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JURISDICTION RATIONE TEMPORIS

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Investment Treaty Arbitration

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The Investment Treaty Arbitration Review fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject – from jurisdictional and procedural issues to damages and much more – but also the debate that led to and the context behind those developments.

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Jurisdiction Ratione Temporis

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Summary

Introduction

Arbitral tribunals typically address three questions when assessing their jurisdiction over an investment treaty claim: 'what?', 'who?' and 'when?'.[2] The 'what' refers to jurisdiction ratione materiae, which is the same as the tribunal's subject matter jurisdiction.[3] The 'who' refers to jurisdiction ratio personae, or personal jurisdiction.[4] Finally, the 'when' refers to ratione temporis, which is defined as 'the time frame to which the treaty applies'.[5] All three requirements must be met before jurisdiction may be exercised.[6] This chapter focuses exclusively on the ratione temporis requirement.

There is not one controlling authority for ratione temporis or temporal jurisdiction. Instead, tribunals typically rely on three primary sources: (1) the investment treaty or treaties governing the dispute, such as a bilateral investment treaty (BIT) or free trade agreement (FTA); (2) the Vienna Convention on the Law of Treaties (VCLT), which is used for the interpretation of treaties, among other uses;[7] and (3) the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).[8] While the VCLT and the ILC Articles establish general principles on ratione temporis applicable to nearly all investor-state disputes (i.e., non-retroactivity), most investment treaties offer more specific limits on jurisdiction ratione temporis, namely, a time bar. Applying these authorities and the ratione temporis principles is a fact-intensive exercise.

The purpose of this chapter is to provide an overview of these concepts and highlight recent developments in the jurisprudence. In the section titled 'The principle of non-retroactivity and its exceptions', we discuss the general principle of non-retroactivity – that is, the rule that treaties are not enforceable before entry into force – and how this principle affects jurisdiction ratione temporis. In the section titled 'Additional limits on temporal jurisdiction', we address variations of this general principle, and in the sections titled 'Termination of the treaties' and 'Sunset provisions', we address how a state's withdrawal from a treaty may limit jurisdiction ratione temporis. Finally, in the section titled 'Time limits in the treaty', we explore other time limits often found in treaties and how such limits might affect an investor's right to relief.

The principle of non-retroactivity and its exceptions

In general, a state is not bound by a treaty until that instrument enters into force.[9] Likewise, a tribunal's jurisdiction does not extend to acts of the state that pre-date the treaty's entry into force.[10] This is known as the principle of non-retroactivity, and is enshrined in both Article 13 of the ILC Articles and Article 28 of the VCLT.[11] There are three main exceptions to the principle: continuous acts, composite acts and provisional application agreements. All three have the effect of extending jurisdiction to acts that occurred before a treaty entered into force.

Continuous acts

Often, a treaty will enter into force when the impugned acts of the state are ongoing. Under the principle of non-retroactivity, the pre-treaty conduct is outside the tribunal's jurisdiction.

States will often argue that the breach began before the treaty entered into force and, therefore, the tribunal lacks jurisdiction. In response, claimants typically contend that the acts are 'continuing' such that pre-treaty conduct is continuous with post-treaty conduct.

Article 14(2) of the ILC Articles provides: 'The breach of an international 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.'[12p>] From this, tribunals consistently consider pre-treaty conduct that is sufficiently continuous with the later conduct.[13p>] But it must be noted that the breach cannot be said to have occurred pre-treaty. There must exist post-entry conduct 'independently actionable' from the pre-entry conduct.[14p>] In other words, an independent breach of the treaty must have occurred post-treaty.

In OKO v. Estonia,[15p>] the claimants loaned money to a joint venture that was owned by a state-owned entity.[16p>] Before the applicable BIT came into force in 1997, the Estonian entity defaulted on its loan and then initiated legal proceedings to invalidate its debt.[17p>] After the local court invalidated the debt in 2001, claimants initiated arbitration. Estonia objected on grounds that the events triggering the dispute began before the BIT entered into force.[18p>] The tribunal disagreed, ruling that these acts 'continued, uninterrupted' through the Estonian entity's legal proceedings.[19p>] Estonia's continued pursuit of its legal case was viewed as sufficiently continuous and actionable post-entry to fall within the tribunal's jurisdiction.[20p>]

In Berkowitz v. The Republic of Costa Rica, the government expropriated multiple beachfront properties to support the creation of a park. The US owners of those properties initiated an arbitration against Costa Rica for expropriation and denial of the minimum standard of treatment under the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), claiming they were not provided adequate compensation or due process.[21p>] Costa Rica objected, arguing that the expropriations were decreed by the government before CAFTA came into force.[22p>] The claimants responded that there were delays in payment and inequities in the court proceedings that continued after CAFTA's entry date.[23p>] The respondent countered by referring to these as the 'lingering effects' of the prior expropriations.[24p>] The tribunal ruled that the expropriations took place before CAFTA and that the later conduct was 'so deeply rooted in pre-entry into force conduct as not to be meaningfully separable form that conduct'.[25p>] Accordingly, it denied jurisdiction over the expropriation claim. However, the tribunal ruled it had jurisdiction over the minimum standard of treatment claim as it pertained to post-entry judicial decisions awarding compensation. In its view, a judicial decision can constitute an 'independently actionable breach'.[26p>]

