

Arbitrating Investment Disputes

Francisco Orrego Vicuña

Investment arbitration has become one of the central features of contemporary legal practice for counsel, government officials and arbitrators. It has also meant the development of specialized institutions, such as ICSID, or the growing utilization for the settlement of investment disputes of other arbitration institutions, such as the LCIA, the ICC and the Stockholm Centre, just as it has meant an increasing utilization of UNCITRAL rules in this context.

This contribution has been organized not so much on the procedural aspects of such arbitration, which are in many respects similar to those of any other arbitration and are very competently explained in other sections of this book. It will rather look at a number of issues concerning jurisdiction which need to be considered by counsel in respect of many disputes that are likely to end in some form of international arbitration or indeed at the time they are brought to arbitration.

A shared privilege

It is many times thought that arbitrating investment disputes is the privilege of capital exporting countries, particularly in connection with investment in Eastern Europe or the developing world. This view, however, sometimes overlooks the fact that developing countries, including to this effect China, have not only signed numerous bilateral investment treaties but have done so both with developed countries and among themselves. Not few arbitration proceedings have been initiated by companies and individuals from developing countries against other developing countries, as well as against developed countries. Bilateral investment treaties, on the other hand, are just a part of the broad legal framework governing investments, which is also supplemented by various multilateral treaties dealing wholly or in part with investments and

sometimes having only developing countries as parties to them, as is the case of the MERCOSUR Protocols¹, the ASEAN Investment Agreement²¹ or some Free Trade Agreements.³

Another question that is important to note is that investment arbitration is not purely an alternative open to investors. It is also open to states. Under the ICSID Convention or other arbitration arrangements not only an investor can bring a State to court but also a host State can initiate proceedings against an investor, provided a written consent to arbitration has been given by both, as is often the case under direct investment agreements and occasionally under investment contracts. States have seldom used this alternative and it seems that awareness about its existence is not widespread.⁴ There is also of course the possibility of counterclaims in a proceeding initiated by an investor.

A related aspect is still more significant. For many years developed countries appeared to believe that bilateral investment treaties were a one way street allowing for claims against developing host States. Much to the surprise of a few OECD countries, investors from developing countries have initiated proceedings against them, thus evidencing that bilateral treaties are a two-way street.⁵ Again this is likely to see important developments in the near future as a consequence of the globalization of investments and of the fact that there are many countries today exporting capital and entering into various forms of business ventures.

This complex legal framework has been interpreted and reinterpreted by numerous international tribunals and increasingly by domestic courts too. Along this process, which is not long in time, a number of issues have been clarified, either in

terms of the consideration of new approaches or understandings or of the placing of limits to some such developments.

In spite of occasional critical perceptions that tend to see in arbitration a tool for protecting foreign investors to the detriment of governments,⁶ the end result of such a process has advanced thus far the balance between the right of host States to undertake regulatory functions in the public interest and the right of foreign investors to carry on their business without arbitrary or unlawful interference.

Intricacies of consent

Practitioners may wish to look first into the jurisdictional issues that will often be found in arbitration. The first such issue is that a State Party to the ICSID Convention or some other arbitration arrangement that is brought to court by an investor is likely to raise the question that it has not expressly consented to the submission of that particular dispute to arbitration. In that point of view, commitment to arbitration under a bilateral investment treaty requires a specific “compromis” in which both parties will agree to that submission and its modalities. True enough this was the traditional modality of inter-State arbitration in the early part of the twentieth century. States agreed to the arbitration of disputes under a treaty, but this was regarded only as a “pactum de contrahendo” the implementation of which required an additional and specific “compromis”.

This is, however, one question that has fundamentally changed in the context of arbitrating investment disputes. Interestingly enough this is not the result of the ICSID Convention that only requires the parties to consent in writing to the submission of the dispute to the Centre.⁷ It is rather the result of the network of bilateral investment treaties that have provided for the overall expression of consent by States parties in

respect of disputes that might arise with foreign investors. This same result can be obtained by a general offer of submission to ICSID arbitration in domestic law.

As these investors are not a party to the treaty but are the beneficiaries of rights bestowed directly upon them under international law, or under domestic law, their own expression of consent might come later in time or under separate instruments. This happens typically when consent by the investor is given in a direct agreement with the State concerned or simply by resorting to such a choice in writing, or even by instituting proceedings in the Centre.

ICSID and other tribunals have had no difficulty in finding that the offer by the State to submit to arbitration, followed by acceptance, is a definite binding legal obligation without further steps needed to establish jurisdiction.⁸ Yet, as a recent case has shown, enormous complexities can be found when this reasoning is applied in conjunction with questions of change of nationality and particularly whether the expression of consent to arbitration given by a foreign national who made the investment at the time he was a national of the defendant State can satisfy the requirement of jurisdiction.⁹

ICSID tribunals have on occasions shown concern about this matter by not accepting modalities that are far remote from a proper consent. In *Cable TV v. St. Kitts and Nevis*, for example, the tribunal ruled that references to an ICSID clause in domestic proceedings did not amount to consent to arbitration.¹⁰ On the other hand, however, tribunals have also been strict in not allowing a State that has expressed its consent to elude its obligations in respect of the foreign investor. So happened in *CSOB v. Slovakia*, where the Tribunal found that an ICSID clause included in a BIT not yet in force had been embodied by the parties in a direct agreement and upheld jurisdiction on this basis.¹¹

In this same case, although the pertinent treaty provided that upon the agreement of both parties the dispute would be submitted to the Centre, it was held that this did not mean, as alleged, that submission had to be made jointly as this would imply the need for an additional agreement to put into practice the consent expressed by the State in the treaty.¹² The “pactum de contrahendo” approach was thus expressly ruled out.

