THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT

Editors
Mark Mangan and Noah Rubins QC

The Guide to Investment Treaty Protection and Enforcement

Editors

Mark Mangan and Noah Rubins QC

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2021
For further information please contact insight@globalarbitrationreview.com

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-856-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

CHAPTER 3

Initial Stages of a Dispute: The Investor's Perspective

Stanley U Nweke-Eze[1]

The relevance of arbitration in the settlement of investor–state disputes has grown over the years. This chapter addresses the considerations that investors should bear in mind before commencing arbitration proceedings. Recommendations are made as to what steps an investor should take to determine whether resorting to arbitration is the optimal strategy and, if it is, how an investor can adequately prepare for formal arbitral proceedings under applicable laws and procedures.

Pre-action preparations

Having determined that there is a dispute to be resolved between the investor and the host state, the investor should conduct a holistic and detailed assessment of the actions that underpin the dispute, to determine its logical next steps. In conducting this assessment, it is important for the investor to carry out the following procedures.

- Analyse and streamline the factual background. This is typically done by collating evidence and interviewing fact witnesses to develop a clear chronology of how the dispute arose and its circumstances. With specific reference to witness testimony, it is important to bear in mind that all relevant fact witnesses may not be readily available during the arbitration hearing. Hence, it is vital to put appropriate plans in place to secure their attendance or consider an alternative plan.

1 Stanley U Nweke-Eze is a senior associate at Templars.

- Establish the relevant instrument that protects its foreign investment (i.e., an investment treaty,[2] investment contract or national legislation). In some instances, for example, there may be more than one applicable instrument, and they may contain varying substantive and procedural provisions. This process will, therefore, help an investor to determine which instrument contains the most favourable provisions in the circumstances.
- Calculate the investor's chance of success, with the aid of lawyers, by assessing the strengths and weaknesses of the proposed claim. This is usually determined by investigating whether the relevant jurisdictional standards for an arbitral tribunal have been met and whether the conduct of the host state in relation to the investor's foreign investment indeed breaches the substantive obligations owed to the investor under the relevant instrument or customary international law. In assessing whether the relevant jurisdictional standards have been met, it is crucial to confirm whether the host state has consented to arbitration under an investment treaty, a local investment statute or an investment contract between the investor and the host state.[3] Also, consideration should be given to whether the host state has consented to arbitration in relation to the covered investor and investment.[4] In addition, it is vital to confirm that there are valid legal grounds upon which the investor can base its claim against the host state under the relevant instrument or customary

2 It is advisable for the investor to understand the entire network of the host state's investment treaties given that one treaty may incorporate the provisions of others through the application of the principle of a most-favoured nation (MFN) clause. The MFN clause generally seeks to provide equal treatment granted to the investors of one state in a treaty to the investors of another nation in a different treaty. See, for example, Article 3 of the Albania–United Kingdom BIT (1996).

3 This is not limited to contracts involving the government of the host state. It can, in certain circumstances, extend to contracts in which a government agency is a party. See B M Cremades and D J A Cairnes, 'Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes', in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004), 326.

4 If the dispute is brought under the aegis of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), it is essential to determine that the requirements for consent have been met and whether the investor and foreign investment qualify as such under the ICSID Convention. See Article 25 of the ICSID Convention.

international law. These legal grounds, which are discussed in further detail in the following chapters, include denials of fair and equitable treatment, unlawful expropriation and discriminatory treatment.[5]

At the end of this phase, it is important to clearly frame the investor's claim and determine the applicable instrument, procedure and strategy.

Satisfying applicable conditions precedent

Having undertaken the pre-action preparations, the investor should consider whether the investment treaty, investment contract or national investment legislation provides for certain procedures that an investor must adhere to before instituting a formal arbitration claim. An example is the requirement to comply with a 'cooling-off' period. This requirement is aimed at encouraging amicable settlement between the parties before they initiate formal arbitration proceedings.[6] Most investment treaties mandate this step and specify a time frame, usually between three to six months, for these amicable discussions or consultations. To the extent that an investment treaty contains this requirement, the investor should ideally wait for that period to elapse because a failure to satisfy the condition could result in the dismissal of its claim as inadmissible by the tribunal, even if there is a basis for jurisdiction.[7] With that said, a treaty's most-favoured nation (MFN) clause may provide a means of evading a prescribed cooling-off period as discussed in the chapter on MFN clauses.

5 A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer, 2009).

6 See, for example, Article 13 of the China–Singapore BIT (1986); Article 12 of the Australia–Vietnam BIT (1991); Article 10(2-3) of the Argentina–Germany BIT (1996).

7 Tribunals' decisions differ on whether failure to comply strictly with a waiting period set out in an investment treaty is a bar to jurisdiction or whether the waiting period is a procedural requirement that may be dispensed with where appropriate. While some tribunals have declined jurisdiction to entertain an investor's claim for failure to comply with the waiting period required by the applicable investment treaty (see, for example, *Murphy Exploration and Production Company International v. Republic of Ecuador*, Decision on Jurisdiction, 15 December 2010, Paragraphs 90–157; *Goetz v. Burundi*, Award, 10 February 1999, Paragraphs 90–93 and *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, Decision on Jurisdiction, 14 January 2004, Paragraphs 82–88), other tribunals have found that provisions on waiting periods in investment treaties are merely procedural in nature and failure to comply with them will not rob an arbitral tribunal of the jurisdiction to entertain an investment dispute commenced under the relevant investment treaty (see, for example, *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, Paragraphs 77, 84–88; *Azurix v. Argentina*, Decision on Jurisdiction, 8 December 2003, Paragraph 55).

Strategic considerations for investors

The strategy in investment disputes varies considerably depending on whether you are on the side of the state or that of the investor. Here are some suggestions for those representing the investor.

For investors, the situation is very different to that of the state. By definition, investors are claimants and, at worst, they will be in the same position if the case is lost, although they may have to pay the state's costs, which can be significant.

The most important strategic approach an investor can take is to remain lucid about the case. In particular, great attention should be devoted to whether there is actually an investment under the treaty in question. Most investors ignore the specific definition of an investment in the treaty, and they frequently fail at the jurisdictional stage because they do not satisfy the requirements of the treaty.

Another important consideration is the ability to prove damages in due course. It is one thing to have a great case on the merits (for example, where there is an obviously expropriated asset). It is quite another to obtain a significant indemnification from an arbitral tribunal. This is particularly the case when the expropriated asset is a company that has no track record of profit or activity. Consulting good experts on quantum very early on is absolutely key in that respect.

