4

Consent to the arbitration of investment disputes

Rule 20. The host contracting state party must have consented to the arbitration of investment disputes with a claimant having the nationality of another contracting state party pursuant to the provisions of the investment treaty and, where relevant, the ICSID Convention. Such consent must be valid at the time the arbitration proceedings are commenced.[1]

Rule 21. In addition to the acquisition of an investment in the host contracting state party pursuant to Rule 22 and Rule 23, the claimant must have satisfied any conditions precedent to the consent of the host contracting state party to the arbitration of investment disputes as stipulated in the investment treaty.

A. THE SCOPE OF ISSUES RELATING TO CONSENT

317. Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal. In the taxonomy outlined in Chapter 3, this has been described as an issue of jurisdiction, together with issues relating to the proper scope of that adjudicative power, which are dealt with in Chapters 6–8. The existence of the arbitral tribunal's adjudicative power is also predicated upon the national of another contracting state to the investment treaty having made an investment in the host contracting state. This second condition gives rise to a great number of complexities that are examined in detail in Chapter 5. In contrast, the range of issues pertaining to whether or not the respondent host state has consented to the arbitration of investment disputes for the purposes of Rule 20 is relatively narrow. In the vast majority of cases the question is resolved simply by reference to an express provision of the investment treaty, coupled by a verification that the investment treaty is in force for the relevant contracting state parties. Exceptionally, questions might arise concerning the geographical scope of the respondent state's consent, such as for overseas

[1] *Zhinvali v Georgia* (Preliminary Objections) 10 ICSID Rep 3, 98/407; *Tradex v Albania* (Preliminary Objections) 5 ICSID Rep 47, 58.

territories in respect of which the respondent state exercises sovereign powers.[2] Also, if the investment treaty envisages a form of provisional application, such as the Energy Charter Treaty, this may entail a delicate inquiry as to whether the consent of the respondent host state to investment arbitration is valid for the adjudication of the particular investment dispute.[3]

318. The difficulty facing tribunals is one of characterisation: namely, whether the particular issue alleged to constitute an impediment to the tribunal's power to adjudicate the investment dispute is one relating to the consent to investment arbitration (jurisdiction),[4] admissibility or seisin. The importance of distinguishing jurisdictional issues from those pertaining to admissibility or seisin was considered in Chapter 3.[5] The task for this chapter is to distinguish those conditions prescribed in an investment treaty that are properly characterised as 'conditions precedent to the consent of the host contracting state party to the arbitration of investment disputes' for the purposes of Rule 21, from other stipulations in the investment treaty that relate to the admissibility of claims or the seisin of the tribunal. By 'seisin' of the tribunal is meant those procedural steps that must be taken by the claimant to commence arbitration proceedings before a tribunal constituted pursuant to an investment treaty.

(i) 'Fork in the road' provisions

319. Many investment treaties allow the investor to choose between different judicial fora for the submission of the defined categories of investment disputes.[6] In accordance with what has come to be known as a 'fork in the road' clause, once that election is made by the investor, it is final and irrevocable. If the investor's election is not in favour of arbitration before an international tribunal, then it precludes the tribunal's jurisdiction over the same dispute. An election in favour of the international tribunal is, therefore, a 'condition precedent to the consent of the host contracting state party to the arbitration of investment disputes' for the purposes of Rule 21.[7]

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[2] E.g. *Petrobart v Kyrgyz Republic* (Merits) (whether the UK had extended the application of the BIT to Gibraltar).

[3] E.g. *Kardassopoloulos v Georgia* (Preliminary Objections).

[4] Such as a provision in the treaty requiring the exhaustion of local remedies before the commencement of international arbitration: *Maffezini v Spain* (Preliminary Objections) 5 ICSID Rep 396, 403/35–6; *TSA Spectrum v Argentina* (Preliminary Objections) para. 107; *Wintershall v Argentina* (Preliminary Objections) paras. 119–22.

[5] See paras. 291 and 292 above.

[6] E.g.: Chile Model BIT, Art. 8(3), UNCTAD Compendium (Vol. III, 1996) 147; Iran Model BIT, Art. 12(3), *ibid*. (Vol. VI, 2002) 483; Benin Model BIT, Art. 10(2) ('Une fois qu'un investisseur a soumis aux juridictions de la Partie contractante concernée, soit a l'arbitrage international, le choix de l'une ou de l'autre de ces procédures reste définitif'), *ibid*. (Vol. IX) 283; China Model BIT 1997, Art. 9(2) ('Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final'), Appendix 5.