“Arbitration without privity” is here to stay, as evidenced not only by a variety of bilateral investment treaties but also by multilateral arrangements.¹³ The NAFTA, in the context of the operation of the ICSID Additional Facility, like the Energy Charter Treaty, contain forms of unconditional consent to ICSID or UNCITRAL arbitration.

Unsuccessful efforts at bypassing consent

A rather different view was put forth by a defendant State in the context of the registration in ICSID of an investor’s request for arbitration under a bilateral investment treaty.¹⁴ Because there had been diplomatic demarches by the State of the investor’s nationality in support of the investor’s right to take the dispute to arbitration, the defendant State made the argument that there was a State to State dispute that had to be settled first through the operation of the ad-hoc arbitration that investment treaties normally provide for disputes between States parties. It should be noted that diplomatic exchanges directed to facilitate the settlement of the dispute are not normally considered a form of diplomatic protection under Article 27(2) of the Convention.

That view, if accepted, could have meant that recourse to ICSID arbitration by a private investor and the Centre’s jurisdiction would be paralysed until a different arbitration finalizes. As diplomatic exchanges not amounting to diplomatic protection regularly take place when there is an investment dispute, it would be easy for any defendant State to elude its obligations toward the investor by claiming the existence of an inter-State dispute. This situation would entangle ICSID’s jurisdiction for long

periods of time to the disadvantage of the investor. Moreover, it is quite evident that the kind of disputes between States parties to which the inter-State procedures could apply are very different from those affecting the investor's rights under a bilateral treaty, a situation somewhat paralleled by Article 64 of the Convention and its negotiation history. The tribunal in that case refused to grant a stay of the proceeding while inter-State arbitration was resorted to by the defendant State, an initiative that ultimately did not materialize.

Intergovernmental treaties and the expanding individuals' right of action

It might also be of interest for counsel to note in this respect the recent decisions of English courts in the context of the doctrine of non-justiciability as argued in respect of an investment dispute decided by an UNCITRAL tribunal whose award had been challenged before those courts. The courts held that the right of the individual to resort to arbitration under inter-State treaties, including the eventual challenge of the award by the defendant State, was quite independent from the intergovernmental nature of investment treaties and the fact that a treaty is concluded between States cannot result in the derogation of rights that belong to private Parties.¹⁵

A different recent development that has influenced some decisions on jurisdiction in cases concerning investment disputes needs to be eventually considered by counsel. Ever since the very outset of the protection of foreign traders by means of treaties of commerce and navigation, the most-favoured-nation clause had a crucial role to play in terms of the material conditions in which trade was developed. This very trend continued unabated under the modern system of protecting the rights of foreign investors. The possibility of applying the clause to procedural matters had arisen but had never been decided, as the well known *Ambatielos* case evidences.¹⁶ This was to change too in the light of recent decisions, albeit not in all.

An Argentine investor proceeding against Spain applied directly to the Centre not taking his claim first to Spanish courts, which had an eighteen-month period to decide the dispute as provided for in the Argentine-Spain investment treaty. The justification for this application was that under the Chile-Spain investment treaty direct recourse to the Centre was allowed, what was argued meant a more favourable treatment to Chilean investors in Spain and hence should be extended under the clause to the Argentine investor.

The ICSID Tribunal, after carefully examining the treaty practice of both Argentina and Spain, concluded that the eighteen-month period did not amount to a requirement of exhaustion of local remedies, which can be made under the ICSID Convention. On that basis, it decided that the clause was applicable to this procedural question and hence affirmed jurisdiction.¹⁷ It should be noted, however, that the Tribunal was also careful in explaining that such a clause cannot be used in highly institutionalized dispute settlement arrangements where procedural aspects have been built as an essential requirement of jurisdiction and admissibility or in other situations where the parties have specifically agreed to more limited arrangements. The wording of the treaty was also crucial as it applied the clause to all matters under that treaty.

While other decisions have expounded on the concept,¹⁸ there have also been cases where the applicability of the clause to procedural questions has not been accepted.¹⁹ This too has been the express understanding of some recent treaties.²⁰ The parties to such arrangements are of course at liberty to narrow down the extent of the clause to some specific matters, but where the contrary intent is evident the clause might perform a useful role in providing for the harmonization of treatment of foreign investors and in avoiding discrimination in this context.

Keeping time

The question of time in connection with investment arbitration is another decisive aspect to be taken into account. This aspect plays of course a most important role in affirming or dismissing jurisdiction in a given case. In *Tradex v. Albania*, for example, the tribunal rejected jurisdiction on the basis that an investment treaty had not yet entered into force.²¹ In *Holiday Inns v. Morocco*, however, the Tribunal faced a more complex situation. At the time of the investment agreement containing the consent to arbitration the pertinent States had not yet ratified the ICSID Convention, but these requirements were satisfied before proceedings were actually instituted. The tribunal concluded that it was the date when conditions were satisfied that should be deemed to constitute the date of consent and, accordingly, affirmed jurisdiction as the request for arbitration was made after this date.²²

Also time is of the essence of most bilateral investment treaties in that they usually allow for submission to arbitration of those disputes that arise after the treaty has entered into force. The investment in most cases might have been made earlier. Given the fact that discussions and disagreements between investors and host States might extend for a long period of time, tribunals occasionally have to decide on the time the dispute arose and whether it is under its jurisdiction. The test was explained in *Maffezini* where it was held that disagreements and difference of views might extend for a period of time, even before the entry into force of the treaty, but what matters is the moment in which there is a claim with a legal meaning in respect of rights and obligations of the parties concerning the investment. In *Lucchetti*, however, the tribunal was of the view that a dispute that arose between the parties before the entry into force of the Treaty concerning construction permits was the same as an expropriation dispute

that arose after the Treaty had entered into force, considering that one was just the continuation of the other, thus declining jurisdiction on this understanding.

