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Temporal Issues Relating to BIT Dispute Resolution

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Abstract—An investor–State tribunal formed under a bilateral investment treaty (BIT) may be called upon to determine its jurisdiction *ratione temporis* based on various 'critical dates' such as: the date of entry into force of the BIT; the date when the investment was made; the date when the investor acquired the requisite nationality; the date of the alleged breach; the date when the investor first acquired knowledge of the alleged breach and of its loss; and/or the date when the dispute arose. When confronted with such temporal issues, tribunals over the past two decades have often reverted to the 'secondary' rules found in the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, and found in the law of treaties. This article identifies a series of propositions that may be extracted from recent investor–State jurisprudence concerning those secondary rules, with particular attention to application of the rule on non-retroactivity. Except in relatively limited situations, tribunals appear disinclined to find temporal jurisdiction over breaches or disputes that are based on pre-BIT acts. Consequently, this article considers as well recent jurisprudence on whether the host State's alleged breach has a continuing or composite character, thus overcoming any temporal bar. While it would be excessive to say that the secondary rules in this area have provided the perfect means for addressing temporal issues, they appear to have generated a comprehensible framework within which investor–State tribunals are successfully operating.

When confronted with temporal issues relating to dispute resolution under a bilateral investment treaty (BIT), investor–State tribunals over the past two decades have often reverted to the 'secondary' rules found in the International Law Commission's (ILC)'s 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[2] A tribunal may be called upon to test its jurisdiction for addressing

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[2] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', UN Doc A/56/83 (2001), annex (ARSIWA). The ILC's draft articles and commentary originally appeared in the ILC's annual report to the UN General Assembly (UN Doc A/56/10 (2001) ch IV), and then in the *Yearbook of the International Law Commission* (2001) vol II pt 2 ch IV. They were conveniently reproduced in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002). For a compendium in the UN Legislative Series of the articles, the commentary and associated case law, see *Materials on the Responsibility of States for Internationally Wrongful Acts*, UN Doc ST/LEG/SER.B/25 (2012). For analysis of the articles in relation to the temporal element of breach, see James Crawford, *State Responsibility: The General Part* (CUP 2013) 240–73.

breaches or disputes as against various possible 'critical dates', to include: the date of entry into force of the BIT; the date when the investment was made; the date when the investor acquired the requisite nationality;[3] the date of the alleged breach;[4] the date when the investor first acquired knowledge of the alleged breach and of its loss, since a failure to file a claim promptly might result in a time bar;[5] and/or the date when the dispute arose.[6] The purpose of this article is to indicate a framework for understanding the most common temporal issues[7] that have arisen before investor–State tribunals regarding BIT dispute resolution since the adoption of the ARSIWA. While the case law in this area at times can appear inconsistent, a close scrutiny of the jurisprudence that takes into account the diversity of BIT provisions, and the complexity of the facts to which they are being applied, may transform what seems inconsistent into a relatively comprehensible pattern.

Section I of this article identifies a series of propositions that may be extracted from recent investor–State jurisprudence with respect to breach and retroactivity, which often arise in the shadow of articles 12–14 ARSIWA. At the outset, it appears generally understood that obligations arising from the BIT itself only bind the host State with respect to *acts or facts* occurring after the BIT's entry into force, unless the BIT otherwise provides. Further, after the BIT's entry into force, the State party's obligations to any given investor only arise after the date of the investment by a qualified investor.

Less well understood is whether *disputes* that are based on pre-BIT acts may be placed before an investor–State tribunal convened under the BIT. In this regard, a BIT providing dispute resolution solely for violations of that BIT *ipso facto* does not establish jurisdiction over any dispute that is based on acts that occur before entry into force of the BIT. A BIT that is silent as to whether dispute resolution is solely for violations of that BIT might expressly address whether it embraces jurisdiction over disputes that are based on pre-BIT acts and, if so, what law is to be applied in assessing an alleged breach. But what if the BIT is also silent as to the coverage of such disputes? Treaties that provide for *general* dispute resolution between States, without any connection to specific substantive obligations, are often interpreted as embracing temporal jurisdiction over acts, facts or disputes arising prior to entry into force of the treaty, unless the treaty provides otherwise.

Yet investor–State tribunals generally appear disposed not to interpret BITs in that way. Rather, a BIT that is silent as to whether dispute resolution is solely for

[3] In situations where the critical date concerns the investor's acquisition of nationality, the parties may debate whether the claimant engaged in an 'abuse of process' whereby, after the events in question, it secured such nationality to take advantage of a BIT's protections. See Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 208 para 5.169.

[4] See eg *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/02, Award (18 May 2010) para 97 ('the Tribunal is of the view that different types of claims require different jurisdictional analyses *ratione temporis*: conventional BIT claims, denial of justice claims and extinguishment of arbitral clause claims').

[5] In situations where the critical date concerns the date on which a limitation period should begin running, the parties may debate when the investor had actual or constructive knowledge of the alleged breach and of its loss. Compare, for example, the majority and separate opinions in *Infinito Gold Ltd v Costa Rica*, in which one arbitrator found that such knowledge existed at the time of the revocation of the Claimant's mining concession through a lower court decision, while the majority saw it as only occurring much later when that decision was upheld on appeal and thus the act was 'completed' (*Infinito Gold Ltd v Costa Rica*, ICSID Case No ARB/14/5 (3 June 2021) paras 220–36 (majority opinion); ibid Separate Opinion on Jurisdiction and on the Merits of Brigitte Stern (26 May 2021) paras 13–47). On the time bar before international tribunals generally, see Nick Gallus, *The Temporal Jurisdiction of International Tribunals* (OUP 2017) 41–59.

[6] On the concept of the 'critical date' generally, see LFE Goldie, 'The Critical Date' (1963) 12 ILCQ 1251; Zhenni Li, 'International Intertemporal Law' (2018) 48 Cal W Intl LJ 341.

[7] Unfortunately, even in an article of this length, it is not possible to treat all such issues fully.

violations of that BIT, and is silent as to coverage of disputes that are based on pre-BIT acts, is often interpreted by tribunals as not embracing temporal jurisdiction over such disputes, for various reasons. That disposition might be overcome if the tribunal discerns an intent by the States parties to provide the tribunal with such jurisdiction, such as in a situation where similar predecessor–successor BITs are at issue. At the same time, certain factors—such as a BIT provision indicating that investments made prior to entry into force of the BIT are encompassed in the investments that are protected by the BIT—are often deemed irrelevant by tribunals when deciding on their temporal jurisdiction.

Given that temporal jurisdiction usually does not extend to disputes that are based on pre-BIT acts, investors have often sought to advance theories about the host State's breach as having a *continuing* or *composite* character, whereby the State's wrongful act (and the dispute arising from it) can be said to have occurred after entry into force of the BIT, even if it relates to a course of conduct straddling that date. In light of article 14(2) ARSIWA, Section II of this article considers recent investor–State jurisprudence regarding breaches having a continuing character, noting that tribunals often focus on two characteristics that can defeat the existence of such a breach.

Section III of this article then turns to recent investor–State jurisprudence regarding breaches having a composite character, with an eye to article 15 ARSIWA. Here there appear to be two types of situations in investor–State arbitration where a composite breach may well be found: when an investor pursues local remedies that straddle the date of entry into force of the BIT, and in doing so experiences a series of delays or impediments that ultimately culminate in a composite breach constituting a denial of justice; and when a series of acts by the host State, which straddle the date of entry into force, over time crystalizes in an expropriatory taking of property, often referred to as a creeping expropriation.

Secondary rules, such as may be found in the ARSIWA or in the law of treaties, are merely the canvas upon which States write their BIT; for any given treaty, States parties remain free to negotiate a different result. If the intention is to avoid one or more of these background rules, and the propositions that seem to flow from them, then it is desirable for States to identify their preferred alternative through express provisions in the BIT. Indeed, while numerous cases are cited below, care must be taken when extrapolating a rule or proposition from any particular tribunal decision, given that the tribunal had before it a specific BIT containing specific terms, and a specific factual context, that were central to the tribunal's decision.

I. BREACH, DISPUTES AND RETROACTIVITY

Article 12 ARSIWA provides that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'.[8] Article 13 then provides that '[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'.[9]

[8] ARSIWA (n 2) art 12. For the ILC's commentary, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 125–30.

[9] ARSIWA (n 2) art 13. For the ILC's commentary, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 131–4.

That proposition essentially reflects the principle of intertemporal law, by which a juridical fact must be appreciated in the light of the law contemporary with it and not the law in force at the time the dispute arises or the claim is filed. Further, article 14(1) ARSIWA states that the 'breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue'.[10] Article 14(1) is referring to an 'instantaneous', 'completed' or 'one-time' wrongful act, rather than a breach that has a continuing or composite character.

For investor–State arbitration, the consequence of these articles is that the international obligation that the State is alleged to have breached (typically embedded in a BIT, but potentially in some other source) must have bound the State at the time of the allegedly wrongful act in question. Unfortunately, identifying precisely when an internationally wrongful act takes place is sometimes a difficult factual question, with claimants advancing arguments that the breach occurred after the BIT's entry into force and after the establishment of the investment, while the respondent argues the converse, seeking a time that falls prior to the tribunal's temporal jurisdiction.

Assuming that a treaty is the instrument that was breached, rules of treaty law also come into play. Paragraph 3(c) of article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that, when interpreting a provision of a treaty, there shall be taken into account, together with the context of the provision, '[a]ny relevant rules of international law applicable in the relations between the parties'.[11] Article 28 VCLT sets forth one such rule: 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.[12] Various consequences flow from such rules of international law, and the failure to heed such consequences can result in the annulment of the arbitral award.[13]

A. *Obligations Arising from a BIT Only Bind the State After the BIT's Entry into Force, Unless the BIT Provides Otherwise*

A threshold consequence of these secondary rules is that the substantive rules of a treaty only bind the State once the treaty has entered into force.[14] Investor–State

[10] ARSIWA (n 2) art 14(1). For the ILC's commentary, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 135–6.

[11] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(c).

[12] ibid art 28.

[13] There are various examples of annulments where the tribunal was found to have lacked jurisdiction *ratione temporis* due to some aspect of non-retroactivity, either as embedded in the express terms of the relevant BIT or as a secondary rule. For example, the Paris Court of Appeal recently set aside the Award in *Oschadbank v Russia*, because the BIT did not apply to investments made prior to 1992 and the Oschadbank had acquired its assets before that date (*Fédération de Russie v Joint Stock Company 'State Savings Bank of Ukraine' (JSC Oschadbank)*, n RG 19/04161, Cour d'appel de Paris, Pôle 5-Chambre 16 (Chambre Commerciale Internationale) Arrêt (30 March 2021) (setting aside an unpublished award in *Oschadbank v Russian Federation*, PCA Case No 2016-14)).

[14] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment [2012] ICJ Rep 422 para 100 (citing VCLT (n 11) art 28 and finding that 'the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned'); ILC YB 1966 II 211 (commentary to what became VCLT art 28, saying: 'The general rule ... is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms').

tribunals[15] and publicists[16] habitually note this consequence, often referring to it as a 'rule' or 'principle' of non-retroactivity.[17] The Tribunal in *Astrida Benita Carrizosa* recently stated: 'It is indeed uncontroversial that, pursuant to the customary international law rule about non-retroactivity, a treaty does not bind the Contracting States in respect of their pre-treaty actions or omissions, unless it provides otherwise'.[18] Further, according to the *Tecmed* Tribunal, the 'burden of proving the existence of any exception to the principle of non-retroactive application established [in the BIT] naturally lies with the party making the claim'.[19]

In practice, this rule of non-retroactivity means that a treaty, such as a BIT, may not bind a State party in relation to any relevant act that took place or any situation that ceased to exist before the date of the treaty's entry into force (unless the BIT otherwise provides). Some treaties expressly confirm this rule.[20] In this context, the date of entry into force may be viewed as the 'critical date'. Thus, when applying the Peru–United States Free Trade Agreement in *Renco v Peru (II)*, the Tribunal cited articles 13 and 14(1) ARSIWA, and article 28 VCLT, and then concluded: 'Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force'.[21] For the *Generation Ukraine* Tribunal, the rule of non-retroactivity required identifying when the 'cause of action' arose, since 'a cause of

[15] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award (1 December 2008) para 282 (referring to ARSIWA (n 2) arts 13 and 14(1)); *Lao Holdings NV v Lao People's Democratic Republic*, ICSID Case No ARB(AF)/12/6, Decision on Jurisdiction (21 February 2014) para 114 (referring to the 'general principle of non-retroactivity'); *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award (8 May 2008) para 584 (citing ARSIWA and VCLT). The rule is sometimes conjoined with the principle of intertemporal law. See eg *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, AS v The Dominican Republic*, UNCITRAL, LCIA Case No UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) paras 78–9, 85 (referring to 'rules on non-retroactivity and the principle of intertemporal law'); *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 (30 April 2015) paras 168–9 (citing VCLT art 28, ARSIWA art 13, and Judge Huber's judgment in the *Island of Palmas* case).

