguably, the different outcome from *Maffezini* was driven partly by the text of the Bulgaria–Cypriot BIT, which was simply too vague to support *Plama*'s case for extension to dispute resolution.

Subsequent tribunals have been split over which decision is more persuasive. The split in case law revolves mainly around the question of whether dispute resolution arrangements constitute a 'substantive' right that can be multilateralised through an MFN clause, or a 'procedural' right excluded from such benefit.[261]

In the wake of *Maffezini*, a number of tribunals have held dispute settlement to be a part of substantive treatment accorded to investors. Siemens sought to avoid the requirement of prior recourse to the local courts for a period of eighteen months as provided by the dispute resolution clause of the Argentina–Germany BIT.[262] The tribunal endorsed *Maffezini* and found that the MFN clause allowed immediate submission of the dispute to arbitration notwithstanding the lack of prior submission of the dispute to local courts:

> (...) the tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.[263]

The *Siemens* tribunal thus concluded that the term 'treatment' was wide enough to incorporate dispute settlement mechanism.[264]

The *Gas Natural* tribunal reached a similar conclusion.[265] Like in *Siemens*, the claimant sought to avoid an 18-month waiting period prior to submission of the case to international arbitration. The allegedly more favourable treatment consisted in the absence of an 18-month waiting period before submission of the dispute to international arbitration in the Argentina–US BIT. The tribunal found that the MFN clause conferred such benefit:

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[259] *Plama v. Bulgaria* (n. 246).

[260] *Plama v. Bulgaria* (n. 246) para. 227; Yannick Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"' (2007) 18 EJIL 757–774 (attempting to reconcile *Maffezini* and *Plama*).

[261] Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge, 2009) 139–163.

[262] *Siemens v. Argentina* (n. 243); *cf.* also *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, paras. 79–109, and dissent by arbitrator Stern who declined that MFN treatment could apply to dispute resolution provisions; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, 24 October 2011, paras. 74–109, and dissent by arbitrator Thomas.

[263] *Siemens v. Argentina* (n. 243) para.102.

[264] *Siemens v. Argentina* (n. 243) para.103.

[265] *Gas Natural v. Argentina* (n. 245).

> [t]he Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period. Accordingly, Claimant is entitled to avail itself of the dispute settlement provision in the United States–Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina.[266]

The *Suez v. Argentina* tribunal also held that dispute settlement mechanisms form an integral part of the 'treatment' accorded to investors by an MFN clause:

> [the Treaty provision] clearly states that 'in all matters' (en todas las materias) a Contracting party is to be given a treatment no less favourable than that which it grants to investments made in its territory by investors from any third country. Article X of the Argentina–Spain BIT specifies in detail the process for the 'Settlement of Disputes between a Party and Investors of the other Party.' Consequently, dispute settlement is certainly a 'matter' governed by the Argentina–Spain BIT. The word 'treatment' is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.[267]

With reference to the BIT's object and purpose, the tribunal declined to distinguish 'substance' and 'procedure':

> the tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of the Argentina–Spain BIT, dispute settlement is as important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states, Argentina and Spain, have agreed upon.[268]

The tribunal in *National Grid v. Argentina* similarly applied the MFN clause to the dispute resolution mechanism:

> [t]he Tribunal concurs with Maffezini's balanced considerations in its interpretation of the MFN clause and with its concern that MFN clauses not be extended inappropriately. It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits. For example, the situation in Plama involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in Maffezini. But cases like Plama do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.[269]

These decisions, following the *Maffezini* were all concerned with attempts to bypass an 18-month waiting period to gain access to international arbitration. Yet *Daimler Financial*

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[266] *Gas Natural v. Argentina* (n. 245) para. 31.

[267] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, para. 55.

[268] *Suez v. Argentina* (n. 267) para. 57.

[269] *National Grid v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 92; *cf.* also *Suez v. Argentina* (n. 267) paras. 55–59.

Services v. Argentina, *ICS Inspection Services v. Argentina* and *Kilic v. Turkmenistan* decline to apply the MFN clause to waiting periods.[270] It is also controversial whether the MFN clause extends more favourable treatment beyond the context of procedural prerequisites.

In *RosInvestCo,* the investor invoked the MFN provision contained in the USSR–United Kingdom BIT to benefit from the broader arbitration provision under the Russia–Denmark BIT, as the dispute resolution clause contained in the USSR–United Kingdom BIT was limited to a procedure determining solely the amount due or payment of compensation in case of expropriation. The tribunal concluded that arbitration formed a 'highly relevant' part of the treatment accorded to investors:

> (...) it is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his 'use' and 'enjoyment', procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.[271]

Another series of cases followed the approach taken by the *Plama* tribunal, distinguishing 'substantive' and 'procedural' rights in relation to dispute settlement.

In rejecting reliance on the MFN clause, the tribunal in *Salini v. Jordan*[272] found that the MFN clause contained in the Jordan–Italy BIT did not apply to an alternative dispute settlement mechanism for contractual claims, which under the basic Jordan–Italy BIT, had to be resolved through the domestic courts:

> the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the MFN clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a state Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements.[273]

The tribunal in *Berschader v. Russia* favoured the 'procedural' and 'material'/'substantive' rights distinction. The basic BIT provided for international arbitration only as regards the amount or mode of compensation in the event of expropriation. The tribunal held that an MFN clause can incorporate by reference an arbitration clause from another BIT only where the terms of the basic treaty so provide clearly and unambiguously:

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[270] *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/1, 22 August 2012, paras. 179–281, and dissent by arbitrator Brower; *ICS Inspection & Control Centre v. Argentina*, PCA Case No. 2010-9, 274–317; *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013.

