UNIVERSITÉ DU LUXEMBOURG

PhD-FDEF-2019-03
The Faculty of Law, Economics and Finance

DISSERTATION

Defence held on 20 May 2019 in Luxembourg

to obtain the degree of

DOCTEUR DE L'UNIVERSITÉ DU LUXEMBOURG

EN DROIT

by

Relja Radović
Born on 13 July 1989 in Bačka Palanka (Serbia)

Demystifying Consent

The Jurisdictional Framework of Investment Treaty Arbitration Revisited

Dissertation defence committee:

Dr Gilles Cuniberti, Chairperson
Professor, Université du Luxembourg

Dr Freya Baetens, Vice Chairperson
Professor, University of Oslo

Dr Matthew Happold, dissertation supervisor
Professor, Université du Luxembourg

Dr Thomas Schultz
Professor, University of Geneva, Graduate Institute of International and Development Studies, and King's College London

Dr Hege Elisabeth Kjos
Assistant Professor, University of Amsterdam

Table of Contents

Acknowledgments

Conducting doctoral studies at the University of Luxembourg has been a phenomenal experience. Several specific thanks are in order. First and foremost, I am grateful to the Luxembourg National Research Fund for funding my doctoral project as part of their AFR PhD scheme. I am very thankful to Professor Matthew Happold, my supervisor, and Professors Gilles Cuniberti and Herwig Hofmann, members of my Dissertation Supervisory Committee, for their supervision and valuable guidance during the work on my thesis. I am also thankful to the National University of Singapore and the Australian National University, for giving me the opportunity to conduct parts of my research at their respective institutions. Professor Anthea Roberts and my colleague Simona Demková have reviewed parts of the thesis, which has been of great value to me. Finally, but most importantly, I am indebted to my doctoral comrades from the Public International Law research group at the University of Luxembourg, Johannes Hendrik Fahner, Başak Bağlayan, and Chrysa Alexandraki, for their friendship, support, and extraordinary ability to cope with me on an everyday basis.

Relja Radović

Luxembourg, April 2019

Abstract

The principle of consensualism is the fundamental principle of international dispute settlement and as such it forms the basis of investment treaty arbitration. The principle governs the process of jurisdictional regulation in international adjudication, and confers the power to define the authority to adjudicate, ie jurisdiction, of international courts and tribunals on disputing parties exclusively. Although generally uncontroversial in the theory of public international law and international adjudication, the principle of consensualism has attracted much attention in both the theory and practice of investment treaty arbitration. Arguments have been made that arbitral practice evidences the willingness of tribunals to establish jurisdiction on alternative and weaker bases. The question that arises is to what extent the principle of consensualism truly governs this field of international dispute settlement. In the attempt to bring some clarity in the resolution of this question, this thesis inquires to what extent the principle of consensualism is perceived and applied differently in the context of investment treaty arbitration from its predecessor in general international law. It is argued that the principle is indeed redefined and eroded from its traditional understanding, which is caused by the rise of arbitral jurisdictional regulation. The thesis tracks the development of arbitral jurisdictional regulation across various jurisdictional questions, and finds that arbitral tribunals have generated rules which direct the interpretation and application of party-provided jurisdictional rules, on the one hand, and occasionally impose independent jurisdictional requirements, on the other. The development of such rules decreases the degree to which disputing parties define the authority to adjudicate, and therefore an erosion of the principle of consensualism can be found in the process of defining the jurisdiction of investment arbitral tribunals. However, because arbitral jurisdictional regulation seems inevitable, the thesis recognises a need for its integration into the jurisdictional framework of investment treaty arbitration. To that end, the thesis sketches a two-layered model of jurisdictional regulation in investment treaty arbitration, consisted of both party-provided and arbitrator-made rules. It is suggested that this model can lead to the restoration of consensualism, by allowing for a clear coordination between the two sets of rules, on the one hand, and more legal certainty in the development of arbitrator-made rules, on the other.

Abbreviations

AJIL	American Journal of International Law
BIT	Bilateral investment treaty
BLEU	Belgium-Luxembourg Economic Union
CETA	Comprehensive Economic and Trade Agreement Between Canada and the European Union
CJEU	Court of Justice of the European Union
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
FTA	Free trade agreement
HRC	Human Rights Committee
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID Rev-FILJ	ICSID Review – Foreign Investment Law Journal
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission

ILM	International Legal Materials
IPA	Investment protection agreement
ITLOS	International Tribunal for the Law of the Sea
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
JWIT	Journal of World Investment & Trade
LCIA	London Court of International Arbitration
LPICT	Law & Practice of International Courts and Tribunals
MFN	Most-favoured nation
MIT	Multilateral investment treaty
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-governmental organisation
OASTS	Organization of American States Treaty Series
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
SGCA	Court of Appeal of Singapore
SGHC	High Court of Singapore
TDM	Transnational Dispute Management
TTIP	Transatlantic Trade and Investment Partnership Between the EU and the United States
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
USMCA	Agreement Between the United States of America, the United Mexican States and Canada
USSC	Supreme Court of the United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

In Klaus Mann's *Mephisto,* the main character Hendrik Höfgen consents to the conditions of a regime whose faults he does not approve of, for one simple reason: to be able to act and achieve his ambition as an actor.[1] Although repeatedly assured that he has nothing to be afraid of because of his acclaim, Höfgen very soon realises that the reality is quite opposite and that his public involvement in a seemingly harmless way has made him bend down in front (and part) of the regime that he had once despised. States and foreign investors similarly consent to international arbitration for a simple reason: to settle their disputes and achieve their ambition to win. They are assured in the traditional premise that the participants themselves define the conditions of their engagement, because that is how the law beyond sovereigns works. However, States and investors very soon find themselves stuck in the system in which the terms of their engagement are defined by, it seems, the system itself. The dissatisfaction with the conditions to which they have not consented is natural. States often claim that their status as sovereigns is being offended.[2] But in the end of the day, without their initial engagement, there would be no opportunity for the system to build itself. And no matter how strong their criticisms are about the appropriateness of the existing investor-State dispute settlement mechanism,[3] States and foreign investors do not have other choice but to accept the practice of that regime if they wish to remain prominent actors in the sphere of international economic relations.

What is the value of the promises and assumptions that we will be treated with deference? And what happens when we discover that our related expectations were a fallacy? This is not an issue of the adequacy of the rules of a specific legal regime. The relevant question is exclusively the one of how such rules are made, and more importantly how they are imposed contrary to the

---

1 Klaus Mann, *Mephisto* (Robin Smyth tr, Penguin Books 1983).

2 Jan Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3(5) TDM <https://www.transnational-dispute-management.com/article.asp?key=883> accessed 28 January 2019 ('Just as jealous sovereign states are averse to any suggestion that compacts other than those to which they have consented may be invoked against them, so too are they unwilling to submit to the elaboration of international law by anything resembling the accretion of binding precedents known as common law.').

3 Chapter 6, Section 2.

participants' initial expectations. However, precisely this unexpected submission to the initially invisible set of rules causes much broader discontent with their general quality. Take the example of investment treaty arbitration: of course, that system, with all its weaknesses, by no means can be compared to the repressive regimes of the 20th century. But the criticisms of the system often do not spare it of their bite, breaking into the sphere of morality and arguing that investor-State arbitration represents a paradigm of everything that is wrong in the modern world.[4] It is submitted that an important, although quite possibly not the only, factor influencing such overreactions is surprise. Investment treaty arbitration is governed by a set of rules which is to a large extent characterised by unclarity and uncertainty. On the one hand, it is a system built on the traditional assumptions and ideals of the international legal order, the most important one being the principle of consensualism.[5] On the other, the actual practice of investment tribunals raises a valid question to what extent the principle of consensualism truly governs this dispute settlement mechanism.[6] This thesis attempts to bring some clarity in the resolution of that question.

The Principle of Consensualism, its Erosion, and Prospective Restoration

The principle of consensualism is the fundamental principle of international law governing the settlement of disputes at the international level, and it is the foundational principle of the investor-State dispute settlement mechanism. In accordance with this principle, the jurisdiction of every investment arbitral tribunal is defined by consent of the disputing parties. The mention of 'arbitration' has led many to analogise with domestic laws and to observe the requirement of a contractual relationship between the disputing parties. The discovery that this field of dispute settlement was developing as 'arbitration without privity' was announced as a radical departure from what was previously known about the consensualism of arbitration, although in a positive sense.[7] Others have been critical about such developments, and talked about 'la marginalisation du consentement dans l'arbitrage international',[8] or attacked the idea of arbitrating investment disputes without a prior contractual relationship.[9] These were reactions to arbitral practice,

---

4 See, for example, M Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 Int'l Environ Agreements 329.

5 Chapter 1.

6 Chapters 3, 4, and 5.

7 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232.

8 Brigitte Stern, 'Un coup d'arrêt à la marginalisation du consentement dans l'arbitrage international (A propos de l'arrêt de la Cour d'appel de Paris du 1er juin 1999)' (2000) 2000 Revue de l'Arbitrage 403. Also: Brigitte Stern, 'ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case' in Steve Charnovitz, Debra P Steger and Peter Van den Bossche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP 2005) 259–60.

9 M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 139–47.

which, it is usually noticed, has been willing to establish jurisdiction on alternative and weaker bases. An overall impression was that something was changing about the consensualism of investment arbitration, either when it comes to establishing a consensual bond between the disputing parties, or in terms of damaging the concept of State sovereignty.

This impression continues to raise many questions which are left without proper answers. There are several deficiencies in the existing literature concerning consent to investment arbitration. First, this topic has mostly been examined from the point of view of 'international arbitration' as a sufficiently defined category, which allegedly comprises both investment and commercial arbitration.[10] The usual narrative goes that consent is required as in 'any form of arbitration'.[11] This type of analysis often fails to accommodate the principle of consensualism within a broader legal context, namely that of public international law. That accommodation is important because in the first step it explains the function of the principle of consensualism, which in turn builds the picture of what is to be expected in its implementation. Second, the existing literature usually examines the process of establishing a consensual link between disputing parties, instead of the process of the making of jurisdictional rules.[12] Such an approach fails to observe that the act of consenting does not imply a simple 'yes' or 'no' to arbitral jurisdiction, but it primarily means providing the substance that defines the scope of the arbitral authority to adjudicate. A focus on the substance defining the authority to adjudicate of an arbitral tribunal can reveal that the problem of the jurisdictional determinations that some commentators would qualify as unusual, adventuristic, expansionary, or simply wrong, pertains to the process of jurisdictional regulation, its imperfections, and possible solutions.[13]

---

10 Monographs addressing the topic of consent to arbitration include Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012); Ousmane Diallo, *Le consentement des parties à l'arbitrage international* (Presses Universitaires de France 2010).

11 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 254. See also Piero Bernardini, 'International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 52 (arguing that analogies between commercial and investment arbitration are based on their consensual foundations and the will of the parties not to resort to other methods of dispute settlement like before local courts or through diplomatic protection).

12 In addition to the literature in n 10, see Paulsson, 'Privity' (n 7); and Jacques Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration' (1997) 14 J Int'l Arb 5. The questions of the scope of consent, covered persons, time-related issues etc, are usually treated as topics for themselves, although occasionally they are included in the analyses of consent in general. See, for example, Guiguo Wang, 'Consent in Investor–State Arbitration: A Critical Analysis' (2014) 13 Chinese JIL 335.

13 By 'jurisdictional regulation' I mean the process of defining the jurisdiction of arbitral tribunals, or more precisely the process of defining the rules drawing the limits of arbitral jurisdiction. This process is analysed extensively in Chapter 1.

Finally, another view on the consensualism of investment arbitration has started developing. Some scholars focus on State consent, considering the authority of arbitral tribunals to be derived from that consent exclusively, observing it either as an act of State regulation over its subjects (as 'public law' approaches to investment treaty arbitration do),[14] or as a unilateral obligation under international law.[15] The problem with these approaches is that they usually impose their view on how investment arbitration functions or is ought to function, without examining whether that view fits within the theoretical foundations of the international legal order, on the one hand, and whether it follows the actual practice of arbitral tribunals, on the other.[16] Furthermore, these approaches also fail to observe the rationale and function behind the principle of consensualism. They either do not go beyond sketching an investor-State jurisdictional bond,[17] or are quite State-centric and ignore the role of investors as well as their interests in the definition of the authority to adjudicate of investment tribunals.[18]

This thesis attempts to fill these gaps in the scholarship. Firstly, it examines the principle of consensualism in investment treaty arbitration from the point of view of public international law. I suggest that an analysis of the principle of consensualism in international law generally can

---

14 Stephan W Schill, 'International Investment Law and Comparative Public Law—An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 10–7; Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 Int'l & Comp LQ 371.

15 For example, Michael D Nolan and Frédéric G Sourgens, 'Limits of Consent – Arbitration Without Privity and Beyond' in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 873; David D Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 649.

16 For example, Van Harten maintains that consent of a home State can oblige its investors to arbitrate with their host States, although such a proposition has been rebutted very early in arbitral practice. Cf Van Harten (n 14) 380; with *American Manufacturing & Trading Inc v Republic of Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997) paras 5.17-18. Similarly, the theory qualifying State consent as a unilateral act under international law ignores the actual practice which observes arbitration agreements established by virtue of State offer and investor acceptance.

17 Thus, the theory qualifying State consent to investment arbitration as a unilateral act under international law, fails to observe its implications relating to the substance of jurisdictional regulation. For example, that theory would imply a clear rebuttal of the theory of reciprocity, according to which the jurisdiction of an international court or tribunal exists only within the limits of the overlap of the intentions of both disputing parties.

18 Van Harten thus criticises the reliance on investor's consent and the constructions of arbitration agreements as transferring investment treaty arbitration into the sphere of commercial arbitration. What he omits to observe, however, is the significance of such consent and arbitration agreement under public international law. See Van Harten (n 14) 380–1.

shed a different light on its function and therefrom derived expectations of how that principle is to be implemented in practice. Secondly, I observe the principle of consensualism as part of the process of defining the authority to adjudicate of arbitral tribunals through provision of concrete jurisdictional rules; simply put, consensualism governs jurisdictional regulation. This perspective shifts the focus from the formalities of establishing consensual bonds, to the substance of party consent which sets or fails to set the limits of arbitral jurisdiction.

The central research question of this thesis is to what extent the principle of consensualism is perceived and applied differently in the context of investment treaty arbitration from its predecessor in general international law. The traditional understanding of the principle of consensualism in international law confers the exclusivity of the definition of the authority to adjudicate on disputing parties.[19] My argument is that this principle is indeed redefined and eroded in investment treaty arbitration in a manner that increasingly divides it from its traditional understanding, which is caused by the rise of arbitral jurisdictional regulation. In order to advance this argument, I set the hypothesis that the strength of the principle of consensualism in investment treaty arbitration is inversely proportional to the extent of arbitral jurisdictional regulation. I find that tribunals are willing to generate rules which, on the one hand, instruct the interpretation and application of the jurisdictional rules provided by disputing parties, and on the other, occasionally impose independent jurisdictional requirements. This proves the hypothesis true, because the development of such rules decreases the degree to which disputing parties define the authority to adjudicate. In other words, while I do not find an erosion of the principle of consensualism in terms of how a consensual bond between parties is established, I find such an erosion in the process of defining the authority to adjudicate.

However, this redefinition and erosion of the principle of consensualism is only factual and not normative. Indeed, nothing has changed in the theoretical structure of investment arbitration, which is still based on the principle that the disputing parties define the limits of the tribunal's jurisdiction. To what extent arbitral activity will be needed to supplement the applicable set of jurisdictional rules depends from case to case, because every arbitration derives jurisdiction from a different arbitration agreement, which is in turn derived from one of the thousands of investment treaties. What is important is that when arbitrators engage in such an activity, they attempt to create arbitration-overreaching jurisdictional rules, observing general considerations not limited to the particular arbitration agreement. They find inspiration in various sources, like analogies to other fields of law, personal beliefs and values, policy considerations, and so on. Although it factually exists, the jurisdictional regulatory activity of arbitral tribunals remains in an informal domain, and it has never been properly acknowledged and accepted, for which reason its growth causes perceived erosion of the principle of consensualism.

The factual existence of the arbitral jurisdictional regulation inspired by external sources challenges the validity of principle of consensualism as the normative basis of investment treaty

---

19 Chapter 1, Section 2.

arbitration. Because consensualism is the basic norm stemming from the foundations of the international legal order, and arbitral jurisdictional regulation is a fact of practice, it is hardly imaginable that the latter could substitute for or derogate the former. Instead, there is a need for integration of the fact of arbitral jurisdictional regulation within the normative framework of the principle of consensualism. For that purpose, this thesis advances a normative proposal of how that integration should be conducted, and it argues that arbitral jurisdictional regulation should be acknowledged and accepted in principle, followed by a formalisation of the process of arbitral law-making. It is believed that this could lead to a restoration of the principle of consensualism, because only clear positioning of the two types of jurisdictional rules, namely primary (created by disputing parties) and secondary (created by arbitral tribunals), could provide for the primacy of the former over the latter, on the one hand, and more legal certainty in the event of the silence of the party-provided jurisdictional rules, on the other.

Framing the Research Project

Before proceeding to the substance, it is necessary to clarify and define the basic notions used in this thesis, which are those of 'consent' and 'jurisdiction'. I will also address some limits of this research project.

Understanding 'Consent'

The notion of consent can be approached from several perspectives. First, consent can be assigned formal and substantive meanings. *Formally*, consent is seen as an act. This perspective seeks the instruments of expression of consent, like arbitration agreements, declarations, treaty accessions, and so on. This perspective can be observed in the work of scholars who talk about 'the consent' or 'a consent'. *Substantively*, consent means intention of a party to submit to third-party dispute resolution, and to do so within defined limits. This perspective targets the substance of party intention which gives parameters defining the limits of jurisdiction of an arbitral tribunal. As such, consent is not seen as a countable act, but as substance without clear beginning and end. This thesis takes the latter, substantive, perspective on the notion of consent.

Second, consent can be assigned narrow and wide meanings. *Narrowly*, consent is required because of some framework regulation. For example, it could be said that State consent is the condition for litigating before the International Court of Justice ('ICJ'), because its Statute requires so.[20] In the same vein, party consent could be seen as necessary within the system of the International Centre for Settlement of Investment Disputes ('ICSID'), because that is what Article 25(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('ICSID Convention') stipulates.[21] The consequence of this

[20] Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153, art 36.

[21] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, art 25(1).

understanding is that the perceived scope of the issues governed by party consent shrinks. In its *wide* meaning, consent is the necessary condition for vesting the authority to adjudicate in any international court or tribunal because of the lack of a centralised legislative authority in the international legal order and the governance of the principle of consensualism.[22] This view broadens the scope of the issues governed by party consent, so for example it includes both the terms of an agreement to arbitrate and the ICSID Convention, as well as party conduct which affects the definition of arbitral jurisdiction.[23] This thesis observes the notion of consent in its latter, wide, meaning.

Understanding 'Jurisdiction'

For the purposes of this thesis, jurisdiction is understood as the limits of the conferred power to adjudicate. In other words, jurisdiction is what disputing parties define by virtue of their consent. Jurisdiction therefore concerns the scope or the area of the conferred power to adjudicate, and as such is inextricably related to the notion of a dispute.[24] In turn, the exercise of the authority to adjudicate over a dispute requires a consensual foundation.[25] Disputing parties also define the conditions of exercise of that power, which makes them jurisdictional.[26] For the sake of clarity, the notion of jurisdiction as defined for the purposes of this thesis should be distinguished from the concept of 'powers' of adjudicative bodies, despite the fact that the two terms are often used interchangeably.[27] The latter is frequently used to refer to the actions undertaken by international courts and tribunals in exercising their judicial function, as is the case with the powers to rule on their jurisdiction, to manage the procedure, to grant provisional measures, to award remedies, and to interpret and revise decisions.[28] Certainly, the relationship between these powers and the limits of the authority to adjudicate (ie jurisdiction) can be discussed, however as the focus of the present work is the latter, such powers will not be considered further.[29]

---

22 Chapter 1, Section 2.A.

23 Chapter 1, Section 2.B.

24 Chapter 1, Section 2.B.i-ii.

25 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene) (1984) ICJ Rep 3, paras 35–7.

26 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, para 88.

27 See, for example, *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, para 23; *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ Rep 457, para 23; Luiz Eduardo Salles, 'Jurisdiction' in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017) 253.

28 See Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 British Yrbk Int'l L 195, 211–22.

29 For example, it is usually said that the conferral of jurisdiction implies the power of the adjudicative body to award remedies. At the same time, the availability of that power can be seen as an issue of

This thesis starts by examining the principle of consensualism in international law generally, and therefore references will be made to the notion of jurisdiction as common to international adjudication at large. However, international adjudication has grown enormously and it now addresses a great range of issues, from inter-State disputes to the matters of individual criminal responsibility. It can hence be objected that the nexus between party consent and the jurisdiction of international courts and tribunals is not obvious in international adjudication at large, particularly in the example of international criminal tribunals. The structure of jurisdictional regulation which relates to international crimes, which is arguably entirely different from the one relating to internationally wrongful acts, is not the topic of this study. This thesis focuses on the jurisdiction of international courts and tribunals akin to the jurisdiction of domestic courts over civil matters, ie on the jurisdiction which orbits around the notion of a dispute as a disagreement between two (or more) parties over their rights and obligations.

Limits of the Project

Investment arbitration is defined descriptively, insofar that it concerns disputes between foreign investors and their host States. As such, it addresses disputes arising out of contracts, domestic laws, investment treaties, and occasionally customary international law. The jurisdiction of arbitral tribunals can thus equally be derived from a contract (directly) and from a domestic law or treaty (indirectly).[30] This study is limited to investment arbitrations whose jurisdiction is governed by public international law. As it will be seen, the jurisdiction of arbitral tribunals governed by public international law can be derived from all these sources.[31] However, the most common source of public international law investment arbitrations today are investment treaties. For this reason, the main focus of this thesis is investment treaty arbitration, while references to contract- and statute-based arbitrations are made for the sake of completeness and/or comparison.

Method

The central focus of this study are arbitral jurisdictional decisions as well as reviews of arbitral jurisdictional determinations by domestic courts and annulment committees within the ICSID system. In particular, I seek to identify parts of primarily arbitral but also judicial reasoning which develop independent rules governing jurisdiction of investment arbitral tribunals. By this I consider the attempts to answer jurisdictional questions in a principled, abstract, and rule-like manner, which are inspired by some sources external to the relevant arbitration agreement, like analogies to other fields of law, personal beliefs and values, policy considerations etc. In order to inquire to what extent such rules have gained some sort of normativity, it is necessary to trace

---

substantive jurisdiction, which disputing parties control by limiting the scope of justiciable disputes to the questions of liability, appropriate remedies or quantum. See Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 187–9.

30 Chapter 2, Section 2.

31 Chapter 2, Section 4.A.

their applications in streams of arbitral practices, the collisions between such streams, and their possible reconciliations. However, it should be emphasised that this is not a quantitative but a qualitative study, and therefore no claim is made of a comprehensive examination of all the publicly available jurisdictional decisions in a defined period of time. Instead, I focus on the decisions which have gained some precedential value and created streams of practice, as well as on other decisions which have engaged in the discourses on the correct legal solutions that should form arbitrator-made rules.

To inquire into the impact of these findings on the principle of consensualism in investment arbitration, it is necessary to accommodate them into a broader context of that principle and its function. For that purpose, I also examine the practice of other international courts and tribunals as well as the literature concerning the structure of international adjudication generally, on the one hand, and investment treaty arbitration, on the other. This examination is also relevant in the parts of the study analysing the driving force behind the regulatory activity of arbitral tribunals in jurisdictional matters and advancing a normative proposal.

Investment law scholarship at large has been criticised for being dominated by external and deductive perspectives focusing on arbitral decisions.[32] This criticism suggests that the proper perspective is internal and inductive, which shifts the examination to arbitrations as a process of interaction between parties and arbitrators.[33] While this criticism certainly has some merit in the analysis of the process of arbitral reasoning, it is hardly sustainable when it comes to the analysis of the meaning of legal concepts, principles, and rules across international law. Even those who apply the suggested inductive method cannot resist the classical deductive patterns when their argument involves some general rules of international law applied by different forums.[34] Deduction is inevitable in the discovery of the meaning and function of the principles of international law such as the consensualism of international adjudication, and their application in practice. For this reason, this thesis does not attempt to reverse methodological directions, and it rather follows the classical canons of the examination of the international judiciary.

Outline

This thesis is divided into three parts. Part I analyses the consensualism of investment treaty arbitration as the means of jurisdictional regulation in this field. Chapter 1 analyses the principle of consensualism in international adjudication generally and investment arbitration particularly in order to inquire into its function, which is the definition of the authority to adjudicate of international courts and tribunals. It is shown that this function is exercised by the match of

---

32 Frédéric Gilles Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill Nijhoff 2015) 25.

33 ibid 25–9.

34 See, for example, Frédéric G Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina J Int'l L & Com Reg 875, 912–8 (referring to a general rule developed by the ICJ governing the proof of law in the context of jurisdiction).

parties' intentions in substance regarding the limits of the authority to adjudicate, and that international law generally does not emphasise the formalities surrounding consensual bonds. It is also demonstrated that the development of international investment law and arbitration has not disturbed these premises, and that the principle of consensualism remains preserved because of its function. Chapter 2 analyses the structure of jurisdictional regulation in investment arbitration and pays special attention to possible deficiencies in definitions of the authority to adjudicate and opportunities for their identification and remedying.

Part II turns to the development of arbitral jurisdictional regulation and it analyses case law which evidences arbitral and judicial attempts to create rules governing arbitral jurisdiction. Chapter 3 analyses the development of the rules which facilitate the access to international arbitration by tackling the procedural aspects of the consensual jurisdictional regulation. These 'procedural aspects' refer to the conditions of access to arbitration defined by disputing parties. Chapter 4 analyses the development of the rules which broaden arbitral jurisdiction by tackling the substantive aspects of the consensual jurisdictional regulation. These 'substantive aspects' refer to the limits of arbitral jurisdiction defined by disputing parties. The rules analysed in these two chapters are developed to instruct the interpretation and application of the jurisdictional rules provided in arbitration agreements. In contrast, Chapter 5 focuses on the development of the rules that impose independent jurisdictional requirements and thus limit both the access to international arbitration and the scope of arbitral jurisdiction. These three chapters do not present an exhaustive catalogue of arbitrator-made jurisdictional rules, but discuss their most prominent examples. Many other examples can develop.

Part III attempts to demystify the status of the principle of consensualism in investment treaty arbitration. It inquires into the causes and rationales behind the development of arbitral jurisdictional regulation and attempts to accommodate that phenomenon within the normative context of the principle of consensualism. Chapter 6 analyses what is the driving force behind arbitral jurisdictional regulation, and pays special attention to the failures of States as treaty-makers, and therefore the principal rule-makers, to recognise its development in practice. Chapter 7 then advances a normative proposal in favour of the acknowledgment, acceptance, and formalisation of arbitral jurisdictional regulation. In particular, I draft a two-layered model of jurisdictional regulation in investment treaty arbitration, consisting of primary (party-created) and secondary (arbitrator-created) jurisdictional rules. I argue that the proposed model can lead to the restoration of the principle of consensualism through a clear coordination of the primary and secondary jurisdictional rules, on the one hand, and to more legal certainty when it comes to the development and application of the secondary rules, on the other.

Relevance

This project examines investment treaty arbitration in particular, however its aim is to achieve a broader relevance, not limited to this particular field of international dispute settlement. Because the international judiciary remains dispersed, lacking any means of comprehensive regulation,

and governed by the principle of consensualism, it is perfectly imaginable that other fields could face the same phenomenon of a developing judicial and/or arbitral jurisdictional regulation. For that reason, this study should not be taken as an exclusive examination of investment treaty arbitration, but rather as an experiment in one field that could reveal some indicators about the functioning of international adjudication. It is believed that investment treaty arbitration presents an excellent laboratory for such an experiment, because the jurisdictional structure of that dispute settlement mechanism can in many respects be called rudimentary compared to other international courts and tribunals: each arbitral tribunal derives jurisdiction from an arbitration agreement, which is in turn usually based on a single article of an investment treaty. Although recent investment treaties have started regulating arbitral jurisdiction and procedure to a greater extent, much time will pass until the first tribunals are constituted under these new treaties. What is more, increasing treaty regulation of arbitral jurisdiction will not eliminate the need for arbitral regulatory activity, simply because of the dynamics of arbitration and the continuous emergence of new jurisdictional questions. In the meantime, the jurisdiction of investment tribunals remains regulated scarcely, which increases the need for arbitral and judicial activity on the trajectory from a preliminary objection to a jurisdictional determination. The arbitral regulatory activity in the jurisdictional matters is therefore highly visible in investment treaty arbitration. The findings of this study can thereafter serve as the basis for further investigations of similar phenomena in other fields of international adjudication.

PART I

Consent as Jurisdictional Regulation

1

The Consensualism of International Adjudication and Investment Arbitration

§ 1.01. Introduction

International law is changing. There is nothing new in this. Law as such is meant to react to the challenges and demands posed by society.[1] Equally, international law should, and in fact does, react to the challenges and demands put before it by the international community.[2] International adjudication is a perfect example of this. Not very long ago, international law used to govern the relations between States exclusively without any (permanent) adjudicatory bodies. When international courts first began to open, it was the beginning of a new era.[3] When new actors, such as individuals, groups, and corporations acquired direct rights in international legal instruments, it became obvious that international law had begun to govern actual everyday life.[4]

---

1 This relationship works in both directions: Lawrence M Friedman, *Law and Society: An Introduction* (Prentice-Hall 1977) 92–110, 156–68.

2 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) ICJ Rep 174, 178. For the phenomenon of 'novelty of action', see Sir Hersch Lauterpacht, *The Function of Law in the International Community* (reprint, OUP 2011) 113–43, and particularly at 131, arguing that '[w]hen, in meeting a novel situation, there is no room for exclusive application of any of the methods [for filling gaps in international law] described above, there still remains that source of judicial activity which consists in the realization of the purpose of the law, namely, in finding, in case of doubt, solutions most conductive to the benefit of the community as a whole and to the necessity of stable and effective legal relations between its members'. See also, for the problem of international change and the lack of international legislature, ibid 253–67.

3 While the settlement of international disputes by a third party was not a new phenomenon, the idea of empowering a permanent body with that task characterises the end of the 19th and the beginning of the 20th century. In that respect: Vanda Lamm, *Compulsory Jurisdiction in International Law* (Edward Elgar 2014) 9 (arguing that 'with the establishment of the Permanent Court of Arbitration, international tribunals have become a constant institution of international law, and the judicial settlement of international disputes is no longer a sporadic phenomenon in interstate relations'). See also, for the establishment of the PCIJ, see Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005) 14–5.

4 Although conferring direct rights to individuals or groups was not completely alien to international law in earlier times, the period after the Second World War is usually considered the peak time of

And when these new actors acquired the right to pursue claims against States in international forums, such direct rights ceased to be utopian.[5] Certainly, the proliferation of international courts and tribunals, which has put into practice the judicial protection of such diverse interests, has prompted an enormous development of the relevant procedural law. The task was a usual one: how should the existing rules and principles of international law governing international dispute settlement be applied or transposed in new types of processes?

However, some aspects of international law are not changing—they are, it seems, eternal. While new rules governing international adjudication are being developed on an everyday basis, it is reasonable to take at least some principles, and certain rules deriving from them, for granted.[6] These fundamentals of the international legal order in general, and of international adjudication in particular, require new rules to adjust to their requirements. The problem is that it is not an easy task to distinguish between the two groups of rules: how do we know if a certain concept of the existing law is unchangeable and can only direct the development of new law? While such struggles are often shifted to politics when it comes to issues of substantive law,[7] the same problem appears more technical in international adjudication. Adjudicators thus engage in

---

such developments, aimed to establish control of State behaviour towards its subjects, which have primarily taken place in the spheres of human rights and foreign investment. However, for the doubts regarding the effectiveness of these developments in human rights, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2005) 107–34.

5 For the argument that what makes a right is the possibility of enforcement, see Hillel Steiner, 'Working Rights' in Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights. Philosophical Enquiries* (OUP 1998) 235–47. See also *Ashby v White* (1703) 92 ER 126 (Holt CJ Dissent) ('If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal [...]'). But for the argument that procedural enforcement rights in international law do not stem from substantive rights, particularly in the context of investment treaty arbitration, see Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (CUP 2014) 55–70. See further, for broader implications regarding the development of international law, Paul B Stephan, 'Privatizing International Law' (2011) 97 Virginia L Rev 1573.

6 Besides certain fundamentals of the international legal order and international adjudication as its sub-field, which are discussed further in this Chapter, it has also been argued that international courts and tribunals share some common procedural aspects. See generally Chester Brown, *A Common Law of International Adjudication* (OUP 2007). But, for the claim that every tribunal in international law is a 'self-contained system', see *Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) para 11.

7 Martti Koskenniemi, 'What Is International Law For?' in Malcolm D Evans (ed), *International Law* (3rd ed, OUP 2010) 33 ('to inquire about the objectives of international law is to study the political preferences of international actors'). See also further ibid 34–6.

endless discussions on the meaning of the law before them, albeit within the limits of their mandate to resolve the disputes submitted to them.

In this Chapter, I examine the consensualism of international adjudication and investment arbitration as a fundamental feature of both systems. Section 2 firstly discusses the foundations of international adjudication, which is based on party consent, paying special attention to the function of that notion. Section 3 then turns to the particular context of investment arbitration, examining its development and the perception of its role and position in the modern international legal order. The goal is to examine whether the newly developed field of investment arbitration added some value to the international legal order, capable of changing the consensual foundations of international adjudication. The argument of this Chapter is that the answer must be 'no'. On the contrary, the development of international investment law and arbitration has never attempted to address or disturb such 'big' questions, but aimed at introducing a new set of protections through already existing regulatory frameworks. This, of course, required an adjustment of the detailed rules governing investment arbitration to those of general international law. How that adjustment has been performed is discussed in Chapter 2.

§ 1.02. The Significance of Consent

Every defence in international adjudication starts by asking: 'Is there consent?' Indeed, it is quite rare to encounter a case before international courts and tribunals without such a challenge of the jurisdiction of the seized body on the basis of lack of consent.[8] The literature analysing the existence of consent for adjudicating certain disputes has also become dominant in the field of international dispute resolution, relying on the same concept both in favour of expanding and restricting the scope of international scrutiny over States' actions.[9]

On the other hand, recently more and more challenges of the consensualism of international law in general have become visible.[10] They vary, from the arguments that international law is

---

8 The phenomenon that one State is at the same time both the issuer of consent and the party contesting its existence or scope is regarded as 'the paradox of consent': CL Lim and OA Elias, *The Paradox of Consensualism in International Law* (Brill 1998) 202. An earlier research has found jurisdictional issues being raised in 87 out of 102 awards in 82 investment cases: Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina L Rev 1, 24, 52.

9 Indeed, any jurisdictional determination of an international forum is inherently related to an analysis of the scope of consent to its jurisdiction. See Section 2.B below.

10 See, for example, Andrew T Guzman, 'Against Consent' (2012) 52 Virginia J Int'l L 747; and Laurence R Helfer, 'Nonconsensual International Lawmaking' (2008) 2008 Univ Illinois L Rev 71. But see also, on the inevitability of consent, despite its paradoxes, Lim and Elias (n 8).

reforming,[11] to attempts to allow law-making around State consent within the existing system.[12] The requirement of consent in international law has become often regarded as unfair and outdated. These objections have appeared together with an increased regulation of State conduct on the international level, followed by demands for further acceleration of that trend, which are often motivated by humanitarian or moral concerns.[13] Such opinions raise today the possibly valid question: why do we still talk about consent?

Thus, in order to see why we still talk about consent, the analysis should start by looking into the very foundations of the international legal system, and the way international adjudication functions (A). Further, it should be inquired what does party consent actually do in this field (B). The argument developed here is that consent persists in international adjudication precisely because of its function: it defines the authority to adjudicate, its form, scope and other important elements. Finally, it should be asked what is the status of the rule that disputes can be brought for international resolution only subject to the parties' consent: where is it contained? Is it a rule of customary international law, or some sort of a principle? These issues are also addressed (C), arguing that the consensualism of international adjudication belongs to the corpus of law known as 'general international law', probably best defined as a 'general principle of *international* law'.

A. The Functioning of Adjudication in Public International Law

Dispute resolution in international law is characterised by its consensualism (i), on the one hand, and the lack of a centralised adjudicative system (ii), on the other. This is a regime where party consent plays a crucial role in submitting any dispute for resolution before many different courts and tribunals existing today in the international legal system, whose jurisdictions often conflict, and who usually lack proper (or, sometimes, any) means for their coordination. Such a regime is built around one cardinal deficiency: the lack of a higher authority above sovereigns.[14]

---

11 Such suggestions derive from various perspectives to analysing international law, such as Realpolitik, international hegemonic law, and the impact of globalisation. For an overview see Duncan B Hollis, 'Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley J Int'l L 137, 137–9.

12 For example Guzman (n 10). Similarly, for the choice between the conclusion of treaties and 'nonlegal agreements', which is influenced, among other factors, by the necessity of formal (legislative) consent, see Goldsmith and Posner (n 4) 91–100.

13 Indeed, the literature cited above analyses the means of non-consensual law-making almost exclusively in the context of national security, human rights, and environmental issues. For the argument that States cannot benefit from State immunity, and that their consent is not necessary for establishing the jurisdiction of foreign courts in the matters of grave violations of international human rights law, see *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Dissenting Opinion of Judge Cançado Trindade) (2012) ICJ Rep 179.

14 For a critical view on the role of State sovereignty in international law, see Lauterpacht, *Function* (n 2) 3 sq.

i. *The Lack of a Central Authority and Consent to Adjudication*

Sovereignty is an endless topic of theoretical discussions in (international) law.[15] For the present work, however, only one of its many aspects is important: States are the basic subjects of international law, and there is no authority above them.[16] No centralised regulatory authority exists, which would be capable of imposing rights and obligations on States, or for that matter on other possible subjects of international law like individuals and companies.

That States are the principal lawmakers of international law is a truism.[17] A statement of the Permanent Court of International Justice ('PCIJ') in the *Lotus* case from the 1920s, has become the best-known authority on the issue, when the Court said:

> International law governs relations between independent States. The rules of law binding upon States therefore *emanate from their own free will* as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[18]

The same reasoning was followed by the ICJ, which does not omit to mention the notion of sovereignty next to any obligations of the State.[19] The nexus between the two notions is obvious:

---

15 For classical works on this topic, see GWF Hegel, *Elements of the Philosophy of Right* (CUP 1991) 275 sq; Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005); Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 383–6; HLA Hart, *The Concept of Law* (3rd ed, OUP 2012) 215–8; and, for a summary of the Schmitt v Kelsen debate in the context of international law, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005) 226–40. For new developments on this topic, see Nico Schrijver, 'The Changing Nature of State Sovereignty' (2000) 70 British Yrbk Int'l L 65; and Kevin B Sobel-Read, 'A New Model of Sovereignty in the Contemporary Era of Integrated Global Commerce: What Anthropology Contributes to the Shortcomings of Legal Scholarship' (2016) 49 Vanderbilt J Transnat'l L 1045.

16 *Reparation for Injuries* (n 2) 177–80. See also Malcolm N Shaw, *International Law* (6th ed, CUP 2008) 197.

17 Rosalyn Higgins, 'International Law and the Reasonable Need of Governments to Govern. Inaugural Lecture, London School of Economics and Political Science 22nd November, 1982' in Rosalyn Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, vol 2 (OUP 2009) 784 ('states are still the most important of the actors in the international legal system, and their sovereignty is at the heart of this system').

18 *The Case of the SS 'Lotus' (France v Turkey)* (Judgment) (1927) PCIJ Ser A—No 10, 4, 18 (emphasis added). For a commentary see Spiermann (n 3) 247–63. Koskenniemi argues that this excerpt reflects the absolutist pure fact approach to sovereignty: Koskenniemi, *Apology* (n 15) 255–6.

19 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (1986) ICJ Rep 14, para 269 ('in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of

any obligation of the State limits its sovereignty.[20] Another way of thinking about it would be to say that sovereignty gives the capacity to the State to take obligations upon itself, and to appear as a lawmaker in the international scene.[21] Whichever direction is taken in this loop, the creation of international obligations is impossible without the involvement of the concept of State sovereignty, either as the object of such obligations, or the entitlement to possess some.[22] Moreover, the insistence on consent as the basis of each and every obligation of the State has been noted alongside the rise of positivism, when the concept of State sovereignty emerged in the centre of legal thought.[23]

The principle of consensualism described by the PCIJ above, and reaffirmed by the ICJ, has two aspects.[24] First, States create substantive obligations, which regulate their behaviour and

---

armaments of a sovereign State can be limited, and this principle is valid for all States without exception').

20 This would follow the argument that sovereignty of a State is a question of fact, and that any restrictions upon it result from an agreement among States on certain limits, relying on the old theory of 'absolute sovereignty'. Koskenniemi, *Apology* (n 15) 231–3. See also *Case of the SS 'Wimbledon' (UK, France, Italy, Japan and Poland intervening v Germany)* (Judgment) (1923) PCIJ Ser A—No 1, 15, 25; and *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)* (Advisory Opinion) (1931) PCIJ Ser A/B—No 41, 37, 52.

21 This argument follows the opinion that sovereignty is a legal quality granted to States by international law. See *Wimbledon* (n 20) 25 ('the right of entering into international engagements is an attribute of State sovereignty'); Koskenniemi, *Apology* (n 15) 229–30; James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 122–3. Cf Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 British Yrbk Int'l L 1, 2.

22 *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)* (Dissenting Opinion of M Adatci, Mr Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M Schücking, Jonkheer van Eysinga and M Wang) (1931) PCIJ Ser A/B—No 41, 74, 76–8. Further on the two approaches of 'the State as an entity of an absolute legal and moral value', on the one hand, and '[t]he positivist doctrine, grounded as it is on the conception of international law based on the sovereign will of the State', on the other, see Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans 1927, reprint Lawbook Exchange 2013) 43–51.

23 Shaw (n 16) 215; Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (OUP 2013) 56; Horia Ciurtin, 'Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in International Investment Law' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 38–41.

24 It could be said that States as lawmakers create *obligations*, rather than law of general application. See Ian Brownlie, *Principles of Public International Law* (7th ed, OUP 2008) 4. Lauterpacht argued that sovereignty, as a quality regulated by international law, cannot be the source of law; in this line,

determine the lawfulness of State conduct.[25] In the field of international investment law these are, for example, the requirements to provide certain treatment to foreign investors, not to expropriate their properties, and to allow free transfer of assets etc.[26] As noted in the statement of the PCIJ above, substantive obligations can be found both in treaties and customary international law.[27] Second, States create their own procedural obligations, such as to submit the disputes arising from their substantive obligations to judicial or arbitral resolution.[28] So far, these propositions are the alphabet of the international legal order.

However, I suggest that the fact that States' submissions to adjudication 'emanate from their own free will' should not be regarded as strictly connected to the notion of sovereignty as such, but rather to the other side of the same coin: the lack of a higher authority in international law capable of regulating the resolution of disputes arising within that system. As I will argue in Chapter 6, when analysing the practice of investment tribunals, the idea of sovereignty has been lost behind the principle of consensualism when it comes to particular systems of public-private adjudication.[29] The principle of consensualism is inclusive of both public and private actors and it persists because, due to the lack of a higher authority, it represents the only possible method of the conferral of the power to adjudicate. Sovereignty, in that respect, could be seen as assigning

---

it can be argued that the distinction between the sources of international law and obligations stems from their association to sovereignty. Lauterpacht, *Function* (n 2) 103–4.

25 Such international obligations are usually called 'primary' obligations or rules of State responsibility. James Crawford, *State Responsibility. The General Part* (CUP 2013) 64–6.

26 See Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009); August Reinisch, *Standards of Investment Protection* (OUP 2008).

27 See above text to n 18. Customary international law is not necessarily governed by consent in a strict sense: Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 437. Cf *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)* (Judgment) (1969) ICJ Rep 3, para 77; with *Nicaragua* (Merits) (n 19) para 186.

28 *Status of Eastern Carelia* (Advisory Opinion) (1923) PCIJ Ser B—No 5, 7, 27 ('It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.'); *Legality of Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (1999) ICJ Rep 124, para 20 ('Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted; whereas the Court has repeatedly stated "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26); and whereas the Court can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;').

29 See Chapter 6, Section 3.

States the status of an *initiator* of international adjudicatory relationships, but it does not grant them the exclusivity of regulation over international dispute settlement.

A jurisdictional relationship is initiated by expression of at least one 'free will' to commit to international jurisdiction, ie consent. This can be done both *ex ante* and *ex post* to the arising dispute itself. Giving consent in advance for adjudication of future disputes is actually most common today.[30] For example, States can stipulate in a treaty that all their disputes, arising from that treaty or other relations, will be settled by the ICJ, another court or an arbitral tribunal.[31] Sometimes by virtue of their treaties States establish special courts for the resolution of all the disputes arising under such treaties; the most prominent examples being of course in the field of human rights.[32] Some treaties even provide for multiple adjudicatory mechanisms, combining different international forums.[33] Finally, some courts exist on a permanent basis, allowing the willing States to accept (by filing a declaration) their jurisdiction for resolution of any kind of disputes, or of those disputes that the accepting State has defined (the best-known examples being the former PCIJ, and its successor, the ICJ).[34]

It has become a custom to talk about 'compulsory jurisdiction' of international courts and tribunals.[35] Nevertheless, that qualification must be taken with caution, and the farthest we can

---

30 Following the proliferation of international courts and tribunals, States can express consent in their constitutive instruments, or in separate jurisdictional clauses, defining both jurisdiction and procedural powers of such bodies. Brownlie, *Principles* (n 24) 704–6; Brown, *Common Law* (n 6) 37–8.

31 This can be done in regard to specifically defined disputes, as in the Genocide Convention of 1948, or disputes in general, as in the General Act for the Pacific Settlement of International Disputes of 1928, the Revised General Act of 1949, and the European Convention for the Peaceful Settlement of Disputes of 1957.

32 For example, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (opened for signature 4 November 1950, entered into force 3 September 1953; Protocol No 11 entered into force 1 November 1998; Protocol No 14 entered into force 1 June 2010) 213 UNTS 222 ('ECHR') arts 19, 34.

33 See United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 287(1) (offering the choice between the International Tribunal for the Law of the Sea established under Annex VI, the ICJ, arbitration under Annex VII, and special arbitration under Annex VIII).

34 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153 ('ICJ Statute') art 36(2); *Anglo-Iranian Oil Co (UK v Iran)* (Individual Opinion of President McNair) (1952) ICJ Rep 93, 116 ('the machinery provided by that paragraph is that of "contracting-in", not of "contracting-out"').

35 For example, Cesare PR Romano, Karen J Alter and Yuval Shany, 'Mapping International Adjudicative Bodies, the Issues, and Players' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 6; Bernard H Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 AJIL 277 (in general); Lamm

go is to say that in certain situations there is a *de facto* compulsory jurisdiction. This is said when a State has given in advance its consent to adjudication in respect of a *class of disputes*, which, from the point of view of the other party (another State or, more often, a private person) to an arising *concrete dispute* with that State and within that class, appears as if its opponent is subject to the compulsory jurisdiction of the relevant forum.[36] But from the point of view of the law, the compulsory component is lacking, since the subjected State still decides by virtue of its own free will whether it will accept the jurisdiction to an adjudicatory body and to what extent it will do so. Furthermore, as it will be seen further in this Chapter, a conferral of the authority to adjudicate is not complete without the participation of both disputing parties in a sort of a contractual relationship.[37] Therefore, 'compulsory jurisdiction' in this context can only mean *ex ante* consent, which only initiates a conferral of the adjudicative power.

When no such prior acceptance of jurisdiction is present—when no consent has been given in advance—States can still accept resolution of *a particular* dispute. Firstly, they can do so by virtue of a special agreement or *compromis*, as it was often done in the 19th and the first half of the 20th century, during the golden age of inter-State arbitrations[38] and 'mixed claims commissions' for disputes between States and foreign private persons.[39] After the PCIJ opened its doors in the 1920s, States brought quite a number of disputes before it, usually by concluding special agreements to that end,[40] and some States choose to do the same today in respect of the ICJ.[41] Another form of posterior consent to adjudication is the *forum prorogatum* doctrine: should one party file a claim for adjudication without any expression of consent of the other party, that

(n 3) (as for the ICJ in particular); Gary Born, 'A New Generation of International Adjudication' (2012) 61 Duke LJ 775 (as for specialised forums).

36 As is the case with courts and tribunals established by virtue of treaties and State consent contained therein, compromissory clauses in treaties, as well as the optional clause in the ICJ Statute. See in this respect Stanimir A Alexandrov, 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?' (2006) 5 Chinese JIL 29.

37 See Section 2.B.iv below.

38 See AM Stuyt (ed), *Survey of International Arbitrations 1794-1989* (3rd ed, Nijhoff 1990). The Jay Treaty of 1794 is usually taken as the founder of modern arbitration. See also Mary Ellen O'Connell and Lenore Vanderzee, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 44–7; and Lamm (n 3) 1–6.

39 See Ch Carabiber, 'L'arbitrage international entre gouvernements et particuliers' (1950) 76 Recueil des Cours 221, 236–45.

40 For example, *Lotus* (n 18) 5.

41 ICJ Statute (n 34) art 36(1). Until 2011, up to 19 cases were initiated by virtue of special agreements: Table 2 in Mariko Kawano, 'The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes' (2009) 346 Recueil des Cours 9, 461–2.

other party can consent to adjudication simply by not objecting to the lack of consent;[42] however, this doctrine is not often seen in practice.[43] There are many options, therefore, both proactive and retroactive, for the expression of the intention to submit to international adjudication. What is important is that such will must exist.

Because the cardinal notion here is the will or intention, or more precisely its manifestation, the concept of 'consent' should not be understood formalistically.[44] Examining whether consent to adjudication has been given or not, is not a simple reading exercise. It rather requires an inquiry into the will of the concerned party.[45] The questions are whether an obligation to submit a dispute for adjudication can be identified,[46] and whether the party had the intention of undertaking that obligation.[47] Furthermore, because the power to adjudicate can be limited in different ways, as I will discuss shortly, the usual question appearing before adjudicators is not 'whether consent has been given at all', but rather 'whether a particular issue is covered by consent'.[48] Accordingly, 'a search for consent' usually prompts an inquiry into the will of the State as one of the disputing parties, and as manifested in treaties, their preparatory works, other useful instruments, or the circumstances of their conclusion.

The requirement of consent to adjudication and various methods of its expression show that international adjudication is still seen more as an exception than a rule. Despite the possibilities to consent to international adjudication both before and after a dispute has arisen, it is a preserved rule that States must provide their consent individualising the dispute and defining the authority to adjudicate (as it will be seen in detail under B). This is a crucial point that makes international

---

42 See ICJ, Rules of Court (adopted 14 April 1978, entered into force 1 July 1978) ('ICJ Rules') art 38(5); and *Haya de la Torre (Colombia v Peru)* (Judgment) (1951) ICJ Rep 71, 78.

43 Until 2011, in only two clear instances (but arguably up to seven) the ICJ had jurisdiction based on the *forum prorogatum* doctrine. See Table 3, Item 6 in Kawano (n 41) 472. The *Haya de la Torre* case should be added to this list.

44 Indeed, the term 'consent' refers to the substance which can be expressed in different forms: Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') art 11.

45 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) (1927) PCIJ Ser A—No 9, 4, 32 ('When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.').

46 *Maritime Delimitation and Territorial Questions (Qatar/Bahrain)* (Jurisdiction and Admissibility) (1994) ICJ Rep 112, paras 21–30.

47 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) (1978) ICJ Rep 3, paras 100–7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) (1996) ICJ Rep 595, paras 17, 37.

48 *Ambatielos (Greece v United Kingdom)* (Merits: Obligation to Arbitrate) (1953) ICJ Rep 10, 19 ('the question is whether the consent given by the Parties in signing the Declaration of 1926 to arbitrate a certain category of disputes, does or does not extend to the Ambatielos claim'). See further Section 2.B.ii-iii.

adjudication different from municipal judicial systems, where there is usually a general access to courts.[49] As seen above, this is a consequence of the lack of a higher regulatory authority. At the same time, the history of international law is familiar with the attempts to establish international forums of general and compulsory jurisdiction, which are discussed next.

ii. *Dispersed and Horizontal System of the International Judiciary*

For a long period of time no permanent bodies empowered to settle international disputes have existed, and all efforts of peaceful settlement of disputes were dependant on the willingness of the States to bring their disputes to arbitration.[50] The establishment of permanent adjudicatory bodies is a relatively new phenomenon. During the 1899 and 1907 Hague Peace Conferences, the Permanent Court of Arbitration ('PCA') was established,[51] and already then the idea of establishing compulsory arbitration under the PCA's auspices was put forward. The suggestion, however, was unsuccessful.[52] When the First World War ended, the PCIJ was established by the League of Nations, as the first *judicial* body with global competence.[53] Again, the provision on the compulsory jurisdiction of the Court was removed from the drafts of its Statute, and the result was a body claiming to be a court to whose jurisdiction States had to consent, as they had to when submitting their disputes to arbitration.[54] After the Second World War, the ICJ (as the principal

---

49 Chittharanjan F Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International 2003) 56–8; Romano, Alter and Shany (n 35) 5–6.

50 International adjudication has functioned for a long time relying on the *ad hoc* arbitration mechanism. See n 38 and 39 above; and Edvard Hambro, 'The Jurisdiction of the International Court of Justice' (1950) 76 Recueil des Cours 123, 129–41.

51 The Hague Convention for the Pacific Settlement of International Disputes of 1899 (signed 29 July 1899, entered into force 4 September 1900) 1 Bevans 230, art 20; The Hague Convention for the Pacific Settlement of International Disputes of 1907 (signed 18 October 1907, entered into force 26 January 1910) 1 Bevans 577, art 41.

52 For a detailed overview of the drafting history regarding compulsory arbitration, see James Brown Scott (ed), *The Reports to the Hague Conferences of 1899 and 1907* (Clarendon Press 1917) 368–454. See also Lamm (n 3) 6–11.

53 Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) 112 BFSP 13, art 14; Statute of the Permanent Court of International Justice (signed 16 December 1920, entered into force 20 August 1921) 114 BFSP 860, art 1. Notably, a very ambitious judicial project regarding compulsory jurisdiction existed in Central America between 1907 and 1918; see Manley O Hudson, 'The Central American Court of Justice' (1932) 26 AJIL 759.

54 On the establishment of the PCIJ and the failure to include compulsory jurisdiction: Spiermann (n 3) 3–14. The compromise between the proponents and opponents of such jurisdiction was found in the inclusion of the 'optional clause', which allowed States to individually accept jurisdiction of the Court over prospective disputes. Another attempt at establishing compulsory jurisdiction of the PCIJ came with the proposed Geneva Protocol for the Pacific Settlement of International Disputes in 1924, which also failed. See also Lamm (n 3) 12–22, 29–32.

judicial organ of the United Nations) emerged, however this time the proposals for compulsory jurisdiction did not even go as far as earlier.[55] It is quite an irony that all the attempts of eliminating the requirement of consent to adjudication failed precisely because the negotiating States were not willing to consent to such treaty provisions.

The result of such challenges in the beginning of the 20th century was the *status quo.* The requirement of consent to adjudication remained preserved. What was changed, however, was the establishment of permanent adjudicatory bodies for the resolution of international disputes, both in the form of courts (PCIJ and later ICJ) and arbitral institutions (PCA), which facilitated submission of disputes between States for peaceful settlement: now States could simply agree to submit their dispute to arbitration under the PCA's auspices or to the PCIJ/ICJ. But this had nothing to do with mitigating the importance of consent to adjudication. As it will be seen further below, the main role played by consent to adjudication (defining the authority to adjudicate) remained untouched, and references to such permanent bodies facilitated international dispute resolution merely from a technical perspective (administration of cases, appointment of the adjudicators, and provision in advance of the rules of procedure).

An important feature of all these bodies is that their jurisdiction was, and in respect to the ICJ still is, limited to disputes between States.[56] The years after the Second World War brought changes in that respect. The Nuremberg and Tokyo trials were revolutionary with the idea that the barrier called 'the State' between international law and individuals can be breached.[57] And soon it was realised that if private persons indeed can have direct rights under international law, they would also need an access to international forums to enforce those rights. While the sphere of human rights faced quite a fast development in this respect,[58] arbitration of investment disputes developed more gradually: although the ICSID was established already in the 1960s, it took more than 20 years until disputes between foreign investors and their host States finally started to be settled regularly within this system.[59]

Today, the international legal order is permeated with an endless number of different courts, tribunals, and arbitral institutions.[60] States can still submit disputes to the 'old' mechanisms such

---

55 Primarily because of the opposition from both the US and USSR. The ICJ Statute included essentially the same jurisdictional system of the PCIJ, including the 'optional clause'. See Lamm (n 3) 22–9.

56 The PCA, the PCIJ and the ICJ originally had jurisdiction over inter-State disputes only. However, in the 1930s the PCA administered its first arbitration between a State and a private person: *Radio Corporation of America v The National Government of the Republic of China* (1935) 3 RIAA 1621.

57 See M Cherif Bassiouni, 'International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 133.

58 Particularly on the regional level: Shaw (n 16) 345–96.

59 See below Section 3.A.

60 For an overview of various adjudicatory bodies see Romano, Alter and Shany (n 35) 9–15.

as the ICJ or arbitration.[61] They can settle their disputes under the Law of the Sea Convention before a specialised International Tribunal for the Law of the Sea.[62] They can resolve their trade disputes within the Dispute Settlement Mechanism of the World Trade Organization.[63] A number of human rights bodies (on the global, continental, and regional levels) allow private persons to file claims against States for violations of their human rights,[64] while individuals can also be tried for international crimes before a number of international criminal courts.[65] Some disputes between States and individuals arising from particular situations can be settled before specialised bodies, like the Iran-United States Claims Tribunal.[66] And then, there is investment arbitration.

The establishment of all these different forums at the international level in the second half of the twentieth century became well-known as the process of the proliferation of international courts and tribunals.[67] However, this development has raised several new challenges.

Factually, the same dispute is often capable of being brought under jurisdictions of different forums.[68] For example, some investors have brought claims against their host States both before investment tribunals and the European Court of Human Rights ('ECtHR').[69] Although the alleged

---

61 Should States opt for arbitration, they can also establish the 'supervisory jurisdiction' of the ICJ. For example, *Ambatielos* (n 48). See generally W Michael Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' (1996) 258 Recueil des Cours 9.

62 See n 33 above.

63 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401.

64 Such as the Human Rights Committee (in respect of the International Covenant on Civil and Political Rights); European Court of Human Rights, Inter-American Court of Human Rights, and African Court on Human and Peoples' Rights (in respect of continental human rights treaties); the Court of Justice of the Economic Community of West African States (as a regional court with the jurisdiction over violations of any human rights obligations) etc.

65 Today most importantly the International Criminal Court. Previous most notable examples being the international criminal tribunals for the former Yugoslavia and Rwanda.

66 Established by virtue of the Declaration of the Government of Algeria Concerning the Settlement of Claims by the Government of US and the Government of Iran (19 January 1981).

67 See Brown, *Common Law* (n 6) 17–22; and Karen J Alter, 'The Multiplication of International Courts and Tribunals after the End of the Cold War' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 63–88.

68 See generally Oxman (n 35).

69 Cf, for example, *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014); and *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Final Award (18 July 2014); with *OAO Neftyanaya Kompaniya Yukos v Russia* App No 14902/04 (ECtHR, 31 July 2014).

violations in such instances did not pertain to the same legal bases, the two proceedings altogether usually formed one larger dispute between the investor and the State. Similarly, a single measure by a State can simultaneously give rise to an investment claim by a foreign investor, and another claim by the latter's home State, or even by a third State, in an inter-State forum.[70]

In addition, different adjudicatory bodies might be asked not only to adjudicate factually the same disputes, but also in doing so to apply the same law.[71] This scenario is quite more delicate, as the same legal instrument should be interpreted by two different bodies, potentially suggesting two opposing solutions. The overlapping jurisdictions over disputes arising from the same set of facts and/or having the same legal basis seek coordination between different forums.[72] However, at the international level international courts and tribunals normally do not have mechanisms for coordination at their disposal, and the entire action remains dependant on the adjudicators' personal stance.[73] Even if not dealing with the same dispute, different adjudicatory bodies can give different interpretations of the same body of law.[74] Besides causing uncertainties with regard

---

70 Cf, for example, *Philip Morris v The Commonwealth of Australia,* PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015); with WTO, *Australia: Tobacco Plain Packaging (Ukraine)—Request for Consultations by Ukraine* (15 March 2012) WT/DS434/1; WTO, *Australia: Tobacco Plain Packaging (Honduras)—Request for Consultations by Honduras* (10 April 2012) WT/DS435/1; WTO, *Australia: Tobacco Plain Packaging (Indonesia)—Request for Consultations by Indonesia* (25 September 2013) WT/DS467/1; WTO, *Australia: Tobacco Plain Packaging (Dominican Republic)—Request for Consultations by the Dominican Republic* (23 July 2012) WT/DS441/1; and WTO, *Australia: Tobacco Plain Packaging (Cuba)—Request for Consultations by Cuba* (7 May 2013) WT/DS458/1. See further Greg Tereposky and Laura Nielsen, 'Coordinated Actions in International Economic Law as Illustrated by Investment Treaty Arbitration and World Trade Organization Disputes' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016) 119–37.

71 See, for example, *The MOX Plant Case (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) 2001 ITLOS Reports; Case C-459/03 *Commission v Ireland* (2006) ECR I-4657; and *MOX Plant Case (Ireland v United Kingdom),* PCA Case No 2002-01, Order No 6 (6 June 2008).

72 Mohamed Bennouna, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 289–93; Brown, *Common Law* (n 6) 28–9.

73 *MOX Plant Case (Ireland v United Kingdom),* PCA Case No 2002-01, Order No 3 (24 June 2003) para 28 (referring to 'mutual respect and comity'). Further on judicial comity see Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (OUP 2007) 166 sq.

74 See Brown, *Common Law* (n 6) 29–32. The proliferation of judicial forums can particularly contribute to the phenomenon of 'fragmentation' of international law. See generally ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006); and, for a sceptical view on such a trend, Pierre-Marie Dupuy and Jorge E Viñuales, 'The Challenge of "Proliferation": An Anatomy of the Debate' in Cesare PR

to which interpretation is the correct or authoritative one, opposing views by different bodies might also undermine the legitimacy of international adjudication as a whole by failing to provide clear and authoritative solutions.[75]

In short, the system of international adjudication is characterised by continuous failures to establish a system of compulsory jurisdiction, and by the preservation of the rule that adjudication must be consented to by the parties to the dispute. Arguably, the reasons for the existence of the notion of consent in international law did not allow such attempts to be real ones in the first place.[76] In other words, these were not attempts at establishing real compulsory adjudication, but rather (and quite ambitiously) at signing some sort of general compromissory agreement. At the same time, the process of the proliferation of international courts and tribunals took place, and such bodies are today capable of resolving a great diversity of disputes. It is a dispersed and horizontal system, giving States the opportunity to submit their disputes to different forums, but lacking any higher authority to coordinate their actions. Indeed, it is questionable whether such a system could operate at all without State consent at its foundation.

B. The Foundations of International Jurisdiction: Defining the Authority to Adjudicate

Jurisdiction can be defined in many ways.[77] One crucial notion stands at the centre of its every definition: the power to adjudicate.[78] Like any empowerment, the power to adjudicate must stem from somewhere. The origins of this empowerment can be traced using two theories. One theory sees international adjudicators as agents of States.[79] The other regards them as States' trustees.[80]

Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 143–9.

75 But see, for a different view, encouraging judicial competition, William Thomas Worster, 'Competition and Comity in the Fragmentation of International Law' (2008) 34 Brooklyn JIL 119.

76 On the validating role of consent regarding the sources of international law, see Lim and Elias (n 8). Hans Kelsen has rightly noted that compulsory jurisdiction of an international court would exist only if international law provided that 'any member of the judicial community, party to any case whatever, is obliged to recognise the jurisdiction of the Court if the other party refers the dispute to the Court': Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (FA Praeger 1950) 522. For other concerns regarding the universal acceptance of judicial settlement of disputes, see Edward McWhinney, 'Judicial Settlement of Disputes. Jurisdiction and Justiciability' (1990) 221 Recueil des Cours 9, 24–9.

77 See Amerasinghe, *Jurisdiction* (n 49) ch 2; and Chittharanjan F Amerasinghe, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff 2009) 5–8 ('jurisdiction' is not a term of art).

78 Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 22.

79 Karen J Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 European J Int'l Relations 33, 34.

80 ibid 38–44.

Although these theories start from the point of view of States as lawmakers in the delegation of interpretive powers, the trajectories of the empowering processes they describe are also relevant in the present discussion with a small modification: every international jurisdiction starts from the delegation of the *power to adjudicate* to international adjudicators.[81] Investor-State arbitration is particularly fertile for the arguments that States delegate parts of their domestic jurisdiction to investment tribunals, which can emphasise their law-making capacity.[82] However, perspectives change when it is observed that seeking the resolution of a dispute at the international level forms an international legal relationship concerning the breaches of international obligations.[83] Consent to the adjudicative relationship is an expression of the normative legitimacy of an international tribunal to rule on such disputes.[84]

The mere mention of 'jurisdiction' implies some area of competence with defined borders. This perspective becomes emphasised in the context of the resolution of specific disputes.[85] Because consent to adjudication grants the power to adjudicate, the same notion equally defines the limits of that power. If an arbitrator breaches the limits of his adjudicative power as defined by party consent, he commits an *excès de pouvoir*.[86] How are the limits of a power to adjudicate being defined? I will describe that process in four steps. First, I will identify the origins of the delegation of the power to adjudicate (i). Second, I will define the notion of a 'dispute' and the concept of justiciability (ii). Finally, I will describe the formation of jurisdictional borders as a multi-stage process (iii), and the contractual nature of international jurisdiction (iv).

---

81 Shany argues that States do not delegate the judicial, but the decision-making power to international courts and tribunals, because States themselves do not possess the power to adjudicate over each other: Shany, *Questions* (n 78) 27–8. While technically true, this distinction loses importance if one takes into account, as Shany himself does, that States make such a delegation with the condition of employing judicial methodologies, thus defining the adjudicative power as a sub-category of decision-making. Furthermore, because the power to adjudicate has its origins of delegation in the disputing parties to a concrete dispute, no question of authority to adjudicate of one State over another is involved. See Section 2.B.i below.

82 Shany, *Questions* (n 78) 32–3.

83 Note the separate conferral of substantive rights and procedural remedies in international law; see De Brabandere (n 5) 55–70.

84 Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25–6.

85 'Jurisdiction' as the power to resolve specific disputes can be seen separately from the general recognition of an institution's purpose to render judicial decisions: *Corfu Channel (UK v Albania)* (Preliminary Objection) (Dissenting Opinion by Judge *ad hoc* Daxner) (1948) ICJ Rep 15, 33, 39–40. See also discussion in Section 2.B.iii.

86 Following the Roman law maxim *arbiter nihil extra compromissum facere potest.* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 259–66; W Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) 1989 Duke LJ 739, 745–7.

i. *The Origins of Delegation*

The first and obvious question is who the delegating parties are. Do States parties to a treaty, as lawmakers, authorise a tribunal to interpret and give meaning to their treaty norms, or do parties to a dispute authorise a tribunal to settle their differences? It has been argued that the former presents a traditional paradigm of public international law, while the latter characterises other legal systems.[87] The core position of this thesis is that under public international law the authority to adjudicate comes from and is delegated by the disputing parties exclusively. In the words of the ICJ, 'when States sign an arbitration agreement, they […] entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits'.[88] What is central in this definition is not the statehood of the delegating entities, but their status as the disputing parties.[89] That is why the inclusion of non-State actors in international adjudication faced no difficulty for their accommodation in this basic premise of the principle of consensualism.

This proposition can be tested very briefly. Judicial interpretations of international law are incidental (the applicable law is determined *for* the dispute), non-exclusive (the same set of rules can be interpreted by various courts and tribunals), and non-binding (for either the same or other courts and tribunals). In opposition, judicial settlement of a dispute is central (the jurisdiction of a court or tribunal is established for a particular dispute), ideally exclusive (jurisdictional overlaps are seen as problematic), and always binding (both on the disputing parties and other courts and tribunals as *res judicata*). Consider one example: the only inter-State case finding a genocide, and for that purpose interpreting the Genocide Convention extensively, was between two States

---

87 Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 60–1. See also Julia Hueckel, 'Rebalancing Legitimacy and Sovereignty in International Investment Agreements' (2012) 61 Emory LJ 601, 618–21 (relying on the principal-agent theory); Anne van Aaken, 'Control Mechanisms in International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law. Bringing Theory into Practice* (OUP 2014) 410–5 (using economic contract and principal-agent theories); but see Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration. Judicialization, Governance, Legitimacy* (OUP 2017) 22–33 (discussing the principal-agent theory in international arbitration, both commercial and investment, in three models: contractual, judicial and pluralist-constitutional).

88 *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) (1991) ICJ Rep 53, para 49. See also Iain GM Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8 EJIL 264, 277–8 (discussing Lauterpacht's recognition of the creativity of the international judicial function, but only in connection to the development of law as a secondary task, and compared to the primary role to settle disputes).

89 Indeed, practice of investment tribunals shows that the notion of sovereignty has faded away behind the principle of consensualism. See Chapter 6, Section 3.

which did not even exist at the time of drafting of that Convention.[90] The case came to the ICJ not because of the trust the drafting States conferred to it as the 'guardian of the Convention', but because of the applicability of the jurisdictional clause of that Convention between the two disputing States.[91] The Court's interpretation of the relevant Convention is certainly not binding on other tribunals, or for that matter the ICJ itself,[92] unlike its finding of a breach of law and its consequences on the rights and obligations of the parties.[93] This is not to say that judicial task to interpret the law should be undermined, but that that task should rather be seen in light of the judicial purpose to settle disputes. In short, dispute resolution is the *primary* role of international judicial bodies, whereas interpretation of the applicable law is their *secondary* role. A discussion about the notion of jurisdiction, therefore, must begin from the notion of a dispute.

ii. *The Notion of a 'Dispute' and the Concept of Justiciability*

The best-known definition of a 'dispute' is the one offered by the PCIJ in the *Mavrommatis* case, holding that a dispute 'is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.[94] The central element of that definition is the 'positive opposition' of the parties' claims and/or views on the compliance with certain obligations or the existence of certain rights.[95] The ICJ has opined that an inquiry into the existence of a dispute is an 'objective determination': it will inquire whether there is a dispute in substance by examining the facts, and mere assertion or denial of its existence is not conclusive.[96] The positions or attitudes of the parties pertaining to the existence of a dispute need not be stated expressly, and

---

90 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) (2007) ICJ Rep 43.

91 See *Bosnia and Herzegovina v Yugoslavia* (Preliminary Objections) (n 47). Cf *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, paras 64–70 (lacking jurisdiction due to a reservation to the jurisdictional clause in the Genocide Convention).

92 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) (2015) ICJ Rep 3, para 125 (repeating that it is only the Court's choice not to deviate from previous practice without 'very particular reasons to do so').

93 ICJ Statute (n 34) art 59 ('The decision of the Court has no binding force except between the parties and in respect of that particular case.').

94 *Mavrommatis Palestine Concessions (Greece v UK)* (Judgment) (1924) PCIJ Ser A—No 2, 6, 11.

95 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* (Advisory Opinion) (1950) ICJ Rep 65, 74; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) (1962) ICJ Rep 319, 328.

96 *Interpretation of Peace Treaties* (n 95) 74; *South West Africa* (n 95) 328; see also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Judgment) (2016) ICJ Rep, paras 38–41.

they can be inferred.[97] The Court will analyse actions taken by the parties,[98] but also various other types of conduct which is instructive on the question of their awareness of the mutual opposition of views.[99] Despite pertaining to such a clash of positions, the existence of a dispute is a matter of substance, not form, and procedural conditions precedent to the institution of proceedings do not play a role in the formation of a dispute.[100]

Crucially, unless a treaty clause exceptionally states otherwise, a 'dispute' is an objective standard created by virtue of a general understanding.[101] The 'objectiveness' at hand concerns the independent assessment of the existence of the dispute, regardless of the fact that the applicable standard of what forms a dispute might be subject to change.[102] That objective standard, however, must be assessed in each case with reference to the applicable treaty or other rule of international law. That is so because the subject-matter of disputes that can be adjudicated before certain forums is defined in jurisdictional treaty clauses.[103] The claimant party, of course, can try to present its claim in a way that is necessary to trigger a jurisdictional clause, which is why the determination of the subject-matter of the dispute is also left to an objective assessment

---

97 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Preliminary Objections) (1998) ICJ Rep 275, para 89.

98 For example, public statements; see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (2016) ICJ Rep, para 73.

99 For the variety of documents and statements, as well as their historical context, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (2011) ICJ Rep 70, paras 35–9.

100 But they may assist in finding the existence of a dispute and its subject-matter: ibid 30. Equally, the existence of a dispute cannot satisfy procedural conditions to the institutions of proceedings: *Armed Activities on the Territory of the Congo* (n 91) para 91. Cf *Marshall Islands v UK* (n 96) para 41 ('a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant'). The latter approach has been seen as a formalisation of pre-litigation procedures: see Michael A Becker, 'The Dispute That Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice' (2017) 6 Cambridge Int'l LJ 4, 10–20.

101 *Georgia v Russia* (n 99) para 29.

102 See, on the change of the standard of the existence of a dispute, Lorenzo Palestini, 'Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament' (2017) 8 JIDS 557; Béatrice I Bonafé, 'Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications' (2017) 45 Questions Int'l L 3; Vincent-Joël Proulx, 'The World Court's Jurisdictional Formalism and Its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes' (2017) 30 Leiden JIL 925; cf Hugh Thirlway, 'Establishing the Existence of a Dispute: A Response to Professor Bonafé's Criticisms of the ICJ' (2017) 45 Questions Int'l L 53.

103 *Georgia v Russia* (n 99) para 30.

of the adjudicator.[104] Moreover, one factual situation can give rise to multiple disputes, relating to multiple bodies of law, which can also be subject to different adjudicative mechanisms.[105] This scenario shows the necessity of an objective understanding of a dispute, which allows the adjudicator to make proper findings on his jurisdiction.

From the beginning of active international arbitral and judicial dispute resolution, there have been attempts to limit the reach of that practice. The problem is known as the 'justiciability' or 'non-justiciability' of disputes. Arguments have been advanced that 'legal' should be separated from 'non-legal' or 'political' disputes, only the former being suitable for judicial resolution.[106] While the legal/political divide has some parallels in domestic constitutional theories,[107] it seems more fruitful to seek its roots in an earlier State practice of conditioning the jurisdiction of arbitral tribunals in inter-State cases with the absence of one of the disputing States' 'vital interests' from the case (which was determined unilaterally).[108] This might be easy to understand for an early age of international adjudication, when a new role of international law to settle international disputes judicially was waiting to be grasped. But the argument has persisted. After upholding jurisdiction in the *Nicaragua* case, the ICJ was faced with the withdrawal of the US from the case, denying the jurisdiction of the Court on the basis that the dispute, as a political one, was not appropriate for judicial settlement.[109] Some 30 years later, a similar approach was taken by

---

104 Luiz Eduardo Salles, 'Jurisdiction' in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017) 248–9. For an example of such objective assessment, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) (1984) ICJ Rep 392, para 83.

105 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) (1980) ICJ Rep 3, paras 36–7; *Georgia v Russia* (n 99) para 32.

106 Known as the 'doctrine of the limitation of the judicial process' or the 'doctrine of non-justiciable disputes': Lauterpacht, *Function* (n 2) 4–5. See also Hermann Mosler, 'Political and Justiciable Legal Disputes: Revival of an Old Controversy?' in Bin Cheng and ED Brown (eds), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (Stevens & Sons 1988) 219–23.

107 McWhinney (n 76) 68.

108 ibid 73. See also, for a discussion on the origins of the doctrine, Lauterpacht, *Function* (n 2) 7–16.

109 'The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means—not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self-defense and is patently unsuited for such a role. Unlike domestic courts, the World Court has jurisdiction only to the extent that nation-states have consented to it. When the United States accepted the Court's compulsory jurisdiction in 1946, it certainly never conceived of such a role for the Court in such controversies. Nicaragua's suit against the United States—which includes an absurd demand for hundreds of millions of dollars in reparations—is a blatant misuse of the Court for political and propaganda purposes.' US Department

China in the *South China Sea* arbitration.[110] The question is whether such arguments, and limits of international adjudication, are indeed based in law.

Non-justiciability based on the legal/political distinction, which has been historically subject to extensive discussions both academic and inter-governmental,[111] has been criticised heavily by Hersch Lauterpacht. His seminal book *The Function of Law in the International Community* is dedicated entirely to the concept of justiciability. Lauterpacht begins by pointing out that the term 'justiciability' has different meanings, and that only one of them pertains to the legal/political divide.[112] A popular opinion was that not all international relations were regulated legally, and that international law was characterised by considerable gaps and an inherent incompleteness.[113] Lauterpacht opposed distinguishing 'legal' from 'political' disputes in the separation of justiciable from non-justiciable.[114] All international disputes are legal, just as all are political.[115] The history of international dispute settlement does not show dependency between the justiciability of disputes and their political nature; rather, justiciability is dependent on the will of States to submit to international adjudication.[116]

This stream of thought has prevailed in practice. The fact that a dispute or question forms part of a wider political controversy, or itself has a political aspect, cannot annul the established authority to adjudicate.[117] Edward McWhinney argues that the real criteria for assessing the justiciability of a case have become pragmatic, inquiring if judicial involvement could solve a problem.[118] For him, justiciability is a question of judicial restraint and activism, pertaining to the issues of timing, the availability and appropriateness of other solutions, and the capacities of

---

of State File No P85 0009-2151 reported in Marian Nash Leich, 'Contemporary Practice of the United States Relating to International Law' (1985) 79 AJIL 431, 439. See also Iran's argument in *Tehran* (n 105) para 35.

110 *The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China),* PCA Case No 2013-19, Award on Jurisdiction and Admissibility (29 October 2015) paras 133–7 (maintaining that the dispute essentially concerned State sovereignty).

111 See Lauterpacht, *Function* (n 2) 147–52.

112 ibid 19–22 (distinguishing justiciability as a question of the suitability of the dispute for judicial settlement, from justiciability as a question of the existence of jurisdiction).

113 ibid 59–64. Note, in that respect, that the jurisdiction of the ICJ based on the optional clause is limited to 'legal disputes': ICJ Statute (n 34) art 36(2). See also Ian Brownlie, 'The Justiciability of Disputes and Issues in International Relations' (1967) 42 British Yrbk Int'l L 123, 124–36 (identifying various other bases of non-justiciability).

114 Lauterpacht, *Function* (n 2) 174–90. See also Mosler (n 106) 223–4.

115 Lauterpacht, *Function* (n 2) 161–8.

116 ibid 153–61.

117 *Tehran* (n 105) para 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, para 41.

118 McWhinney (n 76) 74, 174–6.

the judges.[119] However, I am more persuaded to side with Lauterpacht in concluding that the concept of justiciability persists in international law in another sense: whether a dispute is justiciable or not is a question of the consensualism of international adjudication, ie whether the parties have consented to a judicial resolution at the international level.[120]

Because justiciability is dependent on consent, States have tried to retain control over the adjudicative space of international forums by qualifying their consent. This was done using the so-called 'self-judging' clauses, which excluded international jurisdiction in matters that States themselves considered their domestic affairs.[121] Again, Lauterpacht was their strong critic. Acting as a judge of the ICJ, he argued that such clauses were contrary to the power of the Court to rule on its own competence (*compétence de la compétence*).[122] What is crucial in this reasoning is that the flaw is manifested not with the question of possible jurisdictional limit, but with whom should examine that limit. Another logical defect is that retaining governmental power to decide which disputes are justiciable does not in fact provide advance consent, but merely restates the need for *ex post* consent.[123] Qualifying consent with certain conditions can also cause broader contextual conflicts. The ECtHR was willing to find territorial reservations to its jurisdiction invalid because of the conflict with the object and purpose of the European Convention on Human Rights ('ECHR').[124] Yuval Shany explains this reasoning by invoking the ECtHR's role as a promoter of human rights.[125] Another explanation can be found beyond that role, in the

---

119 ibid 175. See also Brownlie, 'Justiciability' (n 113) 142 ('justiciability is a matter of policy').

120 Lauterpacht, *Function* (n 2) 24, 171–3.

121 Also known as 'automatic reservations': James Crawford, 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court' (1980) 50 British Yrbk Int'l L 63; and Stephan Schill and Robyn Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 13 (Martinus Nijhoff 2009) 87–91. Self-judging clauses have become most prominent in connection to substantive international obligations.

122 *Certain Norwegian Loans (France v Norway)* (Separate Opinion of Sir Hersch Lauterpacht) (1957) ICJ Rep 9, 34, 43–8; *Interhandel (Switzerland v United States of America)* (Preliminary Objections) (Dissenting Opinion of Sir Hersch Lauterpacht) (1959) ICJ Rep 6, 95, 103–6. Judge Lauterpacht relied on Article 36(6) of the ICJ Statue in particular, however it can be said that the same power is inherent to the judicial function: Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 British Yrbk Int'l L 195, 212. Cf Crawford, 'Automatic Reservations' (n 121) 69–74. See also *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) (1957) ICJ Rep 125, 141–4 (where India argued that a reservation in the Portuguese acceptance of the ICJ's jurisdiction contradicted the object and purpose of Article 36(2) ICJ Statue, which was not accepted by the Court, holding that the clause only reserved the possibility of a partial denunciation of that acceptance).

123 *Certain Norwegian Loans* (Lauterpacht) (n 122) 48–55; *Interhandel* (Lauterpacht) (n 122) 106–7.

124 *Loizidou v Turkey* App No 15318/89 (ECtHR, 23 March 1995) paras 65–89.

125 Shany, *Questions* (n 78) 42.

human rights' rationale. The ECHR itself defines the scope of its application using the term 'jurisdiction', which bears a territorial connotation.[126] For the sake of securing the respect of human rights to everyone under States' control or power, the ECtHR had to reinterpret that term.[127] Just as a general limitation of the ECHR's application to the contracting States' territories was inconsistent with that objective, the same inconsistency would be caused by a similar individual territorial limitation of the ECtHR's jurisdiction.[128] These examples show that framework regulations to which disputing parties access must be observed as equal parts of their consent to adjudication. Only such limitations of international jurisdictions which do not conflict with a rule of the jurisdictional framework, or some other norm to which parties have subjected the dispute resolution mechanism,[129] remain possible.[130]

However, when such contradictions are present, another question arises: should the conflict be resolved in favour or against international adjudication? Judicial practice has given both answers,[131] although the question of severability of the invalid clause appears to be decisive.[132] Shany convincingly argues that the importance of the legitimising role of consent differs among courts, as does the priority given to the enforcement of substantive law.[133] The *Loizidou* case offers, I submit, another important explanation: the regulatory context of consent. The Court in that case made an explicit distinction between itself and the ICJ, referring to the ICJ's general jurisdiction and capacity to settle any dispute referred to it by two States, on the one hand, and the ECtHR's supervisory role over the ECHR, on the other.[134] Further, the ECtHR found that the Turkish invalid reservation was severable from its declaration, on the basis of, *inter alia*, the general practice of unconditional acceptance of the ECtHR's jurisdiction.[135]

---

126 ECHR (n 32) art 1.

127 *Soering v The United Kingdom* App No 14038/88 (ECtHR, 7 July 1989) para 86; *Loizidou* (n 124) para 62.

128 And, indeed, such an inconsistency was recognised: *Loizidou* (n 124) paras 72, 75. See also Alexander Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal' (2003) 3 LPICT 501, 528–9.

129 *Interhandel* (Lauterpacht) (n 122) 104 ('Sovereign States are free to append to their Acceptance any kind of reservation or limitation—subject only to the qualification that reservations and limitations which are contrary to the Statute cannot be acted upon by the Court.').

130 This applies to all principal limitations: *ratione personae, ratione materiae,* and *ratione temporis.*

131 Judge Lauterpacht held that the invalidity of the reservation invalidated the entire declaration accepting the jurisdiction of the ICJ. The ECtHR in *Loizidou,* on the other hand, separated the invalid reservation from the declaration and upheld its jurisdiction.

132 *Certain Norwegian Loans* (Lauterpacht) (n 122) 55–9; *Interhandel* (Lauterpacht) (n 122) 116–7; *Loizidou* (n 124) para 97.

133 Shany, *Questions* (n 78) 43.

134 *Loizidou* (n 124) para 84.

135 ibid paras 90–8.

The regulatory context is crucial here. While consent to the jurisdiction of the ICJ needs to define its authority to adjudicate from scratch, because it cannot defer that issue to a broader regulatory framework defining the borders of the Court's competence in detail,[136] consent to the jurisdiction of the ECtHR appears as an adhesional acceptance of a comprehensively defined judicial framework.[137] It is instructive to inquire whether the overall regulatory framework which the parties have consented to contains a norm prospectively resolving the problem of conflict. Thus, Judge Lauterpacht might have been wrong for not remedying self-judging clauses in the acceptances of the ICJ's jurisdiction by relying on its Statute, although if we follow his opinion that the defect in question invalidated the essence of advance consent, such a remedying attempt seems reasonably impossible. What is apparent from all these considerations is that the conferral of the authority to adjudicate is a complex process which takes place in multiple interconnected stages, steps or levels. I now turn to that multi-stage process.

iii. *Framing the Authority to Adjudicate in Multiple Stages: Substantive, Personal, and Temporal Jurisdiction*

A justiciable dispute must objectively exist,[138] and be sufficiently determined.[139] One aspect of the latter issue is whether the dispute is defined with sufficient precision when brought before an adjudicative body.[140] The other aspect, which is more relevant for the present discussion, is that only a precisely defined dispute can be verified to fall within the jurisdictional scope of that body, because a tribunal 'must conform to the terms by which the Parties have defined [its] task'.[141]

As a preliminary remark, it should be noted that jurisdiction of an adjudicative body can be observed from two perspectives: as jurisdiction *in abstracto*, ie its potential to adjudicate certain classes of disputes (sometimes called 'foundational' or simply 'jurisdiction'), on the one hand, and as jurisdiction *in concreto*, ie jurisdiction over a concrete dispute which is established by its referral to resolution (also known as 'specific' or 'competence'), on the other.[142] This distinction

---

136 The ICJ Statute regulates the access to the Court only, which defines its personal jurisdiction, limiting it to disputes between States: ICJ Statute (n 34) art 35.

137 Defining both personal and substantive jurisdictions; see ECHR (n 32) arts 32-4.

138 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, paras 55–9.

139 Sir Robert Jennings, 'Reflections on the Term "Dispute"' in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff 1994) 404 (concluding that the competence of the ICJ exists in respect of disputes which 'have been reduced to a series of quite specific issues of the kind a court can deal with in an essentially adversarial process').

140 Roberto Lavalle, 'The Need for Precision in Formulating Disputes Brought to the International Court of Justice by Special Agreement, with Particular Reference to the 2008 Belize/Guatemala Special Agreement' (2016) 76 Heidelberg J Int'l L 993.

141 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) (1984) ICJ Rep 246, para 23.

142 Shany, *Questions* (n 78) 22–6, 63–83. In the same direction, see Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence

will not be followed here, for several reasons: first, it observes international courts and tribunals in a multilateral context only, and in my view it undermines the role played by party consent in the definition of jurisdiction; second, it does not observe that consent is not necessarily required as a condition posterior to and separate from the multilateral framework;[143] consent can appear both as consent to a multilateral instrument itself,[144] and as a separate act incorporating its terms by reference;[145] finally, the distinction fails to identify a proper source of normativity of a conferral of international jurisdiction.[146]

When jurisdictional regulation takes place in multiple stages, it is more fruitful to regard such stages as pertinent parts of the intentions of disputing parties to confer the power to adjudicate.[147] The truth is that every definition of the authority to adjudicate is made in multiple stages. On a spectrum between no authority and a full authority to adjudicate in a concrete case, disputing parties take many steps towards its definition: they accept framework or constitutive treaties, they conclude compromissory clauses or special jurisdictional agreements, but they also define detailed jurisdictional rules, like case-specific extensions or limitations of jurisdiction. Referrals of cases to tribunals should not be excluded from this spectrum, because they often play a role in the definition of the authority to adjudicate, like in investment arbitration where

---

and Procedure' (1958) 34 British Yrbk Int'l L 1, 8–9; Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Pedone 1967) 61–3.

143 To resolve the problem caused by attaching the notion of consent to specific jurisdiction and concrete disputes, Shany argues that consent expressed in compromissory clauses or acceptances of the ICJ optional clause could be seen as *promises* of future consent, or as *waivers* of the requirement of consent. See Shany, *Questions* (n 78) 25–6.

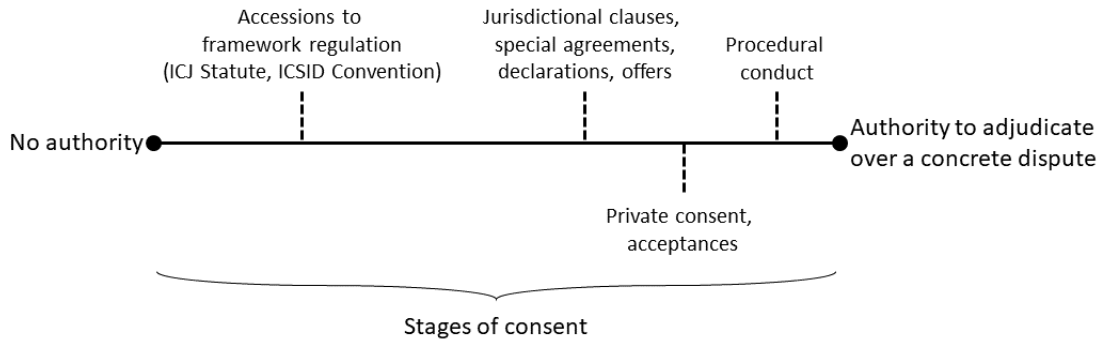
144 For example, the establishment of human rights courts, where States in constitutive treaties consent to the settlement of disputes with private persons. In such cases, withdrawals of consent also take place on the multilateral level, by cancelling the adjudicative body or amending its jurisdiction, as illustrated by the case of the Tribunal of the Southern African Development Community.

145 Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 938 ('In the case of ICSID arbitration, the agreement to arbitrate incorporates the Convention by reference.').

146 According to this separation, the actual normative conferral of the power to adjudicate can take place both at the level of foundational and specific jurisdiction. See Yuval Shany, 'Jurisdiction and Admissibility' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 790–3. In my opinion, this suggestion only refers the definition of jurisdiction back to the examination of consent and its content, and inquiries into the intention to put into motion a (until then dysfunctional) foundational instrument.

147 See Amerasinghe, *Jurisdiction* (n 49) 77–82; and Amerasinghe, *Specific Jurisdiction* (n 77) 14–7 (criticising the distinction of the two stages of conferring jurisdiction to the ICJ, firstly by virtue of its Statute and secondly by virtue of a jurisdictional clause or an agreement; both steps are necessary for the definition of jurisdiction, and one is meaningless without the other).

they perfect agreements to arbitrate,[148] or like when it comes to the *forum prorogatum* doctrine. Looking from this perspective, the ICSID Convention is not the governor, but the substance of consent, together with, for example, an investor's request for arbitration perfecting an agreement to arbitrate. These steps are often unilateral from the perspective of the relationship of the disputing parties, but their common intentions will eventually amount to the formation of a jurisdictional link between them. This means that at some point on this spectrum normativity will be apparent, insofar that there will be sufficient evidence of the parties' shared intention to confer the power to adjudicate over the dispute. But what is more important is that none of these steps works alone, and only together can they provide a full picture of the jurisdictional framework applicable to a dispute. Graph 1 presents this understanding of consent as a multi-stage process.



Graph 1: Consent as a multi-stage process

Limitations in definitions of the authority to adjudicate (jurisdiction) can be advanced at any of these stages, and their full and clear establishment often involves taking several steps. Various qualifiers can be used to draw such limitations: material (or substantive), personal, temporal, and territorial. I will concentrate on the first three, because they are essential for a proper definition of international jurisdiction.[149]

First, a dispute must concern substantive issues designated as justiciable by the consenting parties.[150] The area of thus designated justiciable substantive issues is known as jurisdiction *ratione materiae*.[151] Such areas can be defined in different ways: from all disputes, to those arising in a particular field of law (such as human rights or foreign investment), under a particular treaty, or even from a particular article of a treaty.[152] Or, a dispute can be defined precisely, as in

148 See Section 3.A.iii below.

149 As it will be seen in Chapter 2, territorial limitations are not necessarily independent, and can be implied in other jurisdictional limitations.