[7] The 'fork in road' provision has been curiously described by one tribunal as a 'matter of public policy': *Maffezini v Spain* (Preliminary Objections) 5 ICSID Rep 396, 410/63.

320. The 'fork in the road' is thus in reality a junction leading to several one-way streets representing alternative judicial fora, which usually include a combination of one or more of the following:[8]

- municipal courts of the host state;
- a court or tribunal previously chosen by the investor and the host state in a forum selection clause;[9]
- international arbitration either in the form of an *ad hoc* arbitration pursuant to the UNCITRAL Rules or institutional arbitration under the ICSID Arbitration or Additional Facility Rules.

321. The rationale underpinning the 'fork in the road' provision in investment treaties is clearly the avoidance of multiple proceedings in multiple fora in relation to the same investment dispute. In more colloquial terms, it is designed to prevent the investor having several bites at the cherry. The tribunal in *Lauder v Czech Republic* described the purpose of the provision as follows:

> The purpose of [the fork in the road provision in USA/Czech Republic BIT] is to avoid a situation where the same investment dispute … is brought by the same claimant … against the same respondent (a Party to the Treaty) for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute.[10]

322. The most detailed analysis of the 'fork in the road' is to be found in the *Vivendi v Argentina* decisions.

322C. Compañia de Aguas del Aconquija, SA and Compagnie Générale des Eaux/Vivendi Universal v. Argentine Republic No. 1[11]

The 'fork in the road' provision was contained in Article 8 of the Argentina/France BIT:

1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
2. If such dispute could not be resolved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:

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[8] Other examples of 'fork in the road' provisions may be found in the Energy Charter Treaty, Art. 26(2)(3), Appendix 3 and the following model BITs: Chile Model BIT, Art. 8(3), UNCTAD Compendium (Vol. III, 1998) 147; Iran Model BIT, Art. 12(3), *ibid*. (Vol. VI, 2002) 483; Peru Model BIT, Art. 8(3), *ibid*. 497; USA Model BIT, Art. 9(3), *ibid*. 507; Austria Model BIT, Art. 13, *ibid*. (Vol. VII) 265; Benin Model BIT, Art. 9(2), *ibid*. (Vol. VIII) 283.

[9] The requirements for such a selection in an investment contract were considered in: *Lanco v Argentina* (Preliminary Objections) 5 ICSID Rep 367, 377–8/24–8.

[10] (Merits) 9 ICSID Rep 62, 85-6/161. See also *Casado v Chile* (Merits) paras. 482 *et seq*.

[11] (Merits) 5 ICSID Rep 153; *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340.

> – either to the national jurisdictions of the Contracting Party involved in the dispute;
> – or to international arbitration in accordance with the terms of paragraph 3 below.
>
> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.[12]

Paragraph 3 of Article 8 gives the investor the choice of either *ad hoc* arbitration pursuant to the UNCITRAL Rules or ICSID arbitration. In this case the claimants opted for the latter.

The interpretation given to this clause by the tribunal and the *ad hoc* committee is strictly *obiter*, because the claimant was found to have made a valid choice of ICSID arbitration and the jurisdiction of the tribunal over the investment dispute submitted by the claimants was upheld.[13] The mere existence of the dispute resolution clause in the Concession Contract between the investor and the Tucumán Province did not, therefore, constitute an election by the investor in favour of the 'national jurisdictions' of Argentina. Both the tribunal and the *ad hoc* committee did, nonetheless, consider the hypothetical effect of the claimant bringing its contractual grievances relating to its investment before the Tucumán courts in terms of the 'fork in the road' in Article 8 of the BIT, and came to opposite conclusions. This was despite the common ground on the clear distinction between contractual claims and claims based on the BIT. The tribunal found that, had the investor brought its contractual claims to the Tucumán courts pursuant to the dispute resolution clause in the Concession Contract, this would not have constituted a waiver of any right subsequently to submit treaty claims to an international tribunal pursuant to Article 8 precisely because of the different legal foundations of these causes of action.[14] The *ad hoc* committee, on the other hand, attached significance to the broad formulation of Article 8(1) as it refers to 'any disputes relating to investments made under this Agreement', thereby encompassing contractual *or* treaty claims arising out of the same investment.[15] Thus if the claimants had brought contractual claims against the Tucumán Province before the

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[12] *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340, 355/53.