[271] *RosInvestCo UK Ltd v. Russia*, SCC Case No. Arb. V079/2005, Award on Jurisdiction, October 2007, para. 130.

[272] *Salini v. Jordan* (n. 16).

[273] *Salini v. Jordan* (n. 16) para. 118 (emphasis in original).

> [t]here is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand. While it is universally agreed that the very essence of an MFN provision in a BIT is to afford investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject. (...)
>
> This general uncertainty about the scope of MFN clauses leaves little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute resolution clause. (...)
> (...) the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.[274]

The tribunals in both *Berschader* and *RosInvestCo* were concerned with the operation of the MFN clause in relation to the same less favourable dispute resolution provision yet reached different conclusions.

The *Telenor v. Hungary* tribunal endorsed *Plama*'s observations. The applicable dispute resolution in the Hungary–Norway BIT provided for arbitration only in the event of expropriation. Telenor sought to rely on the 'widest of the dispute resolution clauses under other BITs entered into by Hungary with other States', although without specifically identifying the provisions of such other bilateral investment treaties. In rejecting the claimant's contentions to apply the MFN provision to dispute settlement mechanisms.[275]

E. Admissibility

Section A.3. on the distinction between admissibility and jurisdiction gave examples of matters that pertain to jurisdiction and admissibility. We saw that jurisdiction typically focuses on the tribunal and the parties, whereas admissibility focuses on the claim(s); jurisdiction usually involves permanent defects which imply that tribunals are unable to exercise their mandate in line with the directions of the parties, whereas objections as to the admissibility of claims usually involve more transient circumstances which mean that a claim is not yet ready for adjudication.

Standing involves a category of cases that are widely accepted to pertain to admissibility. In investment arbitrations, a particularly important subset of standing involves claims by shareholders for injury suffered by the company (so-called derivative claims) or by holders of

[274] *Vladimir Berschader and Moïse Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, paras. 179–181 (emphasis in original).
[275] *Telenor v. Hungary* (n. 151) paras. 92–95.

security entitlements in global bonds.[276] By contrast, other issues pertaining to admissibility, such as the presence of third parties or *forum non conveniens*, have thus far played no significant role in investment arbitration.

An issue of a necessary third party could arise in the following hypothetical scenario: if two States jointly expropriate an investment (say France and the UK expropriate the owners of the Eurotunnel), a claim against just one of the two States under a BIT could be inadmissible. In the absence of a specific agreement by the two States to submit jointly to arbitration, investors may struggle to obtain relief because a necessary third party – the other State – is absent and this State's legal rights and obligations are inherently bound up with the rights and obligations of the State party to the arbitration.[277]

The 'twilight zone' between jurisdiction and admissibility is reflected in the interchangeable use of jurisdiction and admissibility by some investment tribunals.[278] More importantly, tribunals disagree on the classification of particular matters as pertaining to jurisdiction or admissibility, with potentially significant consequences for the outcomes of investment arbitrations. This section focuses on how tribunals have classified different matters, especially procedural prerequisites such as waiting clauses and fork in the road provisions. In a first step, we look at why the distinction may have significant practical consequences for how tribunals decide investment arbitration cases.

Whether certain matters pertain to jurisdiction or to admissibility is open to debate. Investment arbitration tribunals often diverge on classification. A good illustration is the common requirement in BITs that attempts are first made to settle a dispute by negotiation between the investor and the host State, or by submitting the dispute to domestic courts, before the investor can request arbitration (examined in subsection 2. below).

1. Consequences of the Distinction into Jurisdiction and Admissibility

[276] *Abaclat v. Argentina* (n. 12).

[277] In the Eurotunnel arbitration, no issue of necessary third party arose because France and the UK had jointly submitted to the jurisdiction of the arbitral tribunal in the Canterbury Treaty (Cmnd. 9745) and the Concession Agreement (Cmnd. 9769), *The Channel Tunnel Group Limited and France-Manche S.A. v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de L'Équipement, des Transports, de l'Aménagement du Territoire, du Tourisme et de la Mer du Gouvernement de la République Française*, Partial Award, 30 January 2007, (2007) 132 ILR 2. The concession agreement between the French and English governments and the concessionaires (the claimants) provided for a 'fundamental parallelism of laws and forums', para. 339.

[278] For example, the *Burlington* tribunal was unclear on its use of the terminology, *Burlington Resources Inc. and others v. Ecuador and and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315. The tribunal treated a prior litigation requirement as jurisdictional (para. 315) and at the same time as related to admissibility (para. 316). See also paras. 336–340, where the tribunal found that because the claim was inadmissible, it lacked jurisdiction over the claim).

Given the lack of express reference to 'admissibility' in the ICSID Convention, why does this distinction matter in investment arbitration? From the perspective of the disputing parties, whether a matter is classified as pertaining to jurisdiction or to admissibility may have important consequences.