As Costa Rica argued in Berkowitz, a distinction must be made between continuous acts and the lingering or continuing effects of those acts. The ILC Articles clarify that: 'An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues into the period when the treaty is in force.'[27p>] A classic way to distinguish the two is to consider a state that wrongfully expropriates an investment versus a state that wrongfully detains an individual. The expropriation occurs at a single moment in time, even if the effects of the expropriation (i.e., loss of the income) continue thereafter. On the other hand, the wrongful detention continues to be wrongful throughout the period of detention, not just when it commences.-[28p>]

Composite acts

Another exception to the principle of non-retroactivity is the concept of a 'composite breach'. Article 15 of the ILC Articles provides that a state may breach a treaty through a series of actions or omissions, which, taken together, constitute a wrongful act.[29p>]

The distinction between a continuing breach and a composite breach lies in the nature of the impugned acts. A continuing breach is a series of acts that individually constitute a separate breach of the treaty.[30p>] Each act in the series is likely to be the same, and at least one must occur while the treaty is in force. A composite breach, on the other hand, comprises a series of acts that are considered wrongful only when aggregated together. The breach itself is said to have occurred 'when the last action occurred',[31p>] which must be while the treaty is in force. Unlike a continuous breach, the acts comprising a composite breach are typically different from one another.[32p>]

Jurisdiction in this context is said to extend 'over the entire period' from the first act until the last, even if the first act occurred before the treaty's entry into force.[33p>] In other words, if the last act occurred while the treaty was in force and after the investment was made, the tribunal has jurisdiction over all acts leading up to it.

For example, in Hydro v. Albania,[34p>] the investors claimed that the state violated the Italy–Albania BIT's expropriation provision after the Prime Minister orchestrated a 'campaign of destruction' against their media company, which culminated in the issuance of a 'seizure decision' in 2015.[35p>] Albania argued that the 'campaign' began before the investors had acquired their investment and, therefore, the tribunal lacked jurisdiction.[36p>] Although the tribunal acknowledged that the claims relied on a sequence of events that preceded the date in which the investment was made, it found that those events crystallised into breaches after the investment was made with the 2015 seizure decision.[37p>] The word 'crystallised' is often used by tribunals and the parties to describe a composite breach.

In LSF-KEB v. Korea,[38p>] the claimant company was forced to sell its majority stake in a Korean bank and, according to claimant, the Korean government delayed the sale, causing damage to the company.[39p>] The investor alleged both a continuous and composite breach through 'systematic harassment' that began before the Korean–Belgium/Luxembourg BIT entered into force but continued after the BIT was in force.[40p>] The tribunal declined jurisdiction over the pre-treaty measures, ruling that there was no composite breach because the state's post-entry conduct was 'repetitive, not transformative' of the post-entry conduct.[41p>] The tribunal determined that the post-treaty acts were separately actionable, and proceeded to address those on the merits.[42p>] Notably, like most tribunals, the LSF tribunal found that it could consider pre-entry measures in its assessment of whether the post-entry conduct breached the treaty.[43p>]

Provisional application

The ILC Articles provide that a treaty may be applied provisionally if the treaty parties agree to do so.[44p>] In other words, the treaty parties may agree that the provisions of the treaty are enforceable before the entry date.[45p>] Von Pezold v. Zimbabwe,[46p>] which involved an expropriation claim brought under both the 1995 Germany–Zimbabwe BIT and the 1996 Swiss–Zimbabwe BIT, provides a clear example of provisional application.-

[47p>] The investors were longtime owners of farmland in Zimbabwe until it was invaded and taken over by the government.[48p>] Zimbabwe contested jurisdiction, arguing that the expropriation occurred before the treaty entered into force.[49p>] The claimant pointed out, however, and the tribunal agreed, that the BITs' parties had agreed, between the signing of the treaty and its entry into force, to make it enforceable during the period prior to its entry into force.[50p>] Since the expropriations occurred during that period, the tribunal ruled that it had jurisdiction.

Additional limits on temporal jurisdiction

Over the years, the principle of non-retroactivity has been used to address other limits on jurisdiction ratione temporis. One question extensively dealt with is whether a tribunal has jurisdiction over claims that arose before the investment was made by the investor. Although the question is notably different from the one addressed above, the answer is the same. Just as a treaty generally does not apply prior to its entry date, the treaty also does not afford rights to investors before the investment is acquired. This is said to 'follow from the principle of non-retroactivity of treaties'.[51p>]

> *Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the tribunal and the instrument that confers jurisdiction upon the tribunal, a claimant bringing a claim based on a treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.*[52p>]

It bears emphasis here that the claimant almost always shoulders the burden to establish the tribunal's jurisdiction, including ratione temporis.[53p>] So in the face of an objection from the state, the claimant must prove that its claims fall within the temporal scope of the treaty. This is not always easy. Two recent cases highlight different factual complexities that may arise.

