6
Jurisdiction *ratione materiae*

Rule 25: In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an investment treaty obligation, a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of measures of the host contracting state party relating to the claimant's investment.

Rule 26: In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction *ratione materiae* may extend to counterclaims by the host contracting state party founded upon a contractual obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of matters directly related to the investment.

Rule 27: For the purposes of Rule 25 and Rule 26, the legal foundation of the claims submitted to the tribunal must be objectively determined by the tribunal in ruling upon the scope of its jurisdiction *ratione materiae* in a preliminary decision.

Rule 28: The test for the legal foundation of a claim for the purposes of Rule 27 is whether the facts alleged by the claimant in support thereof are *prima facie* capable of sustaining a finding of liability on the part of the host state by reference to the legal obligation invoked in support of the claim.

Rule 29: Where the host state party's consent to arbitration is stipulated in an investment agreement rather than in an investment treaty, then, subject to the terms of the arbitration clause, the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an international obligation on the treatment of foreign nationals and their property in general international law, an applicable investment treaty obligation, a contractual obligation, a tort, unjust enrichment or a public act of the host state party in respect of measures of the host state relating to the claimant's investment.

Rule 25. In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty,[1] the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an investment treaty obligation, a contractual obligation,[2] a tort, unjust enrichment, or a public act of the host contracting state party, in respect of measures of the host contracting state party relating to the claimant's investment.

A. INVESTMENT TREATY PROVISIONS ON THE SCOPE OF CONSENT TO ARBITRATION

443. A survey of investment treaties reveals the existence of four prototype provisions recording the consent of the contracting state parties to investment treaty arbitration. The first group of treaties permits 'all' or 'any' disputes relating to investments to be submitted to an investment treaty tribunal. This is by far the most prevalent type of clause in BITs.[3] The second group, inspired by the USA Model BIT (1994), restricts the scope of the treaty tribunal's *ratione materiae* jurisdiction to three legal sources for the investor's cause of action:

> For the purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an

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[1] *PSEG v Turkey* (Preliminary Objections) 11 ICSID Rep 434, 460/139.

[2] E.g. *Noble v Ecuador* (Preliminary Objections) para. 176.

[3] Cambodia Model BIT, Art. 8(1), UNCTAD Compendium (Vol. VI, 2002) 466; Iran Model BIT, Art. 12(1), *ibid*. 482; Peru Model BIT, Art. 8(1), *ibid*. 497; Denmark Model BIT, Art. 9(1), *ibid*. (Vol. VII) 283; Finland Model BIT, Art. 9(1), *ibid*. 292; Germany Model BIT, Art. 11 'divergences concerning investments', *ibid*. 301; South Africa Model BIT, Art. 7(1) 'any legal dispute … relating to an investment', *ibid*. (Vol. VIII) 276; Turkey Model BIT, Art. 7(1), *ibid*. 284; Mauritius Model BIT, Art. 8, *ibid*. (Vol. IX) 299; Sweden Model BIT, Art. 8(1), *ibid*. 313. Several model BITs simply refer to 'investment disputes' without defining this term. This provision is likely to be interpreted in the same way as the broad formulation under consideration: Croatia Model BIT, Art. 10(1), *ibid*. (Vol. VI) 476; Belgo-Luxembourg Economic Union Model BIT, Art. 10 (1), *ibid*. (Vol. VII) 275; Mongolia Model BIT, Art. 8, *ibid*. (Vol. IX) 306. Other Model BITs with a wide formulation for 'investment disputes' include: Asian–African Legal Consultative Committee Model BIT, Art. 10(i), UNCTAD Compendium (Vol. III, 1996) 121; Switzerland Model BIT, Art. 8, *ibid*. 180; UK 'Preferred' Model BIT, Art. 8, *ibid*. 189; 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; Netherlands Model BIT, Art. 9, *ibid*. 336; Sri Lanka Model BIT, Art. 8(1), *ibid*. 343; Bolivia Model BIT, Art. 8(1), *ibid*. (Vol. XII) 275; Burkina Faso Model BIT, Art. 9(1), *ibid*. (Vol.XII) 291; 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).

> alleged breach of any right conferred, created or recognised by this Treaty with respect to a covered investment.[4]

444. The third group restricts the subject matter of investor/state arbitration exclusively to alleged violations of the substantive provisions of the treaty itself.[5] It is this type of clause that features in the two most prominent multilateral investment treaties, NAFTA[6] and the Energy Charter Treaty.[7] Finally, there is a fourth group of treaties, whose membership has been in steady decline, that limit the *ratione materiae* jurisdiction of a tribunal to disputes about the quantum payable in the event of a proscribed expropriation.[8]

445. Where the consent to investment treaty arbitration takes the form of either the first or the second prototype, it is evident that the tribunal's *ratione materiae* jurisdiction extends further than claims founded upon an investment treaty obligation. Rule 25 is, therefore, expressed in permissive rather than proscriptive terms as the precise scope of the tribunal's *ratione materiae* jurisdiction must depend upon an interpretation of the host state's consent to arbitration in each individual treaty. Nonetheless, the underlying premise of Rule 25 is that there is no intrinsic impediment to an investment treaty tribunal exercising jurisdiction over claims based upon municipal law obligations. This premise has been a matter of controversy in some precedents. The most fertile ground for debate has been in relation to contractual obligations in an investment agreement with the host state, in circumstances where the consent to arbitration is an expansive form identified as the first category above; viz. 'all disputes arising out of an investment' or wording to similar effect.

446. Another problem encountered in various precedents is the requisite nexus between the measure of the host state complained of and the investment itself. This requires an analysis of the terms 'measure' and 'relating to' in the formulation of Rule 25.

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[4] USA Model BIT, Art. 9(1), UNCTAD Compendium (Vol. VI, 2002) 506; Burundi Model BIT, Art. 8(1), *ibid*. (Vol. IX) 291; Malaysia Model BIT, Art. 7(1), obligations entered into by a Contracting Party and the Investor in relation to an investment and a breach of the rights under the BIT, *ibid*. (Vol. V, 2000) 328; USA Model BIT (2004), Art. 24(1), Appendix 11.

[5] UK 'Alternative' Model BIT, Art. 8(1), UNCTAD Compendium (Vol. III, 1998) 190; Austria Model BIT, Art. 11, *ibid*. (Vol. VII, 2002) 264; Guatemala Model BIT, Art. 8, *ibid*. (Vol. XII) 292; Ghana Model BIT, Art. 10(1), *ibid*. (Vol. XIII) 283.

[6] Arts. 1116, 1117, Appendix 3.

[7] Art. 26(1), Appendix 4.

[8] China Model BIT, Art. 9(3), UNCTAD Compendium (Vol. III, 1998) 155. Many of the first wave of BITs that followed the friendship, commerce and navigation treaties from the communist bloc favoured this approach. A review of these early BITs can be found in: P. Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Ybk Int L* 91. See further Section F below.

B. JURISDICTION OVER CONTRACTUAL CLAIMS

447. A great number of important foreign investments are memorialised in agreements with the host state or its emanations and thus it is hardly surprising that a great number of investment disputes are intertwined with a contractual relationship of this nature. The specific problem of admissibility that arises where the investment agreement contains an exclusive jurisdiction or arbitration clause is considered in Chapter 10. Here we are concerned only with the abstract question of whether an investment treaty tribunal can be vested with jurisdiction *ratione materiae* over contractual claims. The judicial test for determining the legal foundation of a claim is considered in Rule 27 and Rule 28.

447C. SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan[9]

The Government of Pakistan had entered into a contract with SGS in 1994 whereby SGS agreed to provide 'pre-shipment inspection' services with respect to goods to be exported from certain countries to Pakistan.[10] This 'PSI Agreement' contained an arbitration clause that envisaged arbitration in Islamabad in accordance with the Arbitration Act of Pakistan.[11] A dispute arose between the parties as to the adequacy of each other's performance, and the Government of Pakistan terminated the PSI Agreement with effect from 1997.[12] SGS then commenced court proceedings against Pakistan at the place of its domicile in Switzerland, alleging unlawful termination of the PSI Agreement.[13] The Swiss Courts dismissed SGS's claim, at first instance on the basis of the parties' existing agreement to arbitrate, and on appeal due to Pakistan's entitlement to sovereign immunity from jurisdiction.[14] At the same time, Pakistan commenced arbitration proceedings in Islamabad pursuant to the arbitration clause in the PSI Agreement.[15] SGS filed preliminary procedural objections to the arbitration, and also made counterclaims against Pakistan for alleged breaches of the PSI Agreement.[16] SGS then commenced ICSID arbitration proceedings by relying on Pakistan's consent to arbitration in the Switzerland/Pakistan BIT.

Pakistan objected to the jurisdiction of the ICSID tribunal, primarily because the 'essential basis' of all SGS's claims, in accordance with the dictum of the *ad hoc* Committee in *Vivendi*, was a breach of the PSI Agreement and therefore subject to the exclusive jurisdiction of the arbitral

[9] (Preliminary Objections) 8 ICSID Rep 406.
[10] *Ibid*. 407–8/11.
[11] *Ibid*. 408/15.
[12] *Ibid*. 408–9/16.
[13] *Ibid*. 409/20.
[14] *Ibid*. 410/23–4.
[15] *Ibid*. 410/26.
[16] *Ibid*. 411/27–9.

tribunal constituted pursuant to that Agreement.[17] SGS defended its position with respect to the tribunal's *ratione materiae* jurisdiction by submitting in the alternative that either (i) the effect of the 'umbrella clause' in the BIT was to elevate its contractual claims into claims grounded on an alleged breach of the BIT[18] or, (ii) the tribunal had jurisdiction over purely contractual claims based on the general reference to 'disputes with respect to investments' in Article 9 of the BIT, which recorded the contracting state parties' consent to arbitration with investors.[19] The tribunal dismissed SGS's argument based on the 'umbrella clause'[20] and found that it had no jurisdiction over purely contractual claims by attributing a narrow meaning to the wording 'disputes with respect to investments' in Article 9 of the BIT:

> That phrase … while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims.[21]

The tribunal then makes a deduction based on this observation that is controversial:

> [N]o implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.[22]

The tribunal's ruling appears to rest upon an unreasoned assumption that purely contractual claims should not, as a matter of general principle, be covered by the reference to arbitration in BITs. This is problematic, for the

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[17] *Ibid*. 414/43–4.

[18] *Ibid*. 424/98. Article 11 of the Switzerland/Pakistan BIT provides: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.'

[19] *Ibid*. 424/ 100. Article 9 of the Switzerland/Pakistan BIT provides: '(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned. (2) If these conditions do not result in a solution within twelve months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States …'

[20] *Ibid*. 442-6/163–74.

[21] *Ibid*. 441/161.

[22] *Ibid*. The tribunal did, however, leave upon the possibility that the parties could, by special agreement, vest a tribunal established pursuant to a BIT with jurisdiction over purely contractual claims (*ibid*).

> first premise quoted above on the distinction between the factual and legal basis of the claims is entirely neutral on this question. The general language of Article 9 does not expressly carve out contractual claims from its purview; to the contrary, the natural meaning of the words 'disputes with respect to investments' is broad enough to encompass any disputes that are factually related to investments. It is curious, therefore, that the tribunal reversed the burden of persuasion in its analysis of the scope of Article 9 by stating that 'we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract'.[23] Given the plain meaning of the text of Article 9, it was surely incumbent on the tribunal positively to articulate reasons why a more narrow interpretation should be preferred.

448. The tribunal's assumption in *SGS v Pakistan* that contractual disputes should, by their nature, be excluded from the scope of an open-ended reference to investment disputes is refuted by state practice in concluding investment treaties.

449. First, there are numerous BITs that expressly restrict the sphere of disputes that can be referred to international arbitration by the investor to alleged breaches of the substantive provisions of the investment treaty. Article 11 of the Austria Model BIT, for example, provides:

> This Part applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment.[24]

450. Another example of this express limitation can be found in Article 1116 of NAFTA, which states that an investor may submit to arbitration under Chapter 11 'a claim that another Party has breached an obligation' under that chapter.

451. In light of these types of provisions that may be found in investment treaties, it was artificial, in the absence of any further considerations, to place a more limited construction upon the general words used in reference to arbitration in the Switzerland/Pakistan BIT. It was open to the state parties to restrict the *ratione materiae* jurisdiction of international tribunals constituted pursuant to Article 9 of the BIT. They chose not to do so.

452. Secondly, other BITs make an express distinction between contractual claims and treaty claims in the definition of an 'investment dispute'. The USA Model BITs are good examples. Article 9(1) of the USA Model BIT (1994) reads:

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[23] *Ibid*.
[24] Austria Model BIT, Art. 11, UNCTAD Compendium (Vol. VII, 2002) 264.

> For the purposes of this Treaty, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment.[25]

453. The only plausible way to read such a clause is to admit of the possibility of the investor bringing purely contractual disputes arising out of an investment agreement before the treaty tribunal.

454. Thirdly, the contracting state parties to BITs generally employ a form of words for their consent to state/state arbitration which ascribes a more limited *ratione materiae* jurisdiction to the corresponding tribunal than for an investor/state tribunal. In the case of the Switzerland/Pakistan BIT, which is typical of many investment treaties, Article 10 entitled '*Différends entre Parties Contractantes*', defines the *ratione materiae* jurisdiction as '*les différends entre Parties Contractantes au sujet de l'interpretation ou l'application des dispositions du présent Accord*', whereas Article 9 – '*Différends entre une Partie Contractante et un investisseur de l'autre Partie Contractante*' – confers jurisdiction in respect of '*différends relatifs à des investissements entre une Partie Contractante et un investisseur*'. This juxtaposition confirms that the contracting state parties clearly intended a broader scope for 'disputes relating to investments'.

455. Fourthly, in the absence of any previous election by the investor of a different forum (i.e. in an investment contract with the host state), there might be compelling reasons to allow an investor to bring the whole spectrum of its complaints before one tribunal. Where the investment has been made pursuant to a contract with the host state, it is often the case that the investor will have contractual claims and treaty claims, and the questions of fact arising under both will inevitably be intertwined. To avoid the possibility of conflicting judgments and awards, and to promote efficiency and finality in the resolution of disputes relating to investments, it may be appropriate for an investor to submit both types of claims to a single tribunal.