[13] *Ibid*. 360–2/72–80.

[14] The reasoning provided by the tribunal for this conclusion is sparse: 'submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not … have been the kind of choice by Claimants of legal action in national jurisdictions (*i.e.* courts) against the Argentine Republic that constitutes the "fork in the road" under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention.' *Vivendi v Argentina No. 1* (Merits) 5 ICSID Rep 299, 316/55.

[15] *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340, 356/55. The *ad hoc* committee compared Article 8 of the BIT with Article 11 of the same instrument containing a narrower formulation for the submission of disputes to the state/state arbitration procedure which concerns disputes 'concerning the interpretation or application of this Agreement' and also Article 1116 of the NAFTA which allows an investor to submit to arbitration 'a claim that another Party has breached an obligation' under Chapter 11 (*ibid*.).

> Tucumán courts, it would have thereby foreclosed any recourse to an investment treaty tribunal based on a different cause of action.[16]

323. If the *ad hoc* committee's interpretation in *Vivendi* is correct, the 'fork in the road' provision would undoubtedly have a chilling effect on the submission of disputes by investors to domestic judicial fora even where the issues in contention are purely contractual, tortious or even administrative, and clearly within the domain of municipal law. One would expect, as a result, an increase in claims simply not ripe for international adjudication on the merits. A claimant investor's premature recourse to an investment treaty tribunal, with the attendant time and cost this involves, would be difficult to condemn as a matter of policy because the investor would have a legitimate interest to avoid jeopardising its 'day in court' before an international tribunal. This would put both parties in a difficult position because the investor might be compelled to play what is often its best litigation card too early before its main grievances have ripened and thus risk having its treaty claims dismissed on the merits, whereas the host state would be deprived of the opportunity to dispense adequate remedies through its own courts and instead face more numerous and expensive international proceedings. One can detect both these consequences in the *Vivendi v Argentina*, *SGS v Pakistan* and *SGS v Philippines* cases.

324. Such a development is not inevitable. A 'fork in the road' provision cannot, by any reasonable interpretation of this type of clause, prevent an investor from bringing a treaty claim in respect of a grievance unrelated to a different grievance that was previously submitted to a domestic court, even if such complaints relate to the same investment. For instance, an application by the investor to an administrative court to challenge an increase in the municipal rates for the disposal of waste from the investor's factory cannot prevent the investor from bringing a claim to an international tribunal for the wholesale expropriation of the factory a week later by a presidential decree. These grievances would constitute different 'investment disputes' for the purposes of the provision. This point merely illustrates the fact that the generality of the 'fork in the road' clause must be subject to some limitations. It is more than plausible, and certainly desirable, to further distinguish 'investment disputes' by the *object* of the claim.[17] To take the previous example, the investor's swift administrative court application might be partially successful in reducing the municipal charges. But the unforeseen burden of this additional expense might nevertheless destroy the financial viability of the factory so that it ultimately must be closed down. The investor then brings a claim for a breach of the national treatment standard in the relevant investment treaty, having discovered that no other factory in the same industry

[16] *Ibid*.

[17] There is equivocal support for such an approach in: *Olguín v Paraguay* (Preliminary Objections) 6 ICSID Rep 156, 162/30; *Genin v Estonia* (Merits) 6 ICSID Rep 236, 291–2/330–4;

was subject to the hike in municipal rates. These two claims presented to two different judicial fora address the same measure attributable to the host state in relation to the same investment. But they are easily conceptualised as different 'investment disputes' under the 'fork in the road' provision because the object of the claim is different: before the administrative court it is to quash an administrative decision; whereas before the investment treaty tribunal it is to obtain compensation for prejudice to an investment.

325. This approach of focusing on the object of the claim is preferrable to a test based upon the legal nature of the obligation forming the basis of the claim.[18] If the preclusive effects of the 'fork in the road' provision can be avoided simply by pleading different types of causes of action, then it will be interpreted out of practical existence. For instance, if a claimant were to sue the host state for damages in the tort of conversion in a municipal court and then attempt to sue for the same damages in a claim for expropriation before an international tribunal, this earlier claim would constitute an earlier election of a judicial forum for the purposes of a 'fork in the road' provision.