Resorting to safeguards

Counsel for governments and government officials might also wish to look into the question of safeguards. A number of safeguards available to the parties of bilateral investment treaties are not always resorted to and the very existence of which many times appear not to be particularly noted. States, for example, can exclude from investment treaties given classes of disputes. The extent of this exclusion might eventually be more limited than it appears at first sight. In fact, although under Article 24(4) of the Convention a Contracting State can notify the Centre of classes of disputes it would or would not consider submitting to arbitration, it is usually considered that such a notification does not constitute consent under the Convention nor does it change any consent given in other instruments. Yet, it is a useful tool to guide prospective investors about what they might expect in terms of dispute resolution.

Most treaties, however, include broad expressions of consent. On occasions more limited expressions of consent are made in national legislation or in investment agreements, but then these may not be quite relevant if the dispute arises under the terms of a broadly defined treaty.

It is well known that the Convention did not define “investment” as there was no agreement on this point.²³ Many examples of investment were given during the negotiation of the Convention. The precise definition of investment was therefore left to the consent of the parties in bilateral investment treaties or other agreements and contracts. This is not to say that these treaties are entirely free to define investment as the parties may please. The definition has to be compatible with the meaning of the Convention and not go beyond what can reasonably be regarded as an investment.

In most cases the dispute will relate to an investment on which there will be no doubt. In a few instances, however, doubt has arisen and ICSID's Secretary-General has refused registration because the case is manifestly outside the jurisdiction of the Centre. So too an ICSID tribunal can refuse to accept jurisdiction on this ground. As ICSID jurisprudence develops, a number of cases have clarified whether a particular activity is or not an investment under the relevant treaty. Taxation inconsistent with mining contracts,²⁴ the development of a timber concession,²⁵ construction contracts²⁶ and other activities have been identified as a pertinent investment under the relevant treaties. On the other hand, for example, in *Mihaly v. Sri Lanka* negotiations on a construction project that had not materialized in a contract were held not to constitute an investment.²⁷

A different kind of situation arose in another recent case where the dispute concerned in essence a bank guarantee relating to the sale of mining machinery.²⁸ The tribunal held that the contract in question and the equipment envisaged related to a purely commercial operation, just as the guarantee was a normal commercial instrument, and thus that it could not qualify as investment for the purpose of the Convention.

The exhaustion of local remedies is another available safeguard. This is a rather common feature of traditional international claims that found its way into Article 26 of the ICSID Convention. As noted in the Annulment Decision in *Amco v. Indonesia*, this requirement must be made in an express manner and certainly before consent is perfected.²⁹ Also, as noted in *Maffezini*, other procedural provisions, such as a submission to local courts for a certain period of time, are not equivalent to a requirement to exhaust local remedies.

Attempting to negotiate

The issue of time for negotiation has also become rather common in investment arbitration. Most bilateral investment treaties provide for a period of time in which amicable settlement must be attempted, often a six-month period. While occasionally the investor will not follow this requirement or do so rather casually, it is more often that the government concerned will ignore the communications from the investor to this effect. The view has also been held that such is just a procedural step and not a jurisdictional requirement, and that what matters is to afford the government an opportunity to engage in such settlement which if not taken might open the way to arbitration even before the period in question has lapsed.³⁰

Two aspects appear relevant to find an answer to this question. The first is that, as noted in *Tradex v. Albania*, when the investor repeatedly requests the government to enter into discussions and this is ignored over a period of time, then on completion of the six-month period the request for arbitration may be introduced and such efforts will be considered enough to satisfy the amicable settlement requirement.

The second aspect is whether ICSID's Secretary-General could register a request that has not complied with the six-month amicable settlement requirement. The answer to this is that probably it will find difficulty to do so. In this light the issue does not appear to be purely procedural but might concern an important question of jurisdiction. Just as the investor cannot pretend registration and ultimately jurisdiction if amicable settlement has not been attempted, so too the State cannot object to registration and ultimately to jurisdiction if it has not reacted to the pertinent invitations to this effect during the established period of time.

Who is who

Who may be a party to proceedings before the Centre is one difficult issue that counsel is likely to find before ICSID tribunals at the time of examining jurisdiction of the Centre and their own competence. This is in part connected with the interpretation of Article 25 of the Convention, but it is also connected with the extent of investment agreements and investment treaties.

A first question that has given place to growing confusion relates to the status of a constituent division or agency of a State as parties to an ICSID proceeding. Under the Convention, the participation of such division or agency requires the approval of the State or else that the State notifies that no such approval is necessary. Seldom has this been done. But when proceedings are instituted against the State because of acts or omissions of such divisions or agencies then often the argument is made that no approval has been given to the effect of their participation.