Another essential consideration for investors is the collectability of any future award. Claims are a class of assets that can be financed, but awards are also assets, and they are, in principle, more liquid than claims. They can be traded on the secondary market. As such, they can provide the investor with immediate resources without going through the painful process of enforcement. This, however, presupposes there is a genuine possibility of collecting on the award. This means that the respondent state should have seizable assets of a commercial nature (assuming that there is no waiver from immunity of execution).

These three considerations are key for any investor that proposes to embark in investment arbitration.

– Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP

Resolving potential claims amicably

Although an investor may have a justifiable basis to institute formal arbitration proceedings against the host state, it is often advisable for investors to explore amicable settlement first. This usually involves the representatives of the investor and the host state engaging in constructive discussions among themselves (i.e., negotiation) or with the aid of a third party (i.e., mediation or conciliation) with the goal of an amicable, workable outcome.[8]

8 Some investment treaties expressly require the parties to explore these amicable mechanisms before resorting to arbitration. See footnote 6.

Taking this path before commencing the formal process of settling disputes has some advantages. First, it tends to minimise negative publicity of the dispute by the host state. The second advantage is that an amicable resolution can help preserve working relationships between the parties after the resolution of the dispute. This is particularly vital where the investor has long-term investment plans in the host state. Third, these mechanisms are usually faster and more cost-effective than investment arbitrations. Lastly, informal dispute resolution offers the parties the flexibility to use a fluid, creative process, unlike formal arbitration proceedings that involve comparatively strict procedural rules.

However, adopting amicable processes in the settlement of investment disputes is not free of shortcomings. For example, an arbitral award is more easily enforced around the world than a written settlement agreement between the parties.[9] The exercise could be a waste of time and costs where the process does not result in a workable solution between the parties. Further, they may not be suitable for all types of disputes and circumstances (for example, disputes that relate to public interest issues) or where the relationship between the parties has severely broken down or the matter is urgent.

While these amicable mechanisms could take various forms, the popular options are negotiation, mediation and conciliation.

Negotiation

Negotiation involves direct discussions between the representatives of the investor and the host state without the aid of a third party. The parties try to utilise their relationship to find a solution to their dispute. Negotiation is often required in investment treaties in the form of a mandatory cooling-off period between the filing of a dispute and the formal commencement of the arbitration procedures,[10] but can also extend beyond that time if doing so is likely to yield a fruitful outcome.

9 There are instances where it could be incorporated into an award or judgment. See, for example, Rule 43(2) of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules.

10 See footnote 6.

Mediation

Mediation involves the assistance of a third party, known as a mediator, in the settlement of a dispute. The mediator aims to assist the parties in reaching their own amicable settlement to a dispute, with the exact role and involvement of the mediator varying, depending on the parties' preferences.[11]

Conciliation

This method involves a conciliator who is a neutral, impartial expert, and aims to assist the parties in resolving the issues between them. The exact role of the conciliator depends on the parties' consent.[12] The major difference between conciliation and mediation primarily lies in the degree of control that the parties have in the settlement process. While the parties give the conciliator greater control over the dispute and its processes (which, sometimes, entails the formal collation of evidence, the use of pleadings and the issuance of written recommendations by the conciliator in resolving the dispute), a mediator works towards encouraging the parties to reach a solution themselves, including through focusing on their shared interests.[13] Any agreement that is achieved through conciliation is usually memorialised in writing and can be binding or non-binding, depending on the parties' preferences.[14]

Overall, these amicable strategies for dispute resolution will often be worth exploring before commencing formal arbitral proceedings (although, sometimes, time will be of the essence, and immediate action would be required to preserve rights).[15] They can be explored without prejudice to the right of the parties to resort to other forms of dispute resolution.

---

11 S Franck, 'Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements', in K Sauvant and M Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008), 143–192.

12 U Onwuamaegbu, 'The Role of ADR in Investor–State Dispute Settlement: The ICSID experience', *News from ICSID* (2005), 22 (2), 12–15.

13 L C Reif, 'Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes', *Fordham International Law Journal*, 1991, 14, 578–638.

14 J W Salacuse, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution', *Fordham International Law Journal*, 2007, 13(1), 138–185. See, for example, the ICSID Rules of Procedure for Conciliation Proceedings.

15 There are instances where parties prefer to (or re-attempt to) settle their differences after the exchange of pleadings, which could help them to clearly identify the issues for determination and underlying legal arguments.

Other strategic choices for an investor – choice of forum, choice of arbitration rules, choice of arbitrator

If a claim must be presented formally, an investor may have some strategic decisions to make regarding the appropriate forum, arbitration rules and arbitrators.

Choice of forum

The investor may have a choice of forums in which to pursue its claim against the host state. For example, some investment treaties give investors a choice between pursuing their claims against the host state in the host state's national courts or in an arbitral forum. In relation to arbitral forums, there could be a choice as to whether the investor can pursue its claim through institutional arbitration rules (e.g., under the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)) or under ad hoc arbitration rules (e.g., the Arbitration Rules of the UN Commission on International Trade Law (UNCITRAL)).

In relation to the choice between national courts and arbitration, investors will often prefer investment arbitration so as to access a neutral, qualified tribunal, instead of relying on domestic courts where the relevant judges may not be experienced in the subject matter of the dispute or may be biased in favour of the host state. There is also a perception that arbitration could be a cheaper and more flexible option for the parties[16] (including through the avoidance of potentially endless court appeals) and allows the parties to exercise greater control over the dispute resolution procedure (by appointing the arbitrators, choosing the arbitral rules and agreeing to the relevant timelines). More so, and as noted above, the relative ease of enforcement of arbitral awards is an attractive element of international arbitration.

It is worth bearing in mind that some investment treaties contain a jurisdictional provision that binds an investor or a host state to its first choice of dispute resolution procedure (i.e., domestic court proceedings or arbitration proceedings). This is referred to as a 'fork-in-the-road' provision. Hence, if the

16 This may not be the case in practical reality because investors have decried the system as being excessively costly and the time frame for the settlement of disputes has increased over the years.

investor chooses to pursue its claim in the domestic courts of the host state, it may be prevented from later commencing arbitral proceedings, thereby preventing the duplication of procedures and claims.[17]

Choice of arbitration rules

Many investment treaties allow the investor to choose which arbitration rules will govern the arbitration proceedings.[18] The most common – which is the focus of this chapter – are the Rules of the ICSID Convention[19] and the UNCITRAL Rules.[20] Some major differences between the ICSID and UNCITRAL options are as follows.