150 See, regarding the ICJ, Hambro (n 50) 173–7.

151 See Shany, 'Jurisdiction and Admissibility' (n 146) 791.

152 See Revised General Act for the Pacific Settlement of International Disputes (signed 28 April 1949, entered into force 20 September 1950) 71 UNTS 101, art 17 ('[a]ll disputes with regard to which the parties are in conflict as to their respective rights'); American Treaty on Pacific Settlement (Pact of

cases of special agreements and *forum prorogatum*. When examining jurisdiction in a concrete case, these definitions must be assessed in light of the substantive rules to which they refer. One example is the famous *Oil Platforms* test, which inquires whether the alleged acts could indeed breach the justiciable substantive obligations.[153] Another issue is the connection of the identified substantive rules with other rules of international law, which could prospectively affect the scope of justiciable disputes. This could raise some questions in connection to judicial policy choices.[154]

To be justiciable, a dispute must exist between the consenting parties (this is known as jurisdiction *ratione personae*). When one party (a State) consents in advance, it usually defines a class of prospective entities that could, by virtue of their own consent, perfect a jurisdictional relationship. The evolution of international law has faced a challenge of accommodating disputes between States and private persons.[155] This was an inevitable consequence of an increasing international regulation of State behaviour towards private persons. What followed were offers of the possibility for private persons to access international forums to settle their disputes with States regarding such regulation. Because of the fragmented and subject-oriented development of international forums, jurisdictional instruments expressing State consent had to define classes of persons whose disputes States were willing to submit to adjudication.[156] Such definitions are

---

Bogotá) (signed 30 April 1948, entered into force 6 May 1949) OASTS Nos 17 and 61, art 31 ('all disputes of a juridical nature'); Protocol A/P.l/7/91 on the ECOWAS Court of Justice (signed 6 July 1991, entered into force provisionally 6 July 1991, definitively 5 November 1996), amended by the Supplementary Protocol A/SP.1/01/05 (signed 19 January 2005, entered into force provisionally 19 January 2005) art 9(4) ('jurisdiction to determine case of violation of human rights that occur in any Member State'); ECHR (n 32) art 32(1) ('all matters concerning the interpretation and application of the Convention and the Protocols'); Accord entre les Gouvernements du Royaume de Belgique et du Grand-Duché de Luxembourg et le Gouvernement de l'Union des républiques socialistes soviétiques, concernant l'encouragement et la protection réciproques des investissements (signed 9 February 1989, entered into force 18 August 1991) art 10(1) (disputes 'relatif au montant ou au mode de paiement des indemnités dues en vertu de l'article 5').

153 See *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Judgment) (1996) ICJ Rep 803, para 16; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Separate Opinion of Judge Higgins) (1996) ICJ Rep 847, para 33.

154 See Shany, *Questions* (n 78) 54–9 (on the competing considerations of legitimacy and effectiveness in the resolution of jurisdictional questions); McWhinney (n 76) 46–54 (regarding the ICJ's self-restraint in jurisdictional determinations when prospectively touching upon politically sensitive substantive issues, in the particular example of the *Nuclear Tests* cases).

155 Gerhard Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them' in United Nations, *International Law as a Language for International Relations* (Kluwer Law International 1996) 559.

156 See ECHR (n 32) art 34 ('The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.'); Energy Charter

not always clear and self-sufficient. In some fields, as is the case of investment disputes, such definitions necessarily depend on the subject matter of the dispute, and the satisfaction of the jurisdiction *ratione materiae.*[157] Still, jurisdiction *ratione personae* is one of the basic means of defining the power to adjudicate of an international forum, be it court or tribunal.

Finally, international courts and tribunals usually have strictly defined temporal jurisdiction, ie jurisdiction *ratione temporis.* This is a consequence of the fact that international regulation is not permanent: treaties appear and disappear.[158] Although theoretically parties can agree to submit disputes to judicial resolution without any time limitations,[159] most of them decide to limit the justiciable disputes in time. This can be done in various ways, from implicit temporal limitations of justiciable disputes by their attachment to the issues of application of substantive provisions, relying on the general rule of non-retroactivity of treaties, to explicit limitations of justiciable disputes to those arising after the entry into the force of a treaty, or to those that concern the facts or acts that took place after that date.[160]

These three jurisdictional dimensions are the basic tools by which disputing parties define the scope and the limitations of the power to adjudicate of a particular adjudicative body.[161] The so-called 'jurisdictional conditions' or 'conditions precedent' should be added to this list, as conditions for the exercise of international jurisdiction.[162] What is crucial in such definitions of the power to adjudicate is the identification of the common intention of the parties, expressed in

---

Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 ('ECT') art 26(1) ('Disputes between a Contracting Party and an Investor of another Contracting Party').

157 To qualify as an investor, a person or a company must own or control an 'investment', which also determines the substantive jurisdiction of a tribunal. See further Chapter 2, Section 3.A.

158 As noticed, the life of treaties requires some flexibility and accepting possibilities of their termination: Sotirios-Ioannis Lekkas and Antonios Tzanakopoulos, 'Pacta Sunt Servanda versus Flexibility in the Suspension and Termination of Treaties' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 313–5.

159 For example, Declaration of Austria Recognising the Jurisdiction of the ICJ as Compulsory (19 May 1971) <http://www.icj-cij.org/en/declarations/at> accessed 19 December 2017.

160 See Sadie Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' (2011) 10 Washington Univ Global Studies L Rev 419, 430–3. For example, Declaration of Luxembourg Recognising the Jurisdiction of the ICJ as Compulsory (15 September 1930) <http://www.icj-cij.org/en/declarations/lu> accessed 19 December 2017 ('disputes arising after the signature of the present declaration with regard to situations or facts subsequent to this signature').

161 The ICJ has noted that conditions and reservations to declarations accepting its jurisdiction under the optional clause 'do not by their terms derogate from a wider acceptance already given', but 'operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court': *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (1998) ICJ Rep 432, para 44.

162 See Shany, 'Jurisdiction and Admissibility' (n 146) 793–6. Note, however, that the question whether such conditions pertain to the questions of jurisdiction or admissibility is subject to debate.

their consent instruments. Because these tools can be used in more than one step (for example, defining personal jurisdiction in the ICJ Statute and declarations or a treaty; defining arbitrable disputes in the ICSID Convention, an investment treaty, and investor's acceptance of an offer to arbitrate), the exact jurisdictional limits can be determined only by comparing these different steps, identifying stronger terms, and resolving their conflict.

iv. *The Contractual Nature of International Jurisdiction and the Observance of its Limits*

As seen so far in this Subsection, the jurisdiction of international courts and tribunals is defined by party consent, or more precisely, by the parties' common intention to confer the power to adjudicate certain disputes on an international forum. The dependence of international jurisdiction on the common intentions implies the contractual nature of the conferral of the power to adjudicate, which is particularly obvious when such intentions are expressed in an agreement. Furthermore, the contractual nature of international jurisdiction is confirmed by the fact that international courts and tribunals cannot exercise jurisdiction over a non-party to a jurisdictional agreement,[163] and the disputes that such a non-party might have with the litigating parties.[164] This suggestion can be challenged on the grounds that the evolution of international judiciary, which now often allows private parties to access courts and tribunals by simply instituting proceedings, has moved away from the contractual nature of international jurisdiction, towards a generalised jurisdictional regulation by virtue of multilateral treaties.[165]

However, that is not necessarily so. Even 'opt-in' mechanisms of acceptance of international jurisdiction observe its contractual nature. For example, the ICJ has qualified the link established between two disputing States, which have accepted the optional clause under Article 36(2) ICJ Statute, as a 'contractual relation'.[166] That contractual relation is established by virtue of an offer

---

163 *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) (1954) ICJ Rep 19, 32; *East Timor (Portugal v Australia)* (Judgment) (1995) ICJ Rep 90, para 26; *Larsen v Hawaiian Kingdom,* PCA Case No 1999-01, Award (5 February 2001) para 11.17.

164 *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene) (1984) ICJ Rep 3, paras 28–37.

165 Shany, 'Jurisdiction and Admissibility' (n 146) 784; Shany, *Questions* (n 78) 64. See particularly Cesare PR Romano, 'The Shift From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 Int'l L & Politics 791. Romano analyses the development of a 'compulsory paradigm' in which 'consent is largely formulaic either because it is implicit in the ratification of treaties creating certain international organizations endowed with adjudicative bodies or because it is jurisprudentially bypassed and litigation is often undertaken unilaterally': ibid 794–5. Romano's analysis, however, does not challenge the requirement of consent as such, but rather how it is implemented within judicial institutional frameworks. Also, Romano takes a State-centric perspective, in contrast to the dispute-centric perspective advocated in this thesis.

166 *Right of Passage over Indian Territory* (n 122) 146. See also *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Preliminary Objection) (Separate Opinion by M Anzilotti) (1939)

(by the first accepting State) and acceptance (by the later accepting State).[167] The content of that agreement is the shared intentions of the parties.[168] Basically, there is always an underlying agreement between the parties regardless of the form as long as its content is visible.[169] This theory, relying on an offer and acceptance, is particularly important, because, as it will be seen further in this Chapter, the same technique has been used to establish the jurisdictional relationship in investment arbitration. Another aspect of such contractual nature, being at the disposition of the disputing parties, is the observance of their attitudes and common intentions throughout the proceedings. In *Certain Norwegian Loans,* the ICJ gave effect to a self-judging clause, because the clause's validity was not challenged by the parties, and held that such a clause constituted 'an expression of their common will relating to the competence of the Court'.[170] The contractual nature of international jurisdiction remains preserved, therefore, by being established by virtue of the parties' intentions, regardless of the technical aspects of its acceptance.

The regulatory context in which consent is given is important. Human rights bodies have been willing to declare invalid reservations to their jurisdiction on account of the main intention of the State to accede to a wider legislative context of which such forums form part.[171] The intention to accede to a modelled adjudicative mechanism, whose jurisdiction is defined in a multilateral treaty, is not any less consensual than the intention to define international jurisdiction from scratch. The only relevant difference is that the acceptance of such a modelled framework means accepting its standardised jurisdictional borders, which can be said to form what Shany

---

PCIJ Ser A/B—No 77, 86, 87 ('an agreement'); *Spain v Canada* (n 161) para 46 ('consensual bond'); *Nicaragua* (Jurisdiction) (n 104) para 60 ('the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction'). See also Orakhelashvili (n 128) 520–7.

167 *Land and Maritime Boundary between Cameroon and Nigeria* (n 97) para 25.

168 This is best evidenced in the theory of reciprocity, according to which each party can rely on and invoke the conditions and reservations contained in the declaration of the other party. See *Certain Norwegian Loans (France v Norway)* (Judgment) (1957) ICJ Rep 9 (1957) ICJ Rep 9, 24.

169 See *Monetary Gold* (n 163) 31 (where an offer to submit the dispute to the ICJ was contained in a statement, which was accepted by a declaration deposited with the Court; the Court referred to Article 36(1) of its Statute, thus implying a special agreement reached by the parties). See also, regarding separate acceptances of the Court's jurisdiction, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Preliminary Objection) (Judgment) (1948) ICJ Rep 15, 28.

170 *Certain Norwegian Loans* (Judgment) (n 168) 27. In fact, Norway relied on a self-judging clause contained in the French acceptance of the Court's jurisdiction. See also *Rights of Nationals of the United States of America in Morocco (France v US)* (Judgment) (1952) ICJ Rep 176 (where the same self-judging clause did not bar the Court's jurisdiction because it was not invoked, nor was the jurisdiction of the Court challenged in general).

171 *Loizidou* (n 124) paras 65–89; *Rawle Kennedy v Trinidad and Tobago* Comm No 845 (HRC, 31 December 1999) paras 6.1-8.

calls the 'foundational jurisdiction' of international courts.[172] But without such intention, definitions of international jurisdictions in multilateral or framework instruments remain only dead letters. What gives normativity to such jurisdictional models are the subsequent steps taken by States and other disputing parties which form jurisdictional agreements. The impossibility to redefine their terms does not deprive jurisdiction of international courts and tribunals of its contractual nature. There is nothing wrong with 'take it or leave it' contractual models: what remains crucial is the mere possibility of choice.[173]

The inability of private persons as disputing parties to substantially influence the terms of accessing an international forum, when they are offered such an access, equally has no effect on the contractual nature of international adjudication. From their perspective, international courts and tribunals indeed might appear as exercising a *de facto* compulsory jurisdiction over States.[174] The contractual nature, however, does not stem from the appearance, but from the necessity of party consent in the establishment of the normative legitimacy of an international forum. When it comes to *ad hoc* mechanisms, such as arbitral tribunals, this necessity appears obvious from the fact that without an underlying agreement of the disputing parties there cannot be a tribunal in the first place. When it comes to institutionalised adjudicatory bodies, such as treaty-based courts, the empowering role of the private parties' consent is often ignored due to their one-sided character.[175] What is crucial in observing the contractual nature in such scenarios is that States do not impose jurisdiction to individuals as their sovereigns, but offer them, as to subjects of international law, the possibility to enter a jurisdictional relationship as litigating equals.[176] It can

---

172 Shany distinguishes foundational from specific jurisdiction, whereby the former regulates outer limits of jurisdiction of a particular court, ie its jurisdiction *in abstracto,* while the latter provides jurisdiction of the court over a specific dispute. Shany, *Questions* (n 78) 22–6.

173 An analogy can be drawn to the sphere of private disputes and arbitration rules of arbitration institutions. The fact that such rules become part of the disputing parties' contract does not mean that the parties are free to amend them as they wish. For example, should a State and a foreign investor provide in their contract that the disputes arising from that contract will be settled under the ICSID's auspices, the ICSID Convention and arbitration rules will be considered part of their contract, however without the possibility of altering the basic ICSID jurisdictional rules, except to the extent allowed by them. See Emmanuel Gaillard, 'Some Notes on the Drafting of ICSID Arbitration Clauses' (1988) 3 ICSID Rev-FILJ 136, 139–42.

174 See, regarding investment arbitration, Born (n 35) 838. Born also invokes the fact that many States are pressured to conclude investment treaties providing for arbitration.

175 Because such bodies are normally established to allow private persons to address their claims against States, and not *vice versa.* That does not mean that the expression of consent of private parties does not matter. See Section 3.A.iii and Chapter 2.

176 International law recognises that rights can be conferred on private persons by virtue of international agreements: *LaGrand (Germany v US)* (Judgment) (2001) ICJ Rep 466, para 77. The conferral of the right to litigate in international forums on an equal footing with States can be contrasted with the regulation of the jurisdiction of international criminal courts, where States (or international

consequently be concluded that the contractual analogy has not disappeared from international adjudication, but it has shifted from bilaterally negotiated, to adhesion contractual models.

A clear consequence of the contractual nature of the jurisdiction of international courts and tribunals is the necessity of paying special attention to the observance of its limits. The power of international courts and tribunals to decide on the issues of their own jurisdiction, also known as the *compétence de la compétence,* is the first tool at the disposal of international adjudicators aimed at satisfying that necessity.[177] Admittedly, *compétence de la compétence* had taken a long time to become a rule in international law.[178] That observation does not diminish its importance in the international legal order, and the slow establishment of the rule in international law could be explained by the slow and insecure steps in the early years of international adjudication.[179] The *compétence de la compétence* power can simply be seen as necessary in the international legal order, given the lack of a hierarchy of courts capable of determining each other's jurisdiction, and bearing in mind that deferral of jurisdictional questions to States would be a problem in itself, possibly preventing adjudication.[180] The second tool at the disposal of international adjudicators is the option of raising jurisdictional questions on their own initiative: *proprio motu* or *ex officio,* depending on whether they are considered *able*[181] or *required* to do so.[182] The use of these tools is delicate, because it should not be conducted so as to impose an

---

organisations through their powers) use sovereign prerogatives to subject their nationals and other individuals under their jurisdiction to another level of criminal jurisdiction.

177 Brown, 'Inherent Powers' (n 122) 212. That power of tribunals is particularly important in international law because international arbitrations normally lack support of domestic courts in enforcing arbitration agreements. Hazel Fox, 'States and the Undertaking to Arbitrate' (1988) 37 Int'l & Comp LQ 1, 7.

178 Lauterpacht, *Private Law* (n 22) 207–8; Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction. Compétence de la compétence* (Springer 1965) 11 sq.

179 Arguably, the acceptance was slow because first arbitrations were initiated by virtue of special treaties, and it might have been assumed that States have retained the principal power of their interpretation. See Lauterpacht, *Private Law* (n 22) 247–8 (regarding the *Pious Fund of California* case, where the Tribunal affirmed its *compétence de la compétence,* however on unclear grounds); and Shihata, *Power* (n 178) 16–7 (regarding the *Colombian Bond* cases, where a restrictive approach to jurisdiction was upheld, reserving the issues of the conferral of jurisdiction to States). For the argument that the exercise of this power could lead to outcomes inconsistent with the parties' intentions, see Fitzmaurice, 'Jurisdiction, Competence and Procedure' (n 142) 27–8.

180 Fitzmaurice, 'Jurisdiction, Competence and Procedure' (n 142) 28. See also Shihata, *Power* (n 178) 24–7.

181 Fitzmaurice, 'Jurisdiction, Competence and Procedure' (n 142) 28–9.

182 *Tehran* (n 105) para 33. As regards the terminology, see *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) (Separate Opinion of Judge *ad hoc* Kreća) (2004) ICJ Rep 371, para 43 ('In the practice of the Court the expressions ex officio and *proprio motu* are used as interchangeable, although there exist differences in the meaning of these two expressions.

improper burden of proof on the party attempting to access the forum.[183] Jurisdiction is not to be proven, but established.[184] What is to be proven are the facts.[185] But because the establishment of jurisdiction means an inquiry into the intentions of the disputing parties,[186] including the possibility of finding such intentions by implication,[187] the facts pertaining to the parties' intentions must be examined in jurisdictional determinations. The main purpose is to assure that adjudicators do not act outside the limits set by the disputing parties.

Qualifying the jurisdiction of international courts and tribunals as contractual in nature is not directed at diminishing the prospects of private parties' access to such forums. In my opinion, it is valid to use the expression 'compulsory jurisdiction' for situations where one party (a State) undertakes an obligation to adjudicate all prospective disputes of one kind in a particular forum, but in a strictly descriptive manner. Insisting on the compulsory as actually affecting the nature of international jurisdiction is both unnecessary and erroneous, because it ignores one of the basic principles of international law: *pacta sunt servanda.*[188] That principle alone suffices to recognise the compulsory after the consensual. The essence of the contractual nature, which is argued here, is that the definition of the power to adjudicate of international courts and tribunals, and particularly the source of its normativity, rests on party consent.

The expression *"proprio motu"* implies the discretionary authority of the Court to take action on its own initiative. The action taken by the Court "ex officio" is an expression of the duty of the Court by virtue of its judicial function.').

183 *Spain v Canada* (n 161) para 38 ('there is no burden of proof to be discharged in the matter of jurisdiction').

184 *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) (1988) ICJ Rep 69, para 16 ('The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts.'); *Fisheries Jurisdiction (Germany v Iceland)* (Merits) (1974) ICJ Rep 175, para 18 ('It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.').

185 *Spain v Canada* (n 161) para 37 ('The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it […], this has no relevance for the establishment of the Court's jurisdiction […]' [references omitted]).

186 *Factory at Chorzów* (n 45) 32.

187 *Monetary Gold* (n 163) 32; *Haya de la Torre* (n 42) 78. This is particularly so given the lack of formality of the expression of consent; see *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* (Judgment) (1928) PCIJ Ser A—No 15, 4, 23.

188 Which is also seen as an expression of the principle of good faith: Cheng (n 86) 113.

C. Consent as a Rule or Principle

It is clear what consent does. More complicated question is where the requirement of consent to international adjudication can be found. Its origins can be traced to the theoretical foundations of the international legal order and the lack of an ultimate regulatory authority. It can be argued accordingly that the requirement of consent need not be identified clearly as a rule of international law. When the Vienna Convention on the Law of Treaties ('VCLT') was drafted, the International Law Commission considered the inclusion of the rules governing the expression of consent to be bound unnecessary, however that opinion did not prevail in the finalisation of the Convention.[189] The dilemma concerned the issue if one of the means of expression might take form of a general rule, not touching upon the requirement of consent as such, which was obvious. After all, even the VCLT regulates the means of expression of consent only, and the requirement of consent in the formation of international obligations remains implied.

Nevertheless, considering the important implications of consent throughout the international legal order, it seems fruitful to position it within the wide and complex network of international legal norms. First, the requirement of consent is a norm of general significance. It is not a feature of a particular field of international law or a self-contained regime, but it permeates all aspects of international law in general. It can be therefore considered part of the corpus of norms dubbed 'general international law'.[190] It can even be said that it presents the *grundnorm* of international adjudication in general.[191] But its status as a *rule* of law is less clear. It can hardly be imagined that the requirement of consent could be properly formulated, and it rather appears as a product of simple logic.[192] Consent is, therefore, closer to the category of principles. It is referred to most often as a 'principle'.[193] More importantly, it is consulted as such in practice. Courts and tribunals

---

189 Richard D Kearney and Robert E Dalton, 'The Treaty on Treaties' (1970) 64 AJIL 495, 508; Malgosia Fitzmaurice, 'Consent to Be Bound - Anything New under the Sun?' (2005) 74 Nordic JIL 483, 484.

190 See Christian Tomuschat, 'What Is "General International Law"?' in *Guerra y Paz: 1945-2009. Obra homenaje al Dr. Santiago Torres Bernárdez* (Universidad Del País Vasco 2010) 342–4 (discussing the basic rules and principles stemming from the 'axiomatic premises of the international legal order', and particularly from the sovereign equality of States).

191 Kelsen finds the basic norm of international law in the proposition that 'states ought to behave as they have customarily behaved', forming the basis for the *pacta sunt servanda* principle as a customary norm of general international law, and whose functioning is, in my opinion, impossible without the involvement of the notion of consent. See Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 418. Following Kelsen's definition of a basic norm, as the highest norm whose validity cannot be further questioned, it can be argued that the requirement of consent, resulting from the sole absence of a customary norm providing for compulsory adjudication, is the basic norm of the system of international adjudication taken separately.

192 Cf Tomuschat (n 190) 342 (regarding the basic rules and principles of the VCLT).

193 *Monetary Gold* (n 163) 32; *Larsen v Hawaiian Kingdom* (n 163) para 11.20; Fitzmaurice, 'Jurisdiction, Competence and Procedure' (n 142) 66.

often resort to the notion of consent seeking instruction in the interpretation of jurisdictional rules provided in treaties.[194] It can be said that the principle of consent belongs to the corpus of norms dubbed 'general principles of *international* law', as opposed to general principles of law derived from national legal systems, because it is inherent to the international legal order in particular, retaining general application as its main feature.[195]

§ 1.03. The Development of International Investment Law and Arbitration and the Principle of Consensualism

Does investment arbitration share the same consensual basis? Or, are there some differences to general international law that have emerged specifically within this dispute settlement field? I will attempt to answer these questions by looking into its historic formation (A), some modern views on international investment law (B), and its possible status as a hybrid field of law (C).

A. A BIT of History

International investment law has a complicated history. It was the product of an evolutionary process brought about by many events, factors, and actors, however the policy goals and choices leading to its formation as a modern branch of law are not central in the present analysis.[196] My task is narrow: I look at the effects of the formation of international investment law on the consensualism of international adjudication. For this reason, I will concentrate more on the result, instead of the process, of that formation.

i. *Internationalisation, Depoliticization, and the Loss of State Control over Investment Disputes*

The main idea behind international investment law is raising the regulation of State treatment of foreign investors in its territory from the municipal to the international law level.[197] Although, as private persons, foreign investors should fall under the jurisdiction of their host States, disputes between the two have always resulted in controversies between the investor's host and home

---

194 For example, the ICJ has resorted to the principle of consensualism to qualify the conditions of seisin as jurisdictional (as opposed to the conditions of admissibility). See *Armed Activities on the Territory of the Congo* (n 91) para 88.

195 M Cherif Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Michigan J Int'l L 768, 772.

196 See generally, for the evolutionary process, Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014); and, for a deep historical perspective, Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013).

197 See generally Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 1–2; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 21–5; Newcombe and Paradell (n 26) 41–4.

States. Such scenarios produced two-level relationships: one between the investor and his host State (domestic and legal), and another between the investor's host and home States (international and political).[198] The development of international investment law, and investment arbitration in particular as a means of law enforcement at the international level, brought two changes in this respect: the internationalisation and depoliticization of the relationship between the investor and the host State, and the loss of State control over investment disputes, and particularly over the access to international forums for their settlement.

First, the relationship between the investor and his host State has become internationalised. This has resulted from the development and growth of international regulation pertaining to the treatment of foreign investors in the territory of their host States. International law had already been aware of the minimum standard of treatment of aliens in State territories, which of course covered foreign investors, as well as some other standards of customary international law.[199] What was new was the development of specialised 'legislation' (bilateral or multilateral treaties), which started regulating State behaviour towards foreign investors in a detailed manner. The internationalisation was complete once the procedural tools (in the form of arbitration) for the enforcement of such substantive standards were introduced.[200] The result was that both the substantive regulation and procedural enforcement of norms pertaining to State treatment of foreign investors were now governed by the international legal order, instead of the municipal one.

An important aspect of that process is that the questions of treatment of foreign investors by their hosts have become depoliticized. Of course, many would argue that the internationalisation of investment law was itself motivated by political (particularly economic) desires, consequently concluding that no real depoliticization has ever taken place in this field.[201] But if focus is made on a micro level of concrete disputes (as opposed to the macro level of international money flows), it is undeniable that relations between actors in everyday disputes have been relaxed, at least in theory:[202] as once famously explained, 'the essence' of investment arbitration regimes is

---

198 In the past, disputes between foreign investors and their hosts have often led to inter-State conflicts, depicted in the phenomenon of 'gunboat diplomacy'. See Newcombe and Paradell (n 26) 8–10; Surya P Subedi, *International Investment Law. Reconciling Policy and Principle* (2nd ed, Hart 2012) 11–2; M Sornarajah, *The International Law on Foreign Investment* (3rd ed, CUP 2010) 19–21.

199 Including, for example, some guarantees against expropriation. See Newcombe and Paradell (n 26) 11–8; and, for the challenges of such customary standards, Andreas F Lowenfeld, *International Economic Law* (2nd ed, OUP 2008) 469–94.

200 See Section 3.A.iii.

201 For example, M Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 Int'l Environ Agreements 329; Sornarajah, *International Law* (n 198) 19, 21–8; Miles (n 196) 386–9.

202 For an empirical research finding the preservation of States' willingness to engage diplomatically to protect their investors abroad, in the example of the US practice, see Geoffrey Gertz, Srividya

'that controversies between foreign investors and host states are insulated from political and diplomatic relations between states'; 'the host state is assured that the state of the investor's nationality (as defined) will not espouse the investor's claim or otherwise intervene in the controversy between an investor and a host state', whereas 'the state of the investor's nationality is relieved of the pressure of having its relations with the host state disturbed or distorted by a controversy between its national and the host state'.[203] The extent of the depoliticization, however, is debatable. While some argue that due to the introduction of the investor-State dispute settlement system States have lost all the possibilities to pursue investment claims on behalf of their nationals,[204] others argue that the depoliticization of investment disputes is not absolute, and that States still can pursue claims to protect their investors abroad.[205]

The internationalisation and depoliticization of investment disputes had no capacity to affect the consensualism of international dispute settlement. What is more, State consent is *the principal means* of achieving both developments, following the traditional understanding of international law.[206] An important result of these developments, however, was the loss of State control over access to international dispute settlement arrangements. The establishment of international dispute settlement mechanisms as the standard forums for the settlement of investment disputes, transferred the assessment of the fulfilment of the conditions of access (or the gateway) to such forums from States to international tribunals.[207] Although concerns can be expressed that such transfer of the power to determine whether a private person can enter the international arena to settle its dispute with the State can lead to expansionist determinations,[208] there is nothing in the

---

Jandhyala and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?' (2018) 107 World Development 239.

203 *Corn Products International Inc v United Mexican States,* ICSID Case No ARB(AF)/04/1, Separate Opinion of Andreas F Lowenfeld to the Decision on Responsibility (15 January 2008) para 1.

204 *Republic of Ecuador v United States of America,* PCA Case No 2012-5, Expert Opinion with Respect to Jurisdiction by W Michael Reisman (24 April 2012) paras 23–38.

205 Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard Int'l LJ 1, 10–20.

206 In this context, State consent does not only pertain to the acceptance of international dispute settlement, but to a broader issue of international regulation. See *Certain Norwegian Loans* (Lauterpacht) (n 122) 51 ('There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so […] Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally—all those matters have been claimed to be essentially within the domestic jurisdiction of States.').

207 Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 Int'l Org 457, 458.

208 ibid 459.

internationalising and depoliticizing processes *per se* affecting consensualism in principle. Their relevance is therefore only contextual.

ii. *The ICSID Convention*

To truly depoliticize investment disputes, a proper forum for their resolution was required. That is where the ICSID comes in.[209] Established by virtue of the ICSID Convention,[210] it gradually took the role of the major, albeit not the only, mechanism for the settlement of investment disputes.[211] It is often said that the ICSID was initially meant to serve the settlement of contractual disputes between States and foreign investors, its jurisdiction being extended in the subsequent practice to treaty-based disputes,[212] however, as it will be seen below, such an assumption should not be taken for granted.

Consent of the parties is central to the ICSID system.[213] This is obvious from the fact that the ICSID is nothing more than an institutionalised arbitration mechanism, which only assists or administers individual arbitrations. A point of differentiation from traditional arbitral institutions is, however, notable: the ICSID Convention not only regulates the structure and operation of the ICSID, but it also defines some substantive limits of the jurisdiction of tribunals established under its auspices,[214] as well as provides a limited review mechanism.[215] Still, the Convention is explicit in that its acceptance does not imply consent to arbitrate concrete cases.[216] Individual agreement

---

209 See generally Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Rev-FILJ 1.

210 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention'). See Crina Baltag, 'The ICSID Convention: A Successful Story – The Origins and History of the ICSID' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 4–20.

211 At the time of writing, the ICSID administered five times more cases than the second largest arbitration administrator in this filed, the PCA (more than 500 and 100, respectively). See UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator <https://investmentpolicyhubold.unctad.org/ISDS/FilterByRulesAndInstitution> accessed 17 April 2018.

212 M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 122; Sornarajah, *International Law* (n 198) 300.

213 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965' (1993) 1 ICSID Reports 23, para 23 ('Consent of the parties is the cornerstone of the jurisdiction of the Centre.').

214 ICSID Convention (n 210) art 25.

215 ibid art 52.

216 ibid pmbl ('Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration').

to arbitrate remains the central means of conferring power to adjudicate to individual tribunals.[217] In this respect, the ICSID mechanism does not appear any different from any other arbitration framework, be it public or private. Both the PCA[218] and commercial arbitration regimes,[219] which are often employed for the settlement of investment disputes, follow the same pattern. Thus, both the ICSID and other arbitration mechanisms accommodate the contractual nature of international adjudication, as discussed above.

The ICSID Convention went one step further in fortifying the consensualism of international adjudication as the core principle. Unlike commercial arbitration mechanisms, the ICSID system was produced by diplomatic efforts resulting in a treaty.[220] The demands for the protection of the requirement of consent were so strong in the drafting process, that they led to the establishment of a pre-arbitral, administrative procedure (so-called 'screening process') for the verification of the satisfaction of that requirement.[221] The drafters even went so far to exclude one of the already well known mechanisms of consenting to adjudication—the *forum prorogatum* doctrine—from the ICSID system.[222] Of course, full determination on a tribunal's jurisdiction is for that tribunal itself to decide, following the concept of *compétence de la compétence*.[223] What was intended with the introduction of the screening process was to verify preliminarily whether there could be

---

217 ibid art 25(1) ('The jurisdiction of the Centre shall extend to any legal dispute […] which the parties to the dispute consent in writing to submit to the Centre.').

218 Arbitration Rules of the Permanent Court of Arbitration (in force 17 December 2012) ('PCA Rules') art 1(1). See also UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) (in force 1 April 2014) ('UNCITRAL Rules') art 1(1).

219 Rules of Arbitration of the International Chamber of Commerce (in force 1 March 2017) ('ICC Rules') art 6; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force 1 January 2017) ('SCC Rules') pmbl.

220 *History of the ICSID Convention*, vol I (ICSID 1970) 2–10. Although acting in an advisory capacity, the work of the Legal Committee on Settlement of Investment Disputes, with the representation of 61 governments at its meetings in Washington DC in November and December 1964, is important because of its article-by-article analysis of an earlier draft of the Convention.

221 *History of the ICSID Convention*, vol II–2 (ICSID 1968) 769 (Broches). See further, for the drafting history of the 'screening process', ibid 769–75. The 'screening' is provided for in ICSID Convention (n 210) art 36(3). This process allows the ICSID Secretary-General to deny registration of a request for arbitration if 'the dispute is manifestly outside the jurisdiction of the Centre'. See further Chapter 2, Section 4.C.i.

222 A Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Columbia J Transnat'l L 263, 273.

223 ICSID Convention (n 210) art 41(1) ('The Tribunal shall be the judge of its own competence.'). See also PCA Rules (n 218) art 23(1); UNCITRAL Rules (n 218) art 23(1); ICC Rules (n 219) arts 6(3), 6(5). The SCC Rules imply that power of tribunals.

any discussion on the existence of consent in the first place. Other arbitration institutions conduct similar checks, although to a significantly lower degree.[224]

The annulment proceedings provided for by the ICSID Convention equally safeguard the consensualism of investment arbitration.[225] That safeguard is, however, limited, because to annul an award the excess of powers by the tribunal must be 'manifest'.[226] What that formulation means is debatable,[227] although ICSID tribunals have formed a jurisprudence on the matter.[228] The New York Convention, which applies to all non-ICSID arbitrations, provides similar grounds for non-recognition of awards,[229] however in that case the intensity of review depends on local policies of municipal legal systems.[230] Even if these grounds for annulment and non-recognition would be regarded as somehow neglecting the principle of consensualism, due to the limited review of

---

224 Brooks Daly, Evgeniya Goriatcheva and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (OUP 2014) 23, 84; ICC Rules (n 219) art 6(3)-(4); SCC Rules (n 219) art 12.

225 See ICSID Convention (n 210) art 52(1); *History of ICSID II-2* (n 221) 850 (Broches); Schreuer and others (n 145) 938; Reisman (n 86) 745–7, 750–5.

226 ICSID Convention (n 210) art 52(1)(b). But see Schreuer and others (n 145) 933–4 (on the absence of clear boundaries between different grounds for annulment).

227 Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 LPICT 211, 216–21; Laurens JE Timmer, 'Manifest Excess of Powers as a Ground for the Annulment of ICSID Awards' (2013) 14 JWIT 775, 789–90, 791–802. But see Schreuer and others (n 145) 938 (holding that "manifest" is not an indication of gravity but of ease with which an excess of powers is perceived).

228 See, among many others, *Mr Patrick Mitchell v The Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) para 20; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) paras 44–8; *Industria Nacional de Alimentos SA and Indalsa Perú SA v The Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) paras 99–102; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) paras 125–32.

229 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('New York Convention') art V. See particularly ibid art V(1)(c) ('The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;').

230 Which is particularly problematic when it comes to the review of arbitral awards at the place of the seat of arbitration. See generally William Laurence Craig, 'Uses and Abuses of Appeal from Awards' (1988) 4 Arb Int'l 174; Jessica L Gelander, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations' (1997) 80 Marquette L Rev 625; Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review' (2011) 28 J Int'l Arb 589.

jurisdictional determinations, that cannot be credited to an erosion of the consensualism as such, but rather to other considerations such as the finality of arbitral awards,[231] as well as the transfer of the power to make jurisdictional determinations to arbitral tribunals.[232] The mere possibility of some review of arbitral jurisdictional determinations is already extraordinary. The principle of consensualism is, therefore, safeguarded at all angles of arbitral process: prior to, during, and after arbitration.

iii. *Bilateral and Multilateral Investment Treaties, Investment Legislation, and 'Arbitration Without Privity'*

Finally, we arrive at the question how this requirement of consent is satisfied in each case. And we come to the first point of innovation that appeared with investment law. The novelty was that expressions of State consent found place in a new type of treaties: investment protection treaties, primarily bilateral ('BIT') but also multilateral ('MIT'). Modern investment treaties have proliferated since the late 1950s, and their development has been analysed extensively.[233] It is important to note, however, that first investment treaties did not include provisions on investor-State arbitration, which appeared only with the 'second generation' BITs.[234] Today, there are almost 3000 concluded BITs worldwide (over 2000 of which are in force), and more than 300 other treaties with investment protection provisions,[235] including some prominent MITs such as the NAFTA and the ECT.[236]

---

231 *History of the ICSID Convention*, vol II–1 (ICSID 1968) 423 (Bertram); Mark B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Rev-FILJ 85, 90.

232 This suggestion pertains to more theoretical questions. If tribunals indeed act as agents or trustees of the disputing parties, as discussed above, their decision on the scope of their jurisdiction is thus made on behalf of those disputing parties (only in their delegating, as opposed to litigating, capacity). Any challenge of an arbitral determination of the scope of jurisdiction would thus contradict the delegating act (party consent) itself.

233 See generally Kenneth J Vandevelde, *Bilateral Investment Treaties. History, Policy, and Interpretation* (OUP 2010); Kenneth J Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017); Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Policy 157; Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 Virginia J Int'l L 639; Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000' (2006) 60 Int'l Org 811.

234 Pauwelyn, 'Evolution' (n 196) 29–31; Vandevelde, 'Brief History' (n 233) 174–5.

235 Data available at UNCTAD, Investment Policy Hub, International Investment Agreements Navigator <https://investmentpolicyhubold.unctad.org/IIA> accessed 17 April 2018.

236 North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 ('NAFTA'); ECT (n 156). Note, however, that NAFTA will be terminated after

Bilateral investment treaties now dominate this field, followed by some significant MITs, like the ECT, which bear particular weight because of their wide coverage and specific subject-matter.[237] But there is another source of investment protection possibly allowing for international arbitration: domestic investment protection legislation. Indeed, a number of States have special laws providing that disputes concerning foreign investment protection (which, in turn can be both contractual and statutory) between them and investors will be brought to arbitration.[238] Although this route of access to international investment arbitration is arguably the oldest one,[239] its importance has diminished, due to the dominance of investment treaties. That is why presently this field of international dispute settlement is most commonly referred to as 'investment treaty arbitration', albeit that that phrasing should not incline towards excluding statute-based arbitration from this analysis. As far as consensualism is concerned, the treaty/legislation distinction does not make any difference for the operation of investment arbitration.

BITs, as the most important sources of the contemporary investment law, usually offer two dispute resolution mechanisms: investor-State and State-to-State.[240] Because States parties to a BIT are at the same time the two prospective disputing parties in a State-to-State arbitration, this latter mechanism of dispute settlement is usually seen as a portrayal of the classical paradigm of inter-State disputes and arbitrations.[241] Investor-State arbitration, however, is different. Because

---

the entry into force of the Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, not in force).

237 See, for example, ECT (n 156) art 1(6) ('"Investment" refers to any investment associated with an Economic Activity […]'). See further Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011) 15–6, 41, 46–8.

238 UNCTAD numbers more than 50 countries with investment laws providing for access to international arbitration. Data available at UNCTAD, Investment Policy Hub, Investment Laws Navigator <https://investmentpolicyhubold.unctad.org/InvestmentLaws> accessed 17 April 2018.

239 Legislation as a source of consent was mentioned already in the drafting of the ICSID Convention. See Commentary to Article II, para 8 in Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 15 October 1963 in *History of ICSID II-1* (n 231) 205. The first case using the offer-acceptance theory was based on legislation: *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,* ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction (14 April 1988).

240 UNCTAD maps 2440 (out of 2571) treaties containing investor-State dispute settlement provisions, and 2554 treaties containing State-to-State dispute settlement provisions. See UNCTAD, Investment Policy Hub, International Investment Agreements Navigator <https://investmentpolicyhubold.unctad.org/IIA/> accessed 17 April 2018.

241 Aron Broches, 'Bilateral Investment Protection Treaties and Arbitration of Investment Disputes' in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 447. But, for a prospective wider use of such mechanisms, see Michele Potestà, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?' in Nerina Boschiero and others (eds), *International Courts and the Development of*

investors are not parties to investment treaties, the question was raised how the consensual link between an investor and his host-State was created. The answer was found in the offer-acceptance theory: by including a dispute settlement clause in an investment treaty, States *offer* to investors in their territory to access arbitration should a dispute arise, while an investor can *accept* that offer, and thus perfect an arbitration agreement, by filing a request for arbitration.[242] Because of the lack of a prior contractual or similar relationship between the investor and the State providing for arbitration, this development was famously described by Jan Paulsson as 'arbitration without privity'.[243] Although the first arbitration construing an offer to arbitrate in a BIT did not raise objections from the respondent State,[244] Paulsson was very sharp in his conclusions: 'this is not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere.'[245]

Technically speaking, however, Paulsson's 'arbitration without privity' is not a completely accurate description of the jurisdictional relationship between an investor and a State.[246] Much more to the point is Thomas Wälde's opinion that privity has not disappeared from investor-State relations, but moved to the sphere of legal fictions, simply because without any arbitration agreement between them, arbitration would be impossible.[247] While it is understandable that there

---

International Law: Essays in Honour of Tullio Treves (Asser Press 2013) 753; Clovis J Trevino, 'State-to-State Investment Treaty Arbitration and the Interplay with Investor–State Arbitration Under the Same Treaty' (2014) 5 JIDS 199; Roberts, 'State-to-State Arbitration' (n 205).

242 Dolzer and Schreuer (n 197) 254–60; Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012) 196–212; Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 830.

243 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232. Cf Michael Waibel, 'The Principle of Privity' (2016) University of Cambridge Faculty of Law Research Paper No 44/2016, 20–24 <https://ssrn.com/abstract=2839839> accessed 22 March 2018 (arguing that the principle of privity remains preserved in the sphere of investment contracts and inter-State investment treaty relations).

244 *Asian Agricultural Products Ltd v Republic of Sri Lanka,* ICSID Case No ARB/87/3, Final Award (27 June 1990).

245 Paulsson, 'Privity' (n 243) 256. See also Jacques Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration' (1997) 14 J Int'l Arb 5, 6 ('It is nothing short of a revolution of the classic arbitration theory, which postulates that arbitration is the product of a contract […]').

246 And later acknowledged: Jan Paulsson, 'The Tipping Point' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2016) 86.

247 Thomas W Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007) 59–60. See also Paulsson, 'Privity' (n 243) 247, 250 (in the context of the NAFTA and the ECT, arguing that privity is created at the time of initiation of arbitration).

is no privity in the sense of negotiated two-sided contracts,[248] there is nothing unusual in the move towards a one-sided, adhesion contract analogy.[249] Because such adhesion contracts in fact exist and follow an expression of the will of their parties, I would not go so far as to call privity 'fictional' (considering arbitration separately from substantive rights and obligations) merely due to the lack of factually equal opportunities to influence the content of arbitration agreements (that lack is a consequence of the statehood of one party, while in regular contractual relations it is usually attributed to the economic supremacy of one of the parties).[250]

Paulsson's conclusions were also inaccurate in another respect: the offer-acceptance theory was nothing new in international law. When the idea of what will become the ICSID Convention emerged in 1961, it was stated that the prospective mechanism would imitate the mechanism of access to the ICJ: either by a unilateral undertaking or agreement regarding a concrete dispute.[251] Both the commentary to a preliminary draft[252] and the Report of 1965[253] indicated the possibility of State consent being expressed by an offer, perfected into an arbitration agreement by investor's acceptance, which was assumed with the rise of BITs.[254] If the ICSID system was meant to follow the already known manifestations of consent, primarily those from the PCIJ/ICJ Statue, unilateral undertakings amounting to offers to other prospective litigants were such known mechanisms. As seen above, the same qualifications have been made by the ICJ.[255] If that is indeed so, the innovative aspect of the development of investment law was solely the introduction of a new type of treaties, and not the technique for the establishment of a consensual link.

---

248 Andrea K Bjorklund, 'Contract without Privity: Sovereign Offer and Investor Acceptance' (2001) 2 Chicago JIL 183 ('Yet despite a lack of privity in negotiating the agreement, the parties to an arbitration still have an "arbitral contract."').

249 See above Section 2.B.iv.

250 The requirement of consent is sometimes said to protect States exclusively, which leads to a complete disregard of an agreement that is formed in combination with investor's consent. The argument is that investors always seek consent of States, being interested to institute international arbitration, and not *vice versa.* See Ciurtin (n 23) 50. That view is, however, overly simplistic: the prime example of the investors' reliance on the consensualism and their own consent is the problem of counterclaims.

251 Note by A Broches, General Counsel transmitted to the Executive Directors of 28 August 1961, para 4 in *History of ICSID II-1* (n 231) 2. See also Note by the President to the Executive Directors of 28 December 1961, para 5 in ibid 5.

252 See Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 15 October 1963 in *History of ICSID II-1* (n 231) 205.

253 Report of the Executive Directors (n 213) para 24 ('Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.').

254 Broches, 'Bilateral Investment Protection' (n 241) 452–3.

255 See above Section 2.B.iv. See also, for the same analogy between the ICJ optional clause and offers to arbitrate in investment treaties, Alexandrov (n 36).

Paulsson's 'arbitration without privity' is undoubtedly one of the most influential works in investment law. We can find it, for example, as one of the motivations for Zachary Douglas' qualification of investment law as field of a *sui generis* (or hybrid) legal character, somewhere between public and private.[256] However, such views might be complicating what is in fact much simpler. There is no doubt that the emergence of investment protection treaties has introduced new elements in international law and raised many questions on how such new rights of investors should be accommodated or qualified theoretically. But reaching to completely different (or 'opposite') fields of law, such as private law, for help seems impulsive.

The crucial question here is why consent is consistently viewed through the lenses of private law or commercial arbitration. 'Arbitration without privity' might be seen as innovative through these lenses, but hardly from the public international law point of view. One public international law perspective suggests that jurisdictional clauses in investment treaties can be seen as unilateral obligations of States, rejecting the offer-acceptance theory altogether.[257] But as demonstrated above, international adjudication requires contractual foundation, which does not mean that the offer-acceptance construction is unknown to it.[258] It only appears that the traditional common law concept of 'privity'[259] is not a feature of such jurisdictional relationships, which logically follows the separation between procedural devices and substantive rights and obligations in international law.[260] It is odd that the private international law perspective is being insisted on, despite the fact that the basic premise of the requirement of consent in commercial arbitration is irrelevant in the

---

256 Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Yrbk Int'l L 151; Douglas, *Claims* (n 197) 6–10.

257 See generally Michael D Nolan and Frédéric G Sourgens, 'Limits of Consent – Arbitration Without Privity and Beyond' in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 873; Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 Arb Int'l 129. See also, as for investment legislation, David D Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 649. The unilateral obligation theory, however, fails to explain the required reciprocity of consents for establishing jurisdiction.

258 See above Section 2.B.iv.

259 In English law, 'privity' has been seen as a contractual relation between two parties which prevents the enforcement of its provisions by a third party (an alien to the contract). Because contracts at stake here are formed only for the purpose of settling disputes that arise in public international law, and thus by default can concern various sources of substantive obligations, this traditional understanding of privity is both unnecessary and impossible. See Vernon Valentine Palmer, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law* (Austin & Winfield 1992) 1–5.

260 De Brabandere (n 5) 55–70.

public international law environment.[261] As seen, the ICSID Convention found inspiration in the ICJ, and such a perspective was maintained throughout its drafting process, rejecting immixture with private arbitration mechanisms.[262] For these reasons, there is no need to draw conclusions from the private law sphere, either when defending,[263] or criticising[264] the consensualism of investment arbitration 'without privity', or even when seeking its explanation in a rebuttal of the offer-acceptance construction in its entirety.[265] That is not to say that I categorically reject the assistance of all analogies to private law. Such analogies can be helpful, as they have often been throughout the history of international law, but only when international law itself does not offer satisfactory explanations. In this case, investment arbitration follows the standard international law model of adjudication from one end to another: from the point of formation of an agreement to arbitrate, to awarding a compensatory relief.[266]

B. International Investment Law as a Global Public Good or Protective Regime: Reflections on State Consent

Because the result of the formation of international investment law had not brought any change regarding the consensualism of international adjudication, it is valid to ask whether such a change might have resulted in the further evolution of that field of law, primarily through the perception of its role within the international community. Two such perceptions are particularly important here: first, the idea of investment law and arbitration as a global public good (i), and second, their status as a protective regime of international law (ii).

---

261 As discussed above, the consensualism of international adjudication stems from the fundamentals of the international legal order. In contrast, in private law the requirement of consent stems from a policy and legislative decision to establish jurisdiction of courts as a default rule, granting the possibility, in certain matters, to 'opt-out' from such a default rule by agreeing on arbitration. Should legislators build different policy preferences, the default rule and the exception could be swapped. See generally Gilles Cuniberti, *Rethinking International Commercial Arbitration: Towards Default Arbitration* (Edward Elgar 2017).

262 For example, in the context of drafting the grounds for annulment of awards, see *History of ICSID II-1* (n 231) (Broches) ('He suggested that the parallel with commercial arbitration should not be drawn too closely because the Convention sought to establish a new jurisdiction. The parallel if any lay with the International Court of Justice rather than with commercial arbitration.').

263 See Paulsson, 'Privity' (n 243) 255; Wälde, 'Specific Nature' (n 247) 57–61.

264 See Sornarajah, *Resistance* (n 212) 144–6.

265 See Nolan and Sourgens (n 257).

266 In principle, remedies in investment arbitration are the same as in general international law (restitution, compensation, satisfaction), but the preference for compensation is obvious because of the circumstances giving rise to disputes. See Anne Van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 721.

i. *Global Public Goods and the Persistence of Consent*

Contemporary thinking on the life of the international community recognises that international regulation is needed for the provision of certain goods.[267] For example, human rights have been recognised as public goods on a global scale,[268] which are to be provided through international regulation, or in the concrete case, by international human rights law.[269] 'Global public goods' follow the usual definitions of a public good: these are goods which bring some benefits to a community (in this case the international community), and which are characterised by non-rivalry and non-excludability.[270] The question is whether such a need for the provision of global public goods has affected the foundations of the international legal order, or changed the dominant law-making techniques in an attempt to circumvent the formalism of the classical notion of consent. Although scholars have indeed found that some alternative routes in international regulation have been paved, there is no evidence that the consensualism of the (formal) international legal order decays as the principal regulatory tool.[271]

International economic law is not immune either to the global public goods discourse.[272] *International investment law* is thus said to qualify as such, being both non-rivalrous (because its

---

267 Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 EJIL 651, 655 ('Just as the state is needed to provide public goods at optimal levels nationally, international governance is needed to provide the optimal level of global public goods.' [references omitted]).

268 Inge Kaul and Ronald U Mendoza, 'Advancing the Concept of Public Goods' in Inge Kaul and others (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003) 95–9; Birgit Lindsnaes, 'The Global and the Regional Outlook: How Can Global Public Goods Be Advanced from a Human Rights Perspective?' in Erik André Andersen and Birgit Lindsnaes (eds), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff 2007) 73; Malcolm Langford, 'Keeping Up with the Fashion: Human Rights and Global Public Goods' (2009) 16 Int'l J Minority & Group Rights 165, 166, 168.

269 Which is, of course, also subject to criticisms. See, for example, Daniel Augenstein, 'To Whom It May Concern: International Human Rights Law and Global Public Goods' (2016) 23 Indiana J Global Legal Studies 225; Neil Walker, 'Human Rights and Global Public Goods: The Sound of One Hand Clapping?' (2016) 23 Indiana J Global Legal Studies 249.

270 See Kaul and Mendoza (n 268) 95; Bodansky (n 267) 652–4.

271 Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1, 34. See also, for an explanation of the alternative routes in law-making, Armin Steinbach, 'The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective' (2016) 27 EJIL 643.

272 Barnali Choudhury, 'International Investment Law as a Global Public Good' (2013) 17 Lewis & Clark L Rev 481; Stephan W Schill, 'The Jurisprudence of Investment Treaty Tribunals. Between Public Good and Common Concern' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 9; Stephan W Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty

use by one party does not impair the use by the others), and non-excludable (because it facilitates capital flow and advances economic growth in respect to both members and non-members of the investment law system).[273] Although the actual achievements of such benefits of international investment law are debatable,[274] the effects of this discourse on that branch of international law could be anticipated: just as human rights are sometimes perceived as requiring to be secured by international regulation, an expansion of international investment regulation might be justified with the necessity of securing investor protection. Another approach examines whether *international adjudication* could be or provide a global public good.[275] In the absence of tangible benefits of international adjudication (which are still in the theorising sphere), such an argument is harder to maintain. One such benefit is arguably the practice of investment tribunals, which clarifies the content of law.[276] If the benefits of dispute settlement recognised in the international community at one point grow in scope to the extent of imposing a requirement to be secured, this might have repercussions on the consensualism of international adjudication. In my opinion, that would also involve restructuring the entire international legal order.

There is no sign, however, of a claim that the consensualism of investment treaty arbitration has suffered changes due to the global public goods discourse so far. The principal obstacle to such effects is the notion of jurisdiction, which implies precisely defined borders of competence, and therefore requires consent. What might be affected by the rise of the global public goods idea are the approaches to the interpretation of investment treaties, or as it will be seen in the following chapters, in the possible regulatory activities of investment tribunals. The global public goods narratives, therefore, do not relate to the *lex lata* questions but to those of *lex ferenda*.

ii. *Protective Treaty Regimes and a Changing Perception of Consent*

There is another, perhaps less ambitious, analogy to human rights: the emergence of protective regimes of international law. The 20th century was revolutionary in the departure from the idea of treaty-contracts.[277] A new type of treaties emerged, by virtue of which States did not establish

---

Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 Leiden JIL 401, 416; Petros C Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23 EJIL 731.

273 Choudhury (n 272) 502–4.

274 ibid 505–13 (referring to the failures to bring such benefits because of the well-known legitimacy issues in investment law).

275 See generally Joshua Paine, 'International Adjudication as a Global Public Good?' (2018) 29 EJIL 1223. Cf William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 J Legal Studies 235.

276 Schill, 'Jurisprudence' (n 272) 9; Schill, 'International Economic Order' (n 272) 416.

277 Treaties as contracts between States dominated international legal thinking throughout history. Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 6 ('the treaty as a concept of international law

reciprocal rights and obligations in accordance with their individual interests, but aimed to give effect to some ideals of the international community.[278] This type of treaties is most easily recognisable in the sphere of human rights.[279] What is central in that idea, is that the obligations undertaken by States in human rights treaties are not subjective but objective, which influences significantly how such obligations are interpreted and applied in practice.[280]

The system of international investment law is a network of thousands of different treaties. BITs, the core of that system, are often titled as agreements 'for reciprocal promotion and protection of investments'. Despite such labelling, there is little reciprocal in them. They grant foreign investors direct rights,[281] and foreign investors can rely on them regardless of their home State's behaviour.[282] What might be qualified as reciprocal in BITs is the mutual liberalisation of the conditions for investing, prospectively leading to growing investment exchange,[283] although even in that respect BITs have traditionally been seen as reflecting economic inequality among States, serving one-way investment flows.[284] As far as investors are concerned, attaching their

---

has been mainly indebted in the course of its development to the agreement or contract of private law').

278 See generally Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements' (2007) 77 British Yrbk Int'l L 163; see particularly ibid 170 ('Reciprocity is not the glue that holds a rights regime together; the glue that holds a rights regime together is shared commitment to moral principle.'). On the related effects on State consent in the law of treaties, see generally Vassilis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Edward Elgar 2017).

279 Brilmayer (n 278) 168–72.

280 *Austria v Italy* App No 788/60 (ECmHR, 11 January 1961) 19 ('the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves').

281 Douglas, *Claims* (n 197) 32–8.

282 ibid 17–9. But see, for a proposal of restructuring investment treaties enabling more influence of the home State on investment claims, Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 Harvard Int'l LJ 353.

283 Which is often stated in BIT preambles. See, for example, UK Model BIT (2008) pmbl <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2847> accessed 17 April 2019 ('Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;').

284 It is often recalled that BITs were invented by developed countries in order to protect their investments in developing countries. See Vandevelde, 'Brief History' (n 233) 168–75. See also Armand de Mestral, 'Investor-State Arbitration between Developed Democratic Countries' in

rights to the subjective rights of States would contradict the whole purpose of depoliticizing and internationalising investment protection and investor-State disputes.[285]

Accordingly, investment law is often compared to human rights law.[286] Despite the lack of 'humanity' as its core ideal, the parallel is well founded. Both regimes are founded on inter-State agreements granting direct rights to private parties. The rights granted can also be to some extent similar: the protection from expropriation and the standard of fair and equitable treatment can be compared to the rights to property, fair trial, and non-discrimination.[287] Both regimes empower international adjudicators to review State conduct possibly violating such rights.[288] And both provide specific secondary rules of State responsibility in case of violation.[289] Some procedural differences that can be found among the two regimes, such as the exhaustion of local remedies and the publicity of judgments/awards, are not decisive for this analogy, because they rather appear as technicalities that can be implemented differently in both regimes.[290] After all, human

---

Armand de Mestral (ed), *Second Thoughts: Investor-State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017) 29–30.

285 However, Roberts argues that the depoliticization of investment disputes does not necessarily imply granting investors *absolute* rights to the exclusion of all powers of States parties to investment treaties over such disputes. Roberts, 'Triangular Treaties' (n 282) 388–95.

286 José Enrique Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 Recueil des Cours 193, 234–46; Wälde, 'Specific Nature' (n 247) 60.

287 See Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 20 March 1952, entered into force 18 May 1954) 213 UNTS 262, art 1. Cf ECHR (n 32) arts 6, 14; with *The Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003) para 123. See also *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) paras 141–4 (discussing the practice of the ECtHR).

288 De Brabandere (n 5) 27–9. But see, on the question whether the conduct must be 'sovereign', *Ambiente Ufficio SpA and others v The Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 543–51.

289 Commentary to art 33, para 4 in ILC, 'Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission 2001*, vol II (Part Two) (UN 2007) 95.

290 The exhaustion of domestic remedies can also be required in investment arbitration, while in comparison some human rights courts do not require local remedies to be exhausted prior to initiating proceedings. Cf ICSID Convention (n 210) art 26; with *Essien v The Gambia* ECW/CCJ/APP/05/05 (ECOWAS Court of Justice, 14 March 2007) paras 20–8. Although consent of the parties is required for publishing awards, it is a commonplace that most of them are today public, which is followed by further efforts to improve the transparency of investor-State arbitration. See ICSID Convention (n 210) art 48(5); United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (signed 10 December 2014, entered into force 18 October 2017). In comparison, human rights courts can also restrict the publicity of their cases: ECtHR, Rules of Court (in force 14 November 2016) art 33(2).

rights and the protection of foreign investors share common roots, which can be found in the old standards of the protection of aliens.[291]

Dispute settlement mechanisms, which offer remedies to the beneficiaries of such treaties, are crucial elements of protective regimes. They secure the enforceability of the granted rights, which some would argue makes them meaningful.[292] The environment of protective regimes and their 'objectiveness' (in terms of the pursued aims) possibly affect the work of judges and arbitrators. First, the perception of a regime as protective can make room for judicial development of the doctrines that affect significantly the interpretation and application of the basic (written) law. For example, the ECtHR has the 'living instrument' doctrine, which instructs that the ECHR should be interpreted in accordance with the contemporary circumstances.[293] Second, because such protective regimes are 'one-sided', insofar that they grant rights to a class of beneficiaries which can bring claims against States for violation of those rights, but not *vice versa,* there are suspicions that adjudicators can be inclined to side with those beneficiaries in their interpretations of the law.[294] Investment arbitration is particularly criticised for its systemic one-sidedness,[295] but it is important to note that the 'siding problem' is not peculiar to that field of international law.[296] In addition, some authors argue that investment arbitration is troubled by a professional bias of arbitrators, which can increase their siding potential.[297]

---

291 Alvarez, 'Regime' (n 286) 238–40. This does not mean that the two branches of international law have remained closely connected. To the contrary, their separation is striking, which can be seen even in the complete separation of their 'communities': Moshe Hirsch, 'Investment Tribunals and Human Rights Treaties: A Sociological Perspective' in Freya Baetens (ed), *Investment Law within International Law. Integrationist Perspectives* (CUP 2013) 85.

292 Kelsen, *Principles* (n 191) 140, 143–44; Wälde, 'Specific Nature' (n 247) 56; Sergio Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration' (2014) 35 Univ Penn J Int'l L 829.

293 *Tyrer v The United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) para 31; *Loizidou* (n 124) para 72.

294 This is a consequence of the type of the dispute resolution setting, where the interests of treaty parties are not apparent or directly involved in concrete disputes. Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 184; Alex Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 JIEL 469, 490.

295 Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18 JWIT 343. Cf Wälde, 'Specific Nature' (n 247) 54–7 (rebutting one-sidedness, because '[g]overnments can at any time apply national law to the investor's operation located in their country', which is compensated by the international protection).

296 The 'expansionist problem', which in asymmetrical systems usually resembles favouring claimants, can be linked to the disappearance of States' 'gatekeeping functions' in transnational dispute resolution. See Keohane, Moravcsik and Slaughter (n 207) 459.

297 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 172–3.

I will turn to the practical effects of these concerns in Chapter 6, when analysing the practice of jurisdictional determinations. At this point, from the structural point of view, it should be said that the principle of consensualism cannot be isolated from this environment. If the development of protecting regimes has introduced a new way of thinking about international law, that principle has certainly been affected by this stream: insofar that it is believed that treaty jurisdictional rules should be interpreted so as to serve better the protection of the beneficiaries (investors), and that State consent should be interpreted in such a way to achieve that effect.

C. A Hybrid Regime: Global Administrative Law and Commercial Arbitration Approaches

Apart from the ICSID, whose private origins I have challenged above, it is undeniable that investment arbitration often employs private or commercial law dispute settlement mechanisms, such as those provided by the International Chamber of Commerce ('ICC') and the Stockholm Chamber of Commerce ('SCC'), or the UNCITRAL arbitration rules. In addition, it is often commented that the investment arbitration community is dominated by commercial lawyers, and that arbitral practice is mastered by commercial law approaches to dispute resolution.[298] So far, I discussed the sphere of investment arbitration from the point of view of pure public international law and its framework for the settlement of disputes. But the connection with commercial mechanisms and approaches prompts the question whether the nature of investment arbitration is indeed clear, and whether there are any other factors that could influence the principle of consensualism.

Investment law in its entirety is often called a *hybrid*. The hybridity of investment arbitration is usually invoked due to the mixture of public and private interests or procedural elements.[299] But it seems settled now that the public features of investment arbitration are dominant, at least when it comes to the crux of the disputes to be resolved using this mechanism and the law to be applied to them, that is public international law.[300] New qualifications have emerged: investment

---

298 Wälde, 'Specific Nature' (n 247) 54; Stephan W Schill, 'W(h)Ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875, 880, 888. Contextually, this is not surprising, given that investment arbitration shares some structural similarities with commercial arbitration. See Won L Kidane, *The Culture of International Arbitration* (OUP 2017) 176 (concluding that commercial and investment arbitration are the same insofar that they both suffer from 'stranger justice').

299 Douglas, 'Foundations' (n 256); Douglas, *Claims* (n 197) 6–10; Mills, 'Antinomies' (n 294) 488–98; Alex Mills, 'The Public–Private Dualities of International Investment Law and Arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 108–111; José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 JIDS 534; Guillermo J Garcia Sanchez, 'The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration' (2018) 18 Nevada LJ 489.

300 Andrea K Bjorklund, 'The Public Interest in International Investment Law' in August Reinisch, Mary E Footer and Christina Binder (eds), *International Law and... Select Proceedings of the European*

law and arbitration can be seen as part of a developing *global administrative law.*[301] Investment arbitration represents an additional layer of judicial control of governmental conduct, this time on the international level and using international standards of protection.[302] Historically, this seems a logical outcome. It should be recalled that prior to the development of the modern investment protection instruments, there existed other means of investor protection, such as internationalised contracts.[303] The introduction of treaty regimes providing for investor protection was meant to depart from that practice.[304] If the intention behind what is today the corpus of investment treaties was indeed to abandon private instruments and to establish regulatory regimes for investor protection, there is no room for adding private facet to investment arbitration, despite the involvement of private interests. Otherwise, any field of international law granting direct rights to private persons could be called a hybrid.

The hybridity that I would like to maintain here, however, concerns the practical application of commercial approaches, coupled with the employment of some commercial dispute settlement mechanisms, in investment arbitration practice. Although not part of its legal foundations, this is

---

Society of International Law (Hart 2016) 152; Stephan W Schill, 'International Investment Law and Comparative Public Law—An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 10–7; Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 Int'l & Comp LQ 371. Both Schill and van Harten correctly characterise investment arbitration as public adjudication due to the public law nature of disputes, however they maintain that this dispute settlement mechanism is not based on traditional agreements to arbitrate. The latter argument is not endorsed in this thesis. For a broader picture on the public-private divide in international law and its role in dispute settlement regimes, Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2016) 388 Recueil des Cours 49.

301 See generally Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121; Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University Public Law and Legal Theory Working Papers, Paper 146; Daniel Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 145.

302 Van Harten and Loughlin (n 301) 145–8; Van Harten, *Public Law* (n 297) 45.

303 Sornarajah, *Resistance* (n 212) 78 sq. Sornarajah maintains that internationalised contract arbitration was the predecessor of modern investment treaty arbitration. For some practical difficulties arising from subjecting contracts to public international law, see FA Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 British Yrbk Int'l L 34.

304 James Crawford, 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systematic Integration' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 19 ('The BIT phenomenon involves […] a rejection of the internationalization of contracts.').

certainly a systemic problem of investment arbitration. Indeed, the diversity of actors involved in investment arbitration practice bears the potential of creating a schizophrenic environment of approaches to the interpretation and application of investment treaties,[305] which can be seen in some practical examples.[306] For this reason, calls for more consistent public (international) law approaches are common.[307] It seems that the whole purpose of qualifying international investment law as 'global administrative' is breaking the ties to commercial arbitration and its implications for the functioning of the system.[308] In addition, one can note a process of further 'publicization' of investment law and arbitration, in both substance[309] and form,[310] which can shed a light on that system as not only concerned with monetary losses. Despite these developments, the fact remains that the investment law community encompasses commercial lawyers and arbitrators,[311] and this branch of law remains perceived by many as 'commercial',[312] which certainly affects arbitrators' decisions and reasoning.

This hybridity is another contextual issue whose effects on jurisdictional determinations will be analysed in Chapter 6. Although these considerations cannot affect the consensualism of investment treaty arbitration from a theoretical perspective, they are important in the practical interpretation and application of that principle and should be recognised as a systemic fragility. Despite the public foundations of the system, actors coming from the commercial law sphere might approach the issues of consent differently from what is usually expected under public

---

305 See Roberts, 'Clash of Paradigms' (n 87) 53–7.

306 See Thomas W Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 725 (on the confusing styles of treaty interpretation).

307 Schill, 'Introduction' (n 300) 23–35; and, more hostilely, Wälde, 'Specific Nature' (n 247) 61 ('We should therefore be ready to emancipate ourselves from the tyranny of the commercial arbitration paradigm when the specific nature and purpose of investment arbitration clearly requires so.').

308 Van Harten and Loughlin (n 301) 148 ('Rather than being viewed as an offshoot of commercial arbitration, investment arbitration should be treated as a unique, internationally-organized strand of the administrative law systems of states.').

309 For example, efforts are made to link investment arbitration and the substance of investment protection to other spheres of public international law, such as human rights and environmental law.

310 Efforts are also made to improve the procedural aspects of investment arbitration, like the transparency of the process and the independence and permanency of adjudicators (the latter particularly through the establishment of an investment court system).

311 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387, 401–2; Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 AJIL 761, 773.

312 See also Charles N Brower and Shashank P Kumar, 'Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?' (2015) 30 ICSID Rev-FILJ 35, 36 ('the real distinction today is between investomercial arbitration on the one hand, and strictly private-party arbitration on the other').

international law. The implementation of the principle of consensualism depends not only on the questions to be decided, but also of the actors in charge of such decisions.

§ 1.04. Conclusion

Consensualism is a persistent feature of international adjudication, and that is so in the first place because of the logic behind the international legal order. More importantly, the consensualism of international adjudication persists because it represents the only means of defining the authority to adjudicate. International adjudication, including investment treaty arbitration, is in its essence founded on a contractual relationship between the disputing parties (be it two States, or a State and a private person). This is so because parties inject normativity into jurisdictional frameworks of international courts and tribunals by virtue of their consent, or more precisely their intention to confer the adjudicative power to a defined extent. There are no prospects that this principle will ever change: even the suggestions that State consent to arbitration (more precisely, an offer to arbitrate) might in future reach the status of a customary rule of international law,[313] which are still at the level of theorising, and which face some practical obstacles,[314] do not exceed the classical understanding of consent (or at least the already known controversies regarding customary international law and consent). If we recall the definition of consensualism implied in the reasoning of the PCIJ, that principle pertains to the 'free will' manifested in either treaties or customs.[315] And that is precisely why the consensualism of international adjudication persists: because no conferral of the adjudicative power is possible without the intention of the disputing parties to that effect.

Contemporary developments regarding investment arbitration in particular are not capable of affecting this principle, from a strict point of view. Their contribution is contextual, however prospectively significant: they can shed a different light on the investment law regime, and thus affect the approaches in interpretation and application of investment treaties. An arbitrator seeing investment law and arbitration as a global public good, a protective regime, or from a commercial arbitration point of view, can indeed direct interpretive outcomes to the results that some would call unexpected or inappropriate from a public law or a traditional international law perspective. I will return to this issue in Chapter 6. Now, I turn to the question of the precise implications of the principle of consensualism on the structure of jurisdictional regulation in investment arbitration, which is discussed in Chapter 2, with particular attention to possible deficiencies in consent-based jurisdictional regulation, which seek arbitral supplementing action on a trajectory towards jurisdictional determinations.

---

313 Mathias Audit and Mathias Forteau, 'Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?' (2012) 29 J Int'l Arb 581.

314 Such as the requirement of an agreement in writing: ICSID Convention (n 210) art 25(1).

315 See *Lotus* case, text to n 18 above.

2

The Structure of Jurisdictional Regulation in Investment Treaty Arbitration

§ 2.01. Introduction

The jurisdiction of investment arbitral tribunals has already been a subject of extensive scholarly analyses.[1] My aim in this Chapter is not to provide a detailed overview of the jurisdictional framework of investment arbitration, but to discuss the functioning of jurisdictional regulation within that system, and to identify its possible deficiencies which require further regulatory activity on a trajectory towards proper jurisdictional determinations in concrete cases. Answers to these questions will set a background before proceeding to the analysis of the practice of investment tribunals and inquiring how tribunals have dealt with the deficiencies in jurisdictional regulation, which I will look at in Chapters 3 to 5. To draw such a background, Section 2 discusses the formation of agreements to arbitrate in investment arbitration. Section 3 discusses the substance of such agreements and the jurisdictional rules that they provide. Section 4 discusses the regime governing agreements to arbitrate, including the questions of the governing law, interpretation, jurisdictional examinations, and competences to deal with jurisdictional

---

[1] See generally, among many others, Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill 2018); Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018); Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP 2017) chs 3–6; Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012) pt III; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 235 sq; Chittharanjan F Amerasinghe, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff 2009) ch 7; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (CH Beck/Hart/Nomos 2015) 1212; Uglješa Grušić, 'The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes' (2009) 10 JWIT 69; Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 830; David AR Williams QC, 'Jurisdiction and Admissibility' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 868. See also the special issue 'Jurisdiction and Admissibility in Investment Arbitration' (2017) 16(1) LPICT.

regulatory deficiencies. I will demonstrate that despite the aspiration of the principle of consensualism to provide a comprehensive system of jurisdictional regulation, the thus defined jurisdiction of arbitral tribunals leaves many questions open, which allows room for arbitral discretion and eventually rule-making (as I will argue in Chapters 6 and 7).

§ 2.02. From Consent to an Agreement

The establishment of the authority to adjudicate in investment arbitration is, as in any other type of international adjudication, a multi-stage process.[2] It involves the formation of a jurisdictional bond by matching intentions (A). It can further be asked whether consent must be expressed in a particular form (B), and whether its effects are limited solely to the formation of an agreement to arbitrate or have broader implications in the sphere of substantive investor rights (C). Of course, jurisdictional bonds can also be created by virtue of direct agreements between investors and States, however as this is typical for contractual disputes, it is not in the focus of this thesis.

A. Offer, Acceptance, Agreement

Following the contractual nature of international jurisdiction, a jurisdictional bond in investment arbitration is formed by two expressions of consent, usually by virtue of an offer to arbitrate made by a State (i) and its acceptance by an investor (ii), which together form an agreement to arbitrate an investment dispute (iii).

i. *The Functioning of the Offer to Arbitrate*

As I discussed in Chapter 1, the offer-acceptance theory in the establishment of jurisdiction of investment tribunals has been recognised from the field's beginning, which was nothing surprising in international law.[3] Arbitral tribunals have reaffirmed this theory in practice. The first tribunal to base its jurisdiction on an offer to arbitrate made by a State to investors in a BIT did not say much about the theory because it did not present a controversy.[4] Other tribunals, however, elaborated on the issue. For example, the Tribunal in the *Millicom v Senegal* case stated:

> The Arbitral Tribunal does not see why it would be necessary, as the Respondent asserts […], to adopt a two-step procedure pursuant to which, before submitting a request, the party intending to act would have to request authorization from the Contracting State which it would have no right to refuse, unless otherwise specifically stated. It is more reasonable to view this [the jurisdictional clause in the relevant BIT] as a unilateral offer and a commitment by Senegal to submit itself to ICSID jurisdiction;[5]

---

2 See Chapter 1, Section 2.B.iii.

3 See Chapter 1, Section 3.A.iii.

4 See *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990).

5 *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal*, ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) para 63. See also,

An offer to arbitrate can be made by various means, including national legislation,[6] BITs, and MITs, which are today generally uncontroversial.[7] What can be controversial is the wording of a particular clause. Following the general understanding in public international law that consent pertains to the intention of a party to submit to international adjudication, such an intention must be evident in the relevant clause.[8] One can distinguish between clauses which express consent to arbitration, on the one hand, and clauses which make only a promise of future consent, on the other.[9] Furthermore, some clauses merely mention the option of concluding a special agreement between an investor and his host State to submit their dispute to arbitration.[10] Textual analysis is central in the inquiry whether a clause expresses the intention to accept arbitration of investment disputes.[11]

---

among many others, *American Manufacturing & Trading Inc v Republic of Zaire,* ICSID Case No ARB/93/1, Award (21 February 1997) paras 5.19-20; *Lanco International Inc v The Argentine Republic,* Preliminary Decision on Jurisdiction of the Arbitral Tribunal (8 December 1998) para 44; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic,* ICSID Case No ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004) para 73; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic and BP America Production Company and others v The Argentine Republic,* ICSID Cases Nos ARB/03/13 and ARB/04/8, Decision on Preliminary Objections (27 July 2006) para 33.

6 This means of offering was recognised before BIT clauses, particularly in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt,* ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction (14 April 1988).

7 See generally Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 196–217; Schreuer, 'Consent to Arbitration' (n 1) 831; Dolzer and Schreuer (n 1) 254; Steingruber, *Consent* (n 1) 196–7.

8 See Chapter 1, Section 2.A.i.

9 Aron Broches, 'Bilateral Investment Protection Treaties and Arbitration of Investment Disputes' in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 449–51; Schreuer and others (n 7) 206–9; Dolzer and Schreuer (n 1) 258; Steingruber, *Consent* (n 1) 202–5 (all regarding BIT clauses).

10 Broches (n 9) 449 (regarding BIT clauses); Schreuer and others (n 7) 200–2 (regarding host State legislation); ibid 209 (regarding BIT clauses); Dolzer and Schreuer (n 1) 256 (regarding host State legislation); Steingruber, *Consent* (n 1) 205 (regarding BIT clauses). In addition, the same authors have identified as a special group treaties that oblige States to 'give sympathetic consideration' to investors' requests to settle disputes in arbitration.

11 Cf *Churchill Mining Plc v Republic of Indonesia,* ICSID Case No ARB/12/14, Decision on Jurisdiction (24 February 2014) paras 154–239 (finding that a treaty clause which provided that the State 'shall assent' to arbitration established advance consent); with *Planet Mining Pty Ltd v Republic of Indonesia,* ICSID Case No 12/40, Decision on Jurisdiction (24 February 2014) paras 152–98 (finding that a clause which provided that the State 'shall consent in writing [to arbitration …] within forty-five days of receiving such a request from the investor' did not establish advance consent).

Offers to arbitrate are steps taken by States to initiate the establishment of jurisdictional relationships with investors. They set the terms of possible jurisdictional relationships, such as the scope of justiciable disputes, conditions of access, the use of the ICSID's auspices etc. However, offers themselves do not constitute jurisdictional bonds, and therefore do not amount to a proper jurisdictional regulation. Their central value is the expression of consent of one of the disputing parties.

ii. *The Functioning of the Acceptance*

For the establishment of a jurisdictional relationship there needs to be consent of all the disputing parties. It is now generally accepted that investors can accept offers to arbitrate made by States in legislation or treaties by initiating arbitrations.[12] By doing so, an investor expresses his own consent and perfects an arbitration agreement with the offering State. As the Tribunal in the *Generation Ukraine v Ukraine* put it:

> […] it is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State;[13]

By perfecting an arbitration agreement, an investor establishes a jurisdictional relationship with the State and determines the precise scope of the justiciable disputes. It seems equally possible, however, that an investor accepts an offer to arbitrate in advance,[14] which commentators advise to avoid the risk of the withdrawal of an offer.[15] The risk for investors is obvious: a host State could repeal investment legislation or terminate a treaty which contains an offer to arbitrate, and thus eliminate the access to international arbitration. The case of treaties is less probable to

---

12 Schreuer and others (n 7) 202–5, 211–4; Schreuer, 'Consent to Arbitration' (n 1) 834, 836–7; Dolzer and Schreuer (n 1) 256–60; Steingruber, *Consent* (n 1) 200–1, 206–7.

13 *Generation Ukraine Inc v Ukraine,* ICSID Case No ARB/00/9, Award (16 September 2003) para 12.2.

14 *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary,* ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006) para 363 (where claimants consented to arbitration by a separate letter sent before initiating arbitration); Luke Eric Peterson, 'Venezuela Sees a New BIT Claim – By Another Oil Services Provider That Suffered Expropriation in 2009' (*Investment Arbitration Reporter*, 20 December 2016) <https://www.iareporter.com/articles/venezuela-sees-a-new-bit-claim/> accessed 15 October 2018 (reporting an arbitration initiated in 2016, where the claimant 'appear[ed] to have accepted the ICSID arbitration offer contained in the Barbados-Venezuela BIT several years ago, in advance of the taking effect of Venezuela's denunciation of the ICSID Convention').

15 Broches (n 9) 453; Schreuer and others (n 7) 213; Schreuer, 'Consent to Arbitration' (n 1) 834, 837.

face such scenarios, because the host State is in a treaty relation with the investor's home State.[16] However, a jurisdictional clause in an investment treaty lacks full normativity and becomes binding towards an investor only after his acceptance of the offer. While this question is certainly problematic from the perspective of investor protection,[17] it does not raise difficulties as regards the functioning of jurisdictional regulation: in any event the fact remains that jurisdictional regulation is complete only upon the establishment of an agreement between the State and the investor. The acceptance made by an investor determines the definite scope of the justiciable disputes, which however, by simple logic, can be only narrower than or up to the extent defined in the offer.[18] Otherwise, the investor would make a counteroffer, which would require acceptance from the respondent State.[19]

A jurisdictional link must exist at the time of submission of a dispute for adjudication, at least within the ICSID system.[20] The moment when a jurisdictional link comes into being is when both disputing parties have expressed their consent to a sufficient degree (in multiple steps, as I discussed in Chapter 1)[21] to evidence the existence of such a link, which is known as the 'time of

---

16 The stability of investment treaties, as the case is with all other treaties, is secured by a sort of a tension between States parties, whereby they owe obligations to each other, and each State is interested in maintaining the obligations of its counterparts. Treaties can be terminated or withdrawn from under specific rules only: Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') pt V, sec 3.

17 See Steingruber, *Consent* (n 1) 222–3 (discussing three normative proposals in favour of the irrevocability of offers to arbitrate: investors' reliance on the irrevocability of consent, investor consent by implication, and arbitration agreements as unilateral contracts).

18 Schreuer and others (n 7) 203.

19 It is often insisted that acceptances can be only narrower than offers to arbitrate, but it seems possible for a State to accept an extended jurisdiction in a particular arbitration when such extension is requested by an investor. See Section 2.B below. The notion of counteroffer is often inspired by private law sources, which despite good illustration, cannot have heavier value than analogies. See, for example, Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013) 136.

20 Due to the 'screening' process; see Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') art 36(3); and 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965' (1993) 1 ICSID Reports 23, para 24. Other arbitration frameworks might be more flexible in this respect: n 44 below. See also *Tradex Hellas SA (Greece) v Republic of Albania,* ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996) 29 ('both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim').

21 See Chapter 1, Section 2.B.iii.

consent'.[22] The time of consent is the moment when the consensual jurisdictional regulation is supposedly complete.

iii. *Contract, Agreement, or a Unilateral Act?*

The Court of Appeal of England and Wales ('EWCA') once held that 'the agreement to arbitrate which results by following the Treaty route is not itself a treaty' but 'an agreement between a private investor on the one side and the relevant State on the other'.[23] Although not drawing any conclusions, the Court noted that an arbitration agreement could be governed by international law, simply because 'it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction'.[24] Several scholars have qualified investor-State arbitration agreements as contracts.[25] Besides the question of the governing law, to which I will come back in Section 4 below, these terminological differences do not raise any issues because they essentially refer to the very same phenomenon, namely the overlapping consent and shared intentions of the disputing parties.

On the other hand, some scholars see State consent to investment arbitration as a unilateral obligation under international law. They argue that State consent is a standing obligation which does not require any action on the part of investors to become truly binding.[26] I argued in Chapter

---

22 Schreuer and others (n 7) 217–9; Schreuer, 'Consent to Arbitration' (n 1) 855–6. See also *Tradex Hellas SA (Greece) v Albania* (n 20) 29 (request for arbitration unable to accept offer to arbitrate because it was filed before the entry into force of the BIT); and *Generation Ukraine Inc v Ukraine* (n 13) para 12.6 ('Ukraine's consent to ICSID arbitration in Article VI(3) of the BIT was naturally conditional upon a future event, *viz.* Ukraine's ratification of the ICSID Convention.').

23 *Occidental Exploration & Production Company v The Republic of Ecuador* [2005] EWCA Civ 1116 [33].

24 ibid.

25 James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int'l 351, 361; Steingruber, *Consent* (n 1) 81–2; Andrea Marco Steingruber, 'Some Remarks on Veijo Heiskanen's Note "Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration"' (2014) 29 ICSID Rev-FILJ 675, 689; Charles N Brower and Shashank P Kumar, 'Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?' (2015) 30 ICSID Rev-FILJ 35, 44.

26 Michael D Nolan and Frédéric G Sourgens, 'Limits of Consent – Arbitration Without Privity and Beyond' in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010) 873; Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 Arb Int'l 129; David D Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 653–5; Veijo Heiskanen, 'Comment on Andrea Marco Steingruber's Remarks on Veijo Heiskanen's Note "Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration"' (2014) 29 ICSID Rev-FILJ 669, 671–2.

1 that international adjudication in general, investment treaty arbitration included, has essentially contractual foundations, meaning that the authority to adjudicate is always vested on a tribunal by virtue of the disputing parties' mutual consent.[27] Arguments about State consent as a unilateral obligation can be made with clear policy objectives,[28] but they contradict the prevailing understanding in arbitral practice,[29] and fail to explain the basic features of the conferral of the power to adjudicate in international law.[30] Most importantly, these arguments ignore the fact that jurisdiction of any international tribunal cannot be established unilaterally, involving action on the part of only one actor, but at least bilaterally. Only after the match of two intentions to accept the jurisdiction of an international tribunal, can offers to arbitrate become binding because only after that moment they cannot be withdrawn.[31] Needless to say that thus established jurisdiction becomes binding on both the State and the investor.

The EWCA was indeed correct. Of course, an arbitration agreement between a State and an investor is not a treaty, because it does not qualify as treaties are defined in international law today.[32] But treaties are not the one and only kind of agreements in international law.[33] What is crucial in qualifying something as an agreement are the shared intentions of two parties and their mutual consent. That is the essence of every agreement.[34] Although without much normative value, in order to avoid confusion, investor-State jurisdictional bonds established by an offer and an acceptance are probably best defined as agreements under public international law (as opposed

---

27 See Chapter 1, Section 2.B.iv.

28 For example, Andreeva relies on State consent as unilateral act in order to argue in favour of restrictive approaches to its interpretation: Andreeva (n 26) 137–46.

29 See n 5 and 13 above.

30 Thus, the unilateral act theory cannot explain the concept of reciprocity in the establishment of jurisdiction, which observes consent of two parties only to the extent of their overlap and therefore only their shared intentions. This is the antonym of any unilateral commitment.

31 Schreuer and others (n 7) 254–6. See also *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) paras 333–5.

32 VCLT (n 16) art 2(1)(a); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (signed 21 March 1986, not in force) 25 ILM 543, art 2(1)(a) (these conventions define treaties as instruments between States and/or international organisations).

33 See Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 19–25 (on the exclusion of agreements with non-State entities and persons [like individuals and private organisations, churches, and sub-State units] from the scope of the VCLT).

34 See generally Kelvin Widdows, 'What Is an Agreement in International Law?' (1980) 50 British Yrbk Int'l L 117 (discussing the parties' intentions as the crucial element in the establishment of binding commitments).

to treaties, which are concluded between States and international organisations, and contracts, which are governed by domestic laws).[35]

B. The Form of an Agreement to Arbitrate

Earlier scholarly writings saw the necessity of special agreements between States and investors to bring disputes to international arbitration.[36] This suggestion has been rebutted by a quick recognition of the offer-acceptance theory, which follows the general understanding that conferrals of international jurisdiction need not be made in a single document or other specific form.[37] What is important, however, is that offers and acceptances (ie consent) must be expressed in writing. The ICSID Convention requires this explicitly,[38] however that requirement should not be viewed as a specificity of the ICSID system. Oral establishment of jurisdiction from scratch is hardly imaginable in respect of any international court or tribunal.[39]

An open question is the possibility of establishing jurisdiction by conduct or acquiescence. Filing a request for arbitration accepting an offer to arbitrate expressed in a BIT or investment legislation is in itself an expression of consent by conduct,[40] although technically it satisfies the requirement of consent in writing.[41] The functioning of *forum prorogatum* is more difficult. Some scholars argue that *forum prorogatum* is not applicable in international arbitrations generally, including the ICSID framework.[42] Indeed, the ICSID system does not allow investors to initiate arbitrations without any prior expression of consent on the part of the respondent State, which is the case because of the 'screening' of requests by its Secretary-General.[43] Other arbitration

---

35 Schreuer and others (n 7) 249. See further Section 4.A below.

36 For example, M Sornarajah, *The International Law on Foreign Investment* (CUP 1994) 267.

37 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) (1978) ICJ Rep 3, para 96; *Maritime Delimitation and Territorial Questions (Qatar/Bahrain)* (Jurisdiction and Admissibility) (1994) ICJ Rep 112, para 23.

38 ICSID Convention (n 20) art 25(1) ('The jurisdiction of the Centre shall extend to any legal dispute […] which the parties to the dispute consent in writing to submit to the Centre.').

39 While some steps in the multi-stage process of creation of the authority to adjudicate could perhaps be taken orally, probably in connection to implied consent by conduct or acquiescence, the most important such steps are usually taken in written instruments, like treaties, declarations, written submissions etc. See Chapter 1, Section 2.B.iii. A major difficulty concerns the evidence of oral consent.

40 *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) para 46 ('A request for arbitration is by its very nature a consent to arbitrate because a legal proceeding cannot be requested by a party without their own participation in the proceeding. To request legal process is to submit to this process.').

41 Schreuer and others (n 7) 211–2.

42 Chittharanjan F Amerasinghe, *International Arbitral Jurisdiction* (Brill 2011) 51–3.

43 A Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Columbia J Transnat'l L 263, 273. See further Section 4.C.i below.

mechanisms might be more open to this option.[44] Regardless of the institutional framework, *forum prorogatum* could be relevant when it comes to extensions or modifications of the already existing jurisdictional relationships, for example in the case of counterclaims.[45]

Furthermore, the establishment of jurisdiction by acquiescence is possible through another route. For example, jurisdictional agreements may provide ambiguous jurisdictional rules, which are fertile for the arguments that the scope of the tribunal's substantive jurisdiction is limited. By not raising any jurisdictional objections, the respondent can factually extend jurisdiction, despite the possibility that an objection could lead to its restriction.[46] This scenario is more delicate, as it clashes with the tribunals' power or duty to raise jurisdictional questions on their own initiative, which I will examine shortly.[47] In any event, considering that both parties and arbitrators can value jurisdictional issues differently, it is possible that at least on some occasions arbitrators defer to parties' decision not to raise jurisdictional objections.[48] Furthermore, some scholars have tried to distinguish between 'procedural' and 'jurisdictional' limits of consent on the ground that

---

44 Other arbitration frameworks allow the conclusion of arbitration agreements by virtue of lacking jurisdictional objections. W Laurence Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd ed, Oceana 2000) 21 (regarding the ICC framework); Kaj Hobér, *International Commercial Arbitration in Sweden* (OUP 2011) 96 (regarding the Swedish law, which is applicable to arbitrations under the SCC's auspices).

45 See, for example, *Perenco Ecuador Limited v The Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Perenco's Application for Dismissal of Ecuador's Counterclaims (18 August 2017) paras 35, 43–4.

46 Schreuer and others (n 7) 221–5. This issue relates to another two questions. The first one is the timing when the respondent is supposed to raise jurisdictional objections. See ICSID Rules of Procedure for Arbitration Proceedings (in force 10 April 2006) ('ICSID Arbitration Rules') art 41(1) ('Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible.'). The other question concerns the clarity of the respondent's intention not to raise jurisdictional objections. This is a factual question, which probably requires explicit consent or direct pleading on the merits, because a delay in raising jurisdictional objections cannot imply consent: Schreuer and others (n 7) 222, 225, 527–8. See also, for consent by acquiescence in general international law, Jack Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2015) 86 British Yrbk Int'l L 155.

47 See Section 4.C.ii below. Wass suggests resolving this conflict by observing whether the jurisdictional requirement at stake relates to party interests only, or to non-party interests. He notes that in the ICSID arbitration context this criterion would normally give priority to the possibility of acquiescence: Wass (n 46) 191–4.

48 For some examples in the case law, see Schreuer and others (n 7) 528–30. Schreuer distinguishes between jurisdictional issues that can be disposed by not raising objections, and the objective requirements of the ICSID Convention, which, according to him, cannot. However, as evidenced by some examples discussed by Schreuer himself, that distinction is debatable.

the former can be cured by procedural conduct, whereas the latter cannot.[49] However, since the precise limit between the two categories is uncertain,[50] and because extensions of jurisdiction by acquiescence surely occasionally concern the questions of substantive jurisdiction, such a sharp distinction does not seem appropriate.

In sum, investment arbitration largely follows the prevailing approach of general public international law, which favours written conferrals of jurisdiction, although without the need for a single document or any other specific written form. That does not mean that consent cannot be expressed in any other way: a jurisdictional relationship must be at least initiated in writing, but its later development can be formed by party conduct or acquiescence.

C. A New Cause of Action?

It is a commonplace that jurisdictional bonds in international law are established separately from substantive rights and obligations.[51] Although many arguments can be made that substantive rights and obligations are meaningless without the possibility of their enforcement in a judicial process,[52] so far international law does not support linking 'substantive' and 'procedural' rules at least in the context of jurisdiction.[53]

---

49 Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 141, 152 (differentiating between jurisdiction on the one hand, and admissibility and seisin on the other); Steingruber, 'Remarks' (n 25) 681–2, 684, 687 (arguing that objections to admissibility and conditions of consent should not be examined by tribunals on their own initiative, unlike the terms defining the scope of jurisdiction).

50 See Chapter 3, Section 2.

51 The ICJ relies on this distinction in its practice: *East Timor (Portugal v Australia)* (Judgment) (1995) ICJ Rep 90, para 29; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, paras 64, 67 (substantive rules cannot establish consent to jurisdiction). See also *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011) paras 45, 53 (the distinction between substantive rights and jurisdictional relationships in the context of investment arbitration).

52 See, for example, Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 140, 143–44 (arguing that '[i]f "rights" are to be conferred on individuals by an international agreement, the latter must impose upon the states parties to the agreement the obligation to recognize the jurisdiction of a tribunal to which the individuals have access in case of a violation of the rights on the part of the state, as well as the obligation to comply with the decision of the tribunal', and that '[w]ithout subjecting the state to the jurisdiction of a tribunal, no "rights" of individuals in relation to the state are established').