One thing, however, is the participation of a division or agency in its own right and quite another is the responsibility of the State for the conduct of its organs, whether they are a part of the central government or entirely decentralized, including provinces, municipalities and other entities that exercise public functions. The designation envisaged in the Convention relates to the first aspect only, that is when an investment agreement has been entered into with a given subdivision or agency and then such entity is authorized by the State to participate in an ICSID proceeding. It was thus held in *Cable Television v. St. Kitts and Nevis* that an investment agreement made with a constituent subdivision of that State that included an ICSID clause could not determine the jurisdiction of the Centre as that entity had not been designated by the State in accordance with Article 25.

But if the dispute arises under a bilateral or multilateral investment treaty to which the State is a party and concerns an investment agreed to with a given subdivision or agency, even if such entity has not been designated to participate in ICSID proceedings the State is still accountable for responsibility under international law. Article 4 of the Draft Articles on State Responsibility adopted by the International Law Commission, which on this point unequivocally reflects customary international law, is very precise in establishing the responsibility of the State for acts or omissions of its organs.³¹

This question was specifically discussed and decided in the case of *Compagnie Générale des Eaux (or Vivendi) v. Argentina*, where the existence of a concession contract with an Argentine province and the fact that that province had not been designated to participate in ICSID proceedings, did not prevent the Centre's jurisdiction under a bilateral investment treaty between Argentina and France whose provisions governed the rights and obligations of the Republic of Argentina and foreign investors in its territory.³²

Closing loopholes in nationality

Traditionally, counsel might not have expected difficulty in respect of the participation of natural persons as claimants in ICSID cases as on this point the applicable rules of international law on questions of nationality are generally well established, including the test of effectiveness of nationality in case of disputed facts as decided by the International Court of Justice in the *Nottebohm* case.³³ Yet, new issues have arisen in recent cases, concerning mostly issues of dual nationality or change of nationality.

In spite that the determination of nationality is normally left to domestic law, in case of dispute it has been held that it is for the tribunal to decide on the matter and that

certificates of nationality originating in a State are only *prima facie* evidence of such nationality.³⁴ So too, it has been held that if the defendant State nationality is invoked by the claimant for purposes of the investment and later argues having a different nationality, jurisdiction will be rejected on the ground of dual nationality of the claimant.³⁵

More troublesome was a question of alleged change of nationality in *Siag*, where the claimant argued that because he had acquired Lebanese nationality he had lost his Egyptian nationality and having also alleged that he had acquired Italian nationality because of marriage he could claim on this basis under a Treaty between Egypt and Italy. Hence it was also argued that jurisdiction could not be excluded on the ground of dual nationality. While the Tribunal upheld jurisdiction on such argument, a separate opinion took the contrary view noting that the claimant was a national of the defendant State at the time the investment was made, continued to benefit from that nationality and the later expression of consent to arbitration by such claimant could not abrogate the fact that he was a national of that State at the time the latter expressed his own consent in the treaty.³⁶

Functional nature

Different, however, appears to be the situation concerning juridical persons. The very complexity of corporate structures and investment consortia offers fertile ground for divergent views about who can or cannot claim before ICSID or other arbitration mechanisms.

The private or public nature of the functions of a corporate entity has recently given place to important clarifications as far as the determination of jurisdiction is concerned. The Convention envisaged allowing for claims by private entities against a State, but not by public entities against another State, although this alternative was not

entirely ruled out in the negotiations. In *CSOB v. Slovakia* the claimant was a State agency of the Czech Republic that initiated proceedings against Slovakia, what prompted an objection to jurisdiction on this basis. Interestingly enough, the Tribunal found that jurisdiction could be upheld as that particular entity, although owned by the State, was engaged in banking activities that had been privatized and were essentially commercial by nature. The test thus became not governmental control but the essence of the activities performed. The same test was later applied in *Maffezini* to establish whether some activities of an agency of the Spanish State were of a public or private nature and hence engaged or not the responsibility of the State, but here the public nature of such activities prevailed and thus was held as justifying jurisdiction to hear a claim against that State.

Agreement of the parties on the question of corporate nationality will of course be most influential on a finding of jurisdiction by a tribunal. So happened, for example, in *MINE v. Guinea* where an agreement of the parties establishing that a corporation had Swiss nationality prevailed over the fact that technically the nationality was different.³⁷ Issues relating to the real interest behind the investment and control of a corporation are relevant to this effect.

The ICSID Convention facilitates this more flexible approach. In particular, Article 25(2)(b) refers to the situation of a corporate entity that has the nationality of the defendant State, but because of foreign control the parties have agreed it should be treated as a national of the other relevant State party, and thus can claim against the defendant State. It is not unusual that bilateral investment treaties and investment agreements will contain clauses to this effect.

ICSID tribunals have occasionally found that certain arbitration clauses and other provisions might result in an implied agreement to treat a locally incorporated

company as a foreign investor, as evidenced in *Amco v. Indonesia*³⁸ and *Klöckner v. Cameroon*.³⁹ It should be noted that this same result can be achieved by means of the definition of investment, which if broad enough, as is usually the case, might not need an agreement on nationality or control.

Barcelona Traction on the side track

The decision of the International Court of Justice in the *Barcelona Traction* case⁴⁰ has been many times considered as expressing customary international law in respect of corporate nationality and diplomatic protection.⁴¹ As it is well known, this decision ruled out the protection of shareholders by their State of nationality when the corporate entity was incorporated in a different country, except in very limited circumstances. This understanding, however, was not always shared and appears to be changing in recent years, at least in the context of investment disputes.

