2021, Vol. 10, Issue 1

Michał Pyka

PhD, assistant lecturer at the Jagiellonian University, Faculty of Law and Administration, https://orcid.org/0000-0003-4641-6987

'THE MAKING OF AN INVESTMENT' IN THE CONTEXT OF THE TEMPORAL SCOPE OF INVESTMENT TREATY PROTECTION. DOES THE *INDIAN METALS & FERRO ALLOYS LTD V. REPUBLIC OF INDONESIA* AWARD OF 29 MARCH 2019 CONSTITUTE A BREAKTHROUGH?

Abstract: This contribution deals with the question of the legal character of investment treaty claims, brought to international investment arbitration, when alleged breaches of investment treaty obligations towards an investor occurred after the entry into force of an investment treaty but before the making of an investment by an investor. The analysis of the existing legal framework allows for the conclusion that the said acts of a host state are generally excluded from the scope of investment treaty protection. An arbitral tribunal neither has jurisdiction over these acts nor is it allowed to apply substantive treaty provisions thereto. This conclusion stems from the principle of intertemporal law and numerous provisions of investment treaties constituting the implementation or modification of this principle. Nevertheless, an arbitral tribunal is not fully deprived of the possibility of considering the acts of a host state preceding the making of an investment and undertaken before any activity of the future investor took place. It can consider them as evidence of the intent of a host state, acts creating

legitimate expectations of an investor or acts constituting elements of what is termed a continuing act.

Keywords: international investment arbitration; investment treaties; principle of intertemporal law; ILC Articles on the Responsibility of States for Internationally Wrongful Acts; legality of an investment; pre-establishment expenditures; legitimate expectations; continuing act

1. Introduction

The temporal scope of investment treaty protection has always gained the attention of international investment arbitration.[1] It involves complex issues of temporal law and relates both to jurisdictional and substantive questions raised before arbitral tribunals. Most commonly, it has been assessed with respect to specific time points on the 'lifeline' of investment treaties, namely the time of their entry into force and the time of their expiry (loss of binding force) – either as a result of denunciation (withdrawal) or mutual termination.[2] Among the many questions comprising this issue, the one

[1] In arbitral jurisprudence dealing with temporal aspects of the application of investment treaties, particular attention has been devoted to the issue of provisional application of the Energy Charter Treaty. See specifically: *Petrobart Limited v. The Kyrgyz Republic*, Stockholm Chamber of Commerce (SCC) Case no. 126/2003, Award of 29.3.2005, pp. 60-63; *Ioannis Kardassopoulos v. The Republic of Georgia*, International Centre for Settlement of Investment Disputes (ICSID) Case no. ARB/05/18, Decision on jurisdiction of 6.07.2007, paras. 196-252; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Permanent Court of Arbitration (PCA) Case no. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility of 30.11.2009, paras. 244-398. On the *Yukos v. The Russian Federation Interim Award* see: T. Gazzini, *Yukos Universal Limited (Isle of Man) v The Russian Federation: Provisional Application of the ECT in the Yukos Case*, 'ICSID Review – Foreign Investment Law Journal' 2015, vol. 30, no. 2, pp. 293-302; L.U. Serhan, *Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International Investment Arbitration*, 'Texas Law Review' 2016, vol. 95, no. 1, pp. 101-121; T. Ishikawa, *Provisional Application of Treaties at the Crossroads between International and Domestic Law*, 'ICSID Review – Foreign Investment Law Journal' 2016, vol. 31, no. 2, pp. 270-289.

[2] From recent literature on this issue, see, for example: T. Voon, A. D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 'ICSID Review – Foreign Investment Law Journal' 2016, vol. 31, no. 2, pp. 413-433; K. Nowrot, *Termination and Renegotiation of International Investment Agreements*, [in:] S. Hindelang, M. Krajewski (eds.), 'Shifting Paradigms in International

deserving particular attention is the question of application of investment treaty provisions to facts preceding the making of an investment. It is a complex question, interfering with other issues of the temporal scope of investment treaty protection. Not only does it relate to the 'birth' and 'demise' of investment treaties but also to the time of their 'ordinary lives'. Whether an investment treaty has entered into force or has expired raises the complexity of this question to a higher level.

The question of application of investment treaty provisions to facts preceding the making of an investment has been addressed in investment arbitration. In recent years, a common approach to this question has been developed, due to which investment treaty protection does not apply until

---

Investment Law', Oxford University Press, New York 2016, pp. 227-265; Ch. Nyombi, T. Mortimer, *Rights and obligations in the post-investment treaty denunciation period*, 'International Arbitration Law Review' 2018, vol. 21, no. 2, pp. 46-54. In recent years, scholars have devoted particular attention to the question of denunciation of the Convention on the settlement of investment disputes between States and nationals of other States ('ICSID Convention'). See on this issue: J.O. Rodner, J. M. Estévez, *BITs in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced*, 'Journal of International Arbitration' 2012, vol. 29, no. 4, pp. 437-452; G. Yusuf, O. Owczarek, *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Bolivarian Republic of Venezuela. Removing the Sword of Damocles: ICSID Denunciation under Articles 71 and 72*, 'ICSID Review – Foreign Investment Law Journal' 2018, vol. 33, no. 2, pp. 331-339. In the European context, the question of termination of Bilateral Investment Treaties concluded between European Union Member States ('intra-EU BITs') has become a hot topic of European debate. See: C. Wackernagel, *The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Intra-EU BITs and Why that Matters for International Law*, 'Beiträge zum Transnationalen Wirtschaftsrecht' 2016, no. 140, pp. 1-42; C.I. Nagy, *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back'*, 'German Law Journal' 2018, vol. 19, no. 4, pp. 981-1016. In Polish literature, see: Ł. Kułaga, *Unia Europejska a zmiana paradygmatu w międzynarodowym prawie inwestycyjnym* [The European Union and the paradigm shift in international investment law], 'Europejski Przegląd Sądowy' 2017, no. 4, pp. 4-8; M. Słok-Wódkowska, M. Wiącek, *Zgodność dwustronnych umów inwestycyjnych pomiędzy państwami członkowskimi z prawem Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 6.03.2018 r., C-284/16, Slowakische Republik przeciwko Achmea BV* [Compatibility of bilateral investment agreements between Member States with European Union law – Glossary to the judgment of the Court of Justice of 6.03.2018, C-284/16, Slowakische Republik v Achmea BV], 'Europejski Przegląd Sądowy' 2018, no. 11, pp. 32-40; A. Szostak, K. Wierzbowski, *Niepewna przyszłość arbitrażu inwestycyjnego – klauzule rozstrzygania sporów w wewnątrzwspólnotowych traktatach inwestycyjnych* [Uncertain Future of Investment Arbitration – Dispute Settlement Clauses in Intra-Community Investment Treaties], 'Palestra' 2019, no. 6, pp. 93-101.

an investor makes an investment.[3] The newly published *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* Award of 29.3.2019 ('the *Indian Metals* Award')[4] follows the existing line of reasoning of arbitral tribunals. Nevertheless, it would be a wrong assumption to maintain that everything concerning this question has been said. The aim of this contribution is to comment upon the *Indian Metals* Award and hereafter to use this as a starting point for a deeper analysis of the legal character of the making of an investment as an important fact determining the temporal scope of investment treaty protection.

2. The facts of the *Indian Metals* case

The dispute in the *Indian Metals* case arose on the grounds of the Claimant's investment in the Republic of Indonesia ('Indonesia') for the purposes of coal mining. The Claimant, *Indian Metals & Ferro Alloys Limited* ('*Indian Metals*'), was a private limited company incorporated in the Republic of India. It invested in Indonesia through the locally incorporated company PT SRI. PT SRI was incorporated under the laws of Indonesia in 2003. In 2006, it was granted a coal exploration licence for a territory within Central Kalimantan, one of the provinces of the Indonesian Borneo Island. On 31.12.2009, a new licence covering the same territory was issued for PT SRI. In 2009-2010, *Indian Metals* purchased 70% shares in PT SRI through a chain of subsidiaries, namely *Indmet Mining Pte Limited Singapore*, which

[3] See *Mesa Power Group, LLC v. Government of Canada*, PCA Case no. 2012-17, Award of 24.3.2016, paras. 325-326; *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case no. 2012-12, Award on Jurisdiction and Admissibility of 17.12.2015, paras. 529 and 533; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case no. ARB/11/17, Award of 9.1.2015, paras. 143-150; *Vito G. Gallo v. The Government of Canada*, PCA Case no. 55798, Award of 15.9.2011, para. 328; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, London Court of International Arbitration (LCIA) Case no. UN 7927, Award on Preliminary Objections to Jurisdiction of 19.9.2008, paras. 106-107; *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case no. ARB(AF)/06/2, Award of 17.9.2009, para. 112.