53 This remains true even in regard to the most important substantive norms of international law, like *jus cogens*: *Armed Activities on the Territory of the Congo* (n 51) para 69 ('no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention'). See further Stefan Talmon, 'Jus Cogens after Germany v. Italy:

A question can be raised, however, whether a jurisdictional relationship between an investor and a State is only that—a jurisdictional relationship—or it can also produce effects beyond, into the sphere of substantive rights and obligations. The question is important because it inquires whether the formation of the authority to adjudicate regulates jurisdictional relationships only or affects investor rights and State obligations as well. A straightforward answer in favour of the broader effect is unlikely, but investors have made arguments aiming to achieve that effect at least indirectly. Occasionally, by virtue of their sovereign power, States manage to frustrate the operation of the international judiciary. For example, the Member States of the Southern African Development Community ('SADC') gradually dissolved the SADC Tribunal between 2010 and 2012.[54] Investors whose investment claims were pending before the SADC Tribunal have thus been deprived of the forum capable of adjudicating their claims, which they alleged constituted a separate breach of the investment protection rights existing within this organisation, and started a separate arbitration to rule on that question.[55] The arbitral Tribunal found that the dissolution of the SADC Tribunal amounted, *inter alia*, to a breach of fair and equitable treatment.[56] But the High Court of Singapore ('SGHC'), before which the award was later challenged, ruled that the right to access the SADC Tribunal did not constitute an investment and that therefore the arbitral Tribunal did not have jurisdiction to discuss the treatment of the investors in the first place.[57] Furthermore, States can attempt to frustrate the prospect of arbitration or its operation using State machinery within their domestic jurisdictions.[58] This is sometimes alleged to violate investor

---

Substantive and Procedural Rules Distinguished' (2012) 25 Leiden JIL 979. Talmon confirms the separation between substantive and procedural rules and excludes the possibility of their overriding, but identifies the potential of substantive *jus cogens* rules to have a limited effect on the interpretation of procedural rules. Talmon defines 'procedural rules' broadly, and it is questionable whether the rules governing the invocation of State responsibility, on which he argues substantive *jus cogens* rules can have a limited effect, truly qualify as 'procedural'.

54 See, for this development, *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others* [2017] SGHC 195 [33–7].

55 This arbitration remains confidential, but some information is available online. See Luke Eric Peterson, 'Investigation: Lesotho Is Held Liable for Investment Treaty Breach Arising out of Its Role in Hobbling a Regional Tribunal That Had Been Hearing Expropriation Case' (*Investment Arbitration Reporter*, 14 July 2016) <https://www.iareporter.com/articles/investigation-lesotho-is-held-liable-for-investment-treaty-breach-arising-out-of-its-role-in-hobbling-a-regional-tribunal-that-had-been-hearing-expropriation-case/> accessed 10 October 2018.

56 *Lesotho v Swissbourgh Diamond Mines* (n 54) [45(d)].

57 ibid [194–228].

58 These scenarios are more common in relation to commercial arbitrations; however, it is equally possible that a State attempts to affect the operation of an investment arbitration using its sovereign powers. For a failed State attempt to stop a pending investment arbitration through its own domestic courts, see *Union of India v Vodafone Group plc United Kingdom & ANR* [2017] Delhi HC CS(OS) 383/2017 (restraining the Claimants from initiating or continuing arbitration); *Union of India v*

rights, and if successful, investors manage to convince tribunals that the protected object in such scenarios is the access to arbitration or its product.[59] These examples raise a valid question whether an investor-State jurisdictional relationship in fact produces substantive law effects and provides a new cause of action in the case of frustration of adjudication.

However, what is an issue in these situations is not the effect of procedural relationships into the substantive sphere, but an increasing overlap of international substantive obligations that now can cover various types of State conduct. Of course, the access to international arbitration does not constitute a right as such. Substantive rights remain the same, like fair and equitable treatment. Claims brought to arbitrations and rights and obligations established in arbitral awards can only be parts of the original investments.[60] For that reason, the SGHC made a cardinal error in examining whether the right to access the SADC Tribunal constituted an investment;[61] the actual issue was whether the claims pending before that court continued the original investment,

---

Vodafone Group plc United Kingdom & ANR [2018] Delhi HC CS(OS) 383/2017 & IA No 9460/2017 (vacating the previous order). For examples of attempts to frustrate commercial arbitrations, which later resulted in investment claims, see *ATA Construction Industrial and Trading Company v The Hashemite Kingdom of Jordan,* ICSID Case No ARB/08/2, Award (18 May 2010) para 116; *Saipem SpA v People's Republic of Bangladesh,* ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) paras 18–36.

59 *ATA Construction Industrial and Trading Company v Jordan* (n 58) para 117 ('the right to arbitration is a distinct "investment" within the meaning of the BIT').

60 *White Industries Australia Limited v The Republic of India,* ad hoc UNCITRAL arbitration, Final Award (30 November 2011) para 7.6.10; *Frontier Petroleum Services Ltd v The Czech Republic,* UNCITRAL arbitration, Final Award (12 November 2010) para 231; *Saipem SpA v Bangladesh* (n 58) para 127. This is in accordance with the view that claims continue the original investment: *Mondev International Ltd v United States of America,* ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 80 ('a person remains an investor […] even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation'). See also *ATA Construction Industrial and Trading Company v Jordan* (n 58) para 115 (noting that 'measured by the standards in *Saipem*, the Final Award at issue in the present arbitration would be part of an "entire operation" that qualifies as an investment', although this argument was not successful because of the issues of temporal jurisdiction).

61 Cf *Lesotho v Swissbourgh Diamond Mines* (n 54) [182] ('the alleged investment is not the defendants' claim to compensation *per se*, but rather a *right* to claim for compensation before the SADC Tribunal for the expropriation' [emphasis in the original]); with ibid [184] ('The majority [of the arbitrators] took the view that "a legal claim arising out of an investment" constituted a "[claim] to money or to any performance under contract having a financial value" within the definition of "investment". Such a legal claim continued the investment until the claim was "finally resolved" […]'). The appellate court accepted that claims could continue investments, but with no effect due to the lack of a territorial link with the host State: *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2018] SGCA 81 [171–5].

and whether that investment was mistreated by the forced shuttering of the SADC Tribunal. In other words, jurisdictional relationships appear only as another sphere which could be affected (albeit indirectly) by State sovereign conduct, but in themselves they do not grant additional substantive rights to foreign investors. It is notable that in the past the functioning of jurisdictional clauses in BITs has been imagined differently: they did not make, it has been suggested, an offer to arbitrate to investors, but constituted substantive guarantees to home States that host States will engage in arbitrations with foreign investors where such an obligation exists in a contract.[62] However, as seen above, that suggestion was proved wrong.

§ 2.03. Jurisdictional Regulation: The Substance of Agreements to Arbitrate

Arbitration agreements define the authority to adjudicate of arbitral tribunals. I will discuss the parameters used to regulate the authority of tribunals in two aspects: the parameters which define justiciable disputes (A), and the parameters which define the conditions of bringing a dispute to adjudication (B). I will pay a special attention to the issues which they usually fail to regulate.

A. Defining Justiciable Disputes

Agreements to arbitrate regulate the substantive jurisdiction of tribunals by defining justiciable disputes. This can be done to different extents. The ICSID Convention requires that a dispute must be 'legal' and that it must arise 'directly out of an investment'.[63] BITs often refer only to an 'investment dispute' or simply to a 'dispute' between an investor of one Contracting State and the other Contracting State,[64] but some BITs go into more detail and define an 'investment dispute'.[65] Justiciable disputes can also be limited so as to concern particular substantive protections, like the prohibition of expropriation,[66] or the amount of compensation for expropriation.[67] However, agreements to arbitrate also fail to regulate some questions. For

---

62 Sornarajah (n 36) 267.

63 ICSID Convention (n 20) art 25(1).

64 For example, Agreement Between the Belgo-Luxembourg Economic Union, on the one hand, and the Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments (signed 4 March 2004, entered into force 12 August 2007) ('BLEU-Serbia BIT') art 11(1).

65 For example, Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (signed 19 February 2009, entered into force 1 September 2009) art 94(1) ('"investment dispute" means a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach by the former Party of any obligation under this Chapter with respect to the investor or its investment').

66 For example, Accord entre le Royaume de Belgique et le Grand-duché de Luxembourg, d'une part, et la République populaire de Pologne, d'autre part, concernant l'encouragement et la protection réciproques des investissements (signed 19 May 1987, entered into force 2 August 1991) art 9(1)(b).

67 For example, Accord entre les Gouvernements du Royaume de Belgique et du Grand-Duché de Luxembourg et le Gouvernement de l'Union des républiques socialistes soviétiques, concernant

example, in the absence of any explicit limitation, should justiciable disputes include any dispute between an investor and his host State (like contractual disputes and State counterclaims arising from domestic legislation) or only the disputes that arise under the relevant investment treaty?

Substantive jurisdiction of a tribunal is also defined by other provisions, like those defining 'investment', umbrella clauses, and (arguably) most-favoured-nation ('MFN') clauses. What is often left open are questions like whether the notion of an investment has an objective meaning that must be taken into account in conjunction with the definition in the applicable investment treaty, and whether certain criteria should be considered inherent to any definition of 'investment', even if not mentioned explicitly. Umbrella clauses leave unanswered questions such as whether tribunals would have jurisdiction over direct contractual relations between States and investors only, or including contracts concluded by State-controlled entities and affiliates of investors. Most MFN clauses do not regulate the basic question whether they are applicable to dispute settlement clauses generally, and the more nuanced issues whether they can affect and expand substantive, personal or temporal jurisdiction of tribunals.[68]

When it comes to personal jurisdiction, investment treaties and legislation, and consequently arbitration agreements, define the notion of an 'investor'.[69] The ICSID Convention has its own requirements, like the requirement of different investor nationality from the host State.[70] Equally as in previous cases, many questions in the application of these rules remain open, like whether the notion of an investor has an objective meaning, and whether State-owned companies can in certain scenarios be considered 'private' foreign investors. It must also be borne in mind that qualifying as an 'investor' is also related to having a qualified 'investment',[71] which makes the application of these definitions interconnected.

---

l'encouragement et la protection réciproques des investissements (signed 9 February 1989, entered into force 18 August 1991) art 10(1) ('[t]out differend […] relatif au montant ou au mode de paiement des indemnites dues en vertu de l'article 5'); Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Yugoslavia Concerning the Reciprocal Encouragement and Protection of Investments (signed 18 December 1995, entered into force 13 September 1996) art 9(3) ('a dispute involving the amount of compensation for expropriation').

68 But for a more recent trend in treaty drafting which excludes the application of MFN clauses to dispute resolution, see Chapter 6, Section 4.D.

69 For example, Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (signed 6 June 2005, entered into force 1 December 2009) ('BLEU-China BIT') art 1(1).

70 ICSID Convention (n 20) art 25(1)-(2).

71 For example, BLEU-China BIT (n 69) art 1(2) ('The term "investments" means every kind of asset *invested by investors* […]' [emphasis added]).

Temporal jurisdiction can be defined specifically, usually relying on the time when a dispute arises,[72] but also on the time of the relevant facts or acts.[73] However, when such a definition is not provided, temporal jurisdiction of a tribunal is defined indirectly through the rules governing the temporal validity of investment treaties and substantive investor protection guarantees which give rise to disputes.[74] Some questions remain unregulated. For example, before an agreement to arbitrate is perfected, an offer to arbitrate might cease to exist, in which case the question arises whether in any circumstances such an expired offer can still be used by investors to bring their disputes to arbitration. Some investment treaties allow States to deny their benefits to investors, including the offer to submit disputes to arbitration, however such clauses usually do not regulate some important questions like whether they can be used retroactively, after the perfection of an arbitration agreement.

The unregulated questions mentioned above have all appeared in practice. Some of them could not have been predicted, and others are hardly imaginable to be regulated explicitly. This means that new questions can be expected to continue arising. Furthermore, in parallel with the distinction between 'rules' and 'standards', whereby the latter in theory leave some flexibility and dynamics in their application,[75] it can be argued that disputing parties define only the main features of arbitral jurisdiction, while more detailed questions are left to tribunals. This argument is not valid in the present context. First, this thesis focuses on matters of jurisdiction, which require precise definitions of the authority to adjudicate, and cannot be formulated in terms of 'standards'.[76] Second, the principle of consensualism relates primarily to the issue *who* defines the authority to adjudicate. I will show in Chapters 3 to 5 that arbitral tribunals have attempted to answer the above-mentioned unregulated questions in a general manner, and I will argue in Chapters 6 and 7 that that activity amounts to law-making. If the principle of consensualism

---

72 For example, Agreement Between the Belgium-Luxembourg Economic Union and the Government of the Republic of Mozambique on the Reciprocal Promotion and Protection of Investments (signed 18 July 2006, entered into force 01 September 2009) art 12(1) ('This Agreement […] shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.').

73 See discussion in *Industria Nacional de Alimentos SA and Indalsa Perú SA v The Republic of Peru,* ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) paras 41, 94–5.

74 VCLT (n 16) art 28 (non-retroactivity of treaties). See also BLEU-Serbia BIT (n 64) art 13 ('This Agreement shall also apply to investments made before its entry into force […] and shall be applicable from the date of its entry into force.').

75 See Pierre Schlag, 'Rules and Standards' (1985) 33 UCLA L Rev 379, 400–18 (on the vices and virtues of rules and standards, although criticising the reliance on such features to draw a clear and sharp boundary between the two categories). For the sake of clarity, it should be noted that I do not distinguish between 'rules' and 'standards' as discussed by Schlag.

76 ibid 382–3 ('The paradigm example of a rule has a hard empirical trigger and a hard determinate response. […] A standard, by contrast, has a soft evaluative trigger and a soft modulated response.').

confers the entire power to regulate jurisdictional relationships to disputing parties,[77] *de facto* jurisdictional regulation by any other party would erode the principle.

B. Defining the Conditions of Access

Investment treaties and legislation, and thus arbitration agreements upon perfection, also define the conditions of access to arbitration. Conditions can be various, and equally as with definitions of substantive jurisdiction, they leave a number of questions open. For example, investors can be required to negotiate with their host States, to litigate investment disputes before domestic courts for some time,[78] or to exhaust all local remedies, before bringing a dispute to arbitration. When such conditions exist, they usually do not regulate whether in certain circumstances they can be disregarded. Investors can also be precluded from resorting to international arbitration if they have brought the dispute to domestic courts, through the so-called fork-in-the-road clauses. This latter type of clauses usually does not define the standard against which the two sets of claims and proceedings (domestic and international) should be compared in order to assess whether the clause has been triggered. Similarly, when investors are required to first resort to domestic courts, to assess whether that requirement has been complied with, arbitrators must assess the identity of the two claims and proceedings (domestic and international), for which any standard is usually lacking in the relevant arbitration agreement. When investment treaties contain MFN clauses, investors often attempt to bypass certain conditions relying on such clauses and third-party BITs which offer easier conditions of access. In this scenario, the lack of regulation of the applicability of MFN clauses to dispute resolution clauses within investment treaties becomes apparent again. There are also other uncertainties about conditions of access to arbitration, which usually cannot be answered relying on the text of arbitration agreements, like whether they limit the jurisdiction of tribunals or qualify somewhat differently, which could have implications on their firmness and practical application. Finally, it is questionable whether certain conditions of access are obvious and limit the jurisdiction of arbitral tribunals independently of the text of arbitration agreements, like those preventing investors from artificially bringing themselves under the protection of an investment treaty and benefiting from an offer to arbitrate.

§ 2.04. The Regime Governing Agreements to Arbitrate

The context in which arbitration agreements operate is not necessarily complex. It is generally understood that arbitration agreements operate within and are governed by international law (A),

---

77 See Chapter 1, Section 2.B.

78 Periods vary, usually from few months to two years: Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 LPICT 1, 3; Facundo Pérez Aznar, 'Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America' (2016) 17 JWIT 536, 540–1. But see recent Indian proposal of a five-year local litigation requirement: India Model BIT (2015) art 15(2) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560> accessed 18 April 2019.

which provides relatively clear rules of interpretation (B). Arbitration agreements are examined on multiple occasions, which gives opportunities for identifying possible regulatory deficiencies in the given jurisdictional framework and for attempts to remedy them (C). Nevertheless, the current system of investment arbitration does not confer on arbitral tribunals the power to fill gaps in jurisdictional regulation (D).

A. The Law Governing Agreements to Arbitrate

Agreements to arbitrate investment disputes between States and investors are governed by public international law. This conclusion was not obvious, though. In 1985, the EWCA in *Dallal v Bank Mellat* held that international law could not govern an arbitration agreement establishing jurisdiction of the US-Iran Claims Tribunal.[79] Key to that conclusion was that the arbitration agreement was not concluded between States but individuals, and '[i]f private law rights are to exist, they must exist as part of some municipal legal system, and public international law is not such a system'.[80] But the EWCA fell into a trap: it confused the substantive rights and obligations for the arbitration agreement and spoke about them in the same terms. It is now generally accepted, in investment law particularly but following general international law, that jurisdiction and merits are not governed by the same law.[81] Even if the link were correct, in investment law and arbitration the relevant substantive rights are not 'private' but pretty much public: these are international law guarantees of treatment of foreign investors.[82] This rebuts another presumption adopted by the EWCA, namely that international law governs inter-State relations only.

International law is not exclusive, and it is flexible enough to accommodate various actors and relationships.[83] States and private persons have at times preferred to subject their contracts

---

79 *Dallal v Bank Mellat* [1985] QB 441 (EWCA) 456.

80 ibid. See also *Serbian Loans (France v The Kingdom of the Serbs, Croats and Slovenes)* (Judgment) (1929) PCIJ Ser A—No 20, 5, 41 ('Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.').

81 Schreuer and others (n 7) 248–9; Dolzer and Schreuer (n 1) 263; Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 McGill J Disp Resol 1, 3. This reflects the general international law concept of separate legal relationships, governed by the principle of consensualism, which establish adjudicatory jurisdiction.

82 See Chapter 1, Sections 3.B.ii and 3.C.

83 This proposition is supported by another suggestion in the reverse direction: the conduct of States that can engage international law obligations is not limited to 'sovereign' acts and can equally be private or 'commercial': Commentary to art 4, para 6, and commentary to art 12, para 10, in ILC, 'Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission 2001*, vol II (Part Two) (UN 2007) 41, 56. Furthermore, States also conclude treaties under public international law which execute commercial transactions among themselves: FA Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 British Yrbk Int'l L 34, 34–41.

to international law, and that legal system provided avenues for their accommodation.[84] Still, relying on the arguably baseless assumption that international law governs relations between States exclusively, and that any relationship with private persons must be based in domestic law, some authors have gone even further. Veijo Heiskanen thus argues that State consent and investor consent to arbitration are governed by two different legal systems: international and domestic, respectively.[85] He finds some support in the *Dallal* decision, where the EWCA draws a parallel between the US-Iran Claim Tribunal and the so-called statutory arbitration.[86] What Heiskanen does not appreciate enough is that even the EWCA turned its analysis back to examining the validity of arbitral jurisdiction under international law and its voluntary and direct acceptance by private parties (ie consent) besides that of sovereigns.[87]

The later opinion of the EWCA in the *Occidental* case, that an arbitration agreement could be governed by international law, should be supported.[88] The Court even expressed reservations regarding the *Dellal* reasoning.[89] The EWCA in *Occidental* was right in relying on the nexus between the arbitration agreement and the relevant BIT.[90] Translated into the language of the contractual nature of international adjudication advocated in Chapter 1, when a jurisdictional relationship is initiated in the international legal space (by a State making an offer), it can only be perfected in the same legal space (by an investor accepting the offer).[91] And because consent primarily concerns the intention or the will of its issuer,[92] it is less relevant in what legal space consent is expressed formally, and it is more significant to what legal system the substance of consent refers to, explicitly or implicitly. For this reason, offers to arbitrate made in domestic

---

84 Mann (n 83) 43–56. Mann challenges the statement made by the PCIJ, quoted at n 80 above, arguing that the PCIJ could not have prevented the development of international law since the 1920s: ibid 47–8.

85 Veijo Heiskanen, 'Forbidding *Dépeçage*: Law Governing Investment Treaty Arbitration' (2009) 32 Suffolk Transnat'l L Rev 367; Heiskanen, 'Comment' (n 26) 672–3.

86 Heiskanen, '*Dépeçage*' (n 85) 384–5.

87 *Dallal v Bank Mellat* (n 79) 460–1.

88 *Occidental Exploration & Production Company v Ecuador* (n 23) [33]. The governance of international law over arbitration agreements must be distinguished from the references made in some jurisdictional requirements to the issues governed by domestic laws, like the legality of investment or the nationality of the investor: Schreuer, 'Jurisdiction and Applicable Law' (n 81) 4–6.

89 *Occidental Exploration & Production Company v Ecuador* (n 23) [34] ('If English law recognises the binding force of a "quasi-statutory" adjudication at the international level, it is, in our view, hard to see why it should not be possible for a State and an investor to enter into an agreement to arbitrate of the type contemplated by the present Bilateral Investment Treaty subject to international law.').

90 ibid [33]. See also Crawford (n 25) 361; McLachlan, Shore and Weiniger (n 1) 74–5.

91 See Chapter 1, Section 2.B.iv.

92 See Chapter 1, Section 2.A.i.

statutes equally produce effects in international law,[93] as do contracts regulating the jurisdiction of investment tribunals.[94] Additionally, consent to arbitrate also engages other international law concepts: it affects State immunity,[95] the exercise of diplomatic protection,[96] and the availability of other international law forums.[97]

If agreements to arbitrate are formed within and governed by international law, can domestic legal systems be relevant at least indirectly? In the ICSID context, the answer is 'no'.[98] But when it comes to non-ICSID arbitrations, Zachary Douglas argues that municipal legal systems govern arbitration agreements through setting aside procedures.[99] This contrasts with certain arbitrations against States that are governed by international law only, and that are not subject to any type of domestic judicial review.[100] In the investor-State field, the courts of the seat of arbitration indeed can review arbitration agreements in setting aside procedures.[101] The same type of review can be exercised by domestic courts in recognition and/or enforcement proceedings of foreign arbitral awards, although without invalidating them.[102] But in doing so, domestic courts apply

---

93 *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, ICSID Case No ARB/13/33, Award (5 May 2015) para 264.

94 *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) paras 35, 49–59; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd IBC v Democratic Republic of Timor-Leste*, ICSID Case No ARB/15/2, Award (22 December 2017) para 142.

95 Relating to the supervisory jurisdiction of domestic courts. See Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd ed, revised and updated, OUP 2013) 392–7.

96 ICSID Convention (n 20) art 27(1) ('No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.').

97 ibid art 26 ('Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.').

98 As a consequence of the 'denationalization' of ICSID arbitrations from national legal systems. See, for example, Dolzer and Schreuer (n 1) 278.

99 Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Yrbk Int'l L 151, 213.

100 ibid 214.

101 See UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006, art 34(2) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 14 August 2018.

102 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('New York Convention') art V.

international law.[103] Application of certain domestic policies is certainly possible, however that is a broader problem which follows the non-centralised application of international law in which domestic courts play an important role.[104] Douglas argues that the governance of international law over investment arbitrations depends on the applicability of State immunity before domestic courts, which he finds unsound due to the qualification of such arbitrations as 'commercial'.[105] But as Douglas himself notices, such qualifications originate in State choices, implicit or explicit, as jurisdictional regulators.[106] The crucial point here is that the principle of consensualism allows disputing parties to denationalize their arbitrations, and their intent to make awards reviewable before domestic courts amounts to nothing else but the application of this principle as a concept of public international law.[107] Public international law is the ultimate governing legal system. In short, the governance of public international law over arbitration agreements is established by the parties' intent to engage in that legal system.

B. The Rules of Interpretation of Agreements to Arbitrate

As international law governs arbitration agreements, the same legal system provides the rules of their interpretation.[108] However, this is also not a straightforward answer. The first issue is should

---

103 Thus, domestic courts reviewing investment awards resort regularly to the VCLT when interpreting the relevant jurisdictional provisions. See, for example, *The Republic of Ecuador v Occidental Exploration & Production Co* [2006] EWHC 345 (Comm) [90]; *The Republic of Ecuador v Occidental Exploration & Production Co* [2007] EWCA Civ 656 [25]; *Lesotho v Swissbourgh Diamond Mines* (n 54) [92–103]; *Swissbourgh Diamond Mines v Lesotho* (n 61) [60–3]; *The Russian Federation v GBI 9000 SICAV SA and others* [2016] Svea Court of Appeal T 9128-14, 4. In this regard, a distinction must be made between the scope or standard of review regulated by domestic laws, on the one hand, and the law applied to arbitration agreements in the exercise of that review, on the other. The latter remains public international law.

104 See generally Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016).

105 Douglas, 'Foundations' (n 99) 219–24.

106 ibid 220–4. The applicability of State immunity appears dependent on State consent, which confirms that agreements to arbitrate are formed within and governed by the international legal order.

107 In the ICSID context, the denationalization is effected by the stipulation in the ICSID Convention that awards will not be subject to any additional review, including that of domestic courts, and which forms part of State consent. See ICSID Convention (n 20) art 53.

108 Note that scholars usually focus on the rules governing the interpretation of treaties. See J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 13–4; Daniel Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015) 247–56; Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016) 56–60; Michael Waibel, 'International Investment Law and Treaty Interpretation' in Rainer Hofmann and Christian J Tams

the interpretation of jurisdictional provisions be approached from a particular perspective? Some tribunals have argued that to establish jurisdiction, consent must be clear and unambiguous,[109] while others have maintained that such a requirement is not founded in international law.[110] Indeed, imposing that requirement would favour States in cases of uncertainty, which would contradict a well-established opinion in international law that jurisdictional clauses should not be interpreted differently from other treaty provisions, and that there is neither a restrictive nor a liberal approach to jurisdictional interpretation.[111] This opinion has been widely accepted by investment tribunals.[112] The second question concerns what tribunals interpret: arbitration agreements or offers to arbitrate made in investment treaties/legislation? Because jurisdictional objections normally allege that the respondent State has not consented to arbitration, tribunals engage in interpretations of treaties and domestic laws which investors claim to include offers to arbitrate. This results in confusion regarding the concrete rules of interpretation of treaties, on the one hand, and domestic legislation, on the other.

When it comes to treaties, international law is clear: the rules on interpretation of treaties of the VCLT are applicable either directly as treaty rules or indirectly as customary international

---

(eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 29.

109 *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 198; *Wintershall Aktiengesellschaft v Argentine Republic,* ICSID Case No ARB/04/14, Award (8 December 2008) paras 167, 172. See also *Vladimir Berschader & Moïse Berschader v The Russian Federation,* SCC Case No 80/2004, Award (21 April 2006) paras 177, 181, 206, 208 (firstly criticising the 'clear and unambiguous' standard as a general principle in interpreting jurisdictional clauses, but then applying the same standard on the issue of MFN-dispute settlement conjunction).

110 *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic,* ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006) para 64; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic,* ICSID Case No ARB/03/19, and *AWG Group Ltd v The Argentine Republic,* UNCITRAL arbitration, Decision on Jurisdiction (3 August 2006) para 66.

111 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Separate Opinion of Judge Higgins) (1996) ICJ Rep 847, para 35.

112 For example, *Amco Asia Corp and others v The Republic of Indonesia,* ICSID Case No ARB/81/1, Award on Jurisdiction (25 September 1983) para 14(i); *Ceskoslovenska Obchodni Banka AS v Slovakia* (n 94) para 34; *El Paso Energy International Company v The Argentine Republic,* ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) paras 68–70; *Mondev International Ltd v USA* (n 60) para 43; *Austrian Airlines v The Slovak Republic,* UNCITRAL ad hoc arbitration, Final Award (9 October 2009) para 121; *Spyridon Roussalis v Romania,* ICSID Case No ARB/06/1, Award (7 December 2011) para 867.

law.[113] However, arbitral tribunals are often criticised for using the Vienna tools wrongly and/or inconsistently,[114] or for relying on other means of treaty interpretation which cannot be found in the VCLT.[115]

The other case is more complex, because offers to arbitrate made in domestic legislation are often characterised as unilateral acts of States, and thus are said to be subject to different rules of interpretation. First, unilateral acts of States are interpreted differently from treaties.[116] Secondly, because dealing with domestic law, domestic legal systems could be said to instruct interpretation of offers to arbitrate.[117] This approach is problematic. First, tribunals who characterise domestic laws as unilateral acts at the same time qualify them as offers.[118] This is a contradiction: unilateral acts are binding and effective without any counteraction,[119] whereas offers require acceptance.[120] Second, because the definition of the authority to adjudicate takes place at the international level, tribunals cannot ignore the international law rules of interpretation, which are considered more important than domestic rules.[121] This latter point reflects the international law governance of

---

113 For example, *Tokios Tokelės v Ukraine,* ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 27; Gazzini (n 108) 56–7.

114 Trinh Hai Yen, *The Interpretation of Investment Treaties* (Brill 2014) ch 2.

115 Weeramantry (n 108) 157–64; Thomas W Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 725.

116 See, for discussions on the rules on interpretation of unilateral acts, Caron (n 26) 655–73; and Michele Potestà, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 Arb Int'l 149, 160–8.

117 *PNG Sustainable Development Program Ltd v Papua New Guinea* (n 93) para 265; *Zhinvali v Georgia* referred to in *Mobil Corporation Venezuela Holdings BV and others v Bolivarian Republic of Venezuela,* ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 81. See also *SPP v Egypt,* mentioning 'general principles of statutory interpretation', referred to in ibid para 79.

118 *PNG Sustainable Development Program Ltd v Papua New Guinea* (n 93) para 264; *Mobil Corporation Venezuela Holdings BV and others v Venezuela* (n 117) para 85; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela,* ICSID Case No ARB/08/15, Decision on Jurisdiction (30 December 2010) para 79.

119 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, para 43; *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ Rep 457, para 46. Cf Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 AJIL 658, 667–93, and particularly 673 (extending the unilateral act analysis to substantive protections, which indeed imply unilateral obliging and do not require acceptances).

120 See above Section 2.A. It should be borne in mind that by accepting an offer to arbitrate, an investor does not merely trigger a State's commitment to arbitrate investment disputes, but also undertakes the same commitment on his part.

121 *PNG Sustainable Development Program Ltd v Papua New Guinea* (n 93) para 265 ('Where the principles of interpretation under the State's domestic law conflict with international law principles,

arbitration agreements, and evidences the unsustainability of a high dependence on diverse domestic rules on interpretation.[122] That does not mean that domestic laws should be disregarded completely; legislation can be relevant, for example, for determining the substance of consent.[123] Nevertheless, what results from this very complex picture is much simpler: faced with unclarity regarding the rules of interpretation of unilateral acts, investment tribunals resort to the VCLT and other rules of treaty interpretation by analogy.[124] In conclusion, it is not disputable where the rules of interpretation of jurisdictional clauses are to be found, but their content is, which is again another imperfection of international law manifested in investment arbitration.

C. Three Stages of Jurisdictional Checks

Arbitral tribunals have jurisdiction only to the extent conferred on them by the disputing parties. It is therefore very important to ensure that a tribunal is acting within the limits of its jurisdiction. Jurisdictional examinations, however, carry another prospect: identifying deficiencies in party-provided jurisdictional regulation. This Subsection discusses such possibilities and particularly whether they create the opportunities for remedying deficiencies in jurisdictional regulation. I will look at three stages of jurisdictional examinations: those conducted by the administrative organs of arbitration institutions (i), by arbitral tribunals (ii), and by annulment committees and local courts (iii).

---

international law principles will ordinarily prevail […]'); *Mobil Corporation Venezuela Holdings BV and others v Venezuela* (n 117) para 85 ('Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.'); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela* (n 118) para 79 ('they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States'); *Zhinvali v Georgia* referred to in *Mobil Corporation Venezuela Holdings BV and others v Venezuela* (n 117) para 81 ('the Tribunal must follow that national law guidance, but always subject to ultimate governance by international law').

122 The confusing environment in which tribunals are meant to determine the meaning of domestic laws is reflected in the fact that some tribunals did not specify any guiding rules in such interpretations. See, for example, *Tradex Hellas SA (Greece) v Albania* (n 20). But see also S Mullen and E Whitsitt, 'ICSID and Legislative Consent to Arbitrate: Questions of Applicable Law' (2017) 32 ICSID Rev-FILJ 92, 114–5 (concluding that taking into account domestic principles of interpretation did not make much effective difference in practice).

123 *Mobil Corporation Venezuela Holdings BV and others v Venezuela* (n 117) para 96(i); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela* (n 118) para 89(a).

124 *PNG Sustainable Development Program Ltd v Papua New Guinea* (n 93) paras 265 (VCLT), 269 (the principle of effectiveness); *Mobil Corporation Venezuela Holdings BV and others v Venezuela* (n 117) para 96(ii) (VCLT); *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela* (n 118) para 89(b) (VCLT).

i. *Pre-Examination by Administrative Organs*

All the major arbitration institutions used for the resolution of investor-State disputes provide some form of preliminary review of arbitration agreements conducted by administrative organs like secretariats. The ICSID system has the 'screening' procedure by the Secretary-General, who can refuse to register a request for arbitration if 'the dispute is manifestly outside the jurisdiction of the Centre';[125] the ICC and SCC systems confer a similar power on collective bodies,[126] while the Secretary-General of the PCA conducts a similar review without any formal empowerment in writing.[127] These processes have been a subject of extensive scholarly analyses (particularly in the ICSID context), and their repetition is not necessary.[128] It should only be noted that none of these processes is meant to make full and final jurisdictional determinations, that tribunals remain the judges of their competence, and that in cases of doubt administrative bodies must defer jurisdictional questions to tribunals. Administrative organs can decide not to proceed with arbitrations only if it is manifest or obvious that the submitted dispute would be outside the tribunal's jurisdiction.

One aspect of these processes is relevant, though. Consider the example of an investor who brings a dispute to international arbitration relying on a BIT clause which requires him to firstly bring that dispute before the domestic courts. Wishing to bypass this requirement, the investor invokes the MFN clause contained in the same BIT and a third-party BIT which does not require domestic litigation. Depending on the rigidity of its approach, an administrative organ could hold that the dispute is manifestly outside the jurisdiction because the investor's jurisdictional

---

125 ICSID Convention (n 20) art 36(3).

126 Rules of Arbitration of the International Chamber of Commerce (in force 1 March 2017) ('ICC Rules') art 6(3)-(4) ('The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist.'); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (in force 1 January 2017) ('SCC Rules') art 12 ('The Board shall dismiss a case, in whole or in part, if: (i) the SCC manifestly lacks jurisdiction over the dispute;').

127 Brooks Daly, Evgeniya Goriatcheva and Hugh Meighen, *A Guide to the PCA Arbitration Rules* (OUP 2014) 23, 84.

128 See generally Eloïse Obadia and Frauke Nitschke, 'Institutional Arbitration and the Role of the Secretariat' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014) 80; Sergio Puig and Chester Brown, 'The Secretary-General's Power to Refuse to Register a Request for Arbitration under the ICSID Convention' (2012) 27 ICSID Rev-FILJ 172; Martina Polasek, 'The Threshold for Registration of a Request for Arbitration under the ICSID Convention' (2011) 5 Disp Resol Int'l 177; Stephen D Sutton, '*Emilio Augustin Maffezini* v. *Kingdom of Spain* and the ICSID Secretary-General's Screening Power' (2005) 21 Arb Int'l 113; Charles N Brower, 'The Initiation of Arbitration Proceedings: "Jack Be Nimble, Jack Be Quick …!"' (1998) 13 ICSID Rev-FILJ 15; John M Townsend, 'The Initiation of Arbitration Proceedings: "My Story Had Been Longer"' (1998) 13 ICSID Rev-FILJ 21.

construction is wrong, on the one hand, or defer to the tribunal the question of the applicability of MFN clauses to dispute resolution clauses, on the other. Therefore, administrative organs have an opportunity to filter jurisdictional constructions advanced by claimants that will be considered by arbitral tribunals.[129] Administrative organs thus set the agenda of tribunals regarding the regulatory deficiencies that will be considered and prospectively remedied. Because the function of administrative organs is not to make jurisdictional determinations, I have argued elsewhere in favour of a more technical and administrative approach in preliminary reviews, in the hope of mitigating possible censoring effect on the jurisdictional questions referred to tribunals.[130]

ii. *Examination by Arbitral Tribunals*

Arbitral tribunals are judges of their own competence,[131] and therefore the principal jurisdictional determinations in arbitral processes are made by them. Jurisdictional questions can come before tribunals in two ways. The first one is the power of arbitral tribunals to raise jurisdictional issues on their own initiative, *proprio motu* or *ex officio.*[132] Investment tribunals largely follow general international law in this respect.[133] The second and more usual route through which jurisdictional questions come before tribunals is jurisdictional objections by the disputing parties. Indeed, jurisdictional objections are the usual first line of defence for respondents. Although it is not unimaginable that a tribunal itself raises a jurisdictional question relating to deficiencies in party-provided jurisdictional rules,[134] most of them are raised by respondents when challenging the

---

129 See generally Relja Radović, 'Screening Powers in Investment Arbitration: Questions of Legal Change and Legitimacy' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229521> accessed 25 October 2018.

130 ibid.

131 ICSID Convention (n 20) art 41(1); Arbitration Rules of the Permanent Court of Arbitration (in force 17 December 2012) art 23(1); UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) (in force 1 April 2014) art 23(1); ICC Rules (n 126) art 6(3), (5). See also Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 British Yrbk Int'l L 195, 212 (compétence de la compétence as an inherent power of international courts and tribunals).

132 As noted earlier, these two terms reflect the difference between the *possibility* and the *duty* of tribunals to raise jurisdictional issues. See Chapter 1, Section 2.B.iv, n 182.

133 Cf *Anglo-Iranian Oil Co (UK v Iran)* (Individual Opinion of President McNair) (1952) ICJ Rep 93, 116–7; with ICSID Arbitration Rules (n 46) r 41(2); and *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) para 56.

134 See, for example, *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 82 (where the Tribunal rejected the arguments of both the Claimant and the Respondent regarding the applicability of the *Salini* criteria to the definition of 'investment', arguing that a more appropriate set of criteria needs to be developed); *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on

jurisdiction of the acting tribunal.[135] Some regulatory deficiencies in jurisdictional rules can also be implicit in claimants' requests for arbitration: faced with limited access to arbitration, claimants make complex jurisdictional constructions whose acceptance by tribunals would imply supplementing the given set of jurisdictional rules.[136]

Arbitral tribunals, therefore, have most of the opportunities for answering questions about the deficiencies of party-provided jurisdictional rules. How that has been conducted is analysed in Chapters 3 to 5. At this point, I would like to make two preliminary remarks concerning arbitral activism.[137] First, it is obvious that the power (or even more so, the duty) of arbitral tribunals to raise jurisdictional issues on their own initiative conflicts with the principle of consensualism which gives the disputing parties the possibility to define jurisdiction by procedural conduct, or with what is frequently referred to as 'party autonomy'.[138] The former implies an objectively defined jurisdictional framework, while the latter confers the full definition of jurisdiction on the disputing parties. This is paradoxical, because the arbitral power to raise jurisdictional issues is meant to ensure that the arbitral tribunal is not acting outside its mandate, thus safeguarding the principle of consensualism.[139] Hence tribunals have taken different approaches to this power in practice: they have been willing to both examine jurisdiction on their own initiative and to defer to the parties' procedural conduct on the very same questions.[140] Which consideration will prevail

---

Jurisdiction (17 June 2005) paras 5–6 (where the Tribunal raised the question about the MFN-dispute resolution conjunction on its own initiative to the parties).

135 For example, objections that there is no qualified investment according to some additional criteria, that an MFN clause does not apply to a dispute resolution clause, that contractual claims cannot be arbitrated based on a BIT dispute resolution clause and so on.

136 For example, advancing an MFN-dispute resolution construction in order to bypass a pre-condition to the institution of arbitration.

137 In this context, the term 'activism' refers to the willingness of arbitrators to make more or less use of some of their discretionary powers. This view should be distinguished from the one that observes arbitral activism as an excess of authority. See, for the latter view, Andrea K Bjorklund, 'Are Arbitrators (Judicial) Activists?' (2018) 17 LPICT 49.

138 See above, on consent by conduct and acquiescence, Section 2.B; and Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (CUP 2014) 99–101 (arguing that party autonomy plays a limited role in investment arbitration because of public law concepts like jura novit curia).

139 Schreuer and others (n 7) 528. This is particularly obvious if a party fails to participate in a proceeding, in which case it must be assured that it has consented to adjudication, and therefore courts and tribunals *must* examine their own jurisdiction *ex officio.* See Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153, art 53(2); ICSID Arbitration Rules (n 46) r 42(4).

140 Cf *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile,* ICSID Case No ARB/01/7, Award (25 May 2004) paras 93–4; and *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 108–12 (the Tribunals qualified the Claimants as

in concrete cases seems to depend on the personal attitudes of arbitrators. Second, despite the pressure on disputing parties to raise jurisdictional objections as soon as possible,[141] some arbitral tribunals have been tolerant to belated objections.[142] This is another paradox: both phenomena rely on the parties' definition of jurisdiction, either implicit or explicit. Moreover, tribunals have held that they can open seemingly closed jurisdictional questions throughout the process.[143] This is another opportunity for the expression of arbitral activism or restraint.

When examining jurisdictional issues, arbitral tribunals find themselves in the sphere of law, as generally understood in international law.[144] Jurisdiction is not to be proved, and therefore no burden of proof is imposed on disputing parties.[145] This is a consequence of qualifying as law, in accordance with the principle of *jura novit curia.*[146] Even if there were a burden, it would be

---

investors under the ICSID Convention and the relevant investment treaties on their own initiative); with *Saipem SpA v Bangladesh* (n 58) para 73 (noting that the Respondent has abandoned its objection that the Claimant was not a private investor and considering the corresponding requirement of the ICSID Convention met).

141 ICSID Arbitration Rules (n 46) r 41(1) ('Any [jurisdictional] objection […] shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.').

142 Schreuer and others (n 7) 527–8; Christoph Schreuer, 'Belated Jurisdictional Objections in ICSID Arbitration' (2010) 7(1) TDM <https://www.transnational-dispute-management.com/article.asp?key=1533> accessed 30 October 2018.

143 See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) para 311–4 (holding that a belated jurisdictional objection has been waived, but nevertheless deciding to examine the merits of the objection). This might not be possible when a tribunal has already decided on a jurisdictional objection; see *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) para 68 (however, the Tribunal did not reach its conclusions on formalistic grounds, and it noted that it had 'no doubt about its findings'). But some tribunals and annulment committees have held that the power of tribunals to examine jurisdiction on their own initiative grants them the power to reconsider earlier jurisdictional rulings; see *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited*, ICSID Case No ARB/10/20, Decision on the Application for Annulment (22 August 2018) paras 150–73.

144 *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) (1988) ICJ Rep 69, para 16.

145 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (1998) ICJ Rep 432, para 38. This stands for the assessment of jurisdiction, and not for the provision of documents relating to party intentions.

146 *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) (1974) ICJ Rep 3, para 17; *Fisheries Jurisdiction (Germany v Iceland)* (Merits) (1974) ICJ Rep 175, para 18 ('the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court').

shared by tribunals, following the said principle and their power to raise jurisdictional issues.[147] Investment tribunals, as other courts, analyse arguments in favour and against jurisdiction, and follow those arguments whose force is 'preponderant'.[148] This means that deficiencies in party-provided jurisdictional rules will be discussed in terms of law, not facts, and the answers to the issues raised by such deficiencies will be equally framed in terms of law. Arbitral tribunals are thus given an opportunity to discuss possible remedies to jurisdictional regulatory deficiencies in abstract, principled, and rule-like terms.

iii. *Post-Examination by Annulment Committees and Courts*

Jurisdictional determinations of investment arbitral tribunals are subject to certain controls. On the one hand, within the ICSID system, arbitral awards can be annulled if, among other grounds, 'the Tribunal has manifestly exceeded its powers' or 'the award has failed to state the reasons on which it is based'.[149] On the other hand, non-ICSID awards are subject to control by domestic courts, either in the setting aside proceedings before the courts of the seat of arbitration,[150] or in the recognition and/or enforcement proceedings before other domestic courts.[151] I have already referred to some characteristics of these proceedings in regard to the safeguarding of the principle of consensualism.[152]

The question to be discussed here is to what extent ICSID annulment committees and local courts are able to identify deficiencies in the party-defined jurisdictional rules and to engage in their remedying. There is no doubt that acting outside jurisdiction qualifies as excess of powers for the purposes of the ICSID Convention.[153] The problem is that the excess of powers must be 'manifest' to justify annulment, which can have a limiting effect on the review conducted by committees. As one committee put it: '[i]f an excess of powers is to be the cause of an annulment, the *ad hoc* Committee must so find with certainty and immediacy, without it being necessary to

147 See also Frédéric G Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina J Int'l L & Com Reg 875, 923–6.

148 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) (1927) PCIJ Ser A—No 9, 4, 32; *Nicaragua v Honduras* (n 144) para 16; *Spain v Canada* (n 145) para 38. This approach was accepted very early in investment arbitration; see in that respect *SPP v Egypt,* as reported by Solveiga Palevičienė, 'Consent to Arbitration and the Legacy of the SPP v. Egypt Case' (2014) 7 Baltic J Law & Politics 149, 155. This approach is related to the rejection of liberal or restrictive interpretation of jurisdictional instruments; see n 111-112 above.

149 ICSID Convention (n 20) art 52(1)(b), (e).

150 UNCITRAL Model Law (n 101) art 34.

151 New York Convention (n 102) art V.

152 See Chapter 1, Section 3.A.ii.

153 Schreuer and others (n 7) 943–4.

engage in elaborate analyses of the award'.[154] This principled pronouncement did not stop the same Committee from examining some detailed jurisdictional standards, namely the objective definition of 'investment',[155] which falls within the category which I will further argue to form arbitral law-making.[156] An alternative approach of annulment committees holds that 'manifest' refers to the gravity of excess. The *Vivendi v Argentina* annulment decision is often considered as an example of this alternative.[157] What is more important for the present analysis is a particular part of that decision: the Committee elaborated on the distinction between treaty claims and contract claims using the 'fundamental basis of the claim' standard.[158] It can be debated whether there indeed could be an excess of jurisdiction which is not manifest,[159] but that discussion loses much of its importance in the light of these examples, because they demonstrate that in any event committees are able to address detailed jurisdictional standards and determinations.[160] In contrast to both examples above, some committees have been unwilling to analyse jurisdictional standards that could help remedy certain deficiencies in party-made jurisdictional rules.[161] This finally

---

154 *Mr Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) para 20. See also Schreuer and others (n 7) 938.

155 *Mr Patrick Mitchell v Congo* (n 154) paras 27–33.

156 See generally Chapter 7.

157 *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 115 ('Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest.'). It should be noted, however, that the Committee faced the question of non-exercise of jurisdiction, as opposed to its overstepping, which could have influenced the opinion that 'manifest' referred to the extent of excess of powers. See ibid para 86.

158 ibid paras 98–103.

159 Cf Philippe Pinsolle, 'Jurisdictional Review of ICSID Awards' (2004) 5 JWIT 613, 618–20 (arguing that jurisdiction must be fully reviewed, because jurisdictional determinations cannot be right or wrong to a certain degree; a tribunal either has or does not have jurisdiction); with *Hussein Nuaman Soufraki v The United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr Soufraki (5 June 2007) paras 117–9.

160 See also *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010) paras 44–5 (holding that the excess of powers should be 'demonstrable and substantial and not doubtful', and that 'because the purpose of the inquiry is to determine the reasonableness of the Tribunal's approach, there is necessarily a heavy burden upon the applicant to establish a manifest excess of powers').

161 *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) paras 140–1 (refusing to enter the examination of the applicability of the MFN clause to the dispute resolution clause, and arguing that the Committee

implies that the intensity of review, and consequently the engagement in the attempts to remedy the deficiencies in the jurisdictional framework, depends mostly on the activism and restraint of annulment committees of the same kind as that of arbitral tribunals.[162]

Another ground for annulment within the ICSID framework relates to the duty to state the reasons of arbitral awards.[163] Annulment committees review the completeness and coherence of the given reasons, which is a good opportunity for verifying the methodologies employed by arbitral tribunals when dealing with jurisdictional problems.[164] However, here again the activism of committee members can introduce more substantial points by the back door. For example, in *Patrick Mitchell v Congo,* the Committee identified an objective element in the definition of an 'investment' and held that because the award did not discuss that element, it was not sufficiently reasoned.[165] The possible overlap of this ground for annulment with manifest excess of powers can therefore give even bigger space to annulment committees for expressions of their activism should they be willing to engage in a dialogue with arbitral tribunals on the correct solutions to regulatory deficiencies in jurisdictional frameworks.

---

had no authority to determine whether the Tribunal's interpretation of these clauses was correct); *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic,* ICSID Case No ARB/03/17, Decision on Argentina's Application for Annulment (14 December 2018) paras 173–80 (a similar approach in respect of the same issue). See also *Hussein Nuaman Soufraki v UAE* (n 159) para 116 ('the *ad hoc* Committee reiterates that it is not empowered to correct alleged "errors" committed by the Tribunal, and a series of errors is no more necessarily a ground for annulment than a single error').

162 As for the activism and restraint of annulment committees affecting the intensity of their review, see Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 LPICT 211, 215-21 (on extensions of the grounds for annulment) and 222–4 (referring to 'hyperactive' annulment committees); Laurens JE Timmer, 'Manifest Excess of Powers as a Ground for the Annulment of ICSID Awards' (2013) 14 JWIT 775, 803 (identifying committees' restraint to annul awards for manifest excess of powers).

163 ICSID Convention (n 20) art 52(1)(e).

164 Schreuer and others (n 7) 1003 sq (regarding insufficient and inadequate reasons). It is noted that this ground can lead to blurring the difference between annulment and appeal. As for the standard applied by committees, see *Impregilo SpA v Argentina* (Annulment) (n 161) para 180 (a committee 'shou[l]d not be concerned with the correctness of the Tribunal's reasoning but is confined to ascertaining whether the reasoning would allow an informed reader to understand how the Tribunal reached its conclusions').

165 *Mr Patrick Mitchell v Congo* (n 154) paras 39–41. Cf *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia,* ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009) para 80 (finding that the same objective element—contribution to the economic development of the host State—was not part of the definition of 'investment', and annulling the award for the manifest excess of power).

When it comes to domestic courts reviewing non-ICSID awards, their approaches of course differ from country to country.[166] At the international level one difference is obvious: there is no requirement that the excess of jurisdiction must be 'manifest' in the New York Convention or the UNCITRAL Model Law. This means that domestic courts can be asked to verify *de novo* that the tribunal had jurisdiction. Domestic courts can therefore have the same opportunities as arbitral tribunals to identify deficiencies in the given set of jurisdictional rules and to suggest solutions to the difficulties that they cause.

In sum, the two scenarios must be distinguished. ICSID annulment committees in theory have less opportunities to discover and remedy regulatory deficiencies in the given jurisdictional framework. This does not mean that ICSID annulment committees can never do so: they can exercise a high level of activism, exceeding the intensity of review which is normally understood as appropriate. In contrast, domestic courts have more such opportunities, because their work often includes *de novo* review of arbitral jurisdiction. However, even if ICSID annulment committees and domestic courts can be taken as ideally non-activist, their function can still be significant: although not offering concrete answers, they can control the process of dealing with deficiencies in jurisdictional frameworks, from a rudimentary point of view (like verifying the sufficiency and adequacy of the given reasons).

D. The Power of Tribunals to Fill Gaps in Jurisdictional Regulation

The previous Subsection demonstrates that the ability of jurisdictional examiners to discover and attempt to remedy the deficiencies in party-made jurisdictional frameworks depends to a large extent on their activism. The question arises whether jurisdictional examiners are empowered to remedy such deficiencies by supplementing given jurisdictional rules with independent rule-like input. This is first and foremost a question of authority. The principle of consensualism grants the disputing parties the exclusive authority to define the terms of their submission to adjudication, ie jurisdiction of an adjudicative body,[167] while the *compétence de la compétence* power of a court or tribunal grants it the authority to review and decide whether it is acting within

---

166 See, for example, *Ecuador v Occidental Exploration & Production Co* (High Court) (n 103) [7] ('It is now well – established that a challenge to the jurisdiction of an arbitration panel under section 67 [of the Arbitration Act 1996] proceeds by way of a re – hearing of the matters before the arbitrators. The test for the court is: was the Tribunal correct in its decision on jurisdiction? The test is not: was the Tribunal entitled to reach the decision that it did.' [emphasis omitted]). But see further in this respect Jack J Coe, 'Domestic Court Control of Investment Awards: Necessary Evil or Archilles Heel Within NAFTA and the Proposed FTAA?' (2002) 19 J Int'l Arb 185 (identifying different grounds for setting aside and different levels of deference to arbitral rulings as negative sides of the set-aside system).

167 See Chapter 1, Section 2.B.

the limits of its jurisdiction.[168] This is, therefore, a distinction between regulators and examiners, or as often held in legal scholarship, between law-makers and law-appliers.

Is this distinction a strict one? At this point special attention must be paid to the meaning of the concept of *compétence de la compétence.* This power is often said to relate to the judicial function,[169] and as such it is considered an inherent power of international courts and tribunals.[170] Despite this fact, it is hard to talk about a unified concept of *compétence de la compétence.*[171] Laurence Boisson de Chazournes distinguishes between three effects of this power depending on their different reach to different jurisdictional questions.[172] However, little discussion can be found on the issue of what kind of answers international courts and tribunals are entitled to give to the questions of jurisdiction under examination. Implicitly, the answer seems to be that courts and tribunals can only *interpret* the given jurisdictional framework and cannot supplement it by new jurisdictional rules. Of course, this statement can be debated when it comes to broader issues, like jurisdictional overlaps, which touch upon certain general principles of international law whose meaning is quite dependant on judicial activity.[173] But when it comes to substantive jurisdiction, which is central in the present analysis, it seems generally accepted that courts and

---

168 *Nottebohm Case (Liechtenstein v Guatemala)* (Preliminary Objection) (1953) ICJ Rep 111, 119–20. But see Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction. Compétence de la compétence* (Springer 1965) 27–30. Shihata takes into account the so-called self-judging clauses and argues that the exercise of the *compétence de la competence* takes place in two stages: in the first step the disputing parties determine whether the dispute falls within the reserved domain, while in the second the tribunal determines whether it has jurisdiction. Bearing in mind the problems arising in regard to such clauses, this distinction between two stages is disputable; see Chapter 1, Section 2.B.ii.

169 *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)* (Advisory Opinion) (1928) PCIJ Ser B—No 16, 4, 20 ('as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction'); *Nottebohm* (n 168) 120 ('The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.').

170 Brown (n 131) 212.

171 Laurence Boisson de Chazournes, 'The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 1043–4.

172 ibid 1043–58 (distinguishing between 'extensive', 'restrictive', and 'sui generis' effects of this power). According to Boisson de Chazournes, the ICSID system demonstrates the 'restrictive' effect of the *compétence de la competence*, due to the explicit limitations of ICSID tribunals' jurisdiction in Article 25 of the ICSID Convention.

173 For example, the doctrines of *res judicata* and *lis pendens* in international law. See Kaj Hobér, 'Res Judicata and Lis Pendens in International Arbitration' (2014) 366 Recueil des Cours 99, 287–402.

tribunals are not entitled to do anything else but to interpret the will of the disputing parties,[174] and apply their conclusions on the law to the relevant facts.[175] It can be argued in turn that interpretation in itself is more than law-application,[176] but what matters in this discussion about authority is that a tribunal must assert that its jurisdictional decision is based on the will of the disputing parties. Indeed, the absence of such an assertion would invalidate its entire work.

There are possibilities, however, for blurring the distinction between the definition and the application of jurisdictional rules, and they lie in linguistic tools. One way is to maintain that certain issues are not jurisdictional but 'procedural'. The *Abaclat and others v Argentina* case is the most famous example of an extensive reliance on the power of a tribunal to 'fill gaps' in the rules of procedure, with the effect of affirming its competence.[177] In fact, the ICSID system empowers tribunals only to define procedural rules for the conduct of arbitration in the absence of a relevant rule,[178] which can be seen as another inherent power of international courts and tribunals.[179] By qualifying certain rules as 'procedural' instead of 'jurisdictional', as is often done with regard to the conditions of access to tribunals,[180] a state of confusion can be caused, where the distinctions between different types of rules, their creators and addressees, are lost. However, introducing the category of 'procedural' rules and labelling certain jurisdictional rules as such

---

174 *Nottebohm* (n 168) 119 ('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' [emphasis added]). Shihata identifies certain techniques in the practice of the ICJ for determining jurisdiction, most importantly through the methods of interpretation of jurisdictional instruments. See Shihata (n 168) 188–206. See also ibid 205 ('In this respect, not only the International Court, but, in fact, all courts can only try to "read the mind of the parties" by applying the techniques of interpretation and evidence most suited to their function and to the legal system in which they work.'). Other techniques identified by Shihata concern the ICJ's qualities as an international court and as part of the United Nations system, the ascertainment of jurisdictional facts, and other occasional techniques.

175 For the question how tribunals should approach facts at the jurisdictional level, see *Phoenix Action Ltd v The Czech Republic,* ICSID Case No ARB/06/5, Award (15 April 2009) paras 61–4 (holding that the facts which are relevant for the establishment of jurisdiction must be proved).

176 See generally Ingo Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (OUP 2012).

177 *Abaclat and others v The Argentine Republic,* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) paras 521–8.

178 ICSID Convention (n 20) art 44 ('If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'); ICSID Arbitration Rules (n 46) r 19 ('The Tribunal shall make the orders required for the conduct of the proceeding.').

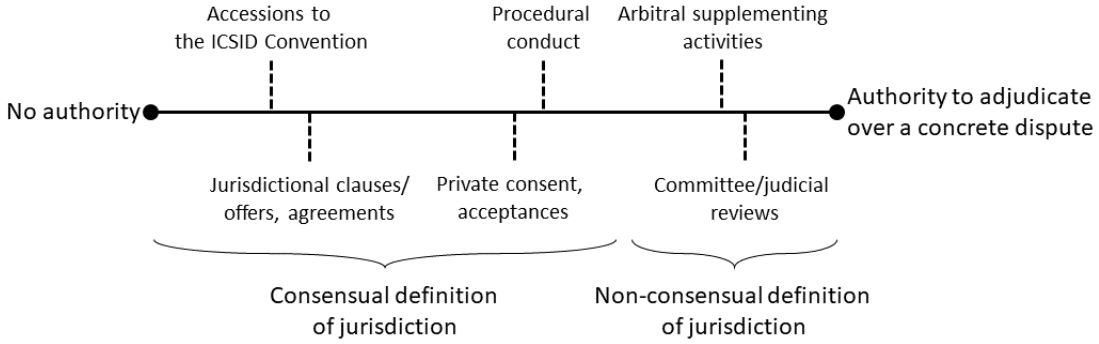
179 Brown (n 131) 215.

180 See Chapter 3, Section 2.B.

can in itself amount to law-making, bearing in mind the absence of that classification in the given framework and its impact on the functioning of jurisdictional rules.[181]

§ 2.05. Conclusion

In conformity with the principle of consensualism in international adjudication, jurisdictional regulation in investment arbitration is founded on a relationship between the disputing parties. Once they enter into a jurisdictional relationship, the disputing parties provide jurisdictional rules which define the authority of an arbitral tribunal to adjudicate their dispute. Those rules, however, are not comprehensive, and they leave many questions open. Answering such questions becomes a necessity when making concrete jurisdictional determinations. Investment tribunals, as any other international court or tribunal, have the power to rule on their own competence, but that power does not allow the filling of gaps or supplementing the given jurisdictional framework. For that reason, supplementing the jurisdictional rules generated by the disputing parties, if it goes beyond the usual understanding of interpretation, finds itself in the domain of informality.



Graph 2: Consensual and non-consensual definition of jurisdiction

In the following chapters, I will demonstrate that arbitral tribunals, annulment committees, and occasionally courts, have attempted to answer some of these open questions in terms of a principle. Indeed, they have engaged in a sort of law-making, generating rules when required which supplement the given jurisdictional framework. Following the model of Graph 1, Graph 2 presents the arbitral regulatory activity as a non-consensual part of the process of definition of the authority to adjudicate of tribunals. The emergence of the arbitral regulatory activity erodes the principle of consensualism, because it contests the premise that the definition of the authority to adjudicate is within the disputing parties' exclusive domain.

[181] See Chapter 3, Section 2.A.

PART II

Arbitral Jurisdictional Regulation

3

Tackling the Procedural Aspects of the Consensual Jurisdictional Regulation

§ 3.01. Introduction

The following three chapters analyse how arbitral tribunals have dealt with the deficiencies in party-provided jurisdictional frameworks. It is clear that such deficiencies become apparent on a trajectory from the given jurisdictional provision towards a concrete jurisdictional determination. In that sense, the techniques used by arbitral tribunals can roughly be divided into those which make the conditions of submission to arbitration easier, and those which make them more difficult. This Chapter discusses the techniques which relax the procedural aspects of arbitral jurisdiction, while Chapter 4 will discuss the techniques which relax its substantive aspects. Chapter 5 will discuss the techniques aimed at sharpening the terms of arbitral jurisdiction, both procedural and substantive.

What I am looking for in particular in this analysis, are the instances in which arbitrators do not merely interpret the terms of arbitration agreements but recognise that their deficiencies require additional input and action on the part of tribunals. I will refer to such action as arbitral *supplementing activities* throughout this thesis, while in Chapter 7 I will qualify it as law-making. In short, by supplementing activities I consider injecting input to jurisdictional interpretative processes in terms of principled answers to open jurisdictional questions, which are not based on terms of arbitration agreements, but find inspiration elsewhere.[1] The sources of inspiration for such input can be various, from analogies to other spheres of law to personal beliefs and values,

---

[1] This is in contrast to the standard approach to the analysis of arbitral work which observes the process of interpretation of treaty provisions. See, for example, Matthew Weiniger, 'Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT by Reading a BIT or by Reading into a BIT?' in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 254 (arguing that through interpretation 'the provisions of BITs are capable of being melded in any direction the tribunal wishes'); Gabrielle Kaufmann-Kohler, 'Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?' in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 257 (discussing the consistency of arbitral decisions pertaining to what is called here supplementing activity through the prism of treaty interpretation).

but their distinctive features are a principled (rule-like) formulation and detachment from the terms of the given jurisdictional framework. My objective is to describe the attempts to formulate rule-like solutions only, and I am not interested in whether their substance is right or wrong.

Chapters 3 to 5 analyse arbitral practice. However, this is not a quantitative but a qualitative study, and therefore this thesis does not make an exhaustive empirical analysis of all the publicly available decisions within a specified period. This study focuses on the leading decisions that have created streams of arbitral practice and which can be said to bear some precedential value, but also on other, less prominent decisions that have actively engaged in debates over the content of the supplementing activities described above.

The term 'procedural' in the title of this Chapter is strictly descriptive, and it refers to the conditions of access to arbitration as defined by disputing parties in their arbitration agreements. This term should not be confused with the normative qualification of some conditions of access as 'procedural' (as opposed to 'jurisdictional' in a narrower sense), that has been developed in practice and which is analysed as part of this Chapter.[2] The starting point of this Chapter is that, following the principle of consensualism which grants the disputing parties the power to define the authority to adjudicate (ie jurisdiction) of arbitral tribunals, all terms of such definitions are jurisdictional. For the sake of clarity, this latter notion can be viewed as jurisdiction in a broader sense of that term.

The procedural aspects of the consensual jurisdictional regulation have been affected in several respects by the practice of arbitral tribunals. First, tribunals have developed a dichotomy between 'procedural' and 'jurisdictional' conditions of access and detached some of them from party consent, which is discussed in Section 2. Second, tribunals have developed rules providing avenues for bypassing several conditions of access, and this is discussed in Section 3. Finally, Section 4 analyses the application of MFN clauses to dispute settlement clauses as an attempt to create a general route for bypassing conditions of access to arbitration as set out in arbitration agreements.

§ 3.02. Conditions of Access and Admissibility of Claims

The ICSID Convention, as well as most of investment treaties and legislation do not define the concept of admissibility. That concept has been developed in practice. I will firstly discuss its formulation (A), and then the qualification of various conditions precedent (B), as well as of the applicable procedure as pertaining to admissibility of claims (C).

---

2 See Section 2 below.

A. The Jurisdiction/Admissibility Dichotomy

Legal scholarship has a great interest in the concept of admissibility of claims. Its existence and separation from the notion of jurisdiction is generally accepted,[3] although arguments exist that the concept of admissibility is unjustified in the context of investment arbitration.[4] Furthermore, even if the concept of admissibility is accepted as firmly established, it is not easy to draw a clear boundary between that concept and jurisdiction.[5]

Academic interest was prompted by the developments in arbitral practice. An early example of formulation of the difference between the two concepts was the *SGS v Philippines* decision on jurisdiction where the Tribunal held that jurisdiction is determined by the applicable BIT and the

---

3 See, among many others, Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005) 601; Ian A Laird, 'A Difference without A Distinction? 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; David AR Williams QC, 'Jurisdiction and Admissibility' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 868; Gerold Zeiler, 'Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 76; Veijo Heiskanen, 'Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 ICSID Rev-FILJ 231; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (CH Beck/Hart/Nomos 2015) 1212; Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: "A Dismal Swamp"' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 227, 243–7; Hanno Wehland, 'Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 227; Filippo Fontanelli and Attila Tanzi, 'Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice' (2017) 16 LPICT 3; August Reinisch, 'Jurisdiction and Admissibility in International Investment Law' (2017) 16 LPICT 21; Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill 2018); Saar A Pauker, 'Admissibility of Claims in Investment Treaty Arbitration' (2018) 34 Arb Int'l 1.

4 See generally Christer Söderlund and Elena Burova, 'Is There Such a Thing as Admissibility in Investment Arbitration?' (2018) 33 ICSID Rev-FILJ 525.

5 It is said that one major difference between the two concepts concerns the possibility of review of their arbitral determinations: Paulsson (n 3) 601. However, such a general claim is possibly too bold, and issues of admissibility could also be reviewed by ICSID annulment committees: Fontanelli and Tanzi (n 3) 12–4. Further on the difficulties in distinguishing between the two concepts, see Fontanelli (n 3) 129 sq.

ICSID Convention while admissibility concerns some impediment for the exercise of jurisdiction over a claim.[6] Later tribunals have gone further and tried to define the two concepts more clearly. As held by the *Hochtief* Tribunal, '[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal'.[7] Or in the words of another tribunal, 'an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction'.[8] The rationale behind the distinction is therefore in the question whether the defect at stake concerns the authority of the tribunal to adjudicate or the claim itself and its suitability for adjudication. It follows that conditions of admissibility are not related to the parties' consent which defines the authority to adjudicate, but to certain other questions.[9] The inspiration for such differentiation between the two concepts can be traced to the practice of the ICJ.[10]

In opposition, some tribunals have disputed the existence of the jurisdiction/admissibility dichotomy. Their rationale has mostly been that the concept of admissibility is not appropriate in the ICSID context because it is not mentioned in that Convention,[11] although some tribunals have

---

6 *SGS Société Générale de Surveillance SA v Republic of the Philippines,* ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 154.

7 *Hochtief AG v The Argentine Republic,* ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 90.

8 *Ioan Micula and others v Romania,* ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 63. See also *Waste Management Inc v United Mexican States,* ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000) para 58 ('Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it.'); and *Supervision y Control SA v The Republic of Costa Rica,* ICSID Case No ARB/12/4, Award (18 January 2017) paras 268–76.

9 See Chittharanjan F Amerasinghe, *International Arbitral Jurisdiction* (Brill 2011) 97–100 (giving examples of the criteria for (in)admissibility of claims from the law of diplomatic protection, and noting that some criteria could become conditions of jurisdiction if qualified as such in the parties' agreement).

10 See *Hochtief AG v Argentina* (n 7) para 95; Reinisch (n 3) 23–4; Söderlund and Burova (n 4) 527–8.

11 *CMS Gas Transmission Company v The Republic of Argentina,* ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) para 41; *Enron Corporation and Ponderosa Assets LP v The Argentine Republic,* ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 33; *Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic* and *BP America Production Company and others v The Argentine Republic,* ICSID Cases Nos ARB/03/13 and ARB/04/8, Decision on Preliminary Objections (27 July 2006) para 54.

also observed the lack of such definitions in the applicable BIT,[12] and other rules of procedure.[13] Yet, these tribunals, with one exception,[14] are not troubled by abstract concepts, and they appear to take more pragmatic approaches, admitting that a negative answer to the posed question would lead to the same outcome—dismissing the case, regardless of the classification of the issue as going to jurisdiction or admissibility.[15]

If the distinction is accepted,[16] which conditions pertain to jurisdiction and which pertain to admissibility? One suggestion is that if a condition appears together with the manifestation of consent to arbitration, it is jurisdictional because it limits that consent.[17] This approach follows the ICJ practice.[18] But other tribunals have been less sharp in drawing such a limitation and have rather inquired into the function of each condition. They have observed that some conditions do not establish consent to arbitrate but regulate how already established consent or a 'right to arbitrate' should be exercised or implemented.[19] Their requirements are 'procedural' as opposed

---

12 *Ambiente Ufficio SpA and others v The Argentine Republic,* ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 572.

13 *Methanex Corporation v The United States of America,* UNCITRAL ad hoc arbitration, Partial Award (7 August 2002) para 123. The Tribunal used this argument to conclude that it did not have power to address certain questions.

14 See *Urbaser SA and CABB v The Argentine Republic,* ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) paras 112–27 (challenging the concept of admissibility in relation to the conditions precedent on many grounds, both practical an theoretical).

15 *Burlington Resources Inc v Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010) para 340.

16 See David L Earnest, 'The Duty of Arbitrators to Delimitate between Jurisdiction and Admissibility in Investor-State Arbitration: A Developed Consensus or an Enduring Lacuna?' (2018) 17 LPICT 135, 140–4 (arguing that the distinction between the two concepts has reached consistency in practice, although that is not the case with the qualification of objections as relating to one of the two).

17 *SGS Société Générale de Surveillance SA v The Philippines* (n 6) para 154; *Ioan Micula and others v Romania* (n 8) para 64; *Impregilo SpA v Argentine Republic,* ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011) para 83; *Abaclat and others v The Argentine Republic,* ICSID Case No ARB/07/5, Dissenting Opinion of Georges Abi-Saab (4 August 2011) para 23. See also Friedrich Rosenfeld, 'Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after BG v. Argentina' (2016) 29 Leiden JIL 137.

18 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, para 88.

19 *Hochtief AG v Argentina* (n 7) para 90; *Abaclat and others v The Argentine Republic,* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) paras 494–5; *İçkale İnşaat Limited Şirketi v Turkmenistan,* ICSID Case No ARB/10/24, Award (8 March 2016) para 242; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic,* ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) para 279.

to 'jurisdictional', because they define a procedure for setting in motion the arbitration mechanism.[20] What comes next to the recognition of different function of certain conditions, is the perceived need for more flexibility in their application.[21] In other words, requirements that do not condition the authority of arbitral tribunals to adjudicate are less strict. This gives tribunals discretion in determining whether non-compliance with such requirements prevents proceeding to the merits. Therefore, drawing an analogy to other fields of international adjudication, investment tribunals have adopted a principled distinction between questions of jurisdiction and admissibility, although allowing their own criteria to qualify individual questions. In the next Subsection, I analyse the conditions precedent to the institution of arbitration which are defined in the domain of the consensual jurisdictional regulation, but which have been requalified by arbitral tribunals as pertaining to the admissibility of claims.

B. Conditions Precedent as Issues of Admissibility

Admissibility of claims can concern many doctrinal issues,[22] however because this thesis focuses on the interplay between consensual and arbitral jurisdictional regulation, here I analyse how party-provided jurisdictional rules are affected by tribunals. Claimants are normally interested in facilitating their access to arbitration and, bearing in mind the flexibility that accompanies the concept of admissibility, they argue that conditions precedent to the institution of arbitration do not limit the jurisdiction of arbitral tribunals. However, tribunals can also requalify jurisdictional conditions as those of admissibility on their own initiative.[23]

Investors are often required to notify the host State of the dispute, to wait for some time before instituting arbitration (cooling-off or waiting periods), and to attempt to settle the dispute

---

20 *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) para 242; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) para 279.

21 See, regarding conditions of admissibility generally, *SGS Société Générale de Surveillance SA v The Philippines* (n 6) para 170 ('This is a matter of admissibility rather than jurisdiction, and there is a degree of flexibility in the way it is applied.' [reference omitted]); *Supervision y Control SA v Costa Rica* (n 8) para 270(a) ('There is greater procedural flexibility if the tribunal has jurisdiction.'). See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) para 275 ('Such less formalistic approach is more in line with the object and purpose of investment treaties to promote and protect foreign investment for the development of economic cooperation between States.').

22 See Waibel, 'Jurisdiction and Admissibility' (n 3) 1218–20.

23 *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) para 239 ('The Tribunal considers that these two provisions [Article 41 ICSID Convention and Rule 41(2) ICSID Arbitration Rules] provide it with the authority to decide independently, within its *Kompetenz-Kompetenz*, and without being bound by the Parties' legal positions, as to whether the objection raised by the Respondent under Article VII(2) of the BIT constitutes an objection to jurisdiction or an objection to admissibility. Indeed, if this were not the case, and if the Tribunal were to be considered bound by the legal argument of the Parties, the Tribunal might have to reach a decision that it does not consider to be legally correct.').

through negotiations. Only after fulfilling these conditions they can initiate arbitration. Tribunals have formed two streams of practice: one maintains that such conditions pertain to their jurisdiction,[24] and the other maintains that they pertain to the admissibility of claims.[25] The first stream follows the classical understanding that every condition appearing with consent to arbitration is jurisdictional.[26] Accordingly, such conditions are always mandatory.[27] The second stream looks at these conditions as part of the procedure to be followed by investors when setting the dispute settlement mechanism in motion.[28] They recognise the need for some flexibility in the application of such conditions, that they should not be regarded strictly mandatory, and that tribunals have certain discretion in their application.[29] An early example was the *Lauder* decision, where the Tribunal held that a waiting period was 'not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant'.[30] This led the Tribunal to reject an 'overly formalistic

---

24 *Enron Corporation and Ponderosa Assets LP v Argentina* (n 11) para 88; *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction (15 December 2010) paras 140–56; *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) para 72.

25 *Abaclat and others v Argentina* (Decision) (n 19) para 496; *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016) para 225; *Supervision y Control SA v Costa Rica* (n 8) para 340. See also Arrêt du 29 janvier 2019, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 16/20822, 4. See also Martina Polasek, 'The Consultation Period Requirement in Investment Treaties as a Matter of Jurisdiction, Admissibility or Procedure' (2006) 23 News from ICSID 14. Contrary to Polasek, I argue here that qualifying conditions precedent as 'procedural' is not aimed at creating a third category of conditions, but rather at describing their function.

26 *Tulip Real Estate Investment and Development Netherlands BV v Turkey* (n 24) paras 61, 63 (referring to the practice of the ICJ).

27 *Murphy Exploration and Production Company International v Ecuador* (n 24) paras 140–56. See also *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 14.3 ('This Tribunal would be hesitant to interpret a clear provision of the BIT in such a way so as to render it superfluous, as would be the case if a "procedural" characterisation of the [negotiation] requirement effectively empowered the investor to ignore it at its discretion.').

28 *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 187.

29 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) para 184; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 99–100, 102; *Alps Finance and Trade AG v The Slovak Republic*, UNCITRAL *ad hoc* arbitration, Award (5 March 2011) paras 201–2. See also Polasek (n 25) 17.

30 *Ronald S Lauder v Czechia* (n 28) para 187.

approach' in its application.[31] Another tribunal maintained that a 'six-month [waiting] period is procedural and directory in nature, rather than jurisdictional and mandatory' and '[n]on-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding'.[32] Qualifying conditions precedent as procedural and pertaining to the admissibility of claims allows tribunals to observe other factors, like procedural economy, when deciding whether to allow the arbitration to proceed.[33] Importantly, tribunals make these qualifications in a principled manner, observing notification and waiting/negotiation requirements generally and their assumed function.[34] However, this leads to very concrete results: requalifying conditions precedent from jurisdiction to admissibility relaxes the conditions of access to arbitration.

Another known condition precedent is the requirement that investors must litigate before domestic courts for a defined period before initiating arbitration.[35] Practice is again divided: some tribunals qualify local litigation requirements as conditions of jurisdiction,[36] while others regard them as pertaining to the admissibility of claims.[37] The latter group of tribunals assert discretion in the application of such requirements. For example, the Tribunal in *Abaclat and others v*

---

31 ibid para 190.

32 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania,* ICSID Case No ARB/05/22, Award (24 July 2008) para 343.

33 *SGS Société Générale de Surveillance SA v Pakistan* (n 29) para 184 ('it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal'). See also *Western NIS Enterprise Fund v Ukraine,* ICSID Case No ARB/04/2, Order (16 March 2006) para 7.

34 See, for example, *Biwater Gauff (Tanzania) Ltd v Tanzania* (n 32) para 343 ('Its [the waiting requirement's] underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible.').

35 See generally Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 LPICT 1, 3–5; Facundo Pérez Aznar, 'Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America' (2016) 17 JWIT 536.

36 *Wintershall Aktiengesellschaft v Argentine Republic,* ICSID Case No ARB/04/14, Award (8 December 2008) paras 133–53; *Impregilo SpA v Argentine Republic,* ICSID Case No ARB/07/17, Award (21 June 2011) para 94; *ICS Inspection and Control Services Limited (United Kingdom) v The Argentine Republic,* PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) paras 258–62; *Daimler Financial Services AG v Argentine Republic,* ICSID Case No ARB/05/1, Award (22 August 2012) paras 193–4; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan,* ICSID Case No ARB/10/1, Award (2 July 2013) paras 6.3.1-15.

37 *Hochtief AG v Argentina* (n 7) para 96; *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) paras 241–2; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) paras 279–80; *Telefónica SA v The Argentine Republic,* ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) para 93.

Argentina considered that a local litigation requirement did not pertain to State consent but to the 'implementation of consent' and therefore the admissibility of claims.[38] The Tribunal held that it should assess and determine whether a disregard of the local litigation requirement precluded proceeding with the case.[39] In exercising that discretion, arbitral tribunals have observed various factors like fairness, efficiency,[40] and appropriateness.[41] As with the previous example, tribunals have taken principled approaches in qualifying local litigation requirements either as conditions of consent and therefore jurisdiction, or as conditions of admissibility. These approaches, based on general and theoretical views of arbitrators on such conditions precedent[42] and the functioning of consent to arbitration,[43] directly determine the possibilities for relaxing the conditions of access to arbitration.

The Supreme Court of the United States ('USSC') has applied the same distinction between jurisdictional and procedural conditions in the investment arbitration context, but inspired by the US domestic law. In *BG Group plc v Argentina,* the USSC held that a local litigation requirement was not a condition of consent of the respondent State, but a procedural requirement in initiating arbitration.[44] The USSC drew an analogy to contractual relationships,[45] and then held that the fact that the instrument in question was a treaty should not lead to a different conclusion, applying US domestic law to treaties.[46] The USSC was clearly wrong: in the assessment of whether

---

38 *Abaclat and others v Argentina* (Decision) (n 19) para 496.

39 ibid paras 579–80.

40 ibid para 579.

41 *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) paras 262–3. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) para 319 (considering the fair administration of international justice and the principle of good faith).

42 *Abaclat and others v Argentina* (Decision) (n 19) paras 579, 581 (stating that the dispute resolution clause with the local litigation requirement 'is a system aimed at providing the disputing parties with a fair and efficient dispute settlement mechanism', and then holding that the purpose of the local litigation requirement is to give a fair opportunity to the host State to resolve the dispute within its own domestic system).

43 Cf *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* (n 36) para 6.2.1 ('It is a fundamental principle that an agreement is formed by offer and acceptance.'); with *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) paras 243–4 (rebutting the offer-acceptance theory and advancing the theory of unilateral State consent).

44 *BG Group plc v Republic of Argentina* (2014) 572 US ___, 8 ('It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.').

45 ibid 6 ('In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties.').

46 ibid 10 (where the USSC stated that '[a]s a general matter, a treaty is a contract, though between nations', that '[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent', and referred to few precedents in that respect; the USSC did not pay any attention to the international law rules of treaty interpretation). This confirms the point made in Chapter 2, that

conditions qualify as jurisdictional or as relating to admissibility, courts should observe the governing law of arbitration agreements, which is public international law.[47] In that respect, the USSC had enough material to reach the same conclusion relying on public international law and the practice of investment tribunals.[48]

These are the most prominent but not the only examples of the questions affected by the jurisdiction/admissibility dichotomy developed in practice. Other examples include time-bars[49] and waiver requirements.[50] It should be noted that tribunals normally resort to this type of analysis when facing a regulatory deficiency in the given jurisdictional framework regarding the qualification of conditions precedent.[51] Qualifying conditions precedent as pertaining to the admissibility of claims rather than jurisdiction relaxes the terms of access to arbitration, which is also visible in the clashing opinions of the majorities and dissenting arbitrators in the analysed cases.[52]

C. Applicable Procedure as an Issue of Admissibility

The principal problem in *Abaclat and others v Argentina* was the introduction of mass claims in investment arbitration. That problem faced many questions which have been subject to extensive

---

international law is generally affected by domestic legal policies and doctrines when domestic courts are asked to rule on some questions of international law. See Chapter 2, Section 4.A.

47 Fabio G Santacroce, 'Navigating the Troubled Waters between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration' (2017) 33 Arb Int'l 539, 565–6.

48 Cf *BG Group plc v Republic of Argentina* (Roberts CJ dissenting) (2014) 572 US ___, 6–7 (referring to arbitral awards which considered local litigation requirements as conditions of jurisdiction) and 14 (stating: 'None of them—not a single one [case cited by the majority]—involves an agreement between sovereigns or an agreement to which the person seeking to compel arbitration is not even a party.').

49 See, for example, *Resolute Forest Products Inc v Government of Canada*, PCA Case No 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) paras 83–4; Arrêt du 29 janvier 2019 (n 25) 4–6.

50 *Waste Management Inc v Mexico* (Highet Dissent) (n 8) para 59; *Supervision y Control SA v Costa Rica* (n 8) paras 297–300.

51 Cf, for example, US Model BIT (2012) art 26 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2870> accessed 18 April 2019 ('Conditions and Limitations on Consent of Each Party').

52 For example, *Abaclat and others v Argentina* (Abi-Saab Dissent) (n 17) paras 20–33; *İçkale İnşaat Limited Şirketi v Turkmenistan,* ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (10 February 2016) paras 3–11. See also *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J Christopher Thomas QC (7 October 2011) para 31; *Daimler Financial Services AG v Argentine Republic,* ICSID Case No ARB/05/1, Dissenting Opinion of Judge Charles N Brower (15 August 2012) para 13.

scholarly analyses and which will not be repeated here.[53] Only one aspect of the jurisdictional decision in that case is relevant for the present discussion. The Tribunal allowed mass claims proceedings, as a hybrid which starts as aggregate but continues as representative proceedings due to the large number of the claimants.[54] Key to that conclusion was divorcing, although arguably wrongly, the applicable procedure from party consent and analysing it through the lenses of admissibility.[55] According to the Tribunal, the mass aspect of the proceedings did not concern party consent but the 'modalities and implementation of the ICSID proceedings', and therefore related to the admissibility of the claims and not jurisdiction.[56] This meant that the Tribunal did not need to look for special consent to a mass claims process.[57] Acknowledging that the ICSID framework did not have appropriate rules for addressing mass claims, the Tribunal asserted the power to fill gaps in the applicable procedure, which made the mass claims process admissible.[58] The Tribunal was explicit that it did not have the power to modify the existing rules of procedure or adopt full sets of rules,[59] but it reached a conclusion with the same effect,[60] which is visible in the changes it has implemented throughout the process.[61] What is crucial here is that the Tribunal was led by the same theoretical distinction between conditions of consent and conditions of 'implementation of consent' as in the context of the local litigation requirement,[62] disregarding the fact that the applicable procedure was defined together with its power to

---

53 See generally Hans van Houtte and Bridie McAsey, 'Abaclat and Others v Argentine Republic: ICSID, the BIT and Mass Claims' (2012) 27 ICSID Rev-FILJ 231; Andrea Marco Steingruber, 'Abaclat and Others v Argentine Republic: Consent in Large-Scale Arbitration Proceedings' (2012) 27 ICSID Rev-FILJ 237; Donald Francis Donovan, 'Abaclat and Others v Argentine Republic: As a Collective Claims Proceeding' (2012) 27 ICSID Rev-FILJ 261; SI Strong, 'Mass Procedures in Abaclat v. Argentine Republic – Are They Consistent with the International Investment Regime?' in Marianne Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration*, vol 3 (NWV Verlag 2013) 261; Berk Demirkol, 'Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?' (2013) 2 Cambridge Int'l LJ 612; Ridhi Kabra, 'Has Abaclat v Argentina Left the ICSID with a 'Mass'Ive Problem?' (2015) 31 Arb Int'l 425; Kei Nakajima, 'Beyond Abaclat: Mass Claims in Investment Treaty Arbitration and Regulatory Governance for Sovereign Debt Restructuring' (2018) 19 JWIT 208.

54 *Abaclat and others v Argentina* (Decision) (n 19) para 488.

55 Relja Radović, 'Problematizing Abaclat's Mass Claims Investment Arbitration Using Domestic Class Actions' (2017) 4 McGill J Disp Resol 1, 12–5.

56 *Abaclat and others v Argentina* (Decision) (n 19) para 492.

57 ibid paras 489–92.

58 ibid paras 521–47.

59 ibid para 524.

60 ibid para 525 ('the filling of the gap does not consist of an amendment of the written rule itself, but rather of an adaptation of its application in a specific case'). See also Radović (n 55) 16–7.

61 See, for the introduction of a representative relief, Radović (n 55) 18–20.

62 See Section 2.B above.

adjudicate in the relevant BIT and the ICSID Convention. Another tribunal dealing with a related case criticised *Abaclat's* disregard of party consent in a multi-party scenario.[63] Although it did not consider to involve a 'mass aspect' (meaning a large number of claimants that causes serious repercussions on the process), the latter tribunal also discussed the issues of procedure and the manageability of the case in the context of the admissibility of claims.[64]

§ 3.03. Bypassing Conditions of Access

Regardless of the qualification of conditions of access to arbitration as relating to jurisdiction or admissibility, tribunals have developed supplementary rules allowing their circumvention or easier satisfaction. Such rules target conditions precedent to the institution of arbitration (A) and fork-in-the-road clauses (B).

A. Bypassing Conditions Precedent

While the qualification of conditions precedent as relating to admissibility in itself allows a certain flexibility in their application, the rules discussed here allow bypassing conditions precedent regardless of their character. Arbitral tribunals have developed three rules in particular affecting the application of conditions precedent: the futility exception (i), the *Mavrommatis* principle (ii), and the identity of disputes test (iii).

i. *Futility*

Conditions precedent like attempts at amicable settlement or local litigation can be avoided if they are futile.[65] Such an exception does not normally appear in investment treaties explicitly but scholars have recognised its development in arbitral practice.[66] The sources of inspiration for such an exception are clearly external to the party-provided jurisdictional rules: from analogies

---

63 *Giovanni Alemanni and Others v The Argentine Republic,* ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) para 289.

64 ibid paras 321–5. The Tribunal distinguished 'between those objections that raise the issue whether the Parties have duly consented to the dispute being brought to ICSID arbitration (which fall more on the 'jurisdictional' side of the line) and those objections that raise the question whether, even if the Parties have duly consented, there nevertheless exist reasons why the Tribunal should decline to hear the dispute in the form in which the dispute is brought before it, even though it possesses the formal competence to do so (which thus fall more on the 'admissibility' side of the line)': ibid para 260.

65 See, in the context of the exhaustion of domestic remedies, James R Crawford and Thomas D Grant, 'Local Remedies, Exhaustion Of' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 6 (OUP 2012) 900 ('A remedy which is practically or legally unavailable to the claimant is not a real remedy in this sense.').

66 Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 JWIT 231, 238.

to the law of diplomatic protection and the requirement of the exhaustion of domestic remedies,[67] to previous investment decisions as established practice,[68] to logical constructions,[69] to no clearly indicated sources.[70] Bearing this in mind, some tribunals have been of the opinion that when a futility exception does not appear in a BIT it would be impossible to accept its existence.[71] Others have accepted the futility exception in principle, but have expressed reservations towards reading it freely into the text of a BIT.[72] Nevertheless, the futility exception seems now generally accepted, so that it has been recognised even by tribunals which have not been able or forced to apply it.[73]

---

67 *Ambiente Ufficio SpA and others v Argentina* (n 12) para 599 (note that the Tribunal argued that the futility exception from the law of diplomatic protection was relevant via Article 31(3)(c) of the VCLT: ibid paras 600–7); *Giovanni Alemanni and Others v Argentina* (n 63) paras 315–6. See also *Ethyl Corporation v The Government of Canada,* UNCITRAL arbitration, Award on Jurisdiction (24 June 1998) para 84. For a criticism of this analogy, see Giulia D'Agnone, 'Recourse to the "Futility Exception" within the ICSID System: Reflections on Recent Developments of the Local Remedies Rule' (2013) 12 LPICT 343, 359–61.

68 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador,* ICSID Case No ARB/06/11, Decision on Jurisdiction (9 September 2008) para 94; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic,* ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) paras 126–9.

69 *BG Group Plc v The Republic of Argentina,* UNCITRAL arbitration, Final Award (24 December 2007) para 147 (the Tribunal declined to apply the futility exception from the law of diplomatic protection, but held that interpreting a local litigation requirement as absolute could lead to absurd results allowing States to avoid arbitration by preventing local litigation).

70 *Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria,* ICSID Case No ARB/03/08, Award (10 January 2005) para 32(iv) ('this condition is not absolute, and that it should be waived when it is obvious that any conciliation attempt would be doomed given the clearly demonstrated attitude of the other party').

71 *İçkale İnşaat Limited Şirketi v Turkmenistan* (n 19) para 260.

72 *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) paras 265–7 ('The Tribunal agrees with the idea that limitations on the excessively strict application of a treaty provision can be implicit and need not be stated expressly. Futility has also been recognised as an exception to jurisdictional prerequisites in international law in other contexts. However, judicially-crafted exceptions must find support in more than a tribunal's personal policy analysis of the provisions at issue. […] The Tribunal cannot therefore create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract.' [references omitted]).

73 *Abaclat and others v Argentina* (Decision) (n 19) para 584; *Daimler Financial Services AG v Argentina* (n 36) paras 190–1; *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* (n 36) paras 8.1.1-21; *Ömer Dede and Serdar Elhüseyni v Romania,* ICSID Case No ARB/10/22, Award (5 September 2013) paras 256, 259–60. But see D'Agnone (n 67) 354 (arguing

A bigger controversy is the standard or threshold that should be applied under this exception. Many tribunals did not address this issue at all and have only discussed the relevant facts.[74] Others have addressed this issue, mostly in the context of local litigation requirements. One approach holds that there needs to be 'obvious futility' of local litigation.[75] Another approach argues that the 'obvious futility' standard is too strict, and adopts the standard formulated by the International Law Commission in regard to the exhaustion of domestic remedies, namely that '[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'.[76] Some tribunals have gone beyond the futility exception as such, and attempted to formulate a specific test stemming from the purpose of local litigation requirements. According to the Tribunal in *Urbaser v Argentina*, this requirement imposes a tougher burden on States, which should ensure that investors have proper opportunities to address their claims.[77] The value of this decision is that it reminds us that regardless of the declared standard of futility, the content of the requirement at stake must be observed.[78] The practice on the standard or threshold of futility is therefore less settled, but what appears well established is that the futility exception exists independently of treaty texts.

---

that although the *Abaclat* Tribunal explicitly stated that it did not apply the futility exception, it conducted an analysis resembling the application of that rule).

74 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador* (n 68) para 94; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) paras 126–9.

75 *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) para 269 ('This is not a case of obvious futility, where the relief sought is patently unavailable within the Argentine legal system.').

76 *Ambiente Ufficio SpA and others v Argentina* (n 12) paras 608–11. For this exception in regard to the exhaustion of local remedies in diplomatic protection, see art 15(a) in ILC, 'Diplomatic Protection', *Yearbook of the International Law Commission 2006*, vol II (Part Two) (UN 2013) 26.

77 *Urbaser SA and CABB v Argentina* (n 14) para 131 ('[… the local litigation requirement] also requires that the Host State allows its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms. […] Thus, the proper interpretation of the meaning of the 18 month rule is that it requires more from the Host State than merely to avoid that the rule becomes "completely ineffective" or represents a "futility" or even an "obvious futility", or "futility or otherwise," as the terms are used by the *ICS* Tribunal. The Host State must assume it's part of the obligation embodied in the 18 month rule, which places the threshold above the floor requirement of avoiding "futility or otherwise."' [reference omitted]).