In point of fact, the very International Court of Justice in the *Elettronica Sicula* decision accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation.⁴² Moreover, the very role of diplomatic protection underlining these decisions has been changing in current international law, as the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected.⁴³ This reality becomes particularly evident in the context of arrangements allowing for the direct right of action by individuals. Notwithstanding this evolution, occasionally features arising from the classic law of international claims tend to reappear rather unexpectedly, as was the case with the rule of continuous nationality in the *Loewen* case.⁴⁴

Recent State practice also appears to support the meaning of this changing scenario. Besides accepting the protection of shareholders and other forms of

participation in corporations and partnerships, the concept of limiting it to majority or controlling participations has given place to a more flexible threshold in this respect. Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements, the decisions of the Iran-United States Tribunal⁴⁵ and the rules and decisions of the United Nations Compensation Commission,⁴⁶ among other examples, evidence increasing flexibility in the handling of international claims.

These trends have gathered momentum in ICSID decisions. This is evidenced first by the discussion of who actually controls a corporation. In *SOABI v. Senegal*, an ICSID tribunal went quite far in searching for the controlling entity of a locally incorporated company.⁴⁷ The immediate controller was a Panamanian company, but Panama was not a party to the Convention; beyond that company, Belgian nationals were in control and Belgium was a State party. The tribunal ultimately accepted this last control. In *Amco v. Indonesia*, however, the tribunal refused to go beyond the control exercised by the immediate parent company of a locally incorporated company.

While questions of control have generally been handled with flexibility, difficult issues may arise in connection with associated problems of nationality and the origin of capital. In *Tokios*, for example, while the tribunal accepted that there was no origin of capital requirement and that the fact of the claimant being a foreign corporation was enough to establish jurisdiction, a dissenting opinion emphasized that the investors were nationals of the defendant State and were only channelling domestic capital through a foreign entity, a situation which should have resulted in the rejection of jurisdiction.⁴⁸

A related issue that counsel will often find in investment arbitration is whether a foreign investor is allowed to claim for damages affecting a corporate entity only when such investor has a controlling interest or can do so even if it is a minority shareholder.

In *Vaccum Salt Products Ltd. v. Ghana* an ICSID Tribunal held that foreign control was an objective test and found out that this test was not met by an investor holding a 20% of a Ghanaian corporation.⁴⁹ However, in various cases other elements have been considered as evidence of control, such as voting power and managerial control.⁵⁰ This can be an important question when investment consortia participate in locally incorporated companies because of legal requirements of the host State.

A number of ICSID and other cases have discussed this question, in particular *AAPL v. Sri Lanka*,⁵¹ *AMT v. Zaire*,⁵² *Antoine Goetz et consorts v. Republique du Burundi*,⁵³ *Maffezini v. Spain*,⁵⁴ *Lanco v. Argentina*,⁵⁵ *Genin v. Estonia*,⁵⁶ the *Aguas Award*⁵⁷ and *Vivendi Annulment*⁵⁸ and *CME v. Czech Republic*,⁵⁹ *CMS*,⁶⁰ *Enron*⁶¹ and other cases. These cases have dealt with different situations, involving both majority shareholders and on occasion minority shareholders. On occasions too the investor has been directly affected while in other situations the affected entity has been the corporation as such. But it appears again that the substantive interest associated to the investment is becoming the object of protection.

In *Goetz* the tribunal found in favour of the real interest underlining the investment in the following terms:

“...le Tribunal observe que la jurisprudence antérieure du CIARDI ne limite pas la qualité pour agir aux seules personnes morales directement visées par les mesures litigieuses mais l’étend aux actionnaires de ces personnes, qui sont les véritables investisseurs.”⁶²

Similarly, the Committee on Annulment in the *Compañía de Aguas del Aconquija* or *Vivendi*, held in this connection:

“Moreover it cannot be argued that CGE did not have an “investment” in CAA from the date of the conclusion of the Concession Contract, or that it was not an “investor” in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5”.⁶³

In *Lanco* it was specifically held that an 18.3% investment in a domestic corporation qualified for protection in the circumstances of the case. In *Enron* the investor’s interest in a locally incorporated company was 35.5%. Yet, the possibility of minority shareholders claiming for indirect interests cannot be unlimited because, as the Government of Argentina rightly pointed out in *Enron (Stamp Tax)*,⁶⁴ there would be an endless chain of claims originating in shareholders in a company that invests in another company and another and another. The Tribunal in that case held that the limit was established by the consent to arbitration, which will only cover the specific investors envisaged and not other that might lie beyond.

Contract and treaties, circular roads

Counsel will no doubt be familiar with the question that because of the various forms that an investment can today adopt, there has also been a growing distinction between contracts made with the host State and the rights of the investors under the applicable bilateral investment treaty. Many times these are parallel arrangements that occasionally entail different dispute settlement mechanisms. This situation has become characteristic of concession contracts or license agreements made by a foreign investor with the host government while at the same time the investment qualifies for protection under a bilateral investment treaty.