[4] *Indian Metals & Ferro Alloys Limited Republic of Indonesia*, PCA Case no. 2015-40, Award of 29.3.2019.

was a subsidiary of *Indmet (Mauritius) Ltd*, which was a subsidiary of *Indian Metals*.[5] The acquisition of shares was completed on 27.10.2010.[6]

In April 2011, *Indian Metals* discovered that the mining licences overlapped with other licences that had been issued for the benefit of other companies from 2006 to 2009. Since the problem of overlapping licences had recently become publicly known in Indonesia[7], Indonesian authorities initiated a process of identifying 'Clean and Clear' licences, which were regarded as only those licences that did not overlap with other licences and were issued before 1.5.2010.[8] The PT SRI licence had not been included in any of 'Clean and Clear' lists.[9]

According to *Indian Metals*, the insufficient reaction of Indonesian authorities to the problem of overlapping mining licences constituted a breach of the India-Indonesia Bilateral Investment Treaty ('the India-Indonesia BIT')[10], although the alleged failure to reconcile the PT SRI mining licence with overlapping licences was not the only source of contention between *Indian Metals* and Indonesia. Another fact giving rise to the dispute was the issuance of the new mining law on coal and mineral mining of January 2009.[11] Due to this legislation, foreign shareholders were obliged to divest their shares after five years of production.[12] According to *Indian Metals*, by issuance of this legislation, Indonesia violated fair and equitable standards and expropriated the investment of *Indian Metals*.[13]

[5] The *Indian Metals* Award, supra, para. 36.

[6] *Ibidem*, para. 37.

[7] *Ibidem*, para. 54.

[8] *Ibidem*, para. 56.

[9] *Ibidem*, para. 58.

[10] *Ibidem*, para. 58. Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments, signed 10.2.1999, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1563/download.

[11] The *Indian Metals* Award, supra, para. 60.

[12] *Ibidem*, para. 60.

[13] *Ibidem*, para. 62.

3. Indonesia's temporal objection and its assessment by the *Indian Metals* arbitral tribunal

Among other jurisdictional objections, Indonesia's temporal objection was particularly relevant within the scope of *Indian Metals*' claim. In light of this objection, the alleged conduct of Indonesia occurred before *Indian Metals* became an investor and made its investment.[14] By accepting the temporal objection, the *Indian Metals* arbitral tribunal ('the Tribunal') decided upon a significant narrowing of the scope of its jurisdiction *ratione temporis*.[15] All acts of Indonesia preceding the date of making the investment by *Indian Metals*, including the issuance of overlapping licences, were held as remaining outside the scope of the Tribunal's temporal jurisdiction.[16] The Tribunal assumed its jurisdiction only with respect to Indonesia's acts that occurred after *Indian Metals*' alleged investment, i.e. the failure to resolve the problem of overlapping licences and the introduction of legislation obliging foreign companies to divest their shares.[17] The parties' disagreement on the exact date of *Indian Metals*' investment (2011 according to Indonesia or 2010 according to *Indian Metals*) was deprived of any relevance in this context, since all of the acts providing a basis for the Tribunal's jurisdiction occurred after 12.5.2011.[18]

4. Events determining the temporal scope of investment treaty protection

At least four events should be considered by an arbitral tribunal assessing the scope of investment treaty protection. Ordinarily, these elements can be placed on a timeline of events in the following order:

- the treaty's entry into force,
- the making of an investment,
- the occurrence of events constituting the breach of a treaty,
- the arising of a dispute.

[14] *Ibidem*, para. 68.
[15] *Ibidem*, para. 112.
[16] *Ibidem*, para. 112.
[17] *Ibidem*, para. 113.
[18] *Ibidem*, para. 113.

The peculiarity of the *Indian Metals* case was that the second and the third event changed places on the timeline of events. As rightly pointed out by the Tribunal, it was not a question of the scope of treaty application to the facts preceding its entry into force but to the facts preceding the making of an investment, which occurred after the entry into force of a treaty:

> 'Several tribunals have wrestled with the argument whether an investment made prior to the entry into force of a treaty is covered by the treaty. […] In the present case, the issue is different, namely whether an investment made after the acts complained of is covered by the treaty'.[19]

In the following parts of this contribution, a detailed analysis of the issue of application of jurisdictional and substantive treaty provisions in cases in which factual contexts are comparable to the facts of the *Indian Metals* case will be presented. The area of research will encompass situations in which events amounting to a breach of the treaty occur after the entry into force of an investment treaty but before the making of an investment, i.e. when the second and the third element changed their places on the timeline of events (all elements can placed on a timeline of events in the following order: 1, 3, 2, 4) and when no activity of a future investor had yet been undertaken.

5. Temporal scope of application of an investment treaty with regard to events occurring after the entry into force of a treaty but before the making of an investment

5.1. The making of an investment in the context of the principle of intertemporal law

5.1.1. The legal nature of the principle of intertemporal law

Not all provisions invoked by the parties to *Indian Metals* dispute shall be regarded as relevant to the temporal scope of the application of investment treaties in similar cases.[20] Undoubtedly, Article 28 of the Vienna Convention on the Law of Treaties ('VCLT') does not constitute a sound basis for

[19] *Ibidem*, para. 104.
[20] See *ibidem*, paras. 70-75.

resolving disputes comparable to the case of *Indian Metals*.[21] Its wording clearly indicates that its scope of application is limited only to the question of temporal application of the treaty to facts occurring before the entry into force of this treaty.[22] It does not cover the question of application of an investment treaty to the acts of a state occurring after the entry into force of an investment treaty but before the making of an investment. More appropriate in this context will be the application of Article 13 of the Articles on the Responsibility of States for Internationally Wrongful Acts ('the ILC Articles') of the International Law Commission, providing that: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs'.[23]

Article 13 of the ILC Articles reflects the general principle of intertemporal law.[24] The principle of intertemporal law has been invoked numerous times by international courts and tribunals – to cite only the famous assertion of Judge Huber in the *Island of Palmas* case:

[21] Vienna Convention on the Law of Treaties. Done at Vienna on 23.5.1969. Entered into force on 27.1.1980, published in United Nations, 'Treaty Series' 2005, vol. 1155, p. 331 et seq., available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[22] See text of Article 28 VCLT: 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.

[23] International Law Commission ('ILC'), *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 'Yearbook of the International Law Commission' 2001, vol. II, Part Two, p. 57 et seq., available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[24] ILC, *Draft articles*..., p. 57. The principle of intertemporal law is also called the 'intertemporal principle', 'rule of inter-temporal law' or 'temporal rule'. See Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, Cambridge 2009, p. 329; R. Higgins, *Some Observations on the Inter-Temporal Rule in International Law*, [in:] J. Makarczyk (ed.), 'Theory of International Law at the Threshold of the 21st Century. Essays of honour of Krzysztof Skubiszewski', Kluwer Law International, The Hague, London, Boston 1996, p. 867; N. Gallus, *Recent BIT Decisions and Composite Acts Straddling the Date a Treaty Comes into Force*, 'International & Comparative Law Quarterly' 2007, vol. 56, no. 3, p. 497.

> '[…] a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[25]

The rationale for this principle is 'a guarantee against the retrospective application of international law in matters of states responsibility'.[26] The *Indian Metals* arbitral tribunal made Article 13 of the ILC Articles the centre of its reasoning and a justification for not assuming jurisdiction for facts that occurred prior to the date of the making of an investment. According to the Tribunal, assuming temporal jurisdiction 'would be contrary to the principle of non-retroactivity as enshrined in Article 13 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts'.[27] This unequivocal assertion of the Tribunal must become a subject of thorough scrutiny. Particularly worth answering is the question of whether the controlling date for the application of the principle of intertemporal law is the date of the entry into force of an investment treaty or the date of the making of an investment.