In Antonio del Valle Ruiz and others v. Spain,[54p>] a group of shareholders in Spain's Banco Popular initiated an arbitration against Spain under the Mexico–Spain BIT.[55p>] The crux of their claim was that Spain mismanaged the bank's dissolution, resulting in a loss of value to their shares. The shares were acquired by the shareholders at different times, and Spain objected, arguing that the impugned acts took place before most of the shareholders became investors.[56p>] In its decision on jurisdiction, the tribunal addressed the timing of each investor's shareholding separately.[57p>] It determined that all but one shareholder had proven to have made an investment before the impugned acts took place,[58p>] and it declined jurisdiction over the claims of the shareholder who had proven to have made the investment after the measures took place.[59p>]

In Renée Rose Levy and Gremcitel SA v. Peru, claimants alleged that the government breached the France–Peru BIT through legislation that crushed their plans to develop a tourism project on the Pacific coast.[60p>] Peru argued that the investment was acquired after the impugned resolution was issued.[61p>] One investor submitted evidence that she acquired her investment before the resolution was issued. The tribunal rejected this evidence, finding it 'untrustworthy, if not utterly misleading'.[62p>]

Aside from the timing of the investment, the timing of the dispute may affect jurisdiction ratione temporis as well. Generally, a tribunal does not have jurisdiction over a dispute that begins before an investment is made. The question often turns on the meaning of the word 'dispute', and when it is shown to have arisen. Tribunals typically rely on interpretations by the International Court of Justice on the elements constituting a 'dispute'. These include for example, 'a situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations'.[63p>] One recent tribunal identified three elements for a dispute to exist:

1. there must be a disagreement regarding a point of law or fact;
2. the disagreement must be between two parties holding different views; and
3. both parties must be aware that the dispute exists.[64p>]

Not surprisingly, this analysis is fact-specific. In Gambrinus v. Venezuela,[65p>] the claimant invested in a Venezuelan fertilisation conglomerate in 2008, only to have it expropriated shortly thereafter.[66p>] Venezuela argued that the tribunal lacked ratione temporis jurisdiction because the expropriation was foreseeable years before claimant made its investment and, in support, pointed to various legislative measures leading up to the decree.[67p>] The tribunal was unpersuaded, however, finding that emails and meeting minutes submitted by the claimant showed that expropriation was not foreseeable,[68p>] and, therefore, a dispute did arise prior to the acquisition.[69p>]

The timing of when an investor attained the nationality of a BIT party may also affect the tribunal's jurisdiction. In Pac Rim v. El Salvador,[70p>] the government refused to issue the investor a full mining concession.[71p>] Subsequently, the investor became a US national and brought claims against the El Salvador under CAFTA.[72p>] The state argued that the refusal to grant the concession occurred before the claimant became an investor.[73p>] The tribunal ruled that the breach was continuous, viewing the refusal to grant the concession as an 'omission that extends over a period of time and . . . should be considered as a continuous act under international law'.[74p>]

Termination of the treaties

The day a treaty terminates typically marks an end to its substantive protections. As set forth in Article 70 of the VCLT: 'Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention . . . releases the parties from any obligation further to perform the treaty'. [75p>] There are a number of ways states terminate or withdraw from treaties, a topic that is beyond the scope of this chapter.[76p>] Important here is the notion that tribunals do not have jurisdiction over acts taking place after a treaty is terminated.[77p>]

The ICSID Convention[78p>] is particularly notable in this regard since the Convention is the vehicle by which ICSID Member States offer their written consent to ICSID arbitration.[79p>] Denouncing the ICSID Convention naturally affects each Member State's consent. Articles 71 and 72 of the ICSID Convention provide:

> 1. *Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.*

2. *Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.*[80]

Tribunals have consistently read Article 71 to mean that a state has the absolute right to denounce the ICSID Convention at any time and, six months later, that state will no longer be a party to the ICSID Convention.[81] However, neither article explains whether an investor may file claims against the denouncing state during the final six-month period after denouncement. Here, the decisions from ICSID tribunals are inconsistent, with some tribunals exercising jurisdiction, and others rejecting it. Cases brought against Venezuela after it denounced the ICSID Convention in 2012[82] illustrate the different views.

In Fábrica de Vidrios and Owens-Illinois v. Venezuela, the investors filed an arbitration at ICSID after Venezuela had denounced the ICSID Convention but before the six-month period had run.[83] Like most claimants, Fábrica and Owens consented to the arbitration in their request for arbitration.[84] Venezuela objected, arguing that its consent was revoked when it denounced the ICSID Convention, which was before claimant offered its consent.[85] The tribunal agreed. After an exhaustive review of Articles 71 and 72 and their negotiating history, the tribunal ruled that consent must have been 'perfected' – that is, provided by both parties – prior to the notice of denouncement.[86]

By contrast, in Venoklin v. Venezuela, Venezuela challenged the tribunal's jurisdiction on the same grounds as in Fábrica de Vidrios and Owens-Illinois.[87] Indeed, Venoklin had initiated arbitration against Venezuela around the same time as Fábrica and Owens in the case above.[88] But this tribunal interpreted Articles 71 and 72 entirely different, relying heavily on the existence of the six-month period prescribed in Article 71.[89] According to the tribunal, Venezuela's consent to ICSID arbitration was not withdrawn until the six-month period ended.[90]