- Cost: arbitration proceedings under the ICSID Convention may be less expensive when compared with ad hoc arbitration under the UNCITRAL Rules because the ICSID Rules provide a fee schedule that establishes hourly fees for arbitrators, which are usually less than the typical market rates.[21] The UNCITRAL Rules, on the other hand, give arbitrators the discretion to determine their fees so long as they are reasonable.[22] In addition, and with regard to procedural expenses, the services provided by the ICSID Secretariat are at minimum cost. Arbitration proceedings under the UNCITRAL Rules, by contrast, are ad hoc in nature and not administered by an institution by default.[23] While this enables the parties to avoid having to pay an institutional fee, it can also lead to inefficiency and, ultimately, increased costs.

---

17 Article 9(3) of the China–Nigeria BIT (2001); Article 10(2) of the Albania–Greece BIT (1991); Article 6(2) of the Ecuador–USA BIT (1993).

18 See, for example, Article 10(4) of the Argentina–Germany BIT (1996); Article 6(3) of the Ecuador–USA BIT (1993).

19 If one of the contracting parties to an investment treaty is not a party to the ICSID Convention, an investment treaty will typically not give the parties the choice of instituting arbitration proceedings under the ICSID Convention. It will, instead, state that the Rules of the ICSID Convention will apply only when both parties become parties to the ICSID Convention or go with the Rules of the ICSID Additional Facility, the UNCITRAL Rules or other institutional rules (such as the Rules of the International Chamber of Commerce).

20 Some investment treaties provide for other arbitral rules including the Rules of the Stockholm Chamber of Commerce and the Rules of the International Chamber of Commerce. See, for example, Article 12(3) of the Russia–Madagascar BIT (2005).

21 Regulation 14 (Schedule of Fees), ICSID Administrative and Financial Regulations, 2013.

22 Article 41 of the UNCITRAL Rules.

23 The parties may agree to have UNCITRAL arbitration proceedings administered by an institution, for instance by the Permanent Court of Arbitration.

- Jurisdiction: under the terms of the ICSID Convention, an investor must satisfy the jurisdictional requirements of the relevant investment instrument and the additional requirements in the ICSID Convention.[24] Bear in mind that the interpretation of 'investment' in the ICSID Convention is unsettled. Hence, the additional layer of jurisdictional requirements imposed therein can, in some cases, add to the complexity of the arbitral proceedings and could ultimately result in the dismissal of the claim.[25] On the other hand, the UNCITRAL Rules impose no additional requirements for jurisdiction. An arbitral tribunal constituted under those Rules will, therefore, have jurisdiction over any claim meeting the requirements of the relevant investment instrument.
- Enforcement and review mechanisms: the ICSID Convention provides a unique system for the review and enforcement of arbitral awards. A party to an ICSID award may file an application for the annulment of an award and it will be decided by an ICSID ad hoc committee.[26] However, awards rendered under the ICSID Convention are not subject to appeal or review by another forum, including national courts.[27] Instead, the ICSID Convention requires national courts to enforce the award as though it is a judgment of a court of last instance.[28] This represents an advantage for the investor. On the other hand, awards rendered pursuant to the UNCITRAL Rules could be subject to set-aside proceedings in the national courts of the place of the arbitration. UNCITRAL awards cannot be enforced as the final judgment of the court of last instance. Thus, the successful party must obtain an order of

24 Article 25(1) of the ICSID Convention provides: 'The jurisdiction of the [ICSID] shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'

25 S Manciaux, 'The Notion of Investment: New Controversies', *Journal of World Investment & Trade*, 2008, 9, 1–6.

26 Articles 50–52 of the ICSID Convention. Article 52(1) specifically provides a list of grounds for annulment, which include: where the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, corruption on the part of one of the members of the tribunal, there has been a fundamental departure from the rules of procedure and where the award fails to state the basis for which it is based.

27 Article 53(1) of the ICSID Convention.

28 id. at Article 54(1).

enforcement from the national courts of each jurisdiction where enforcement is being sought, typically based on the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards.[29]

Choice of arbitrator

An arbitral tribunal in investor–state disputes usually composes three arbitrators. In some instances, the method of the arbitrators' appointment is stated in the applicable investment instrument. In other instances, arbitrator appointment is made by reference to the arbitration rules selected by the parties. The investor typically names the first arbitrator in the originating process (i.e., a request for arbitration or notice of arbitration), following which the host state names the second arbitrator. The presiding arbitrator is then appointed either upon the agreement of the two parties or the two arbitrators.[30]

If the arbitrators are to be appointed by the parties, there are certain factors that the investor must consider when choosing who to appoint as an arbitrator. For example, it is important to appoint an independent and impartial arbitrator to ensure a fair hearing during the proceedings. To ensure that the independence and impartiality of the arbitrator appointed are not impugned, the investor must disclose any information or previous relationship with the arbitrator.[31] Another factor to consider is the experience and expertise of the arbitrator. He or she must be someone with sufficient experience to decide the dispute to ensure a smooth and efficient hearing of the dispute by the tribunal. The availability of the proposed arbitrator is also important to ensure that he or she will invest the required time and effort throughout the proceedings.

The ICSID Rules provide certain restrictions regarding the arbitrators' nationality. In a three-person ICSID tribunal, a national of the state party to the dispute or of the state whose national is a party to the dispute may not be appointed as an arbitrator without the agreement of the other party.[32] The UNCITRAL Rules do not provide for any nationality restrictions but the nationalities of the parties to the dispute are considered in practice by the appointing authority in the event of the parties' failure to appoint the tribunal.[33]

---

29 See, for example, Article 10(4) of the Germany–Russia BIT (1989).

30 See Article 37(2) of the ICSID Convention; Articles 7–9 of the UNCITRAL Rules.

31 Rule 6 of the ICSID Arbitration Rules.

32 id. at Rule 1(3).

33 Article 6(7) of the UNCITRAL Rules.

The originating process

In commencing arbitration proceedings for investment disputes, it is fundamental that certain procedures be followed to ensure that the arbitral tribunal has the competence to decide the issues.

Notice of dispute or notice of intention to submit the dispute to arbitration

As discussed above, parties are mandated to take steps towards settling their differences amicably in most investment treaties. The notice of dispute or notice of intention to submit the dispute to arbitration typically triggers the waiting period. There are usually no formal requirements for this notice. In practice, however, it takes the form of a written notification (for example, a letter), directly from the investor or its legal representatives, and addressed to the head of state or to the relevant ministry charged with the regulation of that investment, or both, identifying the investor's investment in the host state, the disputed measures adopted by the host state that negatively affect the investment, the legal principles that confirm that those measures are contrary to the provisions of the relevant investment instrument, and an offer to engage in amicable discussions.