456. Fifthly, the tribunal's assertion in *SGS v Pakistan* that a plain meaning interpretation of Article 9, *prima facie* extending to contractual claims, 'would supersede and set at naught' all valid forum selection clauses in contracts between Swiss investors and Pakistan is incorrect. The very issue of admissibility before the tribunal, which had been extensively pleaded by both parties, was the circumstances in which an ICSID tribunal established pursuant to a dispute resolution clause in a BIT must defer to another forum with jurisdiction over contractual claims.[26] There was no inevitability about Article 9 having the

[25] USA Model BIT, Art. 9(1), *ibid*. (Vol. VI, 2002) 506.
[26] See Chapter 10.

effect postulated by the tribunal, and indeed the *ad hoc* Committee in *Vivendi* had laid the foundation for a test to avoid this invidious result.

457. The tribunal in *SGS v Philippines*[27] came to the opposite conclusion in relation to an identical provision to that considered by the tribunal in *SGS v Pakistan*. Article 8 of the Philippines/Switzerland BIT reads: '*différends relatifs à des investissements entre une Partie contractante et un investisseur*'. According to the tribunal in *SGS v Philippines*, its *ratione materiae* jurisdiction was 'not limited by reference to the legal classification of the claim that is made'[28] and thus was sufficiently broad to encompass contractual claims. The tribunal thus rejected the problematic assumption of the tribunal in *SGS v Pakistan*[29] that contractual claims by their very nature were incapable of falling within this broad definition of the *ratione materiae* jurisdiction of an investment treaty tribunal[30] for reasons similar to those articulated above. The *ad hoc* Committee in *Vivendi* had already laid the foundation for such an approach,[31] which is also consistent with the decision in *Salini v Morocco*.[32] After the *SGS* cases, however, the tribunal in *El Paso v Argentina*[33] appears to have rejected its jurisdiction *ratione materiae* over contractual claims[34] despite the consent to arbitration being phrased in broad terms ('any investment dispute').[35] There was, however, no discussion of the basis for this ruling. A similar decision was rendered in *LESI (Dipenta) v Algeria*.[36]

C. 'MEASURE OF THE HOST CONTRACTING STATE PARTY'

458. Regardless of whether the investment treaty expressly employs the term 'measure' to define the scope of the contracting parties' consent to arbitration, it is self-evident that at the core of any investment dispute must be a measure of

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[27] (Preliminary Objections) 8 ICSID Rep 518.
[28] *Ibid*. 554/131.
[29] *Ibid*. 556/134.
[30] The grounds favouring an interpretation inclusive of contractual claims are set out *ibid*. 554–5/132.
[31] *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340, 356/55 ('Article 8 deals generally with disputes "relating to investments made under [the France/Argentina BIT]"… Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself').
[32] (Preliminary Objections) 6 ICSID Rep 400, 415/61.
[33] (Preliminary Objections).
[34] *Ibid*. para. 65.
[35] *Ibid*. para. 36. Article VII(4) of Argentina/USA BIT.
[36] (Preliminary Objections) para. 25. The wording of Art. 8 of the Algeria/Italy BIT was: 'Tout différend relative aux investissements entre l'un des Etats contractants et un investisseur de l'autre Etat contractant'.

the host contracting state party. For the purposes of Rule 25, the term 'measure' is given the extremely broad meaning that has been attributed to it by the International Court of Justice in the *Fisheries Jurisdiction* case: 'in its ordinary sense the word ["measure"] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby'.[37]

459. The few investment treaties that do employ the term 'measure' also assign it a very broad meaning. For instance, Article 201 of NAFTA defines it as: 'any law, regulation, procedure, requirement or practice'.[38] The only intention that can be discerned from this widest of definitions is that the Contracting States of NAFTA did not employ Article 201 as a device for narrowing the scope of Chapter 11 investment protection obligations. Article 201 of NAFTA in this respect is consistent with the interpretation of 'measure' provided by the International Court in *Fisheries Jurisdiction*.

460. Attempts to deploy the definition of 'measure' as a limiting device have generally failed before investment treaty tribunals. In *Pope and Talbot v Canada*,[39] Canada submitted that a measure must be 'primarily aimed' at the investor[40] or 'relate' to an investor in a 'direct and substantial way'.[41] It followed, according to this submission, that acts of Canada implementing the Softwood Lumber Agreement with the USA were not 'measures'. The tribunal rejected the Canadian submission because the quota allocation system at the heart of the dispute 'is directly conferred or removed from enterprises' and therefore 'it directly affects their ability to trade in the goods they seek to produce'.[42]

461. In *Loewen v USA*,[43] the tribunal also rejected a submission from the USA to the effect that a judgment from a state court could not constitute a 'measure':

> The breadth of this inclusive definition [in Article 201 of NAFTA] … is inconsistent with the notion that judicial action is an exclusion from the generality of the expression 'measures'. 'Law' comprehends judge-made as well as statute-based rules. 'Procedure' is apt to include judicial as well as legislative procedure. 'Requirement' is capable of covering a court order which requires a party to do an act or to pay a sum of money,

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[37] *(Spain v Canada)* 1998 ICJ Rep 432, 460 at para. 66.
[38] The USA Model BIT (2004) contains an identical provision: Section A, Art. 1, Definitions. See Appendix 11.
[39] (Motion to Dismiss) 7 ICSID Rep 55.
[40] *Ibid*. 57/16.
[41] *Ibid*. 61/27.
[42] *Ibid*. 62/33.
[43] (Preliminary Objections) 7 ICSID Rep 425.

while 'practice' is capable of denoting the practice of courts as well as the practice of other bodies.[44]

462. In several cases arising out of the financial crisis in Argentina, tribunals have accepted that 'general measures of economic policy taken by the host state'[45] do not constitute 'measures' pursuant to the investment treaty or Article 25(1) of the ICSID Convention, but that jurisdiction should nevertheless be exercised where such measures 'violate specific commitments given to the investments'.[46] This distinction is nonsensical. A 'measure' is a 'measure': the meaning of this term cannot fluctuate depending upon the ultimate effects a state measure might produce in relation to a particular investor or class of investors. It is preferable to give the widest meaning to 'measure' and look for doctrines of remoteness elsewhere in investment treaty law.

D. THE NEXUS BETWEEN THE MEASURE AND THE INVESTMENT: 'RELATING TO …'

463. There must be a nexus between the particular measure attributable to the host state and the particular rights and interests that comprise the claimant's investment. Sometimes this nexus is made explicit by the investment treaty; sometimes it is not. The USA Model BIT (2004) refers simply to 'investment disputes' as the object of Section B of the BIT on the dispute resolution mechanism for investor/state disputes, but does not define this term. Nevertheless, if the investor opts for ICSID arbitration under Article 24(3)(a), the explicit requirement of Article 25(1) of the ICSID Convention will apply, which states that *ratione materiae* jurisdiction extends to 'any legal dispute *directly arising out of* an investment'. Article 1101 of NAFTA refers to 'measures adopted or maintained by a Party *relating* to … [investors or investments]', which is less emphatic about the extent of the requisite nexus but nevertheless envisages that one should exist. Similarly, the Energy Charter Treaty mentions 'disputes … relating to an Investment' in Article 26(1).

464. The various formulations used in the treaty instruments do not produce substantive differences with respect to the requirement of a nexus between the particular measure and the particular investment. Nor can the absence of specific wording cast doubt over the existence of such a requirement. The difficulty lies in defining the quality or extent of the nexus.

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[44] *Ibid*. 431/40.

[45] *Pan American Energy v Argentina* (Preliminary Objections) para. 63; *CMS v Argentina* (Preliminary Objections) 7 ICSID Rep 494, 500/33.

[46] *Pan American Energy v Argentina* (Preliminary Objections) paras. 64–8; *CMS v Argentina* (Preliminary Objections) 7 ICSID Rep 494, 500/33.

464C. Methanex Corporation v United States of America[47]

The tribunal held that the phrase 'relating to' 'signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them'.[48]

The US measures impugned by Methanex were the Californian Executive Order of 1999, by which Governor Davis certified that MTBE[49] posed a significant risk to the environment, and the Californian Reformulated Gasoline Regulations (implementing the Executive Order), which banned the sale of gasoline produced with MTBE.[50] According to Methanex, a Canadian producer of methanol (which is an essential ingredient of MTBE), these measures were adopted to favour the domestic ethanol producers to the detriment of the foreign methanol producers like itself.[51] (Methanex maintained that ethanol and methanol are interchangeable as oxygenates for gasoline.)[52] The tribunal held that, *prima facie*, there was no legally significant connection between the two measures on the one hand and Methanex and its investment in methanol production on the other. It followed that the measures did not *relate to* methanol or Methanex.[53] The tribunal nevertheless proceeded to hear Methanex's claims on the merits to the extent (and only to the extent) that they were founded upon the alleged *intent* of the USA to benefit the domestic ethanol industry at the expense of foreign producers of methanol.[54] In this situation, according to the tribunal, the requisite 'legal relationship' would be established by virtue of proof of intent and thus the measures could be said to 'relate to' Methanex and its investment in methanol production.

The problem with the tribunal's interpretation of the threshold requirement in Article 1101 of NAFTA is revealed by quoting its eloquent justification for the requirement:

> The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the

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47 *Methanex v USA* (Preliminary Objections) 7 ICSID Rep 239.
48 *Ibid*. 273/147.
49 A methanol-based source of octane and oxygenate for gasoline.
50 (Merits), Part II, Chapter D, paras. 7–20.
51 *Ibid*. paras. 24–5.
52 *Ibid*. para. 6.
53 (Preliminary Objections) 7 ICSID Rep 239, 274/150.
54 *Ibid*. 279/174.

> complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage.[55]

As a justification for a *substantive* rule limiting a state's international responsibility on the basis of remoteness-of-harm-type considerations, this statement is unimpeachable and entirely persuasive. But the statement served to justify the imposition of a threshold *jurisdictional* rule, and here lies the difficulty. The tort analogy is interesting because each of the 'legal rules' mentioned by the tribunal are substantive rules delimiting the circumstances in which the defendant can be liable in tort. Very different rules serve to determine whether a court has jurisdiction, for instance, over a tort claim with an international element, and such rules are not concerned with remoteness of harm considerations that would defeat the claim on the merits.[56] It would thus be surprising if Article 1101 of NAFTA requires a tribunal to investigate issues that cannot be definitely resolved until it is appraised of the full particulars of the investor's claims with the complete evidentiary record. And it is no coincidence that the Final Award in *Methanex* deals with both jurisdiction and the merits because, if the approach favoured by the tribunal in the Partial Award is correct, then the instances when the 'legally significant connection' test in Article 1101 could be resolved in the absence of the full pleadings of the parties would be rare indeed.

How, then, can a 'legally significant connection' between the measure and the investor be established at the jurisdictional stage? A 'connection' is different from a 'claim'. A 'connection' between your driving and my injury is 'legally significant' if the court adjudges your driving to be negligent so that a secondary obligation arises to pay me damages. But until the court makes this determination, all I have is a 'claim' founded upon the tort of negligence. In other words, for a connection to be 'legally significant' a determination of law is required, and this merely begs the question of the circumstances in which the host state's measure is violative of a NAFTA obligation. Hence, at the jurisdictional stage, the tribunal was obliged to rule that only evidence of an *intention* on the part of the USA to discriminate against Methanex would suffice to establish a 'legally significant connection',[57] but that is just another way of saying that proof of intent would be dispositive of a breach of a NAFTA obligation.

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[55] *Ibid*. 270–1/138.

[56] For instance, the English court may exercise its 'international' jurisdiction over claims in tort where damage is sustained in England or the damage sustained resulted from an act committed in England (Civil Procedure Rules 6.20(8)). In the European Union, a national court can exercise jurisdiction over claims in tort if the harmful event occurred within the territorial jurisdiction of the court (Article 5.3 of EC Regulation 44/2001 of 22 December 2000). Admittedly, the NAFTA context is very different as the consent of a state to a binding form of adjudication is in issue.

[57] (Preliminary Objections) 7 ICSID Rep 239, 279/174.

465. If the *Methanex* tribunal's conception of a 'legally significant connection' cannot be endorsed as a delimiting principle for the term 'relating to' or its equivalent,[58] then what should the principle be?

466. One possibility is to define the nexus as a factual one so that the measure of the host state must be factually connected with an impairment to the rights comprising the claimant's investment. This requirement might be reduced to *prima facie* evidence that the measure has affected the investment; indeed this appears to be the interpretation proferred by the Canadian Government in its Statement of Implementation of NAFTA,[59] and has been adopted, at least implicitly, by a NAFTA tribunal.[60] This threshold of a factual connection for the term 'relating to' does resolve one potential ambiguity insofar as the measure must have impaired or affected the particular investment that the claimant has relied upon to discharge its side of the *quid pro quo*.[61]

467. The concern expressed in *Methanex* that there must be a rupture in the line 'towards an endless horizon' of claims based upon measures with a mere factual connection to an investment is nonetheless a valid one. Take the following scenario as an example. The US Federal Reserve might respond to negative growth in the economy by announcing a series of decreases in the discount rate of interest. Predictably, this leads to a fall of the US dollar and an Argentine investor, with a manufacturing plant in Pennsylvania, suddenly finds the cost of importing its raw materials increases significantly. This results in serious losses. Leaving aside the weakness of the Argentine investor's claims against the United States of America as a matter of substantive law, it would be disturbing if jurisdiction were nevertheless to be upheld, and the USA put to the inconvenience of defending spurious claims on the merits, simply because of a broad factual connection between the 'measure' in changing the interest rates and the ultimate losses to the investor's commercial operation.

468. The question, then, is whether a threshold can be divised for the requisite nexus between an investment and a measure, which avoids the adjudication of

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[58] It was expressly rejected in: *BG v Argentina* (Merits) para. 230.

[59] Statement on Implementation, *Canada Gazette* (Part 1, 1 January 1994) 68, 148 ('relating to' is equivalent to 'effect'), as cited in *S.D. Myers v Canada* (Merits: Separate Opinion) 8 ICSID Rep 66, 75/61. This appears to be consistent with the USA's interpretation of the words 'relating to' in its submissions before the WTO Appellate Body in *United States Standards for Reformulated and Conventional Gasoline*. There, the phrase 'relating to' was interpreted as merely suggesting 'any connection or association existing between two things'. Submissions of the US (Appellant) 1996 WL 112677 (WTO) paras. 32–3.

[60] *S.D. Myers v Canada* (Merits) 8 ICSID Rep 18, 51/234 ('In this case, the requirement that the import ban be "in relation" to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry through with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.').

[61] *Generation Ukraine v Ukraine* (Merits) 10 ICSID Rep 240, 262/8.5; *ADF v USA* (Merits) 6 ICSID Rep 470, 514–5/144–6.

the issue of causation at the preliminary phase of the proceedings but at the same time closes the floodgates to an endless stream of claims based upon the most tenuous connection between the prejudice to the investment and the impeached measure. In the example given concerning the US Federal Reserve, it will at once be appreciated that on the merits the claim would fail as the regulation of interest rates falls within the domain of a state's police powers and thus cannot attract international responsibility. But in the context of a preliminary objection to the investment treaty tribunal's *ratione materiae* jurisdiction, is this a measure 'relating to' the Argentine investor's manufacturing plant in Pennsylvania?