First, the critical date for determining whether investment tribunals have jurisdiction is the date of the request for arbitration (seisin). As a result, new developments after that critical date cannot be taken into account for purposes of assessing the tribunal's jurisdiction. In contrast, new developments that concern admissibility may be taken into account. A counterexample is the *Loewen* case. The tribunal rejected its jurisdiction because of a change of nationality that took place only after the request for arbitration had been filed. This is very unusual because the existence of jurisdiction is as a rule assessed at the time of seisin.[279]

Second, tribunals have greater procedural flexibility with respect to cases over which they have jurisdiction but there is only a temporary barrier to the exercise of their jurisdiction.[280] As they are only presently constrained from exercising their jurisdiction, they may suspend a case for lack of admissibility, in order to allow the claimant to meet the missing admissibility requirement(s).[281] This option of staying the proceedings is not available for jurisdictional requirements that are absent. The investor only has one chance to meet the jurisdictional requirements, generally at the time when the arbitration is initiated.

Third, objections to admissibility can generally be waived. A good example is the requirement to exhaust local remedies, which can be waived under the ILC Articles on Diplomatic Protection.[282] In contrast, at least some conditions for the exercise of jurisdiction contained in a multilateral treaty such as the ICSID Convention cannot be waived.[283] For example, host States cannot waive jurisdictional requirements that the dispute should arise out of an 'investment' and that the dispute arose between it and the national of another contracting party. The latter may be particularly important with respect to sovereign wealth funds.[284]

Fourth and related to the question of waiver is whether the tribunal may look at objections to jurisdiction and admissibility *proprio motu*. Rule 41(2) of the ICSID Rules provides that the

[279] #See Subsection C.3.a) at p. 42.#
[280] *MOX Plant Case*, Order No. 3, (2003) 126 ILR 310.
[281] *SGS v. Philippines* (n. 31); *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006.
[282] Article 14, ILC Articles on Diplomatic Protection.
[283] Zachary Douglas (n. 2) para. 292.
[284] See contribution by Christian Tietje, 'Investment Law and Sovereign Wealth Funds', ch. 13.XII., #xx–yy#.

'Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence'.[285] In practice, at least some tribunals do not appear to consider their jurisdiction *proprio motu*.[286] Other tribunals consider their competence of their own accord, especially in cases where the host State failed to appear.[287] By contrast, tribunals are unlikely to consider questions of admissibility *proprio motu.*[288] Accordingly, host States will generally need to raise objections to admissibility for the tribunal to rule on them.

Fifth, there may be strategic reasons related to the conduct of the arbitration as to why the classification matters. In bifurcated cases with separate jurisdictional and liability phases, if tribunals treat certain matters as concerning the admissibility of claims rather than jurisdiction, they will deal with admissibility matters typically only in the merits phase. In *Abaclat*, for example, the tribunal decided that it had jurisdiction 'as a matter of principle' over a mass claim by thousands of bondholders, and explained that whether it could consider a mass claim was a question of admissibility rather than jurisdiction.[289] Issues of admissibility were thus decided at the same time as issue of jurisdiction, and combined in a single award on jurisdiction and admissibility. That said, tribunals have broad latitude as to when they determine issues of admissibility, similar to the flexibility tribunals enjoy as to when to decide on costs. It is a matter for the tribunal to decide whether to bifurcate proceedings. In addition, bifurcation decisions are case-specific. Arbitrations under UNCITRAL rules do not provide for a separate category in the wider group of preliminary objections of objections based in inadmissibility. In *Chevron v. Ecuador*, the tribunal explained that

> the Respondent's objections to the admissibility of the Claimants' claims, where not amounting to or overlapping with its jurisdictional objections, should be treated under

[285] Zachary Douglas (n. 2) para. 141, n. 14 (a general obligation to consider jurisdiction *proprio motu*); Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) Article 41, paras. 43, 52, 498 (the tribunal is obliged to consider its jurisdiction *proprio motu* in default proceedings, but not in contested proceedings).

[286] *Mobil Oil v. New Zealand*, ICSID Case No. ARB/87/2, Findings on Liability, Interpretation and Allied Issues, 4 May 1989, para. 2.9; *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Award on the Merits, 17 December 2003 (no examination whether an entity which was 100 percent owned by the UK was an eligible claimant). The Seychelles did not raise a jurisdictional objection that the investor was not a 'national' of another State.

[287] *Liberian Eastern Timber Corp. v. Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986; *Kaiser Bauxite v. Jamaica* (n. 58) paras. 6–25.

[288] *Larsen v. Hawaiian Kingdom*, PCA, Award, 5 February 2001, (2001) 119 ILR 566; (2001) 95 AJIL 927–933, considered that the tribunal was obliged to consider objections on admissibility *proprio motu.* The case raised questions as to the existence of a real dispute between the parties and the absence of the United States as necessary third party.

[289] *Abaclat v. Argentina* (n. 12) para. 504 *et seq*. In dissent, arbitrator Abi-Saab emphasised that the mass claim aspect concerned jurisdiction, rather than admissibility, Decision on Jurisdiction and Admissibility, Dissenting Opinion, 28 October 2011.