Sunset provisions

Many treaties have sunset clauses or survival clauses that regulate events post-dating the termination of the treaty by one of its parties. A sunset clause guarantees that the protections of the treaty will remain in place for existing investments for a period after the treaty terminates, usually between five and 20 years.[91] A typical sunset clause can be found at Article 23(5) of the Japan–Morocco BIT:

> *In respect to investments made prior to the date of termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten years from the date of termination of this Agreement.*[92]

One question that has arisen in recent years is whether a sunset clause remains in place when a treaty is terminated by mutual agreement. The question arose from the now-famous Achmea[93] decision in which the European Court of Justice decided that an arbitration clause in a BIT between two EU Member States was incompatible with EU law.[94] After Achmea, some EU Member States terminated their BITs, including the sunset clauses, through the adoption of a termination agreement.[95p>] Investors questioned whether such an agreement was even possible.

The European Commission took the position, as a non-disputing party, that sunset clauses only operate when the treaties are unilaterally terminated.[96p>] Recently, in Adria Group v. Croatia,[97p>] the tribunal found that 'the Termination Treaty was intended to override any sunset clauses in the listed BITs'.[98p>]

Different issues arise when a BIT is succeeded by another BIT. In this case, the sunset clause may not extend the protections of the former treaty given that the newer protections are in place. Instead, the sunset clause may be used to preserve the states parties' consent to arbitration for claims arising under the old BIT. This issue is currently being raised in multiple arbitrations under the NAFTA and its successor, the USMCA.[99p>] To date, no decision has been rendered on the issue.

Time limits in the treaty

While the principles above stem primarily from the laws on state responsibility and general principles of international law, other limitations may exist in the BIT itself. Often, states choose to limit the amount of time an investor has to submit a claim to arbitration or the amount of time an arbitration party may request certain types of relief. Because these limitations are expressly stated in the text, they are often tied to the consent of the treaty parties. States frequently use these limits to advance their case in arbitration.

Time bars

National law systems typically establish strict time limits after which claims are inadmissible as time-barred. The concept is often referred to as a statute of limitations. When included in a treaty, these time bars are said to be 'clear and rigid' and not subject to any suspension or extension.[100up>] Satisfaction of the time bar is generally considered an essential precondition for the tribunal's jurisdiction, and as such, it falls on the claimant to satisfy it.[101up>]

The NAFTA includes an example of the standard language for a time bar in a treaty[102up>]

> *An investor may not make a claim if more than three years have elapsed 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.*[103up>]

Notice that the clock does not start from the date of the breach or the date of the loss, but rather from the date when the investor acquired knowledge (or should have acquired knowledge) of the breach and loss. This is often difficult and fact-intensive for the claimant to establish. The analysis generally focuses on two dates: (1) the date the request for arbitration was filed and (2) the 'critical date,' which is understood as the difference between the date the request for arbitration was filed and the date established in the relevant treaty for the investor to make a claim after it acquires knowledge of the breach and loss. To satisfy its burden, the claimant must show that it first learned of its claim and associated losses in between the two dates.

As noted above, this is a factual question, and tribunals often wait to decide this objection until after a full evidentiary hearing on the merits. One recent case illustrates issues that typically arise. In Ríos v. Chile, claimants invested in two Chilean companies that had received concessions to run Santiago's bus system.104up> When the government took action that adversely affected the concessions, the investors claimed that Chile breached the Chile–Colombia BIT's provisions regarding expropriation and fair and equitable treatment.105up> Chile made a time-bar objection, arguing that the impugned acts occurred over a long period and that the claimant knew of some acts before the critical date.106up>

The tribunal first established the critical date using the method above, that is, by subtracting the prescribed amount of time from the date the request for arbitration was filed.107up> Next, the tribunal determined when the claimant learned of each breach.108up> It found that the expropriation comprised a series of acts that culminated in a composite breach after the critical date.109up> In addition, since claimants learned of the impugned acts in real time, the tribunal ruled that the claim was timely filed within the prescribed number of years.110up> For the fair and equitable treatment claim, the tribunal ruled that the omissions of the state were 'continuous' rather than occurring at a single moment in time.111up> Regarding the time bar, it found that the limitations period begins to run when the claimant first learns of one breach in the continuous series.112up> Ultimately, some parts of the claim were determined to be time-barred while others were not.113up>

Interestingly, one of the arbitrators disagreed on the latter point about continuous breaches. The dissenting arbitrator believed that the limitations period begins only after the continuing wrong has been fully committed.114up> The arbitrator emphasised that, unlike the NAFTA language, the FTA's language says 'acquired knowledge', not 'first acquired knowledge'.115up> According to the arbitrator, the ordinary meaning of this language indicated a later start to the limitations period.116up>

In Corona v. Dominican Republic,117up> the investor initiated an arbitration against the Dominican Republic after the state denied an environmental permit.118up> The applicable BIT had a three-year time bar.119up> There was no dispute that the permit's denial occurred months before the critical date, and the tribunal confirmed through contemporaneous letters and testimony that the claimant knew of its treaty claims before the critical date.120up> The tribunal declined jurisdiction over the claim.121up>