5.1.2. The making of an investment as a factor determining the temporal scope of investment treaty protection under the principle of intertemporal law

One should differentiate between the existence of the subject of a future investment in a corporeal or in a legal sense – under the national law of a host state – and the making of an investment by an investor who acquires the previously existing subject of an investment and therefore fulfils the conditions specified in the definition of an investment in an investment treaty. The subject of an investment in a corporeal sense, including e.g. an enterprise or machines, as well as in a legal sense under the national law of a host state, including e.g. shares, concessions or intellectual property rights,[28] could begin to exist long before it becomes an investment due to its acquisition by an investor. For this time, many acts of a state detrimental

[25] *Island of Palmas case (Netherlands v. USA)*, Merits, PCA Award of 4.4.1928, Reports of International Arbitral Awards 1949, vol. 2, para. 845.

[26] ILC, *Draft Articles*…, p. 57.

[27] The *Indian Metals* Award, supra, para. 112.

[28] On the legal materialisation of an investment as property and contractual rights, see Z. Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, [in:] Z. Douglas, J. Pauwelyn, J.E. Viñuales (eds.), 'The Foundations of International

to the subject of the future investment can be adopted, interfering with its final shape at the date of its acquisition by an investor. These acts can constitute single acts or the long-lasting approach of a state towards the subject of a future investment.

Referring this consideration to the context of the *Indian Metals* case, one can easily notice that Indonesia owed general obligations towards investors to provide for the appropriate treatment of foreign investments which have been in force at least since 2004 when the India-Indonesia BIT came into force, many years before the facts of the *Indian Metals* dispute took place. Investment treaty provisions – both jurisdictional and substantive – had existed before the making of an investment by *Indian Metals*. Moreover, the subject of future investment (mining licence issued to PT SRI as a locally incorporated company) existed and was aimed at numerous acts of Indonesia, including issuance of overlapping licences. Does this mean that Indonesia was obliged to provide the subject of future investment with standards of treatment established in the India-Indonesia BIT?

To resolve this controversy, recourse to Article 13 of the ILC Articles will be necessary again. It should be assessed as to whether the wording 'the obligation in question at the time the act occurs', used in this provision, should be viewed as a general obligation in relation to unspecified classes as facts that may occur at any time this obligation is in force or as a specific obligation of a state, applicable in the context of a particular investment. If the first view were adopted, the controlling date for the application of the principle of intertemporal law would be the date of the entry into force of an investment treaty, while if the second view were adopted, this date would be the date of the making of an investment by an investor.

The application of an investment treaty provision depends not only on the fact of the treaty's entry into force but also upon the fulfilment of all conditions of its binding force in a specific context. Investment treaty provisions create 'potential' protection of possible future investments. If no investment were made, investment treaty protection would never materialise. States-parties to investment treaties are not bound by investment treaty obligations unless an investment is created. It would be contra-intuitive and onerously burdensome on states to require from them that they apply substantive standards of investment protection to all subjects of all potential future investments; otherwise, investment treaty

---

Investment Law: Bringing Theory into Practice', Oxford University Press, New York 2014, pp. 369-393.

protection would cover practically all infra-national economic relations as well. The mere transfer of a title to the subject of investment from a state national to a foreign investor cannot – without a breach of the '*nemo plus iuris transferre potest quam ipse habet*' rule[29] – transform what could be an infra-national claim into the investment treaty claim.

In light of the above, the wording 'is bound by the obligation in question at the time the act occurs', used in Article 13 of the ILC Articles, should be interpreted as a specific obligation of a state towards particular investors and their investments. In the absence of investment treaty provisions dealing specifically with temporal aspects of the moment of the making of an investment, the principle of intertemporal law finds its full application. The outcomes of the application of this principle have been plainly depicted by Z. Douglas:

> 'the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation'.[30]

What can be derived from this unequivocal assertion of Z. Douglas is the observation that under the principle of intertemporal law, the application of an investment treaty to specific investment is conditioned on the making of this investment by an investor. Despite an investment treaty being applicable in relations between states-parties thereto, the temporal scope of application of an investment treaty to a specific investment is additionally determined by fulfilment of material (the making of an investment by an investor) and personal (acquiring of the status of an investor by a national of the other state-party to a treaty) conditions for the application of this treaty. Especially worth emphasising is the necessity of distinguishing between the temporal scope of application of a treaty in general, conditioned on its entry into force and non-expiry, and its temporal scope of application to a specific investment, conditioned on the

[29] On the application of this rule by investment tribunals in the context of transfer of ICSID arbitration clauses – before and after a dispute arises – see: E.Z. Jaramillo, A. Saldarriaga, A. Vohryzek-Griest, *Treaty Planning: Current Trends in International Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting*, [in:] M.A. Fernandez-Ballester, D. Arias (eds), 'Liber Amicorum Bernardo Cremades', Wolters Kluwer España, La Ley 2010, pp. 1245-1247.

[30] Z. Douglas, *The International Law…*, p. 145.

making of an investment by an investor. The qualification of the making of an investment as an indispensable factor determining the temporal scope of the investment treaty protection of a specific investment has been unanimously assumed in investment arbitration.[31]

Determining the exact date of the making of an investment as the date when the unspecified obligation of a state towards investors and their investments materialises in the form of a specific obligation towards a particular investor is not an easy task. Undoubtedly, it is the date when all conditions for material and personal application of an investment treaty to a particular investor and their investment become fulfilled. However, the assertion that these conditions fully overlap with *ratione materiae* and *ratione personae* conditions for jurisdiction of an arbitral tribunal should be perceived as incomplete.

Without doubt, when examining its jurisdiction, an arbitral tribunal should assess whether the claimant qualifies as an investor under the definition of investor included in an investment treaty and whether its purported investment meets the criteria of an investment under the respective definition of investment. Material and personal application of an investment treaty requires that both *ratione materiae* and *ratione personae* conditions for jurisdiction are fulfilled for an investor to advance its claim before an arbitral tribunal.

Arbitral tribunals are granted jurisdiction over the acts of a state that have been undertaken after an investment was made and after the national of the other contracting state received the status of protected investor under the investment treaty.[32] Consequently, the date of fulfilment of *ratione materiae* and *ratione persone* conditions for jurisdiction determines the scope of *ratione temporis* jurisdiction of an arbitral tribunal. An example of an arbitral decision relating to temporal aspects of jurisdiction *ratione personae* is *Société Générale S. A. v. The Dominican Republic* Award, in which the LCIA arbitral tribunal held that:

> '…the treaty violation falling under the Tribunal's jurisdiction must have occurred after the entry into force of the Treaty and the investor became its beneficiary as an eligible national of the relevant

[31] See the case law referred to in FN 3.

[32] *Ibidem*. See specifically *Vito G. Gallo v. The Government of Canada*, Award, para. 328: 'Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted'.

> Contracting Party. One would expect any derogation of this principle to be express and not implied. The Treaty could thus not apply to any acts or omissions that occurred before that date because the investor's nationality was different from that required by the treaty and did not permit it to qualify as a protected investor under the Treaty'.[33]

An example of such a reasoning with regard to the question of the temporal aspects of jurisdiction *ratione materiae* is *Phoenix Action, Ltd. v. The Czech Republic* Award, in which the ICSID arbitral tribunal emphasised that:

> 'The Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State'.[34]

What should be emphasised, however, is the fact that determination whether conditions for jurisdiction of an arbitral tribunal have been fulfilled can require a detailed and complex analysis of the process of making an investment. Many investment treaties introduce numerous conditions for jurisdiction *ratione materiae*, constituting either elements of expanded definitions of investments or conditions incorporated into the definitions of 'covered investments',[35] including territoriality, legality and approval

[33] *Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, Award, para. 106.

[34] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case no ARB/06/5, Award of 15.4.2009, p. 68. See also: E.Z. Jaramillo, A. Saldarriaga, A. Vohryzek-Griest, *Treaty Planning…*, pp. 1244-1245.

[35] Definitions of 'covered investments' can be perceived not only as jurisdictional requirements but also as requirements relevant for the merits of an investment claim. According to B. Stern, 'the concept of covered investment or protected investment also seems to enter into the picture, with a potential narrowing of the category of investments which can benefit from international protection. This seems to be the case whether they are deemed barred at the jurisdictional level when it is readily apparent that they are not legally or bona fide initiated investments, or whether, at the merits level, they are considered as not able to benefit from substantive international protection on the same grounds of a violation of the national laws or of the principle of good faith in the

by the local authorities requirements.[36] The necessity of examining these conditions makes determination of the exact date of the making of an investment more difficult.