> Articles 15 and 21 of the UNCITRAL Arbitration Rules as issues relating to the merits phase of these arbitration proceedings. The UNCITRAL Rules do not contain any provision equivalent to ICSID Arbitration Rule 41(5). An objection to the admissibility of a claim does not, of course, impugn the jurisdiction of a tribunal over the disputing parties and their dispute; to the contrary, it necessarily assumes the existence of such jurisdiction; and it only objects to the tribunal's exercise of such jurisdiction in deciding the merits of a claim beyond a preliminary objection. Under the UNCITRAL Arbitration Rules, that is an exercise belonging to the merits phase of the arbitration, to be decided by one or more awards on the merits.[290]

In some cases, host States raise strong jurisdictional objections. If tribunals regard them as concerning admissibility, they are likely to be joined to the merits. Such cases, in proceeding to the merits stage, may involve additional expenses for host States, and could increase the risk of losing the case, compared to a situation where the tribunal dealt with the objection as a matter of jurisdiction, isolated from the merits of the case. Questions of admissibility are more likely in such a scenario to become intermingled with questions on the merits. Strategically, this may be a concern for a host State with strong jurisdictional/admissibility objections, but much weaker arguments on the merits.

Sixth, the classification of matters as pertaining to jurisdiction or admissibility determines whether supervisory bodies can review awards.[291] In challenges to awards before national courts or in seeking the annulment of the award before ICSID annulment committees, either party may only raise issues pertaining to the existence of adjudicative power (jurisdiction), rather than those pertaining to the exercise of such power (admissibility).[292]

Whereas decisions by arbitral tribunals on jurisdiction are reviewable in principle either by national courts in non-ICSID arbitrations or by ICSID annulment committees in ICSID arbitrations, determinations of admissibility, cannot, as a general rule, be reviewed. For example, given that the majority in *Abaclat* found that the issue of mass claims concerned the admissibility of claims advanced by the holder of security entitlements rather than its jurisdiction, it is difficult to see how an eventual annulment committee in that case could annul the award on the ground of an erroneous determination on admissibility. However, annulment committees have the option of reclassifying an issue that the tribunal considered concerned admissibility as one affecting the tribunal's jurisdiction, and provided the requirements under the Convention for annulment are met, annul the award on that basis.

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[290] *Methanex v. USA*, UNCITRAL (NAFTA), First Partial Award, 7 August 2002, para. 107 ('the text, however, confers no separate power to rule on objections to "admissibility"'); *Chevron v. Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.91 (objections to admissibility to be dealt with in the merits phase).

[291] Jan Paulsson (n. 23) expands on this idea, 603.

[292] Zachary Douglas (n. 2) 291.

Seventh, a finding of inadmissibility, in contrast to a finding that the tribunal lacks jurisdiction, does not become *res judicata*. By definition, tribunals that decline to examine claims on their merits because they are inadmissible are exercising their jurisdiction, albeit only for the reason to immediately decline to examine the dispute for the time being because a procedural precondition for such determination, or similar, is missing. Such defects are often temporary and may be cured, without prejudice to a new request for arbitration. For example, a decision by a tribunal that a claim is inadmissible because the investor failed to adhere to a waiting period is no bar to a new arbitration once the waiting period has expired. Because a determination of inadmissibility does not become *res judicata*, the investor in *Murphy* could initiate a second arbitration after having satisfied the waiting period.[293]

This is not to say that all findings on jurisdiction become *res judicata*; only some do. Defects to the tribunal's jurisdiction may disappear over time or the parties may bring the arbitration to another forum even if there is identity of the causes of action. An example of an arbitration that migrated from one forum to another is *ETI v. Bolivia*, where the parties agreed to switch from ICSID to UNCITRAL arbitration after questions had been raised about ICSID's jurisdiction in view of Bolivia's withdrawal from the ICSID Convention.[294]

Moreover, if an ICSID tribunal rejects its jurisdiction for any reason, it will be *res judicata* for ICSID purposes only. All it means is that in the absence of a successful application for annulment, the investor will not be able to bring the claim(s) to ICSID a second time. Notwithstanding, an investor can present his claims in other dispute resolution fora. For instance, the investor could bring its claims to the European Court of Human Rights (ECtHR) (provided it has exhausted local remedies), to municipal courts or to non-ICSID BIT tribunals. *Res judicata* thus has a more limited scope than in national law.

The following subsections deals with the four types of scenarios where admissibility has been a prominent tool in investment arbitration, namely (2.) procedural prerequisites, (3.) fork in the road clauses, (4.) the exhaustion of local remedies, (5.) and (6.) derivative claims by shareholders.

2. Procedural Prerequisites

The question of admissibility, as has been discussed earlier, deals with the question of

[293] *Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010; *Murphy Exploration & Production Company – International v. Ecuador*, PCA (pending).

[294] *E.T.I. v. Bolivia* (n. 65).

whether the claims before the tribunal are temporarily defective.[295] Though there is considerable agreement on the function of admissibility in investment treaty arbitration, the scope of admissibility is contested. The question is whether the failure to comply with procedural prerequisites means that the tribunal lacks jurisdiction altogether or whether it simply affects the claim's admissibility.