469. The answer to this dilemma perhaps can be found in the concept of property. All property institutions in every legal system are subject to property-limitation rules. In other words, there is no such thing as a property right that is absolute. Even the right of ownership – the most 'powerful' right on the spectrum of interests in property[62] – is subject to property-limitation rules and expropriatory rules in every legal system. In common law jurisdictions, for instance, the tort of nuisance enjoins a landowner in a residential area from incinerating noxious waste on its property.

470. Adopting the analytical structure of a property right expounded by Harris, a property-limitation rule is premised on the assumption that, but for the restrictions it contains, the owner of property would be free to act in a certain way.[63] Harris contrasts a property-limitation rule with a 'property-independent prohibition', where the impact of the prohibition does not depend on whether the person or entity has an interest in property.[64] The examples he gives are remote from the factual concerns of investment treaty arbitration, but instructive nevertheless. Assume it is a criminal offence for anyone to drive a motor vehicle dangerously in Texas. Leaving aside the public purpose served by legislating for such a criminal offence, those who own motor vehicles cannot be considered to have been subjected to a 'taking' for the purposes of the Fifth Amendment, regardless of the restriction imposed on the use of the things they own. The criminal offence is a 'property-independent prohibition' with respect to the *conduct* of persons. This explains, according to Harris, why 'those who oppose the legal requirement that all drivers and passengers are to wear seat-belts do so on the ground of infringement of liberty, not as an attack on property'.[65]

471. Perhaps closer to home in the investment treaty context, the host state might declare a three-day national holiday, thereby causing serious losses to

[62] By the most 'powerful' it is meant that the right of ownership entails the widest range of privileges of use of a thing and the widest scope for the control and transmission over that thing that is recognised by the legal system.
[63] J. Harris, *Property and Justice* (1996) 34.
[64] *Ibid*. 34, 36, 98, 136.
[65] *Ibid*. 98.

commercial activities. This is clearly a 'property-independent prohibition' because it is directed to both owners of businesses and their employees.

472. It follows from this analysis that the requisite nexus between a measure and the investment, expressed by the qualifier 'relating to', might be satisfied where the measure in question is a 'property-limitation rule' but not where the measure is a 'property-independent prohibition'.

473. This alternative approach can be illustrated by reference to the tribunal's decision on jurisdiction in the resubmitted case in *Amco v Indonesia No. 2*.[66] In the course of the second arbitration proceedings, Indonesia raised an additional counterclaim for 'tax fraud' on the part of the claimants and sought the restitution of sums representing the tax allegedly evaded by claimants throughout the relevant period of the investment. The tribunal found that such a claim was outside the tribunal's jurisdiction *ratione materiae*.

474. The tribunal noted that there was no *a priori* rule or principle that might serve to remove tax claims from the jurisdiction of an ICSID tribunal. The question was simply the nexus between the tax claim and the investment. For the purposes of Article 25(1) of the ICSID Convention, the test was whether the tax claim was a 'legal dispute directly arising out of the investment'. The test would be in substance the same if an investment treaty tribunal was vested with *ratione materiae* jurisdiction over 'investment disputes' or the like. The tribunal identified the relevant principle in the following terms:

> [I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.
>
> The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.[67]

475. Although the tribunal was concerned with its jurisdiction over a counterclaim, it was the nexus between a measure of the host state's tax legislation and the claimant's investment that was in issue. The obligation not to engage in tax fraud as opposed to the obligation to pay tax on income might be characterised as a 'property-independent prohibition' and thus not 'related to' the investment.

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[66] (Preliminary Objections) 1 ICSID Rep 543.
[67] *Ibid*. 565.

E. 'CLAIMANT'S INVESTMENT'

476. The claim must relate to the claimant's investment and not someone else's investment. A trite observation perhaps but difficulties can arise where there is a single investment but several investors with different stakeholdings in the investment. The principle is the same: the claim must relate to the claimant's stakeholding and not someone else's stakeholding.

476C. Impregilo S.p.A. v Islamic Republic of Pakistan[68]

A joint venture 'GBC' was established to construct a hydroelectric power facility in Pakistan. The leading joint venture participant was Impregilo, an Italian company, which concluded two contracts on behalf of GBC with the Pakistan Water and Power Development Authority ('WAPDA').[69] A number of disputes arose between GBC and WAPDA. GBC requested time extensions and reimbursement of costs which it alleged were justified on the basis of WAPDA's defective performance of its obligations under the contracts and by reason of the inadequate instructions given by the engineer charged with the supervision of the construction.[70]

In accordance with the dispute resolution clause in the contracts, the disputes had to be first submitted to the engineer. If either party were dissatisfied with his decision, then the matter could be referred to a Disputes Review Board ('DRB') comprised of three members, one each appointed by GBC and WAPDA, and the chairperson appointed by their mutual consent.[71] Finally, recourse could be had to arbitration in Lahore if either party were dissatisfied with the DRB's decision. The disputes were submitted to the engineer and then, upon GBC's instigation, to the DRB. According to GBC, the engineer had failed to act impartially[72] and WAPDA subsequently hindered the DRB's adjudication of the disputes by its dilatory conduct in appointing its member.[73] As a decision of DRB was a precondition for resort to arbitration, it was Impregilo's case that the arbitral mechanism had in effect been frustrated.[74]

Pakistan challenged the jurisdiction of the investment treaty tribunal on the basis that Impregilo was advancing claims on behalf of GBC as well as other joint venture partners.

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[68] (Preliminary Objections) 12 ICSID Rep 245.
[69] *Ibid*. 248–9/13.
[70] *Ibid*. 249/14–17.
[71] *Ibid*. 249/20.
[72] Allegedly due to the engineer's indirect relationship with WAPDA. *Ibid*. 249–50/21.
[73] *Ibid*. 250/22.
[74] *Ibid*.

GBC was established under Swiss law as an unincorporated joint venture.[75] The GBC did not, therefore, constitute a separate legal entity and had no capacity to act in its own name.[76] Impregilo was the major joint venture participant with a 57.80 per cent interest in the joint venture.[77] Pursuant to the contracts with WAPDA, joint venture participants were to be joint and severally liable to WAPDA for the performance of the obligations therein.[78]

Impregilo claimed for the entire loss alleged to have been suffered by the joint venture GBC as a whole, which included a French company and two Pakistani companies.[79]

The tribunal duly noted that GBC is not a 'juridical person' for the purposes of Article 25 of the ICSID Convention and hence could not appear as a claimant within the tribunal's *ratione personae* jurisdiction.[80]

The tribunal then upheld Pakistan's objection to the jurisdiction of the tribunal to entertain a claim by Impregilo 'on behalf of' GBC:

> The claim remains that of GBC, albeit advanced by Impregilo in some form of representative capacity. If this were permissible, it would constitute a simple and effective means of evading the limitations in Article 25 of the Convention, and expanding the scope of the BIT. Indeed, on this basis, any party could bring itself within the ambit of the Convention and the BIT by simply appointing a representative. This cannot have been intended by the careful delimitation of both the Convention's and the BIT's scope.[81]
>
> In the Tribunal's view, the fact that Impregilo is empowered to represent GBC by virtue of the provisions of the JVA does not change this analysis. This must be so, since it remains a fundamental proposition that the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party.[82]

477. The objection raised by Pakistan is not properly classified as *ratione personae* because there was no doubt that Impregilo, as an Italian company with an interest in the joint venture to construct a hydroelectric power facility in Pakistan, qualified as an investor. The objection, rather, went to the scope of Impregilo's claims, which included a claim for the losses alleged to have been suffered by its joint venture partners in the same project.

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[75] *Ibid*. 269–70/115.
[76] *Ibid*. 270–1/122–4.
[77] *Ibid*. 270/116.
[78] *Ibid*. 270/123.
[79] *Ibid*. 269–70/115.
[80] *Ibid*. 273/134.
[81] *Ibid*. 273/135.
[82] *Ibid*. 273/136.

F. INVESTMENT TREATIES WITH LIMITED CONSENT TO ARBITRATION

478. There is a corpus of BITs signed by China, the USSR and certain Eastern European States that limit the consent to investor/state arbitration to disputes concerning the amount of damages for an expropriation.

479. Article 10.1 of the Belgo-Luxembourg Economic Union/USSR BIT provides a typical example:

> Tout différend entre l'une des Parties contractantes et un investisseur de l'autre Partie contractante, relative au montant ou au mode de paiement des indemnités dues en vertu de l'article 5 …

480. The tribunal in *Berschader v Russia*[83] found that the ordinary meaning of this provision excludes disputes concerning whether or not an act of expropriation actually occurred under Article 5:[84]

> It is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgment of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty.[85]

481. The tribunal in *RosInvest v Russia*[86] interpreted a similar provision in Article 8 of the UK/USSR BIT[87] and held that it did not confer jurisdiction 'over the occurrence or the validity of an expropriation'.[88]

482. The rationale for such a limitation was rooted in Soviet views on sovereignty and in particular the principle of non-interference of Capitalist States in the internal

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[83] (Preliminary Objections).

[84] *Ibid*. para. 153.

[85] *Ibid*. See also: *Sedelmayer v Russia* (Merits). The Germany/USSR BIT, like many BITs ratified by countries of the former Communist Bloc, limited the *ratione materiae* jurisdiction of the tribunal to disputes concerning the amount of compensation for an expropriation. For reasons unknown, Russia did not raise an objection to the tribunal's jurisdiction over a claim for expropriation, which called for the adjudication of Russia's *liability*. In the event, the tribunal upheld this claim for expropriation (*ibid*. para. 2.3.4). The precise formulation in Article 10(2) of the Germany/USSR BIT was as follows: 'If a dispute concerning the scope and the procedures of compensation pursuant to Article 4 of this Treaty [dealing with expropriation], or the free transfer pursuant to Article 5 of this Treaty has not been settled within six months as from the date it was raised by one of the parties to the dispute, each of such parties shall have the right to submit the dispute to an international arbitral tribunal.'

[86] (Preliminary Objections).

[87] Art. 8(1) reads: 'This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement' (*ibid*. para. 105).

[88] *Ibid*. para. 118. See also: paras. 110, 114, 115.

affairs of Socialist States. The insistence of Capitalist States upon the submission to binding third party dispute settlement procedures was considered to be intrinsically linked to such interference. Socialist States insisted that disputes with foreign parties be submitted to the domestic courts. According to Grzybowski:

> Among the various methods of dispute settling, international arbitration and the judicial process are those which enjoy least confidence of the Soviet government. Only occasionally has the Soviet government accepted compulsory jurisdiction of arbitral or judicial bodies, and then only as a concession to an ad hoc situation, and never in matters which could affect vitally the interests of the Soviet State.[89]

483. Denza, who represented the United Kingdom in its negotiations of a BIT with China, reflected on how this ideological preoccupation was transposed into the text of the treaty:

> While the Chinese accepted the principle of arbitration, they wished to see arbitration of such disputes submitted to an *ad hoc* tribunal set up in accordance with detailed provisions specified in the IPPA [BIT]. This was the solution adopted in all previous Chinese IPPAs. The Chinese also took the view that, given that a foreign investor – individual or company – does not have the same status as a State, the investor's recourse to arbitration should remain much more limited. This was a point on which they remained immovable. As with their previous agreements, they were able to accept only that a dispute between an investor and a host State concerning an amount of compensation should be submitted to arbitration.[90]

484. The profound reluctance of Socialist States to submit to the arbitration of disputes concerning their international responsibility for expropriations in particular is entirely understandable: the Socialist economy was founded upon an expropriation of both foreign and national property. Grzybowski's analysis of this aspect of the Socialist economy and its impact of the Soviet conception of international law is illuminating:

> The socialist system of property relations also affected the rights of aliens, whose treatment was regarded as a matter of state responsibility. Thus the Soviet Union placed aliens residing in Russia under the national regime, i.e., on the same footing as Soviet citizens. Aliens are therefore deprived of property rights which they would otherwise enjoy under a free economy system. At the same time, the Soviet Union claims equal rights for Soviet citizens living abroad. This illustrates the Soviet position as regards claims

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[89] K. Gryzybowski, *Soviet Public International Law: Doctrine and Diplomatic Practice* (1970) 473.

[90] E. Denza and S. Brooks 'Investment Protection Treaties: United Kingdom Experience (1987) 36 *ICLQ* 908, 920–1. Similar insights have been provided in relation to the negotiation of the BIT between the USA and China: T. Steinert, 'If the BIT Fits: The Proposed Bilateral Investment Treaty Between the United States and the People's Republic of China' (1988) 2 *J of Chinese Law* 359, 446, 453–4.

> addressed to the members of the free world which in effect demands the best of both worlds. On one hand, the Soviet Union insists on capitalist type of property rights for Soviet citizens and Soviet legal entities abroad. On the other hand, it claims that aliens and foreign legal entities have no property rights in the Soviet Union. The effectiveness of the Soviet position is related to the extent of Soviet power. Indeed, it would not be practical from a policy standpoint to defend the rights of aliens residing in the Soviet Union with reference to standards other than those established by the Soviet domestic order.[91]

485. Following the dissolution of the USSR in 1991, the successor state, the Russian Federation, adopted a radically different approach to its consent to investment treaty arbitration. Of the 11 BITs signed by the USSR, nine provide for limited consent to investor/state arbitration.[92] The Russian Federation has signed 17 BITs and in each instance the consent investor/state arbitration is expressed in the widest terms.[93]

486. The same shift in policy has occurred in China but much later, in 2000. Of the 56 BITs signed by China before 2000, 55 provide for very limited jurisdiction in respect of investor/state arbitration.[94] Since 2000, however, each of the 12 BITs signed by China has contained a wide formulation for consent to investor/state arbitration.[95]

487. Whilst the rationale for the limited consent expressed in BITs signed by China, the USSR and certain Eastern European States has clearly expired, investmenty treaty tribunals must nevertheless give effect to that limited consent pursuant to the normal rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention. It is impermissible to read the standard preamble of investment treaties with modern spectacles in order to give an expansive interpretation of the tribunal's *ratione materiae* jurisdiction contrary to an express limitation in the treaty itself. The tribunal and the English Court do not appear to

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[91] *Ibid*. 510.

[92] The exceptions are: France/USSR BIT (1989); Canada/USSR BIT (1989) (which has not entered into force).