Still, determination of the exact date when *ratione materiae* and *ratione personae* conditions for jurisdiction have been fulfilled does not suffice for a finding that material and personal conditions for the application of an investment treaty have been met. The question of material and personal application of an investment treaty relates not only to the jurisdictional aspects of an investment claim but also to the questions of admissibility of this claim and applicability of substantive standards of investment protection.

Exemplarily, the legality requirement for an investment, so frequently present in investment treaties, can be perceived as a jurisdictional or merits issue.[37] Incorporation of an express legality requirement into the definition of investment necessitates its treatment as a jurisdictional requirement.[38] However, in arbitral jurisprudence, the legality requirement is sometimes viewed as related to the question of the admissibility of a claim.[39] In addition, objections to admissibility *ratione materiae* on the grounds of the illegality of investments are at times linked with the merits of the case,[40] especially when the illegality of an investment is not 'manifest'at its

initiation of the investment'. See B. Stern, *Are There New Limits on Access to International Arbitration?*, 'ICSID Review – Foreign Investment Law Journal' 2010, vol. 25, no. 1, pp. 35-36.

[36] See Article 1(q) of the Investment Protection Agreement between the European Union and its Member States, on the one part, and the Socialist Republic of Viet Nam, on the other part, signed 30.6.2019, incorporating the following definition of a covered investment: 'covered investment' means an investment by the investor of a Party in the territory of the other Party, in existence as of the date of entry into force of this Agreement or made or acquired thereafter, that has been made in accordance with the other Party's applicable law and regulations'.

[37] M. Polkinghorne, S.-M. Volkmer, *The Legality Requirement in Investment Arbitration*, 'Journal of International Arbitration' 2017, vol. 34, no. 2, p. 164.

[38] R. Moloo, *The Compliance with the Law Requirement in International Investment Law*, 'Fordham International Law Journal' 2011, vol. 34, no. 6, p. 1477-1478.

[39] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Award, paras. 180-181; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case no. ARB (AF)/10/1, Award of 16.5.2014, para. 131, FN 191, commenting *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case no. ARB/03/26, Award of 2.8.2006, paras. 230-244.

[40] V. Heiskanen, *Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 'ICSID Review – Foreign Investment Law Journal' 2014, vol. 29, no. 1, p. 241.

face'.[41] The question of nationality of an investor can also serve as another example, which can be examined either as an element of jurisdiction *ratione personae* of an arbitral tribunal or as a question of admissibility *ratione personae* of an investment claim (when it is assessed whether the rule of nationality of a claim has been satisfied[42]).

To conclude this part of the considerations, determination of whether conditions for material and personal application of an investment treaty to a specific investment (constituting an expression of the principle of intertemporal law) have been met often requires a detailed analysis of the complex issues of *ratione materiae* and *ratione personae* conditions for the jurisdiction and admissibility of an arbitral tribunal, as well as the merits of a claim. Fulfilment of conditions for material and personal application of an investment treaty to a specific investment is not a question of the making of an investment *per se* but of the making of an investment capable of being protected by an investment treaty. As a consequence, ascertaining the exact date of the making of an investment, as a date relevant for temporal application of an investment treaty, faces many difficulties. The difficulties become even more burdensome when the peculiarities of the process of making an investment are taken into consideration. In many cases, it is impossible to identify the exact time point when an investment was made[43] and when all the numerous and often interrelated conditions for material and personal application of an investment treaty were fulfilled.

Referring the above considerations to the *Indian Metals* Award, it appears clear that the Tribunal evaded answering the question of whether *Indian Metals*' investment was made in conformity with Indonesian law and whether any approval of national authorities was issued.[44] The source of contention between the parties to the dispute was whether or not the approval issued only to PT SRI as a locally incorporated company and not directly to *Indian Metals* as a foreign investor had any bearing on the question of fulfilment of the requirement for approval. Leaving this controversy unresolved, the Tribunal left the question open as to whether

[41] *Phoenix Action, Ltd. v. The Czech Republic*, Award, para. 104. See also: M. Polkinghorne, S.-M. Volkmer, *The Legality Requirement*…, p. 164.

[42] Ch.F. Amerasinghe, *The jurisdiction of international courts and tribunals*, Kluwer Law International, The Hague 2003, p. 241. See Article 44 of the ILC Articles.

[43] As it will be presented in the latter part of this contribution, an investment often constitutes a lengthy, complex process extending over time. See pt. 5.2.1.2.

[44] The *Indian Metals* Award, supra, para. 140 and 149-151.

Indian Metals' investment was capable of being protected by the India-Indonesia BIT.

All the above considerations on the date of the making of an investment as a relevant time point for commencement of investment treaty protection to a specific investment could be perceived as incomplete without some additional remarks. The fact that the making of an investment constitutes an indispensable condition for the application of an investment treaty to a specific investment does not mean that the making of an investment constitutes such a condition for the application of an investment treaty protection in general. Investment treaty protection often has a broader scope than the protection of previously established investments. In this regard, protection of pre-investment expenditures requires mentioning. As early as in 2015, it was observed that a small but still growing number of investment treaties include the pre-establishment (or 'pre-investment') commitments of states towards investors.[45] They provide for national treatment or most-favoured nation treatment for the 'acquisition' or 'establishment' of investments. The treaty provisions in question can serve investors as a path to overcome difficulties arising out of insufficiently broad definitions of investment, commonly not including the pre-establishment expenditures of investors, such as costs of negotiations or due diligence. In the lack thereof, pre-establishment expenditures would remain outside investment treaty protection, especially when taking into consideration the fact that arbitral jurisprudence remains reluctant to acknowledge pre-establishment expenditures as investments *per se*.[46]

[45] UNCTAD, *World Investment Report 2015*, p. xi, available at: https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf. Recently, pre-establishment commitments towards investors, providing them with national treatment, have been incorporated into China's new Foreign Investment Law of March 2019, probably as an result of the China–US BIT negotiation. See: T. Qi, *Improving Global Investment Governance: China as a New Variable*, 'ICSID Review – Foreign Investment Law Journal', published 6.4.2020, p. 2 and p. 3, FN 7.

[46] To date, the conclusion arrived at by the ICSID arbitral tribunal in the *Mihaly v. Sri Lanca* Award has become widely accepted. In light of this conclusion, pre-investment and development expenditures cannot automatically be admitted as 'investment' in the absence of the consent of the host state to the implementation of the project. See: *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case no. ARB/00/2, Award of 15.3.2002, para. 60. On this issue, see also: C. Chatterjee, *When Pre-Investment or Development Costs May or May Not Be Regarded as Part of 'Investment' under Article 25(1) of the ICSID Convention. The Mihaly Case*, 'The Journal of World Investment' 2003, vol. 4, no. 5, pp. 909-924. Among rare arbitral decisions which dealt positively with the issue of qualification of pre-investment expenditures as investments

Even though protection of pre-investment expenditures is generally separated from protection of investments, it would be conceivable to consider pre-investment expenditures as the elements of an investment eventually made by an investor. If such a broad meaning of an investment were adopted, the date of the making of an investment should be the date of the making of pre-investment expenditures.[47] In this sense, protection of pre-investment expenditures can have an impact on the assessment of the date of the making of an investment and, consequently, on determining the temporal scope of investment treaty protection of a specific investment.

Protection of pre-investment expenditures can be applied only on the condition that there exists a person who is affected by the acts of a state – an investor. The fact that the protected activity of an investor can take various forms, such as 'pre-investment expenditures', 'establishment' of an investment or 'seeking' to make an investment, cannot blur the other fact, namely that the person of an investor is an indispensable linking factor, essential for ascertaining the responsibility of a state. Consequently, the 'pre-establishment' obligations of states should not be treated as an 'investment protection' but rather as 'investor protection'. Despite these peculiarities, protection of pre-investment expenditures additionally confirms the necessity of fulfilment of both material (existence of the pre-establishment phase of an investment) and personal (acquiring the status of an investor) conditions for the application of an investment treaty.

per se, see S.D. Myers, Inc. v. Government of Canada, United Nations Commission on International Trade Law (UNCITRAL) case, Partial Award of 13.11.2000, para. 232, where the UNCITRAL arbitral tribunal held that expenditures on gaining a 'market share' in Canada constituted an investment. See also: M. Hunter, A. Barbuk, *Reflections on the Definition of an 'Investment'*, [in:] G. Aksen, K.H. Böckstiegel et al. (eds.), 'Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner', International Chamber of Commerce Publications, Paris 2005, p. 392.