[16] See eg Noah Rubins and Ben Love, '*Ratione Temporis*' in Marc Bungenberg and others (eds), *International Investment Law* (Beck-Hart-Nomos 2015) 482–3; Zachary Douglas, 'When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action,' *Jurisdiction in Investment Treaty Arbitration—IAI Series No 8* (2018) 321, 357 ('Both the breach of the treaty standard and the damage to the investment must have occurred after the investment treaty comes into force for the tribunal to have *ratione temporis* jurisdiction over the claim'); Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 328 (r 39).

[17] The rule of non-retroactivity might also apply to sources of law other than a treaty, such as the non-retroactivity of an investment law, of a contract or some other source of law. This article primarily addresses the rule when applying a BIT.

[18] *Astrida Benita Carrizosa v Republic of Colombia*, ICSID Case No ARB/18/5, Award (19 April 2021) para 124 (citing VCLT art 28) and para 126 (citing ARSIWA art 13).

[19] *Tecnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 63.

[20] See eg Dominican Republic–Central America Free Trade Agreement (opened for signature 5 August 2004, entered into force 1 March 2006) (CAFTA) art 10.1.3 ('For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement'); see also *Aaron C Berkowitz, Brett E Berkowitz and Trevor B Berkowitz (formerly Spence International Investments and others) v Republic of Costa Rica*, ICSID Case No UNCT/13/2, Interim Award (25 October 2016) paras 214–23 (interpreting and applying CAFTA art 10.1.3).

[21] *The Renco Group, Inc v Republic of Peru*, UNCITRAL, PCA Case No 2019-46, Decision on Expedited Preliminary Objections (30 June 2020) paras 140–2; see *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) para 132 ('[I]n accordance with the well-established principle of non-retroactivity of treaties and absent any indication to the contrary in the text of the Treaty itself, the protections accorded by the Treaty can only apply to acts committed after its entry into force'); *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 166 [applying VCLT (n 11) art 28 to a BIT]; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (9 November 2004) para 177 (same); *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010) para 116 ('[T]he Tribunal has jurisdiction in respect of any act or fact that took place or any situation that continued to exist after the Treaty entered into force'); *Toto Costruzioni Generali SpA v Republic of Lebanon*, ICSID Case No ARB/07/12, Award (7 June 2012) para 58 ('As a general rule, treaties do not apply retroactively').

action based on one of the BIT standards of protection must have arisen after' the BIT's entry into force.[22] Further, if there is provisional application of the treaty prior to its entry into force, the same rule of non-retroactivity applies *mutatis mutandis*: a State party is not bound in relation to any relevant act that took place or any situation that ceased to exist before the date on which there is provisional application of the treaty, but is so bound after that date.[23]

As indicated above, it is possible for the States parties to a BIT to set aside the rule of non-retroactivity, if they wish to do so. Yet it generally appears that States have elected not to do so. Indeed, the rule appears rather 'sticky', in the sense that arguments advanced by claimants that States have, in some fashion, set it aside in their BIT virtually always fail. Writing in this *Review* in 2016, Nick Gallus maintained that 'Claimants before investment treaty tribunals have often argued that the rule against retroactivity was overridden by the treaty but these arguments have been universally rejected, at least in the publicly available awards'.[24]

Yet while tribunals habitually follow the rule, there are some outliers. In *Maffezini*[25] and *Middle East Cement Shipping*,[26] the Tribunals appear to have applied the protections of the BIT retroactively without the parties or the Tribunal raising whether doing so was permissible.[27] In *Hrvatska*, a majority of the Tribunal viewed a bilateral agreement between Croatia and Slovenia relating to complex financial arrangements for energy production at a nuclear power plant (hence, not a BIT as such) as implicitly establishing rights for investors that took effect in 2002, which predated the agreement's entry into force in 2003.[28]

For a constellation of events relating to an investment, it is possible that some predate entry into force of a treaty, while others do not. For example, a governmental measure might deny national treatment to an investment before entry into force of the BIT, while the investor's efforts to litigate that measure in local courts might lead to a denial of justice after the treaty's entry into force. In such an instance, the tribunal lacks jurisdiction *ratione temporis* over a national treatment claim, but has jurisdiction over a denial of justice claim. For complex factual scenarios, determining with precision the legal situation as it stands as of the date of the BIT's entry into force requires careful scrutiny by the tribunal, and often may not be possible at an early

[22] *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 11.2.

[23] See eg *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 205–23, 247 [in the context of provisional application of the Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) (ECT)]; see also Rubins and Love (n 16) 486–7.

[24] Nick Gallus, 'Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions' (2016) 31 ICSID Rev–FILJ 290, 295; see also Gallus, *The Temporal Jurisdiction* (n 5) 11 ('The rule against retroactivity has been endorsed by . . . investment treaty tribunals').

[25] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) paras 90–8 (rejecting Respondent's objection that the *dispute* arose prior to entry into force); *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000) paras 75–83 (finding liability under the BIT for acts occurring in early 1992, prior to the BITs entry into force on 28 September 1992).

[26] *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award (12 April 2002) paras 82, 106–7 (finding an expropriation in a decree issued in 1989, even though the BIT entered into force in 1995).

[27] See Gallus, 'Article 28' (n 24) 296–7.

[28] *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No ARB/05/24, Decision on the Treaty Interpretation Issue (12 June 2009) paras 174–6. Paulsson declined to join in that view, stating in his individual opinion that: 'The Treaty nowhere defines a starting date for the supply of power. The operative date is therefore the date of the Treaty's entry into force'. *Hrvatska Elektroprivreda dd v Republic of Slovenia*, ICSID Case No ARB/05/24, Individual Opinion of Jan Paulsson (8 June 2009) para 14. For Paulsson, the rule of non-retroactivity could only have been overridden by an express provision that the treaty had retroactive effect to 2002 or that provisionally applied the treaty as from that time (ibid para 62).

stage in the proceedings. Looking at a variety of governmental acts, the *Tecmed* Tribunal decided that it would 'not consider any possible violations of the Agreement prior to its entry into force on December 18, 1996, as a result of isolated acts or omissions that took place previously or of conduct by the Respondent considered in whole as an isolated unit and that went by before such date'.[29]

While a breach of the BIT cannot occur before the BIT's entry into force, events or conduct prior to that date may be considered for the purpose of establishing breaches that occurred thereafter. As the Tribunal in *Mondev v United States* noted, 'events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach'.[30]

The rule of non-retroactivity should be used with care; indeed, tribunals have lamented that 'there does not seem to be a common terminology as to what is "retroactive" application'.[31] Certainly, not applying the substantive standards of a treaty to governmental measures that predate the treaty's entry into force is a non-retroactive application of the treaty. Yet a treaty that only regulates measures taken after its entry into force, but that is indifferent as to when the investment at issue was made, is *not* applying the treaty retroactively when the BIT is used to protect such investments from measures taken after entry into force; the treaty is still being applied prospectively to acts postdating entry into force, albeit with respect to investments that were made prior to that date. Likewise, a provision that provides jurisdiction over disputes 'arising after' entry into force of the treaty does not directly address whether the treaty may be applied retroactively; certainly, the *dispute* must have arisen after the treaty's entry into force, but left unstated in that provision is whether a tribunal may exercise jurisdiction over a breach of that treaty or a breach of some other source of law that predated entry into force, as will be discussed further below.

B. *After the BIT's Entry into Force, the State Party's Obligations to Any Given Investor Only Arise After the Date of the Investment by a Qualified Investor*

Even if a BIT is in force as of the date of the alleged breach, the State party's obligations to any given investor only arise after the date of the 'investment' by a qualified 'investor' within the meaning of the BIT. Thus, in *ST-AD v Bulgaria*, the Tribunal maintained that it was applying the rule of non-retroactivity when finding that it 'is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country'.[32]

[29] *Tecmed* (n 19) para 67.

[30] *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 70; see generally Gallus, *The Temporal Jurisdiction* (n 5) 113–29.

[31] *Tradex Hellas SA v Republic of Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996) (1999) 14 ICSID Rev-FILJ 161, 186; see *Tecmed* (n 19) para 55.

[32] *ST-AD GmbH v Republic of Bulgaria*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) para 300; see *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v La République Démocratique du Congo*, ICSID Case No ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité (29 July 2008) paras 108–23 (finding that the underlying dispute predated the existence of the Claimant's acquisition and control of the Congolese investments, and hence the Tribunal had no jurisdiction *ratione temporis*); *Société Générale v Dominican Republic* (n 15) para 107; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 67 (finding that the tribunal cannot assert jurisdiction over claims arising before the claimant's investment).

When assessing such jurisdiction, the Tribunal in *Levy and Gremcitel v Peru* saw it as essential to compare the date of the investment with the 'critical date' on which the State adopted the disputed measure that breached the BIT.[33] If the investment by the investor occurred after that date, then the tribunal had no jurisdiction *ratione termporis*. The *Philip Morris v Australia* Tribunal agreed with this proposition, while at the same time clarifying that the date when the disputed measure breached the BIT is not necessarily the same date that the *dispute* arose; in some instances, the dispute might arise at a later point in time.[34]

There are certain collateral aspects to this rule. Thus, if a BIT only applies to investments that are made as of a certain date, the tribunal may not apply the BIT to investments made prior to that date regardless of when the disputed measure occurs. If an investor makes an investment prior to the date on which the State adopted the disputed measure, but that investment no longer exists as of that date, then likewise the tribunal has no jurisdiction *ratione temporis*.[35] Further, the claimant must qualify as an 'investor' under the BIT prior to the date of the alleged breach. For example, in *Pac Rim v El Salvador* the Tribunal found that, under the Central America–Dominican Republic–United States Free Trade Agreement, it was not necessary for the nationality requirement to be met prior to the making of the investment, but was necessary prior to the alleged breach.[36]

To avoid the implications of such a rule, claimants at times seek to present the alleged breach as having occurred at a later date than one would normally expect, at a time when the existence of an 'investment' and an 'investor' under the BIT are on more solid footing. In doing so, claimants may point to new acts of the State that allegedly constitute the breach, even though those acts are little different than those occurring at an earlier time. The *ST-AD v Bulgaria* Tribunal referred to such an approach as 'mirroring' events that occurred at an earlier time, which the Tribunal found to be unacceptable.[37] As an example, the Tribunal stated that 'if a claimant, before coming under the protection of a given BIT, had asked for and been refused a license, it could not simply purport to create an event posterior to it becoming a protected investor by presenting the very same request for a license that would, no doubt, be similarly refused'.[38]

C. *A BIT Providing Dispute Resolution Solely for Violations of that BIT Does Not Establish Temporal Jurisdiction over Disputes that are Based on Pre-BIT Acts*

Less well understood is whether *disputes* that are based on pre-BIT acts may be placed before an investor–State tribunal convened under the BIT. If a BIT expressly

[33] *Renée Rose Levy and Gremcitel SA v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) para 149 ('In the Tribunal's view, the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier').

[34] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) paras 530–3; see *Indian Metals & Ferro Alloys Limited (India) v The Government of the Republic of Indonesia*, UNCITRAL, PCA Case No 2015-40, Award (29 March 2019) paras 104–8 (citing *Levy and Gremcitel*, and *Philip Morris*, with approval).

[35] *Peter Franz Vocklinghaus v Czech Republic*, UNCITRAL, Final Award (19 September 2011) para 165 (finding that it had no jurisdiction where the investor retained no legal or beneficial ownership in the investment at the time of the alleged breach).

[36] *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) paras 3.32–3.34.

[37] *ST-AD* (n 32) para 332.

[38] ibid.

provides for dispute resolution only with respect to the substantive rules set forth in the treaty, then the non-retroactivity principle automatically limits the disputes over which the tribunal has jurisdiction.[39] Some BITs contain an express provision of this type, such as the United States–Ukraine BIT that featured in *Generation Ukraine*. As the Tribunal noted, article VI(1) of the BIT provided jurisdiction, *inter alia*, for 'an alleged breach of any right conferred or created by this Treaty, with respect to an investment'.[40] Since the Tribunal found that the claims advanced could only fall under that provision,[41] it meant that tribunal could not have temporal jurisdiction over disputes that concerned acts or facts occurring before the BIT entered into force.[42] The Tribunal accepted that 'several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law. The Tribunal does not, however, have general jurisdiction over causes of action based on the obligations of states in customary international law'.[43]

Likewise, some multilateral trade agreements containing investment provisions only provide dispute resolution with respect to the substantive rules set forth in the agreement. For example, the Energy Charter Treaty, in article 26(1), provides for investor–State arbitration over '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, *which concern an alleged breach of an obligation of the former under Part III*'.[44] Similarly, the North American Free Trade Agreement (NAFTA) provided investor–State tribunals with jurisdiction only to hear claims that certain provisions of the NAFTA had been breached.[45]

During the lead-up to adoption of article 28 VCLT, the ILC's rapporteur for the topic, Sir Humphrey Waldock, noted that 'when a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause'. He continued: 'The reason is that the "disputes" with which the clause is concerned are *ex hypothesi* limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which . . . do not normally extend to matters occurring before the treaty came into force'.[46] No doubt expressing caution, given that any particular treaty must be interpreted in accordance with its

[39] *Philip Morris* (n 34) para 528 (finding that the theoretical distinction between jurisdiction *ratione temporis* and the temporal application of the substantive standards 'is unnecessary when the cause of action is founded upon a treaty breach'); *Indian Metals* (n 34) para 106 (same). It is noted that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) does not indicate at what time a dispute must have arisen and consequently the issue turns on the terms of consent to ICSID's jurisdiction. See Christoph H Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 95.