Request for arbitration or notice of arbitration

Investment arbitration proceedings are formally commenced by the sending of a notification known as a request for arbitration (in relation to ICSID proceedings)[34] or a notice of arbitration (under the UNCITRAL proceedings).[35]

This document is not a complete statement of the investor's claims. Instead, it provides some basic information about the claims, the parties and the basis for arbitral jurisdiction, including: (1) the names and contact details of the investor and counsel; (2) the identification of and, where possible, a copy of, the arbitration agreement under which the dispute is to be settled; (3) identification of any contract, other legal instrument or relationship out of or in relation to which the dispute arises; (4) a brief description of the nature and circumstances giving rise to the claims; (5) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; and (6) the claimant's observations or proposals as to the number of arbitrators, the language, the seat of arbitration and the law or rules

34 Article 36 of the ICSID Convention.

35 Article 3 of the UNCITRAL Rules.

of law applicable to the substance of the dispute.[36] This document does not aim to set out the claimant's claim in full (which is typically set out subsequently in the statement of claim or the claimant's memorial).[37]

The request or notice facilitates the commencement of arbitral proceedings when it has been delivered to the host state (in relation to UNCITRAL proceedings)[38] or the registration of the request for arbitration by the ICSID Secretariat (in relation to ICSID proceedings).[39]

In UNCITRAL arbitration proceedings, the host state may file a response to the notice within 30 days of its receipt.[40] This response usually contains a high-level response to the notice and not a complete statement of defence. The request/notice and response allow the tribunal to prepare for the first session because the documents will delineate the key issues in dispute. Failure to submit the response does not prevent the arbitration from kicking off.[41]

There is no similar document to a response to the request for arbitration under the ICSID procedure.

Conclusion

There is little doubt that instituting a claim against a host state relating to foreign investment can be an expensive endeavour. The initial phases of the dispute settlement process are essential because several important decisions are made at this stage of the proceedings. These decisions range from choice of forum and arbitrators to arbitration rules and so on. It is therefore essential that parties devote sufficient time and resources towards strategising and complying with relevant procedural requirements. It is also crucial to note that, at the initial stage, alternative mechanisms should be taken into consideration when seeking to resolve investment disputes. This helps to reduce the after-effects of conflicts, including the heavy costs that are involved in advancing an arbitration claim.

36 Article 3(3) of the UNCITRAL Rules; Rule 2 of the ICSID Institution Rules.
37 Rule 31(1) and (3) of the ICSID Rules; Article 18 of the UNCITRAL Rules.
38 Article 3(2) of the UNCITRAL Rules.
39 Rule 6(2) of the ICSID Institutional Rules.
40 Article 4 of the UNCITRAL Rules.
41 Article 4(3) of the UNCITRAL Rules.

CHAPTER 8

Jurisdiction: Main Elements

Stanley U Nweke-Eze[1]

Introduction

Jurisdiction is an essential precondition to an arbitral tribunal's ability to resolve an investment dispute between an investor and a host state. The issue of jurisdiction is primarily determined by reference to the relevant investment instrument that gives authority to the tribunal (i.e., an investment treaty, domestic foreign investment law or the parties' arbitration agreement). Some elements are important in establishing the jurisdiction of an arbitral tribunal. For example, the tribunal is expected to determine whether the parties (i.e., the investor and host state) have consented to submit the dispute to arbitration, whether the party instituting the claim is a covered investor, and whether the transactions that give rise to the claim qualify as a covered investment in the territory of the host state.[2] These elements are discussed in this chapter.

Establishing consent to arbitration

The consent of the host state and investor is the bedrock of the arbitral tribunal's jurisdiction and lies in the parties' common intention and agreement to submit any dispute arising in their relationship to arbitration. In simple words, the parties'

1 Stanley U Nweke-Eze is a senior associate at Templars.

2 In relation to disputes brought under the International Centre for the Settlement of Investment Disputes (ICSID), the parties would, in addition, also need to comply with the principles governing jurisdiction under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). See Articles 25 to 27 of the ICSID Convention. It has been argued that a similar standard applies to claims under Article 4(2) of the ICSID Additional Facilities given its reference to Article 25 of the ICSID Convention. See also *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID, Award, 4 May 2016, Paragraph 186.

consent confers jurisdiction to the arbitral tribunal. It must, therefore, be established that the host state and investor have given their unequivocal consent to submit a dispute to arbitration.[3]

Consent to arbitration can take varying forms so long as it is clear[4] and free from coercion, fraudulent inducement or mistake.[5] Also, consent shall not be presumed in the face of ambiguity – it must, instead, be established[6] – and it has been held that the burden of establishing consent 'lies primarily upon the claimant'.[7]

The consent of the host state typically takes the form of an offer in an investment treaty,[8] a domestic investment law[9] or an arbitration agreement between the parties.[10] Indeed, the host state can provide conditions under which consent will

---

3 *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction, 24 June 1998, Paragraph 59.

4 *Tenaris and Talta v. Venezuela (II)*, ICSID, Decision on Annulment, 28 December 2018, Paragraph 337.

5 *Abaclat & Others v. Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility, 4 August 2011, Paragraphs 436–438.

6 *PNG Sustainable Development v. Papua New Guinea*, ICSID, Award, 5 May 2015, Paragraphs 255–256; *Daimler v. Argentina*, ICSID, Award, 22 August 2012, Paragraph 175.

7 *National Gas v. Egypt*, ICSID, Award, 3 April 2014, Paragraph 118.

8 This is usually contained in a clause in an investment treaty between two contracting states agreeing to submit future investment disputes arising between an investor from the home state and the host state to arbitration. See, for example, Article 9(3) of the China–Nigeria BIT (2001) and Article 9(1) of the Egypt–Netherlands BIT (1996). A provision on consent in an investment treaty is typically no more than a standing offer that requires the acceptance of an investor. Acceptance in this context can be effected by filing a claim against the host state. See *American Manufacturing & Trading INC v. Republic of Zaire*, ICSID, Award, 21 February 1997, Paragraph 5.23; *Daimler v. Argentina*, ICSID, Award, 22 August 2012, Paragraph 168.

9 These typically provide for the resolution of investment disputes between a foreign investor and the host state through arbitration. For example, Section 26(2) of the Nigerian Investment Promotion Commission Act 1995 provides that 'any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration . . .'. However, provisions such as this are generally nothing more than an offer that may be accepted by the investor, and the filing of a claim at ICSID by an investor in line with any respective national law signifies the acceptance of this offer. See *Inceysa v. El Salvador*, ICSID, Award, 2 August 2006, Paragraph 332; *SPP v. Egypt*, ICSID, Decision on Jurisdiction, 14 April 1988, Paragraph 116.