78 *Murphy Exploration and Production Company International v Ecuador* (n 24) para 135 ('In the Tribunal's opinion, the obligation to negotiate is an obligation of means, not of results. There is no obligation to reach, but rather to try to reach, an agreement. To determine whether negotiations would succeed or not, the parties must first initiate them.').

ii. *The* Mavrommatis *principle*

The PCIJ has established in its practice the so-called *Mavrommatis* principle, according to which the Court will not decline jurisdiction if some conditions were not met at the time of its seizure but have become satisfied subsequently before the ruling on jurisdiction, so that the requesting party could simply reinstitute the proceedings.[79] The ICJ continues to apply this principle.[80] The same principle has been applied by investment tribunals. Some tribunals were openly inspired by the ICJ practice.[81] Others were not clear about the sources of their inspiration, and they simply held that 'it would be highly formalistic' to decline jurisdiction when the claimant could immediately start new arbitration.[82] The application of this principle has direct consequences on conditions precedent, because it results in declining to send the parties to other (prior) dispute settlement methods like negotiation or local litigation. The usual motive is that the time has already passed and the parties have not been able to settle their dispute outside arbitration.[83]

iii. *Identity of Disputes*

The requirement to litigate before domestic courts for some time before resorting to arbitration raises another question: when should the requirement be considered satisfied? Answering this question assumes developing criteria for the assessment of compliance with the requirement. Developing uniform criteria seems unrealistic, because of different formulations of requirements on the one hand, and differently organised local judiciaries on the other. Nevertheless, tribunals have tried to do so and have achieved a certain degree of consistency.

---

79 *Mavrommatis Palestine Concessions (Greece v UK)* (Judgment) (1924) PCIJ Ser A—No 2, 6, 34.

80 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) (2008) ICJ Rep 412, paras 81–91.

81 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) paras 144–8; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 135; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) paras 320–7. See also *Salini Impregilo SpA v Argentine Republic*, ICSID Case No ARB/15/39, Decision on Jurisdiction and Admissibility (23 February 2018) para 139 (following *Philip Morris v Uruguay*).

82 *TSA Spectrum de Argentina SA v Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008) para 112; *Ethyl Corporation v Canada* (n 67) para 85.

83 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay* (n 81) para 146; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 135; *TSA Spectrum de Argentina SA v Argentina* (n 82) para 111; *Ethyl Corporation v Canada* (n 67) para 85; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) paras 319, 328.

One option is to apply the so-called 'triple identity' test, which targets the identity of parties, the object of the dispute, and the cause of action.[84] However, many tribunals considered this test too strict, and focused on the subject matter of disputes instead. The Tribunal in *Philip Morris v Uruguay* started from the notion of the 'dispute' in the BIT, arguing that it was a broad one and not limited to breaches of the BIT.[85] This led the Tribunal to conclude that local litigation need not necessarily concern the same cause of action as arbitration;[86] it also held that the litigating parties need not be the same as in arbitration.[87] According to this Tribunal, the litigated and arbitrated disputes need not be the same.[88] The only requirement is that the subject matter of the disputes and the facts are 'substantially similar' in domestic litigation and arbitration.[89] The Tribunal thus justified its approach on the grounds of treaty interpretation, although how it came up with the two criteria remains unclear. The Tribunal in *Teinver v Argentina* held that the same subject matter must be considered by local courts and arbitration.[90] This Tribunal drew an analogy to the exhaustion of domestic remedies in ICJ practice, rejecting the proposition that there needs to be identity of the parties and of the cause of action.[91] Another tribunal explicitly rejected the 'triple identity' test on the ground that treaty breaches could not be litigated domestically.[92] It can be questioned whether this is a valid concern, in light of the broad

---

84 See, regarding the *res judicata* doctrine, *Marco Gavazzi and Stefano Gavazzi v Romania,* ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) para 166 ('Under international law, three conditions need to be fulfilled for a decision to have binding effect in later proceedings: namely, that in both instances, the object of the claim, the cause of action, and the parties are identical.' [reference omitted]).

85 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay* (n 81) paras 105–11.

86 ibid para 113.

87 ibid para 114. The Tribunal found that one of the Claimants satisfied the local litigation requirement in the interest of the other Claimants.

88 ibid para 105.

89 ibid paras 110, 113. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentina* (n 19) paras 297, 303–5.

90 *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 134.

91 ibid paras 132–3. See also *Salini Impregilo SpA v Argentina* (n 81) paras 128–33. Interestingly, the Tribunal in *Salini Impregilo v Argentina* isolated the notion of the 'dispute' in the local litigation requirement from the rest of the dispute settlement provision. While Article 8(1) of the Argentina-Italy BIT referred to a 'dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this Agreement', Article 8(2) simply referred to 'the dispute'. This was not analysed by the Tribunal regarding the issue of cause of action, and the differences between the two paragraphs were analysed only in regard to the identity of the parties. See ibid paras 115(1)-(2).

92 *Ömer Dede and Serdar Elhüseyni v Romania* (n 73) para 249.

acceptance of the futility exception. The same tribunal further held that 'the most reasonable test […] requires that disputes brought before local courts be of a nature that permits resolution to substantially the same extent as if brought before an international arbitral tribunal pursuant to an investment treaty'.[93]

The same issue can be approached from another angle: what investors could do to comply with the requirement of local litigation? The principal contribution from this side of analysis is the confirmation that local litigation does not necessarily need to concern the same cause of action[94] or the same relief[95] as that pursued in arbitration. However, it could be asked whether the cause of action and the remedy pursued domestically could lead to the settlement of the entire dispute, ie to the same extent as in arbitration.[96]

Despite the attempts to incorporate their conclusions into interpretative narratives, tribunals have created objective criteria orbiting around the notion of the subject matter of dispute, which are determinative in the application of local litigation requirements. Such criteria set the standard for implementation, and at the same time *de facto* concretise the command, of local litigation requirements: the loosening of the criteria of the applicable standard relaxes in turn the conditions of access to arbitration.

B. Bypassing Fork-in-the-Road Clauses

When an investment treaty offers investors choice between multiple forums, fork-in-the-road clauses make their choice of forum final. If an investor attempts to initiate proceedings before more than one forum, what criteria guide the assessment whether the fork-in-the-road clause has been triggered? This is not an interpretive question concerning the text of the relevant clause, as are questions about the existence of a fork-in-the-road clause[97] and its reach to different forums.[98]

---

93 ibid para 253.

94 *Urbaser SA and CABB v Argentina* (n 14) para 181.

95 *Wintershall Aktiengesellschaft v Argentina* (n 36) paras 118, 196.

96 *Urbaser SA and CABB v Argentina* (n 14) paras 179–82. See also *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay* (n 81) para 112.

97 Cf *Beijing Urban Construction Group Co Ltd v Republic of Yemen,* ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) para 71 (interpreting the word 'or' in the jurisdictional clause as a fork-in-the-road); with Damien Charlotin, 'Analysis: At Jurisdiction Phase, Libyan Civil Unrest Justifies Waiver of BIT's Cooling Off Period, but Does Not Excuse State's Failure to Post a Share of Costs; Treaty Provision Should Not Be Read as a "Fork-in-Road" Clause That Would Bar Later BIT Claim' (*Investment Arbitration Reporter*, 4 June 2018) <https://www.iareporter.com/articles/analysis-at-jurisdiction-phase-libyan-civil-unrest-justifies-waiver-of-bits-cooling-off-period-but-does-not-excuse-states-failure-to-post-a-share-of-costs-treaty-provision-should-not-be-read-a/> accessed 3 January 2019 (reporting a decision holding that the word 'or' did not imply a fork-in-the-road).

98 For example, whether a fork-in-the-road clause applies between local litigation and international arbitration only, or between different arbitral forums as well. See Damien Charlotin and Luke Eric

Because of the usual lack of any textual elements that can be interpreted, tribunals are required to create criteria identifying two disputes as sufficiently the same to trigger a fork-in-the-road clause. In this respect, investment tribunals have not created a consistent practice, and have rather established two streams with smaller variations.

One stream of practice advocates for the 'triple identity' test, comprising the identity of the parties, the object of the dispute, and the cause of action.[99] Some tribunals relied on some of these criteria in isolation, like the cause of action,[100] the object,[101] the parties,[102] or on a combination

---

Peterson, 'The Merck v. Ecuador Award (Part One): Arbitrators Wave Away Jurisdictional Objections – Including on Exhaustion – and Warn That Non-Compliance With Interim Orders Could Aggravate Treaty Breach' (*Investment Arbitration Reporter*, 27 March 2018) <https://www.iareporter.com/articles/the-merck-v-ecuador-award-part-one-arbitrators-wave-away-ecuadors-jurisdictional-objections-including-on-exhaustion-and-warn-that-ecuadors-non-compliance-with-interim-orders/> accessed 3 January 2019.

99 *Azurix Corp v The Argentine Republic,* ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) paras 88–90; *Toto Costruzioni Generali SpA v The Republic of Lebanon,* ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) para 211; *Hulley Enterprises Limited (Cyprus) v The Russian Federation,* PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 597; *Mobil Exploration and Development Argentina Inc Suc Argentina and Mobil Argentina Sociedad Anónima v The Argentine Republic,* ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) para 139; *Hulley Enterprises Limited (Cyprus) v The Russian Federation,* PCA Case No AA 226, Final Award (18 July 2014) paras 1256–72.

100 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt,* ICSID Case No ARB/99/6, Award (12 April 2002) para 71; *Desert Line Projects LLC v The Republic of Yemen,* ICSID Case No ARB/05/17, Award (6 February 2008) para 136. See also *Occidental Exploration and Production Company v The Republic of Ecuador,* LCIA Case No UN3467, Final Award (1 July 2004) paras 52, 57–8.

101 *Olguín v Republic of Paraguay,* ICSID Case No ARB/98/5, Decision on Jurisdiction (8 August 2000) para 30.

102 *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador,* PCA Case No 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) paras 4.78-9 (the Tribunal started from the 'triple identity' test, and after expressing some doubts about its sharpness concluded that the wording of the fork-in-the-road clause implied that there needs to be the identity of the parties before local courts and in arbitration, which was not the case); *Charanne BV and Construction Investments SARL v The Kingdom of Spain,* SCC Case No V 062/2012, Final Award (21 January 2016) paras 398–410 (dismissing the objection based on the fork-in-the-road clause solely on the ground of the identity of parties, which made the examination of the other two criteria unnecessary; the Tribunal admitted that sometimes the identity of parties should be analysed flexibly, so that investors could not easily avoid a fork-in-the-road); *Champion Trading Company and others v Arab Republic of Egypt,* ICSID Case No ARB/02/9, Decision on Jurisdiction (21 October 2003) para 3.4.3 (holding that the fork-in-the-road clause required the identity of the parties).

of two of them.[103] The inspiration for the 'triple identity' test can be found in general legal doctrines like *res judicata* and *lis pendens*, and for that reason investment tribunals refer to various sources.[104] Indeed, such an analogy seems well founded, because these doctrines and fork-in-the-road clauses aim at the same phenomenon: parallel or sequential resolution of one dispute by multiple forums. An important consideration is the coordination between contract and treaty claims,[105] but also between the latter and challenges of administrative decisions of the host State, which has led scholars to support the reliance on the above-mentioned criteria.[106] The 'triple identity' test serves the interests of investors, because it rarely leads to triggering a fork-in-the-road-clause.

These criteria have also been affirmed from another angle: in *Compañía de Aguas del Aconquija v Argentina* (better known as *Vivendi v Argentina*), the Tribunal held that a hypothetical submission of the dispute under a concession contract to local tribunals would not trigger the fork-in-the-road clause in the applicable BIT because of the difference in the causes of action.[107] However, this view was challenged by the Annulment Committee which relied on the broad definition of a 'dispute' in the BIT, holding that therefore the submission of contractual claims to local tribunals could *prima facie* trigger the fork-in-the-road clause.[108]

A different stream of practice looks at the 'foundational basis of a claim'. In *Pantechniki v Albania*, the Sole Arbitrator applied this test, which was not disputed by the parties.[109] The test was inspired by the discourses in the context of distinguishing contractual and treaty disputes.[110]

---

103 Usually combining cause of action and parties: *Alex Genin, Eastern Credit Limited Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award (25 June 2001) paras 331–4; *Ronald S Lauder v Czechia* (n 28) paras 161–6; *Enron Corporation and Ponderosa Assets LP v Argentina* (n 11) paras 97–8; *CMS Gas Transmission Company v Argentina* (n 11) para 80.

104 *Enron Corporation and Ponderosa Assets LP v Argentina* (n 11) para 97; *Azurix Corp v Argentina* (n 99) para 88; *Chevron Corporation and Texaco Petroleum Company v Ecuador* (n 102) para 4.77. For these considerations in the context of *res judicata* see *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No ARB(AF)/12/1, Award (25 August 2014) paras 7.10-32.

105 *CMS Gas Transmission Company v Argentina* (n 11) para 80 ('Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.' [reference omitted]).

106 Schreuer, 'Travelling the BIT Route' (n 66) 247–9.

107 *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic*, ICSID Case No ARB/97/3, Award (21 November 2000) para 55.

108 *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 55.

109 *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) para 61.

110 ibid (referring to the 2002 annulment decision in *Vivendi v Argentina*). See *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentina* (n 108) paras 98–101.

What was disputed, however, was what amounted to the fundamental basis of a claim, and the Sole Arbitrator held that the relevant question was 'whether claimed entitlements have the same normative source'.[111] He held that 'there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty' and that it must be determined whether the treaty claim was autonomous from the contract,[112] which the Sole Arbitrator found not to be the case because the Claimant was seeking the same relief on the same fundamental basis in both contractual and treaty disputes.[113] This test, therefore, looks beyond causes of action into the factual basis of claims, and it has been adopted by other tribunals for that particular reason.[114] A major downside of this test is the lack of clear criteria and consequent uncertainty. Although it is arguable that the 'fundamental basis of a claim' refers to something more than a mere cause of action, the cause of action can also be observed as the principal notion in the *Vivendi* annulment decision when reviving this standard in the context of the contract/treaty claims division, despite its unskilful accommodation in relation to the fork-in-the-road clause.[115]

It has been argued that relying on the notion of a 'dispute' in BITs, there should be some harmonisation of the standards applied to local litigation requirements and forks-in-the-road.[116] Some tribunals have indeed used that notion, for example to derive the criteria of the identity of causes of action and parties from precise definitions of an 'investment dispute'.[117] But the same reliance on the terms of the BIT and the notion of a 'dispute' can be made in the opposite direction, to rebut formalities like those of the 'triple identity' test.[118] It seems that tribunals clash

---

111 *Pantechniki SA Contractors & Engineers (Greece) v Albania* (n 109) paras 61–2.

112 ibid para 64.

113 ibid para 67. See also *Supervision y Control SA v Costa Rica* (n 8) paras 308–21 (applying the same test in the context of a waiver/withdrawal of claims requirement).

114 *H&H Enterprises Investments Inc v The Arab Republic of Egypt*, ICSID Case No ARB/09/15, Award (6 May 2014) paras 366–85.

115 See *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentina* (n 108) paras 93–115; and for such a reading of this decision, *Occidental Exploration and Production Company v Ecuador* (n 100) paras 52–3.

116 Pérez Aznar (n 35) 554–5. See also Michal Swarabowicz, 'Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System' (2017) 8 JIDS 280 (supporting the standardisation from a broader perspective).

117 *Ronald S Lauder v Czechia* (n 28) paras 158–61; *Alex Genin, Eastern Credit Limited Inc and AS Baltoil v Estonia* (n 103) para 325; *Middle East Cement Shipping and Handling Co SA v Egypt* (n 100) para 71.

118 *H&H Enterprises Investments Inc v Egypt* (n 114) para 367 ('[…] the Tribunal is of the view that the triple identity test is not the relevant test as it would defeat the purpose of Article VII of the US-Egypt BIT, which is to ensure that the same dispute is not litigated before different fora. […] However, investment arbitration proceedings and local court proceedings are often not only based on different causes of action but also involve different parties. More importantly, the language of Article VII does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted

on their understanding of the purpose and functioning of fork-in-the-road clauses on a more general level, and the reliance on treaty terms has only an instrumental role in argument-building. These treaty-overreaching criteria take precedence over the actual terms of treaties, and thus objective standards for the application of fork-in-the-road clauses are created. Because the 'triple identity' test appears dominant in comparison to the 'fundamental basis of a claim' standard, it can be observed that the widespread formalisation of the applicable criteria of the former test relaxes the conditions of access to arbitration.

§ 3.04. The Most-Favored-Nation Clause as Panacea

The applicability of MFN clauses to dispute resolution clauses within investment treaties is probably the most examined topic in international investment law and arbitration, and can be approached from many perspectives.[119] For the purposes of this Section, I will examine only one

---

to other dispute resolution procedures; what matters therefore is the subject matter of the dispute rather than whether the parties are exactly the same.'). See also *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentina* (n 108) para 55.

[119] See generally, among many others, Rudolf Dolzer and Terry Myers, 'After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements' (2004) 19 ICSID Rev-FILJ 49; Dana H Freyer and David Herlihy, 'Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" Is "Most-Favored"?' (2005) 20 ICSID Rev-FILJ 58; Brigitte Stern, 'ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case' in Steve Charnovitz, Debra P Steger and Peter Van den Bossche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP 2005) 246; 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; Scott Vesel, 'Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties' (2007) 32 Yale J Int'l L 125; Jarrod Wong, 'The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties' (2008) 3 AJWH 171; Yas Banifatemi, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration' in Andrea K Bjorklund, Ian A Laird and Sergey Ripinsky (eds), *Investment Treaty Law: Current Issues III. Remedies in International Investment Law. Emerging Jurisprudence of International Investment Law* (BIICL 2009) 241; Nartnirun Junngam, 'An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference' (2010) 15 UCLA J Int'l L & For Aff 399; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2 JIDS 97; Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Rev-FILJ 14; Grzegorz Domański and Marek Świątkowski, 'Application of Most Favoured Nation Clause to Jurisdiction Provisions in Light of the Award in Austrian Airlines v. Slovakia' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law*, vol II (Juris 2011) 73; Tony Cole, *The Structure of Investment Arbitration* (Routledge 2013) ch 7; Sam Wordsworth and Chester Brown, 'A Re-Run of Siemens, Wintershall and Hochtief on Most-

aspect of that debate: the principled, abstract, and rule-like nature of solutions which tribunals have attempted to create. I will firstly set the scene by discussing the increasing arbitral blending of dispute settlement clauses in investment treaties with their provisions on substantive investor protection (A). I will then address the formation of presumptions in favour or against the applicability of MFN clauses to dispute resolution clauses in the context of the jurisdiction/ admissibility dichotomy (B), and finally I will discuss the coordination of these presumptions with treaty texts (C).

A. Dispute Resolution Clauses as Substantive Protection

The applicability of MFN clauses to substantive investor protections is undisputable.[120] The issue is their applicability to dispute settlement clauses, ie procedural norms which do not regulate the lawfulness of State conduct, but establish the jurisdiction of investment tribunals. However, because the distinction between 'substantive' and 'procedural' rules of international law is conceptual and therefore unable to give definite answers,[121] this is another fertile field for the development of the arguments both in favour and against the applicability of MFN clauses to dispute resolution clauses in principle.

The very first decision which allowed the application of MFN clauses to dispute settlement clauses, *Maffezini v Spain*, held that 'today dispute settlement arrangements are inextricably related to the protection of foreign investors',[122] followed by stressing the importance of dispute settlement arrangements for the protection of foreign investors.[123] Other tribunals have gone beyond establishing a link between dispute settlement and substantive protection. The Tribunal in *Gas Natural v Argentina* maintained that 'provision for international investor-state arbitration in [BITs] is a significant substantive incentive and protection for foreign investors',[124] 'that

---

Favoured-Nation Clauses: Daimler Financial Services AG v Argentine Republic' (2015) 30 ICSID Rev-FILJ 365.

120 However, it is disputable whether MFN clauses can import new substantive rights, not provided for in the basic BIT. Cf *EDF International SA, SAUR International SA, and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) para 929 (importing an umbrella clause); with *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1, Award (21 July 2017) paras 884–92 (rejecting the importation of an umbrella clause).

121 But see Chapter 2, Section 2.C, discussing the separate provision of substantive rights and procedural remedies, which seems to be a very clear point of differentiation between substantive and procedural rules.

122 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) para 54.

123 ibid para 55.

124 *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) para 31.

assurance of independent international arbitration is an important – perhaps the most important – element in investor protection',[125] and that it therefore formed part of 'the bundle of protections granted to foreign investors'.[126] Another tribunal held that access to international arbitration 'is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on'.[127] The mingling of dispute settlement clauses with the rules of substantive protection is therefore enabled by the observance of their protective function towards investors, which leads tribunals not to distinguish between substantive and procedural rules.[128]

A different stream of practice has observed a very strong separation between substantive and procedural rules and used that to build arguments against the applicability of MFN clauses to dispute resolution clauses.[129] According to these tribunals, the different nature of procedural clauses from those granting the substantive investor protections precludes their mingling and militates against the applicability of MFN clauses to dispute settlement clauses.

The value of these opinions, however, should not be overemphasised. They can neither change the nature of dispute settlement clauses, nor break the traditional separation between substantive and procedural rules of international law. Their main value is rather in legitimising the interpretative outcomes on the applicability of MFN clauses to dispute settlement clauses.[130] This is, however, already an important contribution of these decisions for the present discussion: by stressing the protective nature of dispute settlement clauses, or denying their shared character with the substantive provisions, tribunals set the scene for the creation of principled presumptions in favour or against the applicability of MFN clauses to dispute settlement clauses.

---

125 ibid para 49.

126 ibid para 29.

127 *Hochtief AG v Argentina* (n 7) para 68.

128 *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic,* ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006) para 57; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic,* ICSID Case No ARB/03/19, and *AWG Group Ltd v The Argentine Republic,* UNCITRAL arbitration, Decision on Jurisdiction (3 August 2006) para 59.

129 *Vladimir Berschader & Moïse Berschader v The Russian Federation,* SCC Case No 80/2004, Award (21 April 2006) paras 185–208; *Telenor Mobile Communications AS v The Republic of Hungary,* ICSID Case No ARB/04/15, Award (13 September 2006) para 92; *Wintershall Aktiengesellschaft v Argentina* (n 36) para 168; *European American Investment Bank AG (Austria) v The Slovak Republic,* PCA Case No 2010-17, Award on Jurisdiction (22 October 2012) paras 445–52; *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* (n 36) para 7.3.9. See also *Tecnicas Medioambientales Tecmed SA v The United Mexican States,* ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 69.

130 Relja Radović, 'Between Rights and Remedies: The Access to Investment Treaty Arbitration as a Substantive Right of Foreign Investors' (2019) 10 JIDS 42.

B. MFN Clauses and the Jurisdiction/Admissibility Dichotomy

The issue of the applicability of MFN clauses to dispute settlement appeared with the attempts to bypass conditions precedent and thus relax the conditions of access to international arbitration (i), but the solutions created in that context proved problematic with the attempts at establishing substantive jurisdiction via the same route (ii).

i. *The Emergence of the Debate: Seeking Easier Conditions of Access*

In 2000, the *Maffezini v Spain* Tribunal allowed a local litigation requirement to be bypassed by reliance on an MFN clause and a third-party BIT which did not contain such a requirement.[131] The Tribunal essentially created a presumption in favour of the applicability of MFN clauses to dispute resolution clauses, which is visible in its general formulation, on the one hand,[132] and the system of exceptions from that presumption, on the other.[133] This precedent was followed by many other tribunals which faced the same issue of bypassing local litigation requirements using MFN clauses.[134] Confirming the principle, the Tribunal in *Gas Natural v Argentina* went furthest by holding:

> Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.[135]

---

131 *Emilio Agustín Maffezini v Spain* (n 122) para 64.

132 ibid para 56 ('From 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.').

133 ibid paras 62–3 ('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 Tribunal named the exhaustion of domestic remedies, fork-in-the-road clauses, selection of a particular arbitration forum, arbitral institutionalised system and rules of procedure, as examples of such public policy considerations.).

134 *Siemens AG v The Argentine Republic,* ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) paras 102–3; *Telefónica SA v Argentina* (n 37) paras 105–6; *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentina* (n 128) para 60; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA/AWG v Argentina* (n 128) para 62; *National Grid plc v The Argentine Republic,* UNCITRAL arbitration, Decision on Jurisdiction (20 June 2006) para 92. A rebuttable presumption in favour of the applicability of MFN clauses to dispute settlement provisions has also been supported in scholarship: Radi (n 119) 764–71; Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 173–93.

135 *Gas Natural SDG SA v Argentina* (n 124) para 49.

Another way of formulating a similar presumption targets particular wording of MFN clauses. The Tribunal in *Impregilo v Argentina* held that 'in cases where the MFN clause has referred to "all matters" or "any matter" regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules', on which basis it concluded that the MFN clause was applicable to dispute settlement.[136]

The central value of such general considerations about the applicability of MFN clauses to dispute settlement in principle is the direction of the interpretative process towards a concrete jurisdictional determination. Tribunals which see MFN clauses as generally applicable to dispute settlement for some conceptual reasons, like the understanding of the access to international arbitration as a protective right, tend to reverse the interpretative direction, and instead of inquiring whether the drafters of the treaty intended to include dispute settlement within the reach of the MFN clause, they inquire whether the drafters intended not to.[137] The new presumption, therefore, defines the interpretative question, and it seeks the indicators of exclusion of dispute settlement provisions from the reach of an MFN clause. This phenomenon has been openly recognised in practice.[138]

Some tribunals were aware that such general statements could lead to dangerous effects, and they focused on the concrete condition precedent to be bypassed, stressing that it did not present a major jurisdictional issue. In *Hochtief v Argentina,* the Tribunal firstly concluded that an MFN clause was applicable to the dispute settlement clause 'in principle', invoking the latter's protective purpose and establishing it on an equal footing with the rules on substantive protection.[139] But then, the Tribunal held that the local litigation requirement at stake did not pertain to new rights of investors but was only a procedural rule in the implementation of the right to arbitrate, that it concerned the admissibility of claims and not jurisdiction, which enabled its bypassing using the MFN clause.[140] It has become apparent that not all jurisdictional limits can be tackled using an MFN clause, or as one tribunal put it, some claimants have tried to apply MFN clauses 'beyond appropriate limits'.[141] However, these tribunals did not face the questions of serious jurisdictional extensions themselves, and therefore despite such reservations they rather affirmed instead of challenging the general applicability of MFN clauses to dispute

---

136 *Impregilo SpA v Argentina* (n 36) para 108.

137 See, for examples of setting interpretive questions, *Telefónica SA v Argentina* (n 37) para 100; *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentina* (n 128) paras 56–7; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA/AWG v Argentina* (n 128) paras 58–9.

138 *Wintershall Aktiengesellschaft v Argentina* (n 36) para 184; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 173.

139 *Hochtief AG v Argentina* (n 7) paras 59–72.

140 ibid paras 77–99. See also *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 182.

141 *National Grid plc v Argentina* (n 134) para 92.

settlement. Furthermore, this was not a universal trend, and some tribunals insisted on qualifying local litigation requirements as jurisdictional while bypassing them relying on an MFN clause.[142]

ii. *Difficulties with Substantive Jurisdiction and Opposition to* Maffezini

When *Maffezini* and other tribunals were formulating the presumption, they did not distinguish between questions of jurisdiction and admissibility. Indeed, the *Maffezini* Tribunal itself qualified the local litigation requirement as jurisdictional.[143] Although these tribunals faced relatively minor issues (bypassing conditions precedent), the generality of their presumption opened the door for using the same route towards more serious jurisdictional questions (like extending the scope of justiciable disputes).[144] On some occasions, substantive jurisdiction was indeed defined with the help of an MFN clause: in *RosInvest v Russia*, the Tribunal allowed the Claimant to rely on an MFN clause to extend its jurisdiction over the issue of occurrence of expropriation;[145] another tribunal thus established jurisdiction over the alleged breaches of the fair and equitable treatment, which were not arbitrable under the basic BIT.[146]

While the *RosInvest* Tribunal showed restraint towards general considerations on the applicability of MFN clauses to dispute resolution clauses,[147] the Tribunal in *Le Chèque Déjeuner* showed more openness for such considerations,[148] and applied the same type of presumption as in cases discussed above.[149] However, tribunals which had conceptual struggles with the MFN-

---

142 *Impregilo SpA v Argentina* (n 36) paras 94, 108.

143 *Emilio Agustín Maffezini v Spain* (n 122) para 36.

144 In a recent and extreme example, claimants are attempting to import State consent to arbitration via an MFN clause to a BIT which does not provide for such consent at all. See Damien Charlotin, 'New Pleadings Reveal That French Investor Seeks to Overcome Investment Treaty's Lack of an Arbitral Consent Clause, by Relying on Most-Favoured Nation Clause' (*Investment Arbitration Reporter*, 17 October 2018) <https://www.iareporter.com/articles/new-pleadings-reveal-that-french-investor-seeks-to-overcome-investment-treatys-lack-of-an-arbitral-consent-clause-by-relying-on-most-favoured-nation-clause/> accessed 19 January 2019.

145 *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V 079/2005, Award on Jurisdiction (October 2007) paras 124–39.

146 *Le Chèque Déjeuner and CD Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Decision on Preliminary Issues of Jurisdiction (3 March 2016) paras 135–222.

147 *RosInvestCo UK Ltd v Russia* (n 145) para 137.

148 Throughout its analysis, the Tribunal discussed simply the applicability of MFN clauses to dispute settlement clauses and often referred to the work of the ILC on the matter, although the only other arbitral decision commented by the Tribunal was the jurisdictional decision in *RosInvest v Russia* (this and the Tribunal in the latter case were chaired by the same arbitrator). See *Le Chèque Déjeuner and CD Holding Internationale v Hungary* (n 146) paras 165–6, 203–5, 207–15.

149 ibid para 159 ('Had the parties intended the MFN clause to be so limited, it would have been straightforward to set out a restriction to this effect in express terms either in the MFN clause itself or elsewhere in the Treaty. […] To be capable of overturning the fundamental, non-discriminatory

dispute resolution conjunction have been more willing to engage in the discourses on that issue. In *Plama v Bulgaria,* the Tribunal was asked to incorporate consent to ICSID arbitration with a broader scope through an MFN clause. Reacting to *Maffezini*, the Tribunal held

> that the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[150]

The Tribunal thus created a reversed presumption, which has been endorsed by other tribunals when faced with the attempts to broaden the scope of their substantive jurisdiction to non-justiciable issues under the basic BIT.[151] Its main value is that it sets the opposite direction of the interpretative process, so that it must be demonstrated that treaty parties intended to include dispute settlement provisions within the reach of an MFN clause.[152] In other words, the reversed presumption described in *Plama* seeks the indicators of inclusion of dispute settlement provisions within the reach of an MFN clause. Some tribunals fit such an approach within broader narratives on the consensualism of international adjudication in general, as the Tribunal in *Daimler v Argentina* did when it required 'affirmative evidence' for the establishment of consent and therefore jurisdiction.[153]

A functional approach to analysing these two streams of practice (that of *Maffezini* and that of *Plama*) maintains that MFN clauses can affect dispute settlement provisions in respect of the

---

object and purpose of an MFN clause, the language of any limitation must have clearly and unambiguously in contemplation a restriction on the operation of the MFN clause itself. It is not sufficient that a clause elsewhere in the Treaty provides for a limitation in respect of some matter while leaving the MFN clause entirely intact.') and para 177 ('unrestricted language in an MFN clause should, as a matter of treaty interpretation, give rise to a presumption against limitation').

150 *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 223.

151 *Telenor Mobile Communications AS v Hungary* (n 129) para 90 ('This Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal.'); *Vladimir Berschader & Moïse Berschader v Russia* (n 129) paras 178–81; *ST-AD GmbH (Germany) v The Republic of Bulgaria,* PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) para 391 (supporting the principle stated in *Berschader* which is effectively the same as in *Plama*). See also, in the context of the conditions of access, *H&H Enterprises Investments Inc v Egypt* (n 114) para 358; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) para 282.

152 *Plama Consortium Limited v Bulgaria* (n 150) paras 203–7; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan,* ICSID Case No ARB/02/13, Decision on Jurisdiction (15 November 2004) para 118.

153 *Daimler Financial Services AG v Argentina* (n 36) paras 175–6. See also *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) para 280.

admissibility-related conditions, but not in relation to the issues of scope of consent and other major jurisdictional issues.[154] However, that distinction is not obvious, because tribunals which reject the MFN-dispute settlement conjunction in principle usually express their conceptual struggles with that idea, rather than focusing on the concrete jurisdictional issue. Their intention is clearly to address the overall question of the applicability of MFN clauses to dispute settlement in principle.[155] One conceptual problem, as already noted above, is the strong separation between 'substantive' and 'procedural' rules of international law.[156] This separation has practical aspects: one tribunal concluded that if MFN clauses could establish an obligation to consent, narrower consent in the basic BIT than in a third-party BIT would cause breach of the MFN clause, but this could not establish jurisdiction.[157] Tribunals have also pointed out that jurisdictional clauses are severable from the rest of BITs and function as an 'agreement on their own'.[158] Another conceptual problem concerns the qualification of conditions precedent as related to admissibility: as I analysed above, many tribunals have insisted that such conditions qualify as jurisdictional,[159] and moreover many did so precisely in denial of the applicability of MFN clauses to dispute

---

154 UNCTAD, 'Most-Favoured-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements II* (UN 2010) 66–84; and *Teinver SA Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentina* (Jurisdiction) (n 68) para 169 (relying on the UNCTAD's admissibility/scope of jurisdiction dichotomy). See also, in the same direction, Eduardo Savarese, 'Treaty-Based Investment Arbitration and the MFN Clause: The Possible Common Denominator Between Jurisdiction and Admissibility' (2011) 21 Italian Yrbk Int'l L 241, 253. But see ILC, 'Final Report of the Study Group on the Most-Favoured-Nation Clause' (29 May 2015) UN Doc A/CN.4/L.852, para 113 ('But there is no explanation in the UNCTAD report as to why it treats cases relating to the 18-month litigation requirement as concerning admissibility rather than as concerning jurisdiction.').

155 See particularly, *Vladimir Berschader & Moïse Berschader v Russia* (n 129) para 181 ('The tribunal in the *Gas Natural* case suggested that as a matter of principle MFN provisions in BITs should be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise. […] Instead, 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.' [reference omitted]).

156 See above n 129.

157 *Menzies Middle East and Africa SA et Aviation Handling Services International Ltd v République du Sénégal*, ICSID Case No ARB/15/21, Award (5 August 2016) para 141.

158 *Plama Consortium Limited v Bulgaria* (n 150) para 212; *H&H Enterprises Investments Inc v Egypt* (n 114) para 358. See also *European American Investment Bank AG (Austria) v Slovakia* (n 129) paras 445–6.

159 See above n 24, 36.

settlement provisions.[160] This latter group of tribunals did not allow bypassing conditions precedent, like local litigation requirements, through an MFN clause, in regard to which the entire *Maffezini* stream emerged in the first place.

C. Treaty Text and Presumptions

The applicability of MFN clauses to dispute settlement clauses is usually said to be matter of treaty interpretation, whereby that question is principally governed by the wording of the concrete MFN clause. However, survey of the case law reveals that tribunals rather approach the question from a conceptual point of view and try to establish a general rule related to the essence of the concept of an MFN clause.[161] This is evidenced by the fact that tribunals have been willing to both allow and deny the MFN-dispute settlement conjunction regardless of whether MFN clauses were formulated openly[162] or narrowly.[163] Such a clash appeared even in the interpretations of one and the same BIT and its MFN clause.[164] Furthermore, tribunals have been able to implement their presumptions regardless of other restrictive factors of MFN clauses, like the limitation of the 'treatment' to the State's territory.[165] Only exceptionally the wording is decisive.[166] Tribunals

---

160 *Wintershall Aktiengesellschaft v Argentina* (n 36) paras 160–97; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) paras 274–317; *Daimler Financial Services AG v Argentina* (n 36) paras 179–281; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* (n 36) paras 7.1.1-9.1.

161 Tribunals often emphasise their understanding of the function and purpose of MFN clauses. See, for example, *Le Chèque Déjeuner and CD Holding Internationale v Hungary* (n 146) paras 161–3 (on the purpose of MFN clauses to eliminate discrimination among foreign investors).

162 Regarding MFN clauses applicable to 'all matters', cf *Impregilo SpA v Argentina* (n 36) para 108; with *Vladimir Berschader & Moïse Berschader v Russia* (n 129) paras 184–94.

163 Like those limited to investors' 'management, maintenance, use, enjoyment, or disposal of their investments'; cf *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA/AWG Group Ltd v Argentina* (n 128) para 57; and *RosInvestCo UK Ltd v Russia* (n 145) para 130; with *Ansung Housing Co Ltd v People's Republic of China,* ICSID Case No ARB/14/25, Award (9 March 2017) paras 137–8.

164 The MFN clause in the Argentina-Germany BIT was interpreted to include the dispute settlement clause in *Siemens v Argentina* and *Hochtief v Argentina,* and to the contrary in *Wintershall v Argentina* and *Daimler v Argentina.*

165 Cf *Vladimir Berschader & Moïse Berschader v Russia* (n 129) para 185; *Daimler Financial Services AG v Argentina* (n 36) paras 225–31; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina* (n 36) paras 305–9; *ST-AD GmbH (Germany) v Bulgaria* (n 151) paras 394–6; *Beijing Urban Construction Group Co Ltd v Yemen* (n 97) paras 116–21; with *Impregilo SpA v Argentina* (n 36) para 100; *Telefónica SA v Argentina* (n 37) para 102; and *Le Chèque Déjeuner and CD Holding Internationale v Hungary* (n 146) paras 191–2.

166 *Renta 4 SVSA and others v The Russian Federation,* SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009) paras 103–20 (MFN clause limited to fair and equitable treatment);

also have enough interpretative space to give different value to specific wording of dispute settlement clauses, depending on their preferences.[167] It therefore appears that the reach of MFN clauses is governed by presumptions, which are given effect in treaty interpretation.[168] This is not surprising, given the importance of the general understandings on the typical meaning of MFN clauses both in their drafting and application.[169]

Because the practice is sharply divided, it cannot be said that there is a firm presumption of applicability or inapplicability. What is certain, for now, is that when an MFN clause explicitly states that it covers dispute settlement provisions, the MFN-dispute settlement conjunction must be applied.[170] The treaty text should also be given effect when an MFN clause explicitly states

Sanum Investments Limited v The Government of the Lao People's Democratic Republic, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) paras 357–8 (MFN clause limited to fair and equitable treatment and 'protection').

167 Some tribunals have not seen specific limitations of arbitral jurisdiction in dispute settlement clauses as a bar for the application of MFN clauses: *RosInvestCo UK Ltd v Russia* (n 145) para 131; *Le Chèque Déjeuner and CD Holding Internationale v Hungary* (n 146) paras 159, 205. Other tribunals have held that the specific wording of dispute settlement clauses defining substantive jurisdiction could not be overridden via MFN clauses: *Señor Tza Yap Shum v The Republic of Peru,* ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) para 216; *Austrian Airlines v The Slovak Republic,* UNCITRAL ad hoc arbitration, Final Award (9 October 2009) para 135; *Ivan Peter Busta and James Peter Busta v The Czech Republic,* SCC Case No V 2015/014, Final Award (10 March 2017) paras 166–7.

168 For an example of an interpretive twist discovering the application of a presumption, see *A11Y Ltd v Czech Republic,* ICSID Case No UNCT/15/1, Decision on Jurisdiction (9 February 2017) paras 93–107 (the Tribunal declared that an MFN clause could be applicable to dispute settlement clauses, but then gave preference to specific wording of the dispute settlement clause which specified arbitrable causes of action; however, the Tribunal factually applied the presumption against the applicability of MFN clauses to the matters of consent, because it relied on the fact that this was one of the UK BITs without the additional paragraph explicitly allowing the application of the MFN clause to the dispute settlement clause). Furthermore, tribunals generally tend to deny the relevance of any presumptions, despite their factual applications; see *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* (n 36) paras 7.6.4–5, 7.8.10 (stating that it will not engage into discussions on general presumptions about the reach of MFN clauses and denying their applicability, but then verifying the interpretative outcome against a presumption against MFN-dispute settlement conjunction suggested in legal scholarship).

169 Michael Waibel, 'Putting the MFN Genie Back in the Bottle' (2018) 112 AJIL 60, 61–2.

170 *Garanti Koza LLP v Turkmenistan,* ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) paras 40–64; *Venezuela US SRL v The Bolivarian Republic of Venezuela,* PCA Case No 2013-34, Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction Ratione Voluntatis) (26 July 2016) paras 100–3.

that it is not applicable to dispute settlement clauses.[171] Although not unchallenged,[172] these seem to be settled mandatory rules which cannot give way to any kind of a presumption.

When it comes to silent MFN clauses (which have caused the entire problem), possible presumptions about their reach are conditional and depend on the arbitrators' acceptance of the distinction between jurisdiction and admissibility. On the one hand, if the distinction between jurisdiction and admissibility is accepted, and if conditions precedent are qualified as relating to admissibility, then it is possible to presume the applicability of MFN clauses to dispute settlement clauses, but only to the latter category (ie conditions of admissibility). In this case, an MFN clause will be applied to the conditions of admissibility, unless it is demonstrated that treaty parties intended not to include dispute settlement provisions within the reach of the MFN clause.[173] On the other hand, if the distinction between jurisdiction and admissibility is not accepted, and all elements of dispute settlement clauses are seen as jurisdictional, there is a presumption against the applicability of MFN clauses. In this case, an MFN clause will not be applied to the questions of jurisdiction, unless it is demonstrated that treaty parties intended to include dispute settlement provisions within the reach of the MFN clause.[174]

§ 3.05. Conclusion

The procedural aspects of the consensual jurisdictional regulation, ie the conditions of access to international arbitration as defined in arbitration agreements, have been affected significantly by the development of arbitrator-made rules. Conditions of access have been detached from the notion of party consent and qualified as pertaining to the admissibility of claims, with the effect of relaxing the rigidity of their command. Independent exceptions in the applications of the conditions precedent have been developed, like the futility exception and the *Mavrommatis* principle. Local litigation requirements and fork-in-the-road clauses required the development of criteria governing the identity of disputes for the purpose of their application. Finally, arbitrators have attempted to create a presumption about the (in)applicability of MFN clauses to dispute resolution clauses, which defines the interpretative question for reaching the definite conclusion

---

171 ILC, 'Most-Favoured-Nation Clause' (n 154) para 163.

172 *Garanti Koza LLP v Turkmenistan,* ICSID Case No ARB/11/20, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013) (arguing that even when an MFN clause is explicitly applicable to dispute settlement provisions, it cannot be relied on to establish consent to arbitration); *Venezuela US SRL v The Bolivarian Republic of Venezuela,* PCA Case No 2013-34, Dissenting Opinion of Professor Marcelo G Kohen (26 July 2016) paras 10–24 (arguing that an MFN clause is not applicable to dispute settlement provisions even when the former refers to the scope of articles comprising the latter).

173 ILC, 'Most-Favoured-Nation Clause' (n 154) paras 167–71. See also Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP 2017) 352–3.

174 ILC, 'Most-Favoured-Nation Clause' (n 154) para 171.

on that conjunction. The inspiration for such rules came from various sources, like analogies to other spheres of international and domestic law, or personal values and beliefs in connection to policy considerations in international investment law. But in any event, the inspiration was independent from and external to the consensual jurisdictional regulation, ie to the jurisdictional rules as defined by disputing parties in arbitration agreements. The rules thus created by arbitral tribunals have been developed as general, arbitration- and treaty-overreaching jurisdictional rules supplementing those rules provided by virtue of the principle of consensualism.

4

Tackling the Substantive Aspects of the Consensual Jurisdictional Regulation

§ 4.01. Introduction

As tribunals have developed rules regulating the conditions of access to international arbitration, so they have developed rules regulating the substantive limits of arbitral jurisdiction which are defined by disputing parties in arbitration agreements. Tribunals have done so in regard to all three main jurisdictional aspects, namely jurisdictions *ratione temporis, personae,* and *materiae.* I will discuss in this Chapter the examples that affect all these aspects of arbitral jurisdiction, although in a somewhat different division. Thus, Section 2 will address the rules developed in the context of temporal issues. Section 3 will then discuss the rules affecting the scope of protected investments and investors, which regularly emerge as preliminary questions of arbitral jurisdiction. Finally, Section 4 will analyse the rules affecting the scope of arbitrable disputes. The approach and methodology undertaken in this Chapter remain the same as that announced in the introduction to Chapter 3.

§ 4.02. Consent and Time

Besides questions of jurisdiction *ratione temporis,* arbitral competence can also depend on other issues with temporal aspects. I will give examples of arbitral law-making related to both: I will discuss first the possibility of the retroactive effect of denial of benefits clauses on the jurisdiction of arbitral tribunals (A), and second the adoption of the continued act doctrine in the establishment of temporal jurisdiction (B).

A. The Non-Retroactivity of Denial of Benefits

Many investment treaties contain so-called denial of benefits clauses, which allow host States to deny protection under these treaties to investors that, most importantly, do not have a substantial business activity in their home States and are owned or controlled by nationals of third States.[1]

---

[1] See generally on this topic Yas Banifatemi, 'Taking Into Account Control Under Denial of Benefits Clauses' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 223; Loukas Mistelis and Crina Baltag, '"Denial of Benefits" Clause in Investment Treaty Arbitration' (2018) Queen Mary School of Law Legal Studies Research Paper No 293/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300618> accessed 6 February 2019; Carlo De Stefano, 'Denial of

As such, they do not relate to the temporal jurisdiction of arbitral tribunals in a strict sense, but to other concepts like the definition of investor, ie to personal jurisdiction.[2] But there is one temporal aspect to denial of benefits clauses: they usually do not expressly state when they can be triggered, and the issue which often arises is whether States can deprive tribunals of jurisdiction retroactively by denying benefits to investors who have already initiated arbitrations. This is a two-fold question: can States trigger denial of benefits clauses after the initiation of arbitration, and if so, do denial of benefits clauses produce effects prospectively only, or also retrospectively?

The first point of inquiry is the wording of particular clauses, which can be significant regarding their reach. The Energy Charter Treaty ('ECT') limits the reach of its denial of benefits clause to the provisions of substantive protection, and does not cover the arbitration clause.[3] Tribunals have concluded that triggering of that denial of benefits clause therefore does not affect their jurisdiction but pertains to the questions of merits.[4] When denial of benefits clauses do not contain similar limitations, they affect arbitral competence, which, tribunals have held, can be qualified both as an issue of jurisdiction[5] and of admissibility.[6] However, as it will be demonstrated, the decisions which address the issue of prospective or retrospective effects of denial of benefits clauses reveal that not much help in that respect can be found in the wording

---

Benefits Clauses in International Investment Agreements: Burden of Proof and Notice to Claimant' (2016) 30 Diritto del Commercio Internazionale 143; Lindsay Gastrell and Paul-Jean Le Cannu, 'Procedural Requirements of "Denial-of-Benefits" Clauses in Investment Treaties: A Review of Arbitral Decisions' (2015) 30 ICSID Rev-FILJ 78; Panayotis M Protopsaltis, 'The Challenge of the Barcelona Traction Hypothesis: Barcelona Traction Clauses and Denial of Benefits Clauses in BITs and IIAs' (2010) 11 JWIT 561.

2 Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 4–5.

3 Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, art 17.

4 *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) paras 146–79.

5 *Ulysseas Inc v The Republic of Ecuador,* UNCITRAL arbitration, Interim Award (28 September 2010) para 172; *Pac Rim Cayman LLC v The Republic of El Salvador,* ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 4.4; *Guaracachi America Inc and Rurelec PLC v The Plurinational State of Bolivia,* PCA Case No 2011-17, Award (31 January 2014) para 381; *Bridgestone Licensing Services Inc and Bridgestone Americas Inc v Republic of Panama,* ICSID Case No ARB/16/34, Decision on Expedited Objections (13 December 2017) para 288.

6 *Generation Ukraine Inc v Ukraine,* ICSID Case No ARB/00/9, Award (16 September 2003) para 15.7.

and limitations of particular clauses, for which reason tribunals have resorted to objective answers based primarily on policy considerations.

Some tribunals have allowed State respondents to deny benefits to foreign investors after the commencement of arbitration, on two premises. First, they note that the given denial of benefits clauses do not prescribe any time-limits.[7] Second, they rely on the procedural rules which normally state that jurisdictional objections must be raised on the first occasion, like the first submission of memorials by respondents.[8] The argument that by doing so respondent States unilaterally withdraw offers to arbitrate after their perfection, is rebutted by the claim that such offers in investment treaties are qualified by the possibility of denial of benefits.[9] The holding that a denial of benefits after the initiation of arbitration can deprive the tribunal of its jurisdiction maintains that such clauses have retroactive effect, because their triggering affects past events. Most importantly, tribunals have observed the function of these clauses in general; as one tribunal maintained:

> The very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits. As such, it is proper that the denial is 'activated' when the benefits are being claimed.[10]

The other approach, taken in *Ampal v Egypt,* holds that denial of benefits clauses cannot be triggered after the initiation of arbitration to deprive the tribunal of jurisdiction. It is argued that arbitral jurisdiction should be assessed at the time of seizure.[11] Reliance is made on the practice of the ICJ,[12] but also on the provisions of the ICSID Convention, which provide that 'no party may withdraw its consent unilaterally'.[13] According to this approach, denial of benefits clauses

---

7 *Ulysseas Inc v Ecuador* (n 5) para 172; *Pac Rim Cayman LLC v El Salvador* (n 5) para 4.83.

8 *Ulysseas Inc v Ecuador* (n 5) para 172; *Pac Rim Cayman LLC v El Salvador* (n 5) para 4.85; *Guaracachi America Inc and Rurelec PLC v Bolivia* (n 5) para 382. See also *Empresa Eléctrica del Ecuador Inc v Republic of Ecuador,* ICSID Case No ARB/05/9, Award (2 June 2009) para 71 ('The Tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction.').

9 *Pac Rim Cayman LLC v El Salvador* (n 5) para 4.90; *Guaracachi America Inc and Rurelec PLC v Bolivia* (n 5) paras 371–5; *Bridgestone Licensing Services Inc and Bridgestone Americas Inc v Panama* (n 5) para 288. See also *Ulysseas Inc v Ecuador* (n 5) para 173 ('the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State').

10 *Guaracachi America Inc and Rurelec PLC v Bolivia* (n 5) para 376.

11 *Ampal-American Israel Corp and others v Arab Republic of Egypt,* ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016) paras 167–72.

12 ibid para 171.

13 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') art 25(1).

have only prospective effect and their triggering after the initiation of arbitration cannot invalidate previously established jurisdiction.

The prospective effect of denial of benefits clauses has also been endorsed by the tribunals which have analysed them as questions of merits in the context of the ECT. An early example is the *Plama v Bulgaria* decision,[14] which was followed by many others.[15] It has been argued that these cases must be distinguished from non-ECT decisions, on the ground that the limitation of the ECT's denial of benefits clause to the substantive protection provisions is decisive for its exclusive prospective effect.[16] While it is true that the difference in the limitations of clauses has been used to distinguish decisions as precedents,[17] that does not seem to be the decisive argument in the resolution of the question of their prospective or retrospective effects. Already in *Plama* the Tribunal noted that this question could not be resolved by reliance solely on the wording of the denial of benefits clause.[18] The Tribunal turned to the object and purpose of the ECT and built the well-known narrative on the legitimate expectations of investors.[19] But as it is usual with the references to the object and purpose, this was just a gateway for the introduction of the Tribunal's policy considerations, which is visible in its assertion that an investor must be informed before investing about denial of benefits.[20] Furthermore, the Tribunal addressed other questions regarding the prospective/retrospective effect dilemma: it acknowledged that conferring the right to the respondent State to invalidate arbitral jurisdiction by denying benefits to the investor would make the State 'the judge in its own cause',[21] and it rejected the argument that the mere existence

---

14 *Plama Consortium Limited v Bulgaria* (n 4) paras 159–65.

15 *Hulley Enterprises Limited (Cyprus) v The Russian Federation,* PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 457; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan,* ICSID Case No ARB/07/14, Award (22 June 2010) paras 224–7; *Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v The Government of Mongolia and MonAtom LLC,* PCA Case No 2011-09, Decision on Jurisdiction (25 July 2012) paras 425–31; *Anatolie Stati and others v The Republic of Kazakhstan,* SCC Case No V 116/2010, Award (19 December 2013) para 745; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No ARB/14/1, Award (16 May 2018) para 239.

16 Banifatemi (n 1) 247–57; Gastrell and Le Cannu (n 1) 94–5.

17 See, for example, *Ampal-American Israel Corp and others v Egypt* (n 11) paras 128–9.

18 *Plama Consortium Limited v Bulgaria* (n 4) para 159. See also *Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v Mongolia and MonAtom LLC* (n 15) para 425.

19 *Plama Consortium Limited v Bulgaria* (n 4) paras 160–2. Note that other tribunals following the same stream have equally relied on the ECT's object and purpose.

20 ibid para 161.

21 ibid para 149. The reasoning of the Tribunal in this part can even be used for the argument that non-limited denial of benefits clauses should not reach dispute settlement clauses: 'In the absence of Article 26 [the dispute settlement clause] as a remedy available to the covered investor (as the Respondent contends), how are such disputes [about the proper exercise of the denial of benefits] to be determined between the host state and the covered investor, given that such determination is

of such a clause in the ECT would suffice to inform investors of possible denial of benefits.[22] The engagement of the ECT with non-ECT case law also comes from the other direction: the decisions which have endorsed the retrospective effect of denial of benefits clauses in the context of jurisdictional objections have not distinguished the issues covered by such clauses relating to jurisdiction from those relating to merits; their ruling in favour of retrospective effect, therefore, engages substantive investor protections as well.

Therefore, both ECT and non-ECT tribunals have not merely interpreted differently worded denial of benefits clauses in different streams. They have engaged in attempts to create a rule governing the application of such clauses, although heading towards two opposite solutions. The independent input added by the tribunals advocating in favour of either of the two solutions can be accommodated within the framework of the given jurisdictional rules. This is most obvious when tribunals either hold that offers to arbitrate cannot be revoked after being perfected, or that such offers were qualified by the possibility of denial of benefits from the beginning. Tribunals most importantly rely on policy considerations, such as whether investors could expect denial of benefits and deprivation of arbitral jurisdiction,[23] or whether States need an opportunity to track the status of an investor.[24] The impossibility of finding an appropriate answer to the prospective/ retrospective effect dilemma relying on the given jurisdictional framework only, demonstrates its regulatory deficiency and the need for arbitral supplementing activity.[25]

---

crucial to both?' But such an argument does not seem necessary, because the proper exercise of denial of benefits can arise as a question of jurisdiction, and thus still be decided by a tribunal. It should be noted, however, that this remark by the Tribunal was a response to the Respondent's objection that the jurisdictional nature of the denial of benefits would deprive investors of any remedies against its improper exercise.

22 ibid para 163.

23 Cf ibid para 161 ('A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT'); with *Guaracachi America Inc and Rurelec PLC v Bolivia* (n 5) para 383 ('one cannot say that such a denial will come as a total surprise for the investor, since *the BIT is not secret* and we are dealing in this case with an investor who has opted to use an investment vehicle controlled by a company of a third country, which has no substantial business activities in the territory of the Contracting Party under whose laws it is constituted or organized' [emphasis added]).

24 *Guaracachi America Inc and Rurelec PLC v Bolivia* (n 5) para 379 ('the fulfilment of the aforementioned requirements is not static and can change from one day to the next, which means that it is only when a dispute arises that the respondent State will be able to assess whether such requirements are met and decide whether it will deny the benefits of the treaty in respect of that particular dispute').

25 In contrast, some clauses set out more detailed procedures, like inter-State consultations; see eg North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 ('NAFTA') art 1113(2). But cf *Pac Rim Cayman LLC v El Salvador* (n 5) para 4.89 (where a consultations requirement did not prevent denial of benefits after the initiation of arbitration); with

B. The Continued Act Doctrine

The jurisdiction *ratione temporis* of arbitral tribunals can be limited in various ways.[26] The precise meaning of jurisdictional temporal limitations is subject to arbitral assessment in each case, which from time to time might resemble reading into investment treaties additional limitations.[27] However, such operations are more of pure treaty interpretations than rule-creation, because they primarily rely on treaty texts,[28] and the rules of the VCLT regarding the temporal application of treaties.[29] When a tribunal finds that its jurisdiction is limited so that it does not cover facts and acts which have taken place before a certain moment (like the entry into force of the treaty carrying the jurisdictional clause), or by a time-bar, are there any circumstances that could relativize such jurisdictional limits? This is where the continued act doctrine comes in.[30] This doctrine is well known in the sphere of the substantive law of State responsibility.[31] Whether

---

Ampal-American Israel Corp and others v Egypt (n 11) para 172 (noting that the existence of a consultations requirement supported the conclusion that benefits cannot be denied after the initiation of arbitration).

26 See Chapter 2, Section 3.A.

27 Cf *Impregilo SpA v Islamic Republic of Pakistan,* ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 299–300 (holding that the clause referring to 'any dispute arising between a contracting Party and the investors of the other' inferred 'that disputes that may have arisen before the entry into force of the BIT are not covered'); and *MCI Power Group LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) para 61 ('The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. […] The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the nonretroactivity of treaties.'); with *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador,* PCA Case No 34877, Interim Award (1 December 2008) para 267 (holding that without any textual limitation, a jurisdictional clause covers both existing and future disputes).

28 See n 27 above.

29 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') art 28 ('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 entry into force of the treaty with respect to that party.'). It is dubious whether this rule is relevant when it comes to jurisdictional clauses, because such clauses necessarily operate only prospectively: if any dispute has ceased to exist, its judicial settlement becomes impossible; if a dispute continues to exist, there is no issue of retroactivity.

30 See generally, for investment arbitration, Sadie Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' (2011) 10 Washington University Global Studies Law Review 419; and, for general international law, Nick Gallus, *The Temporal Jurisdiction of International Tribunals* (OUP 2017) ch 5.

31 Art 14(2) in ILC, 'Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission 2001,* vol II (Part Two) (UN 2007) 59 ('The breach of an international

an act qualifies as continuing depends on the relevant substantive obligation with which it interacts.[32] Therefore, this doctrine does not touch upon the issues of the jurisdiction of international courts and tribunals, at least not directly.[33] The question is whether this doctrine can be translated into a legal rule that determines, to a certain extent, the jurisdiction of arbitral tribunals. I will observe this question in regard to the issues of retroactivity (i), and the extensions of validity of consent (ii), leading to two different answers: 'no' and 'yes' respectively.

i. *The Non-Retroactivity of Consent*

When multiple State acts are involved in an investment claim, there are a couple of possibilities for approaching them in the establishment of temporal jurisdiction, that essentially depend on concrete arguments. One possibility is to look for the 'real cause' of the dispute when determining whether it falls within the tribunal's temporal jurisdiction,[34] inspired by the practice of the PCIJ.[35] If the dispute finds its real cause within a period of time outside the limits of arbitral temporal jurisdiction, jurisdiction will be denied.[36] This type of analysis seems more appropriate when arbitral jurisdiction is limited by the timing of the dispute, and where the moment of its arising is the main inquiry.[37]

When the central concern is the timing of the relevant facts and acts, the continued act doctrine comes into focus, in the attempts to connect multiple facts and acts and transcend jurisdictional limitations. Can that doctrine establish retroactivity of consent, so as to cover facts and acts occurring before treaty's entry into force? Despite attempts by investors to achieve such an effect,[38] the answer should be negative, because of much broader stakes: even if an offer to

---

obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.').

32 Commentary to art 14, para 4 in ibid 60.

33 However, the ILC notes the use of this doctrine by some human rights bodies in the establishment of their jurisdiction, in the situations where an act commenced before but continued after the entry into force of a human rights instrument. See Commentary to art 14, paras 9-11 in ibid 60–1.

34 *Empresas Lucchetti SA and Lucchetti Peru SA v The Republic of Peru*, ICSID Case No ARB/03/4, Award (7 February 2005) para 50.

35 *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Preliminary Objection) (1939) PCIJ Ser AB—No 77, 64, 82.

36 See *Empresas Lucchetti SA and Lucchetti Peru SA v Peru* (n 34) paras 48–62; and for critical assessment: John P Gaffney, 'Jurisdiction *Ratione Temporis* of ICSID Tribunals: *Lucchetti* and *Jan De Nul* Considered' (2006) 3(5) TDM 11–4 <https://www.transnational-dispute-management.com/article.asp?key=855> accessed 17 February 2019.

37 Thus, the relevant treaty in *Lucchetti* provided that it 'shall not, however, apply to differences or disputes that arose prior to its entry into force'. *Empresas Lucchetti SA and Lucchetti Peru SA v Peru* (n 34) para 25.

38 *Impregilo SpA v Pakistan* (n 27) para 297; *MCI Power Group LC and New Turbine Inc v Ecuador* (n 27) paras 56–8.

arbitrate does not contain any temporal limitations, assuming jurisdiction over treaty disputes concerning the facts and acts taking place before the treaty's entry into force would imply the retroactive effect of its substantive provisions.[39] Although argument exists that if a jurisdictional clause does not make any specific temporal restrictions, there should be no issue in its application to the existing disputes which could have arisen earlier in regard to past events, this reasoning applies only to the extent that such clauses can be isolated from the applicable substantive law.[40] The continuing nature of an act, however, requires the involvement of the relevant substantive

---

[39] *Impregilo SpA v Pakistan* (n 27) paras 309–11; *MCI Power Group LC and New Turbine Inc v Ecuador* (n 27) paras 93–4. See also *Spence International Investments LLC, Berkowitz and others v Republic of Costa Rica,* ICSID Case No UNCT/13/2, Interim Award (25 October 2016) paras 214–22.

[40] *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Ecuador* (n 27) paras 265–8. The often quoted authority in this regard is *Mavrommatis Palestine Concessions (Greece v UK)* (Judgment) (1924) PCIJ Ser A—No 2, 6, 35 ('The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. […] The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.'). See further Veijo Heiskanen, '*Entretemps*: Is There a Distinction Between Jurisdiction *Ratione Temporis* and Substantive Protection *Ratione Temporis*?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 312 (distinguishing between 'regulatory' and 'compromissory treaties'); and Zachary Douglas, 'When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 345–6 (the link to the scope of consent). This is essentially a question of the scope of consent. If a jurisdictional clause limits its scope to the disputes arising under a particular treaty, a tribunal will have jurisdiction only if the alleged dispute could arise under that treaty. If a jurisdictional clause refers to all disputes between States and investors, and an investor tries to bring a dispute to arbitration concerning the violations of substantive protections found elsewhere, this question should not arise. In this respect, the statement that 'one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT' is very important from a technical perspective, whereby the non-retroactivity rule is relevant for the latter aspect; see *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan,* ICSID Case No ARB/02/13, Decision on Jurisdiction (15 November 2004) paras 176–8. However, even this explanation does not seem obvious from the arbitral practice; see Nick Gallus, 'Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions' (2016) 31 ICSID Rev-FILJ 290.

law.[41] For this reason, and due to the general principle of non-retroactivity of treaties,[42] claimants cannot rely on the continued act doctrine to establish arbitral jurisdiction over facts and acts that took place before the entry into force of the relevant treaty. What is more, for the very same reason the doctrine is used in reverse by respondents in their jurisdictional objections.[43] However, it is established arbitral practice to assert jurisdiction over parts of continuing acts which took place after entry into force of treaties.[44]

ii. *Extending the Validity of Consent*

On the other hand, can the continued act doctrine extend the validity of consent? This, in contrast to the issue of retroactivity, appears possible. The validity of an offer to arbitrate can be limited by time-bars.[45] For example, the NAFTA limits the investor's right to submit claim to arbitration to three years 'from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage'.[46] The Tribunal in *UPS v Canada* declared:

> The generally applicable ground for our decision is that […] continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.[47]

---

41 See n 32 above; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 58 ('Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached.').

42 VCLT (n 29) art 28.

43 See, for example, *Empresas Lucchetti SA and Lucchetti Peru SA v Peru* (n 34) para 41.

44 *Mondev International Ltd v USA* (n 41) paras 68–75; *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (6 December 2000) para 62; *Société Générale v The Dominican Republic*, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) para 94. See also, in the context of a time-bar, *Grand River Enterprises Six Nations Ltd and others v United States of America*, UNCITRAL arbitration, Decision on Objections to Jurisdiction (20 July 2006) para 86 ('the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events').

45 This argument proceeds under the assumption that time-bars are jurisdictional requirements. Note that discussion can be led over their qualification as pertaining to jurisdiction or admissibility: *Resolute Forest Products Inc v Government of Canada*, PCA Case No 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) paras 83–4.

46 NAFTA (n 25) art 1116(2).

47 *United Parcel Service of America Inc v Government of Canada*, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) para 28.

The Tribunal held, although wrongly, that this premise was supported by the *Feldman v Mexico* decision,[48] but it also stressed that such a proposition was 'true generally in the law'.[49] The generalised premise allowed the Tribunal to rule that the claims whose submission exceeded the three-year limit were not time-barred, albeit holding that it could take into account only the losses which were incurred during the three-year period.[50] In sum, by relying on a generalised premise, the Tribunal affected the application of the NAFTA Article 1116(2), arguably contrary to its explicit wording which refers to the investor's 'first knowledge'.[51] However, the Tribunal did

---

48 For the incorrect reliance on this decision by the *UPS v Canada* Tribunal, see Blanchard (n 30) 466–7.

49 *United Parcel Service of America Inc v Canada* (n 47) para 28. Indeed, the rule advanced by the Tribunal had some echo in general international law. See, in the context of human rights, *Zorica Jovanović v Serbia* App No 21794/08 (ECtHR, 26 March 2013) para 54 ('it has been said that the six-month time-limit does not apply as such to continuing situations […]; this is because, if there is a situation of an ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end'); and, for a more general view, Gallus (n 30) 92–9.

50 *United Parcel Service of America Inc v Canada* (n 47) para 30. Another view analogises the approach taken in *UPS v Canada* to the US continued tort doctrine: Pedro J Martinez-Fraga and C Ryan Reetz, 'The Status of the Limitations Period Doctrine in Public International Law: Devising a Functional Analytical Framework for Investors and Host-States' (2017) 4 McGill J Disp Resol 105, 118–9.

51 In *Mondev v USA*, the Tribunal rejected the time-bar objection on the ground that the claims were limited to local court decisions, which fell within the time-limit. However, the Tribunal continued: 'If it had mattered, however, the Tribunal would not have accepted Mondev's argument that it could not have had "knowledge of… loss or damage" arising from the actions of the City and BRA prior to the United States court decisions. A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear. […] In any event, the words "loss or damage" refer to the loss or damage suffered by the investor as a result of the breach. Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term "loss or damage" in Articles 1116 and 1117. Thus if Mondev's claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time-barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.' *Mondev International Ltd v USA* (n 41) para 87. See also *Grand River Enterprises Six Nations Ltd and others v USA* (n 44) para 78; and further, for another reading of the NAFTA time-bar provisions, *Resolute Forest Products Inc v Canada* (n 45) para 158 ('Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach "first" occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision […] whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.').

attempt to address this problem, by distinguishing cases in which the acts ended and thus the knowledge about the loss was present at an earlier point.[52]

As this proposition was made in *UPS v Canada* in principle, so it was rebutted in principle based on policy considerations. The Tribunal in *Spence International Investments and others v Costa Rica* expressly disagreed with the suggested rule and stated:

> While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.[53]

However, the Tribunal conceded that if some acts are separable and independently actionable, they can be separated from acts that give rise to time-barred claims and retained within its jurisdiction.[54] The main value of this decision for the present discussion is the principled rejection of the rule advanced in *UPS v Canada.* There are two streams therefore of the arbitral supplementing activities regarding the ability of the continuing act doctrine to extend the validity

---

52 The Tribunal distinguished the *Mondev v USA* decision advanced by Canada by holding that 'the dicta [of that decision] relate to a state action that was completed but was subject to challenge in state court', and that 'the state's action was completed and the information about it known – including the fact that the investor would suffer loss from it – before subsequent court action was complete'. *United Parcel Service of America Inc v Canada* (n 47) para 29.

53 *Spence International Investments LLC, Berkowitz and others v Costa Rica* (n 39) para 208. See also *Grand River Enterprises Six Nations Ltd and others v USA* (n 44) para 81 ('this analysis [that time-bars apply separately to each of many similar measures] seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries'); *Corona Materials LLC v Dominican Republic*, ICSID Case No ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA (31 May 2016) para 192 ('The limitation period clause is written in plain terms and does not contemplate the suspension or "tolling" of the three-year period.'); and *Apotex Inc v The Government of the United States of America*, ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) paras 325–8 (no tolling of the time-bar by judicial challenge of an administrative act).

54 *Spence International Investments LLC, Berkowitz and others v Costa Rica* (n 39) para 210. See also *William Ralph Clayton and others v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 266.

of consent. The tribunals clashed in their principled assumptions (or policy-based opinions) on the permissibility of extending time-bars, and by doing so they have arguably omitted to create a more nuanced approach to the problem.[55]

§ 4.03. Consent and the Scope of Protection

The scope of investment protection offered by investment treaties and statutes is determined by their own terms, which define the notions of an investor and an investment. These definitions equally apply to jurisdictional clauses (ie offers to arbitrate) contained in such instruments. When it comes to the access to ICSID arbitration in particular, the ICSID Convention itself also contains provisions pertinent to both notions. I will discuss here two examples of arbitral law-making in relation to these notions, which affect the scope of arbitral jurisdiction, namely: the Broches test pertaining to the definition of 'investor' and affecting arbitral jurisdiction *ratione personae* (A), and the presumptions regarding the protection of indirect investments and affecting arbitral jurisdiction *ratione materiae* (B).

A. The Broches Test

The ICSID Convention encourages private investment,[56] and its requirement for the involvement of a 'national of another Contracting State' does not allow for inter-State arbitrations.[57] That does not mean that the Convention precludes access to arbitration in regard to any investment with some governmental involvement.[58] An excerpt on this topic from Aron Broches' lectures at the Hague Academy of International Law has become renowned:

---

55 Thus, in the sphere of human rights, a more nuanced approach to the effect of continuing acts on time-bars has been developing, which takes into account the details of the continuing act in question. See Gallus (n 30) 96–9. Furthermore, tribunals could have paid more attention to the practical possibilities of claimants to obtain remedies before domestic courts, and their good faith conduct in that regard. This has been observed by human rights courts, although due to the requirement of the exhaustion of domestic remedies: *Zorica Jovanović v Serbia* (n 49) para 53 ('[…] the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant […]').

56 ICSID Convention (n 13) pmbl ('Considering the need for international cooperation for economic development, and the role of private international investment therein;'); 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965' (1993) 1 ICSID Reports 23, para 9.

57 ICSID Convention (n 13) art 25; CF Amerasinghe, 'Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1976) 47 British Yrbk Int'l L 227, 241–2.

58 Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 161–2.

> […] it was recognized in the discussions leading up to the formulation of the Convention that in today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but which are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' *unless it is acting as an agent for the government or is discharging an essentially governmental function*.[59]

According to Broches, there was a consensus in the drafting process that government-owned companies were not excluded from the scope of the ICSID Convention, but although this was noted in the preparatory work, '[n]o attempt was made […] to reduce this common understanding to a legal definition, which would have been a difficult task'.[60] Broches' main contribution, therefore, was the definition of the two negative exceptions, ie of the cases when a company would not qualify to access the ICSID mechanism.[61]

This so-called 'Broches test' has been accepted in arbitral practice verbatim.[62] What are its practical implications? The effect of the two exceptions seems to be usually reverse, contributing more to the definition of the wide space in which State-owned companies can be claimants. For example, the Tribunal in *CSOB v Slovakia* held that neither State ownership nor control sufficed

---

59 Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' in Aron Broches, *Selected Essays. World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 202 (emphasis added).

60 ibid. See also Amerasinghe (n 57) 242–3.

61 Interestingly, Broches both justified such an omission and, it seems, recognised the objective nature of the negative criteria. He noted: 'Nor was it necessary to do so [to legally define the understanding on the access of government-owned companies to the ICSID] because of the consensual character of the Convention as a whole which justified leaving a large measure of discretion to the parties. But this is not to say that in an extreme case the Secretary-General or a Commission or Tribunal, each within the sphere of their own competence, could not review the soundness of the exercise of that discretion.' Broches (n 59) 202.

62 *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) para 17; *Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Award (18 November 2014) para 275; *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) paras 31, 33. See also Doak Bishop and Margrete Stevens, 'Jurisdiction Ratione Personae – Is There a Standard Definition of an "Investor" in Investment Treaties?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 221–2.

to disqualify a claimant.[63] Furthermore, even when acting on behalf of a State or promoting its policies, this did not suffice to trigger the exceptions, and what mattered was 'the nature of these activities and not their purpose'.[64] A reliance of a company on State policies equally did not mean it exercised a governmental function.[65] Finally, even if State policies drove company acts, as in the case of privatization, this alone did not suffice to make an act governmental.[66] The Tribunal insisted on the concept of the 'nature' of acts.[67] What is most important here is that, while Broches mentioned two alternative exceptions—acting as an agent of a State *or* exercising a governmental function—the Tribunal in *CSOB v Slovakia* emphasised that the governmental nature of an act is the ultimate decisive criterion.[68] In contrast, the Tribunal in *Beijing Urban Construction Group v Yemen* analysed the two exceptions separately, although it also endorsed the *CSOB*'s 'focus on a context-specific analysis of the commercial function of the investment'.[69]

The inspiration for the test was thus mainly academic, but analogies have also been made to the substantive rules of State responsibility. The Tribunal in *Beijing Urban Construction Group v Yemen* noted that '[t]he *Broches* factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*'.[70] Although such an analogy can be

---

63 *Ceskoslovenska Obchodni Banka AS v Slovakia* (n 62) para 18.

64 ibid paras 19–20. This has been criticised on the ground that the purpose of acts must be considered: Mark Feldman, 'The Standing of State-Controlled Entities under the ICSID Convention: Two Key Considerations' (2012) 65 Columbia FDI Perspectives; Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Rev-FILJ 24, 34.

65 *Ceskoslovenska Obchodni Banka AS v Slovakia* (n 62) paras 22–3.

66 ibid paras 24–5.

67 See particularly ibid para 21 ('Although these activities were driven by State policies, as was true generally of economic activities during the country's command economy, the banking transactions themselves that implemented these policies did not thereby lose their commercial nature. They cannot therefore be characterized as governmental in nature.').

68 ibid ('even if one were to conclude that the non-performing assets derived from activities conducted by CSOB as an agent of the State, the measures taken by CSOB to remove them from its books in order to improve its balance and consolidate its financial position in accordance with the provisions of the Consolidation Agreement, must be deemed to be commercial in character').

69 *Beijing Urban Construction Group Co Ltd v Yemen* (n 62) paras 35–44.

70 ibid para 34. See art 5 in ILC, 'State Responsibility' (n 31) 42 ('The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'); and art 8 in ibid 47 ('The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.').

challenged on formalistic grounds,[71] it can also be reinforced by the fact that other judicial forums, like human rights courts, apply similar criteria to State-owned companies when examining their capacity to appear as applicants.[72] Perhaps because of that 'mirror image', the Broches criteria are used to point to the wide space in which State-owned companies can be claimants within the ICSID system, or in the words of the *Beijing* Tribunal, '[t]he *Broches* test lays down markers for the non-attribution of State status'.[73] It is hence not surprising that the Broches test has become relied on by investors in responses to jurisdictional objections to affirm their claimant status, even outside the ICSID context.[74] Possibly for the same reason, respondents

---

71 Arrêt du 29 novembre 2016, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 14/17964 [18] ('Considérant qu'il n'y a pas lieu d'apprécier l'assimilation d'un investisseur à un Etat partie au regard du Projet d'articles invoqué par l'UKRAINE; que ce document énonce, en effet, des règles d'attribution du comportement d'une entité à un Etat afin d'engager la responsabilité de ce dernier pour des faits internationalement illicites; qu'il n'est nullement démontré que ces règles seraient consacrées par la coutume internationale dans le contexte entièrement différent de l'assimilation d'une entité à un Etat afin de la priver d'un droit propre à l'arbitrage en application d'un TBI;').

72 Cf *Islamic Republic of Iran Shipping Lines v Turkey* App No 40998/98 (ECtHR, 13 December 2007) para 79 ('The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34 [of the ECHR], includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities […]'). Note, however, that the similarity in question is only reminiscent, given that the rules of attribution and those applied by human rights courts when qualifying organisations as governmental are much more detailed and sophisticated than the Broches test. Their comparability remains to be examined.

73 *Beijing Urban Construction Group Co Ltd v Yemen* (n 62) para 34.

74 *China Heilongjiang International Economic & Technical Cooperative Corp and others v Mongolia,* PCA Case No 2010-20, Award (30 June 2017) para 276. To what extent this argument influenced the Tribunal's decision is unclear, which noted only that it was 'not persuaded by the Respondent's additional argument that Beijing Shougang and China Heilongjiang acted as "quasi-instrumentalities of the Chinese government"'; that there was no 'evidence in the record to support such a conclusion, or a conclusion that they acted under the Chinese Government's "express instruction to invest abroad in order to serve China's foreign policy goals"'; and that 'nothing in the roles played by Qinlong's controlling shareholder, Mr. Li, amount to a showing that Qinlong was under government control or instruction'. ibid para 418 (references omitted). Scholars have equally concluded that the Broches test is unlikely to lead to declining jurisdiction: Reza Mohtashami and Farouk El-Hosseny, 'State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?' (2016) 3 BCDR Int'l Arb Rev 371, 387.

attempt to discredit the Broches test or revise it in sharper terms, although so far without any sign of success.[75]

B. Protecting Indirect Investment

A frequent question is whether investment treaties protect direct investments only, or also those made through intermediaries incorporated in home, host, or third States.[76] Some treaties regulate this explicitly.[77] Others do not, in which case tribunals are asked whether an indirect investment qualifies for protection, which relates to their jurisdiction *ratione materiae.*[78] This question is usually said to be the one of treaty interpretation,[79] but here again tribunals have attempted to create presumptions directing that interpretative process.

---

75 In *Rumeli v Kazakhstan,* the Respondent argued: '[…] Mr. Broches was writing during the cold war, when, for a multilateral treaty to be effective, he needed to address the peculiarities of genuinely commercial enterprises which happened to be State-owned for political reasons. He did not have in mind the situation in which a State party seized a private company. Respondent therefore submits that the test formulated by Broches has no application in this arbitration.' It also argued, in relation to the second alternative exception of the Broches test, that 'the test is thus whether the entity discharges in general a governmental function and not as suggested by Claimants, whether the particular act in question is of a governmental nature'. These arguments were not addressed by the Tribunal. *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan,* ICSID Case No ARB/05/16, Award (29 July 2008) paras 293, 296.

76 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP 2017) 256–8; Protopsaltis (n 1) 567–84; Engela C Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 86. See also, for the rationale behind such protections, Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard Int'l LJ 469, 492 ('In other words, BITs do not promote the movement of capital, but rather the movement of control over capital.').

77 ECT (n 3) art 1(6) ('"Investment" means every kind of asset, owned or controlled *directly or indirectly* by an Investor […]' [emphasis added]).

78 The question of protection of indirect investment is most often the one of substantive jurisdiction, because indirect ownership/control provisions pertain to definitions of an investment. But note that the same question can be framed in the terms of personal jurisdiction, which is particularly the case when a definition of an investor contains indirect ownership/control provisions. See *Aguas del Tunari SA v Republic of Bolivia,* ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 217 ('a "national" of the Netherlands as defined by Articles 1(b) includes not only: […] but also: (iii) legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party').

79 See, for textual ambiguities that can give rise to issues of interpretation, Damien Charlotin, Facundo Perez Aznar and Luke Eric Peterson, 'Looking Back: Long-Confidential Benhamou v. Uruguay Award Is Unearthed, Revealing First Known Attempt at State-to-State BIT Consultations over Interpretive Question, and Tribunal's Handling of Claims by Beneficiary of Trust' (*Investment*

On the one hand, some tribunals have presumed the protection of indirect investments, so that their exclusion must be demonstrated. This presumption can be given effect in two ways. First, it can be maintained that the exclusion of indirect investments from treaty protection must be explicit. For example, the Tribunal in *Tza Yap Shum v Peru* held that 'in the absence of express wording in the BIT, it cannot be presumed that the intention of the Treaty was to exclude indirect investments of natural persons over which they hold ownership and control'.[80] The Tribunal observed the BIT's protective purpose,[81] but also expressed the expectation that the exclusion of indirect investments would be explicit.[82] That expectation, as well as the remark that referrals in other treaties to indirect investments (although not drawing any decisive arguments from them) had only illustrative and not normative value,[83] reveals that the Tribunal was led by its own policy considerations. Although less developed, the same assumption that the exclusions of indirect

Arbitration Reporter, 2 April 2018) <https://www.iareporter.com/articles/looking-back-award-in-long-confidential-benhamou-v-uruguay-case-is-unearthed-revealing-the-first-known-state-to-state-bit-consultations-over-an-interpretive-question-and-tribunals-reasons-for-de/> accessed 13 March 2019.

80 *Señor Tza Yap Shum v The Republic of Peru,* ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) para 111 ('en ausencia de lenguaje expreso en el APPRI, no se puede presumir sin más que la intención del mismo es excluir las inversions indirectas de personas naturales cuando estas ejercen la propiedad y en control de las mismas').

81 ibid paras 103–6.

82 ibid para 107.

83 ibid paras 109–10.

investments from treaty protections should be explicit can be traced in other arbitral[84] and judicial decisions,[85] which have become relied on as a stream of practice.[86]

The second argument in defence of the presumption of protection of indirect investments holds that reading additional limitations into treaty texts is not permissible. This has mostly been put forward by the tribunals which have faced explicit inclusion of indirect investments, but were nevertheless asked to exclude them.[87] The Tribunal in *Enron v Argentina* conceded that enabling the protection of an indefinite chain of investors might not be preferable, but nevertheless gave priority to treaty text and more specifically State consent.[88]

---

84 For example, among many others, *Siemens AG v The Argentine Republic,* ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) para 137; *Ioannis Kardassopoulos v Georgia,* ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 123–4; *Mobil Corporation, Venezuela Holdings BV and others v Bolivarian Republic of Venezuela,* ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 165; *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia,* PCA Case No 2013-15, Award (22 November 2018) paras 295–8; *Mera Investment Fund Limited v Republic of Serbia,* ICSID Case No ARB/17/2, Decision on Jurisdiction (30 November 2018) paras 127–8. See also *Mr Franz Sedelmayer v The Russian Federation,* SCC arbitration, Arbitration Award (7 July 1998) 56–9 (applying the 'control theory' to conclude that the Claimant was a protected investor in respect of indirectly made investments; among others, the Tribunal stated: 'It is a fact that the Treaty does not contain any specific clause providing such application [of the control theory]. On the other hand, there is nothing in the Treaty which excludes the applicability of the said theory.').

85 Arrêt du 11 décembre 2018, Tribunal fédéral, Ire Cour de droit civil (Switzerland) 4A_65/2018 [3.2.1.2.4].

86 *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela,* ICSID Case No ARB/08/15, Decision on Jurisdiction (30 December 2010) paras 156–8.

87 *Ampal-American Israel Corp and others v Egypt* (n 11) paras 342–3; *Waste Management Inc v United Mexican States,* ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 85 ('Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.'). See also *Société Générale v Dominican Republic* (n 44) paras 49–51 (giving priority to the treaty text).

88 *Enron Corporation and Ponderosa Assets LP v The Argentine Republic,* ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) para 52 ('The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that

The development of this presumption can be seen in the context of the liberalisation of claims by shareholders. The Tribunal in *CMS v Argentina*, reacting to the proposition that the ICJ's decision in *Barcelona Traction* precluded (although in the context of diplomatic protection) shareholders' claims for the injury done to a foreign company, famously stated:

> The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach – a proposition that is open to debate – then that approach can be considered the exception.[89]

On the other hand, some tribunals have presumed that indirect investments are not protected, so that their inclusion must be demonstrated. An example is the *Berschader v Russia* decision. Before engaging in treaty interpretation, and after dismissing the relevance of several decisions advanced by the Claimants, the Tribunal stated that '[i]n the absence of any authority on the point, […] there can be no presumption that the wording of Article 1.2 [definition of an investment] encompasses the kind of indirect investment relied upon in the instant case'.[90] From that point on, the Tribunal sought indicators of inclusion. Although the applicable BIT explicitly covered indirect investments made through intermediaries in third countries, the Tribunal found that there was no indication of the coverage of indirect investments made through intermediaries in the home State,[91] which could not be changed by the BIT's protective purpose.[92] The Tribunal held that the explicit protection of indirect investments made through third-party intermediaries deviated from the general rule that such investments would not be protected, at least at the time of the BIT's conclusion.[93] In contrast, the dissenting arbitrator applied the type of analysis that

---

investment.'). The Tribunal answered this question in the affirmative: ibid para 56 ('in the present case the participation of the Claimants was specifically sought and […] they are thus included within the consent to arbitration given by the Argentine Republic').

89 *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) para 48 (reference omitted).

90 *Vladimir Berschader & Moïse Berschader v The Russian Federation*, SCC Case No 80/2004, Award (21 April 2006) para 135.

91 ibid paras 136–43.

92 ibid para 144.

93 ibid paras 140–3. Cf *HICEE BV v The Slovak Republic*, PCA Case No 2009-11, Partial Award (23 May 2011) paras 110–45 (reaching a similar conclusion regarding indirect investment made through intermediaries in the host State, however through strict treaty interpretation and relying on additional treaty-related documents).

presumes the protection of all indirect investments, primarily relying on the protective purpose of the BIT and noting no indicators of their exclusion.[94]

The supplementing action of arbitral tribunals in this scenario can be seen in the formation of presumptions in favour or against the protection of indirect investments in principle. Such presumptions direct the interpretative process, by setting the burden of argumentation. Because the presumption in favour of protection of indirect investments seems dominant, it can be expected that in most cases respondents will be required to demonstrate that under terms of the relevant treaty such protection is excluded.

§ 4.04. Consent and the Scope of Arbitrable Disputes

Jurisdictional clauses define the scope of justiciable disputes, like those relating to the substantive protections of a treaty, its particular provisions, or even more limited issues like the amount of compensation for expropriation.[95] However, some jurisdictional clauses, and therefore arbitration agreements, do not define such limits, and simply refer to 'disputes' or sometimes 'all disputes' concerning an investment.[96] The question is whether such unlimited clauses can serve as general arbitration agreements, so as to cover, for example, a contractual dispute between an investor and a State. This question has been addressed in principle, which I will discuss first in the terms of the permissibility of jurisdictional bridging (A). To demonstrate the process of rule-formation, I will briefly compare this supplementing activity of tribunals with their interpretative exercises in relation to similar issues of the scope of consent (B).

A. The Permissibility of Jurisdictional Bridging

Investor-State arbitrations are often complex, so that they can involve both treaty and contract claims. Consider a simplified scenario in which an investor attempts to arbitrate a contractual dispute with the host State, and for that purpose relies on a jurisdictional clause contained in a BIT. Such possible effect of wide treaty jurisdictional clauses on the arbitrability of contract claims (which I term here 'jurisdictional bridging') has attracted scholarly attention.[97]

---

94 *Vladimir Berschader & Moïse Berschader v The Russian Federation*, SCC Case No 80/2004, Separate Opinion of Arbitrator Todd Weiler (7 April 2006) paras 6–14.

95 See Chapter 2, Section 3.A.

96 Agreement Between the Belgium-Luxembourg Economic Union and Barbados for the Reciprocal Promotion and Protection of Investments (signed 29 May 2009, not in force) art 8(1) ('Any dispute relating to an investment between an investor of one Contracting Party and the other Contracting Party […]'); Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (signed 6 June 2005, entered into force 1 December 2009) art 8(1) ('When a legal dispute arises between an investor of one Contracting Party and the other Contracting Party […]').

97 Stanimir A Alexandrov, 'Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v.

Arbitral tribunals have created presumptions in favour or against jurisdictional bridging, whose prototypes can be found in the two *SGS* cases. On the one hand, the Tribunal in *SGS v Pakistan* held that a jurisdictional clause which referred to 'disputes with respect to investments' was 'descriptive of the *factual subject matter* of the disputes', but did not 'relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims'.[98] The Tribunal concluded that 'from that description alone […] no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9'.[99] The presumption against jurisdictional bridging is evident in the demand for indicators that contractual disputes are included in the scope of justiciable disputes. The same approach can be traced in several other decisions dealing with the same issue.[100]

On the other hand, the Tribunal in *SGS v Philippines* held that a jurisdictional clause which referred to 'disputes with respect to investments' was 'not limited by reference to the legal classification of the claim that is made', and therefore *prima facie* covered both treaty and contractual disputes.[101] The Tribunal verified this conclusion by reference to other treaty

---

Philippines' (2004) 5 JWIT 555, 572–6; Emmanuel Gaillard, 'Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses' *NYLJ* (6 October 2005); John P Gaffney and James L Loftis, 'The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims' (2007) 8 JWIT 5; James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int'l 351, 361–4; Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 92; Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013) 117–27; Mary E Footer, 'Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction' (2017) 16 LPICT 87; Alfred Siwy, 'Contract Claims and Treaty Claims' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 218–20. See also Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims' (2005) 99 AJIL 835 (observing conflicting practices of arbitral tribunals on the relationship between contract and treaty claims as part of their integrationist and disintegrationist approaches).

98 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) para 161 (emphasis in the original).

99 ibid. The Tribunal also added: 'Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.'

100 *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) para 82; *Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005) paras 25–7.

101 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 131.

provisions, which basically amounted to verification that there were no indicators of exclusion of contractual disputes present.[102] The Tribunal also relied on the protective purpose of the BIT, which is served by allowing a choice of forum to investors, and which would otherwise be defeated, because 'drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty'.[103] Finally, the Tribunal acknowledged the holding in *SGS v Pakistan,* but apart from addressing the issue of coordination between wide jurisdictional clauses and exclusive jurisdiction clauses in contracts, it did not engage further with the reasoning applied in that case.[104] Here, the presumption in favour of jurisdictional bridging is evident in the demand for indicators of exclusion of contractual disputes from the scope of justiciable disputes, and the same approach has been taken by other tribunals.[105]

The permissibility of jurisdictional bridging is a question of a principle, which has the potential of producing broader effects than allowing for the arbitrability of contract claims. On the one hand, a presumption in favour of jurisdictional bridging can allow investors to bring claims against States for violations of domestic law,[106] customary international law,[107] and possibly even non-investment treaties.[108] On the other hand, the same presumption can serve State interests, by opening the doors for their counterclaims against investors. Although the

---

102 ibid para 132. The Tribunal also advanced two arguments extrinsic to the BIT. First, it pointed out to the fact that investments are usually made through contracts. Second, it pointed to the example of the NAFTA, which limits the scope of arbitrable disputes to certain substantive provisions of its investment chapter.

103 ibid para 132(c).

104 ibid paras 133–4.

105 *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic,* ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 55; *SGS Société Générale de Surveillance SA v The Republic of Paraguay,* ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010) paras 129, 183. See also, for tribunals which have assumed jurisdictional bridging but focused on the condition of privity between the investor and the host State, *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001) paras 59–61; *Impregilo SpA v Pakistan* (n 27) paras 211–5.

106 *Alpha Projektholding GmbH v Ukraine,* ICSID Case No ARB/07/16, Award (8 November 2010) para 243.

107 *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Ecuador* (n 27) para 209. See also *Cambodia Power Company v Kingdom of Cambodia and Electricité du Cambodge,* ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011) paras 336–7 (finding that contractual arbitration clauses were wide enough to accommodate claims for violation of customary international law). See further Kate Parlett, 'Claims under Customary International Law in ICSID Arbitration' (2016) 31 ICSID Rev-FILJ 434, 453–6.

108 Berk Demirkol, 'Non-Treaty Claims in Investment Treaty Arbitration' (2018) 31 Leiden JIL 59, 61–8.

question of the availability of counterclaims in investment arbitration is complex,[109] one of its crucial aspects is the nexus between the scope of consent and the obligations of investors which exist outside investment treaties.[110] Indeed, the tribunals which have denied the availability of counterclaims, have taken the approach that could be equally qualified as a presumption against jurisdictional bridging.[111] Conversely, the permissibility of jurisdictional bridging seems implied in the acceptance of counterclaims.[112] Such a presumption, therefore, facilitates the access to international arbitration in general, although its use in relation to investors is less controversial than when it comes to claims of States.

B. Comparison with Other Issues of the Scope of Consent

The supplementing activity of arbitral tribunals in the form of presumptions in favour or against jurisdictional bridging can be contrasted to the resolution of similar questions of the scope of consent which did not require additional input. For example, a common question is whether narrowly drafted arbitration clauses which provide for arbitrating disputes relating to the amount of compensation for expropriation can be extended to allow arbitrating the issue of the occurrence of expropriation.[113] In such a scenario, tribunals have preferred to stick to treaty text and its interpretation using the tools of the VCLT, than to add their own input in terms of a principle that would direct or otherwise influence the interpretative process. While the tribunals which deny the extension of jurisdiction emphasise the ordinary meaning of the text,[114] the tribunals which accept such an extension put emphasis on other elements like the context and the object

---

109 See generally Pierre Lalive and Laura Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law*, vol II (Juris 2011) 141; Anne K Hoffmann, 'Counterclaims in Investment Arbitration' (2013) 28 ICSID Rev-FILJ 438; Thomas Kendra, 'State Counterclaims in Investment Arbitration - A New Lease of Life?' (2013) 29 Arb Int'l 575; Dafina Atanasova, Adrián Martínez Benoit and Josef Ostřanský, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration' (2014) 31 J Int'l Arb 357; Arnaud de Nanteuil, 'Counterclaims in Investment Arbitration: Old Questions, New Answers?' (2018) 17 LPICT 374.