The claimant in Corona raised an argument (halfway through the proceedings) that is worth additional consideration for purposes of the topic of this chapter. The claimant argued that the government's refusal to respond to a request for reconsideration constituted a separate, and ongoing, breach that was not time-barred.122up> The tribunal rejected the argument because the subsequent refusal to respond was not 'a standalone measure' but rather 'an implicit confirmation of [the government's] previous decision'.123up> The holding is a confirmation of the ruling in Berkowitz (above), where jurisdiction was rejected because the latter acts were not 'independently actionable' of the earlier acts.124up>

To trigger the time bar, the investor must also be aware of some loss. One (factual) question that arises is: how much damage must the investor be aware of to trigger the time bar? While some knowledge of loss is required, it is not necessary for the investor to know the exact amount or full extent of the loss before the limitations period begins. The important date for purposes of loss is when the investor knows that it has suffered some loss or damage, even if the extent or quantification of the loss or damage is still unclear.[125up>] In this sense, knowledge is acquired when the investor has a first appreciation of the loss.[126up>]

In the absence of an express time bar, the claimant is generally not limited in the time it has to submit a claim. In Orazul v. Argentina,[127up>] there was no express time bar in the Argentina–Spain BIT.[128up>] Argentina argued that the claims should be rejected because the claimant did not file its claim until several years after the impugned acts occurred.[129up>] The tribunal disagreed, ruling that 'a claimant bringing a claim a number of years after the facts giving rise to the claim should not be punished for failing to exercise its rights sooner in the absence of any limitation period in the treaty'.[130up>]

Time limits established under the ICSID Convention and its arbitration rules

Often, other authorities will limit the period in which certain issues or applications may be raised by one of the parties in the arbitration. Admittedly, these limits do not affect a tribunal's jurisdiction ratione temporis, but they can affect the admissibility of the claims and requests filed before the tribunal, that is, request for arbitration, request for annulment of the award, among others. Some deadlines are considered mandatory, meaning the tribunal cannot consider an application filed past the deadline. Others are subject to the discretion of the tribunal or agreement of the parties.

For instance, under Article 52 of the ICSID Convention, a party has 120 days after an award is rendered to request 'annulment' of the award from the ICSID Secretary General.[131up>] Annulment is a post-award remedy that allows a party to challenge an award under limited circumstances before a different panel. Likewise, under ICSID Article 51, a party may request a 'revision' of the award based on newly discovered facts.[132up>] The party applying for revision must submit its application within 90 days after discovering the new fact(s).[133up>] Both Articles 51 and 52 are written in mandatory terms, that is, the application 'shall be made within 90 [or 120] days'.[134up>] Untimely applications will not be considered.

ICSID's Arbitration Rules provide other limits as well. Rule 41 of the ICSID Arbitration Rules, for instance, provides that parties have 45 days from the constitution of the tribunal to object to a claim for 'manifest lack of legal merit'.[135up>] The application will be declared inadmissible if it is filed past the deadline. Similarly, under Rule 13 of the UNCITRAL Rules – another set of arbitration rules sometimes used for investment arbitrations – parties must challenge an arbitrator appointment within 15 days of the appointment, or within 15 days after learning facts that subject the arbitrator to disqualification.[136up>]

Conclusion

Considerations of ratione temporis principles are typically a fact-intensive exercise. The jurisprudence discussed in this chapter is not an exception. The range of outcomes presented by the jurisprudence are the consequence of the difficult, complex and sometimes evolving factual scenarios that have been presented – and will be presented in the future – to investment arbitration tribunals.[137up>] As long as these scenarios are evolving, so will the jurisprudence on jurisdiction ratione temporis.

Endnotes

1 Gary J Shaw is a senior associate and Diana Carolina Plaza is an associate at Pillsbury Winthrop Shaw Pittman LLP. ^ Back to section

2 B Sabahi et al., 'Jurisdiction Ratione Temporis', inInvestor-State Arbitration [2nd edition, 2019], Paragraph 12.01. ^ Back to section

3 ibid. ^ Back to section

4 ibid. ^ Back to section

5 N Gallus,The Temporal Scope of Investment Protection Treaties [2008], 3. ^ Back to section

6 B Sabahi, op. cit., Paragraph 12.01; A Hyder Ali and D Attanasio, 'Jurisdiction and Admissibility: The Scope of Investment Protection', in A and David Attanasio,-International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice (Kluwer Law International; Kluwer Law International 2021), 115–116; S Nweke-Eze, 'Jurisdiction: Main Elements', in The Guide to Investment Treaty Protection and Enforcement, 14 January 2022, 'Jurisdiction: Main Elements', Global Arbitration Review, (last accessed 6 April 2024). ^ Back to section

7 Vienna Convention on the Law of Treaties (VCLT), opened for signature 23 May 1969, entered into force 27 January 1980, Articles 18, 25, 28 and 70. ^ Back to section