It should be noted that not always do investment treaties include this kind of clause but still concession agreements are usually embodied in the definition of investment thus again posing the issue of the dual role of domestic and international law and their respective dispute settlement provisions. The Annulment Committee in the *Vivendi* case contributed to the clarification of this question by looking at whether the basis of the claim related to the terms of a contract or to those of the treaty and holding that the protection granted under the treaty could not be barred by a contract containing an exclusive jurisdiction clause. So too, the distinction between ordinary breaches of contract and breaches that arise from the exercise of the sovereign authority of the State has been helpful to this clarification.⁶⁵

This discussion is also related to the question of the “fork in the road”. Article 26 of the Convention provided that consent to ICSID jurisdiction is to the exclusion of any other remedy. The Tribunal in *Lanco*, for example, found that when the parties give their consent to ICSID arbitration, they lose their right to seek to settle the dispute in any other forum, domestic or international.⁶⁶ In that same case it was held that the provisions of an investment treaty could not be diminished by the submission of a dispute to a domestic court to which a concession agreement remitted.⁶⁷ The ICSID tribunal in *Compañía de Aguas del Aconquija* was of the view that jurisdiction could be affirmed as the claims were not based on a concession contract referring disputes to domestic courts but in the alleged violation of the investor’s rights under the Argentina-France bilateral investment treaty.⁶⁸

An ICSID Annulment Committee in *Wena* also clarified the connection between contracts and the investment treaty, with particular reference to dispute settlement arrangements:

“The Committee cannot ignore of course that there is a connection between the leases and the IPPA since the former were designed to operate under the protection of the IPPA as the materialization of the investment. But this is simply a condition precedent to the operation of the IPPA. It does not involve an amalgamation of different legal instruments and dispute settlement arrangements.(...) [T]he acts or failures to act of the State cannot be considered a question connected to the performance of the parties under the leases. The private and public functions of these various instruments are thus kept separate and distinct”.⁶⁹

Singing in the rain, under the “umbrella clause”

The interpretation of the extent of the “umbrella clause” has also been a difficult issue often arising in investment arbitration. The two main schools of thought have been thus far the restricted interpretation of the *SGS v Pakistan*⁷⁰ and the more open one of *SGS v Philippine*,⁷¹ where both the domestic court concerned and the arbitral tribunal were recognized roles in adjudicating different aspects of the dispute submitted. While interpretations seeking to attach a broad meaning to the clause that would allow any contract breach claim to be brought to arbitration are often advocated, this has not been normally accepted unless the claim can be recognized as in some way included under the protection of the treaty.⁷² Here, however, the issue becomes inextricably linked to the merits.

In any event, it is important to keep in mind that the Convention also requires the dispute to be a legal dispute and to arise directly from the investment. In *Amco v. Indonesia*, a dispute concerning general tax obligations under domestic law invoked in a counter-claim was held not to qualify as an investment as it did not arise directly from the investment made.⁷³ In *Joy* the tribunal found that a bank guarantee relating to a sale

contract did not qualify as an investment under the Convention, declining on this basis to exercise jurisdiction. Occasionally, however, there is some confusion between a dispute arising directly from an investment and the question of the investment being a direct and not an indirect one. The point was also discussed in *Fedax v. Venezuela*, where the tribunal held:

“However, the text of Article 25 (1) establishes that the “jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”. It is apparent that the term “directly” relates in this Article to the “dispute” and not the “investment”. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term “investment” must be given in light of the negotiating history of the Convention”.⁷⁴

As noted above, the definition of investment agreed to in treaties is usually very broad and encompasses movable and immovable property, shares and other forms of participation in a company, claims to money and other contracts of financial value, intellectual property, business concessions and other matters. This broad definition is at the very heart of the difficulties that ICSID and other tribunals have found in respect of the interpretation of treaties.

It might be important for governments and investors to be as precise as possible on the investments they intend to protect as this may avoid many disputes and misunderstandings and might also avoid ancillary claims and counterclaims that further complicate disputes submitted to arbitration.

New trade winds

Two new situations are important to keep in sight. The first concerns investment for trade development, a matter which is likely to be highly relevant for the purpose of both WTO and investment arbitration. In two NAFTA cases the question has been decided. In *Pope & Talbot, Inc. v. Canada*, Canada argued that the dispute did not concern investment but trade and hence the tribunal lacked jurisdiction; the tribunal, however, found that the two questions were not “wholly divorced from each other”.⁷⁵ The tribunal in *S. D. Myres, Inc. v. Canada* faced similar arguments and decided that the questioned measures concerning goods “can relate to those who are involved in the trade of those goods and who have made investments concerning them”.⁷⁶ The connection between trade and investment was thus central to these decisions.

The second development relates to financial instruments. Although not typically an investment of the traditional kind, financial instruments have become a crucial source for government financing and heavy investments are made in them worldwide. In *Fedax v. Venezuela* the tribunal had to deal with promissory notes issued by the government that had circulated internationally and *Fedax*, a foreign financial institution, had invested in them. The tribunal decided that the promissory notes were a means by which loans and credit benefiting the State had been made available and their purchase qualified as an investment under the investment treaty. Also in *CSOB v. Slovakia*, the tribunal held that loans in the circumstance of a large banking operation qualified as an investment. In both cases it was held that the resources made available to the State did not need to be physically transferred across borders to qualify as an investment.

Financial developments cannot of course extend indefinitely as a covered dispute and the circumstances will provide clear limits to this end. In the *Gruslin* case, a Belgian investor who had bought a participation in an international asset fund claimed

against Malaysia on the ground that general economic measures adopted by this country had diminished the value of his portfolio.⁷⁷ The claim failed on jurisdictional grounds.