10 This is usually contained in a clause in an investment agreement between the host state and the investor agreeing to submit future disputes arising in relation to the investment agreement to arbitration. See *Duke Energy v. Peru*, ICSID, Decision on Jurisdiction, 1 February 2006, Paragraphs 80–81; *ST-AD v. Bulgaria*, PCA, Award on Jurisdiction, 18 July 2013, Paragraph 337.

be given (for example, a good-faith attempt by the investor to settle the dispute amicably)[11] or limit its consent to specific investments or disputes that meet the characteristics indicated by it[12] (for instance, limiting its consent to disputes arising out of an alleged act of expropriation).[13]

Also, it must be determined that the investor has given its consent to arbitrate. Normally, the request for arbitration (or notice of arbitration) is considered to qualify as the consent of the investor.[14] Therefore, when a request or notice is delivered by the investor, it is deemed that the investor has accepted the offer to arbitrate by the host state contained in an investment treaty, domestic foreign investment law or an arbitration agreement.[15]

Note that neither the investor nor the host state can unilaterally rescind or withdraw consent once it has been granted and perfected.[16] The unilateral irrevocability rule is founded on the idea that once a contract is finalised, it becomes a binding agreement between the parties. The irrevocability of consent, however, applies once the consent has been completed and does not prohibit the parties from mutually rescinding their consent.[17]

Personal jurisdiction: 'covered investor'

Another important element that goes to the root of an arbitral tribunal's jurisdiction is the determination of whether the investment dispute arises between the proper parties (i.e., a covered investor and a host state). If, for instance, the proposed claimant does not qualify as an investor under the relevant instrument (i.e., an investment treaty, investment law or contract), the arbitral tribunal would lack the jurisdiction to act.

11 *Burlington v. Ecuador*, ICSID, Decision on Jurisdiction, 2 June 2010, Paragraph 315; *ST-AD v. Bulgaria*, PCA, Award on Jurisdiction, 18 July 2013, Paragraphs 372, 337.

12 *Inceysa v. El Salvador*, ICSID, Award, 2 August 2006, Paragraphs 184–185.

13 *Beijing Shougang and others v. Mongolia*, PCA, Award, 30 June 2017, Paragraphs 436, 439, 446.

14 *AES v. Hungary (II)*, ICSID, Award, 23 September 2010, Paragraph 6.3.1; *National Grid v. Argentina*, ICSID, Decision on Jurisdiction, 20 June 2006, Paragraph 49.

15 *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction, 24 June 1998, Paragraph 59.

16 For instance, the closing phrase of Article 25(1) of the ICSID Convention states that when the parties have given their consent, no party may withdraw its consent unilaterally.

17 ICSID 2.3: Consent to Arbitration, Irrevocability of Consent, p. 37.

The covered investor can either be a natural or a juridical person. In relation to natural investors, most investment treaties define a qualified investor by reference to the person's state of origin or nationality,[18] while others define a covered investor by reference to either the nationality or permanent residency of the individual.[19] Hence, to qualify as a covered investor under the relevant investment treaty, it suffices for the investor to be a national of or (if applicable) permanently reside in the other contracting party's state (i.e., the home state). A natural person, that is a national of the host state, generally cannot bring a claim against the host state on the basis of an investment treaty.[20]

Regarding corporate or juridical investors, most investment treaties provide all or either of the following yardsticks for assessing the nationality of a corporate investor: the place of incorporation;[21] the place of constitution in accordance with the law in force in the country;[22] the nationality of the controlling persons;[23] and the location of the place of administration or management (or the seat of the corporation).[24] Satisfying one criterion, or a combination of two or more, would suffice to establish nationality.[25]

It is also important to establish that the respondent state is the host state where the investment was made and a contracting party to the applicable investment treaty or, if applicable, a party to the relevant investment agreement with

18 Article 1 of the China–Nigeria BIT (2001), for example, defines an investor to include 'nationals and companies of both Contracting Parties' and defines 'national' as 'natural persons having the nationality of that Contracting Party'. See also Article 1(3) of the Egypt–Finland BIT (2004) and Article 1(2) of the China–Uzbekistan BIT 2011.

19 Article 1(7) of the Energy Charter Treaty (1998) defines 'investor' as '[a] natural person having the citizenship or nationality of or who is permanently residing in [a] Contracting Party in accordance with its applicable law'. See also Article 1(b)(i) of the Canada–Argentina BIT (1993).

20 Note that Article 25(2)(a) of the ICSID Convention provides that investors who had the nationality of the contracting party to the dispute (i.e., host state) on the date on which the parties consented to submit the dispute to arbitration and on the date on which the request for arbitration was registered are excluded from its jurisdiction.

21 This is the most common. See, for example, Article 1(c)(ii) of the United Kingdom–El Salvador BIT (2001) and Article 1(a)(ii) of the Philippines–Switzerland BIT (1997).

22 Article 1(3)(b) of the Greece–Cuba BIT (1997).

23 Article 1(b)(ii) and (iii) of the Netherlands–Bahrain BIT (2007); Article 1(b)(iii) of the Brazil–Netherlands BIT (1998).

24 Article 1(2) of the Germany-China BIT (2003).

25 Article 2(b) of the China–France BIT (2007); Article 1(2)(b) of the France–Libya BIT (2006). And to substantiate the inclusion of an investor under the treaty, the test of control is sometimes coupled with additional formal requirements such as incorporation and administration. See, for example, Article 1(2) of the Burkina Faso–Chad BIT (2001).

the investor. Hence, if a host state is not one of the contracting parties to an investment treaty or contract[26] the tribunal may have no jurisdiction to determine the dispute.[27]

Subject-matter jurisdiction: 'covered investment'

To ascertain whether the arbitral tribunal has subject-matter jurisdiction, it must be determined that there is a dispute or disagreement between an investor and a host state relating to a legal right or obligation contained in a relevant instrument (i.e., an investment treaty, investment legislation or a contract) that arises directly out of a covered investment. There must, therefore, be a connection between the parties' dispute and the prospective claimant's investment.[28]

As a first step, it is important to establish that the interests of the investor qualify as a covered investment under the relevant instrument. If the qualifying investor's interests in the host state do not qualify as an investment under the relevant instrument, the arbitral tribunal lacks the jurisdiction to act in relation to the claims.