[47] On the question of whether pre-investment expenditures can be put under the umbrella of investment treaty protection as a part of an investment, see: M. Pyka, *Pojęcie inwestycji w międzynarodowym arbitrażu inwestycyjnym* [The notion of investment in international investment arbitration], C.H. Beck, Warszawa 2018, pp. 169-170.

5.1.3. The making of an investment in the context of specific investment treaty provisions constituting a modification or departure from the principle of intertemporal law

Though the principle of intertemporal law has been incorporated into many investment treaties,[48] it is obvious that states may modify or totally depart from it. In fact, investment treaty provisions vary to a large extent. Generally, they do not constitute a mere repetition of the principle of intertemporal law. They introduce various, more or less specific limitations of the temporal scope of investment treaty protection. Some investment treaties restrict temporal application of the whole treaty, whilst others restrict the temporal scope of application of substantive treaty provisions. Another group of investment treaties only delimits a tribunal's jurisdiction over time, providing that certain classes of disputes are not covered by the parties' consent to jurisdiction.[49] The diversity of investment treaty provisions, usually constituting only a limited implementation of the principle of intertemporal law, poses the question as to whether such wording of a treaty should be interpreted as a partial exclusion of the application of this principle or as an unintentional omission. In the following part of this contribution, investment treaties belonging to three groups of treaties, as indicated above, will be discussed. Thereafter, investment treaties constituting a departure from the principle of intertemporal law will become the subject of analysis.

5.1.3.1. Investment treaty provisions constituting a modification of the principle of intertemporal law

Investment treaties belonging to the first group restrict temporal application of both jurisdictional and substantive treaty provisions. As an example,

[48] See ILC, *Draft Articles*..., p. 58, where it has been described as a 'common stipulation' in arbitration agreements: 'A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements...'.

[49] E. Savarese, *BIT Clauses Bearing on the Ratione Temporis Jurisdiction of ICSID Tribunals. A Survey on the Constituent Elements of Investor-State Legal Disputes under BITs*, 'The Journal of World Investment & Trade' 2009, vol. 10, no. 4, p. 601.

Article 2(3) of U.S. Model Bilateral Investment Treaty of 2012[50] stipulates that: 'For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty'. Such a treaty provision reflects the principle of intertemporal law in the most comprehensive way.

Investment treaties belonging to the second group contain intertemporal provisions that restrict the scope of substantive treaty provisions. These provisions do not touch upon the question of whether an arbitral tribunal has jurisdiction over facts giving rise to a dispute. It could be argued that even if an arbitral tribunal had jurisdiction over these facts under a treaty, it could not apply substantive treaty provisions, and instead it would be forced to apply standards of general public international law, including rules of state responsibility for internationally wrongful acts. However, it appears that in such cases, the principle of intertemporal law should apply, excluding any application of jurisdictional provisions of a treaty. As an example of this method of drafting investment treaties, Article 3.1. of Brazil-India Investment Cooperation and Facilitation Treaty of 2020[51] can be invoked, providing that:

> 'This Agreement shall apply to measures adopted or maintained by a Party relating to investments of investors of another Party in its territory, in existence as on the date of entry into force of this Treaty or established, acquired, or expanded thereafter, and which have been admitted by a Party in accordance with its law and policies as applicable from time to time'.

Investment treaties belonging to the third group limit the scope of temporal jurisdiction of arbitral tribunals. The effect of a treaty provision introducing such a limitation is that an arbitral tribunal becomes deprived of any adjudicative powers, since it does not have jurisdiction over the dispute at all – regardless of the scope of substantive provisions it could find applicable to the dispute. Most commonly, provisions restricting the temporal scope of an investment tribunal's jurisdiction are included in the definitions of 'covered investments'. The definition of a 'covered investment' should be perceived as playing the same role as the definition of investment,

[50] 2012 U.S. Model Bilateral Investment Treaty, available at: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[51] Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, signed 25.1.2020, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download.

e.g. determining the boundaries of *ratione materiae* jurisdiction of an investment tribunal. Most frequently, it put limits on the jurisdictional powers of an arbitral tribunal by restricting the scope jurisdiction *ratione materiae* to investments made within a certain territory[52] or in accordance with the laws of the host state.[53]

5.1.3.2. Investment treaty provisions constituting a departure from the principle of intertemporal law

All the provisions described above constitute a more or less accurate implementation of the principle of intertemporal law into investment treaties. Yet, some investment treaties depart from this principle by extending the scope of their application to investments made before their entry into force. Without doubt, states are free to retrospectively assume responsibility for acts performed before the specific obligation are entered into force and therefore depart from the principle of intertemporal law. This power of states has been acknowledged in the Commentary to Article 13 of the ILC Articles, where it was emphasised that:

> 'It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State'.[54]

Formulations of investment treaties expanding their scope of application to investments made before their entry into force are quite common and not limited to jurisdictional issues. An example of such an expansive wording of a treaty is Article 12 of the Czech Republic-Netherlands Bilateral Investment Treaty.[55] Due to this provision, the treaty

[52] The issue of territorial limitations of the scope of jurisdiction of international investment tribunals has recently received a lot of comments in the context of disputes arising from the annexation of Crimea by the Russian Federation. See: N. Tuzheliak, *Investors at conflict's crossroads: an overview of available international courts and tribunals in the Crimean context*, 'UCL Journal of Law and Jurisprudence 2017', vol. 6, no. 2, pp. 21-25.

[53] On the relationship between these provisions and the principle of intertemporal law, see pt. 5.1.2.

[54] ILC, *Draft Articles*..., p. 58.

[55] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed 29.4.1991,

in question shall also apply to investments which have been made after 1.1.1950 (a long time before the treaty's entry into force, which took place on 1.10.1990). Another example of a provision broadening the scope of application of an investment treaty to investments made before its entry into force can be found in Article 2 of the India-Indonesia BIT, analysed by the *Indian Metals* tribunal. It provides as follows:

> This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations in force concerning foreign investments, whether made before or after the coming into force of this Agreement.

A comparable provision of Article 1.1 of the Peru-France Bilateral Investment Treaty[56] was analysed by the arbitral tribunal in the *Gremcitel S.A. v. Republic of Peru* Award of 9.1.2015 (the *Gremcitel* Award). The *Gremcitel* arbitral tribunal arrived at the conclusion that:

> This provision clarifies that an investment may have been made either before or after the entry into force of the Treaty. It does not say, however, whether the 'national' or 'company' must have acquired its investment before the treaty breach occurred for the Tribunal to have *ratione temporis* jurisdiction.[57]

The view expressed in the *Gremcitel* Award can be adopted to the interpretation of investment treaty provisions extending treaty protection beyond the standard expressed in the principle of intertemporal law. All these provisions only deal with the temporal aspects of the first event on the timeline of events indicated above in pt. 4, i.e. the entry into force of an investment treaty. Even if they recognise the relationship between the entry into force and the making of an investment, they generally do not cover the relationship between the making of an investment and the adoption of a measure giving rise to treaty claims.

---

available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/968/download.

[56] L'accord entre le Gouvernement de la République française et le Gouvernement de la République du Pérou sur l'encouragement et la protection réciproques des investissements, signed 6.10.1993, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1269/download.

[57] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Award, para. 145.

However, the significance of these provisions can be questioned. According to Z. Douglas, extension of a treaty protection to investments made prior to the entry into force of the treaty need not be made explicit.[58] Admittedly, even in the case of the lack of an explicit treaty provision, investments made before the entry into force of a treaty will be protected as existing at the date of entering into force of an investment obligation (which took place at the date of the entry into force of an investment treaty). The exact date of making an investment is not relevant. Nevertheless, such an interpretation leaves the question of investments that had been made and subsequently ceased to exist before the entry into force of a treaty unresolved.

This controversy need not be resolved here, as it remains outside the scope of this contribution. What is particularly relevant for the ongoing considerations is the question of interpretation of the said provisions within the context of the acts of a state performed after the entry into force of an investment treaty but before the making of an investment. It should be assessed whether the said acts of a state are covered by treaty provisions similar to Article 2 of the India-Indonesia BIT. On the grounds of interpretation *a maiori ad minus*, it could be contended that, since the acts of a state interfering with investments existing before the entry into force of a treaty are drawn under the 'umbrella' of treaty protection, the acts of a state performed after the entry into force of a treaty and aimed at future investments should be also drawn under this 'umbrella'.[59] However, such an interpretation does not withstand scrutiny. This is because, in the latter case, there is no investment and, therefore, no subject of protection at all, since the analysed treaty provisions provide for protection of 'investments'.