A global globalization

The arbitration of investment disputes is the product of globalization as a consequence of the liberalization of capital movements and related new corporate arrangements, structures and ventures. This same reality also underlies other economic activities, particularly trade. As investment in trade development becomes more common, the link between trade and investment will be strengthened. Access of private parties to trade dispute settlement is also a common feature of many contemporary arrangements, and not in a too distant future it will permeate the WTO dispute settlement procedures.

Globalization will not end there. It might well happen that in the long term these unfolding arrangements will also apply to a variety of aspects that today appear more closely related to domestic law and jurisdictions. An increasing number of activities will follow the same path as investments and trade. To the extent that such activities might be linked to investment, or even on their own, arbitration will become the most likely dispute settlement arrangement available. Current practice and legal developments are just the beginning. Counsel might expect many new opportunities arising from these trends, just as they may expect many new challenges ahead.

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- ¹ MERCOSUR, 1994 Colonia and Buenos Aires Investment Protocols.
- ² ASEAN Agreement for the Promotion and Protection of Investments, 1988.
- ³ See, for example, the 1994 Free Trade Agreement between Colombia, Mexico and Venezuela.
- ⁴ *Gabon v. Société Serete S. A.*, ICSID Case No. ARB/76/1, and discussion in Ibrahim F. I. Shihata and Antonio R. Parra: “The Experience of the International Centre for Settlement of Investment Disputes”, *ICSID Review-Foreign Investment Law Journal*, Vol. 14, 1999, 299-361, at 316.
- ⁵ *Maffezini v. Spain*, ICSID Award of November 13, 2000.
- ⁶ See generally M. Sornarajah: *The Settlement of Foreign Investment Disputes*, 2000.
- ⁷ ICSID Convention, Article 25.
- ⁸ Francisco Orrego Vicuña and Christopher Pinto: “Peaceful Settlement of Disputes, Prospects for the 21st Century”, Report Prepared for the Centennial of the First International Peace Conference, in Frits Kalshoven: *The Centennial of the First International Peace Conference, Reports and Conclusions*, 2000, 261-418, at 286.
- ⁹ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (Jurisdiction), 2007.
- ¹⁰ *Cable TV v. St. Kitts and Nevis*, ICSID Award of January 13, 1997.
- ¹¹ *CSOB v. Slovakia*, ICSID Decision on Jurisdiction of May 24, 1999.
- ¹² *Ibid.*
- ¹³ J. Paulsson: “Arbitration without Privity”, *ICSID Review, Foreign Investment Law Journal*, Vol. 10, 1995, 232.
- ¹⁴ *Empresas Lucchetti SA and Lucchetti Peru SA v. Peru*, 2005.
- ¹⁵ *High Court of Justice, Queens Bench Division, Commercial Court*, Case No. 2004 Folio 656, April 29, 2005, par. 85.
- ¹⁶ *Ambiatelos Case*, United Nations, *Reports of International Arbitral Awards*, 1963, p. 107. The case was discussed both by the International Court of Justice and a Commission of Arbitration.
- ¹⁷ *Maffezini, Emilio A. v. Kingdom of Spain* (Jurisdiction), 2000.
- ¹⁸ *Siemens AG v. Argentine Republic (Jurisdiction)*, ICSID Case No. ARB/02/8, 2004; *Técnicas Medioambientales Tecmed SA v. United Mexican States* (Award), 2004.
- ¹⁹ *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan* (Jurisdiction), 2005; *Plama Consortium Ltd. v. Republic of Bulgaria* (Jurisdiction), 2005.
- ²⁰ Ruth Teitelbaum: “Whose Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses”, *Journal of International Arbitration*, Vol. 22, 2005, 225-238, at 228-229.
- ²¹ *Tradex v. Albania*, ICSID Decision on Jurisdiction of December 24, 1996.
- ²² *Holiday Inns v. Morocco*, Unpublished, Reported in Lalive: “The First ‘World Bank’ Arbitration”, *British Year Book of International Law*, Vol. 51, 1980, at 123.
- ²³ See *Fedax v. Venezuela*, Decision of the ICSID Tribunal on Objections to Jurisdiction, July 11, 1997, pars. 21-26, with citations to the relevant cases and literature.
- ²⁴ *LETCO v. Liberia*, ICSID Award of March 31, 1986.
- ²⁵ *SOABI v. Senegal*, ICSID Award of February 25, 1988.
- ²⁶ *Salini v. Morocco*, ICSID Decision on Jurisdiction of July 23, 2001.
- ²⁷ *Mihaly International Corporation v. Sri Lanka*, ICSID Award of March 15, 2002.
- ²⁸ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt (Jurisdiction)*, 2004.
- ²⁹ *Amco v. Indonesia*, ICSID Annulment Committee, *ICSID Reports*, Vol. 1, at 526.
- ³⁰ *Lauder v. Czech Republic*, Final UNCITRAL Award of September 2001, pars. 181-191; *Ethyl Corporation v. Canada*, Award on Jurisdiction of June 24, 1998, pars. 74-88.
- ³¹ James Crawford: *The International Law Commission’s Articles on State Responsibility*, 2002, Comments on Article 4, at 94-99.
- ³² *Compañía de Aguas del Aconquija et al. v. Argentina*, ICSID Award of November 21, 2000, and *Vivendi* ICSID Annulment Decision, July 3, 2002.
- ³³ *Nottebohm Case* (Second Phase), ICJ Reports, 1955.
- ³⁴ *Soufraki, Hussein Nuaman v. United Arab Emirates* (Award), ICSID Case No. ARB/02/7, 2004, para. 55.
- ³⁵ *Champion Trading Co. and Ameritrade International Inc. v. Arab Republic of Egypt* (Jurisdiction), 2004.
- ³⁶ *SIAG* cit., Partial Dissenting Opinion of Professor Francisco Orrego Vicuña.
- ³⁷ *MINE v. Guinea*, ICSID Award of January 6, 1988.
- ³⁸ *Amco v. Indonesia*, ICSID Decision on Jurisdiction of September 25, 1983.
- ³⁹ *Klöckner v. Cameroon*, ICSID Award of October 21, 1983.