110 Crawford (n 97) 364–6. Another related issue is the proximity or connection of the counterclaim to the primary claim.

111 *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015) para 154.

112 *Urbaser SA and CABB v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 1143–55, 1187. See also *Saluka Investments BV v The Czech Republic*, UNCITRAL arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004) para 39.

113 See generally August Reinisch, 'How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 JIDS 115.

114 *Vladimir Berschader & Moïse Berschader v Russia* (Award) (n 90) paras 151–8; *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V 079/2005, Award on Jurisdiction (October 2007) paras 108–23.

and purpose of the treaty.[115] The latter approach also often attempts to reconcile its reasoning with the ordinary meaning of the jurisdictional clause.[116] What this brief comparison shows is how a supplementing activity is to be identified in an interpretative process. Regardless of the motivations to pursue one or another outcome, in certain situations there is enough substance for an interpretative process. In others there is not, like when it comes to the permissibility of jurisdictional bridging, where tribunals usually have nothing else at their disposal than the words 'all disputes'. Such cases of deficiency require additional input to assist the interpretative process. However, the apparent sufficiency of the interpretative material does not necessarily mean that there is absolutely no space for a supplementing activity of tribunals. In the particular context of narrow jurisdictional clauses, tribunals could have investigated the relevance of the *incidenter tantum* doctrine, ie the possibility of finding an occurrence of expropriation without *res judicata* effect, as a preliminary question to determining the amount of compensation. In another more extreme example, tribunals could have formed a presumption that a narrow jurisdictional clause implies jurisdiction over the occurrence of expropriation. If the inspiration for such arguments would be external to the applicable legal framework, their introduction would qualify as arbitral supplementing activity.

§ 4.05. Conclusion

The substantive aspects of the consensual jurisdictional regulation have equally been affected by the development of arbitrator-made jurisdictional rules. This Chapter advanced some examples of arbitrator-made rules affecting the three dimensions of arbitral jurisdiction—*ratione materiae*, *personae*, and *temporis*. Arbitrators have developed rules precluding retroactive denial of their jurisdiction through denial of benefits clauses, extending the validity of consent limited by time-bars, extending the scope of protected investors and investments by adopting the Broches test and presuming the protection of indirect investments, and extending the scope of justiciable disputes by presuming the permissibility of jurisdictional bridging. All these developments relax the substantive limits of arbitral jurisdiction. That does not mean that arbitral activity has been directed towards facilitating the access to international arbitration exclusively, and Chapter 5 turns next to the examples of arbitral law-making that sharpen the terms of access to arbitration, both procedural and substantive.

---

115 *Señor Tza Yap Shum v Peru* (n 80) paras 150–61; *Renta 4 SVSA and others v The Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009) paras 52, 55–7; *Sanum Investments Limited v The Government of the Lao People's Democratic Republic,* PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) paras 330–42; *Beijing Urban Construction Group Co Ltd v Yemen* (n 62) paras 78–92.

116 *Señor Tza Yap Shum v Peru* (n 80) para 151; *Renta 4 SVSA and others v Russia* (n 115) paras 27–8; *Sanum Investments Limited v Laos* (n 115) para 329.

5

Imposing New Jurisdictional Requirements as Corrective Standards

§ 5.01. Introduction

Chapters 3 and 4 analysed the rules developed by arbitral tribunals affecting the interpretation and application of party-defined jurisdictional rules. In contrast, the main focus of this Chapter are the arbitrator-made rules imposing independent jurisdictional limits, in addition to those defined by disputing parties (although it also mentions one example of the former type of rules). The emergence of independent rules evidences a perceived need for certain objective limitations of the investor-State dispute settlement regime, regardless of the intentions of disputing parties concerning the jurisdiction of individual tribunals. In Section 2, I will firstly discuss the attempts to create objective definitions of 'investment' and 'investor', as well as the formation of an independent legality requirement. Section 3 will discuss the limitation of the scope of arbitrable disputes by reading the privity requirement into umbrella clauses. Finally, Section 4 will analyse the transformation of the abuse of process doctrine from a doctrine of general international law to a specific jurisdictional limitation of the arbitral authority for the specific case of investment corporate restructuring. The approach to these issues and the methodology described in the introduction to Chapter 3 continues to apply.

§ 5.02. Limiting the Scope of Protection

Who qualifies as an 'investor' and what qualifies as an 'investment' to be protected under an investment treaty or statute is defined in those instruments. However, it has also become understood that these two notions have objective meanings, implying certain criteria that must be observed in any event, even when not contained in the relevant treaty or statute. I will firstly discuss the objective definition of 'investment' (A), and then I will proceed to the requirement that an investment must be compliant with domestic law (B). Finally, I will discuss the emerging objective definition of 'investor' (C).

A. The Objective Definition of 'Investment'

The objective definition of 'investment' has emerged in the ICSID context (i), from where it spread to other, non-ICSID arbitrations (ii).

i. *The ICSID Framework and the* Salini *Criteria*

The initial trigger for the emergence of an objective definition of 'investment' was the fact that the ICSID Convention provides for the settlement of 'any legal dispute arising directly out of an investment'.[1] Despite some efforts, the drafting process of that Convention did not provide a definition of the notion of an investment.[2] That omission was considered positive because it allowed the adjustment of the Convention to the developments in forms of investing over time.[3] The definition was left to the disputing parties, and more importantly States who become parties to the Convention.[4] However, this has not prevented the controversies about the meaning of the term 'investment' (indeed the central term) within the ICSID framework.[5] The argument has become heated after the development of practice in this respect.

---

1 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') art 25(1).

2 Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' in Aron Broches, *Selected Essays. World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 207–8; Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009) 114–7.

3 'ICSID 1984 Annual Report', 9 <https://icsid.worldbank.org/en/Documents/resources/1984%20-%20AR%20-%20Final%20EN.pdf> accessed 18 February 2019.

4 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965' (1993) 1 ICSID Reports 23, para 27 ('No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).'). See also Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law' (2010) 51 Harvard Int'l LJ 257 (criticising the sharpening of the ICSID notion of an investment by tribunals and arguing in favour of deference to State commitments).

5 Schreuer and others (n 2) 117–9, 128–34; Tony Cole, *The Structure of Investment Arbitration* (Routledge 2013) ch 1; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP 2017) 218–28; Sebastien Manciaux, 'The Notion of Investment: New Controversies' (2008) 9 JWIT 443; Emmanuel Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 403; Pierre-Emmanuel Dupont, 'The Notion of ICSID Investment: Ongoing "Confusion" or "Emerging Synthesis"?' (2011) 12 JWIT 245; Michael Hwang SC and Lee Chengy Fong, 'Definition of "Investment"—A Voice from the Eye of the Storm' (2011) 1 Asian JIL 99; Mavluda Sattorova, 'Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' (2012) 2 Asian JIL 267; Pierre-Marie Dupuy, 'About the Definition of an International Investment – The Requirement of a Contribution to the Economic Development of

The decision which created now the famous set of criteria implying an objective definition of 'investment' was the 2001 jurisdictional decision in *Salini v Morocco.*[6] After noting that the ICSID Convention did not define 'investment', the Tribunal stated that 'it would be inaccurate to consider that the requirement that a dispute be "*in direct relation to an investment*" is diluted by the consent of the Contracting Parties', and that 'ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre'.[7] After noting that there were no criteria developed in practice, the Tribunal stated:

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […] In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
>
> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.[8]

The Tribunal relied on an academic commentary of arbitral practice.[9] The only other case that the Tribunal could invoke was *Fedax v Venezuela*.[10] There, the Tribunal noted that it was the very first one to face an objection that the transaction at stake did not qualify as an 'investment' under the ICSID Convention.[11] The Tribunal indeed discussed whether the notion of an investment was met under the Convention independently from the relevant investment treaty, although without analysing any concrete criteria.[12] However, the Tribunal again restated that 'as

---

the Host State' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 37; Stephen M Schwebel, 'Does the Consent of the Contracting Parties Govern the Requirement of an "Investment" as Specified in Article 25 of the ICSID Convention?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 55.

6 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001).

7 ibid para 52.

8 ibid.

9 In particular, relying on Emmanuel Gaillard, 'Centre international pour le reglement des differends relatifs aux investissements (CIRDI)' (1999) 126 Journal du droit international 273, 278–93. In the relevant part, the commentary addressed the 1997 *Fedax v Venezuela* decision.

10 *Fedax NV v The Republic of Venezuela,* ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997). Another decision rendered before but not mentioned in *Salini*, which recognised the autonomous nature of the notion of an investment in the ICSID Convention, was *Ceskoslovenska Obchodni Banka AS v The Slovak Republic,* ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) para 68.

11 *Fedax NV v Venezuela* (n 10) para 25.

12 ibid paras 25–9.

contemplated by the Convention, the definition of "investment" is controlled by consent of the Contracting Parties'.[13] After all these considerations, the Tribunal distinguished the transaction at stake (promissory notes) from an 'ordinary commercial transaction'.[14] In the very end of its considerations, the Tribunal noted that '[t]he basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development',[15] relying on the work of Christoph Schreuer.[16] While the *Fedax* Tribunal used these criteria only to verify its previous conclusions, the *Salini* Tribunal formalised them into a clear set of conditions for the establishment of jurisdiction under the ICSID Convention.

Four criteria (contribution, duration, risk, and contribution to the economic development of the host State) became the famous '*Salini* criteria' or 'test'. Some tribunals have adopted this test verbatim.[17] Others have modified it, by either dismissing or adding some criteria. Some tribunals have gone beyond *Salini* and added new criteria: the Tribunal in *Joy Mining v Egypt* added the condition of 'regularity of profit and return', and qualified the conditions of commitment and contribution to the economic development of the host State as 'substantial' and 'significant' respectively.[18] The Tribunal in *Phoenix Action v Czechia* did not follow the Respondent's reliance on *Salini,* holding that that test had to be supplemented.[19] It came up with six criteria: contribution, duration, risk, development of an economic activity in the host State (as opposed to the contribution to economic development), the compliance with the laws of the host State, and *bona fide* nature of the investment.[20] Although the fourth and fifth element were reflected in the

---

13 ibid para 31.

14 ibid para 42.

15 ibid para 43.

16 Referring to Christoph Schreuer, 'Commentary on the ICSID Convention' (1996) 11 ICSID Rev-FILJ 318, 372.

17 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan,* ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 130; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt,* ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) para 91; *Saipem SpA v People's Republic of Bangladesh,* ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 99; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya,* ICSID Case No ARB/15/29, Award (22 October 2018) paras 298–300.

18 *Joy Mining Machinery Limited v Arab Republic of Egypt,* ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) para 53. See also *Unión Fenosa Gas SA v Arab Republic of Egypt,* ICSID Case No ARB/14/4, Award (31 August 2018) para 6.66 ('these rights satisfy the guidelines provided by the ICSID award in *Salini v. Morocco* (2001) in regard to duration, profit and return, risk and commitment to the development of the Respondent's economy').

19 *Phoenix Action Ltd v The Czech Republic,* ICSID Case No ARB/06/5, Award (15 April 2009) para 82.

20 ibid para 114.

applicable BIT, the Tribunal considered them to be implicit in the ICSID notion and applicable regardless of the specific BIT terms.[21]

Other tribunals have created a rump *Salini* test consisting of three criteria. One tribunal noted that '[w]ith the evolution of arbitral jurisprudence, the objective definition of the notion of investment now includes only: (i) a contribution, (ii) the receipt of returns and (iii) the assumption of risks'.[22] Yet the most-represented version of a rump *Salini* test observes contribution, duration, and risk.[23] Finally, the Tribunal in *Abaclat and others v Argentina* again distinguished itself by rejecting the *Salini* test, arguing that a finding that there was an investment under the BIT but which could not be protected under the ICSID Convention would be against the latter's object and purpose, and keeping a contribution that is 'apt to create the value that is protected under the BIT' as the sole criterion under the ICSID Convention.[24]

The group of tribunals which formed a rump *Salini* test had problems with the criterion of the contribution to the development of the host State in particular. In their opinion, this should be the effect or consequence of investments, not a condition for their existence.[25] Others have maintained that such a requirement is simply difficult to establish.[26] These were conceptual issues with the condition of the contribution to the economic development. A controversy has also

---

21 ibid para 116 ('It is the Tribunal's view that in referring expressly to the necessity to invest "in connection with economic activities" and to make the investment "in accordance with the laws and regulations" of the host State, the BIT does not modify in any way the ICSID notion, but only explicitly expresses two necessary elements of the test – 4 and 5 – implicit in the rules of interpretation.').

22 *Isolux Infrastructure Netherlands BV v Kingdom of Spain,* SCC Case No V2013/153, Award (12 July 2016) para 685; translation in *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No ARB/14/1, Award (16 May 2018) para 198.

23 *LESI SpA and ASTALDI SpA v République algérienne démocratique et populaire,* ICSID Case No ARB/05/3, Decision (12 July 2006) para 72(iv); *Victor Pey Casado and President Allende Foundation v Republic of Chile,* ICSID Case No ARB/98/2, Award (8 May 2008) para 233; *Mr Saba Fakes v Republic of Turkey,* ICSID Case No ARB/07/20, Award (14 July 2010) para 110; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia,* ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) para 227; *KT Asia Investment Group BV v Republic of Kazakhstan,* ICSID Case No ARB/09/8, Award (17 October 2013) para 173; *Poštová banka as and Istrokapital SE v The Hellenic Republic,* ICSID Case No ARB/13/8, Award (9 April 2015) para 371; *Masdar Solar & Wind Cooperatief UA v Spain* (n 22) para 199.

24 *Abaclat and others v The Argentine Republic,* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) paras 363–5.

25 *Victor Pey Casado and President Allende Foundation v Chile* (n 23) para 232; *Mr Saba Fakes v Turkey* (n 23) para 111; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) paras 220–5; *KT Asia Investment Group BV v Kazakhstan* (n 23) paras 171–2.

26 *LESI SpA and ASTALDI SpA v Algeria* (n 23) para 72(iv); *Phoenix Action Ltd v Czechia* (n 19) para 85.

arisen about its relationship to the ICSID framework. Two annulment proceedings are instructive in this regard. The Annulment Committee in *Patrick Mitchell v Congo* derived from the preamble of the ICSID Convention the contribution to the development of the host State as an 'essential' criterion of an investment, although this '[did] not mean that this contribution must always be sizable or successful'.[27] The Committee annulled the Award for the failure to address this issue in its reasoning, and specifically stated that it had to answer the question how the investor 'had concretely assisted' the State.[28] Conversely, in *Malaysian Historical Salvors v Malaysia,* the Annulment Committee did not agree with the Sole Arbitrator's reliance on *Salini* in its entirety,[29] and specially criticised him for 'exigently interpret[ing] the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature'.[30] The dissenting member of the Committee opined that the contribution to the economic development of the host State was indeed an 'outer limit' and strict condition of the definition of 'investment' under the ICSID Convention, relying on its context and object and purpose.[31] The Dissent held that such contribution had to be 'substantial', relying on pure policy considerations.[32] These examples reveal that even when such a condition is alleged to have a treaty basis, the true causes of its inclusion are somewhere behind, in the policy considerations of arbitrators about the meaning of a proper investment.

Some tribunals have not been willing to admit the hard normativity of the *Salini* (or any similar) criteria. One tribunal, deciding already before *Salini,* explicitly rejected a similar definition of 'investment' suggested by the Respondent, arguing that its elements 'tend as a rule to be present in most investments, [but] are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the [ICSID] Convention'.[33] Almost a decade later, the Tribunal in *Biwater v Tanzania* rejected the *Salini*

---

27 *Mr Patrick Mitchell v The Democratic Republic of Congo,* ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) paras 27–33.

28 ibid paras 39–41.

29 *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia,* ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009) paras 75–81.

30 ibid para 80(b).

31 *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia,* ICSID Case No ARB/05/10, Annulment Proceedings, Dissenting Opinion of Judge Mohamed Shahabuddeen (19 February 2009) paras 14–32.

32 ibid paras 33–8. The Dissent stated: 'Whatever the strict sequence of the statutory steps, the search for the "ordinary meaning" of "investment" sooner or later throws the searcher back on the understanding of the international legal community. The international legal community would have rejected out of hand the idea that any contribution to the economic development of the host State, however miniscule that contribution is, is sufficient to qualify the whole outlay as an "investment" within the meaning of Article 25(1) of the ICSID Convention.'

33 *Ceskoslovenska Obchodni Banka AS v Slovakia* (n 10) para 90.

criteria holing that they 'are not fixed or mandatory as a matter of law'.[34] But the Tribunal also had conceptual difficulties with the *Salini* test, holding that it was inflexible which was inappropriate for the ICSID context,[35] and argued that

> 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.
>
> […]
>
> To this end, even if the Republic could demonstrate that any, or all, of the *Salini* criteria are not satisfied in this case, this would not necessarily be sufficient – in and of itself – to deny jurisdiction.[36]

On the facts, the Tribunal concluded that there was an investment, and that 'even if such are required for the purposes of Article 25 of the Convention, the conditions of "*risk*" and "*commitment*" […] were present'.[37] This stream of practice[38] gave rise to inductive thinking about the notion of investment under the ICSID Convention, which observed elements that are *characteristic* for an investment, rather than the deductive criteria for its qualification.[39] However, there is also an opinion that the distinction between these two streams is only academic, and that they do not imply any differences in practice.[40]

Finally, the third group of tribunals thought that there was no space for reading into the ICSID Convention any additional requirements: because that Convention did not define 'investment', only the definition in the applicable BIT was relevant. While some tribunals have simply proceeded straightforward to treaty definitions,[41] others have emphasised the lack of such

---

34 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania,* ICSID Case No ARB/05/22, Award (24 July 2008) para 312.

35 ibid paras 314–5.

36 ibid paras 316, 318.

37 ibid para 320 (emphasis in the original).

38 See also *Toto Costruzioni Generali SpA v The Republic of Lebanon,* ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009) paras 77–87 (praising the *Biwater* approach, but practically applying the *Salini* test).

39 Cf *Victor Pey Casado and President Allende Foundation v Chile* (n 23) para 232 ('Le présent Tribunal estime pour sa part qu'il existe bien une définition de l'investissement au sens de la Convention CIRDI et qu'il ne suffit pas de relever la présence de certaines des « *caractéristiques* » habituelles d'un investissement pour que cette condition objective de la compétence du Centre soit satisfaite. Une telle interprétation reviendrait à priver de toute signification certains des termes de l'article 25 de la Convention CIRDI […]').

40 *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia,* ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007) para 105.

41 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt,* ICSID Case No ARB/99/6, Award (12 April 2002) paras 135–6.

a definition in the ICSID Convention.[42] Some have preferred deference to BIT definitions and contractual understandings over imposing additional requirements.[43] Still, these tribunals have not isolated themselves from the broader discourse. One tribunal opined that

> the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.[44]

The Sole Arbitrator in *Pantechniki v Albania* went the furthest. He started from challenging the general understanding of *Salni* in the *Biwater* direction,[45] but then disputed the autonomous meaning of the term 'investment' within the ICSID Convention, especially as a jurisdictional requirement.[46] The Sole Arbitrator did support reaching a consensus on an inherent meaning of the term 'investment' from a policy perspective and with a reference to academic work, but this did not have any clear effect on his final determination.[47]

As it is usual, the arbitral practice concerning the objective definition of 'investment' is also often criticised for inconsistency.[48] However, I suggest that there is more consistency than it

---

42 *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 8.2; *Tokios Tokelės v Ukraine,* ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 73; *MCI Power Group LC and New Turbine Inc v Republic of Ecuador,* ICSID Case No ARB/03/6, Award (31 July 2007) para 159; *Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case No ARB/05/8, Award (11 September 2007) para 249.

43 *Georg Gavrilović and Gavrilović doo v Republic of Croatia,* ICSID Case No ARB/12/39, Award (26 July 2018) para 192 (deference to the BIT definition); *Caratube International Oil Company LLP and Mr Devincci Salah Hourani v Republic of Kazakhstan,* ICSID Case No ARB/13/13, Award (27 September 2017) para 635 ('where there is an agreement between the parties regarding the existence of an investment, they are generally precluded from later challenging ICSID's jurisdiction based on the alleged absence of an investment'); *Alpha Projektholding GmbH v Ukraine,* ICSID Case No ARB/07/16, Award (8 November 2010) para 314 (deference to the BIT definition). See also *Abaclat and others v Argentina* (n 24) para 364 (although acknowledging the double-barrelled test, prioritising the definition in the BIT).

44 *MCI Power Group LC and New Turbine Inc v Ecuador* (n 42) para 165. See also *Georg Gavrilović and Gavrilović doo v Croatia* (n 43) para 193 ('the Tribunal recognises that the *Salini* test may be useful in certain circumstances; for instance, where a tribunal is concerned that a BIT or contract definition of investment is so broad and overreaching as to capture transactions that manifestly are not investments under any acceptable conception').

45 *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania,* ICSID Case No ARB/07/21, Award (30 July 2009) para 36.

46 ibid paras 41, 43.

47 ibid paras 46–7.

48 *Mr Saba Fakes v Turkey* (n 23) para 97 ('The proposed solutions are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals.').

seems at first. It is now undeniable that qualifying an investment assumes a double-barrelled test, observing criteria under both the ICSID Convention and the relevant BIT.[49] Furthermore, when it comes to the objective criteria, the *Salini* test dominates. Even the tribunals which have not considered this test decisive have reached to its criteria (some or all) in drawing or verifying their conclusions.[50] It is not surprising, therefore, that these criteria have been extended outside the ICSID Convention.

ii. *Going Beyond ICSID*

The objective definition of 'investment' emerged in the ICSID context, but from there it spread to non-ICSID arbitrations. Because of the absence of an instrument doubling the notion of an investment, it would be reasonable to assume that that notion is defined by the relevant treaty only. However, a different view emerged. In *Romak v Uzbekistan,* the Tribunal firstly stressed the need for an inherent meaning of the notion of an investment. That meaning was necessary, *inter alia*, because the relevant treaty did not define investments exhaustively,[51] but also because it was necessary to distinguish conceptually between investments and 'purely commercial transactions'.[52] In the latter point, the Tribunal relied on the policy considerations advanced in the *Joy Mining* case,[53] although it also attempted to link the need for distinguishing to the treaty's

---

49 *Global Trading Resource Corp and Globex International Inc v Ukraine,* ICSID Case No ARB/09/11, Award (1 December 2010) para 43 ('for the Tribunal, it is now beyond argument that there are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions'); Schwebel (n 5) 55.

50 See, for example, *Georg Gavrilović and Gavrilović doo v Croatia* (n 43) para 194; *MCI Power Group LC and New Turbine Inc v Ecuador* (n 42) para 165; *Pantechniki SA Contractors & Engineers (Greece) v Albania* (n 45) paras 48–9; *Alpha Projektholding GmbH v Ukraine* (n 43) paras 316–31; *Abaclat and others v Argentina* (n 24) paras 370–1.

51 *Romak SA (Switzerland) v The Republic of Uzbekistan,* PCA Case No AA280, Award (26 November 2009) para 180.

52 ibid para 185.

53 *Joy Mining Machinery Limited v Egypt* (n 18) para 58 ('[…] if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?').

object and purpose.[54] After reviewing the practice, the Tribunal came up with a set of criteria that could be characterised as the rump *Salini* test:

> The Arbitral Tribunal therefore considers that 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.[55]

Although accommodating this conclusion within the narrative of treaty interpretation,[56] the Tribunal clearly also engaged in an arbitration-overreaching discourse about the objective meaning of 'investment'.[57] The Tribunal even suggested that States can opt-out of the inherent meaning of 'investment' and assign that term whatever meaning they wish, however under the condition that 'the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term "investment" an extraordinary and counterintuitive meaning'.[58]

The endeavour of the *Romak* Tribunal is somehow surprising, given its insistence that it was neither bound by previous decisions nor meant to develop the law.[59] Perhaps more pragmatic reasons have forced the Tribunal to nevertheless move in that direction: the Tribunal noted that it would be unreasonable to conclude that the notion of an investment could change meaning by simple choice of the claimant between ICSID and non-ICSID arbitrations, or to make the choice of ICSID arbitration ineffective by broadening the notion of an investment.[60] This was an admission of the need for harmonisation, but also at the same time an acknowledgment of the built objective meaning of 'investment' in the ICSID context.

The *Romak* decision was only the first step in the objectivization of the term 'investment' independently of any framework regulation. Other non-ICSID tribunals followed and referred to the 'concept of investment'.[61] Some ICSID tribunals referred to an inherent meaning of the term

---

54 *Romak SA (Switzerland) v Uzbekistan* (n 51) para 189.

55 ibid para 207 (emphasis in the original).

56 ibid para 206.

57 ibid para 207 ('The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals […] which consistently incorporates contribution, duration and risk as hallmarks of an "investment."').

58 ibid para 205.

59 ibid paras 170–1.

60 ibid paras 194–5. This is a consequence of the fact that BITs usually offer investors a choice between multiple arbitration options, as it was also the case here. See also *Pantechniki SA Contractors & Engineers (Greece) v Albania* (n 45) para 46.

61 *Isolux Infrastructure Netherlands BV v Spain* (n 22) paras 683–5. See also *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/1, Award (30 April 2014) paras 77–84 ('inherent features').

'investment' itself, rather than the one provided in Article 25(1) ICSID Convention.[62] And some ICSID tribunals asserted that this provision referred to the 'ordinary meaning' (ie objective one) of the notion of an investment existing outside and independently from the ICSID Convention.[63] The *Romak* case is the usual point of reference in these ICSID decisions.[64] That is not to say that the practice is absolutely uniform. It is occasionally maintained that outside the ICSID context there is no room for adding another definition of 'investment', and that only the definition provided in the relevant BIT applies.[65] Yet, the objective definition of 'investment' is a good example of widespread acceptance of an arbitral supplementing activity, which is even visible in the attitudes of claimants, who are now reluctant to challenge its existence.[66] As pointed out by some commentators, the objectivity at hand has become systemic, rather than institutional.[67]

B. The Legality Requirement

Many investment treaties limit the scope of the protected investments with the requirement that they are established in accordance with the law of the host State (legality requirements).[68] The

---

62 *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award (31 March 2011) para 141; *Masdar Solar & Wind Cooperatief UA v Spain* (n 22) para 196.

63 *Mr Saba Fakes v Turkey* (n 23) para 108 ('The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning.'); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) para 212; *KT Asia Investment Group BV v Kazakhstan* (n 23) para 165.

64 *GEA Group Aktiengesellschaft v Ukraine* (n 62) para 141; *Masdar Solar & Wind Cooperatief UA v Spain* (n 22) para 197; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) para 216; *KT Asia Investment Group BV v Kazakhstan* (n 23) para 165.

65 *A11Y Ltd v Czech Republic*, ICSID Case No UNCT/15/1, Award (29 June 2018) paras 139–40; Arrêt du 25 septembre 2008, Cour d'Appel de Paris, 1ère Chambre - Section C (France) 07/04675, 5.

66 For example, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) para 213; *KT Asia Investment Group BV v Kazakhstan* (n 23) para 164.

67 Perry S Bechky, '*Salini*'s Nature: Arbitrators' Duty of Jurisdictional Policing' (2018) 17 LPICT 145, 158–9. See also Emmanuelle Cabrol, 'Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does "Investment" Really Mean "Every Kind of Asset"?' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (OUP 2010) 217 (supporting the extension of the objective criteria to BIT definitions of 'investment').

68 See generally on this topic Christina Knahr, 'Investments "in Accordance with Host State Law"' (2007) 4(5) TDM <https://www.transnational-dispute-management.com/article.asp?key=1070> accessed 23 February 2019; Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 Fordham Int'l LJ 1473; Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 LPICT 281; Thomas Obersteiner, '"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors' (2014) 31 J Int'l Arb 265; Michael Polkinghorne and

very narrow question which is addressed here is whether in the absence of a legality requirement in the applicable treaty, such a condition could be implied or assumed to exist independently of the treaty text. More importantly, can such a requirement be implied as a jurisdictional condition? I argue that the answer is affirmative, which is visible in two stages.

The first stage is the recognition of the need to exclude illegally made investments from the scope of investment protection. In *Inceysa v El Salvador*, where there was a legality requirement in the applicable BIT, the Tribunal opined that the inclusion of such clauses in BITs was 'a clear manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory States to exclude from its protection investments made in violation of the internal laws of each of them'.[69] These clauses followed 'international public policies designed to sanction illegal acts and their resulting effects'.[70] The Tribunal noted that 'respect for the law is a matter of public policy […] in any civilized country' and that 'there is a meta-positive provision that prohibits attributing effects to an act done illegally'.[71] The same narrative about the international public policy was employed in *Plama v Bulgaria.* The applicable ECT did not contain a legality requirement, but the Tribunal held that 'the substantive protections of the ECT cannot apply to investments that are made contrary to law'.[72] After surveying case law, the Tribunal held that, bearing in mind the conduct through which the investment was obtained, granting it protection under the ECT would 'be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal'.[73] These questions were discussed as part of the merits, because of the lack of jurisdictional limitations in the ECT.[74] Nevertheless, the important point of these cases is the acknowledgment of the international public policy as the carrier of the requirement that an

Sven-Michael Volkmer, 'The Legality Requirement in Investment Arbitration' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 65.

69 *Inceysa Vallisoletana SL v Republic of El Salvador,* ICSID Case No ARB/03/26, Award (2 August 2006) para 246.

70 ibid para 247.

71 ibid para 248. See also ibid para 252 ('not to exclude Inceysa's investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow').

72 *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Award (27 August 2008) paras 138–9.

73 ibid para 143. See also *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic,* ICSID Case No ARB/14/3, Award (27 December 2016) para 264; *Yukos Universal Limited (Isle of Man) v The Russian Federation,* PCA Case No AA 227, Final Award (18 July 2014) paras 1349–52.

74 *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) para 229.

investor has to act legally in establishing his investment. This suggestion has been affirmed even in the context of contractual arbitrations.[75]

The second stage pertains to the formalisation of the legality requirement as a jurisdictional condition. In the absence of a legality clause in the relevant treaty, imposing such a requirement as a jurisdictional limit seems problematic,[76] for which reason scholars argue that legality of an investment can be discussed only as a matter of admissibility,[77] or merits.[78] Nevertheless, some tribunals have attempted to do so. As seen above, the Tribunal in *Phoenix Action v Czechia* read a legality requirement into the definition of 'investment', or more precisely the definition of a *protected* investment.[79] Notably, the relevant BIT contained a legality requirement, but the Tribunal stated:

> In the Tribunal's view, *States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.* If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. *And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT.* This position of the Tribunal has also been adopted in the case of *Plama*, where the Tribunal was faced with the silence of the relevant treaty on the necessary conformity of a protected investment with the laws of the host country.[80]

For the Tribunal, manifestly illegal investments would lead to the denial of jurisdiction, although it also left open the possibility of discussing this question in the merits.[81] On a closer look, the Tribunal stated that the legality requirement pertained 'to the access to the substantive

---

75 *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) paras 138–57.

76 Note that there is a debate about whether any legality requirement, explicit or implicit, relates to the questions of jurisdiction or exclusively admissibility/merits. Cf Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 ICSID Rev-FILJ 155 (arguing that illegal conduct of an investor is never a question of jurisdiction); and Andrew Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 187 (focusing on illegality as a question of admissibility); with Thomas Roe, 'Illegality and Jurisdiction in Investment Arbitration' (2016) 2 Turkish Commercial L Rev 17 (arguing in favour of the jurisdictional nature of the question in the case of explicit clauses).

77 Moloo and Khachaturian (n 68) 1489; Obersteiner (n 68) 275.

78 Schill (n 68) 322–3.

79 *Phoenix Action Ltd v Czechia* (n 19) para 114.

80 ibid para 101 (emphasis added).

81 ibid para 102.

provisions on the protection of the investor under the BIT', which 'can be denied through a decision on the merits', but 'if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction'.[82]

The Tribunal in *Hamester v Ghana,* also facing a BIT with an explicit legality requirement,[83] endorsed the reasoning of *Phoenix:*

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law […] *These are general principles that exist independently of specific language to this effect in the Treaty.*[84]

Regarding the reach of the legality requirement, the Tribunal held that 'on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue', but that 'the broader principle of international law […] does not change this analysis of [the BIT legality requirement], and in particular its distinction between legality at different stages of the investment'.[85] This can be interpreted as an affirmation of the *Phoenix* reasoning that the legality of an investment as a general requirement pertained to the substantive protection. However, the distinction made in that case was between manifestly illegal investments and those whose legality had to be examined in more detail. On the other hand, if one accepts the *Hamster* opinion that it is a general principle that an illegally made investment cannot be protected, there is no reason for not applying the same distinction between illegally *made* (precluding jurisdiction) and *operated* investments (pertaining to merits). The rationale is the same: illegally made investments could never qualify for investment protection (thus precluding jurisdiction *ratione materiae*). Nevertheless, the question whether an implied legality requirement concerns jurisdiction or merits remains blurred. Recently, the Tribunal in *Cortec v Kenya* held: 'It is accepted jurisprudence that in order to be protected an investment has to be in accordance with the laws of the host State and made in good

---

82 ibid para 104.

83 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana,* ICSID Case No ARB/07/24, Award (18 June 2010) para 126.

84 ibid paras 123–4 (emphasis added). See also *SAUR International SA v Republic of Argentina,* ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012) para 308 ('Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agit à l'encontre du droit.' [reference omitted]).

85 *Gustav F W Hamester GmbH & Co KG v Ghana* (n 83) para 127.

faith. This requirement can be analyzed at the jurisdictional or the merits level.'[86] The Tribunal then dismissed claims for the lack of jurisdiction because of the illegality of the investment.[87]

The contribution of these two stages is twofold. First, there is a growing understanding that investments which are not made in compliance with domestic laws of host States cannot be protected under investment treaties in principle, even if that assumes leaving the terms of clear treaty provisions and entering the field of meta rules.[88] This development is indeed conceptual, as it rebuts the paradigm of investment law which assigns obligations to States exclusively.[89] Second, tribunals are capable and willing to translate that general understanding into a rule governing their jurisdiction.[90] In doing so, tribunals attempt to accommodate their supplementing

---

86 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Kenya* (n 17) para 260. The Tribunal relied on the *Phoenix* decision. However, the Tribunal's further reasoning could detract from the quoted generalised premise: 'The Tribunal concludes that for an investment such as a licence, which is the creature of the laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State. The claims do not relate to bricks and mortar, as earlier observed. The claimed rights flow from a document which has no legal existence or effect, and cannot therefore give rise to compensable rights.' ibid para 319.

87 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Kenya* (n 17) para 333. Among the reasons, the Tribunal held that '[t]he *explicit* language to the effect that protected investments must be made "in accordance with the laws of Kenya" is therefore unnecessary to secure the objects and purpose of the BIT' (emphasis in the original).

88 See also *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar,* ASEAN Case No ARB/01/1, Award (31 March 2003) para 58 (in the context of a requirement for an investment to be approved in writing and registered, the Tribunal stated: 'In this respect Article II goes beyond *the general rule* that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.' [emphasis added]); *Ioannis Kardassopoulos v Georgia,* ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) para 182 ('"Protection of investments" under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, "no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State".' [citing M Sornarajah, *The International Law on Foreign Investment* (2nd ed, CUP 2004) 106]); *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan,* ICSID Case No ARB/05/16, Award (29 July 2008) para 319 ('Indeed, in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host State laws and regulations.').

89 See, in this direction, Jorge E Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 ICSID Rev-FILJ 346, 367–8.

90 See further Luke Eric Peterson, 'In New Ruling, a Divided Tribunal Dismisses Claims of Costa Rican and Dutch Investors Against Panama' (*Investment Arbitration Reporter*, 15 October 2018) <https://www.iareporter.com/articles/in-new-ruling-a-divided-tribunal-dismisses-claims-of-costa-rican-and-

action within the treaty context, as the *Plama* Tribunal did when mentioning the objective of the ECT to contribute to the rule of law.[91] But it is obvious that tribunals readily reach to their own policy considerations, which is particularly visible in *Pheonix* and *Hamester* decisions, and also others in the context of 'international public policy'.

Again, this does not mean that arbitral practice has been completely uniform. Some tribunals have criticised the reading of a legality requirement into the objective definition of 'investment', arguing that whether such a requirement will be applicable to investments depends on the will of the parties to the BIT.[92] Yet, these tribunals have taken a rather technical approach, arguing that the question whether something qualifies as an investment is different from the question whether that investment is protected. Outside this context, some tribunals have maintained that legality requirements simply cannot be read into BITs.[93] This formalistic opinion, however, loses much of its strength in light of the widespread understanding that illegal investments do not qualify for international protection.

C. The Objective Definition of 'Investor'

The ICSID Convention provides for the settlement of disputes between 'a Contracting State […] and a national of another Contracting State',[94] and it provides more details about the meaning of a 'national of another Contracting State'.[95] In that respect, the Convention sets some outer limits on the notion of an investor that cannot be exceeded by the party arrangements, similarly to the rationale behind the objective definition of 'investment'.[96] Investment treaties normally refer to

---

dutch-investors-against-panama/> accessed 24 February 2019 ('Thus far, Panama has said, via a statement of its counsel that "(i)n its decision, the Tribunal noted that all investment treaties have an implicit requirement for an investor to comply with domestic law. […]"').

91 *Plama Consortium Limited v Bulgaria* (Merits) (n 72) para 139. See also *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Kenya* (n 17) para 333(a) ('The text and purpose of the BIT and the ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws fundamental protecting public interests such as the environment.').

92 *Mr Saba Fakes v Turkey* (n 23) paras 112–4; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) para 226.

93 *Capital Financial Holdings Luxembourg SA v Republic of Cameroon,* ICSID Case No ARB/15/18, Award (22 June 2017) paras 464–8; *Bear Creek Mining Corporation v Republic of Perú,* ICSID Case No ARB/14/21, Award (30 November 2017) para 320.

94 ICSID Convention (n 1) art 25(1).

95 ibid art 25(2).

96 Broches (n 2) 207; CF Amerasinghe, 'Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1976) 47 British Yrbk Int'l L 227, 244.

the treatment by a contracting party of investors of the other contracting party,[97] and domestic investment laws are often made for the protection of foreign investments specifically.[98] What if the applicable jurisdictional framework does not mention a foreign element? Would such an omission amount to an equal protection of domestic investors to that of foreigners? Although this question should emerge very rarely, it appears the answer is 'no', thanks to the development of an objective foreign element in practice.

The first occasion on which a tribunal read the foreign element into a definition of 'investor' was in *Bayview Irrigation District and others v Mexico*, a case initiated by a group of domestic investors within the US against Mexico for alleged transboundary damage.[99] The NAFTA, as the applicable treaty, did not limit the definition of an investor or an investment with a foreign element, and its dispute settlement clause provided that '[a]n investor of a Party may submit to arbitration under this Section a claim [against] another Party […]'.[100] Technically, the Claimants satisfied these criteria. However, the scope of the NAFTA's investment chapter was limited to 'measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party […]'.[101] This was a sufficient basis for rejecting the claims on the grounds of substantive jurisdiction. However, the Tribunal took another route. It turned to the definition of 'investor' and the question whether there must be a cross-border investment, concluding that, although such wording was not explicit, 'NAFTA Chapter XI in fact refers to "foreign investment" and that it regulates "foreign investors" and "investments of foreign investors of another Party"'.[102] This conclusion indeed could be made by

---

97 For example, Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (signed 6 June 2005, entered into force 1 December 2009) art 3(1) ('Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.'). See further, for definitions of 'investor' in investment treaties, Doak Bishop and Margrete Stevens, 'Jurisdiction *Ratione Personae* – Is There a Standard Definition of an "Investor" in Investment Treaties?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018) 199.

98 UNCTAD lists 40 States with specific foreign investment laws, and 72 States with general investment laws. See UNCTAD, Investment Policy Hub, Investment Laws Navigator <https://investmentpolicyhubold.unctad.org/InvestmentLaws> accessed 18 April 2019.

99 *Bayview Irrigation District and others v United Mexican States,* ICSID Case No ARB(AF)/05/1, Award (19 June 2007).

100 North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289, art 1116(1).

101 ibid art 1101(1).

102 *Bayview Irrigation District and others v Mexico* (n 99) paras 87–96.

the mere reliance on the treaty text, which the Tribunal did in part to confirm its views.[103] But the Tribunal's main considerations concerned the different status of domestic and foreign investors in relation to host States and the familiarity with local laws in general, and it endorsed the statement of the US Government which read:

> The aim of international investment agreements is the protection of foreign investments, and the investor who make them. This is as true with respect to the investment provisions of free trade agreements (FTAs) as it is for agreements devoted exclusively to investment protection, such as bilateral investment treaties (BITs). NAFTA Chapter Eleven is no different in this regard.[104]

The Tribunal concluded 'that in order to be an "investor" within the meaning of NAFTA Art. 1101 (a), an enterprise must make an investment in another NAFTA State, and not in its own'.[105] The value of this reasoning is that the Tribunal engaged an analysis of the rationale behind investment protection agreements in general. That was the source of the foreign element in the notion of an investor, not merely the text of the NAFTA.

More recently, in 2017 the SGHC in a set-aside proceeding faced a more clear-cut scenario. Annex 1 to the Protocol on Finance and Investment of the SADC did not distinguish between domestic and foreign investors, which led an arbitral tribunal to conclude that arbitration under that Annex was open to both domestic and foreign investors.[106] The SGHC disagreed, and held that Annex 1 was meant to protect foreign investors only. The Court inferred such purpose of the Annex 1 from a number of provisions which attempted to improve the position of the SADC region as a whole as an investment destination, but also from the fact that it provided for *international* arbitration (before the SADC Tribunal or ICSID or *ad hoc* tribunals).[107] But SGHC could not resist conceptual considerations either. First, it stated that this conclusion was supported by the requirement of the exhaustion of local remedies in the same Annex, which protected State sovereignty in relation to foreign investors.[108] One cannot omit to notice that precisely those mechanisms that allow individuals and companies to bring claims against their own States, like human rights courts, do so with the requirement of the exhaustion of local remedies. But then, the SGHC rejected a parallel with a human rights case heard before the SADC Tribunal, which affirmed jurisdiction over a claim by a national against his own State. The Court distinguished the objectives of the SADC Treaty from Annex 1, as if the latter had nothing to do

---

103 ibid para 105.

104 ibid paras 97–100.

105 ibid para 101.

106 *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others* [2017] SGHC 195 [324].

107 ibid [331].

108 ibid [332].

with the SADC framework.[109] Crucially, the jurisdiction of the SADC Tribunal, regulated by its Protocol, was different from the jurisdiction defined in Annex 1, because it was 'not confined to disputes concerning specific subject-matter or persons suing in a particular capacity', while arbitration under the latter instrument was 'limited exclusively to persons suing in a particular capacity (*ie*, as investors) and to disputes with a specific subject-matter (*ie*, concerning a host State's obligations in relation to an admitted investment)'.[110] In reaching its conclusions, the SGHC asserted that it was not led by comparisons to other investment treaties,[111] however it did engage a familiar narrative:

> The fact that Annex 1 does not *expressly* confine its terms to foreign investors is not so compelling as to outweigh the clear context, object and purpose of Annex 1. On the contrary, it is difficult to believe that if SADC Member States did intend to confer treaty protections on domestic investors, which would trigger broad-ranging and significant legal consequences (not least the *de facto* creation of a new tier to the judicial system for domestic investors), they would have neglected to provide for and regulate these consequences expressly. That is far less plausible than the alternative, *ie*, the SADC Member States did not intend to trigger such consequences although they did not expressly say so. The definition of "investment" in Annex 1 is one which, if applied to nationals, would invariably include every national who had ever purchased property, acquired company shares or acquired licences to exploit natural resources (amongst others). Extending treaty protections to nationals would constitute a significant intrusion into the sovereignty and freedoms of each Member State. Indeed, it seems quite extraordinary to conclude as such in the absence of clear and explicit language. Construing Annex 1 in such a way contradicts the principle that treaties must be interpreted with due recognition to the interests of the negotiating States and their sovereignty […][112]

Although quite rudimentary, an objective definition of 'investor' appears in a general understanding about the necessity of a foreign element in the notion of an investor, which usually need not be addressed because of explicit treaty clauses to the same effect. To what extent that element will be defended in concrete cases, and whether arbitrators will be satisfied with its formal fulfilment or will pursue more substantial inquiries, is a more complex question. One should only mention the debates about the piercing of corporate veil of investors that formally qualify as foreign but substantively arguably do not,[113] or about the permissibility of claims by

---

109 ibid [335(a)].

110 ibid [335(b)–6].

111 ibid [338].

112 ibid [333].

113 Tribunals have been asked many times to pierce the corporate veil of companies to discover the true investor not falling under the protection of the relevant treaty, which has mostly been rejected. This can be seen as a failure of rule-formation which was sought by States as respondents. See, for the precedent, *Tokios Tokelės v Ukraine* (n 42) paras 24–71.

dual nationals (of home and host States) outside the ICSID context.[114] Addressing these issues exceeds the scope of this study, and it suffices to observe here that the extreme cases which do not mention a foreign element in the applicable jurisdictional framework, reveal the objective nature of that element and its applicability by virtue of the arbitral supplementing activity.

§ 5.03. Limiting the Scope of Arbitrable Disputes: The Example of Umbrella Clauses

Arbitral tribunals have also attempted to set some limits on the scope of arbitrable disputes and supplemented given jurisdictional rules to that end. I will discuss one such example in the context of umbrella clauses. I will firstly distil the privity of contract as a jurisdictional issue arising in the application of umbrella clauses (A), and then I will discuss reading the condition of privity into umbrella clauses as a supplementing activity of arbitral tribunals (B).

A. Conceptual Issues with Umbrella Clauses

An umbrella clause in an investment treaty obliges States parties to observe the obligations they have entered into with respect to investments.[115] Such clauses have raised many questions,[116] one of the first ones being whether the State act breaching an obligation that triggers an umbrella

---

114 See *Serafín García Armas and Karina García Gruber v The Bolivarian Republic of Venezuela*, PCA Case No 2013-3, Decision on Jurisdiction (15 December 2014) paras 159–75; and Javier García Olmedo, 'Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?' (2017) 8 JIDS 695. The ICSID Convention explicitly excludes dual nationals of home and host States as claimants: ICSID Convention (n 1) art 25(2)(a). Some BITs regulate dual nationals as investors: US Model BIT (2012) art 1 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2870> accessed 18 April 2019 ('provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'). If the exclusion of dual nations as claimants would be extended beyond ICSID, that could be seen as another example of arbitral rule-creation.

115 For example, Agreement Between the Belgium-Luxembourg Economic Union and Barbados for the Reciprocal Promotion and Protection of Investments (signed 29 May 2009, not in force) art 2(4) ('Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.').

116 See generally Anthony C Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arb Int'l 411; Jarrod Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason L Rev 137; John P Gaffney and James L Loftis, 'The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims' (2007) 8 JWIT 5; James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int'l 351, 366–70; Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013) 247–53; Mary E Footer, 'Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction' (2017) 16 LPICT 87.

clause must be governmental or can be of whatever nature.[117] Another important issue is the reach of umbrella clauses. First, do such clauses cover any type of obligations between States and investors, including contractual, administrative, and statutory commitments, or is their reach somehow limited?[118] Second, if umbrella clauses cover contractual obligations between States and investors, do they imply the condition of privity, so that the contract at stake must be concluded between the State and the investor themselves, or do they cover contracts concluded through affiliates as well? Assuming that the reach of umbrella clauses to contractual obligations is now settled,[119] I will focus on the second issue. While some treaties provide textual guidance on this point,[120] others do not,[121] which demonstrates a regulatory deficiency allowing for arbitral supplementing action.

As a preliminary remark, it can be questioned whether these are jurisdictional issues at all. One can argue that alleging a contractual breach (as a fact) and invoking an umbrella clause (as the cause of action) would suffice to establish jurisdiction of a tribunal, provided that disputes arising from the umbrella clause are arbitrable.[122] Following this argument, the reach of an umbrella clause would be a substantive question, and the finding that that clause does not cover the obligations (contractual or whatever else) whose breach the investor is invoking would lead to the dismissal of the claim on the merits.[123] This is a technical view, which puts emphasis on

---

117 Cf Thomas W Wälde, 'The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases' (2005) 6 JWIT 183, 235–6 (arguing that umbrella clauses concern breaches of contracts by sovereign conduct only); with Stephan W Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18 Minn J Int'l L 1, 37–47 (arguing that umbrella clauses concern breaches of contracts regardless of the nature of State conduct).

118 Cf *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) para 166; with *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) paras 115–8.

119 But note that umbrella clauses do not elevate contractual obligations to the level of treaty obligations. The two sets of obligations remain technically distinct. See Eric De Brabandere, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (CUP 2014) 38–42.

120 Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 ('ECT') art 10(1) ('Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.').

121 See n 115 above.

122 Cf ECT (n 120) art 26(3)(c) (excluding the arbitrability of the disputes arising from the umbrella clause in respect of certain States).

123 See, for example, *BG Group Plc v The Republic of Argentina*, UNCITRAL arbitration, Final Award (24 December 2007) paras 361–6 (finding no violation of an umbrella clause in the merits, due to the lack of standing in respect of a contract; in this case, the holding on the scope of the umbrella clause seems rather implied).

the ability of the fact of contractual breach to trigger the responsibility under an umbrella clause. But tribunals regularly address the reach of umbrella clauses as questions of jurisdiction, and the same is true for the condition of privity.[124] That is a pragmatic view, which emphasises that only with a full construction of the reach of the umbrella clause can a tribunal know whether it should analyse the fact of contractual breach in the first place.

B. The Condition of Privity as a Jurisdictional Limit

The privity of contract in the context of umbrella clauses can be observed from two perspectives: that of a State, and that of an investor. From the perspective of a State, the condition of privity for triggering an umbrella clause seems often obvious, because such clauses normally refer to obligations entered into by the State. Accordingly, some tribunals have denied the invocation of contractual obligations entered into by State affiliates through umbrella clauses, with more[125] or less discussion.[126] Some decisions at first sight seem to have allowed triggering umbrella clauses without the privity of contract, however one should avoid jumping to conclusions. Those tribunals have focused on the rules of State responsibility on attribution and attempted to attribute obligations of affiliates to States.[127] Regardless of the question whether that approach is correct, what it effectively attempts to do is to find a route for binding the State, which does not rebut but rather fulfil the condition of privity.[128]

---

124 See n 134-139 below.

125 *Gustav F W Hamester GmbH & Co KG v Ghana* (n 83) paras 342–9; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) paras 314–20.

126 *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) para 223.

127 *Eureko BV v Republic of Poland, ad hoc* arbitration, Partial Award (19 August 2005) paras 115–34; *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) paras 68–86. See also *Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No ARB/08/11, Award (25 October 2012) para 246 ('[…] the Tribunal concludes that the term "Party" in the umbrella clause refers to any situation where the Party is acting *qua* State. This means that where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility), such entities are considered to be "the Party" for the purposes of Article II(3)(c). […] if the umbrella clause is to have the effect argued for by the Claimants, it could only do so in respect of obligations that have been assumed by the host State or by an entity whose conduct is attributable to the host State.'); *SGS Société Générale de Surveillance SA v Pakistan* (n 118) para 166 (commitments could be those 'of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the State itself').

128 Cf Nick Gallus, 'An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract' (2008) 24 Arb Int'l 157, 162–9 (for the arguments in support of applying the rules of attribution); with Shotaro Hamamoto, 'Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause' (2015) 30 ICSID Rev-FILJ 449, 463–4 (arguing that what is decisive are not

The true force of the privity condition is therefore better observed from the perspective of an investor. Because many umbrella clauses refer to obligations 'with respect to investments', they do not necessarily require that a contract covered under such a clause must be concluded by the investor himself. The early practice was conflicting: some tribunals have not seen a problem in relying on contractual rights of investors' affiliates,[129] while others have assumed the condition of privity without offering any explanation.[130] These tribunals have not provided satisfactory reasons for their positions, but others have been more willing to engage in analysis. One tribunal opined that 'provided that these obligations have been entered "with regard" to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary […] is not in principle excluded'.[131] Again, such principled pronouncements on the reach of umbrella clauses should be distinguished from the assessment of concrete facts establishing privity.[132]

A proper discussion on the condition of privity appeared only in the decisions which insisted on its imposition. The Annulment Committee in *CMS v Argentina* was the first to express doubts about unrestricted reading of an umbrella clause. The Committee held, *inter alia*, that '[c]onsensual obligations are not entered into *erga omnes* but with regard to particular persons', and that 'the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee'.[133] The Tribunal in *Burlington v Ecuador* went the furthest.

---

the rules of attribution but the representation of the State by a separate entity); and Crawford (n 116) 369 ('the question of the scope of a commitment to arbitrate made by the State is a matter of interpretation and has nothing to do with attribution'). See also Albert Badia, 'Attribution of Conducts of State-Owned Enterprises Based on Control by the State' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017) 204–8.

129 *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005) paras 132, 298–9; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 241. See also *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) para 152. These holdings were not properly reasoned and often referred to previous jurisdictional decisions which did not address the issue. See Gallus (n 128) 159–60.

130 *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) para 384; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) para 204.

131 *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008) para 297.

132 See *EDF International SA, SAUR International SA, and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) para 942 (seemingly not requiring privity, but noting that the concession agreement 'makes explicit mention of shareholders').

133 *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007) para 95(b). See also ibid para 95(c) ('The effect of the umbrella clause is not to transform the

Although it firstly dismissed the alleged general rule of privity established in *CMS*,[134] it arrived at the same conclusion. The Tribunal advanced two decisive arguments. First, that 'the obligation of one subject is generally seen in correlation with the right of another', and that '[a]n obligation entails a party bound by it and another one benefiting from it, in other words, entails an obligor and an obligee'.[135] Second, the Tribunal held that every obligation must be analysed in light of its governing law, however it did not examine the Ecuadorian law as the governing law of the contracts.[136] The central argument, therefore, in both *CMS* and *Burlington* was the conceptual understanding of an obligation, which led to restricting the reach of umbrella clauses. Moreover, the latter Tribunal, in light of its aspiration to contribute to the development of investment law, engaged in a broader discourse on the privity requirement in umbrella clauses, and found that the majority of ICSID decisions supported the imposition of that requirement.[137] Another tribunal, despite finding the privity requirement in the relevant clause, engaged in a similar discussion and found that such a requirement was generally accepted in the case law.[138]

There is a strong case, therefore, for the condition of privity being read into umbrella clauses, although the practice is still not uniform. One tribunal recently maintained that an umbrella clause went 'beyond the simple direct contractual relationship between the investor and the host State, because such provision establishes that the State shall comply with the obligations undertaken *"…related to investments by investors of the other Contracting Party …"*'.[139] The supplementing activity of arbitral tribunals therefore remains visible in their willingness to fill what they see as a regulatory gap in umbrella clauses with their theoretical views on the process of obliging, and to read an additional jurisdictional requirement into treaty texts.

---

obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.*, the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.'); and ibid para 95(d) ('Yet a shareholder, though apparently entitled to enforce the company's rights in its own interest, will not be bound by the company's obligations, *e.g.* as to dispute settlement.').

134 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010) para 195. On this point, the Tribunal emphasised the fact that the *CMS* Annulment Committee annulled the award for the lack of sufficient reasons, and not on the ground of manifest excess of powers.

135 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012) para 214.

136 ibid paras 214–5. The Tribunal shifted the burden on the Claimant to argue that the Ecuadorian law would allow enforcement by non-signatories of contracts, which the Claimant did not pursue.

137 ibid paras 221–33.

138 *WNC Factoring Ltd (United Kingdom) v The Czech Republic*, PCA Case No 2014-34, Award (22 February 2017) paras 312–41.

139 *Supervision y Control SA v The Republic of Costa Rica*, ICSID Case No ARB/12/4, Award (18 January 2017) para 287 (emphasis in the original).

§ 5.04. Abuse of Process as a Jurisdictional Limit *in Statu Nascendi*

The final example of arbitral law-making that I will discuss in this study is the doctrine of abuse of process as a developing jurisdictional obstacle. The doctrine of abuse of process is well known in international law, and in its essence it holds that no legal process can be used in bad faith and contrary to its purpose.[140] The main value of this doctrine is that it allows tribunals to find claims inadmissible if they are abusive.[141] As a doctrine of a general significance in international law, it has been employed in investment arbitration numerous times. The usual example of an abuse of process is when an investor restructures his investment to bring himself under the protection of an investment treaty for the purpose of gaining access to international arbitration in respect of foreseeable disputes.[142] I will not address many questions that arise in this scenario, like how an abusive restructuring should be identified.[143] What I am interested in is the arbitral translation of the abuse of process doctrine into a jurisdictional rule tailored for the particular scenario of restructuring investments for the purpose of accessing international arbitration, which I argue presents an example of law-making.

There are two routes for transforming the abuse of process doctrine into a jurisdictional rule. The first route targets the definition of 'investment'. The Tribunal in *Phoenix v Czechia* held that 'States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith'.[144] Discussing the meaning of the good faith principle in general, it stated that '[n]obody shall abuse the rights granted by treaties, and more generally,

---

140 The concept of abuse of process is generally seen as part of the broader concept of abuse of rights, which is in turn a reflection of the principle of good faith in the exercise of rights. See, for the doctrine of abuse of rights, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 121–36; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of International Law' (1959) 35 British Yrbk Int'l L 183, 207–16; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian Yrbk Int'l L 191, 202–3; and, for the abuse of rights/process doctrine in investment arbitration, Jorun Baumgartner, *Treaty Shopping in International Investment Law* (OUP 2016) 202–5; Eric De Brabandere, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' (2012) 3 JIDS 609, 618–9. But see John P Gaffney, '"Abuse of Process" in Investment Treaty Arbitration' (2010) 11 JWIT 515, 523–4 (finding the translation of the abuse of rights doctrine into the concept of abuse of process difficult in the context of investment treaty arbitration).

141 Lowe (n 140) 202–3; De Brabandere, 'Good Faith' (n 140) 619–20; Hervé Ascensio, 'Abuse of Process in International Investment Arbitration' (2014) 13 Chinese JIL 763, 784.

142 I focus here on this particular scenario, although many other scenarios can also be qualified as abuse of process. See Emmanuel Gaillard, 'Abuse of Process in International Arbitration' (2017) 32 ICSID Rev-FILJ 17, 19–27; Ascensio (n 141) 767–77.

143 See, for a discussion on the applicable test, Duncan Watson and Tom Brebner, 'Nationality Planning and Abuse of Process: A Coherent Framework' (2018) 33 ICSID Rev-FILJ 302.

144 *Phoenix Action Ltd v Czechia* (n 19) para 106.

every rule of law includes an implied clause that it should not be abused'.[145] The Tribunal concluded with a seemingly policy-based task:

> The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.[146]

The Tribunal thus read the good faith element into the definition of 'investment' that qualifies for protection.[147] On the facts, the Tribunal found that '[t]he unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty'.[148] Because the investment was made solely for the purpose of gaining access to arbitration, and thus not in good faith, it was not protected and the Tribunal declined jurisdiction.[149] Support for this type of reasoning can be found elsewhere,[150] although the practice is not uniform and some tribunals have explicitly opposed reading the good faith element into the objective definition of 'investment'.[151]

The second route is more straightforward: a finding of an abuse of process leads directly to denial of jurisdiction. Abuse of process appears as a stand-alone jurisdictional limitation, without intermediary concepts such as the objective definition of 'investment'. Some tribunals which take this approach start from the *Phoenix* decision, but do not discuss the abuse of process doctrine as part of the broader issue of the existence of a protected investment.[152] Others have made general statements that they had to examine the allegation of abuse of right/process in order to verify whether they had jurisdiction.[153] Of course, the application of the abuse of process doctrine is much more complex than presented here, especially when it comes to the relevant facts, which

---

145 ibid para 107.

146 ibid para 113.

147 ibid para 114.

148 ibid para 142.

149 ibid paras 143–5.

150 Arrêt du 7 février 2017, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 14/21103, 4 (in the context of the definition of 'investor'; noting 'que le bénéfice de la protection du Traité ne peut, dès lors, lui [investor] être refusé que s'il est démontré que l'incorporation au Canada est purement fictive ou procède d'un abus de droit').

151 *Mr Saba Fakes v Turkey* (n 23) paras 112–3; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (n 23) para 226.

152 *Cementownia 'Nowa Huta' SA v Republic of Turkey,* ICSID Case No ARB(AF)/06/2, Award (17 September 2009) para 154; *ST-AD GmbH (Germany) v The Republic of Bulgaria,* PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) para 423; *Transglobal Green Energy LLC and Transglobal Green Panama SA v Republic of Panama,* ICSID Case No ARB/13/28, Award (2 June 2016) paras 102, 118.

153 *Mobil Corporation, Venezuela Holdings BV and others v Bolivarian Republic of Venezuela,* ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) para 185.

often require engaging other legal concepts too.[154] But when it comes to generalised references to abuse of process as such, the following will be noted: first, although some tribunals have explicitly endorsed the *Phoenix* reasoning, they have not focused on the objective definition of 'investment'; second, their focus on abuse of process as such resembles a direct translation of that doctrine into a jurisdictional limit.

Abuse of process in the context of corporate restructuring is an example of an arbitrator-made jurisdictional rule *in statu nascendi*. The supplementing activity of arbitral tribunals is visible in two respects. On the one hand, the *Phoenix* Tribunal read the good faith requirement into the objective definition of 'investment', which is already in itself an example of arbitral law-making.[155] This approach has some theoretical justifications, although not settled. It can be objected that if there is no right to access international arbitration in the first place (jurisdiction), there is nothing capable of being abused. On this basis, it has been suggested that investors who restructure their investments can be seen as acting in bad faith, but not as committing an abuse of process.[156] Yuka Fukunaga argues in turn that investors are actually abusing a *general* right to arbitration, in order to acquire their own *specific* right to arbitration.[157] Because offers to arbitrate in investment treaties are addressed to those qualifying as investors exclusively, I would argue that by restructuring their investments investors abuse that qualification itself which entitles them to protection under the relevant treaty. Indeed, investors do not abuse offers to arbitrate that are already applicable to them but restructure their investments to qualify as addressees of such offers. This discussion, however, seems academic, because none of these arguments deny that the proper consequence in this scenario is the lack of jurisdiction.

On the other hand, the supplementing activity of tribunals is visible in the view that the arbitral authority to adjudicate as such needs to be limited. It is obvious that abuse of process is still based in a doctrine of general international law. But the need to characterise its consequences as jurisdictional evidences a perceived need for a stronger rule, existing independently of general doctrines and governing the authority to adjudicate of arbitral tribunals. Yet, because the supplementing activity of tribunals in either of these two respects is not as widespread as to be considered fully implemented (and tribunals still apply abuse of process as a doctrine leading to

---

154 See Baumgartner (n 140) 219–22 (discussing the distinction between temporal jurisdiction and abuse of process).

155 See Section 2.A above.

156 De Brabandere, 'Good Faith' (n 140) 619–20.

157 Yuka Fukunaga, 'Abuse of Process under International Law and Investment Arbitration' (2018) 33 ICSID Rev-FILJ 181, 194–7.

the inadmissibility of claims),[158] one can only see a sketch of a possible future jurisdictional rule which is under development.[159]

§ 5.05. Conclusion

This Chapter concludes the analysis of the practical examples of arbitral law-making. I showed that, besides crafting rules relaxing the procedural and substantive aspects of arbitral jurisdiction defined by disputing parties, tribunals have also created jurisdictional rules which impose further limitations on their authority to adjudicate. The latter rules are often independent of party-defined jurisdictional rules. In particular, tribunals have created rules limiting the scope of protection by developing objective definitions of 'investment' and 'investor', and an independent legality requirement. Tribunals have also limited the scope of arbitrable disputes by creating the privity condition in the application of umbrella clauses. Finally, tribunals have attempted to translate the doctrine of abuse of process, as a well-known doctrine of general international law, into a specific jurisdictional rule which limits their authority to adjudicate in the specific scenario of investment restructuring. Whether the last example will indeed become a widely accepted jurisdictional rule remains to be seen.

---

158 *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 588. But see *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para 2.10 ('[…] the Tribunal has noted that the Respondent's jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist. For present purposes, the Tribunal considers this to be a distinction without a difference.').

159 See also Gaillard, 'Abuse of Process' (n 142) 37 ('Where certain types of conduct generate a sense of unease, they are first addressed through the application of general principles such as "abuse of rights" or "good faith". Over time, new legal rules will emerge that are specifically designed to tackle particular types of procedural conduct. One would expect the same development to take place in the field of international arbitration with respect to abuse of process.').

PART III

Demystifying Consent

6

Investment Treaty Arbitration Between States and Arbitrators: A Lacking Dialogue

§ 6.01. Introduction

The practice of international investment tribunals is often criticised. For the most of its existence, already from the early 2000s, arguments are made that investment arbitration finds itself in a 'legitimacy crisis'.[1] Criticisms vary, however when it comes to questions of jurisdiction, the usual narrative is that arbitrators are reaching jurisdictional determinations in a manner that could not be anticipated. Accordingly, dissatisfaction was obvious in the reactions of some States, which is particularly important because States remain the crucial actors in this field.[2] Dissatisfaction is also visible in parts of civil society, such as NGOs, which often side with States and adopt narratives about arbitral excessiveness.[3]

---

1 See generally Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer 2010); Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521; M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 39; Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago JIL 471; Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Virginia J Int'l L 57; Daniel Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015) 46 Georgetown JIL 363. See also Gus Van Harten and others, 'Public Statement on the International Investment Regime' (31 August 2010) Osgoode Hall Law School <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> accessed 1 July 2018.

2 See Section 4.

3 For example, 'Petition protesting Telecom Italia's case against Bolivia at World Bank tribunal, ICSID' (21 March 2008) <www.tni.org/en/archives/act/18079> accessed 1 July 2018; and NGO letter in *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (8 February 2012) <http://chevrontoxico.com/assets/docs/2012-02-08-ngo-letter.pdf> accessed 1 July 2018.

It is questionable whether such criticisms and related reactive steps taken by States[4] can constructively address the relevant arbitral practice. Have the criticisms of investment arbitration pointed to the crux of arbitral actions leading to the outcomes dissatisfactory to States and other actors (such as civil society, but also occasionally investors)? In this respect, I argue that a dialogue between States (as treaty-makers) and arbitrators (as decision-makers) has never taken place. This is so because the criticisms of arbitral practice fail to identify the crux of the practical developments whose outcomes many would call expansionary, adventuristic, unsatisfying, or simply wrong. While some change in arbitral behaviour in response to State criticisms has indeed been identified,[5] this is susceptible of not having been motivated by a dialogue, but by a fear of losing the support of States, as the crucial actors in the field.[6]

The misunderstanding of arbitral activities on the part of States stands at the centre of the inability to initiate a dialogue. The criticisms against investment arbitration have focused on the arbitral activities as solely a process of interpretation of investment treaties, and they have failed to identify the layer of arbitral activity which amounts to the regulation of jurisdictional issues. As seen in previous chapters, arbitrators have often faced regulatory deficiencies in investment treaties regarding questions of jurisdiction. They have remedied such deficiencies by injecting some kind of input for which they found inspiration elsewhere. For now, I will continue to term this phenomenon the supplementing activity of arbitral tribunals. In the course of this Chapter, it will be seen that that activity can have a regulatory function, before proceeding to the argument for its acceptance and formalisation in Chapter 7.

Crucially, both theoretical and practical criticisms of investment arbitration fail to observe the causes behind the development of arbitral jurisdictional regulation. These causes are the central topic of this Chapter, whose objective is to rationalise the emergence of what I call here arbitral supplementing activities. Section 2 firstly reviews some traditional criticisms of investor-State arbitration, and argues that they cannot explain this phenomenon. Section 3 offers a new view on the principle of consensualism in investment arbitration. I argue that the perception of that principle has shifted from that of consent as a guardian of State sovereignty to that of consent as the primary means of jurisdictional regulation. This shift and the framework of investment arbitration have created both the needs and the opportunities for the development of arbitrator-made rules as the secondary means of jurisdictional regulation. Section 4 then turns to State

---

4 Expressing their dissatisfaction with the case law, States have moved to, *inter alia*, withdraw from the ICSID Convention, impose harder conditions of access to international arbitration, restructure the network of investment treaties or terminate them, and to establish 'investment courts'. See Section 4.

5 As evidenced in an empirical research: Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 EJIL 551.

6 See, in this regard, David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 Northwestern J Int'l L & Business 383, 403–7 (discussing the strategic model of arbitral decision-making).

attempts to reassert control over investment arbitration, which is done by making the conditions of access to arbitration more difficult and by limiting the interpretative powers of tribunals. Such practice proves the failure to acknowledge the developments analysed in Section 3, and for that reason it cannot engage with the exercise of arbitral supplementing activities more properly than sending indirect signals of State policy choices and preferences.

§ 6.02. Traditional Concerns About Investment Arbitration

If two States are said to establish an equilibrium of different interests in a BIT, it is reasonable that a re-balancing of those interests could take place in an arbitral process, because of different acting parties (investor v State) pushing for their cases.[7] Similarly, both theory[8] and practice[9] sometimes instruct tribunals to resolve concrete jurisdictional issues by balancing the interests (or arguments) at stake. What is important, however, is that arbitral balancing of interests, powers, arguments and so on, is usually discussed in the context of treaty interpretation. It is often alleged that a treaty clause has been interpreted wrongly which led to an unsatisfactory outcome. But as I showed in Chapters 3 to 5, arbitral work cannot be simplified to the point of treaty interpretation governed by the VCLT or customary rules: arbitrators inject independent input into their work, which often does not resolve an interpretive issue but defines one. Traditional criticisms do not recognise this aspect of arbitral work, and that is why they equally cannot offer a convincing argument how that aspect can be corrected or advanced. Here, I review the three most commonly met criticisms: that investment arbitration is dominated by commercial law approaches (A), that it is a one-sided system prioritising investors (B), and that its practice is affected by an arbitral bias in favour of investors (C).

---

7 Alex Mills, 'The Balancing (and Unbalancing?) Of Interests in International Investment Law and Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 445–8.

8 Frédéric G Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina J Int'l L & Com Reg 875.

9 *Abaclat and others v The Argentine Republic,* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 584 (bypassing the local litigation requirement because of the prevailing Claimants' interest to access arbitration). Many investment tribunals have noted that they should apply a 'balanced' approach to interpreting jurisdictional clauses, meaning that there are no special rules justifying their restrictive or expansive interpretation. See, for example, *Amco Asia Corp and others v The Republic of Indonesia,* ICSID Case No ARB/81/1, Award on Jurisdiction (25 September 1983) para 14(i); *Ceskoslovenska Obchodni Banka AS v The Slovak Republic,* ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) para 34; *El Paso Energy International Company v The Argentine Republic,* ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) paras 68–70; *Mondev International Ltd v United States of America,* ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 43; *Austrian Airlines v The Slovak Republic,* UNCITRAL ad hoc arbitration, Final Award (9 October 2009) para 121; *Spyridon Roussalis v Romania,* ICSID Case No ARB/06/1, Award (7 December 2011) para 867.

A. Commercial Law Approaches to Investment Arbitration

A chronic problem of the system of investment treaty arbitration is that it is often equated with commercial arbitration.[10] The idea of 'international arbitration' as a sufficiently defined and independent category, together with some common driving forces behind the two systems like international money flows and increasing globalisation, are central for the establishment of that link.[11] But as also argued in Chapter 1, because of the critically different foundations of the two arbitration regimes, their principal link persists in a sociological perspective, because the actors (primarily arbitrators and counsels) in the field of investment arbitration often come from the commercial sphere,[12] which can have significant effects on their work.[13]

What are these commercial approaches, then? While it would be certainly hard to define a single 'commercial approach' to arbitration, it is fruitful to look at a few of its frequently alleged features. First, it can be said that arbitrators from the commercial sphere might be inclined to focus on or analogise to a contractual relationship between the disputing parties exclusively, not paying much attention to the context of public international law.[14] It is true that in some cases

---

10 See Chapter 1, Section 3.C.

11 Bernardo M Cremades and David JA Cairns, 'The Brave New World of Global Arbitration' (2002) 3 JWIT 173; Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration. Judicialization, Governance, Legitimacy* (OUP 2017) 66–78. See also, on the unification of the investment treaty- and contract-based arbitration fields, Charles N Brower and Shashank P Kumar, 'Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?' (2015) 30 ICSID Rev-FILJ 35. See further, on the effects of globalisation on international investment law and arbitration, Tillmann Rudolf Braun, 'Globalization: The Driving Force in International Investment Law' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 491.

12 Thomas W Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007) 54; Stephan W Schill, 'W(h)Ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875, 880, 888; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387, 401–2; Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 AJIL 761, 773; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 JIEL 301, 307, n 35.

13 Hirsch argues that investment tribunals are reluctant to rely on human rights law because of the socio-cultural distance between the two legal communities. Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 148–58. But see, on a positive transfer of skills between the two areas, Charles N Brower, 'W(h)ither International Commercial Arbitration?' (2008) 24 Arb Int'l 181, 191–4.

14 Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 77; Julie A Maupin, 'Public and Private in International Investment Law: An

jurisdictional determinations can seem like simple reading of treaty clauses and their application to facts. But when facing regulatory deficiencies, it is hard to claim that arbitrators tend to stick to the relationship between the disputing parties. Inspiration is always external. Take the example of the futility exception: tribunals have found inspiration and drawn a clear analogy to the law of diplomatic protection.[15] The Broches test in the identification of State-owned companies as private foreign investors resembles greatly the identification of State-owned companies as non-governmental under the ECHR,[16] and the inspiration in such situations can reach to more general and substantive sources of international law.[17] These examples, which are today quite widespread in practice, evidence that regulatory deficiencies simply prevent isolating the parties' relationship as a self-sufficient jurisdictional framework.[18] A related but very different question is whether investment arbitral tribunals should look into the practice of commercial arbitration and draw analogies to its concepts in search for inspiration, however that question seeks further research outside the scope of this work.[19]

Second, it can be said that arbitrators coming from the commercial sphere might prefer to focus on the monetary losses of the investor, as opposed to the administrative (or simply public) review of State conduct.[20] The first observation is that this issue might not be so much relevant for jurisdictional questions, and that it pertains more to the questions of merits. Some relevance is still present. Those tribunals which have expressed a sharp view on the distinction between treaty and contract claims have borne in mind precisely their role as reviewers of State conduct against international standards of treatment.[21] It can be argued that on some occasions tribunals

---

Integrated Systems Approach' (2014) 54 Virginia J Int'l L 367, 394–7. As for other possible interests at stake, see Andreas Kulick, *Global Public Interest in International Investment Law* (CUP 2012).

15 For example, *Ambiente Ufficio SpA and others v The Argentine Republic,* ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 597–607. See further Chapter 3, Section 3.A.i.

16 Cf *Beijing Urban Construction Group Co Ltd v Republic of Yemen,* ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) paras 31–6; with *Islamic Republic of Iran Shipping Lines v Turkey* App No 40998/98 (ECtHR, 13 December 2007) paras 78–81.

17 Thus, the Broches test is said to mirror Articles 5 and 8 of the ILC Articles on State responsibility. *Beijing Urban Construction Group v Yemen* (n 16) para 34. See further Chapter 4, Section 3.A.

18 Investment tribunals have found inspiration for their reasoning in quite various sources. See Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2016) 88–110; and ibid ch 4.

19 This question is particularly interesting because, as correctly noted, the two regimes are not 'self-contained', and many overlaps are notable. See Vadi (n 18) 186–7.

20 See in this regard Stone Sweet and Grisel (n 11) 230–2 (arguing that investment arbitration is closer to commercial arbitration than to public law review, because arbitrators are empowered to award damages for losses and not to invalidate unlawful State acts).

21 *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic,* ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) paras 94–115; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan,* ICSID Case No ARB/01/13, Decision of the Tribunal

have focused on the losses of investors when determining jurisdiction, like those maintaining that jurisdictional treaty clauses allow arbitrating contract disputes altogether.[22] My opinion is that in such instances what matters more are the views on the limitations of jurisdictional clauses: whether a compromissory clause is limited to the treaty in which it is contained can surely be motivated by the said criticism, but eventually has to be implemented through an opinion on the nexus between that clause and the relevant substantive law.[23] The need for such an opinion itself is a regulatory deficiency, which is where this entire problem of arbitral activism only begins.

Third, it is said that commercial arbitration concerns the interests of the disputing parties only, which justifies procedural confidentiality, in opposition to any form of public adjudication, which concerns public interests and therefore requires transparency.[24] Today, there is a striking difference between the two systems in this regard: although there are still some traces of confidentiality in investment arbitration, that field is now dominantly public.[25] Let us assume for the moment that investment arbitration is indeed dominantly confidential, lacking all the pressure and other effects that the publicity and the participation of non-disputing actors (such as *amicus curiae*) might bring. Indeed, the publicity of proceedings, which is often associated to public law approaches, can bring additional elements influencing arbitral re-balancing of the interests under a BIT.[26] But again, this can be the case only when it comes to the weighting of the stakes at hand in the interpretation of treaty provisions. When facing a jurisdictional issue, which reading the BIT could be seen as simply unregulated, there is nothing in the publicity of the proceedings or the lack of it preventing an arbitral tribunal from reaching for a legal concept in another field of law, or finding inspiration elsewhere, aiming to discover how that issue should be approached. Of course, one can argue that a deficit of voices in a process can substantially affect the creativity of arbitral reasoning, but that does not say anything about the need itself for inspiration. Besides their inaccuracy when it comes to the contemporary investment arbitration practice, the claims

---

on Objections to Jurisdiction (6 August 2003) para 161; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) paras 255–62.

22 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 132(c).

23 See in that respect ibid paras 132(a), (d) (regarding the applicable law and the relevance of contracts in making an investment); and ibid paras 132(b), (e) (regarding the lack of limitations in the definition of a dispute).

24 Brower (n 13) 186–7, 194–5; Roberts, 'Clash of Paradigms' (n 14) 48. The use of commercial arbitration rules, providing for confidentiality, has been criticised as particularly inappropriate in investment disputes: Giuditta Cordero Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 791–6.

25 Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different Are They Today?' (2012) 28 Arb Int'l 577, 586–7.

26 Mills (n 7) 448–51.

of confidentiality and the lack of transparency do not contribute to the discussion about arbitral supplementing activities.

There is one aspect of commercial approaches that is useful for the present discussion, but not fully satisfactory: adopting a commercial arbitration point of view, with the belief of serving the disputing parties only, is said to induce arbitrators to neglect State interpretive interests in investment treaties as their parties, which ultimately gives arbitral tribunals more law-making opportunities.[27] This suggestion is useful because it identifies a gateway for the introduction of arbitral supplementing activities. On the other hand, it is not fully satisfactory for two reasons: first, as maintained in this thesis, dispute-centrism in the delegation of the authority to adjudicate is not alien to public international law; second, the presence of an opportunity for supplementing activities is important but not the sole issue. What remains questionable is what constitutes the driving force behind the exercise of such supplementing activities. This question seeks further inquiry into the criticisms of investment arbitration.

B. One-Sided System and the Purpose of Protecting Foreign Investments

Investment treaty arbitration is often said to be a 'one-sided' system. This can be defined in two ways. First, the system allows only one side in an investor-State relationship (the investor) to vindicate its rights.[28] This is a clear consequence of the fact that investment treaties dominantly provide for investor rights exclusively (without imposing any obligations),[29] which means that only investors appear as claimants in arbitrations. There is more to this aspect of one-sidedness than mere reading of treaty provisions: the purpose of investment law and arbitration as a defined branch of law has been seen to protect foreign investment.[30] In such an environment the interests

---

27 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 184.

28 For a critique, see Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 577. This is said to have broader, systemic effects: Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18 JWIT 343.

29 But see, for some newer examples of treaties imposing obligations on investors, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS (signed 19 December 2008, entered into force 19 January 2009) arts 11-18; Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not in force) arts 14, 17-21, 24.

30 See, for examples of the acknowledgment of such purpose in case law, *SGS v Philippines* (n 22) para 116; *Renta 4 SVSA and others v The Russian Federation,* SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009) para 56; *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) para 187; *Ecuador v Occidental Exploration & Production Co* [2007] EWCA Civ 656 [28]; *The Kyrgyz Republic v Stans Energy Corp and Kutisay Mining LLC* [2017] EWHC 2539 (Comm) [124–31].

of other interested parties and their representation are said to be unfairly ignored,[31] especially bearing in mind that the ultimate purpose of investment treaties should be sustainable economic development of States and local communities.[32]

This type of asymmetry has been rebutted from a theoretical point of view by Thomas Wälde on the basis that host States are in advantage over investors as their sovereigns,[33] but also as treaty masters.[34] This proposition appears correct in principle, but it cannot answer the question whether the one-sidedness of investment arbitration leads to overly investor-friendly outcomes in practice. Translated into my quest for an explanation of arbitral supplementing activities, the question is whether the one-sided character of investment arbitration, which stems from the purpose of the system to protect foreign investors by reviewing governmental conduct, inclines tribunals to supplement the substance of jurisdictional frameworks towards the enhancement of the investor protection exclusively.

I have argued elsewhere that the foundations of investment arbitration are characterised by a rivalry between two ideals: the legalistic ideal, which corresponds to the classical thought about international law that obligations of States must be approached strictly from the point of view of their consent, and the teleological ideal, which pertains to the questions of the role that should be played, and the benefits that should be brought, by investment law and arbitration in the international community.[35] This rivalry is evident in the sphere of jurisdictional determinations, both arbitral and judicial, where the two ideals are used in the creation of decisive arguments, and, more importantly, used in opposition to each other.[36] What is crucial in this analysis is that

---

31 Ilija Mitrev Penusliski, 'A Dispute Systems Design Diagnosis of ICSID' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 520–5; Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade, Law and Development 19, 33–4; Mary Bottari and Lori Wallach, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* (Public Citizen 2005) vii, xvi–xvii.

32 As occasionally acknowledged: *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007) paras 66–8; *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia*, ICSID Case No ARB/05/10, Annulment Proceedings, Dissenting Opinion of Judge Mohamed Shahabuddeen (19 February 2009) para 2; *Mr Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) para 28; *Alps Finance and Trade AG v The Slovak Republic*, UNCITRAL ad hoc arbitration, Award (5 March 2011) para 226.

33 Wälde, 'Specific Nature' (n 12) 55.

34 Thomas W Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-Actively, the Equality of Arms' (2010) 26 Arb Int'l 3, 15–8.

35 See generally Relja Radović, 'Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations' (2018) 2018 J Disp Resol 143.

36 ibid 157–71.

these two ideals form the bases of pro-State (legalistic) or pro-investor (teleological) decisive arguments and, eventually, outcomes.[37] Certainly, many arbitral supplementing activities have been openly directed towards enhancing the protection of investors, like presuming the applicability of MFN clauses to dispute resolution clauses,[38] and presuming the protection of indirect investments.[39] However, accepting the one-sidedness of investment arbitration in terms of the abilities to submit a claim as a fact of the international legal life,[40] there is nothing in that feature of the system preventing tribunals from reaching pro-State or anti-investor outcomes. And there is nothing preventing tribunals from exercising their supplementing activities along the same lines. In fact, investment tribunals have often done so; examples are the doctrine of abuse of process,[41] the legality requirement without a treaty clause,[42] and the objective definition of 'investment',[43] among many others, which are clearly directed at limiting the investors' access to international arbitration.

---

37 ibid 171–82.

38 See, for example, *Emilio Agustín Maffezini v The Kingdom of Spain,* ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 54–5; *Gas Natural SDG, SA v The Argentine Republic,* ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) para 49; *Hochtief AG v The Argentine Republic,* ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 68. See further Chapter 3, Section 4.

39 See, for example, *Tza Yap Shum v Peru* (n 30) para 106; *Vladimir Berschader & Moïse Berschader v The Russian Federation,* SCC Case No 80/2004, Separate Opinion of Arbitrator Todd Weiler (7 April 2006) paras 6, 14. See further Chapter 4, Section 3.B.

40 Wälde, 'Procedural Challenges' (n 34) 15–6 (attributing this asymmetry to the function of a system to review governmental conduct, which is also present in human rights adjudication). International adjudication between States and private persons is established to enhance the protection of the latter, and it has been recognised that investment arbitration and human rights litigation can in certain situations achieve the same protective purpose. See Stephen Fietta and James Upcher, 'Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?' (2013) 29 Arb Int'l 187 (regarding the rights arising from international commercial arbitrations); Christian Tomuschat, 'The European Court of Human Rights and Investment Protection' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 636 (regarding the protection of property).

41 See Chapter 5, Section 4.

42 See, for example, *Phoenix Action Ltd v The Czech Republic,* ICSID Case No ARB/06/5, Award (15 April 2009) paras 101–5. See further Chapter 5, Section 2.B.

43 See, for the precedent, *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001) paras 50–8. See further Chapter 5, Section 2.A.

The second aspect of the one-sidedness is more specific, and it alleges that investment treaty arbitration favours the interests of strong companies against capital demanding and importing States.[44] This argument has evolved together with the growth of transnational corporations: from the initial suggestion that the system benefits developed over developing countries, to the context of a supposed neo-liberal movement in which companies are frequently seen as stronger players than States.[45] Despite their generality, and moreover despite their empirical rebuttal,[46] these concerns are alleged to have resulted in concrete changes in the jurisdictional structure of investment arbitration. The concept of 'arbitration without privity' is said to be a direct product of neo-liberal tendencies,[47] followed by the urges for further expansion of arbitral jurisdiction in favour of foreign investors.[48] Such arguments should be taken with caution. As argued in Chapter 1, 'arbitration without privity' was not quite an innovation in international law.[49] The question to be asked here is how arbitral work on jurisdictional determinations in concrete cases is affected by the one-sidedness. The arguments alleging arbitral excessiveness resulting from this issue, however, face two major problems which prevent drawing proper and convincing conclusions regarding the supplementing activities of tribunals: first, they rely heavily on outcomes rather than arbitral methodologies; and second, they do not attempt to identify something close to what I call here supplementing activities in the arbitral interpretative work. Additionally, as mentioned in the previous paragraph, tribunals have often limited access to international arbitration through such supplementing activities.

---

44 See generally Muthucumaraswamy Sornarajah, 'Power and Justice in Foreign Investment Arbitration' (1997) 14 J Int'l Arb 103.

45 See M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 10–9.

46 Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard Int'l LJ 435; Susan D Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55 Virginia J Int'l L 13; and, for a critique of the former, Gus Van Harten, 'Fairness and Independence in Investment Arbitration: A Critique of "Development and Outcomes of Investment Treaty Arbitration"' *ITN Quarterly* (December 2010) 7. But see also, on pro-developed States bias associated to some aspects of good governance, Daniel Behn, Tarald Laudal Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2017) PluriCourts Research Paper No 17-05 <https://ssrn.com/abstract=2978546> accessed 25 April 2018.

47 Sornarajah, 'Power and Justice' (n 44) 126–39; Sornarajah, *Resistance* (n 45) 139–43.

48 Muthucumaraswamy Sornarajah, 'Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (OUP 2010) 619–24; Sornarajah, 'A Coming Crisis' (n 1) 51–61.

49 See Chapter 1, Section 3.A.iii.

C. Biased Arbitrators and 'Adventurism' in Jurisdictional Determinations

A related criticism claims that arbitrators adjudicating investment disputes are biased in favour of foreign investors, which can be reflected in jurisdictional determinations.[50] This claim can be deconstructed as follows. First, a limited circle of actors dominates investment arbitration, both as arbitrators and counsels.[51] Second, their interest in maintaining their business brings about a perceived bias in favour of claimants, ie foreign investors.[52] Third, some argue that support for the allegations of perceived bias can be found empirically.[53] Fourth, it is questionable whether the institutional aspect of the regime, such as the framework of the ICSID Convention, is in itself biased to a certain extent.[54] Fifth, the bias in favour of foreign investors, either perceived or real, inclines towards expansionism or adventurism in jurisdictional determinations.[55]

In opposition, it is argued that allegations of systemic bias in investment arbitration are not supported by either theory or evidence.[56] One can add to this the recognition of a schism between

---

50 See generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 167–75 (on the 'dependency of arbitrators on prospective claimants').

51 See generally Puig (n 12); and Langford, Behn and Hilleren Lie (n 12).

52 Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 433. See also Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Helen Burley ed, Corporate Europe Observatory and Transnational Institute 2012).

53 Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall LJ 211; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall LJ 540. See also, for a continuance of the same empirical research project, focusing on the behaviour of individual arbitrators and leaders of expansive interpretations, Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29 EJIL 507.

54 For an empirical, albeit older, analysis and rebuttal of this suggestion, see Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 Virginia J Int'l L 825.

55 See Sornarajah, 'Toward Normlessness' (n 48) 618 (attributing the inclination to expansionism to neo-liberal values); Van Harten, *Public Law* (n 50) 167–75; Chen Huiping, 'The Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages' (2011) 12 JWIT 671, 683–4; and Sornarajah, *Resistance* (n 45) 136–47 (discussing consequential expansionism and adventurism).

56 William W Park, 'Arbitrator Integrity' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer 2010) 213–6; Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell L Rev 47; Susan D Franck and Lindsey E Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 Duke LJ 459; Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina L Rev 1, 50; Brower and Schill (n 1) 489–95. See also Catherine A Rogers,

pro-investor and pro-State arbitrators, each aiming to appear friendly to their respective group of possible clients, and each pushing for certain views accordingly.[57] Another structural point to consider is that the expectancy of an arbitrator to appear balanced, reasonable, neutral, or to aim to present the system as coherent and functional, might be another driving factor in decision-making.[58] If correct, these considerations argue that State interests are not left without defenders in the arbitral process, and that tribunals hence are not inclined towards adventurism.

Allegations of arbitral biases are directly connected to jurisdictional determinations.[59] Their problem, however, is the same as with the arguments about one-sidedness: they emphasise results instead of arbitral methodologies. One research in particular has criticised the reliance on the outcomes in scholarship, and claimed to have conducted an empirical analysis of legal reasonings and approaches; however, the data was once again classified in accordance with the interpretive (as opposed to final) outcomes, that is in accordance with the answers to interpretive questions.[60] Furthermore, as biases are defined in sharper terms than one-sidedness, their link to the outcomes is equally stronger, which some use to rebut the allegations of bias, and they do so relying, *inter alia*, on the success rate of jurisdictional objections.[61] If that is correct, one cannot speak of a systemic impact of biases on jurisdictional determinations, and that can be even less so when it comes to the supplementing activities of arbitral tribunals. Accepted as true, arbitral biases would impose a pro-investor imperative in jurisdictional rulings, setting the agenda for the exercise of their supplementing activities. There is no proof of such practices, as seen in Chapters 3 to 5. The trajectory from arbitral attitudes to jurisdictional determinations suggested by the allegations of arbitral bias in favour of investors, therefore, does not offer any satisfactory explanation of the phenomenon of tribunals' supplementing activities.

'The Politics of International Investment Arbitrators' (2013) 12 Santa Clara J Int'l L 223, 248–53 (arguing that Van Harten's thesis on arbitral expansionism, which he tested empirically, is not inherent and peculiar to the arbitral environment); and, for a psychological study finding no difference in decision-making processes of arbitrators and judges, Susan D Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory LJ 1115.

57 Sornarajah, 'Toward Normlessness' (n 48) 599, 618, 638–9.

58 Mills (n 7) 451–5; Kapeliuk (n 56) 83, 90.

59 See n 55 above.

60 Van Harten, 'Arbitrator Behaviour' (n 53) 225–8 (classifying the resolutions of jurisdictional issues as expansive, restrictive or non-classifiable); Van Harten, 'Arbitrator Behaviour (Part Two)' (n 53) 549–54 (using the same classification in regard to substantive issues).

61 See Franck, 'Empirically Evaluating Claims' (n 56) 48–55 (although acknowledging that investors have been more successful in jurisdictional phases, noting State successes in partially or entirely disqualifying claims on jurisdictional grounds, which forms an important part of their overall success rate); and, for a summary of the overall success rates, Susan D Franck, 'International Investment Arbitration: Winning, Losing and Why' (2009) 7 Columbia FDI Perspectives.

§ 6.03. A Fresh Start: Changing Perspectives on Consent to Arbitrate

This Section will offer an explanation of the supplementing activities of investment tribunals by discussing a new perspective on the consensualism of investment arbitration, and prospectively international adjudication in general, which has been built in practice. That new perspective on the principle of consensualism has been caused by a shift in the perception of the principal role played by consent. The crucial question here is whether consent is primarily seen as a guardian of State sovereignty, or as the basis of arbitral jurisdiction. While one role should not exclude the other, the true dilemma is which one of the two is seen as the *principal* function of consent. I argue that the perception of the principal function of consent has shifted from the former to the latter. This shift has taken place in parallel with the growth of international adjudication, which is supported by the preservation of the classical perspectives on consent in those fields of international dispute settlement which have not witnessed a significant growth. I will firstly address these classical perspectives on the principle of consensualism (A). I will then discuss a new perspective on that principle (B), followed by an attempt to accommodate the phenomenon of arbitral supplementing activities within the mechanism of investment arbitration (C).