5.2. Possible methods of consideration by an arbitral tribunal the acts of a state preceding the making of an investment

The above considerations lead to the conclusion that existing investment treaty provisions, including the ones resulting in a modification or departure from the principle of intertemporal law, do not constitute a sound basis for ascertaining the responsibility of states for acts undertaken before

[58] Z. Douglas, *The International Law*..., p. 337.

[59] This reasoning has been indirectly advanced by *Indian Metals*, relying on Article 2 Indonesia-India BIT. See the *Indian Metals* Award, supra, para. 91.

the making of an investment and which are detrimental for the subject of future investment when no activity of a future investor has yet been undertaken. However, even with the lack of specific treaty provisions extending investment protection to the acts of a state undertaken before the making of an investment, arbitral tribunals are not fully deprived of the possibility of considering these acts. In the following part of this contribution, various methods of considering the acts of a host state, preceding the making of an investment, will be analysed from the perspective of the assessment of treaty claims raised by the investor who eventually made an investment – either as facts relevant for the merits of a case or as elements of a continuing act.

5.2.1. Acts of a host state preceding the making of an investment considered as facts relevant for the merits of a case

It would be inappropriate to draw a general conclusion from the above considerations that the principle of intertemporal law does not allow an arbitral tribunal to consider any facts preceding the making of an investment. As emphasised in Commentary to Article 13 of the ILC Articles, the principle of intertemporal law does not mean that facts 'occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant'.[60] In the realm of investment arbitration, facts preceding the making of an investment cannot by themselves give rise to the responsibility of a state towards an investor, since at the time these facts occurred no investment existed, the host state did not owe any obligations towards the future investor. However, these facts may be taken into consideration while assessing the question of a breach of substantive treaty provisions, applicable after the making of an investment. The application of substantive treaty provisions can require an arbitral tribunal to take into account the past acts of a host state affecting the subject of a future investment or future investor. Among these acts, particularly important are acts constituting evidence of the intent of a host state and acts creating legitimate expectations of an investor.

[60] ILC, *Draft Articles…*, p. 59.

5.2.1.1. Acts constituting evidence of the intent of a host state

Treatment of the subject of investment in times preceding the acquisition of an investment by an investor can be compared with the treatment of the same subject of investment in those periods of time when it constituted an investment. Since the subject of investment was treated differently when it was in the hands of the nationals of a host state, as compared to times when it was in the hands of an investor, an arbitral tribunal can come to the conclusion that the host state was prejudiced towards an investor and did not provide them with appropriate standards of treatment. This does not mean that an arbitral tribunal has jurisdiction over facts taking place before the making of an investment, nor that these facts could by themselves constitute a breach of the substantive provisions of an investment treaty. Past facts can be regarded by an arbitral tribunal as evidence of the intent of a host state. While applying this reasoning to the circumstances of the *Indian Metals* case, it appears evident that the Tribunal should have taken into account the facts that occurred before the acquisition of mining concessions by *Indian Metals* and should have assessed whether *Indian Metals* was treated differently as compared to its predecessor.

5.2.1.2. Acts of a host state creating legitimate expectations of an investor

The question whether the acts of a host state preceding the making of an investment can create any legitimate expectations of an investor as to the treatment of its future investment (bearing in mind that the frustration of these expectation constitutes a breach of the fair and equitable treatment standard of investment protection[61]) is not easy to resolve.

[61] Consistent arbitral case law recognises legitimate expectations as an element of a fair and equitable treatment standard. On this issue, see specifically: *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case no. ARB (AF)/00/2, Award of 29.5.2003, para. 154: 'The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment'; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL case, Partial Award of 17.3.2006, para. 302, where the UNCITRAL arbitral tribunal held that the standard of fair and equitable treatment is 'closely tied to the notion of legitimate expectations which is the dominant element of that standard', and *Duke Energy*

It has been consistently emphasised by investment arbitral tribunals that the acts of a host state should constitute a part of the considerations taken into account by an investor while deciding whether to invest in a host state and not at any time before.[62] This unequivocal approach of arbitral jurisprudence disregards the fact that an investment rarely constitutes a single transaction made at a specific moment. An investment usually takes the form of a complex process extending over time. In many cases, it is impossible to identify any moment relevant for the identification of a closed list of factors creating the legitimate expectations of an investor.[63] What is plausible instead is to identify particular transactions constituting the complex process of making an investment and to assess whether they have been undertaken by an investor with reliance on facts contemporary to these transactions and creating legitimate expectations of an investor.[64]

While assessing the scope of legitimate expectations of an investor, the complex nature of the process of making an investment should not only be taken into account. Equally important is to consider the complex nature of the acts of a host state giving rise to the legitimate expectations of an investor. They can constitute single acts undertaken at the moment

---

Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case no. ARB/04/19, Award of 18.8.2008, para. 340: 'The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment'.

[62] See specifically *Gami Investments Inc. v. Mexico*, UNCITRAL case, Award of 15.11.2004, para. 93: 'NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest'; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case no. ARB/01/3, Award of 22.5.2007, para. 262: 'these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest'; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL case, Final Award of 12.11.2010, para. 287: 'protected expectations must rest on the conditions as they exist at the time of the investment'. See also: Ch. Schreuer, U. Kriebaum, *At What Time Must Legitimate Expectations Exist?*, [in:] J. Werner, A.H. Ali, 'A Liber Amicorum: Thomas Wälde – Law Beyond Conventional Thought', CMP Publishing Ltd, London 2009, p. 267; R. Dolzer, Ch. Schreuer, *Principles of International Investment Law*, Oxford University Press, New York 2012, p. 145-146. One of the latest examples of this approach can be found in *CEF Energia BV v. Italian Republic*, SCC Case no. 158/2015, Award of 16.1.2019, para. 186-189, where the SCC arbitral tribunal concluded that the decisive date for the assessment of legitimate expectations of an investor was the date of the making of an investment.

[63] Ch. Schreuer, U. Kriebaum, *At What Time…*, [in:] J. Werner, A.H. Ali, 'A Liber Amicorum…', p. 273.

[64] *Ibidem*.

of the making of an investment but also a series of acts creating the long-lasting approach of a host state towards investors and their investments. In order to determine whether any legitimate expectations of an investor were created, it will be necessary to trace back the process of application of these acts to investors and investments in order to determine whether any long-lasting practice of the host state's authorities or well-grounded jurisprudence of the host state's courts had been established.[65] This could also allow for the determination of whether any change of this practice or jurisprudence had happened before the making of an investment by an investor and whether this change created any legitimate expectations of an investor that any new lasting practice or jurisprudence had been established.

The reasoning of the *Indian Metals* tribunal fails to take into account the peculiarities described above. The Tribunal concentrated on the insufficient response of Indonesia to the problem of the existence of overlapping licences[66] and on adoption of divestiture requirements[67] (i.e. on the acts and omissions of Indonesia allegedly taking place after the investment was made) rather than on the issuance of overlapping licences (i.e. on the acts of Indonesia allegedly performed before the investment was made).[68] Consequently, it refused to consider the problem of the issuance of overlapping licences from the perspective of the legitimate expectations of *Indian Metals*.

In light of the Tribunal's reasoning on the issues of overlapping licences and divestiture requirements, it appears that even if the problem of the issuance of overlapping licences had eventually been addressed by the Tribunal, the conclusion of the Tribunal would nevertheless have been negative for *Indian Metals*. This results from the Tribunal's findings that *Indian Metals* held the obligation to conduct proper due diligence[69] and

[65] 'Dramatic change of law' by national courts was deemed as a factor that can constitute the frustration of legitimate expectations in *Eli Lilly and Company v. The Government of Canada*, ICSID Case no. UNCT/14/2, Final Award of 16.3.2017, paras. 380--389. For examples of factors leading to the frustration of legitimate expectations, see M. Kałduński, *Some Remarks on the Protection of Legitimate Expectations in International Investment Law*, 'Comparative Law Review', vol. 25, December 2019, p. 220.

[66] The *Indian Metals* Award, supra, paras. 241-250.

[67] *Ibidem*, paras. 251-253.

