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XII. Jurisdiction Ratione Temporis

12.01 In addition to 'what' (subject matter jurisdiction, or *ratione materiae*) and 'who' (personal jurisdiction, or *ratione personam*), one of the most difficult issues of tribunal competence under the aegis of investment protection treaties is 'when'. (1) Questions of timing are further complicated by the blurred boundaries in many cases between jurisdiction and admissibility, the separate inquiries as to how far the state's consent extends in time and as to whether its substantive obligations were applicable at a particular point in the past.

12.02 In general, investment treaty tribunals have formulated a basic rule that a state's obligations under an investment treaty (including its consent to arbitrate) do not extend to periods before a treaty's entry into force. Generalizations are rather unhelpful in this area, however. Many investment protection treaties impose special rules in respect of temporal coverage. Moreover, a number of exceptions and qualifications have to be considered, even where the state parties have not provided any guidance in the applicable treaty.

12.03 Tribunals have produced a body of inconsistent case law that often falls short of clearly delineating basic temporal concepts. Some decisions have distinguished between the temporal application of an investment treaty's substantive provisions and the temporal jurisdiction of the same treaty, which is usually defined by the treaty's dispute resolution clause. Still, other decisions have applied purportedly general rules of
P 413 international law articulated in other decisions applying specific treaty language to derive the supposed rule in question. These inconsistencies in the jurisprudence underscore the importance of examining specific treaty language when reconciling temporal issues.

12.04 This chapter provides an overview of the basic temporal rules and issues that arise in investment treaty cases, noting contrary jurisprudence where applicable. This chapter addresses: (i) jurisdiction to consider acts before a treaty's entry into force; (ii) jurisdiction over disputes that arise before a treaty's entry into force; (iii) the availability of arguments of laches or extinction to preclude jurisdiction over a claim; and (iv) the effect of termination and survival clauses in investment treaties.

12.05 Although this chapter is aimed primarily at addressing the *ratione temporis* coverage of investment treaties, the analysis below extends to the temporal scope of a treaty's substantive protection, which often limits the temporal scope of admissible claims due to the narrow wording of the dispute resolution clauses found in many investment treaties.

A. Application to Acts before a Treaty's Entry into Force

1. Non-Retroactivity of Treaty Obligations

12.06 The baseline rule of international law is clear with respect to the temporal relationship between the law and facts underlying a claim: '[a] judicial fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled.' (2) This uncontroversial proposition is codified in Article 13 of the International Law Commission Articles on State Responsibility for Internationally Wrongful Acts, and is referred to as the 'rule against non-retroactivity':

> 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. (3)

12.07 The same rule also finds expression in the Vienna Convention on the Law of Treaties, at Article 28:

> 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. (4)

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12.08 At least as far as this principle remains in the abstract, arbitral tribunals applying investment treaties have been consistent in their confirmation of the rule against retroactivity when determining the temporal scope of a state's treaty obligations. For example, when considering claims under the NAFTA, which entered into force at the beginning of 1994, the *Feldman* tribunal held:

> Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. (5)

12.09 Other tribunals have affirmed this fundamental rule, such that there can be a presumption that a state will not be liable for treaty breach based on conduct that took place entirely before the treaty took effect. (6)

12.10 The non-retroactivity rule does not prevent a tribunal from considering acts before a treaty entered into force when determining whether a state violated the treaty through conduct that took place after the entry into force of the treaty. (7) In *Mondev v. United States*, the tribunal reasoned as follows, faced with the claimant's allegations that decisions of state and federal courts in the United States that had undermined its rights before NAFTA came into force had breached the treaty because they were not corrected thereafter:

> The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties and in the ILC's Articles on State Responsibility, and has been repeatedly affirmed by international tribunals. There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that 'this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter'. Thus, as the Feldman Tribunal held, conduct committed
P 415 before 1 January 1994 cannot itself constitute a breach of NAFTA.

> On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force. To the extent that the last sentence of the passage from the *Feldman* decision, quoted . . . above, appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.
>
> Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility. (8)

12.11 It is important to distinguish between temporal jurisdiction on the one hand and subject-matter or personal jurisdiction on the other. The non-retroactivity rule does not prevent tribunals from deciding disputes that are connected with investments that were made before the treaty's entry into force. Nor does it exclude investments made by investors who were not qualifying nationals when the investment was made. These are questions typically resolved in the definitions of the applicable investment treaty itself, which set the parameters for qualifying 'investments' and 'investors'. (9)