In terms of admissibility, procedural prerequisites form an intermediate category. They can pertain to either jurisdiction or admissibility, depending on how the prerequisite and the arbitration clause are formulated. The key question is whether these prerequisites have been formulated as a condition for consent or not. The respondent State invariably has incentives to characterise all procedural prerequisites as a condition of consent, and vice versa for the investor, and so it is up to the tribunal to reach an objective determination on the basis of the exact wording of the procedural prerequisite set in its context and objectives.

Mandatory conditions are properly regarded as concerning the tribunal's jurisdiction, whereas other procedural prerequisites concern the claim's admissibility. In *Nicaragua*, the procedural prerequisite at issue was a prior attempt at diplomatic settlement. The ICJ characterised it as concerning admissibility.[296] In *Georgia v. Russia* (Preliminary Objections), the ICJ qualified the absence of reference to the supervisory organ of the International Convention on the Elimination of All Forms of Racial Discrimination as affecting the court's jurisdiction, rather than only the admissibility of Georgia's claims.[297] Accordingly, the claimant's failure to respect procedural prerequisites implies that the tribunal lacks jurisdiction *tout court*, rather than being temporarily barred from exercising jurisdiction. The failure to meet some or other procedural prerequisite means that the dispute is not within the terms of the host State's consent.

Waiting clauses are a common procedural prerequisite in BITs. They provide that the investor may initiate international arbitration after a defined period has elapsed after the dispute has arisen. There are two main forms: (i) waiting periods which encourage the settlement of dispute through diplomatic negotiations prior to the submission of arbitration and (ii) waiting period which requires the investor to first litigate before domestic courts. Waiting clauses aim to encourage parties to engage in settlement negotiations, and thereby avoid the need for the

[295] *Waste Management v. Mexico* (n. 11) para. 58.

[296] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* Jurisdiction and Admissibility, ICJ Rep 1988 p 69, para 76.

[297] *Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, 1 April 2011. Article 22 of the ICERD refers to disputes 'not settled by negotiation or by the procedures expressly provided for in this Convention'.

formal dispute settlement. The resolution of disputes is more efficient and less costly if the parties themselves manage to resolve their differences, rather than having to rely on a third-party adjudicator.

An example of the first type of waiting clause is found in Article 11(2) of the German Model BIT 2008 which provides:

> [i]f the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration.

Tribunals are split on whether waiting and forum selection clauses affect the admissibility rather than the jurisdiction of the tribunal.[298] With respect to forum selection clauses, the case law is almost evenly divided.[299] Some tribunals construe a prior litigation requirement in domestic courts as concerning jurisdiction.[300] The *Kilic v. Turkmenistan* tribunal reasoned that such a litigation requirement prior to submission of an investment claim was a modified application of Article 26 (to exhaust local remedies) and hence as affecting their jurisdiction.[301] The tribunal found that the failure to respect a procedural prerequisite affects the tribunal's jurisdiction rather than admissibility. Arbitrator Park dissented, explaining that such failure concerned the admissibility of the claim.[302]

SGS v. Philippines involved the question of priority between an ICSID tribunal and national courts over the adjudication of claims arising out of a shipping inspection contract. The tribunal treated the submission of the dispute to a domestic forum as affecting the admissibility of a treaty claim pending resolution of the dispute by the contractual forum, rather than concerning its jurisdiction over it.

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[298] *SGS v. Pakistan* (n. 37).

[299] Campbell McLachlan, Laurence Shore and Matthew Weiniger (n. 24) para. 4.107.

[300] *Georgia v. Russia* (n. 297) paras. 173–177 (a limitation of the consent in compromissory clauses to disputes that 'cannot be settled by negotiation' implies that the court lacks jurisdiction unless negotiations have at least been attempted); *Interhandel* (n. 28) 28; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Judgment, 20 July 2012, General List No. 144 (2012) (Article 30(1) of the UN Convention against Torture); *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda)*, ICJ Judgment, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ Rep. 2006, 6, para. 88. *ICS Inspection and Control Services Limited v. Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 12 February 2012; *Argentina v. BG Group plc*, 665 F3d 1363 (DC Cir 2012); *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012.

[301] *Kilic v. Turkmenistan* (n. 270) paras. 6.25–6.26.

[302] *Cf.* also *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315. But in this case, the tribunal has almost used jurisdiction and admissibility interchangeably (*cf.* para. 315 and 417; see also paras. 336–340); *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 156 (see also para. 142); *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 July 2011, para. 94 (though the tribunal applied the MFN clause in to circumvent the condition); *Daimler Financial v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 281 (see also para. 194); *ICS v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 326; *Murphy v. Ecuador* (n. 293) para. 149; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

> [T]this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense (…) the question is not whether the tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered a matter of admissibility than jurisdiction.[303]

The tribunal stayed the proceedings regarding the contractual claims on the basis that Pakistani courts had exclusive jurisdiction over the contractual claims, and held that the Pakistani court's jurisdiction was not affected by the ICSID Convention or the BIT.