[68] However, it was induced to do so by the change in *Indian Metals*' position during the main hearing, see FN 86.

[69] The *Indian Metals* Award, supra, para. 244.

that it did not possess any legitimate expectations as to the stability of Indonesia's legal order.[70]

Undoubtedly, the Tribunal could have elaborated more upon the issue of the existence and scope of legitimate expectations of an investor making an investment. Even with the lack of specific assurances made by a host state to an investor, it seems unacceptable to maintain that the entire risk of making an investment rests on the investor. Unrestricted application of the *caveat emptor* principle to the process of making an investment would be incompatible with the fair and equitable treatment standard of investment protection. Except for totally hazardous investments in fallen states, investors do not make investments in a legal vacuum but within the more or less stable legal system of a host state. Some minimum set of legitimate expectations is almost necessarily created by the acts of host state authorities participating in the process of making an investment.[71] Arbitral jurisprudence generally requires that specific commitments of a host state be made to investors to generate legitimate expectations.[72] However, since the legal nature of an investment entails its materialisation under the national law of a host state,[73] which is impossible without an administrative (e.g. in the form of an administrative decision to grant a licence) or contractual basis (e.g. in the form of a share purchase agreement), the investor always acquires some legitimate expectations concerning the validity of legal acts constituting an investment under national law. Revocation (e.g. annulment of an administrative decision or the setting aside of a purchase agreement) or simple non-performance of these acts (e.g. refusal to recognise the exclusive character of a concession) on grounds attributable to the host state constitutes s frustration of legitimate

[70] *Ibidem*, para. 252.

[71] The problem of the overreliance of an investor on these acts and decisions, or generally on the stability of the national legal order, is another issue, separate from the analysed one.

[72] M. Kałduński, *Some Remarks…*, p. 223.

[73] M. Pyka, *Pojęcie inwestycji…*, p. 150-151. See also M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, Kluwer Law International, Alphen aan den Rijn 2017, p. 9: 'Even where parties have sought to exclude municipal law and have referred exclusively to international law, the latter does not define or regulate contractual or property rights related to an investment. These are in principle governed by the law of the host State (which is also usually the applicable law of the investment contract). Municipal law has a role represented by the definition of the contents of the property rights in dispute'.

expectations – even without any specific commitments made towards an investor by a host state.

When considering the circumstances of the *Indian Metals* case, it appears unclear whether mining licences issued to PT SRI and subsequently taken over by *Indian Metals* had an exclusive character.[74] Arguably, at the moment of the making of an investment, *Indian Metals* could have acquired some legitimate expectations as to the legal nature of its investment under Indonesian law.[75] These expectations were based on false assumptions, since many overlapping licences existed at the same time. If such legitimate expectations of *Indian Metals* existed, they were violated by Indonesia when it refused to acknowledge the exclusive character of *Indian Metals*' mining licence.

The problem of the existence of overlapping licences in the *Indian Metals* case was neither a problem of the consistent approach of the authorities of the host state to investors and their investments, nor was it a problem of the assessment of the process of making an investment extending over time. However, it does remains within the scope of this contribution, since the legitimate expectations of *Indian Metals* related to facts occurring before the making of an investment. While the alleged fact constituting the breach of a fair and equitable treatment standard (refusal to acknowledge the exclusive character of the mining licence) occurred after the making of an investment, previous facts (the issuance of the overlapping licences) should have also been taken into account by the Tribunal as a prerequisite for the conclusion on the merits (breach of a fair and equitable treatment standard).

The *Indian Metals* case reveals that historical analysis of the acts of a host state preceding the making of an investment can be indispensable for the assessment of the existence and the scope of legitimate expectations of an investor, the question of frustration of these expectations and, consequently, the breach of a fair and equitable treatment standard.

[74] The *Indian Metals* Award, supra, paras. 25-33 and 192.

[75] The exclusive right to exploit the mine was recognised as possible grounds for the legitimate expectations of an investor in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4.4.2016, paras. 502 and 552.

5.2.2. Acts of a state preceding the making of an investment constituting element of a continuing act

In the circumstances of the *Indian Metals* case, issuance of overlapping licences can be perceived either as a series of single, instantaneous acts with lasting effects[76] or as a continuing act.[77] The latter proposition appears to be more plausible. In the Separate Opinion to the Permanent Court of International Justice (PCIJ) judgment in the *Phosphates in Morocco case (Italy v. France)*, Judge Cheng Tien-Hsi expressed a view that:

> 'For the monopoly, […], is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir that first created it remains in force'.[78]

The legal character of concession is approximate to a monopoly. It creates rights that may be utilised by the entitled for a considerable period of time. In other words, it creates a lasting entitlement that shapes the legal position of the entitled. Therefore, it should be perceived as a continuing act and not as a single act. The lasting existence of a licence or a monopoly

[76] J. Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 'The British Yearbook of International Law' 1996, vol. 66, no. 1, p. 419.

[77] The *Indian Metals* tribunal refused to analyse the legal character of overlapping licences on the grounds of its conclusion on the merits, namely the lack of a breach of a fair and equitable treatment standard. See the *Indian Metals* Award, supra, para. 115: '…in light of the Tribunal's conclusion regarding the merits of the Claimant's case, the Tribunal does not need to decide on the jurisdictional ramifications of the Respondent's distinction between a continuing act and an act which is already completed but continues to cause loss or damage'. The Tribunal's conclusion was affected by the fact that *Indian Metals* shifted the focus from the issue of existence of overlapping licences to the issue of refusal to address a problem of overlapping licences which allegedly took place after the making of an investment. See: the *Indian Metals* Award, supra, para. 231. However, the Tribunal stressed that even if treated as an omission by Indonesia, failure to solve the problem of overlapping licences 'is not a new act which gives rise to a new treaty claim but simply the lasting effect of the impugned measure that occurred before the Claimant's investment'. Thereby, it indirectly refused to treat it as a continuing act. See: the *Indian Metals* Award, supra, para. 235.

[78] *Phosphates in Morocco (Italy v. France)*, Separate Opinion of Mr. Cheng Tien-Hsi to the PCIJ judgment of 14.6.1938, PCIJ Series A/B. Judgments, Orders and Advisory Opinions, no. 74, p. 35. See also: J. Pauwelyn, *The Concept…*, p. 419.

is more important than the acts creating them. As rightly observed by Judge Cheng Tien-Hsi: '…if it is wrongful, it is wrongful not merely in its creation but in its continuance'.[79] Similarly, the unlawful occupation of a property creates lasting interference with property rights and constitutes a continuing act as well.[80] The mere existence of an overlapping licence/monopoly or the fact of occupation of property is a continuing act in itself. The performance of licences/monopolies or further acts undertaken within the time of the occupation of property (e.g. partial destruction of this property) are additional single acts that do not interfere with the legal character of the continuing act.

To assess whether a continuing act exists, it can be helpful to apply a test of cessation and compare it with a test of restitution. As observed by J. Pauwelyn:

> …reference should be made to the problem of reparation and, especially, the question whether after the act first occurred, the remedy of cessation is still of any use or the only possible reparation, or whether restitution in kind or compensation suffices to provide reparation both for the past and the future. Only in the former case should a continuing violation be established.[81]

In the case of a continuing act, the simple non-performance of an act (cessation) should suffice to bring an infringement of an international obligation to an end. In the case of a single act with continuous effects, such as expropriation of property, some additional acts reversing the consequences of a breach, such as the return of property, will be necessary.

Applying both tests to the question of overlapping licences, as the source of contention between *Indian Metals* and Indonesia, it appears that the revocation of overlapping licenses would have constituted sufficient means to reverse the consequences of possible breaches of investment treaty obligations owed by Indonesia to *Indian Metals*. Hence, the issuance of each of the overlapping licences should not be treated as a single act performed by Indonesia before the making of an investment by *Indian Metals* but rather as a continuing act. In the very moment of the making of an investment by *Indian Metals*, the legal situation of the investor was

[79] Separate Opinion of Mr. Cheng Tien-Hsi, p. 36.

[80] However, see the opposite view of Judge Cheng Tien-Hsi, expressed in the Separate Opinion of Mr. Cheng Tien-Hsi, p. 36-37.

[81] J. Pauwelyn, *The Concept*…, p. 420.

presumably 'contaminated' by treaty violations that did not cease to exist at this moment, but which lasted for a considerable period of time.