[40] *Generation Ukraine* (n 22) para 8.10.

[41] ibid para 8.14.

[42] ibid para 11.2.

[43] ibid para 11.3. To similar effect, see *Mondev* (n 30) para 74 ('Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law').

[44] Energy Charter Treaty (n 23) art 26(1) (emphasis added).

[45] North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994, terminated 1 July 2020) (NAFTA) arts 1116–17; see Gallus, *The Temporal Jurisdiction* (n 5) 32.

[46] Third Report of the Special Rapporteur, Sir Humphrey Waldock, on the Law of Treaties, UN Doc A/CN.4/167 and Add.1-3 (1964) 11 para (4).

particular text and context, the ILC (in its commentary to what became article 28 VCLT) maintained that 'when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle *may* operate to limit *ratione temporis* the application of the jurisdictional clause'.[47] In short, absent treaty language calling for a contrary result, the 'disputes' at issue in such a situation must necessarily concern alleged breaches that postdate the entry into force of the treaty, since it is only then that there can be a dispute concerning an alleged breach of standards that the tribunal is empowered to apply.

A much-cited case in this regard is the *Ambatielos Case*.[48] In 1886, Greece and the United Kingdom (UK) had entered into a treaty of commerce and navigation, which provided for the referral of disputes to arbitration (not to an international court). In 1926, the same countries entered into a new treaty of commerce and navigation, which provided for referral of disputes to the Permanent Court of International Justice (PCIJ). The 1926 treaty's compromissory clause (article 29) provided: 'The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration. The court of arbitration to which disputes shall be referred shall be the' PCIJ, unless otherwise agreed.[49] In 1951, Greece brought a case to the International Court of Justice (ICJ), as the successor to the PCIJ, concerning the rights of a Greek shipowner for losses incurred under a contract that he had concluded with the UK in 1919. Greece argued to the Court that the 1886 treaty provisions were similar to those of the 1926 treaty (a 'similar clauses theory') and that the Court therefore had jurisdiction under the 1926 treaty to adjudicate breaches that occurred during the time of, and that were based upon, the 1886 treaty.[50] Yet the ICJ rejected that theory, as it 'would mean giving retroactive effect to Article 29 of the Treaty of 1926'.[51] The ICJ explained that this conclusion 'might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case'.[52]

Given that a tribunal's jurisdiction may be limited to post-BIT disputes, tribunals have grappled with how best to assess the point in time at which a 'dispute' arose. Commonly, tribunals will first consider what is meant by a 'dispute', often referring to it as a 'disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties'.[53] From there, approaches differ. Some tribunals have focused on when the facts giving rise to the dispute (or claim) occurred.[54]

[47] ILC YB 1966, vol II, 212, para (2) (emphasis added).
[48] *Ambatielos Case (Greece v United Kingdom)*, Judgment on Preliminary Objection [1952] ICJ Rep 28.
[49] ibid 36.
[50] ibid 39–40.
[51] ibid 40.
[52] ibid.
[53] *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) para 63 (citing *inter alia The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment on Objection to Jurisdiction [1924] PCIJ Rep Series A No 2, 11); see also *Empresas Lucchetti, SA and Lucchetti Peru, SA v The Republic of Peru*, ICSID Case No ARB/03/4, Award (7 February 2005) para 48; *Maffezini*, Objections to Jurisdiction (n 25) paras 93–4. For more recent confirmations by the ICJ see eg *East Timor (Portugal v Australia)*, Judgment [1995] ICJ Rep 90, 99, para 22; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)*, Judgment on Jurisdiction and Admissibility [2006] ICJ Rep 6, 40, para 90.
[54] In *Lucchetti*, the Tribunal analyzed whether the pre-BIT acts continued to be central to whether the post-BIT acts breached the BIT; if the acts have the same 'source' or 'origin' then the dispute arose pre-BIT. The Tribunal also considered whether there were other reasons to distinguish a purportedly post-BIT dispute from a pre-BIT dispute [*Lucchetti* (n 53) paras 50–4]; see also *ATA Construction* (n 4) para 102 (finding *Lucchetti* persuasive); *Sociedad Anónima Eduardo Vieira v República de Chile*, ICSID Case No ARB/04/7, Award (21 August 2007) paras 215–21 (similar analysis).

Others have focused on when opposition between the two parties has emerged.[55] In any event, claimants may maintain that the dispute arose after the BIT's entry into force, while the respondent may maintain that it did not, and that any purported 'dispute' advanced by the claimant is nothing more than a reformulation of an earlier dispute.[56] Further, the respondent may seek to argue that a series of acts that straddle entry into force of the BIT are best conceived of as separate breaches, giving rise to separate disputes, leaving only post-BIT breaches or disputes within the tribunal's jurisdiction. Yet the Tribunal in *CMS Gas* concluded that '[a]s long as [the measures] affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct'.[57]

D. *A BIT that is Silent as to Whether Dispute Resolution is Solely for Violations of that BIT Might Expressly Address Whether It Embraces Temporal Jurisdiction over Disputes Arising, or Concerning Acts Occurring, Before Entry into Force*

In situations where a BIT providing for dispute resolution is silent as to whether the tribunal has jurisdiction solely for violations of the BIT, ideally the States parties would expressly address whether temporal jurisdiction exists with respect to disputes arising before, or based on acts occurring before, the BIT's entry into force (which will be referred to herein as 'disputes based on pre-BIT acts').

The States parties to the BIT could expressly exclude jurisdiction over any dispute that arose prior to entry into force of the treaty (sometimes referred to as a 'single exclusion clause'). For example, the Chile–Peru BIT provided that it 'shall not, however, apply to differences or disputes that arose prior to its entry into force'.[58] The United States–Peru Trade Promotion Agreement has a similar clause, which, interestingly, commences with the words 'for greater certainty', thereby signaling a belief that the clause reinforces a rule that otherwise already exists, even in the

[55] The *Maffezini* Tribunal did not focus on the subject-matter of the dispute, but rather on when the difference between the parties acquired 'a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party' [*Maffezini*, Objections to Jurisdiction (n 25) para 96 (discussing a 'natural sequence of events that leads to a dispute')]; see also *Railroad Development Corporation* (n 21) paras 127–9. For commentary, see McLachlan (n 3) 233–4 paras 6.63–70.

[56] See eg *ST-AD* (n 32) para 317 ('The Tribunal considers that a tactic based on the resubmission of an application that has been denied before a claimant becomes an investor after it has acquired such status is unacceptable'); *African Holding* (n 32) para 116 ('S'il n'y a qu'une simple continuation, il faudra décliner la compétence. Si les événements sont différents, la compétence est maintenue').

[57] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) para 109; see *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (3 July 2002) para 112 ('Although the Tribunal expressed conclusions on certain aspects of the claim, it never expressed a conclusion as to the claim as a whole'); Stanimir Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*' (2005) 4 Law and Practice of Intl Courts and Tribunals 19, 54–7. For example, in the context of an inter-State use of force, the ICJ declined to view each North Atlantic Treaty Organization (NATO) air attack against Yugoslavia as separate wrongful acts giving rise to separate disputes (ibid 55–6).

[58] Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile for the Promotion and Reciprocal Protection of Investments (signed 2 February 2000, entered into force 11 August 2001, terminated 1 March 2009) art 2 ('Sin embargo, no se aplicará a divergencias o controversias que hubieran surgido con anterioridad a su entrada en vigencia'). This provision featured in *Lucchetti* (n 53), while similar provisions of the Chile–Spain BIT featured in *Sociedad Anónima Eduardo Vieira* (n 54), and of the Netherlands–Tunisia BIT featured in *ABCI Investments NV v Republic of Tunisia*, ICSID Case No ARB/04/12, Decision on Jurisdiction (18 February 2011).

absence of an express provision.[59] Conversely, the States parties could expressly include jurisdiction only for 'any dispute arising after' entry into force of the BIT. Since a single exclusion clause focusing on the timing of the 'dispute' does not directly address the timing of the act relating to the dispute, States parties sometimes exclude jurisdiction over 'claims and disputes arising out of events' that occurred pre-BIT, thereby precluding jurisdiction over both pre-BIT disputes and post-BIT disputes based on pre-BIT acts (a 'double exclusion clause'), but such provisions do not appear to be common.[60] In any event, the absence of such clauses in a BIT is not generally regarded as demonstrating an intent favoring retroactivity.[61]

Alternatively, if the intent is to *include* disputes concerning pre-BIT acts, then the States parties could expressly include jurisdiction over such disputes, mostly likely by defining what types of such disputes are included. For example, Canada and Slovakia concluded a BIT in 1990 and then a new BIT in 2010, with the latter entering into force on 14 March 2012. The 2010 BIT provided, in article XV(6), that the 1990 BIT was terminated, but continued operating for existing disputes that had already been submitted to arbitration under the earlier BIT. Apart from those disputes, the 2010 BIT 'shall apply to any dispute which has arisen not more than three years prior to its entry into force'.[62] Consequently, as the Tribunal found in *Eurogas*, the 2010 Canada–Slovakia BIT expressly applies to disputes (not already in arbitration) that arose on or after 14 March 2009.[63] Although the *Eurogas* Tribunal found that the dispute before it preceded that date,[64] had it found otherwise the Tribunal would have needed to address the applicable law. Given the 2010 BIT's language that it 'shall apply' to certain disputes concerning pre-2010 BIT acts, it appears that the States parties intended the substantive protections of the 2010 BIT to operate retroactively for such disputes.

E. *A BIT that is Silent as to Whether Dispute Resolution is Solely for Violations of that BIT and as to Whether It Embraces Disputes that are Based on Pre-BIT Acts is Usually Interpreted as Not Providing Temporal Jurisdiction over Such Disputes*

Unfortunately, often the BIT is silent as to whether dispute resolution is solely for violations of the BIT, and silent as to whether the temporal jurisdiction of the tribunal embraces disputes that are based on pre-BIT acts. For example, the BIT may simply accord jurisdiction to the tribunal for 'any dispute arising' or 'when a legal

[59] Trade Promotion Agreement, Peru–United States (signed 12 April 2006, entered into force 1 February 2009) art 10.1.3 ('For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement'). According to the US Government, the opening phrase 'signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent' [*Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Case No ARB/18/21, Submission of the United States (19 February 2021) para 5].

[60] See *Mabco Constructions SA v Republic of Kosovo*, ICSID Case No ARB/17/25, Decision on Jurisdiction (30 October 2020) paras 231, 460.

[61] See eg *MCI Power* (n 53) para 61 ('The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of non-retroactivity of treaties'); *Lao Holdings* (n 15) paras 115–6 ('It cannot be said that the silence of Article 9 with respect to a temporal limit "clearly" manifests a "different intention" apparent on the face of the treaty . . . The general presumption favours non-retroactivity and in this Treaty the presumption is not displaced by any different intention "apparent" on its face').

[62] Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments (signed 20 July 2010, entered into force 14 March 2012) art XV(6).

[63] *EuroGas Inc and Belmont Resources Inc v Slovak Republic*, ICSID Case No ARB/14/14, Award (18 August 2017) para 427.

[64] ibid paras 456–8.

dispute arises' between the investor and the respondent State, without expressly indicating any temporal limitation. In such a situation, claimants sometimes have argued that they can present to the tribunal a dispute that is based on pre-BIT acts so long as it concerns breach of a non-BIT source of law (such as a prior treaty, a contract, customary international law, or a national law on investment). In this way, the claimant can avoid retroactive application of the 'substantive' obligations of the BIT, but can take advantage of the 'procedural' provisions of the BIT's dispute resolution process.[65]

In considering such an argument, tribunals sometimes assert that it is important to distinguish between substantive and procedural provisions, because the rule of non-retroactivity operates differently as between them.[66] The point in drawing that distinction seems to be that, while the rule precludes any application of the substantive obligations of the BIT to pre-BIT acts, the rule does not necessarily preclude an investor–State tribunal from addressing disputes that are based on pre-BIT acts and that are presented to the tribunal *today*, so long as the legality of the pre-BIT acts is tested against a source of law other than the BIT itself.

To address this issue, investor–State tribunals might look to the approach that has been taken for treaties on general dispute resolution, where it is generally accepted that the intention of the States parties is that the treaty allows for temporal jurisdiction over disputes that are based on pre-treaty acts. Such general dispute resolution treaties—including the 1928 General Act for the Pacific Settlement of International Disputes, as revised (Revised Geneva Act),[67] the American Treaty on Pacific Development (Pact of Bogotá),[68] or the European Convention for the Peaceful Settlement of Disputes[69]—typically are written to allow for resolution of 'all disputes' between the States parties, to be adjudged based on any applicable source of

[65] See Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill J Dispute Resolution 1, 21 ('[W]here a tribunal's jurisdiction extends to facts that had occurred before the entry into force of the treaty bestowing jurisdiction, the applicable law is not to be found in that treaty. Rather, the law in force at the time of the relevant facts has to be applied. In other words, jurisdiction may exist in respect of a dispute that arises from facts which are not subject to the treaty's substantive standards').