[93] The following BITs signed by the Russian Federation with: USA (17 June 1992) Art. VI; Greece (30 June 1993) Art. 9; Portugal (22 July 1994) Art. 7; Hungary (March 1995) Art. 8; Sweden (April 1995) Art. 8; Norway (April 1995) Art. 8; Lebanon (8 April 1997) Art. X; Cyprus (4 April 1997) Art. 7; Philippines (12 September 1997) Art. X; Egypt (23 September 1997) Art. 10; Turkey (15 December 1997) Art. X; Argentina (25 June 1998) Art. 10; Japan (13 November 1998) Art. 11; Ukraine (27 November 1998) Art. 9; Lithuania (29 June 1998) Art. 10; Ethiopia (10 February 2000) Art. 8; Thailand (17 October 2002) Art. 9.

[94] The treaty constituting the single exception never came into force: China/Marshall Islands (1999).

[95] The following BITs signed by China with: Botwana (12 June 2000) Art. 9; Brunei (17 November 2000) Art. 9; Jordan (5 November 2001) Art. 10; Netherlands (26 November 2001) Art. 10; Bosnia and Herzegovina (26 June 2002) Art. 8; Trinidad and Tobago (27 July 2002) Art. 10; Côte D'Ivoire (23 September 2002) Art. 9; Guyana (27 March 2003) Art. 9; Djibouti (18 August 2003) Art. 9; Germany (1 December 2003) Art. 9; Finland (15 November 2004) Art. 9; Madagascar (November 2005) Art. 10.

have given sufficient weight to the principle of contemporaneity[96] in treaty interpretation in *Czech Republic v European Media Ventures S.A.*

487C. Czech Republic v European Media Ventures S.A.[97]

The consent to investor/state arbitration in Article 8(1) of the Belgo-Luxembourg/Czech Republic BIT was expressed in the following terms:

1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party concerning compensation due by virtue of Article 3 Paragraphs (1) and (3) [on expropriation], shall be the subject of a written notification, accompanied by a detailed memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably.
2. If the dispute is not resolved within six months from the date of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.

This BIT employed an ususual form of words to limit the consent to investor/state arbitration: instead of having a direct reference to disputes concerning the 'amount' of compensation for an expropration, the BIT simply referred to 'disputes… concerning compensation due by virtue of' an expropriation.

The tribunal accepted that Article 8(1) of the BIT limited the consent of the contracting state parties to investor/state arbitration but interpreted that limitation as directed at the exclusion of a declaratory remedy or restitution[98] from the scope of the tribunal's jurisdiction:

> The phrase 'concerning compensation' is clearly intended to limit the jurisdiction of an Article 8 Tribunal. It would seem to exclude from that jurisdiction any claim for relief other than compensation (e.g. a claim for restitution or a declaration that a contract was still in force). Where, however, the claim is solely for compensation it would appear to fall within the jurisdiction of an Article 8 Tribunal subject to the limiting effects of the words which follow. Those words limit the

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[96] See, in relation to this principle: I. Sinclair, *The Vienna Convention on the Law of Treaties* (1981, 2nd edn) 124; G. Fitzmaurice, 'The Law and Practice of the International Court of Justice 1951–4: Treaty Interpretations and other Treaty Points' (1957) 33 *BYBIL* 204, 212; D. O'Connell, *International Law* (Vol. 1, 1970, 2nd edn) 257–8; *Rights of Nationals of the United States of America in Morocco* (*France v USA*) 1952 ICJ Rep 176, 189; *South West Africa (Ethiopia v SA; Liberia v SA)* 1966 ICJ Rep 6, 23; *Territorial Dispute (Libya v Chad)* 1994 ICJ Rep 6.

[97] *EMV v Czech Republic* (Preliminary Objections); *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm), [2008] 1 Lloyd's Rep 186.

[98] If the tribunal were to award compensation, then it would have to be premised upon a declaration to the effect that the host state has breached Art. 3 of the BIT. Hence it is logically impossible to exclude declarations as a remedy if the tribunal's jurisdiction extends to awarding compensation. In relation to restitution, it is so seldom granted by international tribunals that it seems unlikely that this was the purpose of the limitation in Article 8(1) of the BIT. On the rarity of restitution, see: C. Gray, *Judicial Remedies in International Law* (1987) 13–15.

> jurisdiction of the Tribunal to claims for compensation 'due by virtue of Article 3, paragraph (1) and (3)', i.e. to claims for compensation arising out of the events specified in Article 3(1) and (3).[99]

It followed that EMV's claim for expropriation was within the jurisdiction *ratione materiae* of the tribunal, both in respect of questions of liability and quantum of damages.

The Czech Republic challenged this decision on jurisdiction pursuant to section 67 of the Arbitration Act 1996. Simon J of the English court also accepted that Article 8(1) of the BIT imposed a limitation upon the consent of the contracting state parties to investor/state arbitration, but expressed his reservation about the limitation identified by the tribunal:

> I am very doubtful as to whether the contracting parties intended that claims for compensation fell within the jurisdiction of the tribunal and claims for restitution and declarations fell without.[100]

The principal difficulty with Simon J's judgment is that he recognised the limitation on the tribunal's jurisdiction imposed by the terms of Article 8(1) of the BIT, but did not express his own view as to its scope or meaning. Such an approach renders superfluous the terms giving effect to the limitation.[101]

There was no authority cited by the tribunal for its interpretation that certain remedies were intended to be excluded from the scope of the tribunal's jurisdiction. More importantly, the Czech Republic's subsequent practice in signing BITs and all the contemporaneous evidence of the negotiations between Czechoslovakia[102] and Belgium[103] suggested that

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[99] *EMV v Czech Republic* (Preliminary Objections) para. 52.

[100] [2007] EWHC 2851 (Comm), [2008] 1 Lloyd's Rep 186 at para. 51.

[101] And thus contrary to the principle *verba aliquid operari debent*.

[102] Joint Report from the Minister of Finance and Minister of International Trade of Czechoslovakia (31 October 1988) ('[I]t has been proposed that the Czechoslovak side agrees with implementing the issues of diagonal disputes [i.e. investor/state disputes] in the agreement … The agreement should ensure that a potential dispute between an investor from one country and the second country might namely be conducted with regard to an amount of the financial compensation for the property affected. It is therefore going to be enforced in the course of negotiations with the Belgian-Luxembourg side that the relevant section of the agreement (Article 8) is formulated so that the diagonal disputes may namely concern financial consequences resulting from an expropriation or other proprietary restrictions concerning assets of an investor of the other contractual party.'). After the BIT was signed on 24 April 1989, the Czechoslovak Government believed that these instructions were fully reflected in the wording of Art. 8(1): Letter from the Minister of Finance to the Deputy Prime Minister (3 May 1989) ('The signed agreement [Treaty] delimits just one area of possible disputes, namely concerning the indemnification amount for interfering with the property of the investor … [I]f a dispute on amount of indemnification for expropriation of an investment would occur, the investor can present the dispute to arbitration proceedings according to principles given in the agreement, after exhaustion of amicable procedures.').

[103] Record of the Session of the Belgian Senate (6 December 1990) ('The Minister calls the Bill under discussion as the confirmation of a typical bilateral investment treaty. It is true that the treaty itself was concluded with the Czechoslovak Republic, which was at the time "Socialist".

Article 8(1) of the BIT was intended to restrict the jurisdiction of the tribunal to matters relating to the amount of compensation in line with the vast majority of other BITs signed by Socialist states.[104] The BIT was in fact the only BIT signed by the Czechoslovak Socialist Republic before the Velvet Revolution and the advent of market reforms. Immediately after the Velvet Revolution and the demise of the Socialist Government, the Czech Republic adopted the more expansive consent to arbitration in its BITs: *viz*. 'any disputes arising out of an investment' or 'all investment disputes'.[105] Interestingly, one of the few exceptions was its BIT with China in 1991 that records the consent to investor/state arbitration as limited to 'the amount of compensation for expropriation'.[106] Thus China was able to insist upon the Socialist policy being maintained in its negotiations with the Czech Republic, despite the latter's transition to a market economy.

Rule 26. In accordance with the terms of the contracting state parties' consent to arbitration in the investment treaty, the tribunal's jurisdiction *ratione materiae* may extend to counterclaims by the host contracting state party[107] founded upon a contractual

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The qualifying adjective "Socialist" has in the meantime been replaced by "Federal" and "Czechoslovak" by "Czech-Slovak". A certain continuity is however necessary in interstate relations. The commissioner notes that the treaty under discussion contains a certain amount of exceptions to the normal provisions generally found in these types of treaties. According to the explanatory report, these exceptions are due to the objections from the Czechoslovak side, which were in turn attributable to the regime which at that time was still communist. Since then, the Czech and Slovak Republic is no longer a communist regime. The petitioner asks whether in the circumstances such exceptions still make sense. The Minister states that the derogations to the usual protection are minimal. They are limited to the following: (1) Recourse to international arbitration is limited to disputes relating to compensation due in the event of expropriation (Article 8) […] The petitioner ends the discussion by asking if it would not be desirable to remedy the imperfections existing in the treaty under discussion and a few others concluded with previously communist States by an additional treaty which would this time correspond perfectly to normal practice on this point as between Western countries. The Minister considers that it is indeed desirable. Another commissioner wishes to highlight the importance of this treaty. He congratulates the Minister for the swift reaction to the evolution in the Czech and Slovak Republic. He also joins his colleague in expressing the wish to refine the provisions in the treaty and to adapt them to the post communist era.') No such 'refinement' subsequently took place.

[104] And academic commentary that recognised the limitation in the BIT as pertaining to the amount of compensation for an expropriation: W. Van de Voorde, 'Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment' (1991) 1 *Studia Diplomatica* 87, 107; P. Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Ybk of Int L* 91, 119.

[105] Czech and Slovak Federal Republic/Switzerland (1990) ('disputes with respect to investments'); Czechoslovakia/ Sweden BIT (1990) ('disputes … concerning the interpretation or application of this Agreement'); France/Czech and Slovak Federal Republic BIT (1990) ('disputes relating to investments'); Finland/Czech and Slovak Federal Republic BIT (1990) ('Any legal dispute … concerning an investment').

[106] Czech and Slovak Federal Republic/China BIT (1991), Art. 9(2)(b).

[107] *Saluka v Czech Republic* (Preliminary Objections) para. 39.

obligation, a tort, unjust enrichment, or a public act of the host contracting state party, in respect of matters directly related to the investment.[108]

A. THE SIGNIFICANCE OF THE CONSENT TO ARBITRATION AND THE APPLICABLE ARBITRATION RULES

488. Where the consent of the contracting state parties to investor/state arbitration in an investment treaty is couched in broad terms, there is nothing in principle to exclude a tribunal's *ratione materiae* jurisdiction over counterclaims by the host state. Numerous international tribunals have recognised their jurisdiction to hear counterclaims in circumstances where their constitutive instruments do not confer an express power to do so. Thus, for instance, the Permanent Court of Justice,[109] the International Court of Justice[110] and the International Law of the Sea Tribunal[111] have adopted procedural rules for the adjudication of counterclaims, despite the silence of their constitutive instruments on this possibility. The same approach has been taken by several mixed claims commissions[112] and the Iran/US Claims Tribunal in relation to counterclaims by one of the State parties.[113] If a general principle can be discerned from this practice, it is that the jurisdiction *ratione materiae* of an international tribunal extends to counterclaims unless expressly excluded by the constitutive instrument.[114]

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[108] *Ibid*. para. 61 ('[A] legitimate counterclaim must have a close connexion with the primary claim to which it is a response.'). See also: *Amco v Indonesia No. 2* (Preliminary Objections) 1 ICSID Rep 543, 565; *Klöckner v Cameroon* (Merits) 2 ICSID Rep 9, 17, 65.

[109] Statute of the Permanent Court of International Justice (13 December 1920) PCIJ (Ser. D) No. 1; Article 40 of the 1922 Rules of Court, Art. 40; 1936 Rules of Court, Art. 63.

[110] Statute of the International Court of Justice (26 June 1945), Acts and Documents concerning the Organization of the Court, No. 5; 1946 Rules of Court, Art. 63; 1972 Rules of Court, Art. 68; 1978 Rules of Court, Art. 80; 2000 Rules of Court, Art. 80.

[111] Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3; Rules of the Tribunal, Art. 98.

[112] England–Austria, Arts. 26–8 ; England–Bulgaria, Arts. 26–8; England–Hungary, Arts. 26–8; Italy–Germany, Art. 34; Italy–Austria, Art. 34; Italy–Bulgaria, Art. 34; Italy–Hungary, Art. 34; France–Germany, Art. 14(e); France–Bulgaria, Art. 14(e); France–Austria, Art. 14(e); France–Hungary, Art. 14(e); Greece–Germany, Art. 14(e); Greece–Bulgaria, Art. 14(e); Greece–Austria, Art. 14(e); Greece–Hungary, Art. 14(e); Romania–Germany, Art. 13(e); Romania–Hungary, Art. 13(e); Siam–Germany, Art. 14(e); Czechoslovakia–Germany, Art. 24. See: *Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les traités de paix* (Vols. 1–5, 1922).

[113] *Iran v USA* (Case ITL 83-B1-FT, 9 September 2004) (Counterclaims).

[114] *Installations Maritimes de Bruges v Hamburg Amerika Linie* 1 RIAA 877 (1921) ('Att. que les deux requêtes introductives sont basées sur un seul et même fait, qui est la collision survenue le

489. It must follow that consent to arbitration in relation to 'all disputes arising out of an investment',[115] for instance, is wide enough to encompass counterclaims by the host state. Where the consent to arbitration is expressed in narrow terms, such as in Articles 1116 and 1117 of NAFTA, which limits the scope of primary claims to a breach of an international obligation in Section A of Chapter 11,[116] the position is far more tenuous. There are two possible interpretations. The first is that the scope of counterclaims is delineated by the legal source of the primary claims: obviously the host state cannot counterclaim for the investor's breach of a Chapter 11 obligation, so if this principle is adopted, then counterclaims would be excluded by implication. Alternatively, rather than defining the scope for counterclaims by reference to the legal source of the primary claims, the delineating principle might be the *object* of the primary claim, which is the investment, so that any counterclaims relating to the investment would be within the tribunal's jurisdiction *ratione materiae*, whatever their legal source. The difficulty with this second interpretation is that it would potentially allow the host state to counterclaim based upon a contractual obligation (if there is an investment agreement in place between the investor and the host state), a tort, unjust enrichment, or a public law act, in circumstances where the investor's primary claims are limited to breaches of Chapter 11 obligations. Both interpretations therefore produce an inequality in the procedural positions of the claimant investor and the respondent host state. It is submitted that, on balance, the inequality suggested by the second interpretation is more acute so that it would be preferable to construe Chapter 11 of NAFTA as excluding the possibility of counterclaims by the host state respondent.