A. Classical Perspectives: Sovereignty and Consensualism as the Ultimate Principle

Sovereignty is difficult to define, at least in legal terms. This does not prevent its frequent mention: critics of investment arbitral practice, for example, often invoke sovereignty as their core concern.[62] Respondent States equally often invoke sovereignty in their defences,[63] which is occasionally followed by some tribunals in the construction of their reasoning.[64] Nevertheless, such mentions of the concept of sovereignty do not reveal much of its concrete legal meaning. The lack of a concrete meaning of the concept can also be seen in the long-established principle

---

62 Sornarajah, *Resistance* (n 45) 138 (erosion of sovereignty through jurisdictional expansionism); Bottari and Wallach (n 31); Chen (n 55) 686–7; Julia Hueckel, 'Rebalancing Legitimacy and Sovereignty in International Investment Agreements' (2012) 61 Emory LJ 601, 610–4. Sornarajah also talks about the 'surrender of sovereign rights' of States through investment treaties: Sornarajah, *Resistance* (n 45) 159.

63 For example, *Amco v Indonesia* (n 9) para 12(i); *Methanex Corporation v The United States of America*, UNCITRAL ad hoc arbitration, Partial Award (7 August 2002) para 103; *Vladimir Berschader & Moïse Berschader v The Russian Federation*, SCC Case No 80/2004, Award (21 April 2006) paras 53, 203; *Cambodia Power Company v Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011) para 323.

64 For example, *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) para 160(3); *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) para 193.

that sovereignty should not have a direct effect on the rules governing the jurisdiction of international courts and tribunals.[65]

Sovereignty is still important, and perhaps could be defined from another angle, through an inductive process. Jorge Viñuales sees sovereignty as a mosaic, instead of a unified concept.[66] That mosaic consists of many legal concepts, institutes, and rules which altogether position the State within the international legal order. The consensualism of international adjudication is certainly part of that mosaic: it is clearly related to the idea of sovereignty,[67] yet it can be defined in clear legal terms and positioned within the coordinate system of international legal norms.[68] Because the principle of consensualism, together with other legal concepts of international law, is permeated by an idea which does not bear any identifiable and clear legal meaning, it can be seen as one of many family resemblances of State sovereignty.[69]

My argument is that the idea of sovereignty is employed in classical perspectives on the consensualism of international adjudication to sharpen the terms of that legal principle, leading to 'hard approaches' to consent. The notion of sovereignty is used in this context as a political and highly symbolic category.[70] Take the example of the traditional concept of the exhaustion of local remedies. That legal concept has been a barrier between two legal worlds—domestic and international.[71] That barrier was necessary precisely because of the symbolic exit of a dispute from a domestic to the inter-sovereign sphere, where only sovereigns were able to address claims against each other.[72] Allowing private persons to directly address international claims against

---

65 See H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yrbk Int'l L 48, 56–67 (challenging restrictive interpretation of treaties, which is alleged to stem from State sovereignty, both in principle and practice); and particularly ibid 65–6 (the same regarding jurisdictional determinations); *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Separate Opinion of Judge Higgins) (1996) ICJ Rep 847, para 35 (noting that there are no rules instructing restrictive or liberal interpretation of jurisdictional clauses). The latter opinion (that jurisdictional clauses should be interpreted neither restrictively nor expansionary) has been followed widely by investment tribunals: see n 9 above.

66 Jorge E Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *International Investment Law: Bringing Theory into Practice* (OUP 2014) 319–24.

67 See Chapter 1, Section 2.A.i.

68 See Chapter 1, Section 2.C.

69 See, for the famous concept in philosophy, Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, 3rd ed, Basil Blackwell 1967) 32.

70 See generally Jens Bartelson, *Sovereignty as Symbolic Form* (Routledge 2014).

71 See James R Crawford and Thomas D Grant, 'Local Remedies, Exhaustion Of' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 6 (OUP 2012) 895–7.

72 *Mavrommatis Palestine Concessions (Greece v UK)* (Judgment) (1924) PCIJ Ser A—No 2, 6, 12 ('By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in

States was, as it later turned out, technically possible with an appropriate jurisdictional link, but not acceptable from a symbolic point of view. It is thus not surprising that when arguments are made that the same legal concept should be restored today as a rule in the field of investment arbitration, this is done through the symbolic prism of sovereignty.[73]

This classical perspective on the principle of consensualism is preserved in the practice of the ICJ. The importance of the consensualism of international adjudication as 'a well-established principle of international law' is emphasised when necessary to defend third States from having their rights and obligations determined in a litigation of which they are not part.[74] In its essence, this is just another reaffirmation of the sovereignist premise that any determination of States' rights and obligations stems from their 'own free will'.[75] The notion of sovereignty behind the principle of consensualism instructs the practical effects of that principle. For example, when in doubt how to qualify certain questions of procedure, the ICJ has resorted to the principle of consensualism, arguing that any procedural limitation included in a jurisdictional clause is a limitation of consent, and raises questions of jurisdiction.[76] The symbolism of sovereignty plays a bigger part than it seems at first: whether an issue is jurisdictional or the one of admissibility does not impose any significant consequences, at least in the context of the ICJ; yet, the Court's resolution of the problem defers the complete definition of its jurisdiction to the disputing parties. States as sovereigns, it follows, are the sole governors of the conditions under which they can be litigated.

This perspective on consent and its use is reasonable in the inter-State adjudication context. States are the traditional law-makers in international law, and the principal focus of that activity has dominantly been the regulation of their mutual relations. For that reason, in the event of

---

the person of its subjects, respect for the rules of international law. […] Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.').

73 See, for one such argument, George K Foster, 'Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia J Transnat'l L 201, 267 (regarding the resort to local courts in connection to the assessments of violations of the substantive standards of treatment).

74 *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) (1954) ICJ Rep 19, 32; *East Timor (Portugal v Australia)* (Judgment) (1995) ICJ Rep 90, para 34.

75 *The Case of the SS 'Lotus' (France v Turkey)* (Judgment) (1927) PCIJ Ser A—No 10, 4, 18. See also *Case of the SS 'Wimbledon' (UK, France, Italy, Japan and Poland intervening v Germany)* (Judgment) (1923) PCIJ Ser A—No 1, 15, 25; *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)* (Advisory Opinion) (1931) PCIJ Ser AB—No 41, 37, 52; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (1986) ICJ Rep 14, para 269.

76 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, para 88.

uncertainty the ICJ can reach to other relevant spheres of inter-State relations in construction of State consent,[77] to other classical concepts of international law providing the rules governing its jurisdiction,[78] or even to hypothetical scenarios in the already known framework of inter-State adjudication, which help the establishment of certain procedural doctrines.[79] In such exercises the Court stays in the domain of the traditional State-created law, which suffices to eliminate any disturbances of the classical perspectives on consent as a guardian of sovereignty. At the same time, it remains in the sphere of the law which is directly applicable between the disputing parties. Additionally, one cannot ignore the fact that inter-State adjudication is still exceptional, which contextualises the preservation of the classical perspectives on consent in this field.

What can be observed in these examples from the practice of the ICJ is that the principle of consensualism guards sovereignty as a political concept. Sovereignty can be invoked as one of many inspirations in the interpretation of jurisdictional rules, but not as a direct source of legal rules. What is a direct source of legal rules is the principle of consensualism, which as the ultimate principle of international adjudication instructs that the principal—and quite possibly the only—governors of the jurisdictional rules of international adjudication are States in their capacity as disputing parties. This perspective can produce an understanding of 'hard consent', meaning that apart from their interpretation, an international tribunal does not have any other powers allowing it to supplement the rules governing its jurisdiction.

B. A New Perspective: Consent as the Primary Means of Jurisdictional Regulation

In contrast to the classical perspectives on consent, the practice of investment arbitral tribunals gives an impression of a somewhat different view. The principle of consensualism in this context seems, to a certain extent, untied from the political symbol of sovereignty. At least, that principle is released from the symbolic instruction of the idea of sovereignty in its application. In my view, it is precisely this liberation from political and symbolic ideals, which permits tribunals to see

---

77 For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) (1996) ICJ Rep 595, paras 17–24 (discussing the questions of State continuity and succession in regard to the Genocide Convention).

78 For example, *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Jurisdiction) (1927) PCIJ Ser A—No 9, 4, 21 (stating the principles of State responsibility, and consequently implying jurisdiction over the questions of reparations); and, regarding the issues of the exercise of jurisdiction, *Interhandel (Switzerland v United States of America)* (Preliminary Objections) (1959) ICJ Rep 6, 27 (observing the requirement of the exhaustion of domestic remedies as 'a well-established rule of customary international law' concerning diplomatic protection).

79 For example, the *Mavrommatis* doctrine, which allows the Court some flexibility in jurisdictional determinations, is based on the hypothesis that the applicant State could remedy a procedural defect in its application. See, for the precedent, *Mavrommatis Palestine Concessions* (n 72) 33; and, for practical application, *Bosnia and Herzegovina v Yugoslavia* (n 77) para 26.

consent more pragmatically as a pure legal concept, that creates the driving force behind arbitral supplementing activities.

There are two factors explaining this shift of perspectives. The first one is the investor-State *jurisdictional relationship*. One can argue that the departure from the chains of sovereignty has resulted from the development of an inclusive public international law, which observes interests of not only States but also private persons.[80] Although the principle of consensualism in its original form might have represented or been seen as one of many family resemblances of the idea of sovereignty, that principle is primarily directed at and engages the disputing parties which delegate the authority to adjudicate.[81] Once international law accepted private persons as possible litigants, that principle became their protector as well. The notion of sovereignty behind consent has been lost. A dispute is property of both of its parties in equal shares, and one party should not be discriminated against by permeating the idea of sovereignty behind consent in favour of the other party, only because of the statehood of that other party.[82] Practical application of this understanding is easily visible in practice.[83]

There is another explanation concerning jurisdictional relationships: every jurisdictional regulation is incomplete. No matter how detailed rules governing jurisdiction of a court or tribunal are, some unregulated questions will always appear. This is visible already in the context of the ICJ, where the Court often must search extensively for the applicable legal standards to resolve questions of its jurisdiction.[84] International law per definition accommodates inter-State relations built on the ideal of sovereignty, which will hence provide the Court with an answer, despite the complexity of the question.[85] By contrast, investment tribunals face a more difficult

---

80 Braun (n 11) 502–5.

81 See Chapter 1, Section 2.B.

82 See further in this direction, although in the context of a tension between deference to the State and equality of arms, Wälde, 'Procedural Challenges' (n 34) 11–4.

83 This understanding can be observed already in the application of the offer-acceptance theory. See *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal,* ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010) para 65 ('Moreover, there is nothing extraordinary about the rule [offer of arbitration in the relevant BIT] to the extent that it implies nothing else for the State involved except to agree to submit itself to an arbitration proceeding under the aegis of ICSID by independent arbitrators, in a proceeding during which it shall have every opportunity to defend its positions.'). Furthermore, faced with an argument for restrictive interpretation of a jurisdictional clause due to State sovereignty, one tribunal has famously stated: 'a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties': *Amco v Indonesia* (n 9) para 14(i). This statement had a precedential value: see other cases on the 'balanced' interpretation in n 9 above.

84 See Section 3.A above.

85 See n 77-79 above.

situation, because private-public claims and jurisdictional relationships are not the traditional issues governed by international law.[86] Such relationships require special regulation, which was initiated in modern investment treaties. Facing an issue that is not regulated by the given jurisdictional framework (for example, a BIT and the ICSID Convention), investment tribunals must look elsewhere. This is the point where analogies, personal understandings and beliefs, legal knowledge and so on come into play. In such an environment, where the principle of consensualism in its traditional sense fails to answer every jurisdictional question, it is reasonable that the symbolic value of sovereignty behind it fades away.

The second factor is the sensation and assurance of *regularity.* Despite many threats to the future of investment arbitration coming from States, to which I will turn shortly, the regularity at stake is a feature of this dispute settlement regime, in the sense of dealing with everyday matters on an everyday basis. The judicialization of international law has certainly increased States' referrals to international courts and tribunals, however one cannot ignore the fact that inter-State litigation and arbitration is still conducted on an exceptional basis, compared to individual-State international adjudication regarding the treatment of the former.[87] This is understandable: inter-State litigation often forms part of broader political differences, it can have serious consequences on the life of the international community, and it requires coordination of both legal and political considerations.[88] Investment arbitrations can also be 'big',[89] but their standard setting is meant to

---

86 Traditionally, prior to the emergence of modern special regimes such as human rights and investment law, private interests have been internationalised by the attachment to their States of origin. See, regarding foreign investors' claims and diplomatic protection, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 232; and Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 3–7.

87 In the 70 years of its existence, the ICJ has dealt with some 170 cases, both contentious and advisory, which makes in average between 2 and 3 new cases initiated per year. Data from ICJ website <www.icj-cij.org/en/cases> accessed 25 May 2018. In comparison, in 2017, ICSID administered over 250 cases, while at the same time its entire caseload, which started truly forming itself only in the 1990s, amounted to over 600 cases. Counting from 1988, this makes in average over 20 new cases initiated per year. See ICSID, 2017 Annual Report <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf> accessed 25 May 2018.

88 Bart L Smit Duijzentkunst and Sophia LR Dawkins, 'Arbitrary Peace? Consent Management in International Arbitration' (2015) 26 EJIL 139, 168 ('To achieve a peaceful outcome, it is not enough for parties to offer initial consent to arbitration; tribunals need to maintain the consent of the parties throughout the arbitration process and the implementation phase of the award.').

89 Some investment arbitrations have reached significant publicity. The best-known examples include challenges of Australian cigarette plain packaging laws and awarding over USD 50 billion in damages for Russian expropriation of an oil company: *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015); *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award

resolve the issues of treatment as common in the field of foreign investment. They form part (the most important part, some would argue) and ensure the stability of the legal framework governing foreign investments.[90] Recall that this was the rationale of the depoliticization of investor-State disputes.[91] In the context of regular dispute settlement, as opposed to an exceptional one, the idea of sovereignty has lost any meaning. Consent, when manifested, is nothing but a source of jurisdictional rules.

Applied to the concrete jurisdictional framework of investment arbitration, these contextual factors reveal a new perspective on the principle of consensualism, where party consent is seen as nothing more than the primary means of jurisdictional regulation. BITs, domestic legislation, the ICSID Convention, counter-offers made by investors—in short, all the sources injecting the substance to agreements to arbitrate—provide the rules establishing the tribunal, defining its mandate and giving procedural instructions for its operation. And nothing else. However, party consent and agreements to arbitrate usually do not provide comprehensive sets of rules regulating the work of tribunals: every jurisdictional regulation is incomplete and usually has regulatory deficiencies. The disappearance of the idea of sovereignty behind the principle of consensualism, and the liberation from its instructions, lifts the perceived restrictions on tribunals regarding the ability to fill jurisdictional regulatory deficiencies. The elimination of such deficiencies becomes the cardinal condition for the successful work of a tribunal.

C. The Contribution of the Investor-State Dispute Settlement Framework

Next to the need comes the opportunity to fill jurisdictional regulatory deficiencies, which stems from the structure of the investment dispute settlement regime. I will address such opportunities from two perspectives: substantive, regarding the absence of detailed jurisdictional standards (i), and procedural, regarding the *ad hoc* nature of this dispute settlement regime (ii).

i. *The Incentives for Law-Making and Broken Bonds with General International Law*

Chapters 3 to 5 showed a significant practice of rule- and standard-development by investment tribunals. One can observe that such practice perhaps could not be found, or at least would be present to a much lesser extent, should investment treaties and other instruments manifesting party consent provide more detailed and precise jurisdictional rules. Indeed, investment treaties are often said to be minimalist in terms of regulation, and even when providing rules, vague and

(18 July 2014); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Final Award (18 July 2014); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, PCA Case No AA 228, Final Award (18 July 2014).

90 Stephan W Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 31–3.

91 See Chapter 1, Section 3.A.i.

ambiguous.[92] This problem has been discussed extensively when it comes to the process of treaty interpretation. Of course, it can be argued that States deliberately leave definitions in BITs vague or ambiguous for a variety of reasons, from allowing evolution in the meaning of the terms, to the inability to agree on anything more precise.[93] On the other hand, it can also be argued that an endless inquiry into the intentions of the parties to an investment treaty is inappropriate: if the delegation of the authority to adjudicate comes from the disputing parties, as maintained in this thesis, an investor accepting an offer to arbitrate accepts it with all its imperfections, and should be able to rely on them. When it comes to issue-solving in practice, the vagueness and ambiguities of treaty provisions are usually seen as problematic.[94] It is equally possible, however, to view such problems as opportunities, which 'enable a court or tribunal to engage in judicial law- or policy-making'.[95] These opportunities for tribunals to assert the true, correct, precise, definitive, or whatever else meaning of a provision, lead to the establishment of their 'semantic authority'.[96] This is so regardless of the desirability of such a setting.[97]

Structurally, vague and ambiguous legal standards, the absence of clear and precise norms, and the questions of their interactions, grant international adjudicators certain legal discretion.[98] This leads to a greater independence of international adjudicators from norm-creators, which are

---

92 But see Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 JIEL 507, 527–31 (discussing vague treaty terms as a possible device for securing flexibility of investment treaties, which suits States).

93 Mills (n 7) 455–6.

94 Andreas Kulick, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law' in Andreas von Arnauld and Kerstin von der Decken (eds), *German Yearbook of International Law*, vol 59 (Duncker & Humblot 2016) 273–4.

95 ibid 274–5. See also ibid 279–82 (for an example of employing vagueness and ambiguity as opportunity in investment arbitral practice).

96 Kulick (n 94) 277. For the concept of 'semantic authority' as 'an actor's capacity to influence and shape meanings as well as the ability to establish its communications as authoritative reference points in legal discourse', see Ingo Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (OUP 2012) 62–4.

97 Cf Hueckel (n 62) 627–31 (arguing, in the context of the substantive investment protection rules, in favour of drafting more precise treaty rules to the effect of limiting the possibilities and methods of arbitral law-making).

98 Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 Int'l Org 457, 461–2. For the extent of interpretive discretion see Roberts, 'Power and Persuasion' (n 27) 185 ('The zone of interpretive discretion of investment tribunals may be understood as the interpretive powers explicitly or implicitly delegated to them minus the formal and informal powers retained by treaty parties to influence their interpretations, including through dialogue.' [with reference to Alec Stone Sweet, 'Constitutionalism, Rights, and Judicial Power' in Daniele Caramani (ed), *Comparative Politics* (OUP 2008) 228–9]).

still primarily States.[99] At the same time, this gives them opportunity to establish new norms. Despite various attempts of States to impose some limits, which I will discuss in the following Section, it is the framework of private-public adjudication itself that makes such adjudicative discretion, because of the transfer of the decision-making power from the original norm-creators to third-party adjudicators. That framework, it has been argued, is crucially different from the traditional inter-State dispute settlement model, in which States retain the gatekeeping functions and control over their dispute settlement processes.[100] A further implication is the detachment from the classical international law thinking: if international law has traditionally been seen as accommodating inter-State relations, the adjudication of private-public relationships, which have not been traditionally regulated by international law, can incline adjudicators to focus on the development of law in that particular context, released from the duty to follow traditionalist concepts of general international law.[101]

I wish to be sharper in my terms: the practice of investment tribunals has not faced vague and ambiguous treaty provisions only, but also regulatory deficiencies in the sense of the absence of any rule that could address a jurisdictional question. Jurisdictional regulation is specific: while substantive standards of investment protection can be subject to different interpretations,[102] the establishment of the authority to adjudicate appears more technical through jurisdictional rules where gaps are identified with more ease. If interpretation presents an opportunity for asserting new norms, that is even more so in the case of regulatory gaps. That opportunity is more apparent in the context of traditionally internationally unregulated relationships, which shifts the burden of action to adjudicators.

ii. *An* Ad Hoc *Regime, Consistency, and System-Formation*

Besides the substantive qualities of the norms in question, the procedural features of the investor-State dispute settlement regime equally give opportunities and incline arbitrators to remedy regulatory deficiencies when necessary. Factors like low control of States over adjudicators (ie their independence), the direct access of private persons to international adjudication, and the assurance of enforcement, are said to be central features of adjudicative models which offer more opportunities for developing jurisprudence, precedents, and new norms.[103] Investment arbitration

---

99 Keohane, Moravcsik and Slaughter (n 98) 461–2.

100 See generally Keohane, Moravcsik and Slaughter (n 98).

101 See also in this direction Radović (n 35) 155–6.

102 For example, substantive standards of protection are more likely to be influenced by the rule of systemic integration in treaty interpretation, despite some difficulties in applying that rule in investment law generally: Rumiana Yotova, 'Systemic Integration: An Instrument for Reasserting the State's Control in Investment Arbitration?' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 193–207.

103 Keohane, Moravcsik and Slaughter (n 98) 459–70, 479. However, some commentators have seen the independence of adjudicators negatively (of course subject to discussions what does it mean to be

is an example where these factors are fully met: States select one out of (usually) three arbitrators,[104] investors can institute arbitrations directly, normally without the need to exhaust domestic remedies, and awards are easily enforceable domestically, either directly[105] or through a limited domestic judicial control.[106] The last factor, however, should be taken with caution, because local courts can review jurisdiction of arbitral tribunals if their awards are subject to recognition and enforcement. In my view, the crucial factor here is the direct access of investors, which get to set the agenda of investment tribunals as 'passive legislators' which require cases to be initiated and issues to be raised as an impulse to act.[107]

There is also something about the perspective of individual arbitrations: the *ad hoc* nature of the system. As it is well known and often pointed out, there is neither a doctrine of precedent, nor any other sort of obligation of tribunals to follow previous awards and judgments.[108] There is no controlling authority capable of conducting an exhaustive and uniform analysis of arbitral rulings. Admittedly, jurisdictional determinations are peculiar, insofar that they are subject to a

---

independent), and have argued that effective and successful international adjudication (at least in the inter-State context) is State-dependent. See Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California L Rev 1. The measurement of effectiveness in this case observed the level of compliance with judicial rulings, States' willingness to use the system further, and the success of the legal regime that a court serves: ibid 27–9. See also, for a rebuttal of this argument, Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California L Rev 899.

104 While it can be argued that arbitrators are per definition State-dependent, because they are nominated by States in the capacity of disputing parties, in a private-public context such a strong statement is not valid. The other nominating party in that scenario is a private person (an investor), whose interests are directly opposed to State interests, on the one hand, and do not exist in the form of interpretive interests of treaty-masters, on the other.

105 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') art 54.

106 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('New York Convention') art V.

107 See in this respect Keohane, Moravcsik and Slaughter (n 98) 462, 468–70. See also ibid 481 ('The key to the dynamics of transnational dispute resolution is access.'). The question of putting arbitral mechanism in motion is separate from, yet related to the question of whether investor practice should contribute to the substance of the rules of investment law. See Martins Paparinskis, 'Analogies and Other Regimes of International Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 94–6.

108 It is also well-known that investment tribunals often follow previous awards. This issue is discussed in detail in Chapter 7, Section 2.B.ii.

limited control, which is however also decentralised and certainly not uniform.[109] It could be said that investment arbitration is in its structure a prototype of an *ad hoc* system, lacking any legal component imposing uniformity and inter-dependence between adjudicating bodies.

Despite the *ad hoc* structure, tribunals prefer to appear systematised and to that effect they rely on previous decisions, pursuing consistency.[110] A simple explanation is that such reliance advances the legitimacy of rulings. It is particularly interesting that investment tribunals willingly rely on the ICJ,[111] of course only when facing an opportunity because the practice of that court does not quite pertain to investment disputes.[112] If judicial decision-making indeed depends on the respective audiences,[113] this seems particularly true if one talks about the pursuit of legitimacy of arbitral reasoning. This is not to say that the audiences in investment arbitration are uniform: they are various, as are arbitrators' opinions on different jurisdictional issues. But let me raise this discussion to a higher level: readers[114] of investment awards can have cardinally different attitudes towards concrete issues, but what they probably want to see is the implementation of their opinions as part of the investment law system. The main thought in the minds of such readers is not 'what are the rules of international law', but 'what are the rules of investment arbitration'. It can be said that we are facing the *ad hoc* nature of the system (perceived separately from the mainstream public international law litigation), rather than of arbitrations. What stems from such apprehension of investment arbitration as a separate system is a perceived opportunity to create

---

109 Committees which can annul ICSID awards are also constituted on an *ad hoc* basis. Non-ICSID awards, on the other hand, can be set aside or denied recognition and/or enforcement by domestic courts, which could have various policies on the intensity of their review: William Laurence Craig, 'Uses and Abuses of Appeal from Awards' (1988) 4 Arb Int'l 174.

110 See Jeffery P Commission, 'Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence' (2007) 24 J Int'l Arb 129; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL 301, 333–43.

111 See in this regard Hirsch (n 13) 165–7 ('This pattern is linked to the concepts of social status and reference groups in sociological literatures.').

112 Hence the observation that investment tribunals are more likely to refer to the ICJ jurisprudence when dealing with procedural or general international law issues: Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Rev-FILJ 223, 239–40.

113 See generally Ingo Venzke, 'Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016) 240.

114 For the 'investment arbitration community' as a 'social group, comprised of lawyers, arbitrators, and scholars specializing in investment arbitration', see Hirsch (n 13) 146–8. See also, for the 'epistemic community of international lawyers and scholars' shaping investment law, Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harvard Int'l LJ 427, 465–6.

norms crafted specifically for that regime. In other words, arbitral supplementing activities can be seen as part of a broader process of system-formation.[115]

§ 6.04. State Reaction and Reform

The phenomenon of 'backlash' is not peculiar to investment arbitration, and it has also been well examined in a broader context of the international judiciary.[116] That phenomenon is a topic for itself in the field of investment arbitration,[117] and for the present purposes it is useful to pay attention only to its certain aspects. Reaction to arbitral activities is to be expected: even the orientation of arbitral reasoning towards audiences implies that arbitrators anticipate critique.[118] The question arises whether the States which criticise arbitral practices are able to recognise the true rationales of such activities and to anticipate their future developments.

When it comes to substantive investor protections, one research suggests that States have not generated backlash against arbitral activity in the conclusion of new investment treaties.[119] The case is quite opposite regarding jurisdictional and/or procedural issues. As a preliminary matter, one can see a revival of sovereignist narratives. Some States have decided to reconsider their participation in the system altogether, either by withdrawing from the ICSID Convention,[120] or by terminating their BITs.[121] Sovereignist narratives are also present in those States which

---

115 See in this respect Alec Stone Sweet, Michael Yunsuck Chung and Adam Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration' (2017) 8 JIDS 579, 584–5 (discussing various notions of 'precedent' and concluding that under an advanced one 'the duty to pursue doctrinal coherence is owed to the regime itself, not just to the contracting states and the disputing parties').

116 See generally Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 Int'l J L Context 197; and particularly ibid 198 ('there is a difference between mere *pushback* from individual Member States or other actors, seeking to influence the future direction of an IC's case-law and actual *backlash* in terms of critique triggering significant institutional reform or even the dismantling of tribunals, the latter typically involving the collective action of Member States').

117 For example, Waibel and others (n 1).

118 Venzke, 'Judicial Authority' (n 113) 257. This is so despite the doubts about the possibility of such anticipations to engage in a proper debate: as Venzke argues, reasons in such scenarios are meant to please, rather than to convince prospective critics.

119 Stone Sweet, Yunsuck Chung and Saltzman (n 115) 608.

120 As did Bolivia, Ecuador, and Venezuela. See Sergey Ripinsky, 'Venezuela's Withdrawal From ICSID: What It Does and Does Not Achieve' (*Investment Treaty News*, 13 April 2012) <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> accessed 28 June 2018.

121 For such instances: 'Ecuador Denounces Its Remaining 16 BITs and Publishes CAITISA Audit Report' (*Investment Treaty News*, 12 June 2017) <https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/> accessed 24 June 2018; Engela

have not gone so far to question their participation in the investor-State arbitration regime in its entirety.[122] Fortunately, a number of moves has not been obsessed with such narratives, and has focused instead on improving and reforming the system in detail. Nevertheless, my conclusion is that the initial suggestion that States react to claims that hurt them,[123] and not to calls for a dialogue, seems preserved.[124] The reacting States have tried to limit arbitral interpretive spaces and abilities, and have not recognised the exercise of arbitral supplementing activities as a consequence of jurisdictional regulatory deficiencies. In this Section, I address State attempts to reassert their treaty interpretive powers (A), to impose tougher conditions of access to international arbitration (B), and to create more judicial-like bodies for the settlement of investment disputes (C). I will end by discussing some occasional instances of exchange, which unfortunately have not been intended (D).

C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Rev-FILJ 167; Alvin Yeo and Smitha Menon, 'Indonesia – Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement' (2016) 2016 Asian Disp Rev 124; Nish Shetty and J Romesh Weeramantry, 'India's New Approach to Investment Treaties' (2016) 2016 Asian Disp Rev 189. See also, for the developments in the termination of intra-EU BITs at the insistence of the European Commission, Joel Dahlquist, 'Investigation: European Commission's Push for Termination of Intra-EU Investment Treaties Shifts to Multilateral Plane, but Member-States at Odds over Scope of Effort' (*Investment Arbitration Reporter*, 15 November 2018) <https://www.iareporter.com/articles/investigation-european-commissions-push-for-termination-of-intra-eu-investment-treaties-shifts-to-multilateral-plane-but-member-states-at-odds-over-scope-of-effort/> accessed 26 January 2019.

122 For some of the past and present examples, see An Chen, 'Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled? Comments on Provisions Concerning Dispute Settlement in Model U.S. and Canadian BITs' (2006) 7 JWIT 899, 901 (China); Junianto James Losari and Michael Ewing-Chow, 'Difficulties with Decentralization and Due Process. Indonesia's Recent Experiences with International Investment Agreements and Investor-State Disputes' (2015) 16 JWIT 981, 999 (Indonesia); Shotaro Hamamoto, 'Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy' (2015) 16 JWIT 931, 934–5 (Japan); David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2017) 7 Asian JIL 124, 138 (Indonesia).

123 Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits. Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 World Politics 273; Yoram Z Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration' (2018) 13 Rev Int'l Organ 25.

124 No definitive answer to this question can be given, as one research has found that in fact States have not changed their treaties systematically in reaction to claims: Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality' (2017) 42 Yale J Int'l L 1.

A. Reasserting States' Interpretive Powers

Discussions about the possible reform of investor-State dispute settlement take place at various forums and levels, sometimes with the ambition of taking global action.[125] The immediate and actual State reaction to arbitral practice, however, has so far been individual, from the perspective of treaty relationships. States have firstly tried to narrow down possible arbitral interpretations of their investment treaties by virtue of interpretive statements. An early example was the exchange of letters between Argentina and Panama stating that they never intended to allow the application of the MFN clause to dispute settlement in their BIT, in the aftermath of the *Siemens v Argentina* award which allowed such a conjunction.[126] After a tribunal found that the China-Laos BIT was applicable to Macau, the two governments exchanged letters to the contrary, which were then used in an attempt to set aside the arbitral award.[127] More recently, India has suggested an interpretive statement to its investment treaty partners which, *inter alia*, adopts the arbitrator-made objective standards in the definition of 'investment', sends the investor relying on an umbrella clause to contractually agreed or local forums, excludes the applicability of MFN clauses to dispute resolution clauses, and introduces the standard of 'ripeness' of a claim as a condition for its submission to arbitration (which is basically meant to keep investors longer before local judicial or administrative organs).[128]

The arbitral practice that motivated these State moves has also taught them that similar needs might appear in the future. The mentioned Indian proposal for interpretive statements makes a rather sharp suggestion that tribunals should be bound by '[a]ny interpretation of th[e] Agreement [at stake], including any interpretation contained in these Notes, which is jointly agreed to and issued as such by the Contracting Parties', as well as by 'subsequent agreement and practice manifested through submissions made to tribunals'.[129] Led by the example of the NAFTA,[130] the

---

125 For example, recent work of the UNCITRAL Working Group III. See Stephan W Schill, 'Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?' (2018) 19 JWIT 1; Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 AJIL 410.

126 Noted in *National Grid plc v The Argentine Republic*, UNCITRAL arbitration, Decision on Jurisdiction (20 June 2006) para 85.

127 *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 [39–40].

128 Government of India, 'Office Memorandum of 8 February 2016', paras 4(3), 8(3), 9(2)(b), and 12(1)(c) <http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf> accessed 11 June 2018.

129 ibid para 12(3). Cf India Model BIT (2015) art 24 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560> accessed 19 April 2019 (providing that tribunals *may* take into account individual interpretations).

130 North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289, art 2001 (establishing the Free Trade Commission); ibid art 1131(2) ('An

European Union ('EU') started including in its treaties provisions empowering supervising committees to issue authoritative interpretations,[131] also empowering them explicitly to supplement the applicable 'dispute settlement rules'.[132] Of course, these are not the only examples of providing committees of States parties to interpret treaties,[133] which is particularly known as a long-established approach of the North American States,[134] spreading further around the world.[135] The EU's approach to empower committees to supplement 'dispute settlement rules', as opposed to 'arbitration' or 'procedural' rules,[136] can open a way for many interpretations, some of them possibly aiming to supplement the jurisdictional rules which stem from party consent. There is no such practice so far, and this suspicion cannot be verified. What can be predicted at this point, is that the same issue as with the more traditional interpretive statements would appear: that an action by the States parties or their committee cannot amount to an amendment of the treaty text outside the adequate procedures.[137]

---

interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.').

131 Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, not in force) ('CETA') art 8.31(3); EU-Vietnam Investment Protection Agreement: Agreed Text as of August 2018, art 3.42(5) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 30 December 2018; EU-Singapore Investment Protection Agreement: Agreed Text as of April 2018, art 3.13(3) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 11 June 2018.

132 CETA (n 131) art 8.44(3)(b); EU-Vietnam IPA (n 131) art 4.1(5)(b).

133 For an overview, see Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Frédéric Bachand (ed), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris 2011) 176–80.

134 US Model BIT (2004) art 30(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2872> accessed 18 April 2019; US Model BIT (2012) art 30(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2870> accessed 18 April 2019; Canada Model BIT (2004) art 40(2) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2820> accessed 18 April 2019. See further Kenneth J Vandevelde, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2008-2009* (OUP 2009) 195–6 (on the entry of such a provision from the NAFTA to the 2004 US Model BIT).

135 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, not in force) ('CPTPP') art 9.25(3); ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) art 40(3); Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 1 January 2010) 2672 UNTS 3, ch 11, art 27(3).

136 Cf Canada Model BIT (n 134) art 27(2) (empowering a commission to supplement arbitral rules).

137 *Pope & Talbot Inc v Government of Canada*, UNCITRAL arbitration, Award in Respect of Damages (31 May 2002) para 47 (an interpretation of the NAFTA resembling an amendment). Note that this

The empowerment to make authoritative interpretations is not problematic in itself. What is more, it can actually contribute to the rule of law if it satisfies some standards like clarity, non-retroactivity, and respect for due process.[138] Its legitimacy is reinforced when States parties are observed as the principal law-makers and the ultimate treaty masters.[139] However, what could be problematic is the possibility for States benefiting in concrete arbitrations from their double role as committee members and disputing parties. This is a serious issue.[140] First, as seen above, States have indeed been willing to advance interpretations in response to developments in practice. They did so using retroactive narratives, already thus failing to contribute to the rule of law,[141] and arguably aiming to amend treaties.[142] Second, authoritative interpretations could be advanced in the middle of pending arbitrations, which raises a serious question whether tribunals in such cases should pay any attention to them.[143]

---

question is more relevant in multilateral contexts, because in a bilateral relation any agreement between the two sides could amend their treaty.

138 Kaufmann-Kohler (n 133) 194.

139 Eleni Methymaki and Antonios Tzanakopoulos, 'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 160–1; Roberts, 'Power and Persuasion' (n 27) 182.

140 Cf Methymaki and Tzanakopoulos (n 139) 180 (arguing that due process rights of investors cannot take priority over the fact that States are the treaty masters).

141 See text to n 126-127 above.

142 Particularly in the Indian example, although such action could be permissible in a bilateral context: see text to n 128 above.

143 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57 [101–12] (using the critical date doctrine to reject the reliance on a post-award exchange of interpretive letters); and ibid [116] (not allowing a de facto retroactive amendment of the treaty). See also *Pope & Talbot v Canada* (n 137) para 23 ('If a question is raised whether, in issuing an interpretation, the Commission has acted in accordance with Article 2001 [NAFTA], an arbitral tribunal has a duty to consider and decide that question and not simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2) [NAFTA].'); Michael Ewing-Chow and Junianto James Losari, 'Which Is to Be the Master? Extra-Arbitral Interpretative Procedures for IIAs' in Jean E Kalicki and Joubin-Bret Anna (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 96–7; Charles H Brower II, 'Investor-State Disputes under NAFTA: The Empire Strikes Back' (2001) 40 Columbia J Transnat'l L 43, 56–7, n 71. But cf Tomoko Ishikawa, 'Keeping Interpretation in Investment Treaty Arbitration "on Track": The Role of State Parties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015) 145 (suggesting an inter-State dialogue on the interpretation of treaty provisions after a dispute arises but before the initiation of arbitration).

B. Reasserting the Gateway and Fighting Easy Access to International Arbitration

More to the point, States have aimed to revise and sharpen the conditions of access to investment arbitration for foreign investors. Here, I refer to these conditions as the 'gateway' to international arbitration.[144] The exact conditions targeted by States vary, but what binds them is that they make access to the international sphere more difficult and complex from what has become normal in this field of international dispute settlement. Of course, the following list does not claim to be an exhaustive one of the suggested and/or implemented revisions, and here I only offer few such notable examples.

Perhaps the most radical move was taken by those States that have decided to require a special agreement to arbitration to be concluded with every investor. The Philippines has taken such an approach for more than ten years. It either does not offer access to investor-State arbitration in its bilateral treaties, conditioning such access with special consent,[145] or it includes a footnote in multilateral frameworks requiring special agreement between an investor and that State to commence an ICSID arbitration in particular.[146] Indonesia has similarly been reported to consider concluding new BITs under the condition that they require special consent for initiating investment arbitration.[147] Both developments are reactive to case-law: either due to the mere existence of investment claims,[148] or due to the failure to read into the existing BITs a requirement

---

144 This should not be confused with the same term used in the US to describe those jurisdictional issues that are to be decided by courts: Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 56–7; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 Yale J Int'l L 1, 7–10.

145 Agreement Between Japan and the Republic of the Philippines for an Economic Partnership (signed 9 September 2006, entered into force 11 December 2008) art 107(2).

146 ASEAN Comprehensive Investment Agreement (n 135) art 33(1)(b), n 14; ASEAN-Australia-New Zealand FTA (n 135) ch 11, art 21(1)(b), n 14; ASEAN-China Investment Agreement (signed 15 August 2009, entered into force 1 January 2010) art 14(1)(b), n 8; ASEAN-Republic of Korea Investment Agreement (signed 2 June 2009, entered into force 1 September 2009) art 18(5)(a), n 20; ASEAN-India Investment Agreement (signed 12 November 2014, not in force) art 20(7)(b), n 13. Note also that some States parties to the CPTPP have excluded investor-State arbitration between them and conditioned access to that mechanism by special State consent. See, for example, Side Instrument between Vietnam and New Zealand (signed 8 March 2018) <https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Viet-Nam-ISDS.pdf> accessed 29 December 2018.

147 Yeo and Menon (n 121) 128; Losari and Ewing-Chow, 'Difficulties with Decentralization' (n 122) 1010.

148 Claudia T Salomon and Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific. A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region' (2015) 16 JWIT 800, 808–9 (the Philippines signed only one BIT—with Syria—after facing its first arbitration and award).

of special consent.[149] For context, this does not make these States alone in not offering access to arbitration to foreign investors: Brazil has never offered such a possibility, and continues to insist on that position;[150] Australia prefers domestic courts over international arbitration,[151] while the latter mechanism has also been eliminated from some regional investment protection regimes, which focus on State-to-State dispute settlement.[152]

Less dramatically, some States have decided to continue to offer foreign investors access to arbitration, however under narrower conditions. Firstly, they attempted to bind investors to their local courts for longer periods. A recent example is the introduction of the 'exhaustion' of local remedies requirement in the India Model BIT,[153] which is actually not a real exhaustion requirement, but rather a condition of domestic litigation, although a very long one: investors must litigate domestically for at least five years.[154] Only then, or if they demonstrate that the futility exception applies, investors can give notice of a dispute to the host State and commence dispute settlement under the treaty.[155] It seems that investors must litigate treaty claims from the beginning, because they are precluded from arguing that different causes of action at different

---

149 *Churchill Mining Plc v Republic of Indonesia*, ICSID Case No ARB/12/14, Decision on Jurisdiction (24 February 2014) paras 100–15.

150 See Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' (2017) 8 JIDS 79, 90–1.

151 See Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 UNSWLJ 979.

152 Protocolo de cooperación y facilitación de inversiones intra-Mercosur (signed 7 April 2017, not in force); Luke Eric Peterson, 'Investigation: In Aftermath of Investor Arbitration against Lesotho, SADC Member-States Amend Investment Treaty so as to Remove ISDS and Limit Protections' (*Investment Arbitration Reporter*, 20 February 2017) <https://www.iareporter.com/articles/investigation-in-aftermath-of-investor-arbitration-against-lesotho-sadc-member-states-amend-investment-treaty-so-as-to-remove-isds-and-limit-protections/> accessed 28 August 2017. The NAFTA parties will preserve their consent to arbitration in respect of the existing investments only three years after the termination of that agreement, after which date investor-State dispute settlement will remain applicable only between the US and Mexico: Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, not in force) ('USMCA') annexes 14-C and 14-D.

153 India Model BIT (n 129) art 15(2).

154 Cf Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 LPICT 1, 3; Facundo Pérez Aznar, 'Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America' (2016) 17 JWIT 536, 540–1. Both authors identify time limitations of similar requirements from few months to two years.

155 India Model BIT (n 129) art 15(1)-(2).

levels result in *de facto* satisfaction of the local litigation requirement.[156] India has also suggested introducing the criterion of 'ripeness' as a substantive standard for submission of claims, with a similar effect of binding investors to local courts.[157] Investment treaty practice is familiar with other examples of keeping investors before domestic organs, in the form of either true exhaustion requirements,[158] or special domestic administrative review processes.[159] Their effect is clear: they delay the access of investors to the international level by binding them to the municipal system. The full exhaustion requirement has been considered vanished in investment law but one might observe its revival.[160]

Secondly, investors' possibilities have been narrowed by some States preferring fork-in-the-road clauses over those requiring a waiver of parallel local proceedings. While the dominant 'western' approach, following the NAFTA example,[161] requires only a discontinuance and a waiver of domestic proceedings when initiating arbitration,[162] some States insist on the fork-in-the-road clause, even if that means singling them out in multilateral frameworks.[163] The latter clause is stricter towards investors, because it bars them from initiating arbitration if they have resorted to domestic courts, which is, bearing in mind the complexity of foreign investment disputes, usually the case.

---

156 ibid art 15(1) ('the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action').

157 Government of India, 'Office Memorandum' (n 128) para 12(1)(c), n 5.

158 SADC Protocol on Finance and Investment, Annex 1 (Co-Operation on Investment) (signed 18 August 2006, entered into force 16 April 2010) art 28(1). This requirement existed before the SADC eliminated investor-State dispute settlement altogether from its framework: SADC, Agreement Amending Annex 1 (Co-Operation on Investment) of the Protocol on Finance and Investment (signed 31 August 2016, not in force).

159 Stephan W Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China' (2007) 15 Cardozo JICL 73, 92–3 (regarding the Chinese Administrative Review Procedure; Schill however maintains that this non-judicial requirement is different from the exhaustion of local remedies).

160 Schreuer, 'Grandchildren' (n 154) 1–3. For other examples see Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law* (IISD 2017) 7–9.

161 NAFTA (n 130) art 1121(1)(b), (2)(b).

162 US Model BIT (2012) (n 134) art 26(2)(b); Canada Model BIT (n 134) art 26(1)(e), (2)(e); CPTPP (n 135) art 9.21(2)(b); CETA (n 131) art 8.22(1)(f)-(g); EU-Singapore IPA (n 131) art 3.7(1)(f); EU-Vietnam IPA (n 131) art 3.34(4).

163 CPTPP (n 135) annex 9-J (Chile, Mexico, Peru and Vietnam); EU-Vietnam IPA (n 131) annex 12 (Vietnam); ASEAN-China Investment Agreement (n 146) art 14(5) (Indonesia, Philippines, Thailand and Vietnam); ASEAN-Australia-New Zealand FTA (n 135) ch 11, art 21(1) (Philippines and Vietnam); USMCA (n 152) annex 14-D, appendix 3 (Mexico).

Thirdly, other gateway conditions, such as conditions precedent and time limitations, have been tightened. The EU model requires investors to negotiate for at least 180 days and to wait another 90 days for the determination of the respondent before initiating arbitration.[164] It also limits the possibility of triggering the dispute resolution machinery to three years after acquiring knowledge of the alleged breach and the incurred loss or damage.[165] The India Model BIT requires investors to negotiate with the host State for at least six months from the receipt of the notice of a dispute, and then limits the right to initiate arbitration to six years from acquiring knowledge of the critical measure or 12 months from the conclusion of domestic proceedings.[166] Combined with the condition to litigate domestically for at least five years, in an ideal scenario an investor thus has six months to act and initiate arbitration, which includes informing the host State of that intention at least 90 days before the actual submission of the claim.[167]

C. The Creation of Investment 'Courts'

The idea of establishing a permanent adjudicative institution specialised in investment disputes is not new,[168] however it gained a serious momentum only in 2015 when the EU tabled such a suggestion to its prospective free trade treaty partners.[169] The CETA constitutes a Tribunal and

---

164 CETA (n 131) art 8.22(1)(b). See also EU-Vietnam IPA (n 131) art 3.35(1)(b) (six and three months respectively); EU-Singapore IPA (n 131) art 3.7(1)(b) (the same).

165 Or two years after ending domestic proceedings, but no later than ten years from acquiring knowledge of the breach and damage: CETA (n 131) art 8.19(6)(a)-(b). Such limitations firstly appeared in the NAFTA, further spreading to other regimes. See NAFTA (n 130) arts 1116(2), 1117(2) (three years from acquiring knowledge of the breach and damage); CPTPP (n 135) art 9.21(1) (three years and six months from acquiring knowledge of the breach and damage).

166 India Model BIT (n 129) arts 15(4), 15(5)(i)-(ii).

167 ibid art 15(5)(v).

168 See ECOSOC, 'The Promotion of the International Flow of Private Capital: Further Report by the Secretary-General' (1961) UN Doc E/3491, para 279, n 113 (mentioning 'the resolution on the establishment of a new international procedure for the settlement of disputes adopted in 1960 by the Committee for Court and Court Procedure for Protection of Investments Abroad of the International Bar Association; […] and the Draft Statutes of the Foreign Investment Court prepared in 1960 by the Committee on Nationalization and Foreign Property of the International Law Association'). For a more recent proposal see Van Harten, *Public Law* (n 50) 180–4.

169 European Commission, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (16 September 2015) <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> accessed 8 June 2018. For an overview of the EU's attitudes towards investor-State dispute settlement, see August Reinisch, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court' in Armand de Mestral (ed), *Second Thoughts: Investor State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017) 333.

an Appellate Tribunal for the settlement of investment disputes under its investment chapter.[170] This model has also appeared in other investment agreements negotiated by the EU.[171] The model is meant to address the basic criticisms of investor-State dispute settlement: tenure of judges and their ethics, transparency of the process, review of awards and similar. The model, however, still uses the ICSID's auspices and the UNCITRAL Arbitration Rules for *ad hoc* arbitrations.

It is obvious that the suggested model was not meant to establish a true court system with its own procedures, but only to modify the existing arbitration mechanism in response to mainstream criticisms.[172] At some points, however, the drafters of the model have targeted the core of the authority of investment tribunals. The CETA thus provides that the EU shall determine whether the EU itself or one of its Member States should be the respondent in a dispute based on the measure identified in a notice issued by an investor.[173] More radically, '[t]he Tribunal shall be bound by th[is] determination'.[174] In the event that the EU fails to make such a determination within 50 days, the treaty gives some guidelines for determining the respondent,[175] whose application (presumably by the investor) equally binds the Tribunal.[176] The rationale of this provision is clear: the EU does not want investment tribunals to freely and without control

---

170 CETA (n 131) arts 8.27-8.

171 See EU-Vietnam IPA (n 131) arts 3.38-9; EU-Singapore IPA (n 131) arts 3.9-10; Transatlantic Trade and Investment Partnership between the EU and the United States, Trade in Services, Investment and E-Commerce (proposal of the EU of 12 November 2015) ('TTIP') ch 2, s 3.4, arts 9–10 <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 8 June 2018; EU-Mexico Free Trade Agreement: Agreement in Principle as of April 2018, Resolution of Investment Disputes, arts 11–2 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833> accessed 31 December 2018.

172 Céline Lévesque, 'The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?' in Armand de Mestral (ed), *Second Thoughts: Investor State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017) 61–2 (the system is still arbitral). Although it is doubtful whether the aimed improvements have been indeed achieved: Freya Baetens, 'The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges' (2016) 43 Legal Issues Econ Integration 367 (various weaknesses in addressing the criticisms of the existing system); August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 JIEL 761, 780–2 (the non-enforceability of awards under the court system as 'ICSID awards' in third States).

173 CETA (n 131) art 8.21(1)-(3).

174 ibid art 8.21(7).

175 ibid art 8.21(4) ('(a) if the measures identified in the notice are exclusively measures of a Member State of the European Union, the Member State shall be the respondent. (b) if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent.').

176 ibid art 8.21(7).

interpret its law, which has been reaffirmed by the Court of Justice of the EU.[177] The concept of the 'autonomy' of the EU law, which stands behind these attitudes, might have its justifications from the internal EU perspective.[178] But its destructive effects upon international adjudication cannot be ignored. Without the power to decide on the standing to be sued, the adjudicative role of international courts and tribunals remains only a façade.[179] Furthermore, although 'arbitration without privity' has not been an innovation in international law, as I argued in Chapter 1,[180] Paulsson was right in concluding that its biggest advantage was that it allowed true claimants to

---

177 Case C-284/16 *Slowakische Republik v Achmea BV* [2018] EU:C:2018:158, paras 39–60. See also Opinion 2/13 of the Court (Full Court) [2014] EU:C:2014:2454 (regarding the accession of the EU to the ECHR).

178 *Slowakische Republik v Achmea BV* (n 177) paras 33, 35 ('[…] the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other […] In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law […]'). For the intra-EU context, see Eirik Bjorge, 'EU Law Constraints on Intra-EU Investment Arbitration?' (2017) 16 LPICT 71.

179 Although the jurisdictional relevance of standing to sue and to be sued is understudied in international law, it can be said that that concept pertains to the crux of the so-called *Oil Platforms* test, which instructs tribunals to ensure that there is an obligation between the disputing parties which could be breached by the alleged acts. See *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Judgment) (1996) ICJ Rep 803, para 16; *Oil Platforms* (Higgins) (n 65) para 33; *SGS v Philippines* (n 22) para 26. The issue has appeared before the ICJ. See *Monetary Gold* (n 74) 30–3 (although the respondents were named in accordance with the Washington Statement, which was the underlying jurisdictional instrument, the Court found that Italy's claim concerned the lawfulness of conduct (in particular legislation) of a third State—Albania); and particularly *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) (Declaration of Sir Arnold McNair) (1954) ICJ Rep 19, 35 ('The Court is asked to adjudicate upon an Italian claim against Albania arising out of an Albanian law of January 13th, 1945. Albania is therefore an essential respondent. But these proceedings are not brought against Albania, nor does the Application name Albania as a respondent, although there is nothing in the Washington Statement which could preclude the Italian Government from making Albania a respondent. I cannot see how State A, desiring the Court to adjudicate upon its claim against State B, can validly seise the Court of that claim unless it makes State B a respondent to the proceedings—however many other States may be respondents.').

180 See Chapter 1, Section 3.A.iii.

meet their true respondents.[181] That advantage has been completely lost in CETA. First, the model ignores the fact that every definition of the authority to adjudicate (ie jurisdiction) in international law starts from the substantive notion of a dispute.[182] Second, it defeats the logic of every, domestic and international, litigation: the claimant is to determine the respondent in its claim, and the rejection of the claim for the lack of the standing to be sued is its own failure.

The suggested model, therefore, has gone beyond fixing some of the imperfections of the system. It has at some points challenged the authority of investment tribunals, and it has done so for the first time despite the EU's long-lasting awareness of its legal order's autonomy in relation to investment tribunals.[183] It is not surprising that some commentators have qualified the EU's proposal as politically motivated, not resulting from a proper analysis of the existing system.[184] But, the EU-proposed model, as others, also contains some more nuanced provisions which can be said to have engaged in a dialogue with arbitrators, and they are considered next.

D. Unintended Instances of Exchange

There have been some occasions on which treaty reforms have targeted and will surely affect the products of the arbitral supplementing activities. Probably the most widespread such move is the exclusion of the applicability of MFN clauses to dispute resolution clauses, which can be found

---

181 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Rev-FILJ 232, 256.

182 See Chapter 1, Section 2.B.i-ii.

183 In contrast, in a statement issued by the EU in relation to the ECT, it is said: 'The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party'; but '[t]his is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States'. See Statement Submitted by the European Communities to the Secretariat of the Energy Charter Pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, n 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31998D0181&from=EN> accessed 10 June 2018.

184 Piero Bernardini, 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests' (2017) 32 ICSID Rev-FILJ 38, 44.

in multilateral (mega-regional)[185] and bilateral agreements,[186] as well as in model BITs.[187] This development is clearly a result of dissatisfaction with the arbitral practice which has allowed such a conjunction, and moreover if that practice is seen as having established a presumption of the applicability of MFN clauses to dispute resolution, that presumption is now being rebutted. Note, however, that this is not the first time that States have provided in their treaties rules on the MFN-dispute resolution conjunction: a rule *allowing* it appeared in UK BITs already back in the early 1990s.[188] This was before the emergence of the actual practice applying MFN clauses to dispute resolution. The appearance of explicit *prohibitions* of such conjunctions reacts to that arbitral practice. While the common approach is to simply provide that an MFN clause is not applicable to dispute resolution proceedings,[189] the 2015 Norway Model BIT stands out by explaining the rationale behind such a limitation: its commentary distinguishes the substantive rights of foreign investors from the procedural mechanisms of their enforcement and limits the MFN clause to the former.[190] The commentary states that the aim is to resolve the dilemma that appeared in practice regarding the applicability of MFN clauses to 'procedural rights'. This explanation is important,

---

185 CETA (n 131) art 8.7(4); EU-Vietnam IPA (n 131) art 2.4(5); CPTPP (n 135) art 9.5(3); ASEAN Comprehensive Investment Agreement (n 135) art 6, n 4(a); USMCA (n 152) art 14.D.3(1)(a)(i)(A), n 22.

186 For example, Free Trade Agreement between China and Peru (signed 28 April 2009, entered into force 1 March 2010) art 131(2), n 13; Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation (signed 19 February 2009, entered into force 1 September 2009) art 88(2); Protocol Between the Government of the United States of America and the Government of the Republic of Korea Amending the Free Trade Agreement Between the United States of America and the Republic of Korea (signed 24 September 2018, not in force) para 4(c).

187 Norway Model BIT (2015) art 4(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3350> accessed 19 April 2019; Netherlands Model BIT (2018) art 8(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5695> accessed 19 April 2019.

188 See UK Model BIT (1991) art 3(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2846> accessed 19 April 2019. It can be debated, however, whether this outcome was indeed intended. The clause confirms 'that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11', which also includes provisions which do not concern the treatment of foreign investors, such as those dealing with inter-State disputes. It should only be noted that the same formulation was kept in a newer version of this model BIT: UK Model BIT (2008) art 3(3) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2847> accessed 19 April 2019.

189 Or, often more specifically, that the term 'treatment' used in the MFN clause does not include dispute resolution.

190 Government of Norway, 'Comments on the Individual Provisions of the Model Agreement' (2015) 8 <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/comments-on-the-model-for-future-investment-agreements-english-translation.pdf> accessed 26 June 2018.

because it complements and justifies the regulatory role of the provision, which consequently does not appear as a mere dissatisfied-State reaction to arbitral practice.

There are other reactive changes, which are less widespread. As I mentioned above, the India Model BIT provides that its local litigation requirement can be bypassed using the futility exception.[191] However, that exception, requiring proving that the domestic system does not offer *any* remedy,[192] can be viewed in opposition to the arbitral practice which has formed the futility exception by analogy to the law of diplomatic protection, relying on the standard of *effective* remedy.[193] If accepted in treaties, the Indian formulation would affect the rule developed in practice, clearly raising the threshold for bypassing the local litigation requirement. A similar development can be observed in the USMCA, which allows bypassing its local litigation requirement in the event of 'obvious futility'.[194] India has also suggested the inclusion of the rule that investors could be denied benefits of investment agreements after the initiation of arbitration, contrary to the arbitrator-made default rule.[195] On the other hand, the EU's proposal of few of its future investment chapters attempts to exclude the possibility of mass claims.[196] That proposal clearly misses the point: as demonstrated in Chapter 3, the introduction of mass claims in investment arbitration had nothing to do with party representation, as the EU understands it, but was rather based on the arbitral-created rule that the applicable procedure is not a consensual matter and that it consequently can be changed by the acting tribunal.[197] Still, because the inclusion of the suggested clause in a treaty would clearly signal the policy choice that mass claims are not acceptable, tribunals would probably reach the same conclusion, despite the fact that the supplementing activity which has empowered them to conduct such processes in the first place remains untouched.

Some proposals and changes can be qualified as overregulation. First, some treaties now provide that if some of the conditions precedent to the institution of arbitration are not fulfilled, the acting tribunal should decline jurisdiction.[198] This, it can be argued, only restates the obvious.

---

191 See Section 4.B above.

192 India Model BIT (n 129) art 15.1 ('if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief […]').

193 For example, *Ambiente Ufficio SpA v Argentina* (n 15) para 608. See further Chapter 3, Section 3.A.i.

194 USMCA (n 152) art 14.D.5(1)(b), n 25.

195 India Model BIT (n 129) art 35; Government of India, 'Office Memorandum' (n 128) para 3. For the practice on this issue, see Chapter 4, Section 2.A.

196 TTIP (EU Proposal) (n 171) ch II, s 3, art 6(5) ('Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.'). See also EU-Vietnam IPA (n 131) art 3.33(6); EU-Singapore IPA (n 131) art 3.6(1), n 4(b).

197 See Chapter 3, Section 2.C.

198 CETA (n 131) art 8.22(4); EU-Singapore IPA (n 131) art 3.7(3).

Another possibility is that such a provision is meant to affect the jurisdiction/admissibility divide developed in practice,[199] which could affect the opportunities for tribunals to bypass conditions precedent.[200] Whether that is indeed so is unknown, but what is certain is that States observe the targeted outcomes (in this case strict application of conditions precedent), instead of the rationales behind tribunals' supplementing activities.

Second, another instance of overregulation, which evidences that States are led by outcomes instead of regulatory considerations, is the formalisation of the arbitrator-made standards which restrict investors' access to arbitration. For example, States have started adopting the so-called *Salini* criteria in definitions of 'investment'.[201] More critically, some of the well-established doctrines of international law have been explicitly mentioned: treaties now provide that a claim cannot be submitted if an investment is made through a conduct amounting to abuse of process,[202] on some occasions specifically referring to the scenarios of making an investment only for the sake of submitting a claim,[203] which was one of the major controversies at the time of drafting.[204] At the same time, investors are being precluded from submitting claims if their investments are made through 'fraudulent misrepresentation, concealment, [or] corruption'.[205] It can be said that these provisions ensure the application of these principles in practice, but at the same time one cannot ignore the fact that their past application by tribunals, if not completely uniform, was at least heading that way, through establishing firm default rules on legality of investments[206] and

---

199 See Chapter 3, Section 2.A.

200 For the discussion on this possibility, see Chapter 3, Section 2.B. Note, however, that some tribunals have opposed categorically the proposition that they could bypass conditions precedent by discretion, characterising them as conditions of State consent: see *Daimler Financial Services AG v Argentina* (n 64) paras 192–4. Tribunals have also suggested that the concepts of jurisdiction and admissibility differ as regards the possibility of bypassing conditions precedent by party acquiescence: see *Hochtief AG v Argentina* (n 38) paras 94–5 ('Defects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot.').

201 CETA (n 131) art 8.1; EU-Vietnam IPA (n 131) art 1.2(h); EU-Singapore IPA (n 131) art 1.2(1); CPTPP (n 135) art 9.1; US Model BIT (2004) (n 134) art 1; US Model BIT (2012) (n 134) art 1; India Model BIT (n 129) art 1.4; Government of India, 'Office Memorandum' (n 128) para 4(3); Netherlands Model BIT (n 187) art 1(a).

202 CETA (n 131) art 8.18(3); EU-Vietnam IPA (n 131) art 3.27(2); India Model BIT (n 129) art 13.4.

203 EU-Vietnam IPA (n 131) art 3.43; EU-Singapore IPA (n 131) art 3.7(5).

204 See generally *Philip Morris Asia Limited v Australia* (n 89).

205 CETA (n 131) art 8.18(3); EU-Vietnam IPA (n 131) art 3.27(2). See also India Model BIT (n 129) art 13.4 (also mentioning money laundering); and ECOWAS Supplementary Act on Investment (n 29) arts 13, 18(1) (preventing investors from initiating dispute settlement if engaged in corruption in particular).

206 See Chapter 5, Section 2.B.

abuse of process.[207] The codification of these rules does not benefit at all from these developing practices, and seems adopted solely for the sake of strict and extensive treaty regulation.

There are two major problems with these developments in treaty-making. The first one is that they prompt inflation of the law: the increasing number of provisions that must be observed and applied by tribunals only weakens their sharpness and value.[208] The second problem is that extensive treaty regulation does not eliminate regulatory deficiencies in jurisdictional regulation, and moreover new ones will continue to appear.

An example of an emerging regulatory deficiency, which could hardly be addressed by a treaty rule, can be observed in the context of the denunciation of the ICSID Convention. The discussions on this topic have so far focused on how Article 72 of that convention should be interpreted, with two clarified options: the 'narrow' interpretation considers that only the rights and obligations arising from combined consent of *both* disputing parties are not affected by the withdrawal;[209] the 'broad' interpretation reads literary the singular formulation of the text, which refers to 'consent […] given by one of them' (ie State).[210] The consequence of the first approach is that only perfected agreements to arbitrate survive the withdrawal, while the second option instructs that unilateral offers to arbitrate given by the State in BITs before the withdrawal remain valid consent to ICSID arbitration. There is a hidden question behind this dilemma: what is the status of the ICSID Convention in the expression of consent of a State, regardless of the problem of its correct interpretation? Does the ICSID Convention *govern* or *form substance* of consent? This question itself is a regulatory deficiency which, if answered, could instruct the resolution of

---

207 See Chapter 5, Section 4.

208 Increasing the number of jurisdictional treaty provisions which must be observed by tribunals at a first look already implies that their coordination will be a challenge for tribunals in practice. Compromises about the preference for some principles embodied in the treaty text over others will have to be made. On the other hand, the introduction of very detailed procedural rules could trigger further dissatisfaction and demands for changes, once their actual effect is seen in practice, either in the present or some future circumstances. In short, the stabilisation of the jurisdictional framework of future investment tribunals and courts does not seem likely.

209 The principal supporter of this approach is Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 353.

210 Supporters of this interpretation, among others, are Frédéric G Sourgens, 'Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements' (2013) 11 Santa Clara J Int'l L 335, 390–5; Oscar M Garibaldi, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 251; Emmanuel Gaillard, 'The Denunciation of the ICSID Convention', *NYLJ* (26 June 2007). See also Fernando Lusa Bordin, 'Reasserting Control through Withdrawal from Investment Agreements: What Role for the Law of Treaties?' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 224–8.

the issues arising from the denunciation of the ICSID Convention. If the Convention were seen as part of the substance of consent, as opposed to an external standard of validity of consent, Articles 71 and 72 would become only a part of the intention of the consenting State. This could imply, in turn, the intention of the consenting State to retain the right to withdraw its unperfected offer to arbitrate, with the limitation that such offer remains valid for six months after the delivery of the notification of withdrawal. In other words this view would reconcile Articles 71 and 72, but at the same time would avoid reading into them a clearly non-existing mention of perfected agreements to arbitrate. Finally, this suggestion does not require departing from the contractual paradigm of ICSID jurisdiction,[211] while accommodating the practical answers reached by some tribunals.[212] Whether this outcome is desirable is not the topic of this work: my point is that even when certain questions appear clearly as those of treaty interpretation, there also can be some jurisdictional regulatory deficiencies involved, whose remedying would assist the interpretative process. Such deficiencies will continue to emerge, and will continue to demand arbitral supplementing action.

Finally, in some instances State reaction to arbitral supplementing activities could be seen as positive. These are, for example, explicit exclusions of indirect investment from the protection of investment treaties.[213] Regardless of an economic policy assessment whether such exclusions are appropriate, I view them as 'positive', because they can be considered as going hand in hand with arbitral supplementing activities: if tribunals have created a presumption in favour of the inclusion of indirect investment in the absence of an answer in the treaty, providing an explicit exclusion can be seen as an acceptance and response to that presumption.[214] This is a modest reaction, because clauses explicitly including or excluding indirect investment have existed in the past treaty practice. The product of arbitral practice—the presumption in favour of (or even

---

211 Cf Garibaldi (n 210) 272–6. Although arguing in favour of a different (narrow) interpretation, Schreuer maintains that offers to arbitrate do not provide rights and obligations under the ICSID Convention, and thus cannot be protected under its Article 72. Schreuer, 'Denunciation' (n 209) 365.

212 *Venoklim Holding BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/22, Award (3 April 2015) paras 62–8; *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Award (26 April 2017) paras 108–20 (interpreting Articles 71 and 72 of the ICSID Convention as granting investors the possibility to accept an offer to arbitrate in the six-month withdrawal period). See also *Rusoro Mining Limited v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award (22 August 2016) paras 255–68. Cf *Fábrica de Vidrios Los Andes CA and Owens-Illinois de Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/21, Award (13 November 2017) para 282 (taking the narrow interpretation of Article 72).

213 Government of India, 'Office Memorandum' (n 128) para 2(2).

214 For the discussion on the arbitral formation of a presumption in favour of or against the protection of indirect investment, see Chapter 4, Section 3.B.

against) their inclusion in the absence of an explicit clause—serves as a reminder to States not to omit certain elements in their treaties if they aim at a particular result.

Despite the reactive character of State action, and despite States' failure to recognise and observe arbitral supplementing activities and their rationales, I believe that these examples can, although unintentionally, begin an exchange with tribunals. The new types of investment treaties, such as mega-regionals, have a potential to further lead to multilateralization of the rules of investment law generally.[215] Combined with other instances of State reactive moves, new treaty provisions can signal State policy choices about the acceptability of certain jurisdictional boundaries. When constituted under these treaties, arbitral tribunals will have to adjust to these choices. But even when not acting under one of those new investment treaties, tribunals can pick up such uniform policy choices as indicators of global trends and opinion. These will be another input into arbitral supplementing activities.

§ 6.05. Conclusion

In this Chapter, I attempted to find the driving force behind the arbitral action which is meant to remedy deficiencies in jurisdictional frameworks. Considering that the mainstream criticisms of investment arbitral practice cannot provide an appropriate answer, I suggested a new perspective of the principle of consensualism in investment arbitration, which is now seen as only the primary means of jurisdictional regulation. The disappearance of the idea of sovereignty behind that principle had a liberating effect in the apprehension of the task of arbitral tribunals, which are now seen as able and under a duty to tackle regulatory deficiencies in jurisdictional frameworks, by supplementing them with what they see as appropriate standards. This view is accommodated well in the structure of investment arbitration.

Neither arbitral supplementing activities as such, nor their rationales, have been recognised by States. Regulation can be responsive, particularly in connection to self-regulation, but the first step in that must be observing the doing of the regulated.[216] States have failed to do so: they have not observed arbitral supplementing activities and their rationales; they have not observed the prospect of formation of consistent jurisprudence; overall, States have acted in a reactive and retributory manner. State reaction in this context cannot be qualified as a pushback, aimed to influence a different development of the practice and law, which is seen as normal and usual in the international judiciary.[217] States have rather challenged the authority of investment tribunals, by narrowing their interpretive space and at some points depriving them of the authority to rule on some common judicial questions. Several States have gone to an extreme, by pulling out of

---

215 Tania Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway towards Multilateral Rules' (2018) 17 World Trade Rev 33.

216 John Braithwaite, 'Types of Responsiveness' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 117–8.

217 See generally Rask Madsen, Cebulak and Wiebusch (n 116).

the investor-State dispute settlement mechanism in its entirety, which cannot even address the mainstream criticisms of investment arbitral practice.[218]

Only marginal, but equally reactive, changes in the form of detailed treaty rules bear the potential of starting an exchange with tribunals. Although unintentionally, such detailed treaty clauses can signal State policy choices to tribunals, which the latter can regard as an input in their work on the resolution of regulatory deficiencies. Thus, although not addressing each other, State reactions described above and arbitral supplementing activities can be reconciled. To achieve that reconciliation, in the last Chapter I propose a two-layered model of jurisdictional regulation in investment treaty arbitration. Specifically, I draft a model of jurisdictional regulation which accepts the regulatory function of investment tribunals in jurisdictional matters, but at the same time safeguards the principle of consensualism as the primary means of jurisdictional regulation. I suggest that such a model can preserve the control of the disputing parties over jurisdictional matters, and at the same time provide arbitral tribunals with the necessary space for dealing with dynamic jurisdictional questions.

---

218 See generally Stephan W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 JIEL 649.

7

Towards a New Jurisdictional Framework of Investment Treaty Arbitration

§ 7.01. Introduction

The effects of the activity of international investment arbitral tribunals, discussed in Chapters 3 to 5, should not be underestimated. One possibility is to simply maintain that such an activity forms part of arbitral interpretations of treaty provisions, which is inevitable in the exercise of any judicial function. Treaty interpretations can put different emphasis on various factors and considerations, giving priority to the interests of different actors. The analysed activity of arbitral tribunals, looking from this perspective, forms only a corpus of interpretations of various treaty provisions, which cannot have any higher or heavier legal value than that of an opinion of an *ad hoc* tribunal on the meaning of a particular provision in one concrete case.[1] This is so regardless of the importance given to the judicial interpretive work.[2]

This explanation, in my opinion, is not satisfactory. The activity of tribunals analysed in the previous chapters reveals that tribunals add input into interpretive exercises, which often forms generalised premises. What is the quality of such an input? What is the character of the positions taken by tribunals that in the application of treaty provisions they should be led by certain presumptions, default rules, and standards? I am referring to what I have previously called 'arbitral supplementing activities'. In this final Chapter, I suggest that supplementing activities of arbitral tribunals amount to law-making, or at least to some form of jurisdictional regulation. This is the already *de facto* existing situation, however which is constantly ignored. As seen in the previous chapters, and particularly in Chapter 6, arbitral practice and State reaction in the sphere of treaty-making evidence a tension between States and tribunals. That tension is based on the traditional premise that States are law-makers and tribunals law-appliers. It also stems

---

1 See particularly Frédéric G Sourgens, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina J Int'l L & Com Reg 875, 877–80 (criticising legal scholarship for overemphasising the development of 'formal legal rules' and for attempting to deduce them from arbitral interpretations of jurisdictional clauses).

2 For the importance of legal interpretations in the establishment of meaning of international legal norms, see generally Ingo Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (OUP 2012).

from the traditional understanding of the principle of consensualism of international adjudication, according to which every aspect of the jurisdiction of a tribunal had to be defined by the disputing parties, and any form of arbitral self-regulation in jurisdictional matters was inconceivable. In my opinion, the supplementing activities of arbitral tribunals demand an acknowledgment of their regulatory character.

The argument developed in this Chapter is that the regulatory function of arbitral tribunals relating to their jurisdiction should be recognised and integrated into the jurisdictional framework of investment treaty arbitration. To have a clear overview of the boundaries and the area of competence of such a regulatory function of arbitral tribunals, I sketch a two-layered model of the jurisdictional rules in investment treaty arbitration. Besides the basic rules provided by virtue of consent to arbitrate of disputing parties (which can be dubbed for the present purposes *primary rules*), I identify another layer of jurisdictional rules (hereinafter *secondary*), which is developed in arbitral practice, and which is created in the application of the primary rules. As seen, primary rules frequently contain regulatory deficiencies, which makes them non-self-executing, in terms of lacking sufficient detail to allow direct application assisted with their interpretation. They often require an additional level of regulation, which makes their application realistic.

To this end, Section 2 sketches the said model of two-layered jurisdictional regulation. Then, Section 3 addresses some challenges of that model, while Section 4 places it within a broader perspective of the international legal order, and discusses the questions of global governance and the regulatory role increasingly played by many international adjudicatory bodies.

§ 7.02. A Two-Layered Model of Jurisdictional Regulation in Investment Treaty Arbitration

Jurisdictional regulation of investment treaty arbitration is composed of two layers, or two types of rules: primary (A) and secondary (B). In this Section, I sketch this model. I maintain that such division of jurisdictional regulation *de facto* already exists in investment arbitral practice but that it has not been properly acknowledged, especially when it comes to the second layer, consisted of the arbitrator-made jurisdictional rules.[3]

[3] See also Dolores Bentolila, *Arbitrators as Lawmakers* (Kluwer 2017) 231–2. Bentonila recognises the arbitrator-created 'power-conferring rules that regulate international arbitration'. However, her analysis differs significantly from the present one. First, Bentonila examines arbitral law-making in commercial and investment arbitration altogether, as a common field of international arbitration. Second, and more importantly, she does not attempt to accommodate arbitrator-created rules within a concrete legal system, and particularly to define their relationship and interaction with the system of norms created in international law by virtue of consensual law-making through treaties and arbitration agreements.

A. Primary Rules: Jurisdictional Rules Provided by Disputing Parties

Primary rules of jurisdictional regulation are the main means of empowering international arbitral tribunals, and international courts and tribunals in general, to adjudicate. They are the starting point in every assessment of the existence and the limits of that empowerment. I will firstly define them (i), and then I will turn to the rules and principles of the international legal system that must be taken into account when analysing the meaning and the scope of the primary jurisdictional rules discussed here (ii).

i. *Defining Primary Rules*

International adjudication, and investment arbitration in particular, are governed by the principle of consensualism, which, as I discussed in Chapter 1, essentially implies their contractual nature. That is where the primary rules of jurisdictional regulation stem from: they are created by virtue of the arbitration agreement of the parties in dispute.

Dispute settlement clauses of investment treaties, both bilateral or multilateral, can vary in scope. They can merely provide the basics necessary for empowering an arbitral tribunal to adjudicate, or exhaustively regulate its powers and the procedure to be followed. In any case, such clauses provide the basic rules regulating the jurisdiction of arbitral tribunals. They define the scope of arbitrable disputes and thus arbitral substantive jurisdiction.[4] They define conditions precedent to the institution of arbitration, such as the requirements to attempt to settle the dispute amicably, to negotiate with the host State or litigate before domestic courts for a certain period of time, to waive other (domestic and arbitral) proceedings, to exhaust local remedies and so on. They define the arbitral forums and their availability, which may be conditional or sequential, using standard clauses such as the fork-in-the-road clause. They determine the procedural rules to be applied, which in some instances, as discussed in Chapter 1,[5] can also have the effect of adopting (or contracting-in) additional jurisdictional rules.[6] Finally, a dispute settlement clause should not be isolated from the other parts of the treaty in which it is contained, because its other provisions can equally pertain to and affect the jurisdiction of arbitral tribunals. These are, most importantly, the definitions of ‘investor’ and ‘investment’, clauses regulating the temporal application of investment treaties, but also MFN and umbrella clauses. All these treaty provisions, which can directly or indirectly affect the jurisdiction of arbitral tribunals, should be

---

4 Using such phrases as ‘all disputes’, ‘disputes arising from this agreement’, ‘disputes arising from Articles…’, ‘disputes concerning expropriation’, ‘disputes involving the amount of compensation for expropriation’ etc.

5 See Chapter 1, Section 2.B.iii. Essentially, when specific procedural rules are included by reference in an arbitration agreement, they become part of that agreement, and their content consequently reflects the intentions of the disputing parties.

6 For example, arbitrations under the ICSID’s auspices, whose foundational convention contains some rules affecting the substantive jurisdiction of arbitral tribunals, and particularly the definitions of ‘investment’ and ‘investor’. See in this respect Chapter 2, Section 3.A.

seen as the primary rules of jurisdictional regulation. Because they are part of the legal relationship of the disputing parties, they are the starting point in every assessment of the scope of arbitral jurisdiction.

It is obvious that most of such rules will be imposed by States, simply because treaty dispute settlement clauses function as offers or adhesion contracts towards investors. But the contribution of investors' acceptances of such offers, which perfect arbitration agreements, should not be underestimated. At the moment of acceptance, dispute settlement clauses of investment treaties transform into arbitration agreements, and as far as the arbitration perspective is concerned, only at that moment do the primary rules gain normativity. It thus appears that investors actually trigger their binding force by virtue of their acceptance. From that point on, States are not able to change the content of their offers.[7] This is significant from the investors' perspective, because, as seen in Chapter 4,[8] this understanding can protect them, to a certain extent, from prospective State counterclaims. Furthermore, investors also have the possibility of making counteroffers to States and negotiating the details of arbitration agreements with them directly, which can amend their initial arrangement, and thus change the initial jurisdictional regulation.[9] The primary rules of jurisdictional regulation are, therefore, products of the common will of States and investors, and they are defined and derive their normativity from party consent.

ii. *The Relevance of General International Law, 'Meta Rules', and 'Consent Management Tools'*

The concept of 'general international law' has been challenged by the process of 'fragmentation' of international law,[10] which can also be seen as part of a broader phenomenon sometimes called 'functional differentiation'.[11] However, as correctly noted, the development of specialised rules

---

7 See Chapter 2, Section 2.A.ii.

8 See Chapter 4, Section 4.A (as regards jurisdictional bridging and counterclaims).

9 For example, *Burlington Resources Inc v Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017) paras 60–1 (where counterclaims were allowed because of the parties' subsequent agreement to that effect); *Lao Holdings NV and Sanum Investments Limited v Lao People's Democratic Republic,* ICSID Case Nos ARB(AF)/16/2 and ADHOC/17/1, Procedural Order No 2 (23 October 2017) para 31 (where the parties agreed on the consolidation of two cases and thus reached a special agreement on the scope of arbitrable disputes); *Cargill Incorporated v Republic of Poland,* UNCITRAL arbitration, Final Award (29 February 2008) paras 20–2 (where the parties changed the procedural rules by virtue of a subsequent agreement).

10 See generally ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682.

11 Rainer Hofmann and Christian J Tams, 'International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 10.

and the deviation from the framework of general international law cannot be presumed.[12] The logic is rather opposite: rules of general international law remain relevant in specialised fields of international law, unless the former have developed deviating rules. Now, to what extent does general international law remain relevant in the context of primary jurisdictional rules?

The law of treaties, the law of State responsibility, and the law of State immunity are usually seen as significant parts of general international law relevant in investment treaty arbitration.[13] The former two, also called 'meta rules' of general international law, are particularly important.[14] Because State consent to investment arbitration is most frequently expressed in treaties, I will concentrate here on the law of treaties.[15] Firstly, questions like the entry into force of treaties, withdrawal from treaties, their amendment, temporal application and so on, are all governed by the law of treaties, most notably by the rules of the VCLT,[16] but also by the rules of customary international law.[17] When State consent is manifested in a treaty, either bilateral of multilateral, these rules have direct effect on its validity and application. Another part of the law of treaties of crucial importance for the issues of consent to arbitration are the rules of treaty interpretation.[18] It has been commented that no better system of treaty interpretation specific to the field of foreign investments can be found or created, than the one offered by the VCLT.[19] Without an intention to engage into a discussion on whether that statement is true, and whether the rules of the VCLT on treaty interpretation are being idealised,[20] it suffices to end here by noting that at least in

---

12 ibid 11.

13 James Crawford, 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systematic Integration' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 22–6.

14 Hofmann and Tams (n 11) 13.

15 The law of State responsibility, which regulates internationally wrongful acts and their consequences, is relevant for substantive issues arising in investment arbitration.

16 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

17 Even the VCLT rules on treaty interpretation, which are said to reflect customary international law, are often applied as custom, because it frequently happens that the VCLT is not applicable between the two States concerned: Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016) 56–60.

18 VCLT (n 16) arts 31-3.

19 Michael Waibel, 'International Investment Law and Treaty Interpretation' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 29–30.

20 Cf Thomas W Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 725 (criticising investment tribunals for using a range of 'pre-Vienna' and commercial arbitration approaches to treaty interpretation).

principle arbitrators should be led by the rules of that Convention when establishing the concrete meaning of the jurisdictional clause (ie consent) before them.

The expression of consent is not necessarily limited to a single document. What is more, if the intentions of both disputing parties in a case (claimant and respondent) are taken into account, the power to adjudicate is never conferred on a tribunal by virtue of a single document. But even when the expression of consent of only one side, usually the State, is viewed, different documents or bodies of law may be relevant. For example, two States can be parties to both a multilateral and a bilateral agreement regulating investment protection, and offering access to investment arbitration to foreign investors.[21] Or, an investment treaty might contain such a broad dispute resolution clause, that an argument could be made that it allows arbitrating disputes for violations of both treaty and customary international law protections.[22] In such a context, one should not ignore the toolkit, including some basic legal general principles, offered by the International Law Commission in its work on the fragmentation of international law, tackling both harmonious interpretation and the resolution of conflicts between different norms.[23]

Finally, one should not neglect some general principles of law which can be relevant for issues of consent to arbitration. They are various: from those relevant to treaties generally, such as the principles of good faith and *pacta sunt servanda,*[24] to those peculiar to judicial proceedings, such as the principle of consensualism itself, the principle that no one can be judge in his own case, the principle that both sides should be heard, the principle *jura novit curia,* the principles governing the burden of proof and so on.[25] The relevance of the latter set of principles is rather

---

21 For example, two States can be at the same time parties to the ECT and a BIT. See *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005).

22 This could be argued should the relevant dispute settlement clause refer to 'any dispute' between an investor and the host State, similarly to the argument for the inclusion of contract claims in treaty-based arbitrations. A similar result was reached when a tribunal allowed customary international law claims to be arbitrated in a contract-based arbitration: *Cambodia Power Company v Kingdom of Cambodia and Electricité du Cambodge,* ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011) paras 327–38. See further, on the permissibility of jurisdictional bridging, Chapter 4, Section 4.A.

23 ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' in 'Report on the Work of the Fifty-Eighth Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 175, para 251.

24 See generally Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 105 sq.

25 See generally ibid 257 sq. Although it could be debated whether the principle of *jura novit curia* applies to international arbitration generally and investment arbitration particularly, there is a strong support for such an argument when it comes to the latter as part of international adjudication. See *Glamis Gold Ltd v United States of America,* UNCITRAL arbitration, Award (8 June 2009) para 8 ('to the degree that the parties to the dispute do not raise what the tribunal regards to be a particularly

implied, but necessary. Indeed, if the *differentia* of the empowerment to adjudicate, within the *genus* of international decision-making, is the employment of judicial methodology,[26] the basic features of that methodology must be taken into account when assessing whether that power has been conferred, in what form, and to what extent.

These rules and principles of general international law give some basic guidelines on how consent to arbitration should be established, read, and interpreted. I will call them, for the present purposes, 'consent management tools', because they are used to find, identify, and interpret the intentions of the parties to a dispute to confer the judicial power on a tribunal, and hence to establish the primary jurisdictional rules governing that power. However, such findings do not automatically resolve all doubts about the application of the primary jurisdictional rules. At this point, I introduce the concept of secondary jurisdictional rules.

B. Secondary Rules: Jurisdictional Rules Developed in Arbitral Practice

Three crucial questions arise when discussing the idea of secondary jurisdictional rules and their operation. First, what are these secondary rules (i)? Second, can arbitral practice indeed produce jurisdictional rules with a normative status (ii)? And third, how should such secondary rules be applied in practice (iii)? The idea of creating additional jurisdictional rules is not unchallenged,[27] and therefore their justification is specially emphasised.

i. *Defining Secondary Rules*

Practice has shown that primary rules are often not self-executory or self-sufficient. They contain deficiencies and require assistance in their application. Arbitral tribunals have for that purpose developed a number of tools, which I define here as secondary rules of jurisdictional regulation, aimed to resolve difficulties in the application of the primary, party-provided jurisdictional rules. I identify three types: presumptions, default rules, and standards. It should be emphasised, however, that this taxonomy of secondary rules is not exhaustive, and its main purpose is to describe the functions of secondary rules in relation to primary rules.

Presumptions serve the resolution of the questions of the applicability of primary rules. For example, tribunals have been asked to determine whether MFN clauses are applicable to dispute

---

relevant authority, the tribunal should bring such an authority to the attention of the parties and provide them an opportunity to comment'); and generally Friedrich Rosenfeld, '*Iura Novit Curia* in International Law' in Franco Ferrari and Giuditta Cordero-Moss (eds), Iura Novit Curia *in International Arbitration* (Juris 2018) 425.

[26] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 27–8.

[27] Oscar M Garibaldi, 'Jurisdictional Errors: A Critique of the North American Dredging Company Case' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 168 (criticising the introduction of presumptions in favour or against jurisdiction and additional rules which affect the application of the original jurisdictional rules as a structural error).

resolution clauses within BITs, and whether BITs protect indirect investments and thus confer jurisdiction to arbitral tribunals over a broader circle of investors. As seen in Chapters 3 and 4, arbitral tribunals have answered these questions by adopting premises dictating the process of treaty interpretation by determining what kind of indicators should be sought. This has further repercussions: tribunals which considered that MFN clauses are applicable to dispute settlement provisions in principle, shifted the burden of proof (or rather argumentation) to the party arguing to the contrary, and *vice versa*.[28] The same was the case with the issue of indirect investments.[29] What is important for the operation of presumptions, is that they leave open the possibility of different application of a primary rule, subject to convincing arguments to the contrary.[30] What these secondary rules do is establishing a presumption about the application of the primary rules, which defines the interpretive question for the final jurisdictional determination.

Default rules concretise primary rules, or even fill their gaps in the absence of a primary rule to the contrary. For example, some tribunals have been willing to give effect to umbrella clauses only subject to the condition of privity, ie that the contract whose protection is sought via an umbrella clause is concluded directly between the investor and the host State (to the exclusion of investors' and States' affiliates).[31] It is possible to imagine that a primary rule (an umbrella clause) provides otherwise,[32] but in the absence of such regulation, the default rule that is developed in the arbitral practice applies. On the other hand, sometimes primary rules require that investments must be compliant with domestic laws in order to be protected under BITs and gain access to international arbitration. But very often, such a requirement is lacking in the sphere of primary rules. Some tribunals were of the opinion that that requirement should be a default rule, ie that every investor seeking access to arbitration must assure that he observed local laws in establishing his investment.[33]

---

28 See Chapter 3, Section 4.B.

29 See Chapter 4, Section 3.B.

30 Cf Sourgens, 'By Equal Contest of Arms' (n 1) 947–9 (supporting the use of factual presumptions only, in the context of his thesis that jurisdictional determinations should not be governed by 'formal rules of law' derived from arbitral practice).

31 See, for example, *WNC Factoring Ltd (United Kingdom) v The Czech Republic*, PCA Case No 2014-34, Award (22 February 2017) paras 325–40. See further Chapter 5, Section 3.B.

32 Some umbrella clauses are worded very widely and refer to 'any obligation [a State] may have entered into with regard to investments', although as seen in Chapter 5, tribunals have been willing to read into such clauses the privity requirement. To broaden the scope of umbrella clauses, States could mention their and investors' affiliates explicitly too. Conversely, umbrella clauses can be limited to specific commitments between a host State and an investor; see Netherlands Model BIT (2018) art 9(5) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5695> accessed 19 April 2019.

33 See, for example, *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) paras 101–5. See further Chapter 5, Section 2.B.

Standards regulate the criteria to be applied in the implementation or qualification of the primary rules. The most important example is the objective definition of 'investment': inspired by the fact that Article 25(1) of the ICSID Convention limits the jurisdiction of arbitral tribunals under the ICSID's auspices to disputes 'arising directly out of an investment', but without defining the term 'investment', tribunals have tried to make such a definition, coming up with the famous *Salini* test.[34] Such attempts have not been limited to ICSID, and non-ICSID tribunals have thus not only supported the creation of a secondary standard, but also aimed to establish a default rule that requires an objective definition in the first place.[35] Furthermore, faced with the arguments of claimants that certain conditions precedent, such as local litigation requirements or the exhaustion of domestic remedies, need not be fulfilled, tribunals have analysed the futility exception and what it means to be 'futile', which indeed allows such a possibility under certain conditions.[36] Note that in such cases claimants do not argue the invalidity of the primary rule at stake: the futility exception is applied in its implementation.

On some occasions, primary rules require the development of secondary standards for establishing their positive application, ie that they have been complied with: the application of the fork-in-the-road clauses and local litigation requirements requires comparing the identity between international and local claims, and for that purpose arbitrators have developed special tests.[37] Sometimes standards are needed to qualify the primary rules in a way that could instruct their application. For example, one of the biggest confrontations between two streams of arbitral practice was the distinction between jurisdiction and admissibility,[38] which determines how conditions precedent, as primary rules, should be read and applied, and what finding a tribunal should make in the operative part of its award. However, qualifying conditions precedent or some aspects of the agreed procedure as jurisdictional or as issues of admissibility can also determine

---

34 See *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001) paras 50–8. See further Chapter 5, Section 2.A.i.

35 See, for example, *Romak SA (Switzerland) v The Republic of Uzbekistan,* PCA Case No AA280, Award (26 November 2009) paras 188–207. See further Chapter 5, Section 2.A.ii.

36 See, for example, *Ambiente Ufficio SpA and others v The Argentine Republic,* ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 597–611. See further Chapter 3, Section 3.A.i.

37 See, for example, *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014) paras 1256–72 ('triple identity' test: identity of the parties, cause of action, and object of the dispute). See further Chapter 3, Sections 3.A.iii and 3.B.

38 See generally Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005) 601; and Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 151–60 (for a particular view on the rules of *seisin*). See further, for the arbitral practice creating a qualifying standard, Chapter 3, Section 2.A.

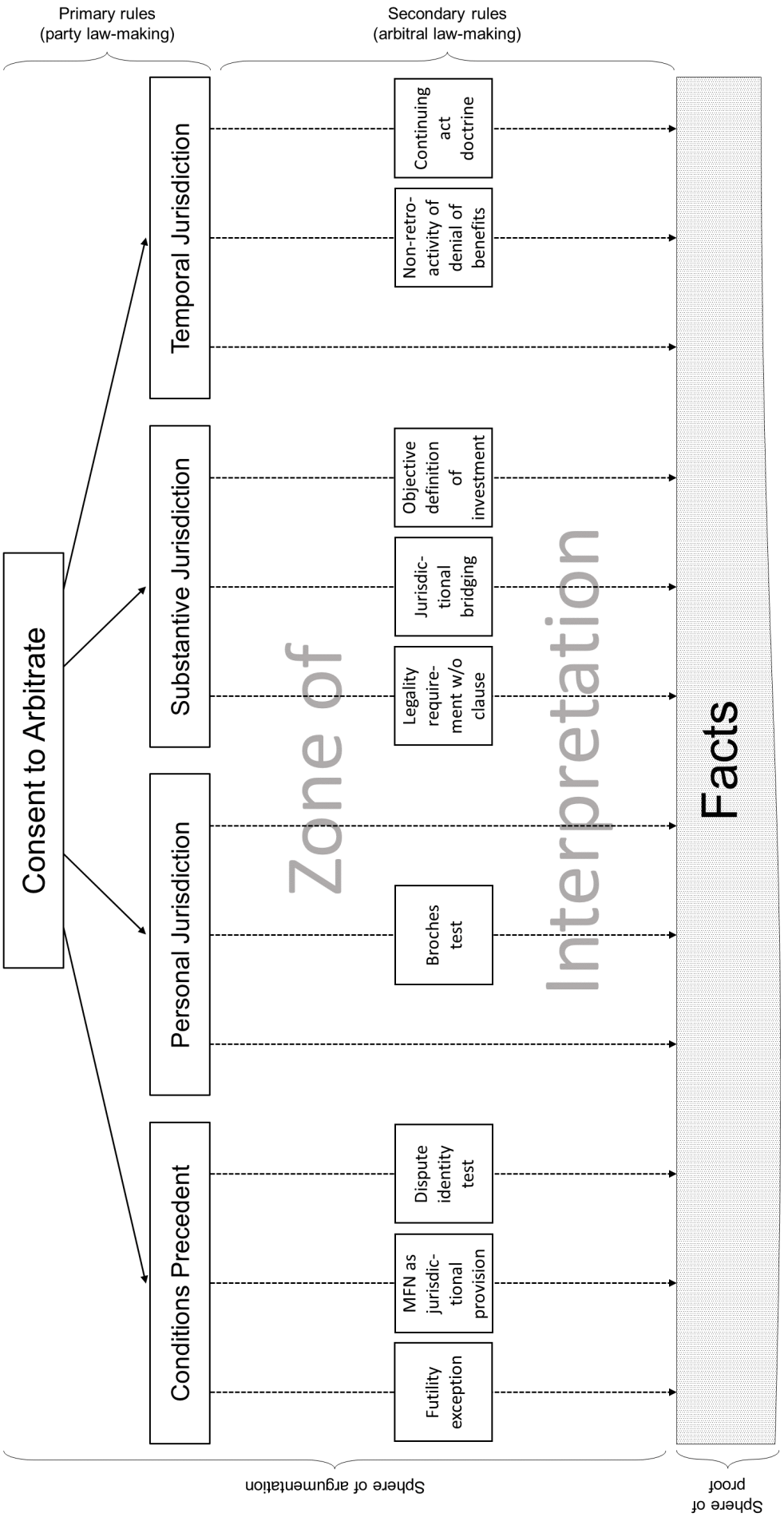
the rigidity of their command.[39] Standards, as described here, have also a default element: it is perfectly imaginable that they can be deviated from by a primary rule providing to the contrary in an investment treaty (and hence in an arbitration agreement).[40] What distinguishes standards from default rules is that the former do not regulate a jurisdictional command, but rather the conditions under which such a command should be implemented.