The definition of 'investment' is, indeed, an important element of an arbitral tribunal's jurisdiction and a key feature in determining whether the substantive protections contained in the relevant instrument are applicable.[29] However, there is no generally accepted definition of investment under international investment law because investment treaties adopt varying approaches. Many adopt an open-ended, asset-based definition of investment, usually starting with 'every

26 For example, a state-owned entity, except in instances where the conduct of that entity can be attributed to the contracting party, or where, under the ICSID Convention and supported by the underlying investment treaty or contract, the claim is against 'constituent subdivisions or agencies of a contracting state' that has been 'designated to the [ICSID] by that state'); see Article 25(1) of the ICSID Convention; *Mytilineos v. Serbia (I)*, PCA, Partial Award on Jurisdiction, 8 September 2006, Paragraph 173.

27 *Öztaş Construction v. Libya*, ICC, Final Award, 14 June 2018, Paragraph 94.

28 *National Grid v. Argentina*, ICSID, Decision on Jurisdiction, 20 June 2006, Paragraphs 138–140.

29 *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID, Award, 4 October 2013, Paragraphs 145–163; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID, Award, 16 January 2013, Paragraph 133.

kind of asset' and followed by an illustrative, non-exhaustive list comprising different examples of assets. For instance, Article 1 of the China–Turkey Bilateral Investment Treaty (BIT) (2015) provides as follows:

> *The term 'investment' means every kind of asset, connected with business activities, invested by an investor of one Contracting Party in the territory of the other Contracting Party in conformity with its laws and regulations, and shall include in particular, but not exclusively: (a) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights; (b) reinvested returns, claims to money or any other rights having financial value related to an investment; (c) shares, stocks or any other form of participation in companies; (d) industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trade-marks, goodwill, know-how and other similar rights; (e) business concessions conferred by law or by contract, including concessions related to natural resources; (f) rights under contracts, including turnkey, construction, management, production, or revenue sharing contracts . . .*[30]

Other investment treaties adopt an enterprise-based definition of investment. For example, Article 1 of the Morocco–Nigeria BIT (2016) defines investment as:

> *[a]n enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets: a) Shares, stocks, debentures and other instruments of the enterprise or another enterprise; b) A debt security of another enterprise; c) Loans to an enterprise; d) Movable or immovable property and other property rights such as mortgages, liens or pledges; e) Claims to money or to any performance under contract having a financial value; f) Copyrights and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State; g) Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.*[31]

---

30 See also Article 1 of the UK–China BIT (1986).

31 See also Article 1 of the China–Hong Kong BIT (2016); Article 2(4) of the Brazil–India BIT (2020).

Newer investment treaties also require the investment to have specified characteristics by seeking to limit the scope of covered investments, instead of embracing broad, open-ended definitions. For example, Article 1 of the Slovakia Model BIT (2019) provides that investment means a specified list of assets that:

> *[a]n investor owns or controls, directly or indirectly, that has the characteristics of an investment, inter alia, the commitment of capital or other resources, the expectation of gain or profit the assumption of risk, a certain duration and the investor performs via its investment substantial business activities in the Host State . . .*[32]

Some investment treaties expressly provide that the investment must be in accordance with the law of the host state. Hence, to the extent that the investment is contrary to the laws of the host state, some tribunals will not accept that it is covered and will declare lack of jurisdiction to act.[33] However, other tribunals have taken the opposite view, insisting that conforming with the law of the host state is not an element of the definition of investment that affects the subject-matter jurisdiction of the tribunal.[34]

Having established that the interests of the investor qualify as an investment under the relevant instrument, it must also be established that a dispute (i.e., a disagreement on a point of fact or law between an investor and a host state in relation to a covered investment)[35] has arisen. Put differently, the investor and the host state must hold conflicting legal or factual views, or both, relating to the question of the performance or non-performance of a legal obligation arising in relation to an investment in the host state.[36]

32 See also Article 3.3 of the Morocco Model BIT (2019), which provides the following characteristics: (1) contribution to sustainable development to the host state; (2) a certain duration; (3) a commitment of capital or resources; (4) an expectation of profit; and (5) risk taking.

33 *Fraport v. Philippines (I)*, ICSID, Award, 16 August 2007, Paragraph 401.

34 *Quiborax v. Bolivia*, ICSID, Decision on Jurisdiction, 27 September 2012, Paragraph 226.

35 *Suez v. Argentina*, ICSID, Decision on Jurisdiction, 16 May 2006, Paragraph 29.

36 *Industria Nacional de Alimentos v. Peru*, ICSID, Award, 7 February 2005, Paragraph 48. Indeed, the subject-matter jurisdiction under the ICSID Convention is a legal dispute that arises directly out of a transaction that qualifies as an investment (Article 25 of the ICSID Convention). The 1978 Additional Facility Rules of ICSID provides for the settlement of disputes that fall outside this definition, including legal disputes between a state (or a constituent subdivision or agency of a state) and a national of another state 'which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State' (Article 2(b) of the Additional Facility Rules).

To sum up, the notion of investment and the existence of a legal dispute in relation to the investment are crucial in conferring or divesting arbitral tribunals of subject-matter jurisdiction.

Territorial jurisdiction

Most investment treaties provide that a qualified investment is one that is made in the territory of the respondent host state. For example, Article 1(f) of the Canada–Venezuela BIT (1996) provides that investment 'means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third state, in the territory of the other Contracting Party in accordance with the latter's laws'.[37]

Although some investment treaties do not expressly require that the investment will be made in the territory of the host state, a holistic interpretation of these treaties usually reveals that there is an implicit requirement that the investments need to be in the territory of the host state to enjoy the protections of the treaty. For example, although Article 1(1) of the Sweden–Egypt BIT (1978) does not expressly require that a protected investment needs to be made within the territory of the host state, Article 2(2) of the treaty provides that 'investments by nationals or companies of either Contracting State *on the territory of the other Contracting State* shall not be subjected to a treatment less favourable than that accorded to investments by nationals or companies of third States'.[38] Therefore, establishing that the investment in question was made in the territory of the respondent host state is generally crucial in determining whether an arbitral tribunal can assume jurisdiction in relation to the claim.

Sovereignty over the boundaries of the host state is usually relevant in determining whether the investment was, indeed, made in the territory of the respondent host state, particularly in instances where the boundaries of the host state are subject to disputes arising from succession, annexation or other territorial issues.[39] The specific ways that arbitral tribunals address these disputes vary.

37 See also Article 1 of the Argentina–US BIT (1991); Article 1 of the Argentina–Italy BIT (1990); Article 1 of the Australia–Uruguay BIT (2019).