In *Ethyl Corp. v. Canada*, the tribunal observed that the failure to fulfil procedural prerequisites such as a waiting period did not result in the absence of jurisdiction *ab initio* but at most in a delay in proceedings (*i.e.* inadmissibility).[304] The tribunals in *Lauder*[305], *SGS v. Pakistan*[306] and *Abaclat* adopted similar positions. The *Abaclat* tribunal explained the classification as pertaining to admissibility in the following terms:

> the negotiation and 18 months litigation requirement related to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim.[307]

In *Western NIS v. Ukraine*, the tribunal said that a waiting period and the failure of the investor to put the host State on notice affected the claim's admissibility. It stayed the case, rather than dismissing the case with prejudice for lack of jurisdiction.[308] In an unusually short order of just one page, the tribunal emphasised that the failure to give proper notice did 'not, in and of itself, affect the Tribunal's jurisdiction. The Claimant should be given an opportunity to remedy the deficient notice. On the other hand, the proceedings should not be indefinitely suspended.'[309] Accordingly, it called on the investor to inform the tribunal within 30 days whether it had given proper notice, and within 7 months whether it would pursue the claim. The case settled within 3 months of the tribunal issuing the order.

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[303] *SGS v. Philippines* (n. 31) para. 154.

[304] *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, (1999) 38 ILM 708; *cf.* also *Hochtief v. Argentina* (n. 262) para. 96; *Western NIS v. Ukraine* (n. 281); *Alps Finance v. Slovakia*, UNCITRAL, Award, 5 March 2011, paras. 200–212; *Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Moldova*, SCC Arbitration, Award, 22 September 2005, 6; *LESI v. Algeria* (n. 157) para. 28 *et seq*.

[305] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

[306] *SGS v. Pakistan* (n. 37).

[307] *Abaclat v. Argentina* (n. 12) para. 496.

[308] *Western NIS v. Ukraine* (n. 281).

[309] *Western NIS v. Ukraine* (n. 281) para. 7.

3. Fork in the Road Clauses

Fork in the road clauses offer the investor a choice between the host State's domestic courts and international arbitration, but not both.[310] Once the investor has chosen, the choice is final. If the investor chooses to settle the dispute in domestic courts, the option of international arbitration is no longer available, and vice versa. However, taking a particular fork in the road does not preclude a new claim based on subsequent events, such as the investor claiming for denial of justice at the hands of the domestic courts.

An example of a fork in the road clause is Article 10(2) of the Albania–Greece BIT that provides that if the investment dispute 'cannot be settled within six months from either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal.'

Fork in the road provisions rely on some identity of the dispute submitted to the first and second forum.[311] Related disputes are only rarely caught by fork in the road clauses. As a result, the admissibility of arbitrations is not affected by the submission of related but not identical disputes to domestic courts. Fork in the road provisions thus far have had little impact on the jurisdiction of tribunals.

In *Pantechniki,* sole arbitrator Paulsson adopted a broader reading of fork in the road clauses than most other tribunals. He found that a claimant who had opted to submit claims arising out of road construction contracts to the Albanian courts rather than ICSID arbitration could not have second thoughts. In the presence of the fork in the road clause, the investor's choice of forum was final. It was to no avail that the investor sought to characterise its claims as treaty claims. The arbitrator determined that the appropriate test was 'whether or not the "fundamental basis of a claim" sought to be brought before the international forum is

[310] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 365, para. 55; Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 JWI 231–256; Gerhard Wegen and Lars Markert, 'Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation' (2010) (4) Austrian Arb. YB 269–292; Lars Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen: Zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investitionsschiedsverfahren* (Nomos, 2010) 223–243.

[311] *Olguín v. Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000, paras. 20–23, 30; *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Award, 21 November 2000, paras. 40, 42, 53–55, 81; *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 38, 42, 55; *Middle East Cement v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 71; *CMS v. Argentina* (n. 17) paras. 77–82; *Champion Trading v. Egypt* (n. 135) para. 3.4.3; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 37–41, 86–92; *Enron v. Argentina* (n. 302) paras. 95–98; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30 April 2004, paras. 75, 76; *Pan American v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras. 155–157.

autonomous of claims to be heard elsewhere.'[312]

NAFTA Art. 1121 is similar in effect to a fork in the road clause. Note that this provision has a dual function. It is simultaneously a fork in the road clause and implicitly rules out a requirement to exhaust local remedies.[313] In initiating a NAFTA case, the investor renounces the right to bring the dispute before the domestic court of a NAFTA contracting State. If a NAFTA tribunal finds that it lacks jurisdiction or dismissed the case on the merits, the investor will be barred from re-litigating the case again before the national State of the NAFTA contracting State. Opting for NAFTA arbitration can therefore be risky, especially in cases where the case for the tribunal's jurisdiction is weak. In the *Loewen* case, in which the tribunal found that the investor had failed to exhaust local remedies in relation to a denial of justice claim, Loewen Group and Raymond Loewen would have been unable to subsequently turn around and bring a claim to the US courts instead.[314]

4. The Failure to Exhaust Local Remedies

The traditional requirement to exhaust local remedies provides that before a claim can be brought internationally, domestic remedies offered by the domestic law of the State concerned must have been exhausted.[315] States are free to waive the requirement to exhaust local remedies, however until recently, such waivers have been the exception, rather than the norm. International investment law thus departs from the position under general international law, as reflected in ARSIWA Article 44 ('Admissibility of Claims') which provides that the responsibility of a State may not be invoked if '(…) (b) [t]he claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.'