326. An analysis of investment treaties reveals that the 'fork in the road' provision is often embedded in treaties which allow the investor to invoke the jurisdiction of an international tribunal with respect to a broad sphere of 'investment disputes' that contemplates both municipal and international law claims.[19] This gives rise to the possibility of parallel claims and hence a more acute need to regulate the competing jurisdictions through the 'fork in the road' mechanism.[20] Treaties that confine the scope of any submission to international arbitration exclusively to claims based on the minimum treaty standards do not usually contain a 'fork

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[18] The approach favoured in: *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340, 356/55; *CMS v Argentina* (Preliminary Objections) 7 ICSID Rep 494, 511/80 ('Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for a breach of contract, this would not have prevented submission of the treaty claims to arbitration'); *Middle East Cement v Egypt* (Merits) 7 ICSID Rep 178, 187/71; *Lauder v Czech Republic* (Merits) 9 ICSID Rep 62, 86/162–3; *Azurix v Argentina* (Merits) para. 90; *Enron v Argentina* (Merits) paras. 97–8. In contrast, in *Desert Line v Yemen* (Merits) the object of the claim submitted to domestic arbitration appears to have been different to the claim submitted to investment treaty arbitration for the purposes of the purported 'fork in the road' provision in Art. 11 of the Oman/Yemen BIT: the claim before the BIT tribunal was a denial of justice in respect of the failure of the Yemeni Government to respect the award rendered by the domestic arbitral tribunal (*ibid*. para. 136).

[19] See, e.g.: Chile Model BIT, Art. 8(3), UNCTAD Compendium (Vol. III, 1996) 148; Peru Model BIT, Art. 9(1), (Vol. VI, 2002) 497; USA Model BIT, Art. 9(3), *ibid*. 507; Austria Model BIT, Art. 13, *ibid*. (Vol. VII) 265 (but only if the dispute has been submitted to a municipal court *and* a judgment has been rendered); Benin Model BIT, Art. 9(2), *ibid*. (Vol. IX) 283.

[20] A novel solution to this problem that may not deter recourse to the local courts may be found in the Finland Model BIT: 'An investor who has submitted to a national court may nevertheless have recourse to one of the arbitral tribunals mentioned in paragraphs 2(b) to (d) of this Article [ICSID, ICSID Additional Facility and UNCITRAL] if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case', Art. 9(3), *ibid*. (Vol. VII, 2002), 292.

in the road' provision. The risk of competing jurisdictions still exists because, in 'monist' jurisdictions where treaties become part of domestic law and thus enforceable before municipal courts, the investor could bring claims based explicitly on the treaty standards in multiple fora. This remedial possibility is unlikely to be often utilised by investors in practice, and there is no reported precedent to date. The 'fork in the road' clause is therefore less relevant to such treaties.

(ii) Requirement of waiver of local remedies

327. The most notorious example of a requirement to waive local remedies[21] is Article 1121 of NAFTA, which is entitled 'Conditions Precedent to Submission of a Claim to Arbitration' and directs claimants to:

> [W]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that it alleged to be a breach of an obligation under the NAFTA.[22]

328. This provision does not relate to the consent of the contracting state parties of NAFTA to the arbitration of investment disputes; rather it is a rule concerned with the seisin of the tribunal. It is a procedural formality that must be complied with in order to commence an arbitration under Chapter 11 of NAFTA.

329. In *Waste Management v Mexico No. 1*,[23] the status of Article 1121 of NAFTA and its scope divided the tribunal. The majority appears to have considered non-compliance with Article 1121 as negating its jurisdiction, whereas the dissenter characterised the issue as one of admissibility.[24] The majority's approach led to the draconian result that non-compliance in this case compelled the claimant investor to commence fresh arbitration proceedings.[25] Labelling the issue as one of admissibility would have avoided this result, but it is an inaccurate label: admissibility goes to the suitability of the particular *claim* for adjudication; whereas the failure to comply with Article 1121 had nothing to do with any defect in the formulation of the claim under Chapter 11 of NAFTA. What was in issue was whether the tribunal had been properly seised of the claim.[26]

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[21] See also: *ibid*.; UNCTAD Compendium (Vol. VII) 292; Canada Model BIT, Arts. 26(1)(e), 26(2)(e), *ibid*. (Vol. XIV) 239–40.