[66] See eg *Salini* (n 21) para 176 ('one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT'); *SGS v Philippines* (n 21) para 167 (after explaining the non-retroactivity principle, maintaining 'that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations'); *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 157 ('The temporal application of the substantive provisions of the BIT is indeed different from the matter of jurisdiction *ratione temporis*'); *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 April 2005) para 309 ('care must be taken to distinguish between … the jurisdiction *ratione temporis* of an ICSID tribunal and … the applicability *ratione temporis* of the substantive obligations contained in a BIT'); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) para 428 (citing *Impregilo* with approval on this point); *WA Investments Europa Nova Ltd v Czech Republic*, UNCITRAL, PCA Case No 2014-19, Award (15 May 2019) para 360 (same); *Pey Casado* (n 15) para 427 ('En effet, pour que l'Etat chilien puisse voir sa responsabilité engagée en application des dispositions de [the BIT], il faut d'une part que le Tribunal soit compétent *ratione temporis* et, d'autre part, que les dispositions de fond de [the BIT] soient applicables *ratione temporis* aux violations alléguées'); *MCI Power Group LC and the New Turbine, Inc v Republic of Ecuador*, Decision on Annulment (19 October 2009) para 45 ('It is important to note that the relevant point in time in [VCLT] Article 28 is not when a dispute arose but the time when an act or fact took place or a situation ceased to exist').

[67] General Act for the Pacific Settlement of International Disputes (opened for signature 26 September 1928, entered into force 16 August 1929; amended by Revised General Act 28 April 1949, entered into force 20 September 1950) 71 UNTS 101 (Revised Geneva Act).

[68] American Treaty on Pacific Settlement (opened for signature 30 April 1948, entered into force 6 May 1949), OAS TS Nos 17 & 61 (Pact of Bogotá).

[69] European Convention for the Peaceful Settlement of Disputes (opened for signature 29 April 1957, entered into force 30 April 1958), 320 UNTS 243.

international law.[70] In that circumstance, where there is no express or implicit connection of such disputes to the substantive standards of a treaty, nor the establishment of a specialized form of dispute resolution, the intent of the States parties would appear to be to provide capaciously for the peaceful settlement of disputes, such that the disputes covered are not limited to those arising only after entry into force of the treaty, nor to disputes that only concern acts occurring after entry into force of the treaty. Operation of the treaty in this way is akin to declarations accepting the compulsory jurisdiction of the ICJ, which are not regarded as time bound in terms of the disputes that may be brought to the Court, unless so stated in the relevant declarations.[71]

Yet investor–State tribunals appear reluctant to approach BITs in this way. Rather, they tend to find a lack of temporal jurisdiction over disputes that are based on pre-BIT acts. This tendency appears to be true whether the facts presented indicate either a pre-BIT dispute or a post-BIT dispute that is based on pre-BIT acts. The approach may be observed in cases such as *ATA Construction v Jordan*,[72] *Impregilo v Pakistan*,[73] *Lao Holdings v Laos*,[74] *MCI Power v Ecuador*,[75] *Pauschok v Mongolia*,[76] *Ping An v Belgium*,[77] *Salini v Jordan*,[78] *Société Générale v Dominican Republic*[79] and *Walter Bau v Thailand*.[80]

[70] See eg Revised Geneva Act (n 67) art 17 ('All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the International Court of Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal'); Pact of Bogotá (n 68) art XXXI (the 'Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them').

[71] Of course, even a general dispute resolution treaty might be written so as to limit temporally the disputes that may be submitted for resolution. For example, the European Convention for the Peaceful Settlement of Disputes provides that the provisions of the convention shall not apply to 'disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute' (European Convention (n 69) art 27(a)). For application of this temporal constraint, see *Certain Property (Liechtenstein v Germany)*, Judgment on Preliminary Objections [2005] ICJ Rep 6, 22–7 paras 39–52; *Jurisdictional Immunities of the State (Germany v Italy)*, Order on the Counter-Claim [2010] ICJ Rep 310, 318–21 paras 23–31.

[72] *ATA Construction* (n 4) para 98 (while the BIT covers investments existing prior to entry into force, it 'does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT', and therefore 'the Tribunal may only exercise jurisdiction *ratione temporis* over the Claimant's claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006').

[73] *Impregilo* (n 66) paras 299–300 (finding that language of 'any dispute arising' between a State party and an investor of the other State party, and 'the absence of specific provision for retroactivity … infers that disputes that may have arisen before entry into force of the BIT are not covered'); see Rubins and Love (n 16) 490 (finding that *Salini* 'held that dispute resolution clauses with no temporal qualifications whatsoever could not extend to disputes arising before the applicable treaty's entry into force').

[74] *Lao Holdings* (n 15) paras 84, 113 (finding that the phrase 'consents to submit any legal dispute arising' operates with a temporal limit, given VCLT art 28, such that the tribunal 'does not accept the argument … that any party may at any time refer to arbitration "legal disputes" that were dealt with before the investor's accession to the Treaty (leaving aside events that form elements of continuing or composite disputes)').

[75] *MCI Power* (n 53) para 61 ('The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force').

[76] *Paushok* (n 66) paras 12, 467 (finding that the phrase disputes 'arising in connection with realization of investments' should 'not be interpreted as granting [the tribunal] jurisdiction concerning disputes which arose after the entry into force but which are based on actions that have occurred before such entry into force, except for the particular situation of continuing or composite acts').

[77] *Ping An* (n 15) para 224 (finding that the phrase '[w]hen a legal dispute arises' refers only to disputes arising after entry into force of the BIT).

[78] *Salini* (n 21) para 170 (finding that the phrase 'any dispute which may arise' refers only to disputes arising after entry into force of the BIT).

[79] *Société Générale v Dominican Republic* (n 15) para 84 (finding that the phrase 'any dispute relating to investments' only allows for jurisdiction 'for alleged treaty violations over the acts and events that have taken place after the entry into force of the Treaty on 23 January 2003, but not those that have taken place before this date').

[80] *Walter Bau AG (in Liquidation) v The Kingdom of Thailand*, UNCITRAL, Award (1 July 2009) paras 1.4, 9.5((d), 9.67 (finding that the phrase '[d]isputes concerning investments between a Contracting Party and an investor of the other Contracting Party', while containing no express restriction against claims arising before the treaty's entry into force, nevertheless 'does not give the Tribunal jurisdiction *ratione temporis* to consider disputes which had come into existence before the date of the coming into force of the Treaty').

This is not to say that tribunals are entirely uniform in this regard,[81] and some exceptions are discussed in the next subsection. Yet, reflecting on the overall jurisprudence, Binder and Hofbauer opine that

> the majority of tribunals dealing with treaties which do not contain any specific exclusion clause engage with Article 28 VCLT's rule of non-retroactivity in a rather strict manner, i.e. where the treaty does not clearly stipulate otherwise, preexisting disputes are generally not considered as encompassed by the respective [investment agreement's] scope of application, even if the provisions on covered investments and dispute settlement are formulated in a vague and open manner.[82]

Investor–State tribunals have differed somewhat as to why they decline to assume temporal jurisdiction over disputes that are based on pre-BIT acts, making it difficult to identify a single rationale. Nevertheless, a few different, albeit interrelated, reasons are suggested by the jurisprudence.

First, some tribunals see no distinction between 'substantive' and 'procedural' provisions of the BIT, and view the rule of non-retroactivity as equally relevant for either type of treaty provision. For these tribunals, whether the tribunal is being asked to exercise temporal jurisdiction over a pre-BIT dispute, or over a post-BIT dispute that concerns pre-BIT acts, the State's obligations associated with the BIT (including consent to arbitration) do not bind a party in relation to any act that took place prior to the BIT's entry into force. For example, in *MCI Power*, the Respondent Ecuador maintained that the dispute arose before entry into force of the BIT and thus fell outside the Tribunal's temporal jurisdiction.[83] The Claimants argued the BIT did not foreclose its temporal application to disputes arising prior to the BIT's entry into force.[84] The Tribunal saw nothing in the text of the BIT indicating an 'intention of the contracting Parties with respect to its retrospective application',[85] and therefore concluded that the 'non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force'.[86] The Tribunal appears to have squarely applied the rule of non-retroactivity to the 'dispute resolution system established by the BIT', finding that the 'silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of non-retroactivity of treaties'.[87]

[81] See eg *Toto Costruzioni* (n 21) paras 63–4, 261 (maintaining that 'breach' and 'dispute' are two different things, and finding that while the 'breach' arose before entry into force of the BIT, the 'dispute' arose after that date, such that the Tribunal had jurisdiction; the Tribunal, however, ultimately found no violation of the BIT).

[82] Christina Binder and Jane A Hofbauer, 'The Temporal Scope of Application of Investment Treaties and the Effects on General International Law' 10 <https://ssrn.com/abstract=3829192> or <http://dx.doi.org/10.2139/ssrn.3829192> [forthcoming in Stephan Schill, Christian Tams and Rainer Hoffmann (eds), *Investment Law as a Motor of Legal Development: Assessing Radiating Effects in General International Law* (Edward Elgar Publishing)]. See also Gallus, *The Temporal Jurisdiction* (n 5) 38–9 (viewing the investor–State jurisprudence on jurisdiction over post-BIT disputes that are based on pre-BIT acts as 'mixed') and 134–5 (recounting investor–State jurisprudence whereby no jurisdiction was found over pre-BIT disputes).

[83] *MCI Power* (n 53) paras 51–3.

[84] ibid para 57.

[85] ibid para 59.

[86] ibid para 61.

[87] ibid. An *ad hoc* annulment Committee maintained that, in properly applying the rule on non-retroactivity, the Tribunal should have focused on when the 'act' occurred, not when the 'dispute' arose, indicating that even if the dispute arose before entry into force of the BIT, it is possible that the act at issue in the claim continued thereafter and breached the BIT [*MCI Power*, Decision on Annulment (n 66) paras 45–6]. The *ad hoc* Committee, however, recognized that the Tribunal viewed the relevant act as an instantaneous act occurring prior to entry into force (ibid para 48), and appears to have seen no difficulty in a finding that there was no temporal jurisdiction over disputes grounded in pre-BIT acts. Moreover, the Committee found 'sufficient evidence that temporal applicability of consent to disputes that arose before the coming into force may be subject to debate' (ibid para 52). In any event, the Committee declined to annul the award.

In *Impregilo*, the Tribunal was confronted with a dispute that arose after the BIT's entry into force (on 22 June 2001)[88] but that concerned pre-BIT acts. While the Tribunal acknowledged that there was a formal difference between 'jurisdiction *ratione temporis* of an ICSID tribunal' and 'the applicability *ratione temporis* of the substantive obligations in the BIT',[89] it appears to have viewed the dispute resolution provisions either as 'substantive' or as so intertwined with the BIT's protections that the tribunal could not exercise jurisdiction over pre-BIT acts.[90] It concluded that, given the rule on retroactivity, 'the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal *ratione temporis* is limited accordingly'.[91]

Support for the conclusion reached in cases such as *MCI Power* and *Impregilo* may be found in the observation[92] that article 28 VCLT makes no distinction as to substantive or procedural provisions of a treaty; it simply says that a treaty's provisions (which can include dispute resolution provisions) do not bind a party *in relation to* any act or fact which took place, or any situation which ceased to exist, before the date of the entry into force of the treaty.

Secondly, some tribunals assert that the BIT is best interpreted as not embracing temporal jurisdiction over disputes that are based on pre-BIT acts since doing so could vastly expand the scope of possible disputes, and of the types of violations, that might be placed before the tribunal, especially given that the breach necessarily involves a non-BIT source of law.[93] For example, in *Pauschok v Mongolia*, the Tribunal analyzed a dispute resolution clause in a BIT that entered into force in 2006 and that accorded jurisdiction over 'disputes ... arising' between an investor and a host State. After considering the possibility of jurisdiction over a dispute relating to a pre-BIT breach of customary international law (rather than of the substantive standards of the BIT),[94] the Tribunal concluded:

> While it is true that there is no temporal restriction to the word 'disputes' in Article 6 of the Treaty, this is no reason to give that Article an extensive interpretation which takes it well beyond the general scope of the Treaty. ... The Contracting Parties cannot be assumed to have allowed a situation whereby an investor could, after the entry into force of the Treaty, simply manufacture a dispute with a Contracting Party concerning events which would have occurred, say in 1955, and an arbitral tribunal would have jurisdiction to rule on such events. Such an interpretation appears to the

[88] *Impregilo* (n 66) paras 26, 308.
[89] ibid para 309.
[90] ibid paras 310–1.
[91] ibid para 316(f); see also ibid para 314.
[92] See eg *Chevron* (n 15) para 173 ('The principle of non-retroactivity is not different for provisions in treaties dealing with the resolution of disputes, and in particular jurisdictional clauses contained therein'); see also *Nordzucker v Poland*, UNCITRAL, Partial Award (10 December 2008) paras 105(iv), 107 (finding that '[w]hile article 28 of the Vienna Convention on the Law of Treaties does not distinguish between jurisdictional obligations under a Treaty and substantive obligations, it must be assumed to apply to both,' and 'the distinction is not important in a case where a Treaty simultaneously creates substantive and procedural obligations').
[93] If the door were opened to disputes arising under unspecified sources of law, in theory tribunals might be faced with disputes predicated upon: bilateral or multilateral treaties that do not provide for investor–State arbitration (such as treaties of amity or friendship); customary international law; general principles of law; national law of the host State; national law of the investor's State; the national law of a third State; or perhaps other sources.
[94] *Paushok* (n 66) para 467.