38 (Emphasis added). See also Argentina–Mexico BIT (1996); Germany–Sri Lanka BIT (2000); Australia–Uruguay BIT (2019); *Inmaris Perestroika v. Ukraine*, ICSID, Decision on Jurisdiction, 8 March 2010, Paragraphs 114–116.

39 See, for example, investment disputes that arose out of the Russia–Ukraine BIT (1998), which are also relevant to the Russia–Ukraine territorial dispute in relation to the Crimea peninsula. Some of the cases include: (1) *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2015-07; (2) *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21; (3) *Limited*

For example, a tribunal may take the view that no territorial dispute arises in the circumstances and proceed on that basis, or that 'territory' should be interpreted by reference to the time when the applicable investment treaty was signed or came into force, or interpret 'territory' as the jurisdiction where the host state has control over, in line with the object and purpose of the relevant investment treaty, among others.[40] In any event, it is important for a tribunal to approach these issues with care, given that delving into a territorial dispute between state parties, in whole or in part, instead of an investment dispute between a covered investor and the relevant host state, will amount to a tribunal acting outside its subject-matter and personal jurisdiction.

It is easier to determine the 'territory' in which a tangible investment (for example, factories and oil fields) is made than it is to determine the territory for intangible assets.[41] In identifying the territorial requirement in relation to monetary investments, for instance, the tribunal in *Abaclat v. Argentina* observed that:

> *With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial*

Liability Company Lugzor, Limited Liability Company Libset, Limited Liability Company Ukrinterinvest, Public Joint Stock Company DniproAzot, Limited Liability Company Aberon Ltd v. The Russian Federation, PCA Case No. 2015–29; (4) *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, Stemv Group LLC v. The Russian Federation*, PCA Case No. 2015-35; (5) *PJSC Ukrnafta v. The Russian Federation*, PCA Case No. 2015-34; (6) *Everest Estate LLC et al v. The Russian Federation*, PCA Case No. 2015–36; (7) *NJSC Naftogaz of Ukraine (Ukraine) et al v. The Russian Federation*, PCA Case No. 2017–16; and (8) *Oschadbank v. The Russian Federation*, PCA Case No. 2016–14.

40 See, generally, P Tzeng, 'Investments on Disputed Territory: Indispensable Parties and Indispensable Issues', *Brazilian Journal of Investment Law*, 14(2), 2017, 122; R Happ and S Wuschka, 'Horror Vacui: Why Investment Treaties Should Apply to Illegally Annexed Territories', 33 *Journal of International Arbitration*, 2016, 245, 260; B S Vasani and T L Foden, 'Burden of Proof Regarding Jurisdiction', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010), 271; A Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 *Chicago JIL* 287, 289. See also Article 29 of the Vienna Convention on the Law of Treaties 1969 and Article 15 of the Vienna Convention on Succession of States in Respect of Treaties 1978 in the Context of Annexed Territories.

41 C R Zheng, 'The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism' (2016), *Singapore Law Review* 34: pp. 139–140. See also *EMV v. Czech Republic*, ad hoc arbitration, Partial Award on Liability, 8 July 2009, Paragraphs 37–38.

nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is were the invested funds ultimately made available to the Host State and did they support the latter's economic development? This is also the view taken by other arbitral tribunals.[42]

Tribunals have therefore held that indirect investments are generally protected and can satisfy the territoriality requirement. Also, there is no requirement for a movement or flow of capital or value into the host state's borders, so long as the ultimate beneficiary of the investment is the host state.[43]

Overall, satisfying the temporal jurisdiction of an arbitral tribunal depends on the nature and definition of the investment under the relevant instrument.

Temporal jurisdiction

The period within which the alleged breach of an obligation occurred and the time of instituting a claim are essential in determining whether an arbitral tribunal has the authority to adjudicate an investment dispute between an investor and a host state.[44] In determining the role of timing in the jurisdiction of arbitral tribunals, reference is typically made to the wording of the relevant instrument (i.e., the investment treaty, investment legislation or investment contract)[45] or customary international law.

For instance, most investment treaties expressly state that they cover investments made prior to the entry into force of the relevant treaty or after its entry into force.[46] In circumstances where investment treaties do not contain express

42 *Abaclat & Others v. Argentine Republic*, ICSID, Decision on Jurisdiction and Admissibility, 4 August 2011, Paragraph 374. See also *Fedax N.V. v. The Republic of Venezuela*, ICSID, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, Paragraph 41. See also decisions in relation to contractual investments: *Bayview Irrigation District et al. v. United Mexican States*, ICSID, Award, 19 June 2007, Paragraph 101; and cross-border investments: *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, Paragraph 144.

43 See *Gold Reserve v. Venezuela*, ICSID, Award, 22 September 2014, Paragraphs 261–262; *Nova Scotia Power v. Venezuela (II)*, ICSID, Award, 30 April 2014, Paragraph 130.

44 *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, Paragraph 326.

45 And if the instrument is silent in relation to the temporal scope, reference is usually made to the Vienna Convention on the Law of Treaties, the ILC Draft Articles and arbitration precedents.

46 *Cortec Mining v. Republic of Kenya*, ICSID, Award, 22 October 2018, Paragraphs 284, 286. Article 8 of the German Model BIT (2008). Article 11 of the China–Nigeria BIT (2001), for

provisions in this regard, there is no consensus on whether investments are covered by the investment treaty. While some hold the view that these investments are covered,[47] a few tribunals have held otherwise, insisting that investments made prior to the entry into force of the investment treaty are not covered by the provisions of the investment treaty.[48] Further, if the investment did not exist before the host state's alleged measure that amounted to a breach of the treaty, it is settled that a tribunal has no temporal jurisdiction to determine the dispute.[49]

It has also been held that an investment treaty will not, in the absence of clear wording to the contrary in the treaty, apply retroactively to measures or acts that occurred before the treaty came into force.[50] Nonetheless, facts that occurred before the entry into force of a treaty have, in certain instances, been taken into consideration in determining whether the treaty was subsequently breached (for example, for the purpose of understanding the background to the dispute, causal links and details of the alleged breach).[51]

There are, however, generally accepted exceptions to the principle of non-retroactivity. For instance, the principle of retroactivity may not apply to an action of a host state that constitutes a continuous or composite act. A continuous act has been defined as a single act that extends over the entire time during which the act continues to breach an international obligation.[52] A composite act is made

---

instance, provides that its substantive provisions will 'apply to investments which are made prior to or after its entry into force by investors or either Contracting Party'.