[22] Article 1121 exempts 'proceedings from injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party'. See Appendix 3. A similar provision in Art. 10.18.2 of the Free Trade Agreement between the Dominican Republic, Central America and the USA (CAFTA) was considered in: *Railroad v Guatemala* (Preliminary Objections).

[23] (Merits) 5 ICSID Rep 443.

[24] *Waste Management v Mexico No. 1* (Merits: Dissenting Opinion) 5 ICSID Rep 462, 478–80/56–63.

[25] Which it promptly did: *Waste Management v Mexico No. 2* (Preliminary Objections) 6 ICSID Rep 549.

[26] See further: *Ethyl v Canada* (Preliminary Objections) 7 ICSID Rep 12, 40/91; *Mondev v USA* (Merits) 6 ICSID Rep 192, 203/44.

330. In relation to the scope of Article 1121, the majority in *Waste Management* found that there was an overlap between the Mexican court and domestic arbitration proceedings brought by Waste Management[27] relating to non-compliance with the obligations of guarantor assumed under a line of credit agreement with the state owned entity, on the one hand, and the submission to the ICSID tribunal, on the other, because 'both legal actions have a legal basis derived from the same measures'.[28] By pursuing these proceedings simultaneously, Waste Management's conduct was found to be incompatible with the terms of Article 1121.[29] The majority was correct to point out that:

> It is clear that the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.[30]

331. In contradistinction, the dissenting opinion accentuated the difference in the causes of action in the different fora as being 'local commercial claims in the Mexican tribunals, and international treaty claims before this Tribunal'.[31] The claimant's concurrent legal proceedings in local fora could not, on this basis, fall within the purview of the waiver requirement in Article 1121. And the reason the dissenter's interpretation must be rejected is that no local court proceedings would ever fall within the scope of Article 1121.

(iii) Periods for negotiation before commencing arbitration proceedings

332. The preponderance of BITs contain provisions that direct the disputing parties to attempt to resolve their differences by negotiation before arbitration proceedings are instituted at the election of the claimant investor.[32] Minimum

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[27] More precisely, Waste Management's Mexican subsidiary.

[28] *Waste Management v Mexico No. 1* (Merits) 5 ICSID Rep 443, 457–9/27.

[29] *Ibid*. 460–1/31.

[30] *Ibid*. 460/28.

[31] *Waste Management v Mexico No. 1* (Merits: Dissenting Opinion) 5 ICSID Rep 462, 464/8, 470/28 ('There must be, and is, a distinction to be drawn in juridical terms between the legal obligations of Mexico under Mexican law and the legal obligations of Mexico under its international treaty obligations imposed by NAFTA').

[32] Asian–African Legal Consultative Committee Model BIT, Art. 10(ii), UNCTAD Compendium, (Vol. III, 1996), 121; Chile Model BIT, Art. 8(1), *ibid*. 147; China Model BIT, Art. 9(1), *ibid*. 154; Switzerland Model BIT, Art. 8(1), *ibid*. 180; Egypt Model BIT, Art. 8(1), *ibid*. (Vol. V, 2000) 296; France Model BIT, Art. 8, *ibid*. 305; Indonesia Model BIT, Art. 8(1), *ibid*. 313; Jamaica Model BIT, Art. 10(1), *ibid*. 321; Malaysia Model BIT, Art. 7(3)(a), *ibid*. 329; Sri Lanka Model BIT, Art. 8(1), *ibid*. 343; Cambodia Model BIT, Art. 8(1), *ibid*. (Vol. VI, 2002) 466; Croatia Model BIT, Art. 10(1), *ibid*. 476; Iran Model BIT, Art. 12(1), *ibid*. 482; Peru Model BIT, Art. 8(1), *ibid*. 497; Austria Model BIT, Art. 12(1), *ibid*. (Vol. VII) 264; Belgo-Luxembourg Economic Union Model BIT, Art. 10(1), *ibid*. 275; Denmark Model BIT, Art. 9(1), *ibid*. 283; Finland Model BIT, Art. 10

time periods are usually prescribed for this purpose.[33] The following example is taken from the UK Model BIT (2005):