> Tribunal to be far beyond what could have been the intention of the Contracting States when they entered into the Treaty.[95]

Similarly, the *Lao Holdings* Tribunal vividly declared that it did 'not view the Treaty as intending to provide legal weapons to investors for the purpose of re-engaging in a pre-existing legal dispute with the Lao Government'.[96]

Thirdly, some tribunals focus on the innovative aspect of investor–State arbitration. If the BIT is creating an entirely new mechanism for dispute resolution—essentially, displacing the traditional diplomatic protection of a national by its State through inter-State dispute resolution and displacing litigation in national courts—then it is inappropriate to assume that States parties to a BIT intended that new mechanism to encompass disputes that are based on pre-BIT acts that violate non-BIT sources of law.[97] In *Walter Bau v Thailand*, the Tribunal was confronted with predecessor/successor treaties. It found it significant that 'the Treaty replaced has no provision for investor-state claims', but rather provided only for inter-state claims.[98] Moreover, the Tribunal noted that claims for violation of the prior treaty might still be brought by a State party, since the provisions of the prior treaty allowed such claims for 10 years after the treaty's termination.[99] In such a situation, the creation of investor–State dispute resolution under a new BIT 'is a substantive and not a mere procedural provision', with the 'clear intention ... to provide better future protection for investors in the host country than had previously existed'.[100]

Where the predecessor and successor treaties both contain investor–State dispute resolution, much may depend on how significantly different the substantive protections and remedies available are as between the two BITs. For the *Ping An* Tribunal, it would be inappropriate to allow use of the much wider dispute resolution provisions found in a successor BIT to bring claims already notified under a predecessor BIT, 'with its far more limited substantive scope for the purposes of

[95] ibid 468; see *MCI Power* (n 53) para 96 ('The Tribunal observes that the existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT's arbitral Jurisdiction'). Some contrary views may be found in the literature. See eg Douglas, 'When Does an Investment Treaty Claim Arise?' (n 16) 346 (finding that because the 'scope of consent in the majority of investment treaties is thus defined as "any" or "all" disputes relating to an investment' then it 'is conceivable in this situation that the investor might rely on' customary international law to pursue a claim for damage caused prior to entry into force of the treaty). To date, however, such views do not appear to be reflected in the case law.

Separately, it might be more narrowly asserted that, if the BIT *expressly* calls for the States parties to comply with customary international law, or otherwise confirms the applicability of customary international law, then such a provision means that the tribunal is accorded jurisdiction over a dispute involving alleged breach of such law, even if the breach predates the treaty. See eg Veijo Heiskanen, '*Entretemps*: Is There a Distinction Between Jurisdiction *Ratione Temporis* and Substantive Protection *Ratione Temporis*? *Jurisdiction in Investment Treaty Arbitration—IAI Series No 8* (2018) 297, 309–10 ('if the treaty does not create any novel substantive obligations but simply requires that the State parties comply with customary international law standards, or even if it creates novel obligations but also confirms the applicability of customary international law and the existing claim in question is based on customary international law, and assuming further that the treaty does not specifically exclude existing claims, the tribunal may properly deal with such existing claims or disputes'). Such a reference in the BIT to customary international law, with nothing more, should be scrutinized carefully. The intention of the States parties might be for customary international law to inform the application of the BIT standards (which cannot be applied retroactively), not to create a basis for pre-BIT violations of customary international law—potentially extending back decades—to fall within the temporal jurisdiction of the tribunal.

[96] *Lao Holdings* (n 15) para 117.

[97] See eg *Paushok* (n 66) para 467 ('there is a question as to whether an arbitral tribunal could exercise such jurisdiction, ... the matter becoming one to be addressed as a diplomatic protection claim or as an ordinary commercial dispute to be resolved under private law before the appropriate judiciary').

[98] *Walter Bau* (n 80) para 9.70.

[99] ibid paras 9.5(b), 9.69.

[100] ibid para 9.71.

dispute-settlement jurisdiction'.[101] As noted by the *ATA Construction* Tribunal, 'a general principle of legality instructs interpreters to apply innovative legislation prospectively, unless the legislation clearly indicates that its creators intended to apply it retroactively and, even then, only if such application would not offend some fundamental and peremptory principle of justice'.[102]

Fourthly, some tribunals understand the specific language of the BIT to be prospective in nature, thereby foreclosing temporal jurisdiction over disputes that are based on pre-BIT acts. A provision in the BIT granting jurisdiction over disputes that 'may arise' or 'any disputes arising', in some cases has been interpreted as forward looking, thus excluding disputes that arose prior to entry into force of the BIT.[103] If the tribunal is being asked to exercise temporal jurisdiction over a post-BIT dispute that concerns pre-BIT acts, then BIT language more specific to investment protections might feature in the analysis, be they found in the preamble (for example, a clause expressing the desire to 'create favorable conditions for investments') or in the operative provisions (for example, that the State parties 'shall' do or refrain from doing certain things vis-à-vis investors).[104] The *Tecmed* Tribunal (albeit when deciding whether the substantive provisions of a BIT were retroactive) viewed various provisions of the BIT—'shall offer', 'shall not hinder', 'shall grant', 'shall guarantee' or measure 'which may be adopted'—as suggesting a forward-looking application of the BIT.[105] To similar effect, tribunals may be uneasy mixing and matching two different legal components (the BIT dispute resolution process with pre-BIT sources of law). In principle, at the time of the pre-BIT act, there was no 'investor' or 'investment' as defined in the BIT, given that the BIT did not exist. Further, to the extent that certain exceptions exist within the BIT (perhaps carving out national security or tax matters), a tribunal would have to determine whether such exceptions should be applied to non-BIT sources of law, such as customary international law. Absent express guidance from the States parties as how to navigate such issues, arguably they did not intend for the tribunal to go down that path.

An older case that has generated some confusion in this regard is *Mavrommatis Palestine Concessions*. In that case, the PCIJ considered whether the Mandate for Palestine established by the Council of the League of Nations,[106] which entered into force in 1923 and which granted jurisdiction to the Court over disputes between the United Kingdom and any other Member of the League relating to the Mandate,[107] encompassed disputes arising prior to 1923. The Court stated:

> The Court is of the opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever ... which may arise' shall be submitted to the

[101] *Ping An* (n 15) para 229. For criticism of the decision, see Ren (n 132) 132–7. By contrast, where the substantive protections and remedies are similar, the willingness to find jurisdiction may be different. See nn 121–131 below and accompanying text.

[102] *ATA* (n 4) para 98.

[103] See eg *Impregilo* (n 66) 300 (inferring from the words '[a]ny disputes arising' a lack of jurisdiction over disputes arising pre-BIT).

[104] See eg *Paushok* (n 66) paras 431–3.

[105] *Tecmed* (n 19) paras 64–5.

[106] Council of the League of Nations, Mandate for Palestine (1922).

[107] ibid art 26 ('The Mandatory agrees that, if any dispute whatever should arise between [the] Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations').

> Court. The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.[108]

In some International Centre for Settlement of Investment Disputes (ICSID) arbitrations, it has been argued that this general language reflects a '*Mavrommatis* presumption' in treaty law, such that the dispute resolution provision of a BIT should be deemed to encompass all disputes presented to a BIT tribunal, even in relation to acts arising prior to entry into force of the treaty, so long as a non-BIT source of law is used for the breach.

Yet, for several reasons, such an argument overreads *Mavrommatis*. First, the PCIJ itself concluded in *Mavrommatis* that the breach before it continued to exist after entry into force of the Mandate, such that the Court's statement above was not actually germane to its disposition of the case.[109] Secondly, *Mavrommatis* was a situation where an express objective in adopting the dispute resolution provision of the Mandate for Palestine, and of Protocol XII of the Treaty of Lausanne (which contained substantive standards for addressing Ottoman-era concessions), was for the purpose of addressing disputes that had arisen during the UK's occupation and then administration of Palestine, and hence *prior to entry into force* of either the Mandate or Protocol XII.[110] As such, there was a specific objective of the relevant treaties demonstrating an intent to protect certain acquired rights (preservation of pre-1914 concessions) from measures that might be taken by a successor State.[111]

Thirdly, *Mavrommatis* has been viewed as a situation where the dispute resolution clause (found in the League of Nations Mandate) was not attached to the substantive protections at issue (found in Protocol XII), but instead simply provided for the general submission of a category of disputes between two or more States to an international court. Consequently, the dispute resolution clause in *Mavrommatis* was more akin to the general dispute resolution treaties discussed previously than it was to a dispute resolution clause found in a typical BIT.[112]

Investor–State tribunals largely appear to have viewed *Mavrommatis* in that light. For example, the Tribunal in *Chevron v Ecuador* essentially confined *Mavrommatis* to its facts, finding more pertinent the ICJ's subsequent judgment in *Ambatielos*, and therefore concluded that 'the BIT, including its jurisdictional provisions, cannot apply retroactively unless such an intention can be established in the BIT or otherwise'.[113]

[108] *Mavrommatis* (n 53) 35.

[109] ibid ('this breach, no matter on what date it was first committed, still subsists, and the provision of the Mandate are therefore applicable to it').

[110] Article 1 of Protocol XII provided: 'Concessionary contracts and subsequent agreements relating thereto, duly entered into before the 29th October, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other hand, are maintained.' Treaty of Peace (Treaty of Lausanne), Protocol relating to certain Concessions granted in the Ottoman Empire (Protocol XII) (signed 24 July 1923) 28 LNTS 203, 205. As the Court noted with respect to the protocol, it 'was drawn up in order to fix the conditions governing the recognition and treatment by the Contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence' (*Mavrommatis* (n 53) 34).

[111] See ILC YB 1966, vol II, 212, para (1) (ILC stating that a 'good example of a treaty having such a "special clause" or "special object" necessitating retroactive interpretation is to be found in the *Mavrommatis Palestine Concessions* case').

[112] ibid para (2) (ILC contrasting *Mavrommatis* to a situation where 'a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application,' in which case 'the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause').

[113] *Chevron* (n 15) paras 174–5.

Reflecting on such jurisprudence, the Tribunal in *Ping An v Belgium* noted: 'If (which is doubtful) the *Mavrommatis* case stands for a principle that there is a presumption that the jurisdiction of a tribunal extends to disputes which arose prior to its establishment, such a principle finds almost no support in investor-State arbitration.'[114]

F. *A BIT Might Be Interpreted as Embracing Disputes that are Based on Pre-BIT Acts in Certain Situations*

As indicated in Subsection I.E, investor–State tribunals generally appear disposed to interpret a BIT that is silent as to whether dispute resolution is solely for violations of that BIT, and is silent as to coverage of disputes that are based on pre-BIT acts, as not embracing temporal jurisdiction over such disputes, for various reasons. Yet that disposition might be overcome if the tribunal discerns an intent by the States parties to place before the tribunal disputes that are based on pre-BIT acts.

(i) *A BIT that is amended to be more expansive*

The general disposition not to exercise temporal jurisdiction over disputes that are based on pre-BIT acts might be overcome when there is a BIT that contains various substantive standards, but limited investor–State dispute resolution, which is then *amended* to allow for broader investor–State dispute resolution regarding those same standards.

The Tribunal in *Nordzucker v Poland* regarded itself as empowered to use a BIT's expanded dispute resolution procedures, established by amendment to the BIT, so as to pass upon violations of the BIT that occurred prior to such expansion. The original 1989 BIT contained various standards of protection for investors (such as fair and equitable treatment), but only provided investor–State arbitration for disputes concerning expropriation. The BIT was then amended in 2003 (and entered into force in 2005) to allow for investor–State arbitration over all the standards set forth in the BIT. No transitory provision existed indicating whether pre-amendment violations of the non-expropriation standards could be placed before the Tribunal. The Respondent argued that there could be no jurisdiction over pre-amendment breaches of non-expropriation standards, given that at the time of the breach no compulsory investor–State dispute settlement existed.[115]

The Tribunal, however, found especially pertinent that 'the original BIT imposed already the substantive obligation'.[116] Thus, the 'obligation to treat investments fairly and equitably became effective already' in 1991, and until '2005 disputes about this obligation could not be decided in arbitration' (absent *ad hoc* consent), but as from 2005 tribunals had jurisdiction for all disputes 'including those related to breaches that occurred before' 2005.[117] For the Tribunal, the application of a jurisdictional clause in such circumstances to pre-amendment breaches 'does not constitute a retro-active application of that clause, ... it being understood that the fact to which the jurisdictional provision relates and which must occur after the Treaty or its jurisdictional clause becomes effective, is the filing of the claim'.[118] In sum, 'unless a different intention of the Parties is established, the immediate applicability of a

[114] *Ping An* (n 15) para 184; see generally Gallus, *The Temporal Jurisdiction* (n 5) 16–7, 33–5.
[115] *Nordzucker* (n 92) 106.
[116] ibid 105(i).
[117] ibid 108.
[118] ibid 109.

jurisdictional clause of a Treaty implies that it can also be applied to "old" events, *provided these constituted already a breach of the Treaty at the time they occurred*".[119]

The Tribunal went on to 'test' its conclusion against the broader context of the BIT and its amendment. In support of its conclusion, the Tribunal noted that the dispute resolution mechanism of the amendment definitively replaced the mechanism of the original BIT.[120] Interestingly, the Tribunal decided that a so-called 'preservation of rights' clause in the BIT (which provides that an investor obtains the more favorable treatment afforded by existing or future national or international obligations) does *not* on its own have the effect of giving all future amendments of the BIT retroactive effect.[121]

(ii) *Successor BITs both providing for investor–State arbitration and substantially the same protections*

The general disposition not to exercise temporal jurisdiction over disputes that are based on pre-BIT acts might also be overcome in a situation of successive BITs, which contain similar investment protections and similar dispute resolution procedures, where an intent of the States parties might be discerned favoring the use of the successor BIT's dispute resolution procedures to adjudicate acts occurring during and in breach of the predecessor BIT.