8 International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Article 13. ^ Back to section

9 Gallus, op. cit., p. 7. ^ Back to section

10 *Astrida Benita Carrizosa v. Republic of Colombia, ICSID Case No. ARB/18/5, Award on Jurisdiction, 19 April 2021, Paragraphs 124–128 (Astrida Benita Carrizosa); STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 September 2020, Paragraph 369; Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29, Award on Jurisdiction, 30 April 2015, Paragraphs 189, 203–233, 240.* ^ *Back to section*

11 Article 28, for example, expressly states that treaties 'do not bind a party in relation to any act . . . which ceased to exist before the date of entry into force of the treaty . . ..' VCLT, Article 28. ^ Back to section

12 ILC,Draft Articles on the Law of Treaties with commentaries, 1966(2) ILC Y.B., p. 212 (commenting on what was then Article 24 but became Article 28). This is reinforced in Article 14(2) of the ILC Articles. ILC Articles on State Responsibility, Article 14(2) ('The breach of an international 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.'). ^ Back to section

13 *United Parcel Service of America v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, Paragraph 28 ('continuing courses of conduct constitute continuing breaches of legal obligations') (United Parcel Service). SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, Paragraph 167 (Article VIII of the BIT 'applies to breaches which are continuing [after the date of entry into force], and the failure to pay sums due under a contract is an example of a continuing breach'.) (Société Générale).* ^ *Back to section*

14 *Aaron C Berkowitz, et al. (formerly Spence International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction, 30 May 2017, Paragraph 222 (Berkowitz).* ^ *Back to section*

15 *Oko Pankki Oyj, et al. v The Republic of Estonia, ICSID Case No. ARB/04/6, Award on Jurisdiction and Merits, 19 November 2007.* ^ *Back to section*

16 ibid., Paragraphs 18–20, 109. ^ Back to section

17 ibid., Paragraph 103-104, 195. ^ Back to section

18 ibid., Paragraph 192. ^ Back to section

19 ibid., Paragraphs 195, 284. ^ Back to section

20 ibid., Paragraph 284. ^ Back to section

21 *Berkowitz, Paragraph 2.* ^ *Back to section*

22 ibid., Paragraph 116 ^ Back to section

23 ibid., Paragraphs 144–147. ^ Back to section

24 ibid., Paragraph 233. ^ Back to section

25 ibid., Paragraph 269. ^ Back to section

26 ibid., Paragraph 276. ^ Back to section

27 ILC,Draft Articles on the Law of Treaties with commentaries, 2001, 60, Paragraph 6 (commenting on Article 14). ^ Back to section

28 S Murphy, 'Temporal Issues Relating to BIT Dispute Resolution', in M Kinnear and C McLachlan (eds.),ICSID Review – Foreign Investment Law Journal, 37 (1-2), Section II. ^ Back to section

29 ILC Articles on State Responsibility, Article 15(1). ^ Back to section

30 *United Parcel Service, Paragraph 28 ('continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly').* ^ Back to section

31 *Carlos Ríos and Francisco Ríos v. Chile, ICSID Case No. ARB/17/16, Award on Jurisdiction and Merits, 11 January 2021, Paragraph 189 (Ríos); Astrida Benita Carrizosa, Paragraph 149; OOO Manolium Processing v. The Republic of Belarus, PCA Case No. 2018-06, Final Award on Jurisdiction and Merits, 22 June 2021, Paragraph 284; Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award on Jurisdiction and Merits, 25 July 2018, Paragraphs 1134, 1135. See also ILC, Draft Articles on the Law of Treaties with commentaries, 2001, 63 Paragraph 8 (commenting on Article 15); Técnicas Medioambientales Tecmed, SA v. The Mexican States, ICSID Case No. ARB(AF)/00/2, Award on Jurisdiction and Merits, 29 May 2003, Paragraph 172; Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v. The Dominican Republic, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, Paragraph 91; Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdiction, Paragraph 2.74.* ^ Back to section

32 Murphy, op.cit., Section III. ^ Back to section

33 ILC Articles on State Responsibility, Article 15(2). ^ Back to section

34 *Hydro Srl, et al v. Republic of Albania, ICSID Case No. ARB/15/28, Award on Jurisdiction and Merits, 24 April 2019.* ^ Back to section

35 ibid., Paragraphs 467, 667, 671 ^ Back to section

36 ibid., Paragraph 555. ^ Back to section

37 ibid., Paragraph 558. ^ Back to section

38 *LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, Award on Jurisdiction and Merits, 30 August 2022.* ^ Back to section

39 ibid., Paragraphs 8-12. ^ Back to section

40 ibid., Paragraphs 348, 354. ^ Back to section

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42 ibid., Paragraph 357. ^ Back to section

43 ibid. ^ Back to section

44 ILC,Draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties, 2021, ILC Y.B., p. 2. ^ Back to section

45 VCLT, Article 25. Examples of treaties having provisions on provisional application: Energy Charter Treaty, opened for signature 17 December 1994, entered into force 16 April 1998, Article 45(1); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments, signed 30 October 1990, Article 14; Agreement between the Arab Republic of Egypt and the Belgo-Luxemburg Economic Union for the Encouragement and Reciprocal Protection of Investments, signed on 28 February 1977, Article 13(1); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, signed 11 June 1975; among others, Article 12. ^ Back to section