6. Conclusion

The temporal scope of investment treaty protection will remain the focus of attention of international investment tribunals and scholars. The complexity of this issue is generated not only by the multiplicity of legal sources that have to be taken into consideration by an arbitral tribunal but primarily by the multiplicity of events building up the facts of a case that have to be considered in their interrelations. Among these facts, the making of an investment appears to play one of the central roles.

In light of the principle of intertemporal law, the making of an investment constitutes an important factor determining whether conditions for material and personal application of an investment treaty to a specific investment have been met (in other words, determining the temporal scope of application of an investment treaty to a specific investment). Determination that the investment was made often requires from an arbitral tribunal a detailed analysis of complex issues of *ratione materiae* and *ratione personae* conditions for jurisdiction and the admissibility, as well as the merits of an investment claim.

The general approach of arbitral tribunals to the question of the acts of a host state preceding the making of an investment finds its roots in the principle of intertemporal law. An arbitral tribunal does not have jurisdiction and cannot apply substantive standards of investment protection to facts that happened before the making of an investment. The wording of numerous investment treaty provisions, constituting modifications or even a departure from the principle of intertemporal law, does not change this conclusion. In light of these provisions, investment treaties can be applicable to facts occurring before a treaty's entry into force but not before the making of an investment. This does not mean, however, that the acts of a state undertaken before the making of an investment remain entirely outside investment treaty protection. They can be covered by specific treaty provisions relating to the pre-establishment phase of an investment. However, to remain within investment treaty protection, pre-investment activities should be undertaken by a future investor.

In principle, the acts of a state preceding the making of an investment and which are undertaken before any activity of the future investor took

place remain outside the scope of investment treaty protection. Therefore, in general, the conclusion arrived at by the *Indian Metals* tribunal deserves appreciation. Nevertheless, the Tribunal could have deepened its reasoning and elaborated more upon the possible methods of considering these acts as relevant for its decision. It appears that they could have been taken into consideration – either as facts relevant for the merits of the case, or as facts building up what is termed a continuing act.

Bibliography

1. Amerasinghe Ch.F., *The jurisdiction of international courts and tribunals*, Kluwer Law International, The Hague 2003
2. Chatterjee C., *When Pre-Investment or Development Costs May or May Not Be Regarded as Part of "Investment" under Article 25(1) of the ICSID Convention. The Mihaly Case*, 'The Journal of World Investment' 2003, vol. 4, no. 5
3. Dolzer R., Schreuer Ch., *Principles of International Investment Law*, Oxford University Press, New York 2012
4. Douglas Z., *Property, Investment, and the Scope of Investment Protection Obligations*, [in:] Z. Douglas, J. Pauwelyn, J.E. Viñuales (eds.), 'The Foundations of International Investment Law: Bringing Theory into Practice', Oxford University Press, New York 2014
5. Douglas Z., *The International Law of Investment Claims*, Cambridge University Press, Cambridge 2009
6. Gallus N., *Recent BIT Decisions and Composite Acts Straddling the Date a Treaty Comes into Force*, 'International & Comparative Law Quarterly' 2007, vol. 56, no. 3
7. Gazzini T., *Yukos Universal Limited (Isle of Man) v The Russian Federation: Provisional Application of the ECT in the Yukos Case*, 'ICSID Review – Foreign Investment Law Journal' 2015, vol. 30, no. 2
8. Heiskanen V., *Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 'ICSID Review – Foreign Investment Law Journal' 2014, vol. 29, no. 1
9. Higgins R., *Some Observations on the Inter-Temporal Rule in International Law*, [in:] J. Makarczyk (ed.), 'Theory of International Law at the Threshold of the 21st Century. Essays of honour of Krzysztof Skubiszewski', Kluwer Law International, The Hague, London, Boston 1996
10. Hunter M., Barbuk A., *Reflections on the Definition of an 'Investment'*, [in:] G. Aksen, K.H. Böckstiegel et al. (eds.), 'Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner', International Chamber of Commerce Publications, Paris 2005

11. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission 2001, vol. II, Part Two, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
12. Ishikawa T., *Provisional Application of Treaties at the Crossroads between International and Domestic Law*, 'ICSID Review – Foreign Investment Law Journal' 2016, vol. 31, no. 2
13. Jaramillo E.Z., Saldarriaga A., Vohryzek-Griest A., *Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting*, [in:] M.A. Fernandez-Ballester, D. Arias (eds), 'Liber Amicorum Bernardo Cremades', Wolters Kluwer España, 2010
14. Kałduński M., *Some Remarks on the Protection of Legitimate Expectations in International Investment Law*, 'Comparative Law Review', vol. 25, December 2019
15. Kułaga Ł., *Unia Europejska a zmiana paradygmatu w międzynarodowym prawie inwestycyjnym*, 'Europejski Przegląd Sądowy' 2017, no. 4
16. Moloo R., *The Compliance with the Law Requirement in International Investment Law*, 'Fordham International Law Journal' 2011, vol. 34, no. 6
17. Nagy C.I., *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back'*, 'German Law Journal' 2018, vol. 19, no. 4
18. Nowrot K., *Termination and Renegotiation of International Investment Agreements*, [in:] S. Hindelang, M. Krajewski (eds.), 'Shifting Paradigms in International Investment Law', Oxford University Press, New York 2016
19. Nyombi Ch., Mortimer T., *Rights and obligations in the post-investment treaty denunciation period*, 'International Arbitration Law Review' 2018, vol. 21, no. 2
20. Pauwelyn J., *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 'The British Yearbook of International Law' 1996, vol. 66, no. 1
21. Polkinghorne M., Volkmer S.-M., *The Legality Requirement in Investment Arbitration*, 'Journal of International Arbitration' 2017, vol. 34, no. 2
22. Pyka M., *Pojęcie inwestycji w międzynarodowym arbitrażu inwestycyjnym*, C.H. Beck, Warszawa 2018
23. Qi T., *Improving Global Investment Governance: China as a New Variable*, 'ICSID Review – Foreign Investment Law Journal', 6.4.2020
24. Rodner J.O., Estévez J.M., *BITs in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced*, 'Journal of International Arbitration' 2012, vol. 29, no. 4
25. Sasson M., *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, Kluwer Law International, Alphen aan den Rijn 2017

26. Savarese E., *BIT Clauses Bearing on the Ratione Temporis Jurisdiction of ICSID Tribunals. A Survey on the Constituent Elements of Investor-State Legal Disputes under BITs*, 'The Journal of World Investment & Trade' 2009, vol. 10, no. 4
27. Schreuer Ch., Kriebaum U., *At What Time Must Legitimate Expectations Exist?*, [in:] J. Werner, A.H. Ali, 'A Liber Amicorum: Thomas Wälde – Law Beyond Conventional Thought', CMP Publishing Ltd, London 2009
28. Serhan L.U., *Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International Investment Arbitration*, 'Texas Law Review' 2016, vol. 95, no. 1
29. Słok-Wódkowska M., Wiącek M., *Zgodność dwustronnych umów inwestycyjnych pomiędzy państwami członkowskimi z prawem Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 6.03.2018 r., C-284/16, Slowakische Republik przeciwko Achmea BV*, 'Europejski Przegląd Sądowy' 2018, no. 11
30. Stern B., *Are There New Limits on Access to International Arbitration?*, 'ICSID Review – Foreign Investment Law Journal' 2010, vol. 25, no. 1
31. Szostak A., Wierzbowski K., *Niepewna przyszłość arbitrażu inwestycyjnego – klauzule rozstrzygania sporów w wewnątrzwspólnotowych traktatach inwestycyjnych*, 'Palestra' 2019, no. 6
32. Tuzheliak N., *Investors at conflict's crossroads: an overview of available international courts and tribunals in the Crimean context*, 'UCL Journal of Law and Jurisprudence' 2017, vol. 6, no. 2
33. Voon T., Mitchell A.D., *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 'ICSID Review – Foreign Investment Law Journal' 2016, vol. 31, no. 2
34. UNCTAD, *World Investment Report 2015*, available at: https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf
35. Wackernagel C., *The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Intra-EU BITs and Why that Matters for International Law*, 'Beiträge zum Transnationalen Wirtschaftsrecht' 2016, no. 140
36. Yusuf G., Owczarek O., *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v Bolivarian Republic of Venezuela. Removing the Sword of Damocles: ICSID Denunciation under Articles 71 and 72*, 'ICSID Review – Foreign Investment Law Journal' 2018, vol. 33, no. 2