In *Jan de Nul*, there existed a predecessor BIT with investor–State dispute resolution and then a successor BIT also with investor–State dispute resolution, which both contained 'substantially the same obligations concerning the protection of foreign investments'.[122] Further, the successor BIT expressly applied to investments made before or after entry into force of that treaty.[123] The claims placed before the Tribunal concerned alleged violations of both BITs, as the relevant conduct spanned the period of both treaties.[124] The principal focus at the jurisdictional stage was whether the 'dispute' arose after entry into force of the successor BIT, as required by that treaty; the Tribunal found that it did.[125] At the merits stage, the Tribunal viewed itself as being empowered to use the dispute resolution procedure of the successor BIT for interpreting violations arising under the protections of both BITs, although 'in practical terms the application of the different texts will make no meaningful difference as the protections of the two treaties are essentially identical'.[126] Thus, the rule of non-retroactivity served to prevent retroactive application of the successor BIT's protections to acts occurring prior to its entry into force, but did not serve to prevent dispute resolution established under the successor BIT from reviewing those acts as against the predecessor BIT's protections.

In *Bahgat v Egypt*, the same elements existed, with again the focus at the jurisdictional stage on whether the dispute arose after entry into force of the successor BIT. As in *Jan de Nul*, the Tribunal found that the dispute arose after entry into force of

[119] ibid 110 (emphasis added).
[120] ibid 113(i).
[121] ibid 113 (ii).
[122] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) para 30.
[123] ibid para 33.
[124] ibid 117.
[125] ibid 111, 121–2. For analysis, see John Gaffney, 'Jurisdiction ratione temporis of ICSID Tribunals: Lucchetti and Jan De Nul Considered' (2006) 3(5) Transnational Dispute Management.
[126] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) para 134.

the successor BIT, such that it had jurisdiction over the dispute.[127] Further, the Tribunal found that it could apply the protections of the predecessor BIT to acts that occurred before entry into force of the successor BIT, and the protections of the successor BIT to acts that occurred thereafter.[128] Among other things, the Tribunal noted that the successor BIT dispute resolution clause 'does not restrict the contracting parties' consent to arbitrate only to disputes that involve the application of the' successor BIT.[129] Further, the Respondent's argument that the Tribunal only had jurisdiction to apply the protections of the successor BIT 'would create a situation where the Tribunal has jurisdiction over pre-existing investments under Article 13 of the 2004 BIT, but is prevented from applying either the substantive provisions of the 2004 BIT or the 1980 BIT to the investments. This could not have been the intention of the contracting parties'.[130] The Tribunal also found that the preambles of the two BITs 'strongly indicate that the intention of the contracting parties was to provide continuous investment protection to investors of the other contracting state. A gap in protection afforded to investments under international investment treaties would be contrary to that intention'.[131]

In such a situation of closely related successor BITs, one might consider developing a matrix for any given case that considers the times at which the investment was made, the breach occurred and the dispute arose, and then identifies, in relation to the entry into force (EIF) of the successor BIT, which BIT accords jurisdiction to a tribunal and what substantive protections that tribunal should apply.[132] For example, a basic matrix, which could be refined based on the particular text of the predecessor BIT (BIT1) and the successor BIT (BIT2), might be:

Investment Occurs	Breach Occurs	Dispute Occurs	Jurisdiction Accorded by	Apply Substantive Protections of
Before EIF of BIT2	Before EIF of BIT2	Before EIF of BIT2	BIT1	BIT1
Before EIF of BIT2	Before EIF of BIT2	After EIF of BIT2	BIT2	BIT1
Before EIF of BIT2	After EIF of BIT2	After EIF of BIT2	BIT2	BIT2
After EIF of BIT2	After EIF of BIT2	After EIF of BIT2	BIT2	BIT2

(iii) *Where the tribunal's jurisdiction arises not just from the BIT but from a national investment law that predates the BIT*

In *Mabco Constructions v Kosovo*, the respondent State argued that the relevant events occurred in 2011–12, at a time prior to entry into force of the BIT in mid-2012. The Tribunal agreed that under the BIT it lacked jurisdiction *ratione temporis* over Mabco's claims concerning expropriation and fair and equitable treatment, as they

[127] *Mohamed Abdel Raouf Bahgat v Egypt*, UNCITRAL, PCA Case No 2012-07, Decision on Jurisdiction (30 November 2017) para 303.
[128] ibid 307.
[129] ibid 308.
[130] ibid 309.
[131] ibid 314.
[132] Credit for this idea goes to Qing Ren, who developed a more elaborate matrix when analyzing *Ping An*. See Qing Ren, '*Ping An v Belgium*: Temporal Jurisdiction of Successor BITs' (2016) 31 ICSID Rev–FILJ 129, 134.

related to events that had occurred prior to the BIT's entry into force.[133] Yet the Tribunal found that such claims could proceed under the Kosovo's 2005 foreign investment law, which in conjunction with the ICSID Convention accorded jurisdiction to the tribunal over the claims, and which had become effective in 2006.[134] Mabco's denial of justice claim arose after entry into force of the BIT, and therefore could be assessed under both the BIT and Kosovo's foreign investment law.[135]

G. *Certain Arguments that Might Favor Temporal Jurisdiction over Disputes that are Based on Pre-BIT Acts are Typically Dismissed by Tribunals as Irrelevant*

As indicated in Subsection I.F, the disposition of investor–State tribunals not to exercise temporal jurisdiction over disputes based on pre-BIT acts can be overcome in some situations. At the same time, certain arguments that have arisen in such cases over the past two decades are usually deemed by tribunals to be irrelevant to the analysis.

(i) *Where a BIT protects investments even if they were made prior to the BIT's entry into force*

BITs often provide that their protections extend not just to new investments, which were made after entry into force of the BIT, but also to investments already existing in the host country as of that date. Such a provision might be construed as meaning that the BIT operates retroactively to protect against governmental measures that were taken against such investments prior to entry into force of the BIT, but investor–State tribunals generally have not reached such a conclusion.

Thus, the *Walter Bau* Tribunal found that while 'Article 8 makes it clear that the Treaty applies to "investments" made before entry into force of the 2002 Treaty, that does not mean that investors can claim damages retrospectively for matters which had given rise to disputes prior to that date'.[136] Similarly, in *Ping An v Belgium*, the Tribunal concluded that 'the common provision in Article 10(2) that the 2009 BIT applies to all investments, made before or after its entry into force, does not assist in any way on the question of the effect of a dispute arising before entry into force'.[137] The Tribunal in *Société Générale v Dominican Republic* found that even if there exists a provision acknowledging that the BIT protects investments made prior to its entry into force, 'if the intention had been to allow for retroactivity' of the treaty's substantive protections then 'one would expect . . . a clear and unequivocal expression of intention to that effect'.[138] As previously noted, when reaching the same conclusion the *Tecmed* Tribunal considered other provisions of the BIT and interpreted them as suggesting a forward-looking application.[139] Overall, the approach of these tribunals is that such a provision is simply indicating that a breach and a dispute arising after

[133] *Mabco* (n 60) paras 460, 468, 472.
[134] ibid paras 461, 469, 473.
[135] ibid paras 478–9.
[136] *Walter Bau* (n 80) para 9.68.
[137] *Ping An* (n 15) para 226; see also ibid 173 ('It hardly needs to be pointed out that whether obligations have retroactive effect is a quite different question from the question whether a BIT applies to investments made prior to its entry into force (which are very commonly included within the scope of application of a BIT)').
[138] *Société Générale v Dominican Republic* (n 15) para 82.
[139] *Tecmed* (n 19) paras 64–5.

entry into force of the treaty may involve an investment that was made before entry into force and that still exists thereafter.[140]

In *Chevron v Ecuador*, the Tribunal observed that the BIT provided that it 'shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter'.[141] The Tribunal then stated that such provision was 'an exception to the principle of non-retroactivity' and that the BIT covered 'any dispute as long as it is a dispute arising out of or relating to "investments existing at the time of entry into force"'.[142] If the Tribunal was indicating the existence of temporal jurisdiction over a dispute that is based on pre-BIT acts, the statement appears to have been *obiter dicta*, in that the conduct at issue and the dispute before the Tribunal both arose after entry into force of the BIT.[143]

(ii) *Analogy to disputes concerning obligations owed by a State towards the international community as a whole*

Another argument that has been advanced in support of temporal jurisdiction over disputes that are based on pre-BIT acts relates to a particular area of international case law, where an international court is confronted with a treaty containing obligations owed by a State towards the international community as a whole. In such a situation, the court might regard the obligations as having existed prior to the treaty, and might regard the treaty as intended to provide jurisdiction to address acts breaching those obligations, whether occurring before or after entry into force of the treaty.

That was the approach of the ICJ in the 1996 judgment on jurisdiction in the *Genocide (Bosnia v Yugoslavia)* case, in which the Federal Republic of Yugoslavia (FRY) argued that the rule of non-retroactivity precluded the Court from applying the Genocide Convention[144] to FRY conduct prior to the date on which both Bosnia and the FRY became parties to the convention.[145] The Court noted that the convention contained no clause limiting the scope of jurisdiction *ratione temporis*, and therefore it had 'jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina'.[146] Moreover, that conclusion was 'in accordance with the object and purpose of the Convention'.[147]

Such broad language might be viewed as being supportive of temporal jurisdiction for an investor–State tribunal over disputes that are based on pre-BIT acts. Yet the Court's decision seems best confined to situations where States have enacted a human rights convention codifying certain pre-existing rules about State behavior that, even if the absence of a convention, are binding upon all States and that reflect

[140] See also *MCI Power* (n 53) para 59 ('[T]he Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified'); *SGS v Philippines* (n 21) para 166 (finding such a provision does not 'give the substantive provisions of the BIT any retrospective effect'); *Impregilo* (n 66) para 310 (same); *Paushok* (n 66) paras 430, 439–40 (same); *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN ID Case No ARB/01/1, Award (31 March 2003) paras 69–70 (same); *Pey Casado* (n 15) para. 579 (same).

[141] *Chevron* (n 15) para 188.

[142] ibid 265; see also ibid para 188 ('in spite of the general rule of non-retroactivity, the Tribunal may apply the BIT to a pre-existing investment').

[143] ibid paras 268–9 ('In the present case, however, the Claimants base their claims on post-BIT conduct' and '[i]n any event, the Tribunal concludes that the present dispute has arisen after the entry into force of the BIT').

[144] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[145] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia–Herzegovina v Yugoslavia)*, Judgment on Preliminary Objections [1996] ICJ Rep 595, 617 para 34.

[146] ibid.

[147] ibid.

obligations of a State towards the international community as a whole.[148] When discussing the convention's object and purpose, the Court referred to its 1951 advisory opinion concerning reservations to the convention, where it had said that the drafters were condemning a crime that 'shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law', such that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[149] In light of those origins, and when explaining why the obligations of the convention were not limited territorially, in 1996 the Court said that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*'.[150] Although not expressly linking that reasoning to its next conclusion about the temporal reach of the Convention, the special nature of the rights and obligations would seem pertinent in both contexts. In essence, in this context, the Court saw the Convention as being intended to allow for dispute resolution over the important *erga omnes* obligations set forth in the convention, which pre-existed it and were of concern to all States, even if breached prior to entry into force of the Convention. The Court likely was also influenced by the fact that the States in question were parties to the convention based on State succession in respect of treaties,[151] and the Convention was fully in force for the predecessor state (the Socialist Federal Republic of Yugoslavia) at the time of the events at issue.

By contrast, treaties addressing protection of foreign investments do not establish obligations *erga omnes*, as the Court itself held in *Barcelona Traction.*[152] As such, whatever setting aside of the effects of non-retroactivity may occur in the context of human rights treaties arguably is not justified for disputes that are based on pre-BIT breaches of non-BIT sources of law. Perhaps for that reason, the Tribunal in *Chevron v Ecuador* simply noted that there 'may be a different approach to retroactivity in the human rights context'.[153] As it happens, even in the human rights context, international courts and bodies have been inconsistent on whether to apply the rule on non-retroactivity with respect to acts predating the entry into force of the human rights treaty.[154]

(iii) *Where a national investment law expressly or implicitly allows for dispute settlement*

A third argument that might be advanced in support of temporal jurisdiction over disputes based on pre-BIT acts invokes investor–State precedents relating to national investment laws. For example, in *Tradex Hellas*, the Tribunal considered whether a 1993 Albanian national law on foreign investment should be interpreted to constitute consent to submit to ICSID disputes that had arisen before the entry into force of the law, and found that it did. The case did not involve interpreting whether a dispute resolution clause *in a treaty* should apply to disputes or events arising prior to entry

[148] See ARSIWA (n 2) art 48(1)(b) ('Any State other than an injured State is entitled to invoke the responsibility of another State … if … [t]he obligation is owed to the international community as a whole'). For the ILC's commentary, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 276–8.