46 *Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award on Jurisdiction and Merits, 28 July 2015.* ^ *Back to section*

47 ibid., Paragraph 187. ^ Back to section

48 ibid., Paragraph 159. ^ Back to section

49 ibid., Paragraph 328. ^ Back to section

50 ibid., Paragraphs 333, 340, 341, 343. ^ Back to section

51 *Renée Rose Levy and Gremcitel SA v. Republic of Peru, ICSID Case No. ARB/11/17, Award on Jurisdiction, 9 January 2015, Paragraph 147 (Renée Rose Levy and Gremcitel SA).* ^ *Back to section*

52 ibid. ^ Back to section

53 *Westwater Resources, Inc v. Republic of Türkiye, ICSID Case No. ARB/18/46, Award on Jurisdiction and Merits, 3 March 2023, Paragraph 125; Latam Hydro LLC and CH Mamacocha SRL v. Republic of Peru, ICSID Case No. ARB/19/28, Award on Jurisdiction and Merits, 20 December 2023, Paragraph 353.* ^ *Back to section*

54 *Antonio del Valle Ruiz, et al. v. Kingdom of Spain, PCA Case No. 2019-17, Award on Jurisdiction and Merits, 13 March 2023.* ^ *Back to section*

55 ibid., Paragraphs 1-2. ^ Back to section

56 ibid., Paragraphs 378. ^ Back to section

57 ibid., Paragraph 386. ^ Back to section

58 ibid., Paragraph 392. ^ Back to section

59 ibid., Paragraph 394. ^ Back to section

60 *Renée Rose Levy and Gremcitel SA, Paragraphs 1, 65–67.* ^ *Back to section*

61 ibid., Paragraph 92. ^ Back to section

62 ibid., Paragraphs 140–161, 194–195. ^ Back to section

63 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru, ICSID Case No. UNCT/18/2, REDACTED Award on Jurisdiction and Merits, 6 December 2022, Paragraph 321 (quoting Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, of 30 March 1950, p. 13.)* ^ *Back to section*

64 ibid., Paragraphs 323–325;Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Paragraph 96 ('there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time, these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them . . . this sequence of event has to be taken into account in establishing the critical date . . .'). ^ Back to section

65 *Gambrinus, Corp v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/31, Award on Jurisdiction, 15 June 2015.* ^ *Back to section*

66 ibid., Paragraphs 58-59,151–154. ^ Back to section

67 ibid., Paragraphs 180–187. ^ Back to section

68 ibid., Paragraphs 188-196. ^ Back to section

69 ibid., Paragraphs 198-199. ^ Back to section

70 *Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012.* ^ *Back to section*

71 ibid., Paragraph 6.129. ^ Back to section

72 ibid., Paragraphs 2.107, 3.36–3.37. ^ Back to section

73 ibid., Paragraph 2.76. ^ Back to section

74 ibid., Paragraph 2.92. ^ Back to section

75 VCLT, Article 70. ^ Back to section

76 VCLT, Part III, Section 3 ^ Back to section

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80 ICSID Convention Rules, Articles 71 and 72. ^ Back to section

81 *Blue Bank International & Trust Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Award on Jurisdiction, 26 April 2017, Paragraphs 119–120; Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21, Award on Jurisdiction, 13 November 2017, Paragraphs 250, 285 (Fábrica de Vidrios and Owens-Illinois); Venoklim Holding BV v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Award on Jurisdiction, 3 April 2015, Paragraph 69 (Venoklim Holding BV).* ^ Back to section

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83 *Fábrica de Vidrios and Owens-Illinois, Paragraph 179.* ^ Back to section

84 ibid., Paragraph 12. ^ Back to section

85 ibid., Paragraph 186. ^ Back to section

86 ibid., Paragraph 282. ^ Back to section

87 *Venoklim Holding BV, Paragraph 69.* ^ Back to section

88 ibid., Paragraph 8. ^ Back to section

89 ibid., Paragraph 78. ^ Back to section

90 ibid., Paragraphs 78-79. ^ Back to section

91 A Lauvaux, 'Towards a bumpy ride into the sunset: on the mutual termination of IIAs and their sunset clause's, in W Park (ed.), 38(3)Arbitration International, p. 2 of 10 of the PDF (The Author(s); Oxford University Press 2022). ^ Back to section

92 Agreement Between the Government of the Kingdom of Morocco and the Government of Japan for the Promotion and Protection of Investment, signed 8 January 2020, Article 23(5). ^ Back to section

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94 ibid., Paragraphs 58–60. ^ Back to section

95 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, 29 May 2020, OJ L169, pp. 1–41. Retrieved from EUR-Lex-22020A0529(01)-EN-EUR-Lex (europa.eu). ^ Back to section

96 *Fynerdale Holdings BV v. The Czech Republic, PCA Case No. 2018-18, Award on Jurisdiction, 29 April 2021, Paragraph 241; AMF Aircraftleasing Meier & Fischer GmbH & Co KG v. Czech Republic, PCA Case No. 2017-15, Final Award on Jurisdiction and Merits, 11 May 2020, Paragraph 318; Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37, Decision on Jurisdictional Objection, 12 June 2020, Paragraph 185.* ^ *Back to section*