490. The applicable arbitration rules may also have an impact upon the tribunal's power to determine counterclaims. Investment treaty claims prosecuted under the ICSID Convention attract the application of Article 46:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.[117]

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25 octobre 1911 entre le vapeur Parthia et Duc d'Albe et un mur du port de Zeebruge, et que la seconde requête eût pu prendre la forme d'une simple demande reconventionnelle si l'article 29 du Règlement de procédure ne l'interdisait absolument.')

[115] See para. 443 above.

[116] In addition, claims can be founded on a breach of Art. 1503 (State Enterprises) or Art. 1502(3)(a) (Monopolies and State Enterprises). See Appendix 3.

[117] This provision is reinforced by Rule 40 of the ICSID Arbitration Rules. See also: ICSID Additional Facility Rules, Art. 48.

491. As this provision makes clear, it is the scope of the consent of the parties that is dispositive. The 'parties' in this sense is a reference to the parties in the actual arbitration proceedings rather than the contracting state parties to the ICSID Convention, but the analysis would be the same. The consent is perfected by the investor's filing of a request for arbitration, which cannot expand or limit the host state party's standing offer to arbitrate in the investment treaty. If that standing offer confines the scope of the tribunal's jurisdiction *ratione materiae* to claims for a breach of one of the investment treaty obligations, then the investor's acceptance of that offer cannot expand that scope to include counterclaims by the respondent host state. In contradistinction, if the host state party's standing offer to arbitrate in the investment treaty in expressed in terms of 'all disputes arising out of an investment', then Article 46 of the ICSID Convention merely confirms the general principle in Rule 26 by emphasising the need for a nexus between the counterclaim and the subject-matter of the dispute.

492. More problematic is the application of the UNCITRAL Arbitration Rules, Article 19(3) of which reads:

> In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same *contract* or rely on a claim arising out of the same contract for the purposes of a set-off.[118]

493. The difficulty in transposing this provision into the investment treaty regime is the reference to 'contract'. Even in commercial arbitration, this formulation is liable to cause problems because 'arising out of the same contract' might be construed as preventing a counterclaim in tort, even where the factual matrix for such a counterclaim is intertwined with the subject matter of the contract containing the arbitration clause and the jurisdiction of the tribunal over primary claims may well extend to claims in tort. In this respect it is notable that the Drafting Committee for the UNCITRAL Rules had proposed that the reference to 'the same contract' be widened to include the 'the same dispute, transaction or subject matter'.[119] This proposal was not adopted. Moreover, in the context of the Iran/US Claims Tribunal, Article 19 (3) of the UNCTRAL Rules was modified in the Tribunal Rules to read 'any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim'. This modification

[118] Emphasis added.

[119] *Report of the United Nations Commission on International Trade Law*, 8th Session, Summary of Discussion of the Preliminary Draft (1975) UN Doc A/10017, paras. 136–7, reprinted in: 6 *Ybk of UNCITRAL* 24, 37–8.

brought Article 19(3) of the UNCITRAL Rules in line with the Tribunal's constituent instruments and in particular Article II(1) of the Claims Settlement Declaration.[120]

494. State parties to investment treaties have often included arbitration pursuant to the UNCITRAL Arbitration Rules as one of the procedural options available at the election of the claimant.[121] Unlike the case of the Iran/US Claims Tribunal, however, the state parties have not amended Article 19(3) to make it compatible with the tribunal's jurisdiction *ratione materiae* in respect of the primary claims. How, then, is the reference to 'contract' in Article 19(3) to be interpreted? If the purpose of the reference was to identify the instrument that creates the tribunal's jurisdiction, then an accurate transposition to the investment treaty context would lead to its replacement with the term 'investment treaty'. But this would result in the blanket exclusion of counterclaims by the respondent host state because the claimant investor is not a party to the investment treaty and cannot act in breach of it. Moreover, where the consent of the contracting state parties to investor/state arbitration in the treaty is expressed in wide terms, then such an approach would create an artificial asymmetry in the tribunal's jurisdiction over primary claims and counterclaims: if the claimant investor can sue for breach of contract because it is an 'investment dispute', then surely the respondent host state should be in a position to counterclaim for a breach of the same contract? It is therefore preferable to interpret the reference to 'contract' in Article 19(3) of the UNCITRAL Rules as a reference to the source of the rights forming the object of the claim. In the investment treaty context, that is the investment, and hence a symmetry between the tribunal's jurisdiction over primary claims and counterclaims is achieved by interpreting the reference to 'contract' in Article 19(3) as equivalent to 'investment' in this context.

495. The tribunal in *Saluka v Czech Republic*[122] decided that, as a matter of principle, where the consent to arbitration is expressed in wide terms in an investment treaty, the tribunal is conferred jurisdiction *ratione materiae* over counterclaims by the respondent host state. In that case, Article 8 of The Netherlands/Czech Republic BIT conferred jurisdiction over 'all disputes between a Contracting Party and an investor of the other Contracting Party concerning an investment of the latter'. The tribunal did not address the particular problem presented by Article 19(3) of the UNCITRAL Rules, which governed the procedure of that arbitration. In other cases, jurisdiction

[120] *Iran v USA* (Case ITL 83-B1-FT, 9 September 2004) (Counterclaims) para. 100.
[121] See Chapter 1, para. 3 above.
[122] (Preliminary Objections).

has either been assumed without discussion,[123] or conceded by the claimant in order to buttress an assertion of a broad jurisdiction over primary claims.[124]

B. THE REQUISITE NEXUS BETWEEN THE COUNTERCLAIM AND THE INVESTMENT

496. For an investment treaty tribunal to exercise jurisdiction *ratione materiae* over a counterclaim, it must be formulated in respect of matters directly relating to the investment. The tribunal in *Saluka v Czech Republic*[125] ultimately declined its jurisdiction over the Czech Republic's counterclaims for lack of a sufficient connection between the 'primary claim and the counterclaims'. In doing so, it emphasised that the Czech Republic's counterclaims involved 'non-compliance with the general law of the Czech Republic'[126] or 'rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction'.[127] It followed, according to the tribunal, that such disputes underlying these counterclaims 'in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty'.[128] This approach, which, in the tribunal's words, requires the 'interdependence and essential unity of the instruments on which the original claim and counterclaim [are] based', cannot be endorsed for investment treaty arbitration. It would have the effect of excluding the tribunal's jurisdiction over counterclaims whenever the claimant investor's claim is based upon an investment treaty obligation because the host state's counterclaim cannot by definition be based upon that same instrument. Such an approach also indirectly undermines a broadly formulated consent to arbitration; 'all disputes' concerning an investment is surely capable of including counterclaims directly relating to that investment even where the claimant investor has elected to sue on the basis of an investment treaty obligation.

497. The *Saluka* tribunal cited several precedents relating to situations where there are multiple contracts between the same parties and the counterclaim is

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123 *Genin v Estonia* (Merits) 6 ICSID Rep 236, 271/201, 301–2/376–8 (counterclaim dismissed on the merits without consideration of jurisdiction).

124 *SGS v Pakistan* (Procedural Order) 8 ICSID Rep 388; *SGS v Pakistan* (Preliminary Objections) 8 ICSID Rep 406, 426–7/108–9; *SGS v Philippines* (Preliminary Objections) 8 ICSID Rep 518, 528/40; *Sedelmayer v Russia* (Merits) para. 3.8 (The claimant asserted that the respondent had counterclaimed and therefore accepted the tribunal's jurisdiction over primary claims. The tribunal did not rule upon this submission.).

125 (Preliminary Objections).

126 *Ibid*. para. 78.

127 *Ibid*. para. 79.

128 *Ibid*.

founded upon a different contract to the primary claim.[129] The test derived from these cases is whether the different contracts are sufficiently closely connected to be characterised as a single transaction. But it is doubtful whether these cases provide much assistance to the problem under consideration: the focal point is an investment rather than the identification of a single business relationship arising from multiple contracts between the parties.

498. The *Saluka* tribunal also cited precedents where the primary claim was based on a contractual relationship with the host state, whereas the counterclaim by the respondent host state was founded upon an obligation in general law such as tax legislation.[130] These precedents seem more relevant to the tribunal's basis for decision. In *Amco v Indonesia No. 2*,[131] Indonesia raised an additional counterclaim for 'tax fraud' on the part of the claimants in the second arbitration proceedings and sought the restitution of sums representing the tax allegedly evaded by claimants throughout the relevant period of the investment. The tribunal found that such a claim was outside the tribunal's jurisdiction *ratione materiae*. The tribunal noted that there was no *a priori* rule or principle that might serve to remove tax claims from the jurisdiction of an ICSID tribunal. The question was simply the nexus between the tax claim and the investment. For the purposes of Article 25(1) of the ICSID Convention, the test was whether the tax claim was a 'legal dispute directly arising out of the investment'. The test would be in substance the same if an investment treaty tribunal were vested with *ratione materiae* jurisdiction over 'investment disputes' or the like. The tribunal identified the relevant principle in the following terms:

> [I]t is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the

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[129] *Klöckner v Cameroon* (Merits) 2 ICSID Rep 9, 17, 65; *American Bell International, Inc v Iran* (Case ITL 41-48-3, 11 June 1984) 6 Iran-US CTR 74, 83–4; *Westinghouse Electric Corp v Iran* (Case ITL 67-389-2, 12 February 1987) 14 Iran-US CTR 104; *Owens-Corning Fiberglass Corp v Iran* (Case ITL 18-113-2, 13 May 1983) 2 Iran-US CTR 322, 324; *Morrison-Knudsen Pacific Ltd v Ministry of Roads and Transportation* (Case 143-127-3, 13 July 1984) 7 Iran-US CTR 54, 82-4.

[130] *Amco v Indonesia No. 2* (Preliminary Objections) 1 ICSID Rep 543; *Harris International Telecommunications v Iran* (Case 323-409-1, 2 November 1987) 17 Iran-US CTR 31, 57-61. See also: *Blount Brothers Corp v Ministry of Housing and Urban Development* (Case 74-62-3, 2 September 1983) 3 Iran-US CTR 225, 226; *Behring International, Inc v Islamic Republic Iranian Air Force* (Case ITM/ITL 52-382-3, 21 June 1985) 8 Iran-US CTR 238, 265; *International Technical Products Corp v Iran* (Case 196-302-3, 28 October 1985) 9 Iran-US CTR 206, 226–7.

[131] (Preliminary Objections) 1 ICSID Rep 543.

> former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.
>
> The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.[132]

499. The *Saluka* tribunal appears to have relied heavily on this passage in excluding from its jurisdiction counterclaims based upon 'rights and obligations which are applicable, as a matter of the general law of the Czech Republic, to persons subject to the Czech Republic's jurisdiction'.[133] But this does not accurately reflect the *Amco* tribunal's finding, which did not rest solely upon the general law nature of the legal obligation forming the basis of the counterclaim. A caveat was added: 'unless the general law generates an investment dispute under the Convention' so that it 'arises directly out of an investment'.[134]

500. Considerable care must attend any reliance upon the jurisprudence of the Iran/US Claims Tribunal in this context. The Tribunal's jurisdiction over counterclaims extends to those 'which arise out of the same contract, transaction or occurrence that constitutes the subject matter of' the primary claim.[135] Thus it follows that 'if a claim is for an occurrence, such as a taking of property, then a counterclaim would have to arise out of that same occurrence'.[136] A great number of the cases dealing with the requisite nexus between the primary claim and counterclaim address the specific problem of whether the requisite nexus exists between a primary claim for breach of contract and a counterclaim based upon the general law of Iran; in most instances its tax legislation. Thus, in *Harris International Telecommunications, Inc v Iran*,[137] the Tribunal reiterated its general position that 'it has no jurisdiction over counterclaims relating to allegedly unpaid taxes, when the obligation to pay such taxes does not arise out of the contract, transaction or occurrence that constitutes the subject matter of the claim in the same proceedings'.[138] A distinction between income tax and witholding tax was made: insofar as the latter arose from an obligation in the relevant contract, a counterclaim for such tax if it remained unpaid was properly within the Tribunal's jurisdiction.[139] This particular problem of ensuring that

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[132] *Ibid*. 565.
[133] (Preliminary Objections) para. 79.
[134] A similar caveat was made in: *Harris International Telecommunications Inc v Iran* (Case 323-409-1, 2 November 1987) 17 Iran-US CTR 31, 57–61.
[135] Claims Settlement Declaration, Art. II(1).
[136] *Owens-Corning Fiberglass Corp v Iran* (Case ITL 18-113-2, 13 May 1983) 2 Iran-US CTR 322, 324.
[137] (Case 323-409-1, 2 November 1987) 17 Iran-US CTR 31.
[138] *Ibid*. 57 at para. 115.
[139] *Ibid*. 61 at para. 120.

there is symmetry between a breach of contract claim and any counterclaim does not cover the range of possibilities in the investment treaty context. If an investment treaty tribunal has jurisdiction over 'all claims arising out of an investment', then this is significantly broader that the jurisdiction granted to the Iran/US Claims Tribunal, and this must have consequences for the scope of counterclaims.

501. In conclusion, the requisite nexus is between the counterclaim and the investment rights forming the object of the primary claim. Those rights are grounded in the municipal law of the host state[140] and hence, if the consent to arbitration is sufficiently broad, the tribunal's jurisdiction *ratione materiae* extends to any counterclaims whatever their legal nature in the legal system of the host state, so long as the nexus is satisfed. That nexus in Rule 26 is formulated as 'in respect of matters directly related to the investment'.

Rule 27. For the purposes of Rule 25 and Rule 26, the legal foundation of the claims submitted to the tribunal must be objectively determined by the tribunal in ruling upon the scope of its jurisdiction *ratione materiae* in a preliminary decision.[141]

A. THE IMPORTANCE OF AN OBJECTIVE TEST

502. The principle contained in Rule 27 may appear to be trite for, if not 'objectively', how else is a tribunal to characterise the claims submitted to it? It is thus remarkable that the precedents in investment treaty arbitration are sharply divided on the issue. Several tribunals have by design or by implication ruled that the claimant's characterisation of the legal foundation of its claims is determinative for the purposes of invoking jurisdiction. According to this jurisprudence, an objective assessment of the claimant's characterisation can await the merits phase of the proceedings at which point the claims will be

[140] See Rule 4.