These are the three categories of secondary rules discussed here which are created for the purpose of the implementation of primary jurisdictional rules. It is obvious that secondary rules cannot regulate arbitral jurisdiction on their own. They cannot create the authority to adjudicate from scratch. Graph 3 presents a diagram of the relationship between primary and secondary jurisdictional rules, and of the process of application of the latter to the former. It shows that the basic power to adjudicate is still defined by virtue of party consent (which defines primary rules), which is only assisted by the arbitrator-made (secondary) jurisdictional rules. The latter are made and applied in the process of interpretation and application of primary jurisdictional rules. Yet, secondary rules cannot be regarded as usual components of interpretative processes, because they are injected as supplementary input aimed at assisting the process of interpretation and application of primary rules by defining precise interpretative questions. Furthermore, secondary jurisdictional rules are distinguishable from other factors, like facts, that might be relevant in an interpretive exercise, because they are subject to legal argumentation and not to proof in the classic meaning. In Frédéric Sourgens' words, secondary rules are governed by the 'jurisdictional

---

39 On the one hand, qualifying conditions precedent as procedural or as issues of admissibility could be seen as giving tribunals discretion to avoid their strict application. See, for example, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 100–2; and further Chapter 3, Section 2.B. On the other hand, qualifying the issues of applicable procedure as not concerning party consent can lead to the conclusion that the procedure can be adapted or changed by the tribunal. See *Abaclat and others v The Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) para 492; and further Chapter 3, Section 2.C.

40 For instance, tribunals which have established the futility exception to local litigation requirements have borrowed the standard of 'effective redress' from the law of diplomatic protection. See *Ambiente Ufficio SpA and others v Argentina* (n 36) para 608; and further Chapter 3, Section 3.A.i. A different standard can be suggested in the formalisation of the futility exception in investment treaties: India has thus advanced the standard of 'any relief', which would certainly raise the threshold of futility. See India Model BIT (2015) art 15.1 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560> accessed 19 April 2019.



Graph 3: The relationship between primary and secondary jurisdictional rules

proof' whose burden is not only on the parties, but on the tribunal as well.[41] Indeed, questions of secondary jurisdictional rules can be, and as I previously showed, in practice have been raised by tribunals on their own initiative. Graph 3 gives only few examples of such secondary rules which are injected into interpretative processes.

ii. *Practice as a Source of Law (or Rules)*

It is often said that formally practice of arbitral tribunals is not a source of law, but factually it does play such a role.[42] The 'law-making' of arbitral practice can be seen from two perspectives. The first one, which could be called *negative* or *indirect* law-making, and which is not relevant to this Chapter, reminds us that States, as treaty-makers, will draft treaty provisions in reaction to arbitral interpretations of the law.[43] This could be seen in Chapter 6, where I discussed some of the reactions of States in their treaty practices, reacting to the trends in arbitral practice on certain jurisdictional issues.[44] The second perspective on arbitral law-making, which could be dubbed *positive* or *direct*, observes the instances in which arbitral interpretations of the law produce new standards or rules, which are then given effect by direct application. This question is much more controversial. Indeed, arbitral tribunals are not given a mandate to legislate but to resolve disputes, while the principal legislators in the field are still States, through their treaty-making role.[45] That is probably the reason for a very cautious language which is used in discussions on this issue. Because tribunals clearly lack legal empowerment to create law, it is usually said that their rulings *de facto* achieve that effect.[46] A modest version of this argument

---

41 See Sourgens, 'By Equal Contest of Arms' (n 1) 923 sq. Sourgens starts from the ICJ's preponderance standard, and suggests that a tribunal can raise jurisdictional issues on its own initiative, but 'is not free to establish jurisdiction beyond the parties' submissions, but instead must "interact" with the parties to do so'; this of course does not mean that a tribunal is bound verbatim to such submissions: ibid 924–5.

42 See generally, in respect of general international law, Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 266–9, 293–300.

43 See Eric De Brabandere, 'Arbitral Decisions as a Source of International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill 2012) 282–6; and Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 14 JWIT 829, 843–7.

44 See Chapter 6, Section 4.

45 De Brabandere (n 43) 248.

46 ibid 249; Lucy Reed, 'The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management' (2010) 25 ICSID Rev-FILJ 95; August Reinisch, 'The Role of Precedent in ICSID Arbitration' in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2008* (Beck/Stämpfli/Manz 2008) 495; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arb Int'l 357, 361; Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 Fordham Int'l LJ 1014, 1030–1. Cf Zachary Douglas, 'Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?' (2010) 25 ICSID Rev-

claims that arbitrators create law through interpretation, by giving precise meaning to treaty provisions, arguably deviating from the intentions of the States concerned.[47] However, I wish to make a sharper argument: arbitrators make *independent* rules governing their jurisdiction. I acknowledge that such 'law-making' takes place within interpretive processes. However, instead of being their *products*, the secondary rules at hand are developed as *inputs* to interpretive exercises, and are meant to direct and assist interpretations of the primary rules.

This can be put in different terms. Every legal text requires interpretation before its actual application.[48] An interpreter can exercise more or less creativity, and many debates can be had over the question what it means to be 'creative' in the first place. I take such activities for fact; I do not challenge them. What I aim to identify are particular points in arbitral reasoning which become so much detached from the terms of the treaty (primary rules), constructed through analogies, derived from policy considerations, general knowledge, or even personal beliefs and values, that such points start to resemble—and to form—independent rules of law. In other words, I look for instances of independent supplementing action, as opposed to the considerations of the terms of the relevant primary rules.

The crucial question here is not 'whether arbitrators can create independent rules of law', but rather 'whether they already do so'. There is no doubt that investment tribunals extensively refer to the decisions of other tribunals on similar (or even identical) issues.[49] That phenomenon

---

FILJ 104, 105 (criticising the distinction between *de jure* and *de facto* precedents); Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Rev-FILJ 223, 229 ('I think that there is no rule of precedent either *de jure* or *de facto*'). For the difficulties in accommodating the use of arbitral precedent in the orthodox doctrine of sources of international law, see generally Patrick M Norton, 'The Role of Precedent in the Development of International Investment Law' (2018) 33 ICSID Rev-FILJ 280. The phenomenon of informal precedent is by no means limited to investment arbitration: Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5.

47 Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 1105–6; Titi (n 43) 833–8.

48 See generally Venzke (n 2) 1 sq; and Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed, OUP 2012) 68–9 (on the role of 'judicial reason' in international law).

49 See generally Jeffery P Commission, 'Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence' (2007) 24 J Int'l Arb 129; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL 301, 333–43; Schill, 'Sources' (n 47) 1103–6; Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2016) 92–6; Tai-Heng Cheng (n 46) 1030–44. See also Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking. On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 156 (identifying different modes of use of precedent in investment

has always attracted the attention of scholars, raising an important question: do arbitrators create law by virtue of their decisions, which is further applied in the subsequent practice? There are two approaches to qualifying arbitral law-making patterns. The first approach can be described as *standardisation* of law through arbitral practice. One opinion is that arbitral practice can produce some sort of international custom, or at least contribute to the determination of its content,[50] which can, in turn, be rebutted from both formalistic and substantive perspectives.[51] Besides that, standardisation can be achieved relying on the theory of *jurisprudence constante*, which suggests that a chain of consistent decisions becomes authoritative for other tribunals facing the same issues in the future.[52] The other approach to qualifying investment arbitral law-making patterns can be seen as *competition.* It has been suggested that international investment arbitration should be viewed as common law, which would encourage conflicting decisions dealing with the same concrete problem to compete with each other for the title of the most

arbitration). But see Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1191–5 (showing that when invoking previous cases, tribunals often rebut the applicability of a theory of binding precedent).

50 *International Thunderbird Gaming Corporation v The United Mexican States,* UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) para 16; Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Columbia J Transnat'l L 123, 129; Kaufmann-Kohler (n 46) 377; José E Alvarez, 'A BIT on Custom' (2009) 42 NYU J Int'l L & Pol 17, 45–8; W Michael Reisman, 'Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law' (2015) 30 ICSID Rev-FILJ 616, 622–3. See also Norton (n 46) 299–301 (on the possibility of investment arbitral practice to influence the development of customary law through an inductive process); Stephan W Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?' (2011) <https://www.biicl.org/files/5630_stephan_schill.pdf> accessed 15 July 2018 (on the arbitral precedent taking the function of the traditional customary law); and Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 42–54 (on the role of arbitrators in the formation and identification of custom in international law and investment arbitration).

51 Formally, custom is formed from *State* practice. Substantially, it is questionable to what extent arbitral practice can achieve the consistency and stability necessary for a custom. See Frédéric G Sourgens, 'Law's Laboratory: Developing International Law on Investment Protection as Common Law' (2014) 34 Northwestern J Int'l L & Business 181, 190–2; Frédéric Gilles Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill Nijhoff 2015) 256–63.

52 Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in Colin B Picker, Isabella D Bunn and Douglas W Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart 2008) 265.

persuasive (as opposed to binding) precedent.[53] Looking from this perspective, '[d]isagreement between tribunals […] is a sign of healthy development'.[54] Although investment tribunals at times invoke the first approach, and particularly the theory of *jurisprudence constante,*[55] I do share the opinion that the second—common law—approach has been factually the dominant one in the investment arbitral practice.[56] As seen in Chapters 3 to 5, tribunals indeed tend to create an atmosphere of competition among themselves. That situation should be changed.

Following the general international law view that judicial decisions are not formal but could be material sources of law,[57] investment tribunals often give precedential value to previous cases to form an input to their interpretive exercises. Generally, the question whether the theory of precedent is justified in investment arbitration is popular, but the overall attitude seems to be that such a theory is not really necessary in this field of dispute resolution.[58] What results from such an attitude is the idea of a 'persuasive precedent': decisions are 'precedential' because of their

---

53 Sourgens, 'Law's Laboratory' (n 51) 223–45.

54 ibid 245. See also generally Sourgens, *Common Law* (n 51).

55 For example, *Enron Creditors Recovery Corp and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) para 66 ('Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term there should develop a *jurisprudence constante* in relation to annulment proceedings.' [reference omitted]); and *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012) para 91 ('[the Tribunal] can find no justification either in the text of the German-Argentine BIT or in general international law to depart from the overwhelming *jurisprudence constante* that has emerged around this particular legal question').

56 See Sourgens, 'Law's Laboratory' (n 51) 228–31 (reaching the same conclusion, but for the reason that previous cases are used in defining the problem in question).

57 See Sir Gerald G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000) 72–7 (taking as settled that case-law is material source of law in every legal system, Fitzmaurice argued that arbitral and judicial decisions cannot be seen as 'no more than' material sources of international law, but that they in reality have a more direct effect).

58 Douglas, 'Precedent' (n 46) 110 (countering heavy reliances on previous decisions in general); Alvarez (n 50) 46 (dismissing the need for 'formal precedential value'); Sourgens, 'Law's Laboratory' (n 51) 234 (arguing that the common law approach to investment arbitration does not require qualifying arbitral decisions as formal sources of international law). But see Krzysztof J Pelc, 'The Welfare Implications of Precedent in International Law' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016) 173 (analysing States' tolerance towards the development of precedent in the field of international trade law).

persuasiveness, and not because of some rule of law awarding them such status.[59] As I will discuss when I turn to the practical application of the proposed model, I do not find such a criterion fully convincing. What matters here is the fact that arbitral decisions are widely followed as 'precedents' or in streams.[60] An important part of that usage, which I believe has been neglected, is the fact that these 'precedents' are often used as generalised premises, gaining the features of a norm, and which serve as inputs to interpretations of treaty provisions. The last observation is crucial for understanding the arbitral law-making role discussed here.

Why do I call the products of arbitral and judicial practices 'rules' or 'norms'? To answer this question, it is not necessary to analyse general qualities of such notions. A more fruitful path is to discuss the role played by the 'rules' at hand. First of all, they interact with the primary rules which empower investment tribunals to resolve disputes. As seen above, they coordinate and direct the application and interpretation of the party-established jurisdictional rules. Because the rules that empower individuals or bodies to adjudicate must be distinguished from those rules that determine rights and obligations,[61] the rules developed in judicial practices pertaining to the implementation of primary empowering rules must fall within that same class. In Hart's words, these are special 'rules of adjudication', which determine judicial powers to rule on breaches of rights and obligations.[62] It is not hard to observe this point in practice: when a tribunal says that the applicability of MFN clauses to jurisdictional clauses, the protection of indirect investments, or the permissibility of jurisdictional bridging, must be presumed, it essentially says that its authority to adjudicate, in certain scenarios, must be presumed. That presumption directs the further work on treaty interpretation, aimed to determine the precise scope of jurisdiction before moving to the merits, as a usual judicial task inherent to decision-making. Therefore, tribunals do not merely make jurisdictional determinations, but rather supplement the rules of adjudication, ie the rules that empower them to decide investment disputes.

Second, previous decisions are used in subsequent cases in a process of deduction, instead of induction. It has been argued that the main benefit of the reliance on previously decided cases in subsequent practice is the definition, or filtering, of the relevant questions to be answered.[63]

---

59 Sourgens, 'Law's Laboratory' (n 51) 239–46. But see RY Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 Int'l & Comp LQ 1, 6–12 (discussing the grey zone between precedent and *res judicata*).

60 See n 49 above. After many repetitions, tribunals do not feel obliged to refer to specific precedents; see *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29, Award (22 October 2018) para 271 ('*It is well established in arbitral law* that the "origin of funds" issue is not a valid objection.' [emphasis added]).

61 HLA Hart, *The Concept of Law* (3rd ed, OUP 2012) 96–7.

62 ibid.

63 Sourgens, 'Law's Laboratory' (n 51) 209–15. This suggestion largely motivates Sourgens' proposal that investment arbitration should be seen as common law, as an 'inductive paradigm' as opposed to

By discussing previous cases which are usually submitted by the parties, tribunals narrow down possible interpretations and choices, forming the precise questions before themselves and the factors to be weighed in their assessment.[64] That is certainly the case from the point of view of the parties and their counsel, especially throughout the conduct of cases.[65] However, I believe that the benefit is overstated. Chapters 3 to 5 reveal that tribunals rather use previous decisions in support of the rules or principles to be applied as inputs to treaty interpretations.[66] To use an already mentioned example: tribunals do not rely on previous cases to conclude that possible interpretations of MFN clauses offer two solutions—in favour of or against their applicability to dispute resolution clauses. That choice is implicit in the initial arguments of the parties. Instead, tribunals invoke previous cases dealing with the same issue to inquire whether such applicability should be presumed or not. That is the abstract nature of arbitral practice that implies top-down direction of its application. That is why its reasonings form rules.

What is the source of their normativity? Why should these rules be considered binding? As in Chapter 1, I call Kelsen for help here, who argues that the validity of a norm is always derived from a higher norm.[67] The higher norm in question is the empowerment to settle disputes, which is a power to create individual norms. More precisely, I refer to the power of a tribunal to resolve jurisdictional questions, ie to make a final and binding determination about the limits of its own jurisdiction.[68] Now, it could be said that the general norm-creating function of investment tribunals appears as a 'free rider' in the execution of its individual norm-creation empowerment. Free riding is possible, because general norms find their expression in the creation of individual

---

the 'deductive paradigm' of the civil law tradition: ibid 224–31. See also Sourgens, *Common Law* (n 51) 286–305.

64 *Brandes Investment Partners LP v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Award (2 August 2011) para 31 ('[… the Tribunal is not precluded] from considering the substance of decisions rendered by other arbitral tribunals, and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided at this stage of the proceeding'); *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V079/2005, Final Award (12 September 2010) paras 276–8 (the analysed decisions on the meaning of denial of justice were submitted by the parties).

65 See particularly Sourgens, 'Law's Laboratory' (n 51) 209–15.

66 It should be highlighted, however, that the use of such rules and principles is often incorporated into narratives on treaty interpretation and the originality of tribunals' decisions.

67 Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 110 sq. See also, for Kelsen's tracing of the basic norm of international law, Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 417–8. In contrast, another suggested route, which is not endorsed in this thesis, does not seek to validate arbitrator-created rules by observing any particular legal order like international law and its sources, but looks at these rules as possessing 'intrinsic legality' within the arbitration community and a special arbitral legal system: Bentolila (n 3) 242–53.

68 See Chapter 2, Section 4.C.ii.

norms. General norms are—to use a sharp language for the sake of the argument—meaningless. To be truly binding, they must be individualised. Just as a prohibition of expropriation contained in a BIT becomes truly binding by an arbitral finding of its violation and an order of compensation as a remedy, an arbitral-made rule that, for example, the application of an MFN clause to a dispute resolution clause should be presumed, becomes truly binding by an arbitral finding of jurisdiction in a particular case. Precisely this trajectory of normativity, which has perhaps a non-positivist sound, but is essentially reflected in Kelsen's claim that creation of one norm is application of another,[69] makes room for arbitral law-making, when such an activity appears necessary.[70]

I am aware that this argument could encounter resistance from the proponents of 'hard' positivism in international law, with the objection that arbitrators are not empowered to create law and that that should be the end of the matter. But the truth is that international law does not give substance to such strong claims. If international law has never truly developed proper 'rules of recognition',[71] which is evidenced in the never-ending discussions on the sources of international law[72] and the always current issues of the judicial roles in law-making,[73] free riding in relation to the arbitral power to create individual norms (ie the decision-making power), which I suggest here, should not be disqualified by formalist arguments of the division between law-making and law-application. Furthermore, this feature of the framework of international law

---

69 Kelsen, *Principles* (n 67) 303–4. Kelsen makes this claim precisely by rebutting the assumption that tribunals cannot have any law-creating, but only law-applying function.

70 Because the power to adjudicate is conferred on arbitral tribunals by virtue of what I call here primary jurisdictional rules, such primary rules will always be superior to the secondary, arbitrator-made rules, and will prevail in a case of conflict.

71 Hart (n 61) 214.

72 See generally Fitzmaurice, 'Some Problems' (n 57) 57; Sir Robert Y Jennings, 'What Is International Law and How Do We Tell It When We See It?', *The Cambridge-Tilburg Law Lectures: Third Series 1980* (Kluwer 1983) 1; and Hugh Thirlway, *The Sources of International Law* (OUP 2014) ch 1.

73 There has been an attempt to accommodate judicial law-making even within the framework of Article 38(1)(d) of the ICJ Statute, to an extent also relying on the above-suggested trajectory between general norms and their individualisation in judicial decisions: see Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 1996) 76–83 (distinguishing previous decisions that are used as subsidiary sources in the determination of the law, from new decisions which give effect to the law determined relying on such earlier decisions, but in effect amount to new rules created by the Court itself). For judicial law-making in international law, see generally Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012). See also, on the judicial role in giving normative value to informal and arguably non-binding instruments, Jan Klabbers, 'International Courts and Informal International Law' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 219.

provides a fertile soil for an increased mixture of Hart's 'rules of recognition' and 'rules of adjudication', whose inherent overlap has been recognised from the beginning.[74]

iii. *Practical Application and the Doctrine of Evolutionary Jurisdictional Regulation*

So far, arbitral and judicial practice has insisted on the individualisation of every jurisdictional clause.[75] Because arbitration is *ad hoc*, this insistence seems justified. Indeed, tribunals often emphasise their power to deviate from previous arbitral practice.[76] However, it seems that this tendency has rather been prompted by the fear of being seen to neglect the main mandate to settle the dispute.[77] Arbitrators and judges, facing jurisdictional questions, should not be afraid to generalise such questions, and to engage in arbitration-overreaching and global discussions on the meaning and application of different parts of investment treaties.

---

74 Because adjudicators recognise the substance of the law by enforcing it. This is precisely the trajectory of normativity addressed above. Hart (n 61) 97.

75 See, for example, *AES Corporation v The Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) paras 24–5.

76 ibid para 30 ('Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest;').

77 For example, *Romak SA v Uzbekistan* (n 35) para 171 ('Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general. It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law.'); *Gas Natural SDG SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) para 36 ('The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.'); *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) para 80 ('There has been much argument regarding recent cases, notably *SGS v. Pakistan* and *SGS v. Philippines*. However, this Tribunal is not called upon to sit in judgment on the views of other tribunals. It is only called to decide this dispute in the light of its specific facts and the law, beginning with the jurisdictional objections.').

It is a commonplace that jurisdictional clauses and other parts of investment treaties include standardised parts and sub-clauses, often based on a model,[78] such as the requirements of local litigation, exhaustion of local remedies, amicable settlement and prior negotiation, MFN and umbrella clauses and so on. They use modelled phrases defining arbitrable disputes, such as 'all disputes' or 'disputes concerning the amount of compensation for expropriation'. These clauses, however, may include different details, and of course, due regard to specificities of different texts must be given.[79] But what is actually standardised and modelled in these clauses is their essence—the role played by each of them:[80] local litigation clauses require investors to first resort to domestic courts; exhaustion of local remedies clauses require the complete use of all the domestically available remedies by investors; prior negotiation clauses require negotiating with the host State for some time before initiating arbitration and so on. What triggers the discussion among tribunals on the application of all of these clauses, and consequently creates their consistent or conflicting, but in any case interacting, practice, is exactly the essence of each of these clauses. The narratives on the individualisation of jurisdictional clauses and questions, are rather a mask for a more complex process: the invocation by arbitral tribunals of previous decisions interpreting *other* but *similar* jurisdictional clauses or issues to prove a point seems completely reasonable in this context, and indeed is often done in practice.[81]

This brings me to the central question of my argument: which approaches or previous cases should be followed? What decisions evidence the law? As mentioned above, both theory and practice say that the only standard for gaining the precedential status of a decision is the one of persuasiveness.[82] Putting the theory on one side, that has indeed been the practice of arbitral tribunals: previous decisions are often being compared, and some of them given precedence because of their 'persuasiveness'. That practice, however, is unconvincing, because it essentially amounts to cherry-picking. As demonstrated in Chapters 3 to 5, investment tribunals have often formed opposing streams of practice, criticising one another, and supporting previous cases which affirm the targeted interpretive outcome. The standard of 'persuasiveness' is nothing else but a gateway for arbitrators to freely choose previous decisions supporting their view of the rule to be applied. Since we are in the sphere of rules, which affect interpretations of jurisdictional provisions, such a choice is inappropriate: an arbitrator does not simply choose between two,

---

78 Vadi (n 49) 92–3 (noting that this phenomenon 'facilitates borrowing' arbitral reasonings from other tribunals).

79 James Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008) 100–1.

80 Authors have argued that such similarities, along with other factors, result in a 'treaty-overarching regime for international investment relations'. Schill, 'System-Building' (n 49) 154.

81 See n 49 above.

82 See n 59 above and the accompanying text.

more or less convincing, interpretations of the same or similarly worded jurisdictional provisions, but which legal standard should be employed as an independent input.

That is why the standard for reliance on previous cases must be objectivised. If international law-making indeed can be seen as a much broader, communicative process, than usually thought in a formalistic sense (and I will come back to this shortly, when discussing arbitral impulses for legal change),[83] there is no justification to isolate certain cases and opinions, simply because they are 'persuasive' to a two-member majority. There is equally no justification for forming streams of practice, disqualifying the 'others' on similar grounds. Arbitral tribunals should consider all, including opposing, considerations on the rule to be applied. Most importantly, they should take into account these voices as part of the *evolution* of the jurisdictional framework of investment treaty arbitration and its rules. In this evaluation, arbitrators must be led by the essence of both the primary rules at stake and the secondary rules applied by other tribunals, and not by ultimate interpretive outcomes.[84] Certainly, whether the application of a secondary rule is persuasive is an important question, which should be asked in every case. But if the majority of voices considers, or at least if a dominant opinion is, that Rule 1 should be preferred over Rule 2, there is not much justification to opt for Rule 2.[85] In other words, there is no room for the 'sovereignty' of arbitral tribunals granting them a free choice as to which rule should be applied.[86]

---

83 W Michael Reisman, 'International Lawmaking: A Process of Communication' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000) 501.

84 Tribunals seem to make a cardinal mistake when analysing the existence of a *jurisprudence constante*, because they often observe interpretive outcomes only, which inevitably leads to the conclusion that the existing practice is not consistent. See *European American Investment Bank AG (Austria) v The Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012) paras 436–7.

85 See in this respect *Cargill Incorporated v Poland* (n 9) para 224; *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67; *Noble Energy Inc and Machalapower Cia Ltda v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 March 2008) para 50; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 117; and *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010) para 100. These Tribunals made practically the same statement, with insignificant variations in the wording: 'It [the Tribunal] believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.' (reference omitted). It is only worth noting that the *Duke* Tribunal stated that 'it has a duty to consider' (instead of 'adopt') established solutions. It appears that these are not the only tribunals which have made this same statement.

86 Cf *AES Corporation v Argentina* (n 75) para 30.

I will call this the *evolutionary jurisdictional regulation.* Such an approach in arbitral and judicial decision-making must be taken as a doctrine, and not a rule of law. This is a consequence of a very broad problem. It is often said that there is no rule of binding precedent in international law, which combined with the *ad hoc* nature of international arbitration disqualifies any form of arbitral law-making.[87] The actual problem preventing binding precedents in international law is not the lack of a rule of precedent, but that such a rule is not possible at all, simply because there is no framework regulation capable of regulating international courts and tribunals horizontally. That is why I argue in favour of a doctrine in the reliance on previous decisions. Such a doctrine is not a doctrine of sources of law; it is a doctrine of arbitral and judicial reasoning and method of searching for the law. After all, decisions are not the law. But their reasoning can be. Tracing the evolution of rules of law throughout arbitral and judicial reasoning should not be prevented by formalistic rationales either. For example, the precedential nature of arbitral decisions is often disqualified on the grounds that awards are binding between the disputing parties only and cannot be binding generally on other States.[88] That issue is irrelevant here: what is at stake are procedural norms, or rules of adjudication, which do not make obligations. Moreover, in this context they do not even confer the basic power (or obligation, if one prefers that qualification) to adjudicate, but only assist the implementation of such power once it has been granted explicitly.

This approach seems appropriate. It is well established in international law, and indeed international courts and tribunals often state, that 'like cases should be decided alike', unless there are strong reasons for deviation.[89] The ICJ often holds that 'it will not depart from its settled jurisprudence unless it finds very particular reasons to do so',[90] and that the question that should be asked is whether in a particular case 'there is cause not to follow the reasoning and conclusions of earlier cases'.[91] The crucial pillar in the understanding of such a harmonising or unifying task of tribunals is the settled or consistent case law, also called *jurisprudence constante*.[92] There is

---

87 De Brabandere (n 43) 253–7; Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration. Judicialization, Governance, Legitimacy* (OUP 2017) 132–3.

88 De Brabandere (n 43) 253–4; Schreuer and Weiniger (n 49) 1190.

89 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19, and *AWG Group v The Argentine Republic*, UNCITRAL arbitration, Decision on Liability (30 July 2010) para 189; *Daimler Financial Services AG v Argentina* (n 55) para 52.

90 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) (2008) ICJ Rep 412, para 53.

91 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Preliminary Objections) (1998) ICJ Rep 275, para 28.

92 *Suez and AWG v Argentina* (n 89) para 189 ('a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues […;] a tribunal should always consider heavily solutions established in a series of consistent cases'); *Daimler Financial Services AG v*

nothing new in this: it is well established that previous cases can be used to find the law,[93] which is after all the main rationale for the inclusion of 'judicial decisions' in Article 38(1) of the Statute of the PCIJ/ICJ. The question is what is the effect of previous decisions in particular cases. It has been rightly noted that they 'shift[] the burden of argumentation by demanding a reasoned justification for departing from established precedent', and 'the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes for parties and tribunals to meet that burden and to deviate from prior practice'.[94] The 'like cases', I suggest, to be observed in the implementation of this reasoning, are not the specificities of the text of the applicable treaty, but the essence of each jurisdictional primary rule. One essentially the same primary rule should be accompanied by the same secondary rule. The specificities of the text in the primary rules should be consulted in the second place, if its language instructs deviation from an arbitrator-made secondary jurisdictional rule. And if such deviation is indeed instructed, the secondary rule must give way to the supremacy of the text of the primary rules.

It remains to be asked whether such a use of arbitrator-made jurisdictional rules relying on the evolutionary jurisdictional regulation is disturbed by the duty of tribunals to reach their own conclusions on the law, its interpretation and application in each and every case.[95] Implicitly, this argument holds that a tribunal cannot decide in one direction because previous case law instructs it to do so, with the possibility that the tribunal itself does not necessarily agree with that direction. But this argument is based on a fundamentally wrong premise. The tribunal is faced with a much simpler choice: it either agrees or it does not agree with the previously developed (evolved) law. If it does not agree, that should form an 'impulse to legislate' (to which I will

---

Argentina (n 55) para 52 ('This latter consideration [whether cases should be distinguished] will weigh more or less heavily depending upon: a) how "like" the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear *jurisprudence constante* has emerged in respect of a particular legal issue; and c) the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning.').

93 See Shahabuddeen (n 73) 9–12 (identifying three ways of using precedents: 'such a system may authorise the judge to consider previous decisions as part of the general legal material from which the law may be ascertained; or, it may oblige him to decide the case in the same way as a previous case unless he can give a good reason for not doing so; or, still yet, it may oblige him to decide it in the same way as the previous case even if he can give a good reason for not doing so'; it seems clear, in the context of the ICJ at least, that the first two approaches are prevalent in international law).

94 Schill, 'Sources' (n 47) 1104–5.

95 Cf the statement made by a number of tribunals in n 85 above with *Burlington Resources Inc v Ecuador* (Jurisdiction) (n 85) para 100 ('Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.'). In a similar direction, Eric De Brabandere suggests that a reliance on previous decisions can be made only as a result of an independent assessment by tribunals: De Brabandere (n 43) 286.

come back shortly). For that action, however, the tribunal needs to have well-substantiated reasons. In fact, this is an opportunity to verify whether the tribunal is serious in its doubts about the previous practice (and thus created secondary rules), or creates disagreements for the sake of self-promotion and intellectual gymnastics. Besides, arguments about the arbitral duty to reach an independent conclusion on the interpretation and application of the law idealize the image of an arbitrator as an independent, uninfluenced, and almost isolated decision-maker, which is hardly imaginable in practice.[96]

In conclusion, tribunals should continue their practice of inquiring into previous decisions as sources of inspiration for the establishment of rules of law, as it has been a long-lasting practice of the international judiciary in general. However, in that inquiry, they should regard such cases as evidence of an evolutionary jurisdictional regulation, which shows the state of development of the secondary jurisdictional rules. Persuasiveness should not be the sole criterion for the use of previous cases, unless tribunals have strong reasons to argue that previously made conclusions about the current state of the secondary rules are not correct. Tribunals should not be afraid to state what the law is. They are not called to mediate but to adjudicate.

§ 7.03. Some Challenges of the Proposed Model

The above-sketched two-layered model of jurisdictional regulation of investment arbitration raises some important questions. Is the proposed system flexible enough to allow a dynamic development of secondary jurisdictional rules (A), and if so would it be problematic in relation to the questions of application of treaties (B)? How can the compliance with the proposed system be secured (C)? Is the proposed model indeed possible due to the fact that there is still a number of confidential arbitrations and decisions (D)? Finally, would the proposed model facilitate arbitral excessiveness or 'adventurism' in jurisdictional determinations, and is there a prospect of forming a uniform system of jurisdictional rules (E)? These questions are now addressed.

---

96 See Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia J Transnat'l L 418, 459 ('Presumably, the parties to an arbitration wish to have their dispute decided by the arbitrators they selected, not—albeit indirectly—by tribunals that were appointed in the past by other parties. In this setting, there are compelling reasons to place a strong value on the independent judgment of the tribunal appointed pursuant to the parties' agreement, as opposed to the collective wisdom of tribunals that have decided similar disputes in the past.'). However, even Ten Cate notes the impossibility of arbitral isolation in decision-making: ibid 472 ('By submitting that arbitrators should not be constrained by earlier awards, I don't argue that arbitrators should decide in a vacuum, nor do I argue that they should not familiarize themselves with relevant awards and decisions. […] In addition to pointing tribunals to the rules of law, the reasoning in earlier awards may be so compelling that a tribunal becomes convinced that it represents an accurate interpretation and application of the law.').

A. The Development of Secondary Rules and an 'Impulse for Change'

Is the proposed model flexible enough to allow a dynamic development of the law? Questions of legal change have always troubled international law in general.[97] The need for such changes has been admitted early in international adjudication, which is reflected in the way international courts and tribunals deal with their established practices. Mohamed Shahabuddeen has noted that the ICJ will 'follow them [precedents] unless they can be distinguished on valid grounds or shown to be clearly wrong, or, possibly, where they no longer meet the new conditions of the evolving international community'.[98] The needs of the international community therefore change, but also one should not exclude the possibility that a previously established legal rule is simply wrong. However, international courts and tribunals have preferred distinguishing cases over admitting a change in the law or interpretation.[99] That attitude has not been absent in investment arbitration either.[100] International courts and tribunals, including investment arbitrators, appear rather reluctant to admit legal change in its true meaning.

Yet, to make the proposed model work, it is necessary to allow legal change. This is required by the mere idea of formalising the regulatory role of arbitral tribunals.[101] To allow legal change requires in turn admitting that circumstances and/or needs have changed,[102] or that a previously established rule is clearly wrong.[103] These could be achieved under few conditions: first, that

---

97 See, among many others, Sir Hersch Lauterpacht, *The Function of Law in the International Community* (reprint, OUP 2011) 253–67; and Arthur N Holcombe, 'The Improvement of the International Law-Making Process' (1961) 37 Notre Dame L Rev 16, 17–8.

98 Shahabuddeen (n 73) 12.

99 For the ICJ, see ibid 110–1. It is believed that in doing so international courts improve the coherence of their practices.

100 See, for example, in the context of the MFN-dispute resolution conjunction: *National Grid plc v The Argentine Republic*, UNCITRAL arbitration, Decision on Jurisdiction (20 June 2006) para 91; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006) para 63; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19, and *AWG Group Ltd v The Argentine Republic*, UNCITRAL arbitration, Decision on Jurisdiction (3 August 2006) para 65. See also Pellet (n 46) 229–40.

101 For the 'normative effects' of acts as creating, amending or cancelling rules of international law, see Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 38.

102 For example, States' drafts of new treaties and various other voices in the investment law community can signal to arbitrators their policies and views on the acceptability of certain rules in the functioning of the investment arbitration system. Such signals will form part of a dialogue and a communicative process with arbitrators on the proper secondary jurisdictional rules. See Chapter 6, Section 4.D.

103 Cf the argument that the possibility that some rules of investment law have been set wrongly, could imply that their inconsistent application would do less harm: Thomas Schultz, 'Against Consistency

arbitrators observe a broader range of circumstances than that of the particular case before them; second, that prior practice and other voices are observed in terms of dominant or prevailing views, especially in a temporal dimension as trends; and third, that tribunals become willing to express the inadequacy of a previously developed secondary rule, either in its essence, or because of changed circumstances and/or needs.

The question about the possibility of legal change, therefore, is not the one of the firmness of the established practice. It rather comes down to what is required for a departure. In my view, the only necessary element in a departure from a previously established practice (and therefore secondary rule) is an advanced arbitral reasoning. It is already well recognised in arbitral practice that a departure from a trend should be well justified and reasoned.[104] No more is required for the proposed model. An advanced reasoning in this context assumes listening to more voices than disputing parties, within a broader discourse than a concrete dispute.[105] For quite a while already, international lawyers discuss the material aspects of international law-making: that law-making is not only a formal adoption of a treaty or expression of an opinion that something is a custom (both by States exclusively), but that law-making is a broader process which includes all the actors which can and do influence what the law should be.[106] There is no better opportunity to give effect to this view than the proposed model. Indeed, law-making in international law is a communicative process, in which tribunals do not communicate to the disputing parties only, but to a much bigger audience (and also *vice versa*), and in which their communications form part of

---

in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297.

104 See in that respect *Glamis Gold Ltd v USA* (n 25) para 8 ('regardless of whether the particular line of reasoning was argued to the tribunal, it is our view that the tribunal should indicate its reasons for departing from a major trend of previous reasoning'); *International Thunderbird Gaming Corporation v Mexico* (Wälde Separate Opinion) (n 50) para 16 ('A deviation from well and firmly established jurisprudence requires an extensively reasoned justification.') and ibid para 129 ('Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not "confronting" established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence.'); and the statement adopted by a number of tribunals in n 85.

105 See Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 31 (identifying three problems in reasoning of investment tribunals: misuse of precedent, internal inconsistency, and minimalism); Guillermo Aguilar Alvarez and W Michael Reisman, 'How Well Are Investment Awards Reasoned?' in Guillermo Aguilar Alvarez and W Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Martinus Nijhoff 2008) 29 (arguing that because of far-reaching effects of investment awards, the reasons requirement could be higher than in commercial arbitration).

106 See generally Boyle and Chinkin (n 42) ch 2; and for a comment Arnold N Pronto, 'Some Thoughts on the Making of International Law' (2008) 19 EJIL 601.

a broader regulatory discourse or 'functional' law-making.[107] It is reasonable therefore to expect arbitrators to listen to previous tribunals, academics, civil society and other relevant actors expressing views about jurisdictional questions, and in return to write their decisions not only for the satisfaction of the disputing parties, but also as a functional part of a broader discourse about the jurisdictional framework of investment arbitration. Of course, it must be borne in mind that arbitral communication with the investment law community is qualified: it is authoritative and at the same time it enforces the rules created in the practice.[108]

Only when listening to such various voices, can a tribunal find its 'impulse for change'.[109] A presumption could change,[110] a default rule could disappear or a new one could emerge,[111] and a standard could be modified.[112] What is required when it comes to these changes is that a tribunal should properly justify and reason the existence of an impulse to legislate: what circumstances

---

107 See generally Reisman, 'International Lawmaking' (n 83); and particularly ibid 503.

108 McDougal and Reisman have argued that international law-making (or prescription, as they maintain) includes communicating to the targeted audience and creating their corresponding expectations in respect of three elements: policy content, authority signal, and control intention. Arbitral jurisdictional determinations meet fully these criteria. Besides stating the content of the secondary rules which assist the application of primary jurisdictional rules, arbitral tribunals do so with a direct and explicit authority towards disputing parties, being empowered to settle jurisdictional questions, and indirectly and symbolically towards the investment law community. Furthermore, arbitral tribunals communicate with disputing parties and the rest of the investment law community by giving effect to the secondary jurisdictional rules, thus not only signalling, but actually exercising the control intention. See Myres S McDougal and W Michael Reisman, 'The Prescribing Function in World Constitutive Process: How International Law Is Made' (1980) 6 Yale Studies in World Public Order 249, 250.

109 The ICJ also looks for a 'cause not to follow the reasoning and conclusions of earlier cases'. *Land and Maritime Boundary between Cameroon and Nigeria* (n 91) para 28. What I call here an 'impulse for change' plays the same role: it is the principal cause for departing from previously established rules and practices.

110 Arguably, after the initial impetus towards a wide acceptance of the applicability of MFN clauses to dispute settlement clauses, the development of arbitral practice has reversed that presumption. See Chapter 3, Section 4.B.

111 See, for example, *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) para 157 ('In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.'). Further on the development of the legality requirement, see Chapter 5, Section 2.B.

112 For the emergence and subsequent modification of the *Salini* criteria in the objective definition of 'investment', see Chapter 5, Section 2.A.i.

have changed from those surrounding a previously established rule or trend? Or what discovery has been made implying the wrongfulness of such previous rule or trend? These are the minimum expectations from a tribunal that diverts from the established practice, trends, and rules. So far, tribunals have been able to change what in reality represents true jurisdictional rules, often with a cardinal effect on the success of investment claims, without fulfilling their duty to give proper justifications and full reasons for such departures.[113]

Indeed, if the difference between creating and determining law is only in the degree, and not in the kind,[114] an 'impulse for change' would require a proportionally higher degree of arbitral diligence than the tendency to follow the existing law. A diligent arbitral approach would firstly find a convincing 'impulse for change', as opposed to minor disagreements with previous trends or reasons of personal promotion, and secondly, draft a well-reasoned jurisdictional decision that can convince the investment law community that a rule has indeed been changed for convincing reasons, and as such should be followed in subsequent cases. This would furthermore reinforce the tribunals' law-making role, because it is the audience (ie disputing parties and the investment law community) who gives tribunals the authority to make rules.[115] Finally, because the reaffirmation of the existing rules is crucial for their survival, the cessation of the enforcement of a rule would make space for the accommodation of a new one resulting from a legal change.[116]

B. The Relationship Between Primary and Secondary Rules Regarding Legal Change

It can be objected that the proposed model of two-layered jurisdictional regulation would have a drastic impact on investment treaties: any legal change in the domain of secondary jurisdictional rules would effectively change the way investment treaties are applied, contrary to the principle of legal certainty and possibly against the intentions of their parties. For example, a presumption could emerge reversing the way treaty provisions were interpreted before that event. This is

---

113 See, for example, *H&H Enterprises Investments Inc v The Arab Republic of Egypt,* ICSID Case No ARB/09/15, Award (6 May 2014) paras 363–70 (in the context of a fork-in-the-road clause, rejecting the 'triple identity' test and adopting the 'fundamental basis of the claim' test, without examining the suitability, advantages or possible shortcomings of the latter).

114 RY Jennings, 'General Course on Principles of International Law' (1967) 121 Recueil des Cours 323, 341.

115 Reisman, 'International Lawmaking' (n 83) 506 ('It is the audience, whether or not its members realize it, that endows the prescriber with the authority that renders his communications prescription.'). See also, for the link between judicial decision-making and audiences, Ingo Venzke, 'Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016) 240.

116 Reisman, 'International Lawmaking' (n 83) 507 ('the communication of control intention must be continuous throughout the life of the prescription').

basically an argument in defence of treaties as static instruments that preserve the original intentions of States parties, in contrast to the dynamic layer of secondary jurisdictional rules.

My first observation is that radical legal changes should not be expected to occur easily and often. They should be exceptional and rare. But when they do happen, the real problem is not the change in the application of the treaty caused by a secondary rule, but the fact that the treaty itself did not address a new jurisdictional question. In such a situation, it is questionable whether there has been any change in the application of the treaty in the first place. For example, if arbitrators have created a presumption in favour of the applicability of MFN clauses to dispute resolution, that development did not come out of nowhere, but from the fact that tribunals faced a new jurisdictional question which has never been addressed and which was not regulated in treaties.[117] And if that presumption was later reversed, that development took a very long time, observing many voices and considerations, and eventually settling at a position that could hardly be said to go against the wishes of States as treaty drafters and respondents.[118]

When it comes to more subtle and modest changes, they are more probable, as can be seen from the existing practice. For example, the standard of the objective definition of 'investment' has been advanced and enforced in many variations,[119] as were the standards of futility[120] and identity of claims.[121] One can be more or less satisfied with the justifications given for each of these variations, but what is certain is that they do not cause earthquakes in the world of investment arbitration. Instead, such variations are subject to detailed academic analyses, which often accept them as different but correct and acceptable approaches to treaty application. Within

---

117 See Chapter 3, Section 4.B.i.

118 See Chapter 3, Section 4.B.ii-C.

119 Cf, for example, *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 320 (two criteria); with *Phoenix Action Ltd v Czechia* (n 33) para 114 (six criteria). See further Chapter 5, Section 2.A.i.

120 Cf, for example, *Ambiente Ufficio SpA and others v Argentina* (n 36) para 608 ('no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress'); with *Urbaser SA and CABB v The Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) para 131 ('the opportunity to reach a suitable remedy is provided in efficient terms', 'the threshold above the floor requirement of avoiding "futility or otherwise"'). See further Chapter 3, Section 3.A.i.

121 Cf, in the context of fork-in-the-road clauses, *Hulley Enterprises Limited (Cyprus) v Russia* (n 37) paras 1256–72 ('triple identity' test); with *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) para 80 (different parties and causes of action); *H&H Enterprises Investments Inc v Egypt* (n 113) para 370; and *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) paras 61–7 (the latter two regarding 'fundamental basis of a claim'). See further Chapter 3, Section 3.B.

the layer of secondary rules, these variations can be envisaged as subsequent changes, instead of co-existing alternatives that cause uncertainty.

Two further arguments are particularly worth mentioning in this context. The first one is the inapplicability of the principle of contemporaneity to the jurisdictional questions addressed by secondary rules. This principle, which instructs an interpreter to observe the meaning of treaty terms, circumstances, and rules of international law as existing at the time of the conclusion of the treaty, is generally important.[122] However, the principle is simply meaningless in the context of secondary jurisdictional rules, because the reasons for their existence are, firstly, the novelty of raised questions, and secondly, the failure of treaty clauses to answer them through simple interpretation.[123] Applying that principle to jurisdictional clauses would also open possibilities to States to easily manipulate the opportunities of investors to rely on treaty clauses by subsequently changing their domestic legal environments.[124] Finally, from an extreme technical perspective,

---

122 *Rights of Nationals of the United States of America in Morocco (France v United States of America)* (Judgment) (1952) ICJ Rep 176, 189; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 British Yrbk Int'l L 1, 5–6; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yrbk Int'l L 203, 212. But see Epaminontas E Triantafilou, 'Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties' (2017) 32 ICSID Rev-FILJ 138, 139–51 (challenging the concept of this principle as previously defined, by distinguishing questions of interpretation and application of treaties, and disputing the principle's link to the concept of inter-temporal law).

123 When used in this context, the principle of contemporaneity often leads to mere restatements of the initial interpretive question. See *Daimler Financial Services AG v Argentina* (n 55) paras 220–1; *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina,* PCA Case No 2010-9, Decision on Jurisdiction (10 February 2012) paras 289–90 (both Tribunals, facing a failure of the parties to submit any evidence of the intentions of the States parties to the relevant BITs regarding the applicability of MFN clauses to dispute resolution clauses, stated that that issue was 'entirely unexplored' in the early 1990s; both Tribunals found the principle of contemporaneity useful to inquire into certain 'soft law' instruments dealing with the notion of 'treatment', however its application could not result in decisive arguments and the Tribunals had to turn back to textual interpretation of the BITs). Conversely, where a treaty provision answers the interpretive question, the principle of contemporaneity is of no use: *Garanti Koza LLP v Turkmenistan,* ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) paras 55–7 (faced with the argument that in the 1990s the parties to the BIT could not foresee the idea of applying MFN clauses to dispute resolution, the Tribunal responded that the principle of contemporaneity could not affect the reading of the MFN clause which explicitly allowed its application to the jurisdictional clause).

124 *Urbaser SA and CABB v Argentina* (n 120) para 149. The problems caused by the principle of contemporaneity in the resolution of the questions of jurisdiction can be seen in the *Wintershall* award, where the Tribunal, sitting in 2008 and faced with a dispute that emerged in the early 2000s,

an agreement to arbitrate is concluded only upon the acceptance of an offer to arbitrate by an investor, which following this principle would imply that the meanings, circumstances, and rules to be observed are contemporary with the arbitration.

Second, on the other side of interpretive spectrum, the doctrine of the evolution of treaty terms fully supports the proposed model. Indeed, the intent of treaty parties can sometimes be presumed to give the terms of a treaty not a fixed meaning, but a meaning capable of evolving.[125] That presumption arises primarily where generic terms are used,[126] but some tribunals have been willing to apply the same presumption to non-generic treaty provisions as well, if the object and purpose of the treaty required it.[127] What is decisive is the long and continuous duration of a treaty regime.[128] That is why this doctrine of the interpretation of treaties is particularly important when it comes to protective treaty regimes, like human rights treaties,[129] and also to other objective regimes, like international trade and environmental law.[130] If investment law and arbitration indeed qualify as a protective regime, as I discussed in Chapter 1,[131] the main implication of their protective purpose on the consensualism of investment arbitration is that its jurisdictional framework should follow current circumstances. In fact, some tribunals have already followed this view: faced with an argument that an older investment treaty could not

---

discussed whether foreign investors could settle disputes before domestic courts in 1991 and 1993 (when the BIT was signed and entered into force respectively), in the context of a local litigation requirement. See *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) para 129. See also Epaminontas E Triantafilou, 'Contemporaneity and Its Limits in Treaty Interpretation' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 474–6 (arguing that the *Wintershall* Tribunal did not apply the principle of contemporaneity, but simply applied the treaty to the facts existing at the time of its conclusion).

125 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) (2009) ICJ Rep 213, para 64.

126 *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) (1978) ICJ Rep 3, para 77.

127 *Iron Rhine Arbitration (Belgium/Netherlands)*, PCA Case No 2003-02, Award of the Arbitral Tribunal (24 May 2005) para 80.

128 *Aegean Sea Continental Shelf* (n 126) para 77; *Navigational and Related Rights (Costa Rica v Nicaragua)* (n 125) para 66; *Iron Rhine Arbitration* (n 127) paras 81–2.

129 For the 'living instrument' doctrine in the interpretation of the ECHR, as developed in practice by the ECtHR, see *Tyrer v The United Kingdom* App No 5856/72 (ECtHR, 25 April 1978) para 31; and *Loizidou v Turkey* App No 15318/89 (ECtHR, 23 March 1995) paras 71–2. In the latter decision, the ECtHR held that this doctrine applied equally to the matters of substantive protection and jurisdiction.

130 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [129–30]; Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 Columbia J Envt'l L 489, 518–9.

131 See Chapter 1, Section 3.B.ii.

make an offer to foreign investors to arbitrate, because the offer-acceptance technique of establishing jurisdiction had emerged only after its conclusion, one tribunal affirmed the existence of such an offer relying on modern practices and the treaty's objective of investment protection.[132] In sum, if the use of generic and open-ended terms in investment treaties that are meant to last indefinitely implies acceptance of the evolution of such terms,[133] it can be argued with an equal force that insufficient regulation of certain jurisdictional questions in the sphere of primary rules implies the acceptance of the evolution of secondary rules and the effect that they bring. This argument is strengthened by the protective purpose of investment treaties, which requires actuality.

In conclusion, whatever type of change can happen in the domain of secondary rules, the suggested model aims to allow it only with proper justifications and to avoid arbitrariness. If accepted, a more pertinent question would be whether it is more legitimate to allow a change or to insist on the preservation of the alleged intentions of treaty parties, which cannot be truly verified and which take effect retroactively. Answers would probably favour the former because otherwise there would be no question of change in the first place.

C. Control Mechanisms

How can compliance with the proposed model be secured in practice? The lack of a control mechanism in investment arbitration, particularly in a hierarchical form, is commonly seen as an obstacle for the law-making role of arbitral decisions.[134] That problem is certainly more visible in the sphere of merits, because in jurisdictional matters mechanisms of a limited control exist: either as annulment of awards within ICSID,[135] or as review by domestic courts when it comes

---

132 *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, UNCITRAL arbitration, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) paras 81–3.

133 Triantafilou, 'Contemporaneity and Evolutive Interpretation' (n 122) 168. See also ibid 160 ('It is difficult to imagine that the meaning of entire legal instruments, which are expressly intended to serve broad and lasting policies with respect to ever-changing concepts such as "investments", are meant to remain "frozen in time" in the general sense […]').

134 Beata Gessel-Kalinowska vel Kalisz and Konrad Czech, 'The Role of Precedent in Investment Treaty Arbitration' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (3rd ed, Law Business Research 2018) 175.

135 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention') art 52(1) ('Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: […] (b) that the Tribunal has manifestly exceeded its powers;').

to non-ICSID arbitrations, in the forms of non-recognition and setting aside.[136] This is an important facilitating factor for the proposed model.

The compliance with the two-layered model of jurisdictional regulation can be controlled and secured in the same way as that model can be implemented by arbitral tribunals: through the reasoning of controllers, ie members of annulment committees and judges. First, tribunals have already expressed an expectation that control mechanisms answer difficult jurisdictional questions.[137] The problem is that control mechanisms cannot resolve such questions initially, but only in the second instance when controlling the validity of arbitral determinations. For that reason, I suggest that in exercising their controlling function, annulment committees and judges should verify the methodology applied by arbitral tribunals in jurisdictional determinations, and particularly whether they have complied with the system of applying secondary jurisdictional rules discussed above. When it comes to questions of legal change, controlling mechanisms

---

136 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('New York Convention') art V(1) ('Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;'); UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006, art 34(2) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 14 August 2018 ('An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: […] (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;').

137 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 97 ('It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.'). Cf *MCI Power Group LC and New Turbine Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Decision on Annulment (19 October 2009) para 24 ('The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals.').

should only verify whether a change is well justified and reasoned by the tribunal.[138] A negative finding would suffice to annul the award, without the need to answer the question of the omitted and correct secondary rule, for the simple reason that control mechanisms cannot modify and/or reverse arbitral awards with their own findings.

Because the task of arbitral tribunals is to find and apply the relevant secondary rule, a failure to do so would qualify as a 'manifest' excess of the granted authority to adjudicate.[139] The requirement that an excess of power must be 'manifest' for annulment of an award is often seen as an important limitation of the powers of annulment committees.[140] That limitation, however, should not disturb the controlling role of ICSID annulment committees. If arbitral supplementing activities can be seen as mere modalities in treaty interpretation, as they often are, they could connote only details. But if they are seen as forming secondary rules of jurisdictional regulation, as suggested here, with all the features of legal norms, like the abstract and principled character, a failure of their observance and application could hardly escape being seen as a 'manifest' excess of arbitral authority.

Therefore, I maintain that a control mechanism could be established even within the already existing systems of limited control of jurisdictional determinations. But one should not ignore the prospect of the development of appellate mechanisms. The idea of their establishment is old, but it has gained momentum only more recently with the attempts to establish an investment 'court' system.[141] The EU-proposed system provides for an appellate tribunal which can modify

---

138 The ICSID mechanism allows annulment for the lack of proper reasoning: ICSID Convention (n 135) art 52(1)(e) ('that the award has failed to state the reasons on which it is based').

139 See *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) paras 93–115 (where the Annulment Committee identified the 'fundamental basis of a claim' as the relevant standard for distinguishing between treaty and contract claims, and because the Tribunal failed to give effect to that distinction and exercise jurisdiction over treaty claims, concluded that it manifestly exceeded its powers).

140 *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) para 128 ('it is clear that not every excess of powers could result in an annulment of an award issued under the ICSID Convention').

141 For older ideas and problems with regard to establishing an appellate mechanism, see Barton Legum, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 231. For newer developments in this direction and the current challenges, see Freya Baetens, 'Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 114–26; Freya Baetens, 'Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms' (2017) 8 JIDS 432; Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32 ICSID Rev-FILJ 503; and Lucy Reed and Christine Sim, 'Potential Investment Treaty Appellate Bodies: Open Questions' (2017) 32 ICSID Rev-FILJ 691.

or reverse arbitral awards in respect of jurisdictional matters on the same ground as provided in the ICSID Convention (that is manifest excess of powers).[142] Because this model simply refers to the grounds enumerated in Article 52(1) of the ICSID Convention, first instance awards could equally be modified or reversed for the failure to state reasons. If established, institutionalised appellate bodies would offer an opportunity for strengthening and streamlining the control mechanism, at least within the investment court system. This is only an institutional potential; in terms of the substance, the control of the implementation of the two-layered model of jurisdictional regulation would have to be conducted as suggested in the previous paragraphs, because the standards of review of arbitral jurisdictional determinations stay the same as within the existing ICSID system. However, because of the explicit empowerment of appellate tribunals to modify or reverse first instance awards, these bodies could contribute more directly to the law-making of secondary jurisdictional rules, by expressing their view on the correct secondary rule to be applied.

D. Transparency and the Availability of the Law-Making Material

As discussed earlier, there is a striking difference between investment and commercial arbitration in terms of transparency, which is being further advanced in regard to investment disputes.[143] But because some arbitrations in this field are still confidential, an argument is often made that the arbitral law-making role is precluded by these instances of confidentiality.[144] Although this is usually seen as an obstacle to a system of precedent in investment arbitration, in the context of the model of two-layered jurisdictional regulation, some traces of confidentiality would imply that tribunals do not have a full picture of the relevant law-making material when searching for and determining the relevant secondary jurisdictional rule.

Confidentiality, if present, indeed raises challenges for the proposed model, but they are surmountable. First, confidentiality is a chronic difficulty of investment arbitration, and being recognised as such, it is fought systematically.[145] Second, once confidential decisions become

---

142 Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, not in force) art 8.28(2)(c); EU-Vietnam Investment Protection Agreement: Agreed Text as of August 2018, art 3.54(1)(c) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 30 December 2018; EU-Singapore Investment Protection Agreement: Agreed Text as of April 2018, art 3.19(1)(c) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 11 June 2018. These provisions refer to Article 52(1) of the ICSID Convention. Other grounds for appeal, mentioned specifically in these (draft) treaties, are errors in the application or interpretation of the applicable law and manifest errors in the appreciation of the facts which includes the appreciation of domestic law.

143 See Chapter 6, Section 2.A.

144 Gessel-Kalinowska vel Kalisz and Czech (n 134) 174.

145 For some efforts to fight the confidentiality of investor-State disputes, see United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (signed 10 December 2014, entered into

exceptional, which is arguably already the case,[146] they should not present an obstacle for the functioning of the proposed model. One can argue that those decisions which remain confidential do not present valid law-making material. As argued above, to engage in a law-making process, tribunals must observe broader discourses, and they must equally draft their awards in a way that enables them to engage in such broader discourses.[147] Arbitral reasoning must be advanced and should not be addressed to the disputing parties only. Without the ability to engage in broader communicative processes, awards could not be seen as having law-making capacity. Their confidentiality evidences the lack of such ability. In short, overlooking confidential jurisdictional decisions would not harm jurisdictional decision- and law-making by other tribunals, which are able to engage in broader communicative processes and discourses.[148] What seems problematic in this suggestion is that disputing parties would retain the ultimate control over the entrance of their awards into public discourses, and therefore over awards' law-making effect, however that is a price that must be paid because of the authority of the principle of consensualism.[149]

E. Consistency, the Risk of 'Adventurism', and the Prospect of Stabilisation of Practice

Could the recognition of the arbitral regulatory role encourage the development of expansionary or 'adventuristic' practices and the formation of secondary jurisdictional rules along those lines?

---

force 18 October 2017); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (in force 1 April 2014); Luke Eric Peterson, 'An In-Depth Look at ICSID's Proposed Transparency Changes (Including Non Disputing Party Participation)' (*Investment Arbitration Reporter*, 6 August 2018) <https://www.iareporter.com/articles/an-in-depth-look-at-icsids-proposed-transparency-changes-including-non-disputing-party-participation/> accessed 16 August 2018 (reporting the recent attempts to introduce a default rule of publication of *orders* and *decisions* within the ICSID system, to the extent possible due to the limitation of Article 48(5) of the ICSID Convention which requires party consent for publication of *awards*; it is also proposed that a similar limitation should be removed from the ICSID Additional Facility rules, thus allowing default publication of awards as well, besides orders and decisions).

146 See data tracking known investment treaty arbitrations at UNCTAD, Investment Policy Hub <https://investmentpolicyhubold.unctad.org/ISDS> accessed 19 April 2019. See also Emilie M Hafner-Burton and David G Victor, 'Secrecy in International Investment Arbitration: An Empirical Analysis' (2016) 7 JIDS 161 (criticising the ICSID system for encouraging secrecy, but empirically finding that the majority of 'secret' cases ended in settlement or discontinuance).

147 See Section 3.A.

148 See also, in the same direction, Thomas Wälde, 'Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008) 113 (arguing that awards outside the public domain and debate cannot have a precedential effect in investment arbitration).

149 ICSID Convention (n 135) art 48(5) ('The Centre shall not publish the award without the consent of the parties.').

As seen earlier, arbitrators are often accused of expansionism or 'adventurism' that allegedly results in extensions of their jurisdiction.[150] If that is indeed so, one could argue that the consistency of arbitral practice is actually undesirable: occasional excesses like violations of the conferral of the power to adjudicate would do less harm to the international community than persistent violating practices.[151] I do not share this view, because consistency is a necessary pre-condition for assessing which rules of law and practices are indeed wrong and for what reasons.[152] How else could certain practices be objectively characterised as expansionary or 'adventuristic', besides the expressions of dissatisfaction with the outcomes in individual cases? Of course, I do not claim that practices should be absolutely uniform to allow such conclusions, but at least some degree of consistency is needed to disclose the produced effects.[153] Another question is who decides what is right or wrong, expansionary, restrictive or ideally neutral. If international law-making includes various communicating actors,[154] there is no justification for vesting the power of judgment of rightfulness to only one and limited circle of actors, namely States. Through the coordination of primary and secondary rules, the proposed model accommodates various voices and a broader discourse on the jurisdictional framework of investment arbitration.

Crucially, however, I maintain that the proposed model offers no more opportunities for expansionism or 'adventurism' than the current setting of non-recognising the regulatory role of arbitral tribunals in jurisdictional matters. On the contrary, the burden of the law-making role, manifested in the awareness that a jurisdictional determination is made with possible arbitration-overreaching effects, can be expected to restrain arbitrators from reaching easily decisions that some would characterise as 'adventuristic'. Furthermore, those areas of arbitral practice which

---

150 See Chapter 6, Section 2.C.

151 Schultz (n 103) (assuming that some rules of investment law are bad, their inconsistent application would do less harm than consistent); Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 ICSID Rev-FILJ 528, 531–4 (consistency does not ensure accuracy in treaty interpretation); Ten Cate (n 96) 457–9 (consistency undermines accuracy in decision-making).

152 It should not be thought, however, that consistency is easily achievable in the international legal order. Certainty and clarity of legal rules, as elements of the 'formal legality', are endangered in providing for the rule of law in international law because of the dispersed nature of international adjudication: Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 97, 132.

153 See, for example, *Plama Consortium Limited v Bulgaria* (n 21) para 224 (although departing from the previous line of case law which allowed the application of MFN clauses to dispute resolution, the Tribunal noted that the precedent which formed that previous line was 'perhaps understandable', because it faced quite different jurisdictional issue from the one in this case; despite the common general question—whether MFN clauses are applicable to dispute resolution—the same principled answer would produce critically different effects in two different cases, which the Tribunal used to distinguish the two cases).

154 See Section 3.A above.

have faced extensive discussions on popular jurisdictional questions, show that although some early decisions could be called expansionary or 'adventuristic', their multiplication tends to have a stabilising effect in terms of nuancing approaches to jurisdictional issues and removing their drawbacks.[155] The same effect could be expected in the proposed model, even more so because of the encouraged communication of arbitral tribunals as part of broader discourses on the jurisdictional framework of investment arbitration.

A different question is whether the consistency and the stabilisation of practices are possible and desirable from the point of view of the structure of investment law. First, it is often said that the fragmented architecture of investment law, consisting of more than 3000 separate investment treaties, does not allow a true consistency.[156] When it comes to the jurisdictional matters, this objection can be rebutted by the observance of the essence of jurisdictional sub-clauses used in investment treaties.[157] Second, this objection has also been invoked by States to express their preference against consistency in arbitral practice that would resemble a law-making role of arbitrators.[158] Without the intention to undermine State discretion to form their own preferences, it should be noted that such suggestions have been put forward by less prominent users of the investment arbitration regime.[159] Once States become regular users of this regime, particularly as

---

155 For example, in the context of the application of MFN clauses to dispute resolution, Stephan Schill has argued that a general view generated in practice is that such application is possible in regard to the admissibility of claims, but not in regard to the jurisdiction of tribunals: Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 151. Although this proposition can be challenged, particularly due to the subsequent practical developments, the application of MFN clauses to dispute resolution is a good example of the evolution of practice. Only after facing various jurisdictional questions, and after seeing the effects of previous rulings reflected in demands for further jurisdictional extensions, can tribunals 'correct' their approaches and set the framework of the MFN-dispute resolution conjunction. See Chapter 3, Section 4.B.

156 Gessel-Kalinowska vel Kalisz and Czech (n 134) 174–5; Ten Cate (n 96) 422.

157 See Section 2.B.iii above.

158 Several States (namely Israel, Japan, and the US) challenged the ideal of consistency during the recent discussions about the reform of investment arbitration organised under the auspices of UNCITRAL: Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Consistency, Predictability and Correctness' (*EJIL: Talk!*, 5 June 2018) <https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-consistency-predictability-and-correctness/> accessed 13 September 2018. See also Mark Huber and Greg Tereposky, 'The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism' (2017) 32 ICSID Rev-FILJ 545, 583–4 (identifying treaty varieties as a difficulty in the establishment of an appellate mechanism, and arguing that such a mechanism should find a way to accommodate such differences).

159 See, for the example of Japan's preference to preserve the current investment arbitration system, despite not being an active participant, Yuka Fukunaga, 'ISDS Under the CPTPP and Beyond: Japanese Perspectives' (*Kluwer Arbitration Blog*, 30 May 2018) <http://arbitrationblog.

direct participants as respondents, the increasing predictability of the system, as a consequence of the consistency, reveals itself as an equal protector of investor and State interests.[160] Finally, through the coordination of primary and secondary rules, the proposed model aims to provide a channel for expressions of State preferences when it comes to particular jurisdictional rules, with a direct effect on secondary rules and hence arbitral practices.

§ 7.04. The New Jurisdictional Framework Governing Investment Treaty Arbitration Within the International Legal Order

It can be questioned whether the proposed model of two-layered jurisdictional regulation satisfies the basic premise of the international legal order that the authority to adjudicate is created by disputing parties. This is the entire rationale of the principle of consensualism.[161] If the arbitral law-making role is indeed acknowledged and accepted, it can be argued that the principle of consensualism is being derogated from, which is problematic because it leaves the system with an uncertainty as regards the proper basis of every arbitration. It could be even argued that the logic of the proposed model is flawed because, with the transfer of the regulatory role from parties to tribunals, it comes down to the confusion of the delegator and the delegate, the principal and the agent (or trustee), the addresser and the addressee of the law. However, the relationship between primary and secondary rules is precisely set so as to fit the proposed model within the basic premise of the principle of consensualism. What is more, I maintain that the principle of consensualism can be preserved better, and that the ultimate regulatory authority of disputing parties can be safeguarded, with the application of the proposed model, because of the clear relationship between the two sets of rules.

While these considerations have largely been addressed in the previous sections, there are further questions regarding the compliance of the proposed model with broader developments in the international legal order, which, although not revolutionary, have brought significant changes to the perception of its functioning. I will address two such developments, namely the concept of global governance and its relevance to the law-making role of arbitrators (A), and the trends in international law towards a wider acceptance of the law-making functions of international courts and tribunals (B).

---

kluwerarbitration.com/2018/05/30/isds-cptpp-beyond-japanese-perspectives/> accessed 12 July 2018.

160 Which encourages the reliance on precedents in arbitral reasoning: *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006) para 293 (‘cautious reliance on certain principles developed in a number of those [previous] cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States’).

161 See Chapter 1, Section 2.B.

A. Investment Arbitration and Global Governance

Investment arbitration undoubtedly forms part of a broader regime governing international investment flows.[162] Hence the suggestion that those who control investment arbitration at the same time control, at least to a certain extent, the regime governing international investments.[163] In other words, those who govern investment arbitration also engage in global governance.[164] This field involves a number of actors, the most important being States, investors, and arbitrators, (excluding actors with indirect interests like the general public or NGOs). The extent of their control over the regime can only be assessed by observing their practical possibilities to influence how the regime and individual arbitrations function. It turns out that all of these actors exercise more or less control over investment dispute settlement, and that the traditional view that matters of (global) governance belong to States only is not supported in reality.[165]

States undoubtedly claim the biggest share in the governance of the investment arbitration regime. This belongs to them, it is often assumed, because of statehood and their status as the masters of treaties.[166] After all, States decide freely to what kind of adjudication they wish to

---

162 Douglas, *Claims* (n 38) 1–6; Schill, *Multilateralization* (n 155) 5–6; Stephan W Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010) 30–3.

163 Stephan W Schill, 'International Investment Law and Comparative Public Law—An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 18 (arbitral decision-making affecting the whole system).

164 Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University Public Law and Legal Theory Working Papers, Paper 146; Schill, 'Introduction' (n 163) 17–23; Stephan W Schill and Vladislav Djanic, 'International Investment Law and Community Interests' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018) 225–7 (investment law as governance of the global economy). See also, for a broader perspective on international adjudication and global governance, Eduardo Zuleta, 'International Jurisprudence, Global Governance, and Global Administrative Law' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 69.

165 See in this respect Rosalyn Higgins, 'International Law and the Reasonable Need of Governments to Govern. Inaugural Lecture, London School of Economics and Political Science 22nd November, 1982' in Rosalyn Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, vol 2 (OUP 2009) 784 ('It is manifest that there are a variety of international actors contributing to the development of international law, and in turn affected by it—international organizations, individuals, multinational corporations and others. But states are still the most important of the actors in the international legal system, and their sovereignty is at the heart of this system.').

166 See, in respect of the proposal to structure investment treaties as 'triangular treaties': Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 Harvard Int'l LJ

subject themselves. But as I argued earlier, the principle of consensualism does not grant States the exclusivity of jurisdictional regulation, but only the position of an initiator of jurisdictional relationships.[167] Because jurisdictional relationships are today most often initiated by offers in investment treaties, this position motivates the claim for an exclusive State governance over investment arbitration.[168] Furthermore, as such offers are made next to substantive protections, their connection to the overall State regulation in this field seems apparent. It is often argued that States require regulatory space: after committing to international scrutiny of their acts, States must know what is the area of their conduct that can be freely exercised.[169] The same objection can be advanced in regard to the proposed model of jurisdictional regulation: States determine to what extent investment protections, and therefore their conduct, are arbitrable at the international level, which would be endangered by the power of arbitrators to create jurisdictional rules. However, the proposed model precisely aims to secure the regulatory space of States, by establishing the priority of the primary over secondary jurisdictional rules. Only knowing the exact relationship between party- and arbitrator-made law, can States construct their action in treaty drafting capable of affecting secondary jurisdictional rules. Secondary jurisdictional rules are desirable in a dispersed and fragmented field of investment law, because they ultimately do not rebut the specific text of treaties, but rather remind States how to draft their clauses if they wish to specially craft certain jurisdictional provisions.

Investors are on the opposite side of the governance spectrum. Per default, they accept offers made by States, and they usually do not contribute substantially to the formation of the primary jurisdictional rules. However, occasionally they get an opportunity to have a bigger say in the rule-formation.[170] Another aspect of investors' control over the investment law and arbitration regime concerns the fact that investors put the system in motion by instituting arbitrations, and that they influence the decisions of arbitral tribunals by setting their agenda and advancing legal arguments.[171] Still, to the extent that investors have so far been able to influence the governance

353, 363–4 ('I adopt a public international law paradigm as my premise because I assume that investment treaties are entered into by sovereign states against background assumptions about the powers of states and treaty parties. […] Likewise, the standard assumption in treaty law is that treaty parties are masters of their treaties.').

167 See Chapter 1, Section 2.A.i.

168 See above Section 3.B, for the objections that can be raised by this suggestion to the proposed model of jurisdictional regulation.

169 For the problem of regulatory space appearing in international economic law, see generally Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 Univ Penn JIL 1.

170 See n 9 above.

171 See in this respect Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 Int'l Org 457, 462–6 (analysing different

of investment arbitration, the proposed model would not bring any significant changes in that respect. Of course, one can argue about factual possibilities of strong investors to pressure States for various benefits, including more favourable jurisdictional provisions, however such analysis is outside the scope of this work.[172]

Arbitrators are somewhere in between, but their governing role over the investment arbitration regime, and therefore international investment flows, is central for the present discussion. There is no doubt that by authorising arbitral tribunals to settle disputes between States and investors power and authority are conferred to arbitrators, as some would argue—by depriving States of that same power and authority, however this has been seen positively for the global promotion of investments and development.[173] The question that arises here is whether the conferral of not only adjudicative but also law-making power on arbitral tribunals can be seen as legitimate.[174] Questions of the 'legitimacy' of international courts and tribunals are complex, and the present study certainly cannot address all of their many aspects.[175] For the present discussion two issues are important: first, whether investment tribunals are successful in creating rules of law (as opposed to mere dispute settlement); and second, whether such actions of investment tribunals are legitimate from the sociological and external perspectives. These issues are important because the assignment of the law-making role to arbitral tribunals increases the needs for justifications legitimising their work.[176]

Because every arbitration is based on consent of the disputing parties, normative legitimacy of arbitral work should not raise difficulties, at least initially.[177] Problems might arise in another

---

levels of access among international courts, which determines to what extent non-State actors can set their agenda).

172 For example, there are some allegations of lobbying with law-firms for the preservation of liberal investment protections: Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Helen Burley ed, Corporate Europe Observatory and Transnational Institute 2012) 28.

173 Tai-Heng Cheng, 'Power, Authority and International Investment Law' (2005) 20 American Univ Int'l L Rev 465, 503.

174 The concept of legitimacy in its core meaning refers to the justification of authority: Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 6–7.

175 See generally Harlan Grant Cohen and others, 'Legitimacy and International Courts – A Framework' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018) 1.

176 ibid 28 ('The less authority a body claims or asserts, the less justification it needs to do so legitimately.').

177 See the discussion about primary jurisdictional rules in Section 2.A above. For the foundation of normative legitimacy in consent: Wolfrum (n 174) 7–9; Andrea K Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018) 271–2. Although contributions to the legitimacy of

respect. Yuval Shany has proposed a model for assessing the effectiveness of international courts and tribunals which inquires whether a judicial body is achieving the goals assigned to it by its mandate-givers.[178] As this thesis maintains that the definition of the authority to adjudicate comes from the disputing parties, the question is what goal is usually assigned by that definition. International courts and tribunals can have different 'normative goals', like settlement of concrete disputes or the development of rules of law, but that does not mean that one necessarily excludes the other.[179] Even if investment tribunals are seen as 'regime-neutral', ie not being in charge of a single regulatory regime, an expectation of development of the law or at least its clarification is present, although not as tribunals' primary task.[180] Investment tribunals are often seen as having a dispute resolution role exclusively,[181] which can at first be assumed endorsed by the theory of delegation advocated in this thesis.[182] However, it is hard to imagine that an authority to adjudicate is defined without any prediction and expectation that the resolution of the dispute could contribute to the development of the law. The goal of law development need not be explicit; it can also be implicit or 'unstated',[183] stemming from the use of the judicial methodologies as such. When it comes to the facts, it is clear that practice of investment tribunals forms part of the 'body of investment law',[184] and that prior decisions are used extensively to determine the content of legal rules.[185] As demonstrated in this thesis, investment tribunals inject supplementary input into interpretative processes, which I have qualified as secondary jurisdictional rules. Regardless of one's judgment about their merits, investment tribunals certainly cannot be called ineffective as regards the development of legal rules.

---

international governance institutions can be sought elsewhere, it is doubtful that they can substitute consent in the establishment of normative legitimacy: Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 AJIL 596.

178 Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) ch 1.

179 Grant Cohen and others (n 175) 15–6.

180 ibid 24–5.

181 Bjorklund, 'Legitimacy' (n 177) 253 ('ICSID's goal is providing a neutral forum for dispute settlement.').

182 See Chapter 1, Section 2.B.i.

183 Shany, *Effectiveness* (n 178) 19. Cf Eyal Benvenisti, 'Community Interests in International Adjudication' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018) 71 (attributing the law development function to the permanency of a judicial body).

184 Stephan W Schill, 'W(h)Ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875, 880.

185 See n 49 above. This practice has also motivated the argument by Frédéric Sourgens that investment arbitration functions as common law, although he opposes the concept of formal rule-development through such practice. See Sourgens, 'Law's Laboratory' (n 51) 209–15.

What appears more challenging are the sociological and external aspects of legitimacy, ie those dealing with the beliefs that arbitrators can conduct such work, particularly of those not directly engaged in the system.[186] The attitudes of broader audiences are particularly important because the law-making process advocated here is the one of communication.[187] Here, the critical notions are belief or trust in the system and its reliability, and the consequent question arises whether arbitrators are improving those aspects. The consistency of practice has been identified as crucial for the establishment of legitimacy of investment arbitration, from both theoretical and sociological perspectives.[188] Of course, many objections can be raised to the pursuance of consistency, but they seem hardly justifiable.[189] The truth is that not only the disputing parties, but also indirect actors and the public at large build their perceptions about the legitimacy of a legal system based on how the law is applied.[190] Leaving all the discussions about the validity of the ideal of consistency on one side,[191] the proposed model of two-layered jurisdictional regulation would undoubtedly help the consolidation of arbitral practice, and prospectively improve the perceptions of broader audiences about arbitral work. In turn, this would enhance the legitimacy of the arbitral regulatory activities.

The final question is a simple one: whether it is desirable to empower arbitrators to play a bigger part in global governance by means of jurisdictional regulation? This issue is sensitive as it seeks some hard policy answers. The first one is whether arbitrators would promote global investment flows if they are given the power of jurisdictional regulation.[192] Arguably, that would indeed be the case, although no assurances can be made: at times arbitrators have taken rather

---

186 For definitions of 'sociological' and 'external' legitimacy, see Grant Cohen and others (n 175) 4–5. See also Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25.

187 See above Section 3.A.

188 Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017) 117–27. See also Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008) 147 ('Consistency is not a myth. Consistency is a reality and a necessary objective at the same time.'); and Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521 (inconsistent decisions damaging the legitimacy of the system).

189 Diel-Gligor (n 188) 127–57.

190 ibid 120–7.

191 This is a much broader theoretical issue, which does not pertain to investment arbitration only, but rather to the questions of legitimacy of legal systems, (international) adjudication etc. These questions are outside the scope of this thesis.

192 Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 Temple L Rev 61, 103 (arguing that, to be normatively legitimate, international courts and tribunals 'must promote the purposes of the normative regimes they are charged with interpreting and applying').

limiting approaches to the access of investors to international arbitration, although this can also be seen as a positive development aimed at establishing clear boundaries and standards of the investment law regime.[193] The second question is whether international investment has indeed reached such a high level of global importance as to require an independent existence of its legal regime, justifying a (partial) transfer of the regulatory role from States to non-State actors. This question pertains to the understanding of some legal regimes as global public goods, and probably will not give definite answers in the near future.[194] These questions remain to be answered by someone else, and I will only note that if the answers turn out positive, the theory of international adjudication would welcome them prepared. The shift in the understanding of adjudicators from agents to trustees,[195] the recognition of the benefit of judicial independence with limited control of the mandate providers,[196] as well as the possible trust of law-makers in adjudicators to supplement incomplete treaty regimes,[197] would accommodate well the conferral of a regulatory role on investment arbitrators. Finally, it should be borne in mind that the proposed model of two-layered jurisdictional regulation does not aim to transfer the jurisdictional regulatory role from disputing parties to arbitrators in its entirety, but only partially, with a strong emphasis on the supremacy of party jurisdictional regulation. For these reasons, even if the above-mentioned

---

193 See generally Chapter 5.

194 See Chapter 1, Section 3.B.i. But see, for a prospective positive answer, Schill and Djanic (n 164) 224 (arguing that investment law advances the community interest in increasing investment flows).

195 Karen J Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 European J Int'l Relations 33, 35 ('Principals choose to delegate to Trustees, as opposed to Agents, when the point of delegation is to harness the authority of the Trustee so as to enhance the legitimacy of political decision-making. Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary. […] While Trustees are less manipulable via recontracting tools, Trustees are not apolitical or immune to state pressure. Trustees are subject to the sorts of legitimacy and rhetorical pressures of all political decision-makers. To the extent that Trustees must rely on others to execute their decisions, they must also worry about maintaining the support of those who implement their decisions.').

196 Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California L Rev 899, 904 ('Independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts. They do so by raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance. Such violations create short-term material and reputational costs for the state in default. But detection of these violations also encourages future compliance, maximizing the long-term value of the agreement to all parties to the multilateral regime, including the defecting state.').

197 For the incomplete contracts analogy, albeit with some difficulties, in the context of the WTO dispute resolution, see Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard Int'l LJ 333, 346–50.

questions remain unanswered, the proposed model should not be dismissed. To the contrary, it should be encouraged, primarily because it already *de facto* functions in practice. The solution for those seeking to reassert control over investment arbitration might be in a more extensive engagement in the system, rather than searching for ways to restrain its functioning.[198]

B. Trends Towards Judicial Regulation in International Adjudication

The proposed model of two-layered jurisdictional regulation of investment arbitration would not be alone in formalising the regulatory role of adjudicatory bodies in international law. It would rather fit within a broader movement towards the acknowledgment of the law-making role of international courts and tribunals. The development of international law by adjudicatory bodies was recognised in legal scholarship relatively early.[199] The questions of global governance are directly related to such law-making function, as I discussed in the previous Subsection, and as such they are factually unavoidable.[200] The increased judicialization of international law has amplified the significance of international courts and tribunals in the international legal order, and therefore their function in the development of international law.[201]

Well-established judicial bodies, like ICJ[202] and ECtHR,[203] openly talk about something that could be called the semi- or quasi-binding force of their decisions. One can argue that these

---

198 Diane A Desierto, 'State Controls over Available Remedies in Investor-State Arbitration' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) 259 (arguing that some States were able to reassert control by enhanced engagement in investment arbitrations).

199 See, for example, Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958).

200 See generally Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 3.

201 See generally Philippe Sands, 'Reflections on International Judicialization' (2016) 27 EJIL 885.

202 See text to n 90-91 above. But note that the ICJ was cautious not to vest on itself a direct legislative role: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226, para 18 ('It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.').

203 *Chapman v The United Kingdom* App No 27238/95 (ECtHR, 18 January 2001) para 70 ('The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without

approaches are rather a reflection of institutional arrangements, in the sense that these courts follow previous decisions for the sake of internal consistency and maintaining their reputation, and not with the purpose of law-development as such. But it would be hard to argue that decisions of these courts do not have broader law-making effects. ICJ practice is often cited as authoritative by virtually all other international courts and tribunals.[204] The same is the case with ECtHR practice, and because this is a 'regime-specific' court,[205] its treaty- or regime-overreaching law-making effects become apparent.[206]

In the field of international economic law, the dispute settlement mechanism of the World Trade Organization ('WTO') has developed a somewhat stronger form of judicial law-making. Because that mechanism has an appellate instance, the Appellate Body's reports have a *de facto* vertical *stare decisis* effect towards future panel findings, which has been developed for either conceptual considerations of predictability of the system or more practical considerations like the threat of having a finding reversed.[207] Although it can be debated whether such a development is rather a reflection of the specific structure of the WTO dispute resolution mechanism (like the existence of appeal or the different character of adjudicators at the two levels), the point that matters here is very simple: it has become recognised that the judicial activity determines the reliability of the WTO system, and for that reason it is given a wider, law-making effect.

The recognition of the judicial law-making function is so broad that it has entered virtually all spheres of international law. The International Criminal Court thus 'may apply principles and rules of law as interpreted in its previous decisions'.[208] Earlier criminal tribunals have established

---

good reason, from precedents laid down in previous cases.'). Another example of judicial law-making in the practice of the ECtHR is the concept of 'pilot judgments': Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 329.

204 The reliance on the practice of the ICJ is a widespread phenomenon in international law. In the context of investment arbitration, Moshe Hirsch explains this phenomenon from a sociological perspective with the concepts of social status and reference groups: Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 165–7.

205 Grant Cohen and others (n 175) 23–4 (defining regime-specific courts as those embedded within a particular regime, which in this case is the ECHR).

206 For example, for the use of ECtHR precedents in the practice of the Inter-American Court of Human Rights, see Gerald L Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101, 109.

207 Meredith Crowley and Robert Howse, 'US–Stainless Steel (Mexico)' (2010) 9 World Trade Rev 117, 122–9.

208 Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 21(2).

a vertical *stare decisis* effect of appellate decisions.[209] Although outside the scope of this thesis,[210] these examples show that judicial law-making is more of a fact than a policy choice, and because as such it cannot be avoided, it requires an open recognition for the sake of proper functioning of the international legal order and any of its many branches.

The fact that the given examples are on a higher level of institutionalisation than investment arbitration should not disqualify the latter from following the same trend. Indeed, modern international arbitration exercises a judicial function because, as with international courts, the task of arbitral tribunals is to settle international disputes by an independent determination of facts and application of law.[211] As long as investment tribunals are meant to interpret and apply international investment law for the purpose of settling investment disputes, there is no reason for distinguishing between them and standing courts as regards their law-making capacity. One can argue about the lack of institutional capacities on the part of arbitral tribunals (in comparison to standing courts),[212] but as seen in previous sections, that should not be a major concern for the functioning of the law-making model advanced in this thesis. Law-making, as a communicative process, and the system of adjudication in international law are equally dispersed, and by default include a variety of actors and voices which must be heard. The key to successful law-making is therefore in their inclusion in the law-making process, rather than exclusion by means of vesting the exclusivity of regulation on a single court.

§ 7.05. Conclusion

The practice of investment arbitral tribunals has caused many discussions about the proper rules and standards governing their jurisdiction. An overall sentiment is uncertainty, often followed by allegations of infringement of the principle of consensualism. It has now become apparent that arbitral work in jurisdictional determinations includes not only black letter approaches to application of the jurisdictional rules established by virtue of party consent, but also requires

---

209 See *Prosecutor v Zlatko Aleksovski* (Judgment) ICTY-95-14/1-A (24 March 2000) para 113 ('The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers […]').

210 As stated in Introduction, the concept of international adjudication in this thesis is understood as more akin to civil adjudication in domestic legal systems, whose central notion is a dispute between parties over their rights and obligations. Accordingly, I have not dealt with international criminal courts and tribunals.

211 Chittharanjan F Amerasinghe, 'International Arbitration: A Judicial Function?' in Rüdiger Wolfrum, Maja Seršić and Trpimir M Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015) 687–9.

212 It can be objected that the system of investment arbitration lacks institutional devices capable of consolidating arbitral practice, like appellate mechanisms, or that the circle of individuals serving as arbitrators is simply too broad (in comparison to very limited numbers of judges) to allow unification of arbitral practices.

remedying their regulatory deficiencies. That part of arbitral activity has never been properly recognised as a kind of jurisdictional regulation, which results in a failure to put the jurisdictional framework of investment arbitration under control, with a clear overview and division of powers and competences. The proposed model of two-layered jurisdictional regulation aims to achieve exactly that: to create a stable jurisdictional framework of investment arbitration, which defines clear powers and competences in jurisdictional regulation. To that end, however, it is necessary to acknowledge and accept the regulatory role played by arbitral tribunals. In sum, I argue that the jurisdictional framework of investment arbitration consists of (i) primary rules, which are created by virtue of party consent, and (ii) secondary rules, which are created in arbitral practice. Secondary rules are developed only for the sake of interpretation and application of the primary rules, and the latter in any event remain superior to the former. This proposal also reaffirms the principle of consensualism in investment arbitration, because it establishes a framework that allows disputing parties to deviate from the layer of secondary jurisdictional rules by regulating the relevant issue in the sphere of primary rules. Only by having a full picture of the jurisdictional framework of investment arbitration, can States and investors envisage how their primary rules will be implemented in practice, and can structure their action accordingly. Finally, despite some challenges, the proposed model seems feasible within the already existing structure of investment arbitration, and its implementation would not require any hard steps, such as renegotiation of treaties or amendments to arbitration rules. All that is required is a change in arbitral approaches to drafting their jurisdictional decisions, and the acceptance of the reality on the part of States and investors.

Final Conclusions

This thesis started from a frequently repeated question in investment treaty arbitration: how does the principle of consensualism differ in that narrow field of international adjudication from how it has been traditionally considered to mean in general international law? I find that the principle of consensualism is indeed being redefined and eroded in investment treaty arbitration, becoming increasingly divided from its traditional understanding. But contrary to the mainstream literature, I do not find that redefinition and erosion in terms of how the consensual bonds between disputing parties are established, but in the degree to which the disputing parties define the authority to adjudicate of investment arbitral tribunals.

This study started from the principle of consensualism as a fundamental principle of international adjudication. As showed in Chapter 1, this principle is inherently related to the lack of a central regulatory authority in international law. The definition of the authority to adjudicate at the international level is possible only by consent of the disputing parties. The definition of the authority to adjudicate is therefore the main function of the principle of consensualism, which means drawing the limits of the jurisdiction of international courts and tribunals. Consensualism therefore governs the process of jurisdictional regulation in international law, by conferring the power to regulate jurisdictional limits on the disputing parties. The evolution of investment treaty arbitration has not challenged but preserved these premises. Contemporary developments in the field of investment protection and the views on the purpose of that regime have not disturbed them either. Observing international investment law and arbitration as a global public good, as a protective regime, or through the lenses of commercial arbitration, can only bring contextual elements into the process of treaty interpretation and arbitral decision-making. But such elements and considerations cannot affect the principle of consensualism as the foundation of the process of jurisdictional regulation.

The analysis of the structure of jurisdictional regulation in investment arbitration, conducted in Chapter 2, demonstrated that the provision of jurisdictional rules by disputing parties in their arbitration agreements often does not amount to a comprehensive regulation of the jurisdiction of arbitral tribunals. Indeed, on the trajectory from party-provided jurisdictional rules to concrete jurisdictional determinations many questions can emerge, which often evidence regulatory deficiencies in the given set of jurisdictional rules. Such deficiencies can be discovered at any

stage of jurisdictional examinations, such as those conducted by the administrative organs of arbitral institutions, arbitral tribunals, ICSID annulment committees, and domestic courts. The principal jurisdictional examiners remain arbitral tribunals themselves, and therefore they have most of the opportunities to discover such deficiencies. Regulatory deficiencies in jurisdictional frameworks require some action on the part of arbitral tribunals to enable them to make concrete jurisdictional determinations. That is where another problem emerges: the power of arbitral tribunals to rule on their own jurisdiction does not allow them to define new rules, but only to interpret the given set of party-provided jurisdictional rules.

Despite this background, arbitral tribunals have engaged in an activity supplementing party-provided jurisdictional frameworks. Arbitrators have added independent input, formulating rules that direct the interpretation and application of party-provided jurisdictional rules, and occasionally impose independent jurisdictional requirements. Chapter 3 discussed this practice in relation to the procedural aspects of the consensual jurisdictional regulation. Arbitrators have introduced rules affecting the rigidity of the conditions of access to arbitration (qualifying them as related to the admissibility of claims rather than jurisdiction), and providing avenues for their bypassing (the futility exception, the *Mavrommatis* doctrine, a liberal test for the satisfaction of local litigation requirements, and a strict test for the triggering of fork-in-the-road clauses). They have also attempted to create presumptions in favour or against the applicability of MFN clauses to dispute resolution clauses. In a nutshell, they have either presumed that MFN clauses covered jurisdictional clauses so that their interpretation had to observe possible indicators of exclusion, or that MFN clauses did not cover jurisdictional clauses, so that their interpretation had to observe possible indicators of inclusion. This issue, however, is complex insofar that it also assumes arbitral acceptance of the jurisdiction/admissibility dichotomy in the context of the conditions of access to arbitration.

Chapter 4 turned the discussion to the substantive aspects of arbitral jurisdiction as defined by disputing parties, and also found examples of arbitral supplementing activities. Tribunals have built rules precluding retroactive deprivation of their jurisdiction by one of the disputing parties (non-retroactivity of denial of benefits clauses), extending the validity of consent when limited by time-bars (continued act doctrine), extending the scope of protection of investment treaties (the Broches test and the presumption in favour of the protection of indirect investments), and extending the scope of arbitrable disputes (the presumption in favour of jurisdictional bridging). Most of these rules operate as default rules in the absence of contrary party-defined rules. The Broches test can be seen as a standard that instructs when an investor should not qualify for the access to the ICSID mechanism. Finally, the two mentioned presumptions set the interpretative direction: they presume the protection of indirect investments and the permissibility of jurisdictional bridging, so that the interpretation of the relevant treaty clauses should observe if there are any indicators of their exclusion. These examples, equally as those discussed in Chapter 3, relax the conditions of access to arbitration and broaden arbitral jurisdiction.