Article 26 of the ICSID Convention contains the default rule that for ICSID arbitrations there is no requirement to exhaust local remedies unless otherwise stated. The default rule in general international law on the exhaustion of local remedies does not apply.[316] Article 26 forms part of the title in the ICSID Convention entitled 'jurisdiction'. Notwithstanding, it is better regarded as concerning the admissibility of the claim, given that is only a temporary obstacle to the exercise of the tribunal's jurisdiction. Exhaustion of local remedies can also

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[312] *Pantechniki S.A. Contractors & Engineers v. Albania,* ICSID Case No. ARB/07/21, Award on the merits, 30 July 2009, paras. 61, 68.

[313] See the next subsection.

[314] *Loewen v. United States* (n. 170).

[315] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66), Article 25, p. 402, para. 187; *cf*. generally Lars Markert (n. 310) 189–210.

[316] Zachary Douglas (n. 2) para. 178.

concern the merits, as a substantive requirement for denial of justice.[317] Most tribunals regard it as affecting the claim's admissibility.[318]

The departure of investment arbitration from general international law, dispensing with the requirement to exhaust local remedies, is especially important in respect of non-ICSID BIT arbitration, for treaties that lack an express waiver from exhaustion of local remedies. Article 26 of the ICSID Convention reverses the situation compared to international law in general: the contracting States waive the requirement to exhaust local remedies unless otherwise provided for.

By contrast, the ECT is silent on whether local remedies need to be exhausted. Notwithstanding, the general view is that no such requirement applies.[319] The NAFTA also does not deal expressly with this point. According to one view, there is no requirement to exhaust local remedies under either treaty. Article 1121 of the NAFTA requires, as a condition precedent for the tribunal's jurisdiction, that the claimant waive the right to initiate or continue any domestic proceedings in relation to any measures taken by the respondent allegedly in breach of the NAFTA. According to the majority of NAFTA tribunals, Article 1121 of the NAFTA dispenses with the need to exhaust local remedies.[320]

In *Waste Management v. Mexico*, the tribunal said

> [i]t is true that in a general sense the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11. But the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) have been complied with by the State.[321]

Notwithstanding, States may require exhaustion of local remedies as a pre-condition for their consent to arbitration. That it is a pre-condition for consent would make it a jurisdictional requirement and not an admissibility requirement. Art. 25(4) pertains to arbitrability (which classes of disputes can be submitted to arbitration and which cannot), not admissibility, so it should be addressed under jurisdiction.[322]

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[317] *Loewen v. USA* (n. 170); *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, paras. 121–122; *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 168.

[318] *RosInvest v. Russia* (n. 271); *SGS v. Philippines* (n. 31); Lars Markert (n. 310) 207–209.

[319] Thomas Roe, Matthew Happold and James Dingemans, *Settlement of investment disputes under the Energy Charter Treaty* (Cambridge University Press, 2011) 138–141.

[320] Andrea K. Bjorklund, 'Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence' in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational, 2004) 254–286; William S. Dodge, 'Local Remedies under NAFTA Chapter 11' in Emmanuel Gaillard and Frédéric Bachand (eds), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris, 2011) Chapter 3.

[321] *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 116.

[322] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 342–347.

Attempts of States to invoke the exhaustion of local remedies as a jurisdictional requirement have largely been unsuccessful.[323] In *AES v. Argentina*, the tribunal stated that no rule in the ICSID Convention required that disputes could only be brought to ICSID once local remedies had been exhausted:

> [t]he Tribunal reiterates that there is no rule according to which a 'legal dispute' should only be brought to ICSID subject to prior exhaustion of local remedies, including negotiations between the investor and the authorities of the host State. On the contrary, the ICSID system has been established on the basis of a reversed rule of exhaustion of local remedies. Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be expressly required as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.[324]

The procedural requirement to exhaust local resources is to be distinguished from exhaustion of local remedies as a substantive requirement. With denial of justice the exhaustion of remedies is an element of the standard of international law that the investor alleges has been violated.[325] In such cases, exhaustion of local remedies is not a procedural requirement, but a substantive requirement and hence concerns the merits.

5. Derivative Claims by Shareholders

Issues of standing arise in investment arbitration in two types of cases. Most prominently, in the case of derivative shareholder arbitrations for injury suffered by the company; and second in the case of holders of security entitlements in dematerialised global securities.[326]

Shareholders can suffer losses directly and indirectly. First, shareholders can also suffer direct injury affecting their rights as shareholders as such. Second, reflective losses refer to the loss incurred by shareholders as a result of injury to 'their' company, typically a loss in value of the shares.[327] Most domestic legal systems allow shareholder actions for reflective loss only in narrow circumstances. The rule of not allowing shareholder claims for reflective loss is well established in general international law, including in ICJ[328] and ECtHR[329] judgements.

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[323] *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, para. 62; *AES v. Argentina*, Decision on Jurisdiction, 26 April 2005, para. 69.

[324] *AES v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 69.

[325] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 1 LPICT 13–16; *Waste Management v. Mexico* (n. 321) para. 97.

[326] *Abaclat v. Argentina* (n. 12).

[327] Zachary Douglas (n. 2) Chapter 11.