[141] *Oil Platforms (Iran v USA)* 1996 ICJ Rep 803 (Preliminary Objection). The *Oil Platforms* case is cited with approval in the investment treaty context in: *Methanex v USA* (Preliminary Objections) 7 ICSID Rep 239, 264/117; *UPS v Canada* (Preliminary Objections) 7 ICSID Rep 288, 296/35; *SGS v Philippines* (Preliminary Objections) 8 ICSID Rep 518, 523–4/26, 562/157; *El Paso v Argentina* (Preliminary Objections) para. 42; *Impregilo v Pakistan* (Preliminary Objections) 12 ICSID Rep 245, 293/239; *Saipem v Bangladesh* (Preliminary Objections) para. 85. *Legality of Use of Force (Yugoslavia v Italy)* 1999 ICJ Rep 490 at para. 25. The *Legality of Use of Force* case is cited with approval in the investment treaty context in: *Impregilo v Pakistan* (Preliminary Objections) 12 ICSID Rep 245, 293/240; *UPS v Canada* (Preliminary Objections) 7 ICSID Rep 288, 296/35; *Methanex v USA* (Preliminary Objections) 7 ICSID Rep 239, 265/121. Other precedents that appear to favour an objective determination include: *PSEG v Turkey* (Preliminary Objections) 11 ICSID Rep 434, 466/173; *Sempra v Argentina* (Preliminary Objections) paras. 99–101; *Noble v Ecuador* (Preliminary Objections) para. 151 *et seq*.

upheld or dismissed and thus the characterisation accepted or rejected. Such an approach is contrary to principle and refuted by the practice of other international courts and tribunals.

503. The claimant's own characterisation of the legal foundation of its claims cannot be determinative because an investment treaty tribunal is not a court of general jurisdiction with adjudicative power to determine any disputes between investors and states: it is the creation of a specific international treaty with adjudicative power by virtue of the consent to arbitration expressed therein by the contracting state parties. This consent delineates the boundaries of the tribunal's jurisdiction and it is the duty of the tribunal to ensure that these boundaries are respected in exercising its power of *compétence de la compétence*. There is, by contrast, no corresponding duty upon the claimant to respect these boundaries in formulating its claims for the purposes of invoking the jurisdiction of an investment treaty tribunal. The tribunal is the gatekeeper; the claimant only has an interest in securing the passage of its wares across the moat before the drawbridge is hoisted. A tribunal is delinquent in performing its duty if it fails to apply a judicial test to determine the legal foundation of the claims or counterclaims submitted to arbitration and instead simply adopts the characterisation advanced by the claimant or host state. If the tribunal commits an error in performing this duty entrusted to it by the contracting state parties then its decision is liable to be quashed in judicial review.

504. There are abundant analogies to illustrate the importance of an objective assessment of the legal foundation of the claims submitted to investment treaty arbitration. The EC Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[142] permits certain exceptions to the general allocation of jurisdiction in civil and commercial matters to the courts of the Member State where the defendant is domiciled (Article 2). One such exception or ground of 'special jurisdiction' is in respect of 'matters relating to a contract' in Article 5(1): the claimant can bring proceedings in the courts of the Member State of the 'place of performance of the obligation in question'. Each of these elements of the 'special jurisdiction' granted by Article 5(1) has given rise to an autonomous interpretation by the European Court of Justice. It would be inconceivable for the courts of the Member States to allow a claimant to invoke Article 5(1) merely on the strength of the claimant's insistence that the dispute concerns a 'matter relating to a contract'. The legal foundation of the claim must be independently assessed by the court in accordance with the judicial test propounded by the European Court for otherwise the restrictive nature of Article 5(1) as a derogation from the general allocation of jurisdiction in Article 2 would be jeopardised.

[142] No. 2201/2003 of 27 November 2003.

505. The International Court Justice has also insisted upon objective assessment of the legal foundation of claims submitted to its jurisdiction and the corresponding precedents have been influential in the investment treaty cases which recognise the principle reflected in Rule 27.

B. THE JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE

506. The consent of the state parties is the lodestar for determining the scope of the International Court of Justice's jurisdiction and hence the Court's pronouncements on the matter under consideration are relevant in the investment treaty context where the consent of state parties is also critical. Three judgments of the Court in particular leave no doubt about the objective nature of the Court's inquiry into the scope of its *ratione materiae* jurisdiction.

507. In the *Oil Platforms* case,[143] the Court ruled:

> [T]he Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application of the Treaty of 1955'. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.[144]

508. Simarly, in the *Legality of Use of Force* case:[145]

> [I]n order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; … [It] must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of the instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.[146]

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143 *(Iran v USA)* 1996 ICJ Rep 803 (Preliminary Objection).
144 *Ibid*. 810 at para. 16.
145 *Legality of Use of Force (Yugoslavia v Italy)* 1999 ICJ Rep 481 (Provisional Measures).
146 *Ibid*. 490 at para. 25.

509. Finally, the same principle was propounded in the *Fisheries Jurisdiction* case:[147]

> It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties …
>
> The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute.
>
> The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a question of law to be resolved in the light of the relevant facts.[148]

C. INVESTMENT TREATY PRECEDENTS CONFIRMING THE OBJECTIVE TEST

510. The clearest endorsement of the objective test is the tribunal's decision on jurisdiction in *SGS v Philippines*.[149] The tribunal applied the principle stated by the International Court of Justice in the *Oil Platforms* case:

> [I]t is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on.[150]

511. Likewise, the tribunal in *Pan American Energy v Argentina*[151] stated that:

> [A] claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (but not whether the claims are well founded). In that respect, labelling is not enough. For, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.[152]

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147 *Fisheries Jurisdiction (Spain v Canada)* 1998 ICJ Rep 432 (Jurisdiction).
148 *Ibid*. 448–9 at para. 30; 450 at para. 37.
149 (Preliminary Objections) 8 ICSID Rep 518.
150 *Ibid*. 562/157.
151 (Preliminary Objections).
152 *Ibid*. para. 50.

512. The *ad hoc* committee's decision in *Vivendi v Argentina*[153] is more difficult to interpret on this issue. The committee relied upon the *Woodruff* case[154] for the principle that 'where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.[155] This is a rule of admissibility, but it assumes that the tribunal has characterised the 'essential basis' of the claim in its antecedent examination of jurisdiction. But in the *ad hoc* committee's consideration of the tribunal's decision on jurisdiction, one finds a statement endorsing the view that the forum selection clause in the contract did not exclude 'the jurisdiction of the Tribunal *with respect to a claim based on the provisions of the BIT*'.[156] There is no attempt here to investigate the 'fundamental basis of the claim', but rather what appears to be acceptance of the investor's formal characterisation of the claim. This deduction is supported by reference to other parts of the committee's review of the tribunal's jurisdictional decision:

> Even if it were necessary in order to attract the Tribunal's jurisdiction that the dispute be characterised not merely as one relating to an investment but as one concerning the treatment of an investment in accordance with the standards laid down under the BIT, it is the case (as the Tribunal noted) that *Claimants invoke substantive provisions of the BIT*.[157]

513. It is perhaps unfair to attach too much significance to the *ad hoc* committee's choice of words in this context, especially in light of the fact that the committee went on to say that the dispute was capable of raising issues under the BIT.[158] Nevertheless, there does appear to be some contradiction between the dictates of the *Woodruff* principle, requiring an analysis of the 'essential basis of the claim', and the more formal test that the *ad hoc* committee actually applied to the facts at the jurisdictional stage.

D. INVESTMENT TREATY PRECEDENTS UPHOLDING A SUBJECTIVE TEST

514. There are numerous decisions of investment treaty tribunals on jurisdiction that simply accept the claimant's characterisation of its claims without further

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153 *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340.
154 *(USA v Venezuela)* reported in J. Ralston, *The Law and Procedure of International Tribunals* (1926) No. 75, 62.
155 *Vivendi v Argentina No. 1* (Annulment) 6 ICSID Rep 340, 366/98. Elsewhere, the *ad hoc* committee referred to the 'fundamental basis of the claim', which was the expression used in the *Woodruff* case: *ibid*. 367/101.
156 *Ibid*. 360/76.
157 *Ibid*. 360/74 (emphasis added).
158 *Ibid*. 368/106, 370/112, 370–1/114.

analysis.[159] The ramifications of such an approach are well illustrated by the decision in *Azurix v Argentina*.

514C. Azurix Corp. v Argentine Republic[160]

The claimant's Argentine investment vehicle 'ABA' was awarded a thirty year concession by the Province of Buenos Aires for the distribution of potable water and the treatment and disposal of sewerage.[161] The various pre-contractual documents, together with the Concession Agreement itself, all contained an exclusive jurisdiction clause in favour of the courts of the City of La Plata and a waiver by the parties of any other forum.[162] Clause 16.7 of the Concession Agreement, the Concession Agreement signed by ABA, the Province of Buenos Aires and a municipal authority responsible for sanitation, read as follows:

> In the event of any dispute regarding the construction and execution of the Agreement, the Grantor [the Executive Authorities of the Province of Buenos Aires] and the Concessionaire [ABA] submit to the court for contentious-administrative matters of the city of La Plata, expressly waiving any other forum or jurisdiction that may correspond due to any reason.[163]

Argentina objected to the tribunal's jurisdiction under the USA/Argentina BIT on the basis that ABA's waiver of jurisdiction bound the claimant so that the latter was precluded from bringing a claim with respect to the investment in the water concession before another forum.[164] The waiver in clause 16.7 of the Concession Agreement was in fact inserted into the

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[159] *SGS v Pakistan* (Preliminary Objections) 8 ICSID Rep 406, 435–6/145; *Salini v Morocco* (Preliminary Objections) 6 ICSID Rep 400, 407/30, 415/61–3; *Suez v Argentina* (Preliminary Objections) para. 43; *Nykomb v Latvia* (Merits) 11 ICSID Rep 158, 190–9/section 4; *IBM v Ecuador* (Preliminary Objections) paras. 62–3 ('if the claimant considers that an infraction is made of a right granted by the BIT, such allegation is sufficient for this Tribunal to declare itself competent to know about it'); *Siemens v Argentina* (Preliminary Objections) 12 ICSID Rep 174, 216/180; *National Grid v Argentina* (Preliminary Objections) para. 169; *Camuzzi v Argentina* (Preliminary Objections) para. 88; *AdT v Bolivia* (Preliminary Objections) para. 114. *Eureko v Poland* (Merits) 12 ICSID Rep 335, 362/113. In *Parkerings v Lithuania* (Merits), the tribunal intimated that it would only decline jurisdiction if the claimant had in some way disguised the juridical nature of the claims: '[T]he Claimant is alleging treaty violation and there is nothing convincing in the record that may lead to the suspicion of the Claimant having disguised contract claims with Treaty claims for the benefit of jurisdiction' (*ibid*. para. 259). The threshold for claiming on the basis of a treaty obligation was put extremely low; the tribunal only satisfied itself that the state acts in question 'had an impact on the investment of the Claimant' (*ibid*. para. 265). No objective analysis of the foundation of the claims appears to have been made by the tribunal in: *TSA Spectrum v Argentina* (Preliminary Objections) paras. 60 *et seq*. But see, *contra*: *TSA Spectrum v Argentina* (Separate Opinion) paras. 5–7.

[160] (Preliminary Objections) 10 ICSID Rep 416; (Merits).

[161] (Preliminary Objections) 10 ICSID Rep 416, 420/22.

[162] *Ibid*. 421–2/26.

[163] *Ibid*.

[164] *Ibid*.

contractual documents by Argentina precisely to avoid the situation that arose in *Lanco v Argentina* and *Vivendi v Argentina*.[165] According to Argentina, the claimant's claims arose out of the Concession Agreement and thus the exclusive jurisdiction clause should be upheld by the tribunal with respect to those claims.[166]

One might expect that Argentina's objection would have mandated a careful analysis of the nature of the claimant's claims, however, such an analysis is nowhere to be found in the tribunal's decision. Nor are the claimant's claims, as they were actually pleaded, reproduced in the text.

The impact of an exclusive jurisdiction clause is a question of admissibility, but it presupposes an antecedent analysis of the scope of the tribunal's jurisdiction *ratione materiae*. Indeed, Article VII(1) of the Argentina/USA BIT mandates the characterisation of the claimant's claims by reference to three categories of potential investor/state disputes:

> For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

In its discussion of Article 25 of the ICSID Convention, the tribunal had ruled that '(a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is a party to the Concession Agreement'[167] and hence 'the dispute as presented by the Claimant is a dispute arising directly from that investment'.[168] If the investment was ultimately ABA's interest in the Concession Agreement,[169] and the dispute arose directly from that investment agreement, then there was at least a distinct possibility that the legal foundation of the claims was contractual obligations in the Concession Agreement rather than investment treaty obligations. Indeed, Argentina had pointed out that ABA had brought claims before the city courts of La Plata that were 'identical as to their substance' as the claimant's claims before the ICSID tribunal constituted pursuant to the Argentina/USA BIT.[170]

In the end the tribunal upheld its jurisdiction simply by adopting the claimant's own characterisation of its claims:

[165] *Ibid*. 436/78.
[166] *Ibid*. 431/59.
[167] *Ibid*. 433/65.
[168] *Ibid*. 433/66.
[169] *Ibid*. 432/62.
[170] *Ibid*. 425/41.

> The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute. This follows from the scope of the jurisdiction clauses in the Contract Documents and the identity of the parties to whom the commitments were made.[171]

515. Hence, in *Azurix*, the application of the exclusive jurisdiction clause and waiver in the Concession Agreement was defeated by the claimant's mere invocation of the investment treaty obligations in the BIT, despite the fact that the claimant's interest in the Concession Agreement was relied upon to establish its investment in Argentina. This is a classic example of permitting a party to approbate and reprobate in relation to a single legal instrument.

516. By adopting the claimant's own characterisation of its claims without an objective analysis, investment treaty tribunals have allowed claimants to bypass the principle of privity of contract by the simple device of invoking the rules of attribution in the law of state responsibility.

516C. Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v Islamic Republic of Pakistan[172]

Bayindir's alleged investment consisted of its contract with the National Highway Authority to build the 'Pakistan Islamabad – Peshawar Motorway'.[173] The National Highway Authority ('NHA') is a separate legal entity in Pakistan with capacity to sue and be sued in its own name.

Pakistan objected to the jurisdiction of the investment treaty tribunal on the basis that the legal foundation of Bayindir's claims was the contract with the NHA, which specified that disputes arising out of the contract must be submitted to arbitration pursuant to the Arbitration Act 1940 of Pakistan.[174] Bayindir's claims before the investment treaty tribunal, according to Pakistan, originated as claims for precisely the same quantum of damages before the arbitral tribunal constituted pursuant to the contract.[175]

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171 *Ibid*. 435/76.
172 (Preliminary Objections).
173 *Ibid*. para. 4.
174 *Ibid*. para. 154.
175 *Ibid*. para. 158.