[149] *Genocide (Bosnia v Yugoslavia)* (n 145) 615–16, para 31 (citing [1951] ICJ Rep 23).

[150] ibid.

[151] It was not contested in the case that the FRY (later Serbia and Montenegro, and then just Serbia) was a party to the convention, and the court found that Bosnia was a party based on succession (ibid 612 para 23).

[152] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [1970] ICJ Rep 3, 33 para 33.

[153] *Chevron* (n 15) para 176 ('The Tribunal considers that any possible presumption must result from the specific context and purpose of international human rights or a *sui generis* rule in that field').

[154] See Gallus, 'Article 28' (n 24) 302–7; Gallus, *The Temporal Jurisdiction* (n 5) 35–8.

into force of the treaty, and thus appears to have no direct relevance for interpreting international law in this regard.

Even so, the *Tradex Hellas* analysis is of some interest. The Tribunal appeared to agree that, in principle, the substantive rules of a prior Albania investment law (which provided for United Nations Commission on International Trade Law (UNCITRAL) arbitration) would normally govern events arising at the time of the prior law, while the 1993 Albanian national law (which provided for ICSID arbitration) would normally govern events arising at the time of the later law.[155] Yet the Tribunal viewed specific provisions in the 1993 law addressing earlier investments[156] and earlier laws[157] as demonstrating a legislative intent that the 1993 consent to ICSID jurisdiction 'can be used also in relation to investments made and for disputes arisen before the entry into force of such law'.[158] Among other things, the Tribunal noted that the new dispute settlement mechanism was 'more advanced and efficient',[159] and that it 'would save both the investor and Albania the need to engage two procedures and tribunals possibly regarding the same investment should one dispute start before and another start after the coming into force of the 1993 Law'.[160]

H. *Temporal Jurisdiction Can Exist Over a Post-BIT Independent Cause of Action, Even if It is Related to a Broader Pre-BIT Dispute*

As suggested by the above, a key issue for many tribunals is whether the claim before it concerns acts, facts or disputes that predate entry into force of the BIT (or the making of the investment). By contrast, if the claim concerns a new, post-BIT measure by the host State, which stands on its own as a violation of the BIT, then jurisdiction can be found, even if that measure has some relationship to pre-BIT acts, facts or dispute.

Thus, the Tribunal in *Astrida Benita Carrizosa* was confronted with a situation where the Claimant had invested in a Colombian financial institution beginning in 1986.[161] From 1997 to 2001, the Colombian Government intervened in the financial sector by taking various measures that the Claimant asserted harmed the investment, which the Claimant thereafter unsuccessfully contested in local courts.[162] Among the Government's acts, only a 2014 court order confirming a previous court decision postdated the entry into force of the trade promotion agreement (TPA).[163] The parties and the Tribunal agreed that, pursuant to the rule on non-retroactivity, the Tribunal's temporal jurisdiction did not extend to pre-TPA acts or facts.[164] The parties disagreed, however, as to whether such jurisdiction included post-BIT acts that related to a dispute that arose prior to entry into force of the BIT.

[155] *Tradex* (n 31) 193.
[156] ibid 190–1 (discussing art 1(2) of the 1993 Albanian investment law).
[157] ibid 191–2 (discussing art 9 of the 1993 Albanian investment law).
[158] ibid 192; see also ibid 189–90 (discussing art 8(2) of the 1993 Albanian investment law).
[159] ibid 192.
[160] ibid 191.
[161] *Astrida Benita Carrizosa* (n 18) paras 66–8.
[162] ibid paras 69–98.
[163] ibid para 126.
[164] ibid para 124.

The Tribunal found that 'if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the treaty tribunal's jurisdiction, irrespective of whether such conduct may pertain to a broader pre-treaty dispute'.[165] At the same time, the Tribunal made clear that, pursuant to the TPA, it had 'no jurisdiction to assess the lawfulness of the Respondent's pre-treaty conduct, be it under the TPA or under any other source, such as customary international law'.[166] As such, it was necessary that the post-TPA conduct be capable of breaching the TPA 'independently from the question of (un)lawfulness of the pre-treaty conduct'.[167] On the facts before it, that test could not be met, as the legal effect of the 2014 order was simply to leave unaltered the outcome of pre-TPA court decisions.[168] Indeed, the Tribunal noted that would not be able to decide on the damages sought by the Claimant without reviewing the lawfulness of the pre-TPA acts.[169]

Similarly, the Tribunal in *Cervin and Rhone v Costa Rica* maintained that the mere fact that there pre-existed a litigious issue related to the same subject-matter of the claim before the tribunal cannot, by itself, deprive the tribunal of its jurisdiction. Where the claim concerns a series of events that occurred after the making of the investment, jurisdiction *ratione temporis* exists.[170]

Such decisions are perhaps best understood as urging caution in concluding that a breach or dispute that relates in some fashion to pre-BIT acts necessarily strips away the tribunal's temporal jurisdiction. While that is generally true of disputes that are based solely or dominantly on pre-BIT acts, a dispute focused exclusively on the legality of post-BIT acts presents a different situation, even if it has some relationship to pre-BIT acts, facts or dispute. Even then, however, the inability to pass upon the legality of the pre-BIT acts imposes certain constraints on the tribunal, such that the post-BIT act must stand on its own as a separate treaty violation—one that is distinct from prior measures related to the same investment.

II. BREACHES HAVING A CONTINUING CHARACTER

So as to overcome the effects of the rule of non-retroactivity, resort is sometimes made to the concept of a breach having a continuing character. As previously noted, article 14(1) ARSIWA provides that 'breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, *even if its effects continue*'.[171] By contrast, under 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

[165] ibid para 143; see ibid para 149 ('Thus, if post-treaty conduct is in itself an actionable breach of the treaty, the principle of non-retroactivity does not place such conduct outside the reach of the treaty even if the dispute to which the conduct pertains had arisen before the treaty entered into force').
[166] ibid para 153.
[167] ibid.
[168] ibid para 156.
[169] ibid paras 162–3; see also *Berkowitz (Spence)* (n 20) para 217 ('[P]re-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actional breach in its own right. Pre-entry into force acts and facts cannot therefore . . . constitute a cause of action').
[170] *Cervin Investissements SA and Rhone Investissements SA v Republic of Costa Rica*, ICSID Case No ARB/13/2, Decision on Jurisdiction (15 December 2014) paras 276–86.
[171] ARSIWA (n 2) art 14(1) (emphasis added).

with the international obligation'.[172] A classic example for distinguishing the two situations is that a State's violent attack injuring an individual is a wrongful act occurring at the moment of the attack, even if the effects of that attack (such as recovery from the injury) continue thereafter, whereas a State's wrongful detention of an individual is an act having a continuous character throughout the period of detention, not just at the moment it commences.[173]

In the context of investor–State arbitration, a wrongful act that begins at a time prior to the temporal jurisdiction of a tribunal might nevertheless have a continuing nature so that it eventually falls within that jurisdiction. Thus, in *Société Générale v Dominican Republic*, the Tribunal concluded that 'to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal's jurisdiction'.[174]

For example, if a foreign investor is pursuing local remedies yet experiencing delays in local courts, and those delays continue after the entry into force of the BIT, the tribunal may conclude that there is a denial of justice having a continuing character.[175] Or if a State enters into an investment contract with an investor by which it is obligated to pay certain sums to the investor, the failure to pay such sums when they become due in the period both before and after entry into force of the BIT may be a continuing breach.[176] Similarly, a State's failure to increase tolls in violation of a concession agreement, beginning before entry into force of a BIT but continuing thereafter, is a wrongful act having a continuing character.[177] A failure to grant mining permits or a concession, which continues over a period of time and which, to the reasonable understanding of the investor, initially did not seem definitive, can be a wrongful act having a continuous character.[178] Crucial to this conclusion, however, is the demonstration of the investor's reasonable understanding; in *Pac Rim*, the Tribunal noted 'the Claimant's belief that it received indications from the Salvadoran authorities, to the effect that the different permits and authorisations could yet be granted to its Enterprises'.[179]

Since the continuing breach endures in the period of the tribunal's temporal jurisdiction, the BIT is not being applied retroactively. Rather, 'the act is indeed

[172] ibid art 14(2) (emphasis added). For the ILC's commentary, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 136–9; see also Arthur Watts (ed), *II The International Law Commission 1949–1998* (OUP 2000) 671 ('If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The nonretroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date'); Crawford, *State Responsibility: The General Part* (n 2) 258–65; Jean Salmon, 'Duration of the Breach' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 386–90; Rubins and Love (n 16) 483–5.

[173] On breaches having a continuing character before international tribunals generally, see Gallus, *The Temporal Jurisdiction* (n 5) 61–100; Jost Pauwelyn, 'The Concept of a "Continuing Violation" of an International Obligation: Selected Problems' (1995) 66 BYBIL 415.

[174] *Société Générale v Dominican Republic* (n 15) para 94; see also *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (6 December 2000) para 62 ('[I]f there has been a permanent course of action by Respondent which started before [NAFTA's entry into force] and went on after that date and which, therefore, "became breaches" of [NAFTA] on that date … that [post-entry into force] part of Respondent's alleged activity *is* subject to the Tribunal's jurisdiction, as the Government of Canada points out … and also Respondent [Mexico] concedes'); *Mondev* (n 30) paras 57–8 (same).

[175] *Chevron v Ecuador* (n 15) para 298; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v The Republic of Estonia*, ICSID Case No ARB/04/6, Award (19 November 2007) paras 194–5.

[176] *SGS v Philippines* (n 21) para 167.

[177] *Walter Bau* (n 80) para 13.1.

[178] *Pac Rim* (n 36) para 2.92.

[179] ibid para 2.83.

continuous but its legal materialization as a breach occurs when the Treaty has come into force and the investor qualifies under its requirements'.[180] While this rule is often acknowledged at the jurisdictional stage of the arbitration, a determination of whether there actually is a breach of a continuing character is typically a matter for the merits, since only then can it be decided which acts amount to breaches and when it is that they occurred.[181] Further, while events prior to the commencement of the tribunal's temporal jurisdiction may not, as such, constitute the breach, they may be considered for purposes of understanding the background, causes or scope of the breach that has occurred within that jurisdiction.[182]

Tribunals that identify a continuing breach extending into the period of their temporal jurisdiction typically award reparation only for injury relating to that period. Thus, a State's failure to increase tolls in violation of a concession agreement that continues after the entry into force of the BIT may only lead to damages that begin accruing after such entry into force.[183] Yet there may be circumstances where a greater scope of damages is possible. For example, in *SGS v Philippines*, invoices were sent by the Claimant from September 1998 through March 2000 that were disputed and not paid by the government, but the BIT only entered into force in April 1999.[184] The Tribunal concluded that the government's failure to observe its obligations under the relevant contract only occurred at the point that a government decision was reached in December 2001 as to the total amount it deemed payable for the unpaid invoices, such that injury from the breach covered all the payments at issue.[185] Of course, to the extent that the wrongful act is ongoing, it may present difficulties for a tribunal in assessing a claimant's losses, as they are a moving target.[186]

When analyzing whether an allegedly wrongful act is of a continuing character, tribunals often ask two related questions. First, is the allegedly wrongful act best understood as an instantaneous act, meaning an act *only* occurring at a particular moment in time?[187] If so, then a 'simple' breach has occurred of the kind envisaged in article 14(1) ARSIWA—not a continuing breach. In *Paushok*, the Tribunal considered an allegation concerning negotiations that occurred between the Claimants' subsidiary and the Respondent about a stability agreement, and found that such negotiations 'were a discrete event in the course of the relations . . . which lasted for a few months', were not raised again thereafter, and thus 'cannot be seen as a continuing act'.[188] Likewise, in *Bilcon*, the Tribunal regarded the government's imposition of restrictions on blasting, its requirement of a study and its referral of a project to a review panel as not constituting ongoing acts, even though they continued to be in place over a

[180] *Société Générale v Dominican Republic* (n 15) para 88; see *Paushok* (n 66) para 494 (citing *Société Générale v Dominican Republic* with approval); *ABCI v Tunisia* (n 58) para 178 ('En tout état de cause, le principe applicable est toujours que le fait illicite doit se rattacher à une obligation existante au moment de la violation').

[181] See eg *Fengzhen Min v Republic of Korea*, ICSID Case No ARB/20/26, Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules (18 June 2021) paras 86–90.

[182] *MCI Power* (n 53) para 93.

[183] *Walter Bau* (n 80) para 13.1.

[184] *SGS v Philippines* (n 21) paras 35–6, 51.

[185] ibid para 168.

[186] *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4, Award (20 February 2015) para 32.