In contrast, Chapter 5 found examples of arbitral supplementing activities that restrict access to investment arbitration. Tribunals have limited the scope of protection of investment treaties (the objective definitions of 'investment' and 'investor', and the legality requirement), limited the scope of arbitrable disputes (the condition of privity in the application of umbrella clauses), and translated the abuse of process doctrine into a jurisdictional rule limiting their authority. The objective definition of 'investment' can be seen as a standard for qualifying for the access to the ICSID mechanism, but that definition also creates an independent default rule when observed outside the ICSID context. The objective definition of 'investor', the legality requirement, and the abuse of process doctrine equally function as default rules imposing jurisdictional limitations independently of treaty texts. The privity requirement in the application of umbrella clauses also functions as a default rule, but it does not present an independent requirement: it is created for the sake of interpretation and application of treaty-provided umbrella clauses.

Chapters 3 to 5 evidence that investment treaty arbitration has witnessed the rise of arbitral regulatory activity in jurisdictional matters. The analysed practice shows that arbitral tribunals have attempted to resolve regulatory deficiencies in given sets of jurisdictional rules in a principled, abstract, and rule-like manner. The proposed solutions have been applied in streams of practices, gaining normativity and the character of a legal rule. The inspiration for thus created jurisdictional rules has been external to the governing arbitration agreements: tribunals (but at times annulment committees and courts too, when reviewing arbitral decisions), have drawn analogies to other fields of law, both international and domestic, relied on personal beliefs and values, policy considerations, and similar. This has led tribunals to create conflicting streams of practices, advocating in favour of opposing rules, and entering debates about the appropriateness of one or another solution in principle. Tribunals praise and criticise the rules adopted by other tribunals; they rely on previous decisions as authoritative sources, and they disdainfully ignore them. In any event, they engage in a law-making activity, attempting to create arbitration-overreaching rules governing questions of jurisdiction.

The development of arbitral jurisdictional regulation cannot be explained by reference to the mainstream criticisms of investment treaty arbitration. In Chapter 6, I reviewed the three main suspects: commercial law approaches to investment arbitration, the one-sidedness of the regime, and alleged arbitral biases. These criticisms cannot find the cause of the emergence of arbitral regulatory activity in jurisdictional matters. In order to find a driving force behind that activity, I suggested that the perspectives on the principle of consensualism have shifted, and that consent is now seen only as the primary means of jurisdictional regulation in investment arbitration, liberated from the political and symbolic concept of sovereignty which might have surrounded it in the inter-State context. This liberation, together with the investment arbitration framework, provides the needs and opportunities for arbitral activity as a secondary means of jurisdictional regulation. Finally, Chapter 6 examined the reactions of States in the domain of treaty-making to the developments in arbitral practice, finding that States have failed to recognise the causes and rationales of the arbitral regulatory activity, which results in the inability to engage in a dialogue

with arbitral tribunals about desirable standards governing the jurisdictional framework of investment treaty arbitration. On the bright side, I also found that, although unintended, some State action in this regard can send signals to tribunals regarding their policy preferences, and thus start an exchange.

The development of such arbitral regulatory activity has significant ramifications regarding the principle of consensualism. The bigger the extent of the arbitral jurisdictional regulation, the lesser the extent of the party definition of the authority to adjudicate. In other words, the development of arbitrator-made jurisdictional rules proves the hypothesis of this study true, namely that the strength of the principle of consensualism is inversely proportional to the extent of arbitral jurisdictional regulation. First, this correlation appears straightforward by observing *who* defines the authority to adjudicate. Second, it also holds true by observing the *function* of arbitrator-made jurisdictional rules: they either direct the interpretation and application of party-provided jurisdictional rules, or impose independent limits and conditions of arbitral jurisdiction. Arbitrator-made rules therefore interact with party-provided rules, either by influencing their meaning or by regulating their perceived shortcomings. Overall, the principle of consensualism, which confers on disputing parties the authority to define the limits of arbitral jurisdiction, is eroded by the rise of arbitral jurisdictional regulation. I note that this conclusion is limited to the field of investment treaty arbitration, but as already indicated in Introduction, given the general relevance of consensualism in international adjudication, similar phenomena might be present elsewhere. Further research, therefore, can examine to what extent other international courts and tribunals have engaged in a regulatory activity in jurisdictional matters and to what extent that development has affected their jurisdictional structure.

Turning back to the topic of this study, the rise of arbitral jurisdictional regulation is not surprising. As demonstrated in this study, it has appeared due to certain regulatory deficiencies in party-provided jurisdictional frameworks, which required a supplementing activity on the part of tribunals on the trajectory towards concrete jurisdictional determinations. Such regulatory deficiencies can only be discovered in practice, and due to insufficient regulation of jurisdictional questions in investment treaties, new ones will continue to emerge. Accordingly, this thesis did not seek to eliminate the opportunities for arbitral tribunals to engage in law-making but it suggested the integration of the arbitral law-making function into the jurisdictional framework of investment treaty arbitration. In Chapter 7, I sketched a two-layered model of jurisdictional regulation in investment treaty arbitration, consisting of primary rules (which are defined by disputing parties) and secondary rules (which are developed by arbitral tribunals). The two layers of rules can be easily coordinated, because the model establishes the primacy of party-provided over arbitrator-made jurisdictional rules, but allows the application of the latter as proper law in the event of the silence of the former. Furthermore, I argued in favour of an *evolutionary jurisdictional regulation*, which gives the opportunity to arbitral tribunals to engage in a process of law-making of secondary jurisdictional rules as a communicative process. In this process, tribunals are instructed to observe various voices and signals over time which influence the

content of secondary rules. Some challenges of this model can be raised by reference to the issues of legal change, its effect on the operation of treaties, the existence of control mechanisms, the availability of law-making material, and the risk of 'adventurism', but they are surmountable and do not present greater difficulties. Finally, the proposed model of formalised arbitral law-making would contribute significantly to legal certainty when it comes to the development of the secondary rules to be applied in the event of silence of the primary rules.

If the attempt of this thesis to demystify the extent to which consensualism truly governs investment treaty arbitration was successful, now is the time to think about that principle in the future. I argue that the proposed model of two-layered jurisdictional regulation will lead to the restoration of the principle of consensualism. That principle is given: it stems from the foundations of the international legal order and as such it is the basis of any form of international dispute settlement. But the normative embeddedness of that principle does not suffice to eliminate the challenges of its validity raised by the fact of arbitral jurisdictional regulation. In other words, an actor engaging in the system of investment treaty arbitration, being assured that he has full power to define the limits of arbitral jurisdiction, raises a reasonable question whether that assurance was sincere once he faces the jurisdiction of a tribunal established on the basis of arbitrator-made law. Only by introducing full transparency and predictability into the structure of jurisdictional regulation in investment arbitration, which gives the relevant actors an overview of the extent to which their consent matters and of the point at which other factors come into play, can a proper reliance on the principles and structure of that system be expected. In other words, the perceived validity of the principle of consensualism cannot be rebuilt by keeping a layer of unknown and unpredictable rules of the game in secrecy. That can be achieved only by laying all the cards on the table.

Bibliography

Books

Abi-Saab G, *Les exceptions préliminaires dans la procédure de La Cour internationale* (Pedone 1967)

Amerasinghe CF, *Jurisdiction of International Tribunals* (Kluwer Law International 2003)

——, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff 2009)

——, *International Arbitral Jurisdiction* (Brill 2011)

Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016)

Banifatemi Y (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Bartelson J, *Sovereignty as Symbolic Form* (Routledge 2014)

Baumgartner J, *Treaty Shopping in International Investment Law* (OUP 2016)

Bentolila D, *Arbitrators as Lawmakers* (Kluwer 2017)

Bottari M and Wallach L, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* (Public Citizen 2005)

Boyle A and Chinkin C, *The Making of International Law* (OUP 2007)

Brauch MD, *Exhaustion of Local Remedies in International Investment Law* (IISD 2017)

Brown C, *A Common Law of International Adjudication* (OUP 2007)

Brown Scott J (ed), *The Reports to the Hague Conferences of 1899 and 1907* (Clarendon Press 1917)

Brownlie I, *Principles of Public International Law* (7th ed, OUP 2008)

Cassese A and Weiler JH (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988)

Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953)

Clapham A, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed, OUP 2012)

Cole T, *The Structure of Investment Arbitration* (Routledge 2013)

Craig WL, Park WW and Paulsson J, *International Chamber of Commerce Arbitration* (3rd ed, Oceana 2000)

Crawford J, *State Responsibility. The General Part* (CUP 2013)

Cuniberti G, *Rethinking International Commercial Arbitration: Towards Default Arbitration* (Edward Elgar 2017)

Daly B, Goriatcheva E and Meighen H, *A Guide to the PCA Arbitration Rules* (OUP 2014)

De Brabandere E, *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (CUP 2014)

Diallo O, *Le consentement des parties à l'arbitrage international* (Presses Universitaires de France 2010)

Diel-Gligor K, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill 2017)

Dolzer R and Schreuer C, *Principles of International Investment Law* (2nd ed, OUP 2012)

Dörr O and Schmalenbach K (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012)

Douglas Z, *The International Law of Investment Claims* (CUP 2009)

Dumberry P, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016)

Eberhardt P and Olivet C, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (Helen Burley ed, Corporate Europe Observatory and Transnational Institute 2012)

Fontanelli F, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory* (Brill 2018)

Fox H and Webb P, *The Law of State Immunity* (3rd ed, revised and updated, OUP 2013)

Friedman LM, *Law and Society: An Introduction* (Prentice-Hall 1977)

Gallus N, *The Temporal Jurisdiction of International Tribunals* (OUP 2017)

García-Salmones Rovira M, *The Project of Positivism in International Law* (OUP 2013)

Gazzini T, *Interpretation of International Investment Treaties* (Hart 2016)

Goldsmith JL and Posner EA, *The Limits of International Law* (OUP 2005)

Hai Yen T, *The Interpretation of Investment Treaties* (Brill 2014)

Hart H, *The Concept of Law* (3rd ed, OUP 2012)

Hegel G, *Elements of the Philosophy of Right* (CUP 1991)

History of the ICSID Convention, vol II–2 (ICSID 1968)

History of the ICSID Convention——, vol II–1 (ICSID 1968)

History of the ICSID Convention——, vol I (ICSID 1970)

Hobér K, *International Commercial Arbitration in Sweden* (OUP 2011)

Kelsen H, *General Theory of Law and State* (Harvard University Press 1945)

——, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (FA Praeger 1950)

——, *Principles of International Law* (Rinehart & Company 1952)

Kidane WL, *The Culture of International Arbitration* (OUP 2017)

Kjos HE, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013)

Koskenniemi M, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005)

Kulick A, *Global Public Interest in International Investment Law* (CUP 2012)

Lamm V, *Compulsory Jurisdiction in International Law* (Edward Elgar 2014)

Lauterpacht SH, *The Development of International Law by the International Court* (Stevens & Sons 1958)

——, *The Function of Law in the International Community* (reprint, OUP 2011)

——, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans 1927, reprint Lawbook Exchange 2013)

Lim C and Elias O, *The Paradox of Consensualism in International Law* (Brill 1998)

Lowenfeld AF, *International Economic Law* (2nd ed, OUP 2008)

McLachlan C, Shore L and Weiniger M, *International Investment Arbitration: Substantive Principles* (2nd ed, OUP 2017)

McNair, Lord, *The Law of Treaties* (Clarendon Press 1961)

Miles K, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013)

Newcombe A and Paradell L, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009)

Palmer VV, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law* (Austin & Winfield 1992)

Paulsson J, *The Idea of Arbitration* (OUP 2013)

Pergantis V, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Edward Elgar 2017)

Reinisch A, *Standards of Investment Protection* (OUP 2008)

Roe T and Happold M, *Settlement of Investment Disputes under the Energy Charter Treaty* (CUP 2011)

Rosentreter D, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Nomos 2015)

Schmitt C, *Political Theology. Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005)

Schreuer CH and others, *The ICSID Convention: A Commentary* (2nd ed, CUP 2009)

Shahabuddeen M, *Precedent in the World Court* (CUP 1996)

Shany Y, *Regulating Jurisdictional Relations Between National and International Courts* (OUP 2007)

——, *Assessing the Effectiveness of International Courts* (OUP 2014)

——, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016)

Shaw MN, *International Law* (6th ed, CUP 2008)

Shihata IF, *The Power of the International Court to Determine Its Own Jurisdiction. Compétence de La Compétence* (Springer 1965)

Sornarajah M, *The International Law on Foreign Investment* (CUP 1994)

——, *The International Law on Foreign Investment* (3rd ed, CUP 2010)

——, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015)

Sourgens FG, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill Nijhoff 2015)

Spiermann O, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005)

Steingruber AM, *Consent in International Arbitration* (OUP 2012)

Stone Sweet A and Grisel F, *The Evolution of International Arbitration. Judicialization, Governance, Legitimacy* (OUP 2017)

Stuyt A (ed), *Survey of International Arbitrations 1794-1989* (3rd ed, Nijhoff 1990)

Subedi SP, *International Investment Law. Reconciling Policy and Principle* (2nd ed, Hart 2012)

Tamanaha BZ, *On the Rule of Law: History, Politics, Theory* (CUP 2004)

Thirlway H, *The Sources of International Law* (OUP 2014)

Vadi V, *Analogies in International Investment Law and Arbitration* (CUP 2016)

Van Harten G, *Investment Treaty Arbitration and Public Law* (OUP 2007)

Vandevelde KJ, *Bilateral Investment Treaties. History, Policy, and Interpretation* (OUP 2010)

——, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017)

Venzke I, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (OUP 2012)

von Bogdandy A and Venzke I (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012)

Waibel M and others (eds), *The Backlash against Investment Arbitration* (Kluwer 2010)

Weeramantry JR, *Treaty Interpretation in Investment Arbitration* (OUP 2012)

Wittgenstein L, *Philosophical Investigations* (GEM Anscombe tr, 3rd edn, Basil Blackwell 1967)

Chapters in Edited Volumes

Aguilar Alvarez G and Reisman WM, 'How Well Are Investment Awards Reasoned?' in Guillermo Aguilar Alvarez and W Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Martinus Nijhoff 2008)

Alter KJ, 'The Multiplication of International Courts and Tribunals after the End of the Cold War' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)

Amerasinghe CF, 'International Arbitration: A Judicial Function?' in Rüdiger Wolfrum, Maja Seršić and Trpimir M Šošić (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015)

Badia A, 'Attribution of Conducts of State-Owned Enterprises Based on Control by the State' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017)

Baetens F, 'Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016)

Baltag C, ‘The ICSID Convention: A Successful Story – The Origins and History of the ICSID’ in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017)

Banifatemi Y, ‘The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration’ in Andrea K Bjorklund, Ian A Laird and Sergey Ripinsky (eds), *Investment Treaty Law: Current Issues III. Remedies in International Investment Law. Emerging Jurisprudence of International Investment Law* (BIICL 2009)

——, ‘Taking Into Account Control Under Denial of Benefits Clauses’ in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Bassiouni MC, ‘International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009)

Bennouna M, ‘How to Cope with the Proliferation of International Courts and Coordinate Their Action’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012)

Benvenisti E, ‘Community Interests in International Adjudication’ in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018)

Bernardini P, ‘International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences’ in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)

Bishop D and Stevens M, ‘Jurisdiction Ratione Personae – Is There a Standard Definition of an “Investor” in Investment Treaties?’ in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Bjorklund AK, ‘Investment Treaty Arbitral Decisions as Jurisprudence Constante’ in Colin B Picker, Isabella D Bunn and Douglas W Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart 2008)

——, ‘The Public Interest in International Investment Law’ in August Reinisch, Mary E Footer and Christina Binder (eds), *International Law and... Select Proceedings of the European Society of International Law* (Hart 2016)

——, ‘The Legitimacy of the International Centre for Settlement of Investment Disputes’ in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018)

Boisson de Chazournes L, ‘The Principle of Compétence de La Compétence in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals’ in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011)

Born G and Šćekić M, 'Pre-Arbitration Procedural Requirements: "A Dismal Swamp"' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)

Braithwaite J, 'Types of Responsiveness' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017)

Braun TR, 'Globalization: The Driving Force in International Investment Law' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Broches A, 'Bilateral Investment Protection Treaties and Arbitration of Investment Disputes' in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995)

——, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' in Aron Broches, *Selected Essays. World Bank, ICSID, and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995)

Buchanan A and Keohane RO, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008)

Cabrol E, 'Pren Nreka v. Czech Republic and The Notion of Investment Under Bilateral Investment Treaties: Does "Investment" Really Mean "Every Kind of Asset"?' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (OUP 2010)

Caron DD, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011)

Ciurtin H, 'Paradoxes of (Sovereign) Consent: On the Uses and Abuses of a Notion in International Investment Law' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017)

Cordero Moss G, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

Crawford J, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008)

——, 'International Protection of Foreign Direct Investments: Between Clinical Isolation and Systematic Integration' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011)

——, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012)

De Brabandere E, 'Arbitral Decisions as a Source of International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill 2012)

de Mestral A, 'Investor-State Arbitration between Developed Democratic Countries' in Armand de Mestral (ed), *Second Thoughts: Investor-State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017)

Desierto DA, 'State Controls over Available Remedies in Investor-State Arbitration' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016)

Domański G and Świątkowski M, 'Application of Most Favoured Nation Clause to Jurisdiction Provisions in Light of the Award in Austrian Airlines v. Slovakia' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law*, vol II (Juris 2011)

Douglas Z, 'When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Dupuy P-M, 'About the Definition of an International Investment – The Requirement of a Contribution to the Economic Development of the Host State' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Dupuy P-M and Viñuales JE, 'The Challenge of "Proliferation": An Anatomy of the Debate' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)

Ewing-Chow M and Losari JJ, 'Which Is to Be the Master? Extra-Arbitral Interpretative Procedures for IIAs' in Jean E Kalicki and Joubin-Bret Anna (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015)

Fitzmaurice SGG, 'Some Problems Regarding the Formal Sources of International Law' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000)

Fyrnys M, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012)

Gaillard E, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

Garibaldi OM, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

——, 'Jurisdictional Errors: A Critique of the North American Dredging Company Case' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)

Gessel-Kalinowska vel Kalisz B and Czech K, 'The Role of Precedent in Investment Treaty Arbitration' in Barton Legum (ed), *The Investment Treaty Arbitration Review* (3rd ed, Law Business Research 2018)

Grant Cohen H and others, 'Legitimacy and International Courts – A Framework' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (CUP 2018)

Heiskanen V, 'Entretemps: Is There a Distinction Between Jurisdiction Ratione Temporis and Substantive Protection Ratione Temporis?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Higgins R, 'International Law and the Reasonable Need of Governments to Govern. Inaugural Lecture, London School of Economics and Political Science 22nd November, 1982' in Rosalyn Higgins, *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, vol 2 (OUP 2009)

Hirsch M, 'Investment Tribunals and Human Rights Treaties: A Sociological Perspective' in Freya Baetens (ed), *Investment Law within International Law. Integrationist Perspectives* (CUP 2013)

——, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Hofmann R and Tams CJ, 'International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011)

Ishikawa T, 'Keeping Interpretation in Investment Treaty Arbitration "on Track": The Role of State Parties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015)

Jennings SR, 'Reflections on the Term "Dispute"' in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff 1994)

Jennings SRY, 'What Is International Law and How Do We Tell It When We See It?', *The Cambridge-Tilburg Law Lectures: Third Series 1980* (Kluwer 1983)

Kalderimis D, 'Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011)

Kaufmann-Kohler G, 'Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?' in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006)

——, 'Is Consistency a Myth?' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008)

——, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Frédéric Bachand (ed), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris 2011)

Kaul I and Mendoza RU, 'Advancing the Concept of Public Goods' in Inge Kaul and others (eds), *Providing Global Public Goods: Managing Globalization* (OUP 2003)

Klabbers J, 'International Courts and Informal International Law' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012)

Koskenniemi M, 'What Is International Law For?' in Malcolm D Evans (ed), *International Law* (3rd ed, OUP 2010)

Kulick A, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law' in Andreas von Arnauld and Kerstin von der Decken (eds), *German Yearbook of International Law*, vol 59 (Duncker & Humblot 2016)

Laird IA, 'A Difference without A Distinction? 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)

Lalive P and Halonen L, 'On the Availability of Counterclaims in Investment Treaty Arbitration' in Alexander J Bělohlávek and Naděžda Rozehnalová (eds), *Czech Yearbook of International Law*, vol II (Juris 2011)

Legum B, 'Options to Establish an Appellate Mechanism for Investment Disputes' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008)

Lekkas S-I and Tzanakopoulos A, 'Pacta Sunt Servanda versus Flexibility in the Suspension and Termination of Treaties' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014)

Lévesque C, 'The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?' in Armand de Mestral (ed), *Second Thoughts: Investor State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017)

Lindsnaes B, 'The Global and the Regional Outlook: How Can Global Public Goods Be Advanced from a Human Rights Perspective?' in Erik André Andersen and Birgit Lindsnaes (eds), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff 2007)

Lusa Bordin F, 'Reasserting Control through Withdrawal from Investment Agreements: What Role for the Law of Treaties?' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016)

Methymaki E and Tzanakopoulos A, 'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016)

Mills A, 'The Public–Private Dualities of International Investment Law and Arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011)

——, 'The Balancing (and Unbalancing?) Of Interests in International Investment Law and Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Mitrev Penusliski I, 'A Dispute Systems Design Diagnosis of ICSID' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Mosler H, 'Political and Justiciable Legal Disputes: Revival of an Old Controversy?' in Bin Cheng and ED Brown (eds), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (Stevens & Sons 1988)

Newcombe A, 'Investor Misconduct: Jurisdiction, Admissibility or Merits?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011)

Nolan MD and Sourgens FG, 'Limits of Consent – Arbitration Without Privity and Beyond' in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley 2010)

Obadia E and Nitschke F, 'Institutional Arbitration and the Role of the Secretariat' in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner's Guide* (Brill 2014)

O'Connell ME and Vanderzee L, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)

Paparinskis M, 'Analogies and Other Regimes of International Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Park WW, 'Arbitrator Integrity' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration* (Kluwer 2010)

Paulsson J, 'Jurisdiction and Admissibility' in Gerald Aksen (ed), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC 2005)

——, 'The Tipping Point' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2016)

Pauwelyn J, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Pelc KJ, 'The Welfare Implications of Precedent in International Law' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016)

Polkinghorne M and Volkmer S-M, 'The Legality Requirement in Investment Arbitration' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Potestà M, 'State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press 2013)

Reinisch A, 'The Role of Precedent in ICSID Arbitration' in Christian Klausegger and others (eds), *Austrian Arbitration Yearbook 2008* (Beck/Stämpfli/Manz 2008)

——, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court' in Armand de Mestral (ed), *Second Thoughts: Investor State Arbitration between Developed Democracies* (Centre for Int'l Governance Innovation 2017)

Reisman WM, 'International Lawmaking: A Process of Communication' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000)

Romano CP, Alter KJ and Shany Y, 'Mapping International Adjudicative Bodies, the Issues, and Players' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)

Rosenfeld F, 'Iura Novit Curia in International Law' in Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Curia in International Arbitration* (Juris 2018)

Salles LE, 'Jurisdiction' in William A Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017)

Schill S and Briese R, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 13 (Martinus Nijhoff 2009)

Schill SW, 'International Investment Law and Comparative Public Law—An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010)

——, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

——, 'System-Building in Investment Treaty Arbitration and Lawmaking' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking. On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012)

——, 'The Jurisprudence of Investment Treaty Tribunals. Between Public Good and Common Concern' in Tullio Treves, Francesco Seatzu and Seline Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (Routledge 2014)

——, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017)

Schill SW and Djanic V, 'International Investment Law and Community Interests' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018)

Schlemmer EC, 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)

Schreuer C, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)

——, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Schreuer C and Weiniger M, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)

Schultz T, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Schwebel SM, 'Does the Consent of the Contracting Parties Govern the Requirement of an "Investment" as Specified in Article 25 of the ICSID Convention?' in Yas Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (Juris 2018)

Shany Y, 'Jurisdiction and Admissibility' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014)

Sinclair A, 'Bridging the Contract/Treaty Divide' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

Siwy A, 'Contract Claims and Treaty Claims' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017)

Sornarajah M, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008)

——, 'Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009-2010* (OUP 2010)

Steiner H, 'Working Rights' in Matthew H Kramer, NE Simmonds and Hillel Steiner, *A Debate Over Rights. Philosophical Enquiries* (OUP 1998)

Stern B, 'ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case' in Steve Charnovitz, Debra P Steger and Peter Van den Bossche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (CUP 2005)

Strong S, 'Mass Procedures in Abaclat v. Argentine Republic – Are They Consistent with the International Investment Regime?' in Marianne Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration*, vol 3 (NWV Verlag 2013)

Tereposky G and Nielsen L, 'Coordinated Actions in International Economic Law as Illustrated by Investment Treaty Arbitration and World Trade Organization Disputes' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016)

Thorn R and Doucleff J, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Tomuschat C, 'The European Court of Human Rights and Investment Protection' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

——, 'What Is "General International Law"?', *Guerra y Paz: 1945-2009. Obra homenaje al Dr. Santiago Torres Bernárdez* (Universidad Del País Vasco 2010)

Toral M and Schultz T, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Triantafilou EE, 'Contemporaneity and Its Limits in Treaty Interpretation' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)

Van Aaken A, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010)

——, 'Control Mechanisms in International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law. Bringing Theory into Practice* (OUP 2014)

Van Harten G, 'Perceived Bias in Investment Treaty Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010)

Vandevelde KJ, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2008-2009* (OUP 2009)

Venzke I, 'Judicial Authority and Styles of Reasoning: Self-Presentation between Legalism and Deliberation' in Joanna Jemielniak, Laura Nielsen and Henrik Palmer Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2016)

Viñuales JE, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *International Investment Law: Bringing Theory into Practice* (OUP 2014)

von Bogdandy A and Venzke I, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012)

Waibel M, 'International Investment Law and Treaty Interpretation' in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011)

——, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (CH Beck/Hart/Nomos 2015)

Wälde T, 'Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris 2008)

Wälde TW, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007)

——, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

Wehland H, ‘Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules’ in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2017)

Weiniger M, ‘Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT by Reading a BIT or by Reading into a BIT?’ in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006)

Williams QC DA, ‘Jurisdiction and Admissibility’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)

Wolfrum R, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’ in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008)

Yotova R, ‘Systemic Integration: An Instrument for Reasserting the State’s Control in Investment Arbitration?’ in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016)

Zeiler G, ‘Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009)

Zuleta E, ‘International Jurisprudence, Global Governance, and Global Administrative Law’ in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015)

The Hague Academy Courses

Alvarez JE, ‘The Public International Law Regime Governing International Investment’ (2009) 344 Recueil des Cours 193

Carabiber C, ‘L’arbitrage international entre gouvernements et particuliers’ (1950) 76 Recueil des Cours 221

Hambro E, ‘The Jurisdiction of the International Court of Justice’ (1950) 76 Recueil des Cours 123

Hess B, ‘The Private-Public Divide in International Dispute Resolution’ (2016) 388 Recueil des Cours 49

Hobér K, ‘Res Judicata and Lis Pendens in International Arbitration’ (2014) 366 Recueil des Cours 99

Jennings R, ‘General Course on Principles of International Law’ (1967) 121 Recueil des Cours 323

Kawano M, ‘The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes’ (2009) 346 Recueil des Cours 9

McWhinney E, ‘Judicial Settlement of Disputes. Jurisdiction and Justiciability’ (1990) 221 Recueil des Cours 9

Reisman WM, ‘The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication’ (1996) 258 Recueil des Cours 9

Articles

Abedian H, ‘Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review’ (2011) 28 J Int’l Arb 589

Alexandrov SA, ‘Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines’ (2004) 5 JWIT 555

——, ‘The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?’ (2006) 5 Chinese JIL 29

Alschner W, ‘The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality’ (2017) 42 Yale J Int’l L 1

Alter KJ, ‘Agents or Trustees? International Courts in Their Political Context’ (2008) 14 European J Int’l Relations 33

Alvarez JE, ‘A BIT on Custom’ (2009) 42 NYU J Int’l L & Pol 17

——, ‘Is Investor-State Arbitration “Public”?’ (2016) 7 JIDS 534

Amerasinghe C, ‘Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (1976) 47 British Yrbk Int’l L 227

Andreeva Y, ‘Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions’ (2011) 27 Arb Int’l 129

Ascensio H, ‘Abuse of Process in International Investment Arbitration’ (2014) 13 Chinese JIL 763

Atanasova D, Martínez Benoit A and Ostřanský J, ‘The Legal Framework for Counterclaims in Investment Treaty Arbitration’ (2014) 31 J Int’l Arb 357

Audit M and Forteau M, ‘Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?’ (2012) 29 J Int’l Arb 581

Augenstein D, ‘To Whom It May Concern: International Human Rights Law and Global Public Goods’ (2016) 23 Indiana J Global Legal Studies 225

Baetens F, ‘The European Union’s Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges’ (2016) 43 Legal Issues Econ Integration 367

——, ‘Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms’ (2017) 8 JIDS 432

Bassiouni MC, ‘A Functional Approach to General Principles of International Law’ (1990) 11 Michigan J Int’l L 768

Bechky PS, ‘Salini’s Nature: Arbitrators’ Duty of Jurisdictional Policing’ (2018) 17 LPICT 145

Becker MA, ‘The Dispute That Wasn’t There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice’ (2017) 6 Cambridge Int’l LJ 4

Behn D, ‘Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art’ (2015) 46 Georgetown JIL 363

Bermann GA, ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37 Yale J Int’l L 1

Bernardini P, ‘Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties’ Interests’ (2017) 32 ICSID Rev-FILJ 38

Bjorge E, ‘EU Law Constraints on Intra-EU Investment Arbitration?’ (2017) 16 LPICT 71

Bjorklund AK, ‘Contract without Privity: Sovereign Offer and Investor Acceptance’ (2001) 2 Chicago JIL 183

——, ‘Are Arbitrators (Judicial) Activists?’ (2018) 17 LPICT 49

Blanchard S, ‘State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration’ (2011) 10 Washington University Global Studies Law Review 419

Böckstiegel K-H, ‘Commercial and Investment Arbitration: How Different Are They Today?’ (2012) 28 Arb Int’l 577

Bodansky D, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law’ (1999) 93 AJIL 596

——, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’ (2012) 23 EJIL 651

Bonafé BI, ‘Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications’ (2017) 45 Questions Int’l L 3

Born G, ‘A New Generation of International Adjudication’ (2012) 61 Duke LJ 775

Brilmayer L, ‘From “Contract” to “Pledge”: The Structure of International Human Rights Agreements’ (2007) 77 British Yrbk Int’l L 163

Broches A, ‘The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction’ (1966) 5 Columbia J Transnat’l L 263

Brower CN, ‘The Initiation of Arbitration Proceedings: “Jack Be Nimble, Jack Be Quick …!”’ (1998) 13 ICSID Rev-FILJ 15

——, ‘W(h)Ither International Commercial Arbitration?’ (2008) 24 Arb Int’l 181

Brower CN and Kumar SP, ‘Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?’ (2015) 30 ICSID Rev-FILJ 35

Brower CN and Schill SW, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 Chicago JIL 471

Brower II CH, ‘Investor-State Disputes under NAFTA: The Empire Strikes Back’ (2001) 40 Columbia J Transnat’l L 43

Brown C, ‘The Inherent Powers of International Courts and Tribunals’ (2006) 76 British Yrbk Int’l L 195

Brownlie I, ‘The Justiciability of Disputes and Issues in International Relations’ (1967) 42 British Yrbk Int’l L 123

Chen A, ‘Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled? Comments on Provisions Concerning Dispute Settlement in Model U.S. and Canadian BITs’ (2006) 7 JWIT 899

Chen H, ‘The Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages’ (2011) 12 JWIT 671

Cheng T-H, ‘Power, Authority and International Investment Law’ (2005) 20 American Univ Int’l L Rev 465

——, ‘Precedent and Control in Investment Treaty Arbitration’ (2006) 30 Fordham Int’l LJ 1014

Choudhury B, ‘International Investment Law as a Global Public Good’ (2013) 17 Lewis & Clark L Rev 481

Coe JJ, ‘Domestic Court Control of Investment Awards: Necessary Evil or Archilles Heel Within NAFTA and the Proposed FTAA?’ (2002) 19 J Int’l Arb 185

Commission JP, ‘Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence’ (2007) 24 J Int’l Arb 129

Craig WL, ‘Uses and Abuses of Appeal from Awards’ (1988) 4 Arb Int’l 174

Crawford J, ‘The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court’ (1980) 50 British Yrbk Int’l L 63

——, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 Arb Int’l 351

Cremades BM and Cairns DJ, ‘The Brave New World of Global Arbitration’ (2002) 3 JWIT 173

Crowley M and Howse R, ‘US–Stainless Steel (Mexico)’ (2010) 9 World Trade Rev 117

D’Agnone G, ‘Recourse to the “Futility Exception” within the ICSID System: Reflections on Recent Developments of the Local Remedies Rule’ (2013) 12 LPICT 343

De Brabandere E, ‘“Good Faith”, “Abuse of Process” and the Initiation of Investment Treaty Claims’ (2012) 3 JIDS 609

de Nanteuil A, ‘Counterclaims in Investment Arbitration: Old Questions, New Answers?’ (2018) 17 LPICT 374

De Stefano C, ‘Denial of Benefits Clauses in International Investment Agreements: Burden of Proof and Notice to Claimant’ (2016) 30 Diritto del Commercio Internazionale 143

Demirkol B, ‘Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?’ (2013) 2 Cambridge Int’l LJ 612

——, ‘Non-Treaty Claims in Investment Treaty Arbitration’ (2018) 31 Leiden JIL 59

Dolzer R and Myers T, ‘After Tecmed: Most-Favored-Nation Clauses in Investment Protection Agreements’ (2004) 19 ICSID Rev-FILJ 49

Donovan DF, ‘Abaclat and Others v Argentine Republic: As a Collective Claims Proceeding’ (2012) 27 ICSID Rev-FILJ 261

Douglas Z, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 British Yrbk Int’l L 151

——, ‘Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?’ (2010) 25 ICSID Rev-FILJ 104

——, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2011) 2 JIDS 97

——, ‘The Plea of Illegality in Investment Treaty Arbitration’ (2014) 29 ICSID Rev-FILJ 155

Dupont P-E, ‘The Notion of ICSID Investment: Ongoing “Confusion” or “Emerging Synthesis”?’ (2011) 12 JWIT 245

Earnest DL, ‘The Duty of Arbitrators to Delimitate between Jurisdiction and Admissibility in Investor-State Arbitration: A Developed Consensus or an Enduring Lacuna?’ (2018) 17 LPICT 135

Elkins Z, Guzman AT and Simmons BA, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000' (2006) 60 Int'l Org 811

Fauchald OK, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL 301

Feldman M, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Rev-FILJ 24

——, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 ICSID Rev-FILJ 528

Feldman MB, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Rev-FILJ 85

Fietta S and Upcher J, 'Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?' (2013) 29 Arb Int'l 187

Fitzmaurice M, 'Consent to Be Bound - Anything New under the Sun?' (2005) 74 Nordic JIL 483

Fitzmaurice SG, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 British Yrbk Int'l L 1

——, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yrbk Int'l L 203

——, 'The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure' (1958) 34 British Yrbk Int'l L 1

——, 'The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of International Law' (1959) 35 British Yrbk Int'l L 183

Fontanelli F and Tanzi A, 'Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice' (2017) 16 LPICT 3

Footer ME, 'Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction' (2017) 16 LPICT 87

Foster GK, 'Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia J Transnat'l L 201

Fox H, 'States and the Undertaking to Arbitrate' (1988) 37 Int'l & Comp LQ 1

Franck SD, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521

——, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina L Rev 1

——, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 Harvard Int’l LJ 435

——, ‘The ICSID Effect? Considering Potential Variations in Arbitration Awards’ (2011) 51 Virginia J Int’l L 825

——, ‘Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes’ (2014) 55 Virginia J Int’l L 13

——, ‘Inside the Arbitrator’s Mind’ (2017) 66 Emory LJ 1115

Franck SD and Wylie LE, ‘Predicting Outcomes in Investment Treaty Arbitration’ (2015) 65 Duke LJ 459

Freyer DH and Herlihy D, ‘Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” Is “Most-Favored”?’ (2005) 20 ICSID Rev-FILJ 58

Fukunaga Y, ‘Abuse of Process under International Law and Investment Arbitration’ (2018) 33 ICSID Rev-FILJ 181

Gaffney JP, ‘“Abuse of Process” in Investment Treaty Arbitration’ (2010) 11 JWIT 515

Gaffney JP and Loftis JL, ‘The “Effective Ordinary Meaning” of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims’ (2007) 8 JWIT 5

Gaillard E, ‘Some Notes on the Drafting of ICSID Arbitration Clauses’ (1988) 3 ICSID Rev-FILJ 136

——, ‘Centre International Pour Le Reglement Des Differends Relatifs Aux Investissements (CIRDI)’ (1999) 126 Journal du droit international 273

——, ‘Abuse of Process in International Arbitration’ (2017) 32 ICSID Rev-FILJ 17

Gallus N, ‘An Umbrella Just for Two? BIT Obligations Observance Clauses and the Parties to a Contract’ (2008) 24 Arb Int’l 157

——, ‘Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions’ (2016) 31 ICSID Rev-FILJ 290

García Olmedo J, ‘Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?’ (2017) 8 JIDS 695

Garcia Sanchez GJ, ‘The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration’ (2018) 18 Nevada LJ 489

Gastrell L and Le Cannu P-J, ‘Procedural Requirements of “Denial-of-Benefits” Clauses in Investment Treaties: A Review of Arbitral Decisions’ (2015) 30 ICSID Rev-FILJ 78

Gelander JL, ‘Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations’ (1997) 80 Marquette L Rev 625

Gertz G, Jandhyala S and Poulsen LNS, ‘Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?’ (2018) 107 World Development 239

Grossman N, ‘The Normative Legitimacy of International Courts’ (2013) 86 Temple L Rev 61

Grušić U, ‘The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes’ (2009) 10 JWIT 69

Guillaume G, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 JIDS 5

Guzman AT, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1997) 38 Virginia J Int’l L 639

——, ‘Against Consent’ (2012) 52 Virginia J Int’l L 747

Hafner-Burton EM and Victor DG, ‘Secrecy in International Investment Arbitration: An Empirical Analysis’ (2016) 7 JIDS 161

Haftel YZ and Thompson A, ‘When Do States Renegotiate Investment Agreements? The Impact of Arbitration’ (2018) 13 Rev Int’l Organ 25

Hamamoto S, ‘Parties to the “Obligations” in the Obligations Observance (“Umbrella”) Clause’ (2015) 30 ICSID Rev-FILJ 449

——, ‘Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy’ (2015) 16 JWIT 931

Heiskanen V, ‘Forbidding Dépeçage: Law Governing Investment Treaty Arbitration’ (2009) 32 Suffolk Transnat’l L Rev 367

——, ‘Comment on Andrea Marco Steingruber’s Remarks on Veijo Heiskanen’s Note “Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration”’ (2014) 29 ICSID Rev-FILJ 669

——, ‘Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration’ (2014) 29 ICSID Rev-FILJ 231

Helfer LR, ‘Nonconsensual International Lawmaking’ (2008) 2008 Univ Illinois L Rev 71

Helfer LR and Slaughter A-M, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’ (2005) 93 California L Rev 899

Hepburn J, ‘Domestic Investment Statutes in International Law’ (2018) 112 AJIL 658

Hoffmann AK, ‘Counterclaims in Investment Arbitration’ (2013) 28 ICSID Rev-FILJ 438

Holcombe AN, 'The Improvement of the International Law-Making Process' (1961) 37 Notre Dame L Rev 16

Hollis DB, 'Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley J Int'l L 137

Howse R, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 Columbia J Envt'l L 489

Huber M and Tereposky G, 'The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism' (2017) 32 ICSID Rev-FILJ 545

Hudson MO, 'The Central American Court of Justice' (1932) 26 AJIL 759

Hueckel J, 'Rebalancing Legitimacy and Sovereignty in International Investment Agreements' (2012) 61 Emory LJ 601

Hwang SC M and Fong LC, 'Definition of "Investment"—A Voice from the Eye of the Storm' (2011) 1 Asian JIL 99

Jennings R, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 Int'l & Comp LQ 1

Junngam N, 'An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference' (2010) 15 UCLA J Int'l L & For Aff 399

Kabra R, 'Has Abaclat v Argentina Left the ICSID with a 'Mass'Ive Problem?' (2015) 31 Arb Int'l 425

Kapeliuk D, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' (2010) 96 Cornell L Rev 47

Kaufmann-Kohler G, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arb Int'l 357

Kearney RD and Dalton RE, 'The Treaty on Treaties' (1970) 64 AJIL 495

Kendra T, 'State Counterclaims in Investment Arbitration - A New Lease of Life?' (2013) 29 Arb Int'l 575

Keohane RO, Moravcsik A and Slaughter A-M, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 Int'l Org 457

Koskenniemi M, 'It's Not the Cases, It's the System' (2017) 18 JWIT 343

Krisch N, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1

Landes WM and Posner RA, 'Adjudication as a Private Good' (1979) 8 J Legal Studies 235

Langford M, 'Keeping Up with the Fashion: Human Rights and Global Public Goods' (2009) 16 Int'l J Minority & Group Rights 165

Langford M and Behn D, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29 EJIL 551

Langford M, Behn D and Hilleren Lie R, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 JIEL 301

Lauterpacht H, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 British Yrbk Int’l L 48

Lavalle R, ‘The Need for Precision in Formulating Disputes Brought to the International Court of Justice by Special Agreement, with Particular Reference to the 2008 Belize/Guatemala Special Agreement’ (2016) 76 Heidelberg J Int’l L 993

Losari JJ and Ewing-Chow M, ‘Difficulties with Decentralization and Due Process. Indonesia’s Recent Experiences with International Investment Agreements and Investor-State Disputes’ (2015) 16 JWIT 981

Lowe V, ‘Overlapping Jurisdiction in International Tribunals’ (1999) 20 Australian Yrbk Int’l L 191

Lowenfeld AF, ‘Investment Agreements and International Law’ (2003) 42 Columbia J Transnat’l L 123

Manciaux S, ‘The Notion of Investment: New Controversies’ (2008) 9 JWIT 443

Mann F, ‘The Proper Law of Contracts Concluded by International Persons’ (1959) 35 British Yrbk Int’l L 34

Martinez-Fraga PJ and Reetz CR, ‘The Status of the Limitations Period Doctrine in Public International Law: Devising a Functional Analytical Framework for Investors and Host-States’ (2017) 4 McGill J Disp Resol 105

Maupin JA, ‘Public and Private in International Investment Law: An Integrated Systems Approach’ (2014) 54 Virginia J Int’l L 367

Mavroidis PC, ‘Free Lunches? WTO as Public Good, and the WTO’s View of Public Goods’ (2012) 23 EJIL 731

McDougal MS and Reisman WM, ‘The Prescribing Function in World Constitutive Process: How International Law Is Made’ (1980) 6 Yale Studies in World Public Order 249

Mills A, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 JIEL 469

Mohtashami R and El-Hosseny F, ‘State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?’ (2016) 3 BCDR Int’l Arb Rev 371

Moloo R and Khachaturian A, ‘The Compliance with the Law Requirement in International Investment Law’ (2011) 34 Fordham Int’l LJ 1473

Monebhurrun N, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' (2017) 8 JIDS 79

Mortenson JD, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard Int'l LJ 257

Mullen S and Whitsitt E, 'ICSID and Legislative Consent to Arbitrate: Questions of Applicable Law' (2017) 32 ICSID Rev-FILJ 92

Nakajima K, 'Beyond Abaclat: Mass Claims in Investment Treaty Arbitration and Regulatory Governance for Sovereign Debt Restructuring' (2018) 19 JWIT 208

Nash Leich M, 'Contemporary Practice of the United States Relating to International Law' (1985) 79 AJIL 431

Neuman GL, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101

Norton PM, 'The Role of Precedent in the Development of International Investment Law' (2018) 33 ICSID Rev-FILJ 280

Obersteiner T, '"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors' (2014) 31 J Int'l Arb 265

Orakhelashvili A, 'The Concept of International Judicial Jurisdiction: A Reappraisal' (2003) 3 LPICT 501

Ortino F, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 31

Oxman BH, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 AJIL 277

Paine J, 'International Adjudication as a Global Public Good?' (2018) 29 EJIL 1223

Palestini L, 'Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament' (2017) 8 JIDS 557

Palevičienė S, 'Consent to Arbitration and the Legacy of the SPP v. Egypt Case' (2014) 7 Baltic J Law & Politics 149

Paparinskis M, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Rev-FILJ 14

Parlett K, 'Claims under Customary International Law in ICSID Arbitration' (2016) 31 ICSID Rev-FILJ 434

Pauker SA, 'Admissibility of Claims in Investment Treaty Arbitration' (2018) 34 Arb Int'l 1

Paulsson J, ‘Arbitration Without Privity’ (1995) 10 ICSID Rev-FILJ 232

Pauwelyn J, ‘The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus’ (2015) 109 AJIL 761

Pellet A, ‘The Case Law of the ICJ in Investment Arbitration’ (2013) 28 ICSID Rev-FILJ 223

Pérez Aznar F, ‘Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America’ (2016) 17 JWIT 536

Pinsolle P, ‘Jurisdictional Review of ICSID Awards’ (2004) 5 JWIT 613

Polasek M, ‘The Consultation Period Requirement in Investment Treaties as a Matter of Jurisdiction, Admissibility or Procedure’ (2006) 23 News from ICSID 14

——, ‘The Threshold for Registration of a Request for Arbitration under the ICSID Convention’ (2011) 5 Disp Resol Int’l 177

Posner EA and Yoo JC, ‘Judicial Independence in International Tribunals’ (2005) 93 California L Rev 1

Potestà M, ‘The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws’ (2011) 27 Arb Int’l 149

Poulsen LNS and Aisbett E, ‘When the Claim Hits. Bilateral Investment Treaties and Bounded Rational Learning’ (2013) 65 World Politics 273

Price D, ‘Indonesia’s Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?’ (2017) 7 Asian JIL 124

Pronto AN, ‘Some Thoughts on the Making of International Law’ (2008) 19 EJIL 601

Protopsaltis PM, ‘The Challenge of the Barcelona Traction Hypothesis: Barcelona Traction Clauses and Denial of Benefits Clauses in BITs and IIAs’ (2010) 11 JWIT 561

Proulx V-J, ‘The World Court’s Jurisdictional Formalism and Its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes’ (2017) 30 Leiden JIL 925

Puig S, ‘No Right Without a Remedy: Foundations of Investor-State Arbitration’ (2014) 35 Univ Penn J Int’l L 829

——, ‘Social Capital in the Arbitration Market’ (2014) 25 EJIL 387

Puig S and Brown C, ‘The Secretary-General’s Power to Refuse to Register a Request for Arbitration under the ICSID Convention’ (2012) 27 ICSID Rev-FILJ 172

Radi Y, ‘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

Radović R, ‘Problematizing Abaclat’s Mass Claims Investment Arbitration Using Domestic Class Actions’ (2017) 4 McGill J Disp Resol 1

——, ‘Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations’ (2018) 2018 J Disp Resol 143

——, ‘Between Rights and Remedies: The Access to Investment Treaty Arbitration as a Substantive Right of Foreign Investors’ (2019) 10 JIDS 42

Rask Madsen M, Cebulak P and Wiebusch M, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’ (2018) 14 Int’l J L Context 197

Reed L, ‘The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management’ (2010) 25 ICSID Rev-FILJ 95

Reed L and Sim C, ‘Potential Investment Treaty Appellate Bodies: Open Questions’ (2017) 32 ICSID Rev-FILJ 691

Reinisch A, ‘How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?’ (2011) 2 JIDS 115

——, ‘Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration’ (2016) 19 JIEL 761

——, ‘Jurisdiction and Admissibility in International Investment Law’ (2017) 16 LPICT 21

Reisman WM, ‘The Breakdown of the Control Mechanism in ICSID Arbitration’ (1989) 1989 Duke LJ 739

——, ‘Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law’ (2015) 30 ICSID Rev-FILJ 616

Roberts A, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 AJIL 179

——, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 AJIL 45

——, ‘State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority’ (2014) 55 Harvard Int’l LJ 1

——, ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56 Harvard Int’l LJ 353

——, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 AJIL 410

Roe T, ‘Illegality and Jurisdiction in Investment Arbitration’ (2016) 2 Turkish Commercial L Rev 17

Rogers CA, ‘The Politics of International Investment Arbitrators’ (2013) 12 Santa Clara J Int’l L 223

Romano CP, ‘The Shift From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent’ (2007) 39 Int’l L & Politics 791

Rosenfeld F, ‘Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after BG v. Argentina’ (2016) 29 Leiden JIL 137

Salacuse JW, ‘The Emerging Global Regime for Investment’ (2010) 51 Harvard Int’l LJ 427

Salomon CT and Friedrich S, ‘Investment Arbitration in East Asia and the Pacific. A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region’ (2015) 16 JWIT 800

Sands P, ‘Reflections on International Judicialization’ (2016) 27 EJIL 885

Santacroce FG, ‘Navigating the Troubled Waters between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration’ (2017) 33 Arb Int’l 539

Sardinha E, ‘The Impetus for the Creation of an Appellate Mechanism’ (2017) 32 ICSID Rev-FILJ 503

Sattorova M, ‘Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond’ (2012) 2 Asian JIL 267

Savarese E, ‘Treaty-Based Investment Arbitration and the MFN Clause: The Possible Common Denominator Between Jurisdiction and Admissibility’ (2011) 21 Italian Yrbk Int’l L 241

Schill SW, ‘Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China’ (2007) 15 Cardozo JICL 73

——, ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’ (2009) 18 Minn J Int’l L 1

——, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’ (2010) 23 Leiden JIL 401

——, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 Virginia J Int’l L 57

——, ‘W(h)Ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 EJIL 875

——, ‘Illegal Investments in Investment Treaty Arbitration’ (2012) 11 LPICT 281

——, ‘Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework’ (2017) 20 JIEL 649

——, ‘Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?’ (2018) 19 JWIT 1

Schlag P, ‘Rules and Standards’ (1985) 33 UCLA L Rev 379

Schlemmer EC, ‘An Overview of South Africa’s Bilateral Investment Treaties and Investment Policy’ (2016) 31 ICSID Rev-FILJ 167

Schneiderman D, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’ (2010) 30 Northwestern J Int’l L & Business 383

Schreuer C, ‘Commentary on the ICSID Convention’ (1996) 11 ICSID Rev-FILJ 318

——, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 JWIT 231

——, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4 LPICT 1

——, ‘From ICSID Annulment to Appeal Half Way Down the Slippery Slope’ (2011) 10 LPICT 211

——, ‘Jurisdiction and Applicable Law in Investment Treaty Arbitration’ (2014) 1 McGill J Disp Resol 1

Schrijver N, ‘The Changing Nature of State Sovereignty’ (2000) 70 British Yrbk Int’l L 65

Scobbie IG, ‘The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function’ (1997) 8 EJIL 264

Shany Y, ‘Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims’ (2005) 99 AJIL 835

Shetty N and Weeramantry JR, ‘India’s New Approach to Investment Treaties’ (2016) 2016 Asian Disp Rev 189

Shihata IF, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 ICSID Rev-FILJ 1

Sinclair AC, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 Arb Int’l 411

Smit Duijzentkunst BL and Dawkins SL, ‘Arbitrary Peace? Consent Management in International Arbitration’ (2015) 26 EJIL 139

Sobel-Read KB, 'A New Model of Sovereignty in the Contemporary Era of Integrated Global Commerce: What Anthropology Contributes to the Shortcomings of Legal Scholarship' (2016) 49 Vanderbilt J Transnat'l L 1045

Söderlund C and Burova E, 'Is There Such a Thing as Admissibility in Investment Arbitration?' (2018) 33 ICSID Rev-FILJ 525

Sornarajah M, 'Power and Justice in Foreign Investment Arbitration' (1997) 14 J Int'l Arb 103

——, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 Int'l Environ Agreements 329

Sourgens FG, 'By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations' (2013) 38 North Carolina J Int'l L & Com Reg 875

——, 'Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements' (2013) 11 Santa Clara J Int'l L 335

——, 'Law's Laboratory: Developing International Law on Investment Protection as Common Law' (2014) 34 Northwestern J Int'l L & Business 181

Steinbach A, 'The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective' (2016) 27 EJIL 643

Steingruber AM, 'Abaclat and Others v Argentine Republic: Consent in Large-Scale Arbitration Proceedings' (2012) 27 ICSID Rev-FILJ 237

——, 'Some Remarks on Veijo Heiskanen's Note "Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration"' (2014) 29 ICSID Rev-FILJ 675

Stephan PB, 'Privatizing International Law' (2011) 97 Virginia L Rev 1573

Stern B, 'Un coup d'arrêt à la marginalisation du consentement dans l'arbitrage international (A propos de l'arrêt de la Cour d'appel de Paris du 1er juin 1999)' (2000) 2000 Revue de l'Arbitrage 403

Stone Sweet A, Yunsuck Chung M and Saltzman A, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration' (2017) 8 JIDS 579

Sutton SD, 'Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General's Screening Power' (2005) 21 Arb Int'l 113

Swarabowicz M, 'Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System' (2017) 8 JIDS 280

Talmon S, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden JIL 979

Ten Cate IM, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia J Transnat'l L 418

Thirlway H, ‘Establishing the Existence of a Dispute: A Response to Professor Bonafé’s Criticisms of the ICJ’ (2017) 45 Questions Int’l L 53

Timmer LJ, ‘Manifest Excess of Powers as a Ground for the Annulment of ICSID Awards’ (2013) 14 JWIT 775

Titi C, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14 JWIT 829

Townsend JM, ‘The Initiation of Arbitration Proceedings: “My Story Had Been Longer”’ (1998) 13 ICSID Rev-FILJ 21

Trachtman JP, ‘The Domain of WTO Dispute Resolution’ (1999) 40 Harvard Int’l LJ 333

Trakman LE, ‘Choosing Domestic Courts over Investor-State Arbitration: Australia’s Repudiation of the Status Quo’ (2012) 35 UNSWLJ 979

Trevino CJ, ‘State-to-State Investment Treaty Arbitration and the Interplay with Investor–State Arbitration Under the Same Treaty’ (2014) 5 JIDS 199

Triantafilou EE, ‘Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties’ (2017) 32 ICSID Rev-FILJ 138

van Aaken A, ‘International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis’ (2009) 12 JIEL 507

Van Harten G, ‘The Public-Private Distinction in the International Arbitration of Individual Claims against the State’ (2007) 56 Int’l & Comp LQ 371

——, ‘Five Justifications for Investment Treaties: A Critical Discussion’ (2010) 2 Trade, Law and Development 19

——, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 Osgoode Hall LJ 211

——, ‘Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration’ (2016) 53 Osgoode Hall LJ 540

——, ‘Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010’ (2018) 29 EJIL 507

Van Harten G and Loughlin M, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17 EJIL 121

van Houtte H and McAsey B, ‘Abaclat and Others v Argentine Republic: ICSID, the BIT and Mass Claims’ (2012) 27 ICSID Rev-FILJ 231

Vandevelde KJ, ‘The Economics of Bilateral Investment Treaties’ (2000) 41 Harvard Int’l LJ 469

——, ‘A Brief History of International Investment Agreements’ (2005) 12 UC Davis J Int’l L & Policy 157

Vesel S, ‘Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’ (2007) 32 Yale J Int’l L 125

Viñuales JE, ‘Investor Diligence in Investment Arbitration: Sources and Arguments’ (2017) 32 ICSID Rev-FILJ 346

Voon T, ‘Consolidating International Investment Law: The Mega-Regionals as a Pathway towards Multilateral Rules’ (2018) 17 World Trade Rev 33

Wagner M, ‘Regulatory Space in International Trade Law and International Investment Law’ (2014) 36 Univ Penn JIL 1

Waibel M, ‘Putting the MFN Genie Back in the Bottle’ (2018) 112 AJIL 60

Wälde TW, ‘The “Umbrella” Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases’ (2005) 6 JWIT 183

——, ‘Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals’ Duty to Ensure, Pro-Actively, the Equality of Arms’ (2010) 26 Arb Int’l 3

Walker N, ‘Human Rights and Global Public Goods: The Sound of One Hand Clapping?’ (2016) 23 Indiana J Global Legal Studies 249

Wang G, ‘Consent in Investor–State Arbitration: A Critical Analysis’ (2014) 13 Chinese JIL 335

Wass J, ‘Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals’ (2015) 86 British Yrbk Int’l L 155

Watson D and Brebner T, ‘Nationality Planning and Abuse of Process: A Coherent Framework’ (2018) 33 ICSID Rev-FILJ 302

Weil P, ‘Towards Relative Normativity in International Law?’ (1983) 77 AJIL 413

Werner J, ‘The Trade Explosion and Some Likely Effects on International Arbitration’ (1997) 14 J Int’l Arb 5

Widdows K, ‘What Is an Agreement in International Law?’ (1980) 50 British Yrbk Int’l L 117

Wong J, ‘Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes’ (2006) 14 George Mason L Rev 137

——, ‘The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties’ (2008) 3 AJWH 171

Wordsworth S and Brown C, 'A Re-Run of Siemens, Wintershall and Hochtief on Most-Favoured-Nation Clauses: Daimler Financial Services AG v Argentine Republic' (2015) 30 ICSID Rev-FILJ 365

Worster WT, 'Competition and Comity in the Fragmentation of International Law' (2008) 34 Brooklyn JIL 119

Yeo A and Menon S, 'Indonesia – Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement' (2016) 2016 Asian Disp Rev 124

Miscellaneous

Behn D, Laudal Berge T and Langford M, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2017) PluriCourts Research Paper No 17-05 <https://ssrn.com/abstract=2978546> accessed 25 April 2018

Crawford JR and Grant TD, 'Local Remedies, Exhaustion Of' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012)

Feldman M, 'The Standing of State-Controlled Entities under the ICSID Convention: Two Key Considerations' (2012) 65 Columbia FDI Perspectives

Franck SD, 'International Investment Arbitration: Winning, Losing and Why' (2009) 7 Columbia FDI Perspectives

Gaffney JP, 'Jurisdiction Ratione Temporis of ICSID Tribunals: Lucchetti and Jan De Nul Considered' (2006) 3 TDM <https://www.transnational-dispute-management.com/article.asp?key=855> accessed 17 February 2019

Gaillard E, 'Treaty-Based Jurisdiction: Broad Dispute Resolution Clauses' *NYLJ* (6 October 2005)

——, 'The Denunciation of the ICSID Convention' *NYLJ* (26 June 2007)

Hafner G, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them' in United Nations (ed), *International Law as a Language for International Relations* (Kluwer Law International 1996)

Kingsbury B and Schill S, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) New York University Public Law and Legal Theory Working Papers, Paper 146

Knahr C, 'Investments "in Accordance with Host State Law"' (2007) 4 TDM <https://www.transnational-dispute-management.com/article.asp?key=1070> accessed 23 February 2019

Mistelis L and Baltag C, '"Denial of Benefits" Clause in Investment Treaty Arbitration' (2018) Queen Mary School of Law Legal Studies Research Paper No 293/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300618> accessed 6 February 2019

Paulsson J, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3 TDM <https://www.transnational-dispute-management.com/article.asp?key=883> accessed 28 January 2019

Radović R, 'Screening Powers in Investment Arbitration: Questions of Legal Change and Legitimacy' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229521> accessed 25 October 2018

Schill SW, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?' (2011) <https://www.biicl.org/files/5630_stephan_schill.pdf> accessed 15 July 2018

Schreuer C, 'Belated Jurisdictional Objections in ICSID Arbitration' (2010) 7 TDM <https://www.transnational-dispute-management.com/article.asp?key=1533> accessed 30 October 2018

Van Harten G, 'Fairness and Independence in Investment Arbitration: A Critique of "Development and Outcomes of Investment Treaty Arbitration"' *ITN Quarterly* (December 2010) 7

Waibel M, 'The Principle of Privity' (2016) University of Cambridge Faculty of Law Research Paper No 44/2016 <https://ssrn.com/abstract=2839839> accessed 22 March 2018

List of Cases

PCIJ and ICJ

Aegean Sea Continental Shelf (Greece v Turkey) (Judgment) (1978) ICJ Rep 3

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Preliminary Objections) (2016) ICJ Rep

Ambatielos (Greece v United Kingdom) (Merits: Obligation to Arbitrate) (1953) ICJ Rep 10

Anglo-Iranian Oil Co (UK v Iran) (Individual Opinion of President McNair) (1952) ICJ Rep 93

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) (2007) ICJ Rep 43

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections) (1996) ICJ Rep 595

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment) (2015) ICJ Rep 3

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections) (2008) ICJ Rep 412

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections) (Judgment) (2011) 2011 ICJ Rep 70

Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment) (1991) ICJ Rep 53

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) (2006) ICJ Rep 6

Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility) (1988) ICJ Rep 69

Case of the SS 'Wimbledon' (UK, France, Italy, Japan and Poland intervening v Germany) (Judgment) (1923) PCIJ Ser A—No 1, 15

Certain Norwegian Loans (France v Norway) (Judgment) (1957) ICJ Rep 9

Certain Norwegian Loans (France v Norway) (Separate Opinion of Sir Hersch Lauterpacht) (1957) ICJ Rep 9, 34

Continental Shelf (Libyan Arab Jamahiriya/Malta) (Application to Intervene) (1984) ICJ Rep 3

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Preliminary Objection) (Dissenting Opinion by Judge ad hoc Daxner) (1948) ICJ Rep 15

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Preliminary Objection) (Judgment) (1948) ICJ Rep 15

Customs Régime Between Germany and Austria (Protocol of March 19th, 1931) (Advisory Opinion) (1931) PCIJ Ser A/B—No 41, 37

Customs Régime Between Germany and Austria (Protocol of March 19th, 1931) (Dissenting Opinion of M Adatci, Mr Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M Schücking, Jonkheer van Eysinga and M Wang) (1931) PCIJ Ser A/B—No 41, 74

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Judgment) (1984) ICJ Rep 246

Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment) (2009) ICJ Rep 213

East Timor (Portugal v Australia) (Judgment) (1995) ICJ Rep 90

Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Jurisdiction) (1927) PCIJ Ser A—No 9, 4

Fisheries Jurisdiction (Germany v Iceland) (Merits) (1974) ICJ Rep 175

Fisheries Jurisdiction (Spain v Canada) (Jurisdiction) (1998) ICJ Rep 432

Fisheries Jurisdiction (United Kingdom v Iceland) (Merits) (1974) ICJ Rep 3

Haya de la Torre (Colombia v Peru) (Judgment) (1951) ICJ Rep 71

Interhandel (Switzerland v United States of America) (Preliminary Objections) (1959) ICJ Rep 6

Interhandel (Switzerland v United States of America) (Preliminary Objections) (Dissenting Opinion of Sir Hersch Lauterpacht) (1959) ICJ Rep 6, 95

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase) (Advisory Opinion) (1950) ICJ Rep 65

Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV) (Advisory Opinion) (1928) PCIJ Ser B—No 16, 4

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Dissenting Opinion of Judge Cançado Trindade) (2012) ICJ Rep 179

LaGrand (Germany v US) (Judgment) (2001) ICJ Rep 466

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) (Preliminary Objections) (1998) ICJ Rep 275

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) (2004) ICJ Rep 136

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) ICJ Rep 226

Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections) (Separate Opinion of Judge ad hoc Kreća) (2004) ICJ Rep 371

Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures) (1999) ICJ Rep 124

Maritime Delimitation and Territorial Questions (Qatar/Bahrain) (Jurisdiction and Admissibility) (1994) ICJ Rep 112

Mavrommatis Palestine Concessions (Greece v UK) (Judgment) (1924) PCIJ Ser A—No 2, 6

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility) (1984) ICJ Rep 392

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (1986) ICJ Rep 14

Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA) (Preliminary Question) (1954) ICJ Rep 19

Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA) (Preliminary Question) (Declaration of Sir Arnold McNair) (1954) ICJ Rep 19

North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands) (Judgment) (1969) ICJ Rep 3

Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objection) (1953) ICJ Rep 111

Nuclear Tests (Australia v France) (Judgment) (1974) ICJ Rep 253

Nuclear Tests (New Zealand v France) (Judgment) (1974) ICJ Rep 457

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Judgment) (2016) ICJ Rep

Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection) (Judgment) (1996) ICJ Rep 803

Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection) (Separate Opinion of Judge Higgins) (1996) ICJ Rep 847

Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) (1949) ICJ Rep 174

Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections) (1957) ICJ Rep 125

Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland) (Judgment) (1928) PCIJ Ser A—No 15, 4

Rights of Nationals of the United States of America in Morocco (France v United States of America) (Judgment) (1952) ICJ Rep 176

Serbian Loans (France v The Kingdom of the Serbs, Croats and Slovenes) (Judgment) (1929) PCIJ Ser A—No 20, 5

South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) (1962) ICJ Rep 319

Status of Eastern Carelia (Advisory Opinion) (1923) PCIJ Ser B—No 5, 7

The Case of the SS 'Lotus' (France v Turkey) (Judgment) (1927) PCIJ Ser A—No 10, 4

The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objection) (1939) PCIJ Ser A/B—No 77, 64

The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objection) (Separate Opinion by M Anzilotti) (1939) PCIJ Ser A/B—No 77, 86

United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) (1980) ICJ Rep 3

ICSID-Administered Arbitrations

A11Y Ltd v Czech Republic, ICSID Case No UNCT/15/1, Award (29 June 2018)

A11Y Ltd v Czech Republic, ICSID Case No UNCT/15/1, Decision on Jurisdiction (9 February 2017)

Abaclat and others v The Argentine Republic, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011)

Abaclat and others v The Argentine Republic, ICSID Case No ARB/07/5, Dissenting Opinion of Georges Abi-Saab (4 August 2011)

ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006)

AES Corporation v The Argentine Republic, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005)

Aguas del Tunari SA v Republic of Bolivia, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005)

Alex Genin, Eastern Credit Limited Inc and AS Baltoil v The Republic of Estonia, ICSID Case No ARB/99/2, Award (25 June 2001)

Alpha Projektholding GmbH v Ukraine, ICSID Case No ARB/07/16, Award (8 November 2010)

Ambiente Ufficio SpA and others v The Argentine Republic, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013)

Amco Asia Corp and others v The Republic of Indonesia, ICSID Case No ARB/81/1, Award on Jurisdiction (25 September 1983)

American Manufacturing & Trading Inc v Republic of Zaire, ICSID Case No ARB/93/1, Award (21 February 1997)

Ampal-American Israel Corp and others v Arab Republic of Egypt, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016)

Ansung Housing Co Ltd v People's Republic of China, ICSID Case No ARB/14/25, Award (9 March 2017)

Apotex Holdings Inc and Apotex Inc v United States of America, ICSID Case No ARB(AF)/12/1, Award (25 August 2014)

Apotex Inc v The Government of the United States of America, ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013)

Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3, Final Award (27 June 1990)

ATA Construction Industrial and Trading Company v The Hashemite Kingdom of Jordan, ICSID Case No ARB/08/2, Award (18 May 2010)

Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Award (14 July 2006)

Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003)

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005)

Bayview Irrigation District and others v United Mexican States, ICSID Case No ARB(AF)/05/1, Award (19 June 2007)

Bear Creek Mining Corporation v Republic of Perú, ICSID Case No ARB/14/21, Award (30 November 2017)

Beijing Urban Construction Group Co Ltd v Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017)

Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award (24 July 2008)

Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/20, Award (26 April 2017)

Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine, ICSID Case No ARB/08/11, Award (25 October 2012)

Brandes Investment Partners, LP v The Bolivarian Republic of Venezuela, ICSID Case No ARB/08/3, Award (2 August 2011)

Bridgestone Licensing Services Inc and Bridgestone Americas Inc v Republic of Panama, ICSID Case No ARB/16/34, Decision on Expedited Objections (13 December 2017)

Burlington Resources Inc v Republic of Ecuador, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017)

Burlington Resources Inc v Republic of Ecuador, ICSID Case No ARB/08/5, Decision on Jurisdiction (2 June 2010)

Burlington Resources Inc v Republic of Ecuador, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012)

Cambodia Power Company v Kingdom of Cambodia and Electricité du Cambodge, ICSID Case No ARB/09/18, Decision on Jurisdiction (22 March 2011)

Capital Financial Holdings Luxembourg SA v Republic of Cameroon, ICSID Case No ARB/15/18, Award (22 June 2017)

Caratube International Oil Company LLP and Mr Devincci Salah Hourani v Republic of Kazakhstan, ICSID Case No ARB/13/13, Award (27 September 2017)

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018)

Cementownia 'Nowa Huta' SA v Republic of Turkey, ICSID Case No ARB(AF)/06/2, Award (17 September 2009)

CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/08/15, Decision on Jurisdiction (30 December 2010)

Ceskoslovenska Obchodni Banka AS v The Slovak Republic, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999)

Champion Trading Company and others v Arab Republic of Egypt, ICSID Case No ARB/02/9, Decision on Jurisdiction (21 October 2003)

Churchill Mining Plc v Republic of Indonesia, ICSID Case No ARB/12/14, Decision on Jurisdiction (24 February 2014)

CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007)

CMS Gas Transmission Company v The Argentine Republic, ICSID Case No ARB/01/8, Award (12 May 2005)

CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003)

Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic, ICSID Case No ARB/97/3, Award (21 November 2000)

Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002)

Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria, ICSID Case No ARB/03/08, Award (10 January 2005)

Continental Casualty Company v The Argentine Republic, ICSID Case No ARB/03/9, Award (5 September 2008)

Corn Products International, Inc v United Mexican States, ICSID Case No ARB(AF)/04/1, Separate Opinion of Andreas F Lowenfeld (18 August 2009)

Corona Materials LLC v Dominican Republic, ICSID Case No ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10205 of the DR-CAFTA (31 May 2016)

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya, ICSID Case No ARB/15/29, Award (22 October 2018)

Daimler Financial Services AG v Argentine Republic, ICSID Case No ARB/05/1, Award (22 August 2012)

Daimler Financial Services AG v Argentine Republic, ICSID Case No ARB/05/1, Dissenting Opinion of Judge Charles N Brower (15 August 2012)

Desert Line Projects LLC v The Republic of Yemen, ICSID Case No ARB/05/17, Award (6 February 2008)

Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador, ICSID Case No ARB/04/19, Award (18 August 2008)

EDF (Services) Limited v Romania, ICSID Case No ARB/05/13, Award (8 October 2009)

EDF International SA, SAUR International SA, and León Participaciones Argentinas SA v Argentine Republic, ICSID Case No ARB/03/23, Award (11 June 2012)

El Paso Energy International Company v The Argentine Republic, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006)

Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000)

Empresa Eléctrica del Ecuador Inc v Republic of Ecuador, ICSID Case No ARB/05/9, Award (2 June 2009)

Empresas Lucchetti SA and Lucchetti Peru SA v The Republic of Peru, ICSID Case No ARB/03/4, Award (7 February 2005)

Enron Corporation and Ponderosa Assets LP v Argentine Republic, ICSID Case No ARB/01/3, Award (22 May 2007)

Enron Corporation and Ponderosa Assets LP v The Argentine Republic, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004)

Enron Creditors Recovery Corp and Ponderosa Assets LP v The Argentine Republic, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010)

Fábrica de Vidrios Los Andes CA and Owens-Illinois de Venezuela CA v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/21, Award (13 November 2017)

Fedax NV v The Republic of Venezuela, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997)

Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/19, Award (18 November 2014)

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010)

Garanti Koza LLP v Turkmenistan, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013)

Garanti Koza LLP v Turkmenistan, ICSID Case No ARB/11/20, Dissenting Opinion by Laurence Boisson de Chazournes (3 July 2013)

Gas Natural SDG, SA v The Argentine Republic, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005)

GEA Group Aktiengesellschaft v Ukraine, ICSID Case No ARB/08/16, Award (31 March 2011)

Generation Ukraine Inc v Ukraine, ICSID Case No ARB/00/9, Award (16 September 2003)

Georg Gavrilović and Gavrilović doo v Republic of Croatia, ICSID Case No ARB/12/39, Award (26 July 2018)

Giovanni Alemanni and Others v The Argentine Republic, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014)

Global Trading Resource Corp and Globex International Inc v Ukraine, ICSID Case No ARB/09/11, Award (1 December 2010)

Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No ARB/07/24, Award (18 June 2010)

H&H Enterprises Investments Inc v The Arab Republic of Egypt, ICSID Case No ARB/09/15, Award (6 May 2014)

Hochtief AG v The Argentine Republic, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011)

Hochtief AG v The Argentine Republic, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J Christopher Thomas QC (7 October 2011)

Hussein Nuaman Soufraki v The United Arab Emirates, ICSID Case No ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007)

İçkale İnşaat Limited Şirketi v Turkmenistan, ICSID Case No ARB/10/24, Award (8 March 2016)

İçkale İnşaat Limited Şirketi v Turkmenistan, ICSID Case No ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC (10 February 2016)

Impregilo SpA v Argentine Republic, ICSID Case No ARB/07/17, Award (21 June 2011)

Impregilo SpA v Argentine Republic, ICSID Case No ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011)

Impregilo SpA v Argentine Republic, ICSID Case No ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment (24 January 2014)

Impregilo SpA v Islamic Republic of Pakistan, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005)

Inceysa Vallisoletana SL v Republic of El Salvador, ICSID Case No ARB/03/26, Award (2 August 2006)

Industria Nacional de Alimentos SA and Indalsa Perú SA v The Republic of Peru, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007)

Ioan Micula and others v Romania, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008)

Ioannis Kardassopoulos v Georgia, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007)

Jan de Nul NV and Dredging International NV v Arab Republic of Egypt, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006)

Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004)

Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan, ICSID Case No ARB/10/1, Award (2 July 2013)

KT Asia Investment Group BV v Republic of Kazakhstan, ICSID Case No ARB/09/8, Award (17 October 2013)

Lanco International Inc v The Argentine Republic, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal (8 December 1998)

Lao Holdings NV and Sanum Investments Limited v Lao People's Democratic Republic, ICSID Case Nos ARB(AF)/16/2 and ADHOC/17/1, Procedural Order No 2 (23 October 2017)

Le Chèque Déjeuner and CD Holding Internationale v Hungary, ICSID Case No ARB/13/35, Decision on Preliminary Issues of Jurisdiction (3 March 2016)

LESI SpA and ASTALDI SpA v République Algérienne Démocratique et Populaire, ICSID Case No ARB/05/3, Decision (12 July 2006)

LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic, ICSID Case No ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004)

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd IBC v Democratic Republic of Timor-Leste, ICSID Case No ARB/15/2, Award (22 December 2017)

Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan, ICSID Case No ARB/07/14, Award (22 June 2010)

Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia, ICSID Case No ARB/05/10, Annulment Proceedings, Dissenting Opinion of Judge Mohamed Shahabuddeen (19 February 2009)

Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007)

Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia, ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009)

Marco Gavazzi and Stefano Gavazzi v Romania, ICSID Case No ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (21 April 2015)

Marvin Roy Feldman Karpa v United Mexican States, ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (6 December 2000)

Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No ARB/14/1, Award (16 May 2018)

MCI Power Group LC and New Turbine Inc v Republic of Ecuador, ICSID Case No ARB/03/6, Award (31 July 2007)

MCI Power Group LC and New Turbine Inc v Republic of Ecuador, ICSID Case No ARB/03/6, Decision on Annulment (19 October 2009)

Menzies Middle East and Africa SA et Aviation Handling Services International Ltd v République du Sénégal, ICSID Case No ARB/15/21, Award (5 August 2016)

Mera Investment Fund Limited v Republic of Serbia, ICSID Case No ARB/17/2, Decision on Jurisdiction (30 November 2018)

Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt, ICSID Case No ARB/99/6, Award (12 April 2002)

Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka, ICSID Case No ARB/00/2, Award (15 March 2002)

Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal, ICSID Case No ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (16 July 2010)

Mobil Corporation, Venezuela Holdings BV and others v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010)

Mobil Exploration and Development Argentina Inc Suc Argentina and Mobil Argentina Sociedad Anónima v The Argentine Republic, ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013)

Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2, Award (11 October 2002)

Mr Patrick Mitchell v The Democratic Republic of Congo, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006)

Mr Saba Fakes v Republic of Turkey, ICSID Case No ARB/07/20, Award (14 July 2010)

MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, Award (25 May 2004)

MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007)

Murphy Exploration and Production Company International v Republic of Ecuador, ICSID Case No ARB/08/4, Award on Jurisdiction (15 December 2010)

Noble Energy Inc and Machalapower Cia Ltda v The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 March 2008)

Noble Ventures Inc v Romania, ICSID Case No ARB/01/11, Award (12 October 2005)

Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/1, Award (30 April 2014)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador, ICSID Case No ARB/06/11, Decision on Jurisdiction (9 September 2008)

Olguín v Republic of Paraguay, ICSID Case No ARB/98/5, Decision on Jurisdiction (8 August 2000)

Ömer Dede and Serdar Elhüseyni v Romania, ICSID Case No ARB/10/22, Award (5 September 2013)

Pac Rim Cayman LLC v The Republic of El Salvador, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012)

Pan American Energy LLC and BP Argentina Exploration Company v The Argentine Republic and BP America Production Company and others v The Argentine Republic, ICSID Cases No ARB/03/13 and ARB/04/8, Decision on Preliminary Objections (27 July 2006)

Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania, ICSID Case No ARB/07/21, Award (30 July 2009)

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award (11 September 2007)

Perenco Ecuador Limited v The Republic of Ecuador, ICSID Case No ARB/08/6, Decision on Perenco's Application for Dismissal of Ecuador's Counterclaims (18 August 2017)

Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013)

Phoenix Action Ltd v The Czech Republic, ICSID Case No ARB/06/5, Award (15 April 2009)

Plama Consortium Limited v Republic of Bulgaria, ICSID Case No ARB/03/24, Award (27 August 2008)

Plama Consortium Limited v Republic of Bulgaria, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005)

Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No 12/40, Decision on Jurisdiction (24 February 2014)

PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea, ICSID Case No ARB/13/33, Award (5 May 2015)

Poštová banka as and Istrokapital SE v The Hellenic Republic, ICSID Case No ARB/13/8, Award (9 April 2015)

Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012)

RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016)

Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan, ICSID Case No ARB/05/16, Award (29 July 2008)

Rusoro Mining Limited v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/12/5, Award (22 August 2016)

Saipem SpA v People's Republic of Bangladesh, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007)

Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (31 July 2001)

Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13, Decision on Jurisdiction (15 November 2004)

Salini Impregilo SpA v Argentine Republic, ICSID Case No ARB/15/39, Decision on Jurisdiction and Admissibility (23 February 2018)

SAUR International SA v Republic of Argentina, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012)

Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16, Award (28 September 2007)

Señor Tza Yap Shum v The Republic of Peru, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009)

SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003)

SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004)

SGS Société Générale de Surveillance SA v The Republic of Paraguay, ICSID Case No ARB/07/29, Decision on Jurisdiction (12 February 2010)

Siemens AG v The Argentine Republic, ICSID Case No ARB/02/8, Award (6 February 2007)

Siemens AG v The Argentine Republic, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004)

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Decision on Preliminary Objections to Jurisdiction (14 April 1988)

Spence International Investments LLC, Berkowitz and others v Republic of Costa Rica, ICSID Case No UNCT/13/2, Interim Award (25 October 2016)

Spyridon Roussalis v Romania, ICSID Case No ARB/06/1, Award (7 December 2011)

Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited, ICSID Case No ARB/10/20, Decision on the Application for Annulment (22 August 2018)

Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic, ICSID Case No ARB/03/17, Decision on Argentina's Application for Annulment (14 December 2018)

Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006)

Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic, ICSID Case No ARB/03/19, and *AWG Group Ltd v The Argentine Republic,* UNCITRAL arbitration, Decision on Jurisdiction (3 August 2006)

Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v The Argentine Republic, ICSID Case No ARB/03/19, and *AWG Group v The Argentine Republic,* UNCITRAL arbitration, Decision on Liability (30 July 2010)

Supervision y Control SA v The Republic of Costa Rica, ICSID Case No ARB/12/4, Award (18 January 2017)

Tecnicas Medioambientales Tecmed SA v The United Mexican States, ICSID Case No ARB(AF)/00/2, Award (29 May 2003)

Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/1, Award (21 July 2017)

Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012)

Telefónica SA v The Argentine Republic, ICSID Case No ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006)

Telenor Mobile Communications AS v The Republic of Hungary, ICSID Case No ARB/04/15, Award (13 September 2006)

The Loewen Group Inc and Raymond L Loewen v United States of America, ICSID Case No ARB(AF)/98/3, Award (26 June 2003)

Tokios Tokelės v Ukraine, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004)

Toto Costruzioni Generali SpA v The Republic of Lebanon, ICSID Case No ARB/07/12, Decision on Jurisdiction (11 September 2009)

Tradex Hellas SA (Greece) v Republic of Albania, ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996)

Transglobal Green Energy LLC and Transglobal Green Panama SA v Republic of Panama, ICSID Case No ARB/13/28, Award (2 June 2016)

TSA Spectrum de Argentina SA v Argentine Republic, ICSID Case No ARB/05/5, Award (19 December 2008)

Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey, ICSID Case No ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013)

Unión Fenosa Gas SA v Arab Republic of Egypt, ICSID Case No ARB/14/4, Award (31 August 2018)

United Parcel Service of America Inc v Government of Canada, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007)

Urbaser SA and CABB v The Argentine Republic, ICSID Case No ARB/07/26, Award (8 December 2016)

Urbaser SA and CABB v The Argentine Republic, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012)

Venoklim Holding BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/22, Award (3 April 2015)

Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No ARB/98/2, Award (8 May 2008)

Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, ICSID Case No ARB/05/15, Award (1 June 2009)

Waste Management Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award (30 April 2004)

Waste Management Inc v United Mexican States, ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet (8 May 2000)

Western NIS Enterprise Fund v Ukraine, ICSID Case No ARB/04/2, Order (16 March 2006)

Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/04/14, Award (8 December 2008)

World Duty Free Company Limited v The Republic of Kenya, ICSID Case No ARB/00/7, Award (4 October 2006)

PCA-Administered Arbitrations

Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador, PCA Case No 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012)

Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador, PCA Case No 34877, Interim Award (1 December 2008)

China Heilongjiang International Economic & Technical Cooperative Corp and others v Mongolia, PCA Case No 2010-20, Award (30 June 2017)

European American Investment Bank AG (Austria) v The Slovak Republic, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012)

Guaracachi America Inc and Rurelec PLC v The Plurinational State of Bolivia, PCA Case No 2011-17, Award (31 January 2014)

HICEE BV v The Slovak Republic, PCA Case No 2009-11, Partial Award (23 May 2011)

Hulley Enterprises Limited (Cyprus) v The Russian Federation, PCA Case No AA 226, Final Award (18 July 2014)

Hulley Enterprises Limited (Cyprus) v The Russian Federation, PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009)

ICS Inspection and Control Services Limited (United Kingdom) v The Argentine Republic, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012)

Iron Rhine Arbitration (Belgium/Netherlands), PCA Case No 2003-02, Award of the Arbitral Tribunal (24 May 2005)

Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v The Government of Mongolia and MonAtom LLC, PCA Case No 2011-09, Decision on Jurisdiction (25 July 2012)

Larsen v Hawaiian Kingdom, PCA Case No 1999-01, Award (5 February 2001)

MOX Plant Case (Ireland v United Kingdom), PCA Case No 2002-01, Order No 3 (24 June 2003)

MOX Plant Case (Ireland v United Kingdom), PCA Case No 2002-01, Order No 6 (6 June 2008)

Philip Morris Asia Limited v The Commonwealth of Australia, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015)

Radio Corporation of America v The National Government of the Republic of China (1935) 3 RIAA 1621

Republic of Ecuador v United States of America, PCA Case No 2012-5, Expert Opinion with Respect to Jurisdiction by W Michael Reisman (24 April 2012)

Resolute Forest Products Inc v Government of Canada, PCA Case No 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018)

Romak SA (Switzerland) v The Republic of Uzbekistan, PCA Case No AA280, Award (26 November 2009)

Sanum Investments Limited v The Government of the Lao People's Democratic Republic, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013)

Serafín García Armas and Karina García Gruber v The Bolivarian Republic of Venezuela, PCA Case No 2013-3, Decision on Jurisdiction (15 December 2014)

South American Silver Limited (Bermuda) v The Plurinational State of Bolivia, PCA Case No 2013-15, Award (22 November 2018)

ST-AD GmbH (Germany) v The Republic of Bulgaria, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013)

The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China), PCA Case No 2013-19, Award on Jurisdiction and Admissibility (29 October 2015)

Venezuela US SRL v The Bolivarian Republic of Venezuela, PCA Case No 2013-34, Dissenting Opinion of Professor Marcelo G Kohen (26 July 2016)

Venezuela US SRL v The Bolivarian Republic of Venezuela, PCA Case No 2013-34, Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction Ratione Voluntatis) (26 July 2016)

Veteran Petroleum Limited (Cyprus) v The Russian Federation, PCA Case No AA 228, Final Award (18 July 2014)

William Ralph Clayton and others v Government of Canada, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015)

WNC Factoring Ltd (United Kingdom) v The Czech Republic, PCA Case No 2014-34, Award (22 February 2017)

Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA 227, Final Award (18 July 2014)

SCC-Administered Arbitrations

Anatolie Stati and others v The Republic of Kazakhstan, SCC Case No V 116/2010, Award (19 December 2013)

Charanne BV and Construction Investments SARL v The Kingdom of Spain, SCC Case No V 062/2012, Final Award (21 January 2016)

Isolux Infrastructure Netherlands BV v Kingdom of Spain, SCC Case No V2013/153, Award (12 July 2016)

Ivan Peter Busta and James Peter Busta v The Czech Republic, SCC Case No V 2015/014, Final Award (10 March 2017)

Limited Liability Company Amto v Ukraine, SCC Case No 080/2005, Final Award (26 March 2008)

Mr Franz Sedelmayer v The Russian Federation, SCC arbitration, Arbitration Award (7 July 1998)

Renta 4 SVSA and others v The Russian Federation, SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009)

RosInvestCo UK Ltd v The Russian Federation, SCC Case No V 079/2005, Award on Jurisdiction (October 2007)

RosInvestCo UK Ltd v The Russian Federation, SCC Case No V079/2005, Final Award (12 September 2010)

Vladimir Berschader & Moïse Berschader v The Russian Federation, SCC Case No 80/2004, Award (21 April 2006)

Vladimir Berschader & Moïse Berschader v The Russian Federation, SCC Case No 80/2004, Separate Opinion of Arbitrator Todd Weiler (7 April 2006)

LCIA-Administered Arbitrations

Occidental Exploration and Production Company v The Republic of Ecuador, LCIA Case No UN3467, Final Award (1 July 2004)

Société Générale v The Dominican Republic, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008)

Non-Administered and Other Arbitrations

Alps Finance and Trade AG v The Slovak Republic, UNCITRAL ad hoc arbitration, Award (5 March 2011)

Austrian Airlines v The Slovak Republic, UNCITRAL ad hoc arbitration, Final Award (9 October 2009)

BG Group Plc v The Republic of Argentina, UNCITRAL arbitration, Final Award (24 December 2007)

Cargill, Incorporated v Republic of Poland, UNCITRAL arbitration, Final Award (29 February 2008)

Ethyl Corporation v The Government of Canada, UNCITRAL arbitration, Award on Jurisdiction (24 June 1998)

Eureko BV v Republic of Poland, ad hoc arbitration, Partial Award (19 August 2005)

Frontier Petroleum Services Ltd v The Czech Republic, UNCITRAL arbitration, Final Award (12 November 2010)

Glamis Gold Ltd v United States of America, UNCITRAL arbitration, Award (8 June 2009)

Grand River Enterprises Six Nations Ltd and others v United States of America, UNCITRAL arbitration, Decision on Objections to Jurisdiction (20 July 2006)

Hesham Talaat M Al-Warraq v The Republic of Indonesia, UNCITRAL arbitration, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012)

International Thunderbird Gaming Corporation v The United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005)

Methanex Corporation v The United States of America, UNCITRAL ad hoc arbitration, Partial Award (7 August 2002)

National Grid plc v The Argentine Republic, UNCITRAL arbitration, Decision on Jurisdiction (20 June 2006)

Pope & Talbot Inc v Government of Canada, UNCITRAL arbitration, Award in Respect of Damages (31 May 2002)

Ronald S Lauder v The Czech Republic, UNCITRAL, Final Award (3 September 2001)

Saluka Investments BV v The Czech Republic, UNCITRAL arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004)

Ulysseas Inc v The Republic of Ecuador, UNCITRAL arbitration, Interim Award (28 September 2010)

White Industries Australia Limited v The Republic of India, UNCITRAL ad hoc arbitration, Final Award (30 November 2011)

Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar, ASEAN Case No ARB/01/1, Award (31 March 2003)

Other International Cases

Austria v Italy App No 788/60 (ECmHR, 11 January 1961)

Case C-284/16 *Slowakische Republik v Achmea BV* (2018) EU:C:2018:158 (CJEU)

Case C-459/03 *Commission v Ireland* (2006) ECR I-4657

Chapman v The United Kingdom App No 27238/95 (ECtHR, 18 January 2001)

Essien v The Gambia ECW/CCJ/APP/05/05 (ECOWAS Court of Justice, 14 March 2007)

Islamic Republic of Iran Shipping Lines v Turkey App No 40998/98 (ECtHR, 13 December 2007)

Loizidou v Turkey App No 15318/89 (ECtHR, 23 March 1995)

OAO Neftyanaya Kompaniya Yukos v Russia App No 14902/04 (ECtHR, 31 July 2014)

Opinion 2/13 of the Court (Full Court) (2014) EU:C:2014:2454 (CJEU)

Prosecutor v Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1995) ICTY-94-1

Prosecutor v Zlatko Aleksovski (Judgment) (2000) ICTY-95-14/1-A

Rawle Kennedy v Trinidad and Tobago Comm No 845 (HRC, 31 December 1999)

Soering v The United Kingdom App No 14038/88 (ECtHR, 7 July 1989)

The MOX Plant Case (Ireland v United Kingdom) (Provisional Measures, Order of 3 December 2001) (2001) ITLOS Reports

Tyrer v The United Kingdom App No 5856/72 (ECtHR, 25 April 1978)

WTO, *Australia: Tobacco Plain Packaging (Cuba)—Request for Consultations by Cuba* (7 May 2013) WT/DS458/1

WTO, *Australia: Tobacco Plain Packaging (Dominican Republic)—Request for Consultations by the Dominican Republic* (23 July 2012) WT/DS441/1

WTO, *Australia: Tobacco Plain Packaging (Honduras)—Request for Consultations by Honduras* (10 April 2012) WT/DS435/1

WTO, *Australia: Tobacco Plain Packaging (Indonesia)—Request for Consultations by Indonesia* (25 September 2013) WT/DS467/1

WTO, *Australia: Tobacco Plain Packaging (Ukraine)—Request for Consultations by Ukraine* (15 March 2012) WT/DS434/1

WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R

Zorica Jovanović v Serbia App No 21794/08 (ECtHR, 26 March 2013)

Domestic Cases

Arrêt du 7 février 2017, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 14/21103

Arrêt du 11 décembre 2018, Tribunal fédéral, Ire Cour de droit civil (Switzerland) 4A_65/2018

Arrêt du 25 septembre 2008, Cour d'Appel de Paris, 1ère Chambre - Section C (France) 07/04675

Arrêt du 29 janvier 2019, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 16/20822

Arrêt du 29 novembre 2016, Cour d'Appel de Paris, Pôle 1 - Chambre 1 (France) 14/17964

Ashby v White (1703) 92 ER 126 (England)

BG Group plc v Republic of Argentina (2014) 572 US ___

BG Group plc v Republic of Argentina (Roberts CJ dissenting) (2014) 572 US ___

Dallal v Bank Mellat [1985] QB 441 (EWCA)

Government of the Lao People's Democratic Republic v Sanum Investments Ltd [2015] SGHC 15

Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others [2017] SGHC 195

Occidental Exploration & Production Company v The Republic of Ecuador [2005] EWCA Civ 1116

Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] SGCA 57

Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

The Kyrgyz Republic v Stans Energy Corp and Kutisay Mining LLC [2017] EWHC 2539 (Comm)

The Republic of Ecuador v Occidental Exploration & Production Co [2006] EWHC 345 (Comm)

The Republic of Ecuador v Occidental Exploration & Production Co [2007] EWCA Civ 656

The Russian Federation v GBI 9000 SICAV SA and others (2016) Svea Court of Appeal, T 9128-14

Union of India v Vodafone Group plc United Kingdom & ANR [2017] Delhi HC CS(OS) 383/2017

Union of India v Vodafone Group plc United Kingdom & ANR [2018] Delhi HC CS(OS) 383/2017 & IA No 9460/2017