47 See Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), pp. 340–341.

48 See, for example, *Impregilo v. Pakistan (II)*, ICSID, Decision on Jurisdiction, 22 April 2005, Paragraphs 309–311; *B3 Croatian Courier v. Republic of Croatia*, ICSID, Award, 5 April 2019, Paragraphs 613–615.

49 *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA, Award, 24 March 2016, Paragraph 326.

50 See *Carrizosa v. Colombia*, ICSID, Award, 19 April 2021, Paragraphs 124–125, 153–156; *Jan de Nul v. Egypt*, ICSID, Award, 6 November 2008, Paragraphs 132–133; *The Renco Group Inc. v. Republic of Peru II*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections, 30 June 2020, Paragraph 140; *Salini Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID, Decision on Jurisdiction, 9 November 2004, Paragraph 177. See also Article 28 of the VCLT and Article 13 of the ILC Draft Articles.

51 *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID, Award, 29 May 2003, Paragraph 68; *Aaron C. Berkowitz et al (formerly Spence International Investments et al) v. Republic of Costa Rica*, ICSID, Interim Award (Corrected), 30 May 2017, Paragraphs 217–218.

52 Article 14(2) of the ILC Draft Articles. See also *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID, Decision on Jurisdiction, 29 January 2004, Paragraph 166; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, Paragraph 3.43.

up of a 'series of actions or omissions defined in aggregate as wrongful'.[53] Note, however, that a 'composite act' does not crystallise until the last portion of the series of acts or omissions that constitute the alleged breach under the investment treaty occurs.[54] Nevertheless, there does not seem to be an agreed position on the extent of the relevance of continuous and composite acts. For instance, while some tribunals take the view that continuous or composite acts before the treaty enters into force are relevant only as factual background,[55] others have opted for the opposite position and have appeared to give these acts more weight and relevance beyond merely setting out the factual background.[56]

Some investment treaties provide a time frame within which a claim must be instituted against the host state in the event of an alleged breach. The recent United States–Mexico–Canada Agreement, for example, provides that 'an investor may not claim if more than four 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'.[57] While some tribunals have enforced the limitation period strictly and held that it is '"clear and rigid" and it is not subject to any suspension, prolongation or other qualification',[58] others have hinted that the limitation period may be renewed (in relation to continuing breaches)[59] or suspended for deserving circumstances.[60] If an investment treaty is silent on the point, tribunals typically apply the principles of customary international law in deciding the issue, and lean towards allowing such claims unless the claimant was so dilatory and negligent that it would be inequitable to consider its claim.[61]

53 Article 15 of the ILC Draft Articles. See also *Talsud v. Mexico*, ICSID, Award, 16 June 2010, Paragraph 12.44; *El Paso Energy International Company v. The Argentine Republic*, ICSID, Award, 31 October 2011, Paragraph 518.

54 *Global Telecom Holding S.A.E. v. Canada*, ICSID, Award, 27 March 2020, Paragraphs 411, 412.

55 *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID, Award, 31 July 2007, Paragraph 93.

56 *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador [I]*, PCA Case No. 34877, Interim Award, 1 December 2008, Paragraphs 282–284.

57 See Article 14.D.5(c).

58 *Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, Paragraph 265. See also *Spence International Investments et al. v. Costa Rica*, ICSID, Interim Award (Corrected), 30 May 2017, Paragraph 208.

59 *UPS v. Canada*, ICSID, Award on the Merits, 24 May 2007, Paragraph 28.

60 *Feldman v. Mexico*, ICSID, Award, 16 December 2002, Paragraphs 57–58.

61 *Nagel v. Czech Republic*, SCC, Final Award, 9 September 2003, Paragraph 128.

A tribunal may also have jurisdiction over a claim arising after a treaty has been terminated. Usually, the termination of an investment treaty does not end its protections and obligations forthwith. Sunset clauses in investment treaties often offer continued protection for investment after the termination of a treaty, usually between 10 and 15 years, and can extend up to 20 years.[62] For example, the Nigeria–China BIT (2001) stipulates post-treaty protection of 10 years,[63] while the United Kingdom–China BIT (1986) provides for post-termination treaty protection of 15 years.[64]

Concluding thoughts

As seen in the foregoing discussions, the jurisdiction of the arbitral tribunal is a vital element in investment arbitration. All aspects of jurisdiction need to be considered, including subject-matter, personal, territorial and temporal jurisdiction. These varying facets of jurisdiction, including consent to arbitration, need to be analysed before taking steps to institute an arbitration claim, and that analysis should be carried out in a timely manner and with clarity against the backdrop of the relevant investment instrument upon which the prospective investment arbitration would be founded.

62 Article 13(3) of the Netherlands–Poland BIT (1992); Article 15 of the China–Germany BIT (2003).

63 Article 14.

64 Article 12.

APPENDIX 1

About the Authors

Stanley U Nweke-Eze

Templars

Stanley U Nweke-Eze is a senior associate at Templars and is admitted to practise law in Nigeria and the State of New York.

He is recognised as 'one of Africa's 50 Most Promising Young Arbitration Practitioners' by the Association of Young Arbitrators, and his practice primarily focuses on complex and high-value commercial and public law litigation, international and domestic commercial and investment treaty arbitrations, commercial mediation and public international law. He has experience with disputes across a broad range of industries, including construction, energy and natural resources, technology and telecommunications, professional services and general commercial law issues. He is also experienced in transaction advisory as well as investigations, white collar and compliance. Before joining Templars, he worked at international law firms in London.

Stanley holds a Master of Laws degree in international economic law from Harvard Law School and a second Master of Laws degree in commercial law from the University of Cambridge. He graduated with first class honours from Nnamdi Azikwe University and won several top prizes during his academic training, including for advocacy and brief writing.

Stanley has served as an editor of several journals, including the *Cambridge Journal of International and Comparative Law*, *Harvard International Law Journal*, *Harvard Negotiation Law Review* and *Harvard Africa Policy Journal*. He is a member of the Africa Users Council of the Singapore International Arbitration Centre, the Association of Young Arbitrators and the Young International Council for Commercial Arbitration, among others.

Templars
5th Floor, The Octagon
13A, A J Marinho Drive
Victoria Island
Lagos
Nigeria
Tel: +234 1 270 3982 / +234 806 133 6923
stanley.nweke-eze@templars-law.com
www.templars-law.com

The *GAR Guide to Investment Treaty Protection and Enforcement* is a new guide on the practical side of investor–state disputes. It tracks the concept of investment protection throughout its life cycle – from negotiation of the treaty to enforcement of an award and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute, focusing on what works. The content is further enriched with a series of contributions from arbitrators, on topics du jour.

ISBN 978-1-83862-856-7