- ⁴⁰ *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, Judgment of February 5, 1970, ICJ Reports 1970, 3.
- ⁴¹ M. Sornarajah: "The Scope and Definition of Foreign Investment", APEC Workshop on Bilateral and Regional Investment Rules/Agreements, 17-18 May 2002, 86-100, at 88.
- ⁴² Case Concerning the *Eletronica Sicula S. p. A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, ICJ Reports 1989, 15.
- ⁴³ International Law Commission: Preliminary Report on Diplomatic Protection, by Mohammed Bennouna, Special Rapporteur, A/CN.4/484, 4 February 1998, at 5.
- ⁴⁴ *Loewen Group Inc. and Raymond L. Loewen v. United States of America* (Award), 2003.
- ⁴⁵ For the jurisprudence of the United States-Iran Claims Tribunal see generally George H. Aldrich: The Jurisprudence of the Iran-United States Claims Tribunal, 1996; Charles N. Brower and Jason D. Brueschke: The Iran-United States Claims Tribunal, 1998.
- ⁴⁶ United Nations Compensation Commission, Decision of the Governing Council on Business Losses of Individuals, S/AC.26/1191/4, 23 October 1991, par. F, and Decision 123 (2001).
- ⁴⁷ *SOABI v. Senegal*, ICSID Decision on Jurisdiction, August 1, 1984.
- ⁴⁸ *Tokios Tokèles v. Ukraine* (Jurisdiction), 2005, and Dissenting Opinion of Professor Prosper Weil.
- ⁴⁹ *Vaccum Salt Products Ltd. v. Ghana*, ICSID Award of February 16, 1994.
- ⁵⁰ See for example *LETCO v. Liberia*, ICSID Decision on Jurisdiction of October 24, 1984.
- ⁵¹ *AAPL v. Sri Lanka*, ICSID Award of June 27, 1990.
- ⁵² *AMT v. Zaire*, ICSID Award of February 21, 1997.
- ⁵³ *Antoine Goetz et consorts v. Republique du Burundi*, Sentence du CIARDI du 10 Fevrier 1999.
- ⁵⁴ Supra note 12.
- ⁵⁵ *Lanco v. Argentina*, Preliminary Decision of the ICSID Tribunal of December 8, 1998.
- ⁵⁶ *Genin et al. v. Estonia*, ICSID Award of June 25, 2001.
- ⁵⁷ *Aconquija* Award cit.
- ⁵⁸ *Vivendi* Annulment cit.
- ⁵⁹ *CME. v. Czech Republic*, Partial Award of September 13, 2001.
- ⁶⁰ *CMS Gas Transmission Co. V. Republic of Argentina (Jurisdiction)*, 2003.
- ⁶¹ *Enron Corp. and Ponderosa Assets LP v. Argentine Republic (Jurisdiction: Ancillary Claim)*, 2004.
- ⁶² *Goetz* cit., par. 89.
- ⁶³ *Vivendi* Annulment cit., par. 50.
- ⁶⁴ *Enron Corp. and Ponderosa Assets LP v. Argentine Republic (Jurisdiction)*, 2004, paras. 50-53. See also *Enron Corp. and Ponderosa Assets LP v. Argentine Republic (Jurisdiction: Ancillary Claim)*, 2004, para. 20.
- ⁶⁵ *Impregilo SpA v. Islamic Republic of Pakistan* (Jurisdiction), 2005.
- ⁶⁶ *Lanco* cit., par. 36.
- ⁶⁷ *Lanco* cit., par. 40.
- ⁶⁸ *Aconquija* Award cit., pars.53-54.
- ⁶⁹ *Wena v. Egypt*, Decision on Annulment of the ICSID Committee of February 5, 2002, par. 35. The IPPA is the relevant Bilateral Investment Treaty between Egypt and the United Kingdom.
- ⁷⁰ *SGS Societé Générale de Surveillance SA v. Islamic Republic of Pakistan* (Jurisdiction), 2003.
- ⁷¹ *SGS Societé Générale de Surveillance SA v. Republic of the Philippines* (Jurisdiction), 2004.
- ⁷² *El Paso Energy International Co. v. Argentine Republic* (Jurisdiction), 2006; *Joy*, cit., para. 81; *CMS* cit., para. 303; *Eureko BV v. Poland*, 2005, para. 112; *Enron* cit., para. 274.
- ⁷³ *Amco v. Indonesia*, Resubmitted Case, Decision on Jurisdiction of May 10, 1988.
- ⁷⁴ *Fedax*, cit.
- ⁷⁵ *Pope & Talbot Inc. v. Canada*, Award on Motion to Dismiss, January 26, 2000.
- ⁷⁶ *S. D. Myres, Inc. v. Canada*, Partial Award of November 12, 2000.
- ⁷⁷ *Gruslin, Philippe v. Malaysia* (Award), 2000.