> Disputes … which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the [investor] so wishes.[34]

333. The question that has arisen in several cases is whether the claimant's failure to adhere to the prescribed period for negotiation before commencing arbitration proceedings against the host state creates an impediment to the tribunal exercising jurisdiction or constitutes a breach of a procedural rule

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(1), *ibid*. 293; Germany Model BIT 1998, Art. 11(1), *ibid*. 301; Turkey Model BIT, Art. 7(1), *ibid*. (Vol. VIII) 284; Greece Model BIT, Art. 10(2), *ibid*. 292; Benin Model BIT, Art. 10(1), *ibid*. (Vol. IX) 283; Burundi Model BIT, Art. 10(2), *ibid*. 292; Mauritius Model BIT, Art. 8(1), *ibid*. 299; Mongolia Model BIT, Art. 8(2), *ibid*. 306; Sweden Model BIT, Art. 8(1), *ibid*. 313; Bolivia Model BIT, Art. 10, *ibid*. (Vol. X) 282; Burkina Faso Model BIT, Art. 9(1), *ibid*. 291; Guatemala Model BIT, Art. 8, *ibid*. (Vol. XII) 292; Italy Model BIT, Art 10(1), *ibid*. 301; Kenya Model BIT, Art. 10(a), *ibid*. 308; Uganda Model BIT, Art. 7(1), *ibid*. 317; Romania Model BIT, Art. 9(1), *ibid*. (Vol. XIII) 291; Canada Model BIT, Art. 25, *ibid*. (Vol. XIV) 239; USA Model BIT (2004), Art. 23, Appendix 11; France Model BIT (2006), Art. 8, Appendix 6; Germany Model BIT (2005), Art. 11(2), Appendix 7; China Model BIT (1997), Art. 9(1), Appendix 5; NAFTA Art. 1118, Appendix 3, Energy Charter Treaty, Art. 26(1), Appendix 4.

[33] Asian-African Legal Consultative Committee Model BIT, Art. 10(2), UNCTAD Compendium (Vol. III, 1996) 121; Chile Model BIT, Art. 8(1), *ibid*. 147; China Model BIT, Art. 9(3), *ibid*. 155; Germany Model BIT (1991), Art. 11(2), *ibid*. 172; Switzerland Model BIT, Art. 8(2), *ibid*. 180; UK Model BIT (1991), Art. 8(3), *ibid*. 189–90; USA Model BIT (1994), Art. 9(3)(a), *ibid*. 201; Egypt Model BIT, Art. 8(2), *ibid*. (Vol. V, 2000) 296; France Model BIT (1999), Art. 8, *ibid*. 305; Indonesia Model BIT, Art. 8(2), *ibid*. 313; Jamaica Model BIT, Art. 8(2), *ibid*. 322; Malaysia Model BIT, Art. 7(3)(a), *ibid*. 329; Sri Lanka Model BIT, Art. 8(2), *ibid*. 343; Cambodia Model BIT, Art. 8(2), *ibid*. (Vol. VI, 2002) 466; Croatia Model BIT, Art. 10(1), *ibid*. 476; Iran Model BIT, Art. 11(2), *ibid*. 482–3; Peru Model BIT, Art. 8(2), *ibid*. 497; USA Model BIT (1994; revised 4/1998), Art. 9(3)(a), *ibid*. 507; Austria Model BIT, Art. 12(2), *ibid*. (Vol.VII) 264; Belgo-Luxembourg Economic Union Model BIT, Art. 10(2), *ibid*. 275; Denmark Model BIT, Art. 9(2), *ibid*. 283; Finland Model BIT, Art. 9(2), *ibid*. 292; Germany Model BIT (1998), Art. 11 (1), *ibid*. 301; South Africa Model BIT, Art. 7(1), *ibid*. (Vol. VIII) 276; Turkey Model BIT, Art. 7 (2), *ibid*. 284; Benin Model BIT, Art. 10(2), *ibid*. (Vol. IX) 283; Burundi Model BIT, Art. 10(3), *ibid*. 292; Mauritius Model BIT, Art. 8(2), *ibid*. 299; Mongolia Model BIT, Art. 8(2), *ibid*. 306; Sweden Model BIT, Art. 8(2), *ibid*. 313; Bolivia Model BIT, Art. 10, *ibid*. (Vol. X) 282; Burkina Faso Model BIT, Art. 9(2), *ibid*. 292; Guatemala Model BIT, Art. 8, *ibid*. (Vol. XII) 292; Italy Model BIT, Art 10(3), *ibid*. 301; Uganda Model BIT, Art. 7(2), *ibid*. 317; Ghana Model BIT, Art. 10(1), *ibid*. (Vol. XIII) 283; Romania Model BIT, Art. 9(2), *ibid*. 291; Canada Model BIT, Art. 26 (1)(b), 26(2)(b), *ibid*. (Vol. XIV) 239–40; USA Model BIT (2004), Art. 24(3), Appendix 11; France Model BIT (2006), Art. 8, Appendix 6; UK Model BIT (2005), Art. 8(1), Appendix 10 ('Disputes … which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the [investor] so wishes'); Germany Model BIT (2005), Art. 11(2), Appendix 7; China Model BIT (1997), Art. 9(2), Appendix 5 ('If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor') ; NAFTA, Art. 1120(1)(a), Appendix 3; Energy Charter Treaty, Art. 26(2), Appendix 4 ('If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution').