[187] See *Pac Rim* (n 36) paras 2.68–2.71 (distinguishing between one-time, continuing and composite acts); *Carlos Ríos and Francisco Ríos v Republic of Chile*, ICSID Case No ARB/17/16, Award (11 January 2021) paras 187, 189, 201 (same). For academic commentary on instantaneous breaches, see Crawford, *State Responsibility: The General Part* (n 2) 254–8; Salmon (n 168) 384–6.

[188] *Paushok* (n 66) para 498.

period of time.[189] An act of expropriation, by its nature, cannot itself be a continuing breach, given that it only happens at the moment when there is a permanent deprivation of property—no sooner and no later.[190] Yet the BIT or other instrument might contain language that affects such an interpretation. The NAFTA, for example, accorded protections as against 'measures adopted or maintained by a Party';[191] such language was understood as addressing measures that had been adopted before its entry into force but that continued to exist thereafter.

Secondly, and relatedly, are matters following the initial act best characterized as *effects* of the initial act rather than a continuation of wrongful conduct? The Tribunal in *Société Générale v Dominican Republic* confirmed that if 'it is merely the continuing effects of a one-time individual act that as such has ceased to exist that is involved, then the non-retroactivity principle fully applies'.[192] As indicated above, an act of expropriation for which compensation is not paid remains a wrongful act only at the moment of expropriation, even though the effects of that act (a lack of compensation) continue thereafter. In *Phosphates in Morocco*, the PCIJ famously concluded that the decree issued by the Moroccan Ministry of Mines (at the time of French colonial rule), which was the 'real cause' of the dispute, occurred prior to the period of the Court's jurisdiction. The Court's decision may be read as concluding that the relevant act did not continue, even though the monopoly that arose from the decree—causing harm to Italians—had lasting effects. In short, at the time when the allegedly wrongful act occurred, it was immediately attributable to France and immediately established international responsibility as between France and Italy, and consequently was a wrongful act occurring prior to the Court's temporal jurisdiction.[193]

As implied by *Phosphates in Morocco*, one way to think about this dichotomy is in reference to primary and secondary rules of State responsibility. The breach of the primary rule (a prohibition on expropriation) occurs at time X; thereafter, application of secondary rules (an obligation of reparation for the breach) does not transform the breach of the primary rule into a breach of a continuing character. Rather, application of the secondary rules all relate back to the breach of the primary rule, which occurred only at time X. Although in the case of expropriation, there may be some intermingling of these concepts (the primary rule may only prohibit expropriation *without compensation*), nevertheless that breach of the primary rule still only occurs at time X, and failure to remedy that breach is best understood as concerning a different legal relationship governed by secondary rules. Another way to think about this concept is to ask whether cessation remains a relevant remedy; if not, then the breach is not continuing.[194]

[189] *Bilcon of Delaware and others v Government of Canada*, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) para 269.

[190] See eg *Pey Casado* (n 16) para 608 ('[L]e Tribunal considère que l'expropriation dont se plaignent les demanderesses doit être qualifiée d'acte instantané, antérieur à la date d'entrée en vigueur de l'API. Cette analyse est conforme à la position de principe de la Cour européenne des droits de l'homme qui considère l'expropriation comme un acte instantané et qui ne crée pas une situation continue de « privation d'un droit »'); see also Douglas, *The International Law* (n 16) 334.

[191] NAFTA (n 45) art 1101(1).

[192] *Société Générale v Dominican Republic* (n 15) para 90; see also *Impregilo* (n 66) para 312 (noting that, while acts taking place before the entry into force of the BIT could have consequences thereafter, this does not mean that they have a 'continuing character', as 'they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date'); *ABCI v Tunisia* (n 58) para 179 ('Les principes qui régissent la responsabilité de l'Etat font une distinction claire entre la nature de l'acte et ses effets; ceux-ci peuvent se poursuivre mais n'affectent pas la date à laquelle la violation de l'obligation juridique est intervenue'); *Bilcon* (n 185) para 268 ('an act can be complete even if it has continuing ongoing effects').

[193] *Phosphates in Morocco*, Judgment on Preliminary Objections [1938] PCIJ Rep Ser A/B No 74, 28.

[194] Pauwelyn (n 173) 420–1.

Certain ancillary issues may arise in the context of a breach having a continuing character. For example, if the BIT contains a limitation period on when a claim may be filed, the tribunal must consider the moment when the limitation period should begin running. One possibility is that the period begins running only when the breach having a continuing character ceases to occur.[195] Another possibility is that the period begins running at the point that the breach commenced, provided that the claimant had knowledge of the breach. In *Berkowitz (Spence)*, the Tribunal concluded that while certain conduct may be a continuing breach, 'such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely to draw a line under the prosecution of historic claims'.[196] Since the NAFTA set the time-bar by referring to the moment when the breach 'first' occurred, the Tribunal in *Resolute Forest Products* found that the relevant moment for applying a three-year limitation period to a continuing breach is when the State's action 'is first perfected and can be definitively characterized as a breach of the relevant obligation',[197] in conjunction with the Claimant becoming aware of that breach.[198] Similarly, in *Carlos Ríos*, a majority of the tribunal found that the language of the Chile–Colombia Free Trade Agreement called for the period to begin running from the time that the Claimant acquired knowledge of the first or initial measure of the continuing breach.[199]

III. BREACHES HAVING A COMPOSITE CHARACTER

An alternative way to overcome the effects of the rule of non-retroactivity is to invoke the concept of a breach having a composite character. Article 15(1) ARSIWA provides that the 'breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act'.[200] Further, under article 15(2), in 'such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation'.[201]

In the context of investor–State arbitration, acts occurring prior to the temporal jurisdiction of a tribunal might combine with acts falling within that jurisdiction so as

[195] *United Parcel Service of America Inc v Government of Canada*, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) para 28 ('continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly'); see also *Carlos Ríos and Francisco Ríos v Republic of Chile*, ICSID Case No ARB/17/16, Partial Dissenting Opinion of Oscar M Garibaldi (29 December 2020) (finding that the *dies a quo* for a continuing breach can be established only at the time when the wrongful act ends).

[196] *Berkowitz (Spence)* (n 20) para 208; see *Société Générale v Dominican Republic* (n 15) para 93.

[197] *Resolute Forest Products Inc v Government of Canada*, UNCITRAL, PCA Case No 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) para 158; see *Apotex Inc v United States of America*, ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) paras 325–7 (declining under NAFTA to allow later acts of a continuing breach to extend the limitation period with respect earlier acts). Separately, if a claimant pleads a large group of acts as constituting a generic breach, the tribunal may view those acts collectively when considering the application of a time bar. See *Grand River Enterprises Six Nations, Ltd, et al v United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) para 81 (declining to view the contested measures of 46 US states as a series of acts entailing multiple limitation periods).

[198] *Resolute Forest Products* (n 197) para 167. It is sufficient that the claimant know that it has suffered loss or damage; it need not also know of the extent of that loss or damage (*Mondev* (n 30) para 87).

[199] *Carlos Ríos* (n 187) paras 199–224.

[200] ARSIWA (n 2) art 15(1). For the ILC's commentary to art 15, see Crawford, *The International Law Commission's Articles on State Responsibility* (n 2) 141–4. For academic commentary, see Crawford, *State Responsibility: The General Part* (n 2) 265–9; Salmon (n 172) 391–3; Rubins and Love (n 16) 485.

[201] ARSIWA (n 2) art 15(2).

to constitute a composite breach at the later point in time.[202] Like the concept of breaches of a continuing character, the composite breach concept is also well recognized in contemporary jurisprudence. The Tribunal in *Société Générale v Dominican Republic* observed:

> While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force.[203]

The concept of 'aggregation' means that the individual acts typically are not the same in nature; they are different in nature and then, when aggregated, result in a composite act that breaches the treaty.[204] There are two types of breaches of a composite character that may be especially pertinent in the context of a BIT. The first type is a denial of justice before national courts. For example, if a foreign investor pursues local remedies and experiences certain delays or impediments in local courts of one kind or another starting before entry into force of the BIT, the tribunal may conclude that the difficulties, when viewed collectively, only crystalized into being a denial of justice after entry into force.[205]

The second type is that of a 'creeping' expropriation, which the *Generation Ukraine* Tribunal described as 'a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates a situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property'.[206] Several tribunals, such as that in *Tecmed*, have characterized the situation as a series of acts that, over time, 'converge' so as to constitute the expropriation.[207] Assuming that the final act crystalizing in the indirect expropriation occurs after the BIT's entry into force, then the BIT's expropriation standard is not being applied retroactively, but only to the 'final result of that convergence'.[208]

For example, in *Carlos Ríos*, Chile had allegedly expropriated the Claimants' investments in Santiago's bus transportation system through a combination of failing: to carry out infrastructure renovations; to control fare evasion and vandalism; to authorize fleet increases; and to restore a contractual equilibrium; as well as wrongful contractual fines, the elimination of certain routes, and a seizure of the Claimants' terminals. The Tribunal found that such acts collectively formed a breach by composite act and, referring to article 15 ARSIWA, the breach occurred at the time when the last action or omission occurred that was sufficient to constitute the expropriation.[209] As that breach fell within the time limitation period allowed for the filing of

[202] As was the case for allegations of a breach of continuing character, the tribunal may refrain from deciding, until the merits stage, whether there has been a breach of a composite character sufficient to establish jurisdiction. See eg *Fengzhen Min* (n 177) paras 91–6.
[203] *Société Générale v Dominican Republic* (n 15) para 91; see also *Pac Rim* (n 36) para 2.71; *Carlos Ríos* (n 187) para 189.
[204] See eg *Pac Rim* (n 36) para 2.88 (finding that the failure to issue permits and a concession both before and after the claimant's acquisition of the relevant nationality are similar acts, 'the aggregation of which does not produce a different composite act under international law').
[205] *Chevron v Ecuador* (n 15) para 301.
[206] *Generation Ukraine* (n 22) para 20.22 (emphasis in original).
[207] *Tecmed* (n 19) para 62; see also *Société Générale v Dominican Republic* (n 15) para 92; *Walter Bau* (n 80) para 9.91.
[208] *Tecmed* (n 19) para 62.
[209] *Carlos Ríos* (n 187) paras 189–98.

claims, the claim was not time barred. By contrast, in *Berkowitz (Spence)*, the Tribunal declined to find an expropriation consisting of acts that continued into the period when the claims could be filed. In that instance, the Tribunal held that certain plots of land had been subject pre-BIT to a direct expropriation, and that later acts were dependent on these earlier formal acts and not 'meaningfully separable' from them.[210]

IV. CONCLUSION

Writing a decade after the adoption of the ARSIWA, the final ILC special rapporteur for the project, James Crawford, noted that, while articles 13–15 'were relatively uncontroversial when they were adopted, they have proved problematic in their application'.[211] With respect to investment law, Noah Rubins and Ben Love lament that tribunals have 'produced a body of inconsistent case law that often falls short of clearly delineating basic temporal concepts'.[212] No doubt those concerns have some validity, and were the ILC to conclude its State responsibility project today, it might provide more granular guidance in light of the past two decades of investor–State jurisprudence.

At the same time, there are reasons to regard the ARSIWA as having successfully provided the framework needed for law in this area. First, the central focus for any investor–State arbitration must be on the primary rules—meaning the provisions of the BIT—with the ARSIWA (and the VCLT) only operating in the background. As such, it is probably a mistake to pursue formulation of secondary rules that provide overly detailed guidance, as it is unlikely to successfully capture the diversity of the thousands of bilateral and multilateral treaties. Crafting a secondary rule that speaks validly to that diversity inevitably calls for broad, conceptual norms of precisely the type that appear in the ARSIWA.

Secondly, any inconsistencies in the jurisprudence of investor–State decisions in this area are not necessarily a product of inadequate law. As Rubins and Love themselves observe, difficult facts arising in these cases contribute greatly to the uncertainty and perceived inconsistency.[213] No matter how clear or detailed the manner in which one might express rules about retroactivity as they relate to procedural or substantive matters, or about instantaneous acts, continuing acts or composite acts, the application of those rules to complex factual scenarios is still likely to result in different outcomes for what may from afar appear to be similar scenarios.

Thirdly, what initially may appear to be inconsistent decisions ultimately may not be so. Close scrutiny of the jurisprudence that takes into account the diversity of the primary rules, and the complexity of the facts to which they are being applied, may transform what seems inconsistent into a relatively comprehensible pattern. The overall objective of this article was to suggest such a pattern for investor–State jurisprudence in this area. There will, of course, always be some decisions that fall outside the conventional understanding of the law, but that is likely to be inevitable no matter how clearly one seeks to illuminate that law.

[210] *Berkowitz (Spence)* (n 20) paras 269, 271–2.
[211] Crawford, *State Responsibility: The General Part* (n 2) 240.
[212] Rubins and Love (n 16) 481.
[213] ibid.

Finally, the danger in overly detailed codification is that it can inhibit the development of the law over time, shaped through a crucible of experience rather than logic. The wide range of arbitral decisions noted in this article reveals a repeated effort by tribunals to clarify the law through its application to concrete situations, no doubt shaping the law to some extent along the way. At least for lawyers from common-law jurisdictions, that is a perfectly sensible way to run a legal system.

While it would be excessive to say that the secondary rules in this area have provided the perfect means for addressing temporal issues relating to BIT dispute resolution, they appear to have generated a comprehensible framework within which investor–State tribunals are successfully operating.