[328] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, ICJ Rep. 1970, para. 47; *Case Concerning Ahmadou Sadio Diallo (Guinea v. Congo)*, Judgment on Preliminary Objections, ICJ Rep. 2007, 582, para. 67; *Case Concerning Ahmadou Sadio Diallo (Guinea v. Congo)*, Judgment, 30 November 2010, ICJ Rep. 2010, 639; *cf.* also Ben Juratowitch, 'Diplomatic Protection of Shareholders' (2011) 81 BYIL 281–323.

[329] ECtHR, *Agrotexim and Others v. Greece*, Application No. 14807/89, Ser. A no. 330, 25–26, paras. 68–71; ECtHR, *Géniteau v. France* (no. 2), Application No. 4069/02, 8 November 2005.

The rationale for declaring derivative claims by shareholders inadmissible is the same in domestic and international law. Limiting claims to the directly injured entity (the company) is efficient and avoids the potential issue of multiple claims related to the same loss. A 'no reflective loss' policy ensures that multiple claims are avoided, along with its attendant problems such as double recovery and inconsistent results. Further, it also helps maintain the integrity of the corporate structure and the priority ranking in bankruptcy. If shareholder claims for reflective losses were allowed, there is a risk that shareholders would be paid in preference to creditors, contrary to the ordinary priority ranking.[330]

Recall from subsection D.1.c) that the ICSID Convention allows companies with the nationality of the host State to initiate arbitrations provided they are foreign controlled (Article 25(2)(b) of the ICSID Convention). This possibility does not expressly extend to shareholders of such companies. The negotiators of the ICSID Convention considered drafting Article 25 of the ICSID Convention to allow claims by foreign shareholders of a domestic company instead of the domestic company.[331] Ultimately they dropped this idea. Yet the inclusion of shares in many investment definitions in modern BITs has led to a strand of the case law allowing claims by (minority) shareholders, despite policy concerns against multiple claims by shareholders as reflected in the ICSID Convention.

However, investment tribunals disagree on the issue of shareholder claims for reflective loss. Some tribunals have affirmed the admissibility of such claims[332], whereas others dismissed claims by shareholders for reflective loss as inadmissible.[333] Based on this inclusion in the illustrative list of transactions that qualify as an investment, some tribunals found that shares are protected investments, and since the shareholder's right is separate from the company's and gives rise to a separate cause of action, they declare shareholder claims for reflective losses to be admissible.

With respect to shareholder claims, investment tribunals are not split between treating the

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[330] E.g. *Gaubert v. United States*, 855 F.2d 1284, 1291 (5th Cir. 1989); *Johnson v. Gore Wood & Co.* [2000] UKHL 65; [2002] 2 A.C. 1 (House of Lords 2000), per Lord Millet; *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 274 (1992).

[331] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 66) 297.

[332] *Lauder v. Czech Republic* (n. 305); *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Final Award, 12 May 2005 (minority shareholder of TGN), para. 51; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Final Award, 27 December 2010 (minority shareholder of TGN); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, para. 42.

[333] See generally Martin J. Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes' (2011) 26 ICSID Rev.–FILJ 1, 34, 73; Zachary Douglas (n. 2) Chapter 11.

issue of shareholder standing for reflective loss as one pertaining to jurisdiction or to admissibility. Rather, the split is between tribunals who fail to look at the admissibility of shareholder claims altogether and those who analyse shareholder claims under the rubric of admissibility. The two approaches lead to different results. The failure to analyse shareholder claims under the heading of admissibility leads to a permissive approach with respect to claims by minority shareholders, in departure from the position in general international law.

F. Concluding Remarks

This chapter examined a variety of questions concerning jurisdiction and admissibility that arise in investment arbitration, including the giving and withdrawal of consent; *Kompetenz-Kompetenz*; counterclaims and the scope of jurisdiction. It attempted to map these questions in their present form. Jurisdiction focuses on the tribunal and the parties, whereas admissibility focuses on claim(s). A lack of jurisdiction typically involves permanent defects of the tribunal's power to decide the case. Conversely, objections as to the admissibility of claims usually involve temporary defects, such as a failure to exhaust local remedies, with the result that the claim(s) are not presently suitable for adjudication.

To determine whether investment tribunals enjoy jurisdiction over particular disputes and the scope of their jurisdiction, we need to look primarily, but not exclusively, at the relevant jurisdictional provisions. In the case of ICSID arbitration, the tribunal's jurisdiction is a function of both Article 25 of the ICSID Convention and the instrument of consent. Jurisdictional questions arise also frequently before other international courts and tribunals. Investment tribunals should draw more frequently on the practice of other tribunals, especially the ICJ. Investment tribunals attuned to this practice are likely to treat such questions in accordance with approaches in international law more generally.

We saw that the determination of whether a certain matter pertains to jurisdiction or admissibility can be crucial to the outcome of investment arbitrations. In the 'twilight zone' of jurisdiction and admissibility, the distinction is at times difficult to draw. Some tribunals use the terms interchangeably, or inconsistently. Accordingly, it is challenging to articulate general principle on jurisdiction and admissibility in investment arbitration. In the early days of investment arbitration, the notion of admissibility played only a subordinated role. Yet investment tribunals increasingly pay attention to this conceptual distinction – one that has important implications, including for the when issues are decided and the possibility of seeking an annulment of the award. Questions of admissibility and jurisdiction are likely to feature prominently in the case law of investment tribunals for the foreseeable future.