Pakistan's jurisdictional objection required an objective analysis of the legal foundation of Bayindir's claims. If this analysis were to disclose the contract as the foundation of the claims, then the NHA, rather than Pakistan, would be the proper defendant and the only proper defendant. Hence the importance of testing the legal foundation of the claims: if it transpired that Bayindir's claims were objectively based on the contract rather than the investment treaty but its own characterisation were nevertheless adopted, then Bayindir would be permitted to sue Pakistan by relying upon the rules of attribution in circumstances where those rules did not form part of the applicable law. If the fundamental basis of the claims were the contract itself, the applicable law would have been the law of Pakistan.

In its Decision on Jurisdiction, the tribunal stumbled before adopting the correct approach. The stumbling point was the following statement of principle which appears to adopt the claimant's characterisation of its claims without objective analysis:

> In the present case, Bayindir has abandoned the Contract Claims and pursues exclusively Treaty Claims. When an investor invokes a breach of a BIT by the host State (not itself party to the investment contract), the alleged treaty violation is by definition an act of '*puissance publique*'. The question whether the actions alleged in this case actually amount to sovereign acts of this kind by the State is however a question to be resolved on the merits.[176]

The question is not whether 'Bayindir has abandoned the Contract Claims' or 'invokes a breach of a BIT' because the jurisdiction of an international tribunal cannot depend exclusively upon the unilateral acts of one of the parties. An 'alleged treaty violation' is not 'by definition an act of "*puissance publique*"' unless it is objectively determined that the claim is properly founded upon an investment treaty obligation. This required a preliminary assessment of the nature of the acts complained of by the claimant. If the NHA never transcended the contractual or administrative law framework that governed its contract with Bayindir, then the investment treaty tribunal had no jurisdiction over the claims submitted by Bayindir however characterised.[177]

It cannot be right that the acts of a public authority automatically become acts of '*puissance publique*' merely because the claimant has formulated its claim as a breach of an investment treaty obligation.

The tribunal did ultimately apply the *prima facie* test before upholding its jurisdiction over the claimant's treaty claims:

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[176] *Ibid*. para. 183.

[177] Unless the contractual or administrative power relied upon by the NHA constituted a *per se* violation of the BIT, which was not alleged.

> [T]he Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.[178]

The tribunal's exact purpose in conducting this analysis, however, is not entirely clear. The tribunal described its task as to determine 'whether the Treaty Claims are sufficiently substantiated for jurisdictional purposes'.[179] According to the tribunal, however, this question was different from an analysis of the legal foundation of the claimant's claims as either based on the contract or the investment treaty.[180] The tribunal's approach leaves the impression that it was concerned to test independently the plausibility of the claimant's claims on the merits as a preliminary issue. Unless Pakistan was advancing something procedurally equivalent to a strike-out application, which is not completed by the ICSID Arbitration Rules, it is difficult to understand the tribunal's motivation in conducting a *prima facie* test independently of its assessment of the legal foundation of Bayindir's claims.

517. In *LESI (Astaldi) v Algeria*,[181] Algeria objected to the tribunal's jurisdiction to hear claims that were founded upon a construction contract to which the '*Agence Nationale des Barrages*' was the counterparty (i.e. not the Central Government of Algeria).[182] The tribunal described the claims in the following terms:

> En substance, cette Requête concluait à l'allocation de dommages-intérêts liés aux difficultés rencontrées sur le chantier du barrage, à la résiliation du Marché et au retard mis à l'indemnisation.[183]

518. The tribunal's threshold for proceeding to hear the merits of these claims *as investment treaty claims* was whether 'it cannot be excluded' that such claims could rise to the level of a breach of the Italy/Algeria BIT:

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178 *Ibid*. para. 197.
179 *Ibid*. para. 186.
180 *Ibid*. paras. 183–4.
181 (Preliminary Objections).
182 *Ibid*. para. 64.
183 *Ibid*. para. 38. This summary was in relation to the first notice of arbitration served by the claimants, but the tribunal recognised that the second notice of arbitration was in substance identical: 'La présente procédure est liée à la première procédure … Elle est dirigée contre la même Défenderesse ; elle repose sur les mêmes faits ; elle contient des conclusions analogues fondées sur les mêmes normes' (*ibid*. para. 56).

> Il lui suffit de constater que l'on ne peut exclure, à ce stade du moins, que les retards qui ont affecté le chantier, la nature (ou l'absence prétendue) des mesures qui auraient été nécessaires pour assurer la protection du chantier et des personnes occupées à la réalisation de l'ouvrage, les conditions de la résiliation du Contrat et les difficultés rencontrées par les Demanderesses dans l'obtention d'une indemnisation pourraient remplir les conditions d'une expropriation ou d'une atteinte au principe du traitement équitable. Ce sont là des éléments qui justifient que le Tribunal arbitral admette sa compétence, sur le fondement d'une analyse *prima facie*, afin d'être en mesure de les examiner au fond sur la base de l'instruction qui sera menée.[184]

519. Needless to say, a test resting upon the threshold 'cannot be excluded' contradicts a basic principle of arbitration: it is for the claimant to invoke the jurisdiction of the tribunal, which has no inherent jurisdiction over the parties or the claims. The threshold proposed by the tribunal in *LESI* reverses the proper burden of persuasion.

Rule 28. The test for the legal foundation of a claim for the purposes of Rule 27 is whether the facts alleged by the claimant in support thereof are *prima facie* capable of sustaining a finding of liability on the part of the host state by reference to the legal obligation invoked in support of the claim.[185]

520. A great number of tribunals have purported to determine questions of jurisdiction according to a *prima facie* standard, but very few have articulated a justification for adopting that standard. As a general approach to questions of jurisdiction, it is manifestly unsound. A tribunal cannot assert jurisdiction over parties and their disputes merely because it is satisfied that the materials presented by the claimant establish a *prima facie* case that the tribunal has jurisdiction. A general *prima facie* test for questions of jurisdiction might be

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[184] *Ibid*. para. 84. In *Société Générale v Dominica* (Preliminary Objections), the tribunal purported to apply the *prima facie* test (para. 60) but then stated that the 'precise nature of the eventual breach is also something to be determined at the merits stage' (para. 64). But in order to apply the *prima facie* test, it is necessary to analyse the claimant's description of the acts attributable to the state that are alleged to have breached the treaty obligations.

[185] *UPS v Canada* (Preliminary Objections) 7 ICSID Rep 288, 296/35; *SGS v Philippines* (Preliminary Objections) 8 ICSID Rep 518, 523–4/26, 562/157; *Impregilo v Pakistan* (Preliminary Objections) 12 ICSID Rep 245, 293/239; *Bayindir v Pakistan* (Preliminary Objections) para. 197; *Jan de Nul v Egypt* (Preliminary Objections) para. 69; *Amco v Indonesia No. 1* (Preliminary Objections) 1 ICSID Rep 389, 406; *Saipem v Bangladesh* (Preliminary Objections) para. 91; *Joy Mining v Egypt* (Preliminary Objections) para. 29; *Telenor v Hungary* (Preliminary Objections) para. 68; *Salini v Jordon* (Preliminary Objections) para. 151; *Plama v Bulgaria* (Preliminary Objections) para. 119; *Camuzzi v Argentina* (Preliminary Objections) para. 63; *Total v Argentina* (Preliminary Objections) paras. 67–8; *Noble v Ecuador* (Preliminary Objections) para. 165; *Chevron v Ecuador* (Preliminary Objections) para. 103; *Mytilineos v Serbia* (Preliminary Objections) para. 187; *Helnan v Egypt* (Merits) para. 104.

appropriate in circumstances where the claimant is requesting urgent provisional or interim relief from an international tribunal and the circumstances do not permit that tribunal to make exhaustive inquiries into the law and facts in order first to establish its jurisdiction. Such is the approach that has been adopted by the International Court of Justice in this respect.[186] But outside this exceptional context, the question of jurisdiction is a question of law and must be answered definitively by the tribunal like any other question of law. Thus, for instance, if the host state raises an objection *ratione personae* on the basis that the claimant does not have the requisite nationality to benefit from the protection of a particular investment treaty, the tribunal is obliged to make a definitive ruling on that objection after an exhaustive examination of the relevant issues of law and fact. It is not permissible for the tribunal to uphold its jurisdiction on the basis of *prima facie* evidence that the claimant has the nationality of a particular state; for once jurisdiction is upheld, there is no procedural imperative to revisit that precise question on the merits.

521. Outside the context of urgent applications for provisional measures or interim relief, a *prima facie* test only has a role to play in a preliminary decision on jurisdiction if the issues to which the *prima facie* standard is applied are destined to be revisited in the tribunal's examination of the merits of the case. Such issues can be narrowly defined as relating to one aspect of the tribunal's *ratione materiae* jurisdiction, which is unique among the other requirements of jurisdiction insofar as the tribunal is obliged to make a preliminary incursion into matters that will be resolved on the merits if jurisdiction is upheld. The tribunal must assess for itself whether the claims and counterclaims submitted by the parties to the dispute fall within the description of the types of claims and counterclaims over which the tribunal has jurisdiction. That description is of course to be found in the provision of the investment treaty recording the consent of the contracting state parties to investor/state arbitration.[187]

522. How, then, is the tribunal to conduct this preliminary assessment of the claims submitted to it? The first element is the principle that, for jurisdictional purposes, the tribunal must presume that the facts pleaded by the claimant are correct. A tribunal is not in a position at a preliminary phase of the arbitration proceedings to make a definitive ruling on the veracity of the facts asserted by the claimant to substantiate its claims, for that would entail a full examination of the evidentiary record. This principle is not inflexible, and there may be circumstances where the particular facts pleaded by the claimant are so implausible that the normal presumption of veracity for jurisdictional purposes should not apply. The second

[186] *Icelandic Fisheries (United Kingdom v Iceland)* 1972 ICJ Rep 12 (Provisional Measures), 16 at para. 18; 30, 34 at para. 18. See further: A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 938; S. Rosenne, *Provisional Measures in International Law* (2005) 91–4.

[187] See Chapter 4.

element is an analysis of these facts against the particular legal obligation upon which the claim is founded in order to determine whether those facts are *prima facie* capable of sustaining a finding a liability on the part of the respondent.

523. The *prima facie* test is thus employed to determine the legal foundation of the claim on an objective basis for the purposes of characterisation. This characterisation is necessary for several reasons. First, many investment treaties limit the scope of a tribunal's *ratione materiae* jurisdiction to a particular class or categories of claims relating to an investment.[188] The most common limitation is that any claim must be founded upon an investment treaty obligation.[189] For a tribunal to confirm its jurisdiction *ratione materiae* over such a claim, it must objectively characterise the legal foundation of the claim by presuming the facts alleged by the claimant to be true and then applying the *prima facie* test. Second, the characterisation of the legal foundation of the claim is essential for several rules of admissibility. If the investment is memorialised in an agreement with the host state, then the investment treaty tribunal must give effect to an exclusive jurisdiction clause in that agreement in relation to any claims within its scope. If the legal foundation of the claim submitted by the claimant is objectively characterised as the contract rather than an investment treaty obligation, then the claim is likely to be inadmissible as falling within the scope of the exclusive jurisdiction clause.[190] Alternatively, if the agreement is with an emanation of the host state but a separate legal entity, then the host state is the proper defendant only if the claim is founded upon an investment treaty obligation for otherwise the rules of attribution do not apply. In both situations, grave injustice might attend a failure on the tribunal's part to characterise the legal foundation of the claim objectively in accordance with the *prima facie* test. It is not acceptable for the tribunal to adopt the claimant's characterisation of its claims without its own analysis.

524. Contrary to the approach that may be detected in many investment treaty precedents, the *prima facie* test advocated in Rule 28 is not a freestanding threshold of plausibility that, once satisfied, merely ensures the safe passage of the claims to a hearing on the merits. Its deployment is rather linked to the assessment of the tribunal's jurisdiction *ratione materiae*; it is a tool for the characterisation of the claims in the preliminary phase of the arbitration at which point a full investigation of the evidentiary record is impractical and a definitive ruling on the merits of the substantive legal arguments impossible.

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[188] Many do not; formulations such as 'any investment dispute' or 'all disputes relating to an investment' do not place any limitation upon the legal foundation of a claim submitted to an investment treaty tribunal.

[189] See para. 443 above.

[190] See Chapter 10.

525. The most succinct statement of the *prima facie* test is to be found in *UPS v Canada*:[191]

> [The Tribunal] must conduct a *prima facie* analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations.
>
> That formulation rightly makes plain that a claimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive.[192]
>
> The test is of course provisional in the sense that the facts alleged have still to be established at the merits stage. But any ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.[193]

526. A great number of tribunals have paid lip service to the *prima facie* test without proper regard for the important objective that it serves. The instances where its application has resulted in jurisdiction being declined are extremely rare. This is somewhat remarkable given how many investment disputes have their genesis in the breakdown of a contractual relationship between the investor and the host state and the clear incentives for an investor to characterise its claims as founded upon investment treaty obligations rather than the contract. The tribunal's decision on jurisdiction in *Impregilo v Pakistan*[194] is notable for the depth of its analysis in this context. The tribunal concluded that one of the claims submitted by Impregilo could not properly be characterised as founded upon an investment treaty obligation by application of the *prima facie* test:

> [T]he Tribunal considers that Impregilo's claims in respect of unforeseen geological conditions, which were the subject of [Dispute Resolution Board] Recommendation 14, and which have since been referred to the Lahore arbitration pursuant to the dispute resolution provisions of the Contracts, are not capable of constituting 'unfair or inequitable treatment' or 'unjustified or discriminatory measures' for the purposes of Article 2 of the BIT. These are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties.[195]

527. In *Salini v Jordan*,[196] the tribunal also declined jurisdiction in respect of certain claims alleged to be founded upon an investment treaty obligation:

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[191] (Preliminary Objections) 7 ICSID Rep 288.
[192] *Ibid*. 296/33.
[193] *Ibid*. 297/36.
[194] (Preliminary Objections) 12 ICSID Rep 245.
[195] *Ibid*. 299/268.
[196] (Preliminary Objections).