[34] Art. 8(1), Appendix 10.

relating to the seisin of the tribunal. The answer is that it clearly goes to the seisin of the tribunal rather than its jurisdiction. It would be extraordinary, for instance, if the court at the seat of the arbitration could entertain an application to quash the tribunal's award because it deemed the dispute to have arisen too early, or ruled that any negotation was futile in light of the host state's conduct. And yet that would be the consequence of characterising the issue as one of jurisdiction. Moreover, there is no doubt that a failure to observe a time period for negotiation can be cured by a party's subsequent conduct, such as by instituting fresh proceedings after the expiry of that period. As the Permanent Court of Justice remarked:

> [T]he Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned.[35]

334. Most tribunals have considered that a provision prescribing a time period for negotiation is procedural and therefore capable of being waived or cured by subsequent conduct.[36] This practice can be endorsed but subject to the following caveat. Too often tribunals have been prepared to declare the prospect of any negotiations to be futile in circumstances where the claimant investor has made no real attempt to engage the host state in *bona fide* negotiations. Whilst a provision calling for negotiations over a prescribed period of time is procedural, it should not be rendered a dead letter by condoning a dispute resolution strategy that leaves no room for an amicable settlement. If proceedings are instituted by the claimant investor before the expiry of the prescribed period, then the onus is on the claimant to demonstrate with clear evidence that any further negotiations with the respondent host state would be futile. If this burden of proof is not discharged, then the tribunal should stay its proceedings to allow a *bona fide* negotiation between the parties to proceed. Where the claimant is unable to demonstrate that it has made any effort to engage the host state in settlement discussions, then the tribunal's stay might be accompanied by an adverse order on costs against the claimant in relation to the preliminary phase of the arbitration.[37]

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[35] *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*) 1925 PCIJ (Ser. A) No. 6 (Jurisdiction) 14; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) 1984 ICJ Rep 392, 427–9 (Jurisdiction and Admissibility).

[36] *Ethyl v Canada* (Preliminary Objections) 7 ICSID Rep 12, 37/77, 38–9/84; *Wena v Egypt* (Preliminary Objections) 6 ICSID Rep 74, 87; *Lauder v Czech Republic* (Merits) 9 ICSID Rep 62, 88–91/181–97; *SGS v Pakistan* (Preliminary Objections) 8 ICSID Rep 406, 448-9/184 ('Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction'): *Biwater v Tanzania* (Merits) para. 343. Those tribunals that have interpreted such a provision as jurisdictional include: *Goetz v Burundi* (Merits) 6 ICSID Rep 5, 31–3/90–3; *Enron v Argentina* (Preliminary Objections) 11 ICSID Rep 273, 291/88; *LESI (Dipenti) v Algeria* (Preliminary Objections) para. 32(iv); *Occidental Ecuador No. 2* (Preliminary Objections) para. 94.

[37] As in: *Ethyl v Canada* (Preliminary Objections) 7 ICSID Rep 12, 39–40/87–8.