97 *Adria Group BV and Adria Group Holding BV v. Republic of Croatia, ICSID Case No. ARB/20/6, Decision on EU Jurisdictional Objection, 31 October 2023.* ^ *Back to section*

98 ibid., Paragraph 185. ^ Back to section

99 SeeTC Energy Corporation and TransCanada PipeLines Limited v. United States of America, ICSID Case No. ARB/21/63; Alberta Petroleum Marketing Commission v. United States of America, Case No. UNCT/23/4. ^ Back to section

100 *Resolute Forest Products Inc v Government of Canada, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, Paragraph 153. ('The Tribunal agrees with [Canada], and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible.') (Resolute Forest Products Inc); Mobil Investments Canada Inc v Canada (II), ICSID Case No ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, Paragraph 146. ([T]he awards . . . highlight that the limitation period is 'clear and rigid'). See also Grand River Enterprises Six Nations, Ltd, et al. v. United States of America, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, Paragraph 29. (Articles 1116(2) and 1117(2) [of NAFTA] introduced a clear and rigid limitation defence); R Ren, 'Vanishing Treaty Claims: Investors Trapped in a Temporal Twilight Zone', in M Kinnear and C McLachlan (eds), ICSID Review – Foreign Investment Law Journal (The Author(s); Oxford University Press 2023, Volume 38, Issue 1), section V(A).* ^ *Back to section*

101 *Resolute Forest Products Inc, Paragraph 85.* ^ *Back to section*

102 *Tennant Energy, LLC v. Government of Canada, PCA Case No. 2018-54, Final Award on Jurisdiction, 25 October 2022, Paragraphs 271, 405, 407–408, 413. (Canada argued that the tribunal had no ratione temporis jurisdiction because the claimant failed to submit its claim within the three-year limitation period established in the NAFTA. The tribunal analysed that an alleged breach occurs when the wrongful measure takes place, but the limitation period starts only after claimant's first knowledge of the breach and loss).* ^ *Back to section*

103 NAFTA, Article 1116(2). See also the Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, signed, 18 March 1998, Article 12(3)(c); CAFTA, signed 5 August 2004, Article 10.18.1; the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, signed 07 September 2007, Article9 (7); among others. ^ Back to section

104 *Ríos, Paragraphs 1–2, 10, 24.* ^ *Back to section*

105 ibid., Paragraphs 226, 229. ^ Back to section

106 ibid., Paragraphs 158–159. ^ Back to section

107 ibid., Paragraphs 178–180. ^ Back to section

108 ibid., Paragraph 185. ^ Back to section

109 ibid., Paragraphs 196–198. ^ Back to section

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114 *Ríos, Partial Dissenting Opinion by Arbitrator Oscar M Garibaldi, 29 December 2020, Paragraph 19.* ^ *Back to section*

115 ibid., Paragraph 21. ^ Back to section

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117 *Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award on Jurisdiction, 31 May 2016.* ^ *Back to section*

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120 ibid., Paragraphs 219, 221–224. ^ Back to section

121 ibid., Paragraphs 236–237. ^ Back to section

122 ibid., Paragraphs 201, 204. ^ Back to section

123 ibid., Paragraphs 210–211. ^ Back to section

124 *Berkowitz, Paragraph 276.* ^ Back to section

125 *Nissan Motor Co v. India, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, Paragraph 325 (If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived . . . The fact that [the investor] may not yet have conceived of this damage as caused by a CEPA breach is not determinative, when both the relevant State conduct (non-payment) and the relevant loss (non-receipt of payment) predated the critical date.); Resolute Forest Products Inc, Paragraph 165; Mondev International Ltd v. United States of America, ICSID Case No. ARB(AF)/99/2, Award on Jurisdiction and Merits, 11 October 2002, Paragraph 87.* ^ Back to section

126 *Rand Investments Ltd, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia, ICSID Case No. ARB/18/8, Award on Jurisdiction and Merits, 29 June 2023, Paragraphs 445–448; Ríos, Paragraph 175; Berkowitz, Paragraph 213.* ^ Back to section

127 *Orazul International España Holdings SL v. Argentine Republic, ICSID Case No. ARB/19/25, Award on Jurisdiction and Merits, 14 December 2023.* ^ Back to section

128 ibid., Paragraph 352. ^ Back to section

129 ibid., Paragraphs 327–328. ^ Back to section

130 ibid., Paragraphs 353, 370. ^ Back to section

131 ICSID Convention Rules, Article 52(2). ^ Back to section

132 ibid., Article 51(1). ^ Back to section

133 ibid., (2). ^ Back to section

134 ibid., Articles 51(2)–52(2). ^ Back to section

135 ICSID Arbitration Rules, Rule 41(1)(a). ^ Back to section

136 2010 UNCITRAL Arbitration Rules, Article13(1). ^ Back to section

137 Murphy, op. cit., Section IV. ^ Back to section

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