> [T]he Claimants … base their treaty claims exclusively on the way in which the Contract was implemented by the Engineer and by [Jordanian Valley Authority]. But they explain nowhere how the alleged facts could constitute not only a breach of the contract, but also a breach of Article 2 (3) of the BIT. They only quote that article and assert that it has been violated. They present no argument, and no evidence whatsoever, to sustain their treaty Claim and they do not show that the alleged facts are capable of falling within the provisions of Article 2(3). The Tribunal, therefore, has no jurisdiction to consider this first treaty claim.[197]

Rule 29. Where the host state party's consent to arbitration is stipulated in an investment agreement rather than in an investment treaty, then, subject to the terms of the arbitration clause, the tribunal's jurisdiction *ratione materiae* may extend to claims founded upon an international obligation on the treatment of foreign nationals and their property in general international law, an applicable investment treaty obligation,[198] a contractual obligation, a tort, unjust enrichment or a public act of the host state party in respect of measures of the host state relating to the claimant's investment.

A. THE RELEVANCE OF THE LEGAL INSTRUMENT CONTAINING THE ARBITRATION CLAUSE

528. It might be thought that an ICSID arbitration clause in an investment agreement could only confer jurisdiction *ratione materiae* in relation to a claim founded upon the legal instrument which contains the clause, viz. a claim for breach of the investment agreement itself. Such an *a priori* assumption concerning the scope of an ICSID arbitration clause, or indeed any arbitration clause, would be mistaken. Arbitration clauses in contracts are frequently interpreted as extending the tribunal's jurisdiction to claims in tort, for instance, because there is a sufficient nexus between the tort claim and the rights and obligations arising out of the contract.[199] There is no reason in principle to deny the possibility of a contractual arbitration clause supporting the *ratione materiae* jurisdiction of an international tribunal over a claim in general international law if the same nexus is found to exist. There are a number of factors that are relevant to such a determination. First, there is the question of contractual interpretation in relation to the specific words employed to describe the scope of the arbitration clause itself. The Model ICSID Clause, for instance, is drafted

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[197] *Ibid*. para. 163.
[198] (*Semble*) *Duke Energy v Ecuador* (Merits) para. 162.
[199] J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (2003) 151.

in the widest terms to encompass 'any dispute arising out of or relating to this agreement'.[200] The ordinary meaning of the words 'relating to' is capable of extending to a claim for the expropriation of the assets that were invested in the host state in accordance with the terms of the agreement. Second, the central government of the host state must be a party to the investment agreement itself. It is impermissible to join the central government as a party to the investment agreement and its arbitration clause merely by pleading a claim in general international law (and thereby relying upon the rules of attribution). Where the tribunal's adjudicatory power is confirmed by an arbitration clause in a contract, the tribunal's jurisdiction *ratione personae* is limited to the parties to that contract. Third, the investment agreement must have memorialised property rights that could be the object of a claim in general international law. Fourth, the international tribunal must be authorised to apply international law by the applicable rules governing the arbitration. The preponderance of modern arbitration rules and municipal laws on arbitration do not restrict the sources of law from which tribunals can derive applicable rules and hence this final factor is unlikely to be an obstacle in many cases. For arbitrations conducted pursuant to the ICSID Convention, Article 42(1) makes express reference to international law. It is important to emphasise, however, that Article 42(1) does not automatically vest an ICSID tribunal with jurisdiction *ratione materiae* over a claim founded upon an obligation in international law – that depends upon the instrument conferring adjudicative power. If the instrument is an investment treaty, then the tribunal clearly has jurisdiction over a claim based upon an investment treaty obligation. If it is an investment agreement, then it is possible that jurisdiction might be vested in relation to a claim founded upon an applicable investment treaty obligation or general international law if the first three requirements previously listed are complied with.

528C. Amco Asia Corp., Pan American Development Ltd & PT Amco Indonesia v Republic of Indonesia No. 1[201]

In April 1968, Amco Asia Corporation ('Amco Asia'), a Delaware company, entered into a Lease and Management Agreement ('Lease Agreement') with P.T. Wisma Kartika ('PT Wisma'), an Indonesian company. PT Wisma was owned by 'Inkopad', a cooperative formed by the Indonesian Army to provide, *inter alia*, low-cost housing.[202] The Lease Agreement called for Amco's construction of a hotel and an office block on land owned by PT Wisma. It contained an ICC arbitration clause.[203]

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[200] Available at: http://icsid.worldbank.org/ICSID/StaticFiles/model-clauses-en/main-eng.htm.
[201] (Preliminary Objections) 1 ICSID Rep 389.
[202] *Ibid*. 416–17/9.
[203] *Ibid*. 416–18/9–11.

In order to benefit from a catalogue of significant tax concessions under the 1967 Foreign Investment Law of Indonesia, in May 1968 Amco Asia submitted an application to the Indonesian Foreign Investment Board for an 'Investment Licence' to establish a wholly owned Indonesian subsidiary to qualify for these concessions.[204] Amco Asia undertook to invest USD 3 million in the equity of the subsidiary, PT Amco Indonesia ('PT Amco'), and provide it with a loan of USD 1 million.[205] The application specified the modalities and timing for this USD 4 million investment in PT Amco[206] and the particular tax concessions that it claimed.[207] It contained an ICSID arbitration clause with respect to disputes arising between PT Amco and the Government of Indonesia.[208] The application was approved by the Indonesian Government in July 1968.[209] The juridical nature of the Investment Licence was contested throughout the ICSID arbitration, the debate focusing on whether it had an administrative law character or was more akin to a civil law contract.[210] It will suffice to note for present purposes that the essential feature of the Investment Licence was a *quid pro quo*: in return for the direct investment of USD 3 million into an approved project in Indonesia, Amco Asia through PT Amco attained significant tax concessions.

Unbeknown to the Government of Indonesia, in October 1968, Amco Asia executed an 'Agreement of Appointment' with Pan American Development Limited ('Pan American'), which stated that Amco Asia 'in fact entered into' the Lease Agreement as agent of Pan American and that Amco Asia held its interest in that agreement on behalf of Pan American.[211] The Agreement of Appointment was never presented to the Indonesian Government. However, in April 1972, Amco Asia notified the relevant Minister that both Amco Asia and Pan American had jointly invested their capital in the project and sought permission to transfer a portion of its shares in PT Amco to Pan American.[212] The Foreign Investment Board communicated to Amco Asia that it had 'principally [sic] no objection' to this partial transfer of shares.[213] Furthermore, in January 1969, Amco Asia transferred all its rights under the Lease Agreement to PT Amco.[214]

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[204] *Ibid*. 420/20. It was essential to establish a 'legal entity organized under Indonesian law and having its domicile in Indonesia' to qualify for the tax concessions, which included, *inter alia*, exemption from corporation tax, tax on profits to shareholders, import duties, capital stamp tax and other benefits for a certain number of years: *ibid*. 419–20/14, 17–8.
[205] *Ibid*. 421–2/20-8.
[206] *Ibid*. 421–2/21, 28.
[207] *Ibid*. 421–2/23, 29.
[208] *Ibid*. 421–2/24.
[209] *Ibid*. 423/32.
[210] *Ibid*. 460–8/179–91.
[211] *Ibid*. 425/41–2.
[212] *Ibid*. 435/42–3.
[213] *Ibid*. 435/46.
[214] *Ibid*. 426/50.

In August 1969 and October 1970, PT Amco entered into sub-lease agreements in relation to the operation and management of the hotel, which was completed by October 1969.[215] Disputes later emerged between PT Amco and the sub-lessees concerning the maintenance standards at the hotel, which resulted in protracted litigation.[216] In June 1978, Inkopad took over possession of the hotel. Shortly afterwards, Inkopad authorised PT Wisma to enter into a profit sharing agreement for the management of the hotel with PT Amco (the '1978 Profit Sharing Agreement') as it transpired that Inkopad was not properly equipped to carrying out the management functions for the hotel.[217]

In the two-year period following the execution of the 1978 Profit Sharing Agreement, the relationship between PT Wisma and PT Amco deteriorated. The main points of conflict were PT Wisma's desire to obtain information about a promised Rp 200 million renovation of the hotel, a breakdown of the profits derived from the hotel, and details about the amounts actually distributed to PT Amco and PT Wisma under the 1978 Profit Sharing Agreement.[218] PT Wisma made its own calculations as to its entitlements under the 1978 Profit Sharing Agreement and on 11 March 1980 sent a payment demand to PT Amco by which it claimed the right to rescind the agreement should PT Amco fail to make full payment by 30 March 1980.[219] PT Amco defaulted on this payment demand and then, on 1 April 1980,[220] the Indonesian armed forces assisted PT Wisma in regaining control of the hotel.[221]

Shortly after PT Wisma repossessed the hotel it made certain representations to the Indonesian Capital Investment Board ('BKPM') about PT Amco's alleged violations of its commitments under the Lease Agreement and the Investment Licence.[222] The crux of these allegations was that PT Amco had employed various accounting techniques to conceal the fact that it had not invested the required USD 3 million in the project as required by the Investment Licence.[223] The BKPM's investigation of PT Amco's accounts confirmed that USD 4 million had not been invested by PT Amco and, on 9 July 1980, it resolved to terminate PT Amco's Investment Licence.[224]

PT Wisma sued PT Amco for breach of the Lease Agreement before the Indonesian courts. The Central Jakarta District Court upheld its

[215] *Ibid*. 428–30/57–70.
[216] *Ibid*. 431/75–7.
[217] *Ibid*. 431/78.
[218] *Ibid*. 433/87.
[219] *Ibid*. 433–4/88–9.
[220] *Ibid*. 434/90.
[221] *Ibid*. 437–8/100–1.
[222] *Ibid*. 440–1/110–16.
[223] *Ibid*. 441/117.
[224] *Ibid*. 445/129.

jurisdiction in spite of the ICC arbitration clause in the Lease Agreement and ruled, *inter alia*, that PT Amco had failed to fulfil its obligation to invest USD 4 million under the Lease Agreement.[225] The judgment was confirmed on appeal.[226]

Amco Asia, PT Amco and Pan American instituted ICSID arbitration proceedings against Indonesia on 15 January 1981,[227] claiming damages for expropriation, breach of contract and unjust enrichment.[228] Indonesia counterclaimed for restitution of all the tax concessions obtained by PT Amco under the Investment Licence.[229]

The ICSID arbitration clause was Article IX of the Investment Licence:

> If at a later date there is a disagreement and dispute between the Business and the Government, this disagreement will be put before the International Centre for Settlement of Investment Disputes, in which body the Government of the Republic of Indonesia and the United States are members. All the decisions made by the Convention mentioned above will bind the sides which are in disagreement and dispute.[230]

Unfortunately, in the tribunal's decision, there is no discussion of the tribunal's *ratione materiae* jurisdiction in respect of the claims advanced by the claimants; namely, expropriation, breach of contract and unjust enrichment. Article XI of the Investment Licence is drafted in the broadest possible terms and expressly binds the Government of Indonesia. Hence, in relation to a claim based upon the general international law of expropriation or an applicable investment treaty obligation of similar import (if there was a BIT in force between the USA and Indonesia at the relevant time), no difficulty would emerge from the wording used in the arbitration clause, the identity of the respondent or the power of the tribunal to apply international law. The controversial question would, instead, be whether the claim for expropriation has to be directed at rights arising out of the Investment Licence. Here the tribunal in the first *Amco v Indonesia* arbitration may have fallen into error. It was perfectly plausible that the Investment Licence did confer a right *in rem* that might have been the object of an expropriation. But the tribunal's finding of expropriation was in relation to the Indonesian Army's assistance to PT Wisma in regaining possession of the hotel.[231] The right *in rem* to possession of the hotel was conferred to PT Amco by the Lease Agreement. The ICSID arbitration clause, however, was in the Investment Licence. If the ICSID arbitration

[225] *Ibid*. 448/138.
[226] *Ibid*. 448–9/141.
[227] *Ibid*. 414/1.
[228] *Ibid*. 450/142.
[229] *Ibid*. 451/145.
[230] *Ibid*. 392/10.
[231] *Ibid*. 457/166.

clause could be read to extend to *any* aspect of Amco Asia's investment in Indonesia, then the tribunal would have jurisdiction over a claim relating to the expropriation of a right created by a wholly separate agreement. But if the word 'dispute' in the arbitration clause in the context of the other terms of the Investment Licence were to be interpreted as limited to disputes arising in connection with the Investment Licence and the rights created therein, then Indonesia's acts to assist a private party (PT Wisma) in its dispute with another private party (PT Amco) pursuant to the Lease Agreement could not have been part of the tribunal's jurisdiction *ratione materiae*. It is impossible to resolve this question without sight of the Investment Licence in its entirety.

In the subsequent annulment proceedings, Indonesia argued that the claim for expropriation is an international delict and thus beyond the *ratione materiae* jurisdiction of the tribunal. The *ad hoc* Committee noted that Indonesia had expressly waived its claim for nullity in respect to the tribunal's decision on jurisdiction in its written pleadings and therefore could not raise this point at the hearing. The *ad hoc* Committee did, however, pronounce upon the argument *obiter*:

> [T]he Tribunal did not manifestly exceed its powers when it considered the question of the legality of the acts of the army and police personnel as an integral part of the investment dispute between Amco and Indonesia. The jurisdiction of the Tribunal is not successfully avoided by applying a different formal categorization to the operative facts of the dispute.[232]

An ICSID tribunal does not have an inherent jurisdiction over any claim – its jurisdiction must be positively invoked rather than 'successfully avoided'. The broad formulation of an investment dispute in Article 25 of the ICSID Convention does not make redundant the specific instrument conferring jurisdiction in the particular case, whether it be an investment contract or investment treaty. Hence, if the *ad hoc* Committee had been called upon to review the tribunal's decision on its *ratione materiae* jurisdiction over the international delict of expropriation, it would have had to examine the ICSID arbitration clause in the Investment Licence and the other requirements listed in paragraph 528 above.

529. It is interesting to consider a hypothetical scenario based upon a different ICSID arbitration clause to that in *Amco v Indonesia*. Suppose the arbitration clause in the Investment Licence referred to a 'dispute relating to a breach of the Licence terms'. A tribunal with adjudicative power by virtue of this arbitration clause would not have *ratione materiae* jurisdiction to hear a claim for expropriation because that is not a claim that derives its juridical foundation from the Investment Licence. But suppose that Amco Asia complains that the Indonesian

[232] *Amco v Indonesia No. 1* (Annulment) 1 ICSID Rep 509, 527/68.

Government has failed to grant a promised tax concession under the Investment Licence due to its annulment of all investment licences issued to American companies. In this situation, the tribunal would be able to assess the international validity of that governmental decree as an incidental question arising out of Amco Asia's claim for breach of the Licence terms. If it concluded that the decree is a nullity by virtue of the general international law on the treatment of foreign nationals and their property, then the decree could not be an impediment to awarding damages based upon the breach of the Investment Licence.