2. Continuous Acts

12.12 As already noted, the non-retroactivity rule is not absolute. One exception to the simple black-letter proposition outlined above when applied in practice is the occurrence of continuing breach. Article 28 of the Vienna Convention reflects this exception, stipulating that the rule applies only to 'any situation which ceased to exist before the date of the entry into force of the treaty . . .' (10) The logical corollary of this
P 416 caveat is that the non-retroactivity rule allows the possibility of state responsibility where a 'situation' that came into existence before the treaty took effect persists afterwards. The International Law Commissions's (ILC) Commentary to Article 28 of the Vienna Convention confirms this interpretation:

> If . . . an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into

> force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date. (11)

12.13 Arbitral tribunals have repeatedly indicated that state conduct that took place before the applicable treaty took effect may give rise to liability under the applicable treaty if it continues afterwards. The tribunal in *Tecmed* considered that the Spain–Mexico BIT protected the claimants from acts that 'upon consummation or completion of their consummation after entry into force of the Agreement constitute a breach of the Agreement . . . .' (12) The tribunal in *SGS v. Philippines* considered a failure to pay under a state contract that began before the entry into force and continued for years after:

> . . . [T]he Respondent argued that the BIT did not apply retrospectively to claims which arose prior to its entry into force on 23 April 1999.
>
> According to Article II of the BIT, it applies to investments 'made whether prior to or after the entry into force of the Agreement'. Article II does not, however, give the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies: the provisions of the BIT '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'. The application of this principle to BIT claims was explored in some detail by a NAFTA Tribunal in *Mondev International Ltd. v. United States of America*. As the Tribunal said (discussing the substantive standards under Chapter 11 of NAFTA): 'events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.'
>
> It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal
P 417 to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach. (13)

12.14 The *SGS* tribunal was not the only one to grapple with the difficult issue of determining if state conduct that straddles the effective date of a treaty constitutes a 'continuing breach'. (14) Investment arbitration panels have found that a failure to pay a contractual debt can be a continuous breach; (15) as can national courts' delay in adjudication persisting after the applicable treaty entered into force. (16) Other such circumstances include the implementation and conservation of adverse legislation (17) and the withholding of required permits. (18)

12.15 In *MCI Power Group v. Ecuador*, the claimants were the beneficiaries of a state contract to build and operate two power plants in Ecuador. After disputes arose under the contract, the Ecuadoran state entity terminated the agreement. The government subsequently revoked the relevant operating permit and the local courts dismissed claims for compensation under the contract. The US–Ecuador BIT, which was the basis for the claims, came into force in the middle of these events.

> ***MCI Power et al v. Ecuador, ICSID Case No. ARB/03/6 (Award of 31 July 2007) ¶¶ 59–84***
>
> From the analysis of the text and background of the BIT, the Tribunal holds that the intention of the contracting Parties with respect to its retrospective application is not evident from its clauses or in any other manner. In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry
P 418 into force, the temporal effects of its clauses are not modified.
>
> The Tribunal notes the temporal requirements under Article XII of the BIT, which states: '[This Treaty] shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.'
>
> The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the nonretroactivity of treaties.
>
> The Tribunal distinguishes acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT. The Tribunal holds that a dispute that arises that is subject to its

> Competence is necessarily related to the violation of a norm of the BIT by act or omission subsequent to its entry into force.
>
> The Tribunal recognizes that under the general international law applicable, a dispute means a disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties. The existence of a dispute determines the critical date after which the parties cannot fail to recognize its existence.
>
> With respect to acts or omissions alleged by the Claimants to be breaches of the BIT subsequent to its entry into force, the Tribunal considers that it has Competence insofar and as those facts are proven to be a violation of the BIT. This determination of the Tribunal does not prejudge the subsequent evaluation of the allegations of both parties on the existence or not of a violation at the time of a decision on the Merits.
>
> The Tribunal likewise distinguishes disputes arising prior to the entry into force of the BIT from disputes arising after that date that have the same cause or background with those prior disputes.
>
> The Tribunal observes that a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the nonretroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.
>
> . . .
>
> The Tribunal holds that, in accordance with customary international law, the relevant element to determine the existence of a continuing wrongful act or a composite wrongful act is the violation of a norm of international law existing at the time when that act that extends in time begins or when it is consummated.
>
> The line of reasoning adopted by intergovernmental bodies for the protection of human rights as well as human rights tribunals in order to typify acts of a continuing wrongful nature, stresses the continuity of those acts after the treaty giving rise to the breached obligation entered into force.
>
> With respect to the various positions taken by the Parties regarding the case *Tecmed v. the United Mexican States*, the Tribunal holds that the only interpretation possible is that which is consistent with the international law
P 419 applicable to the case. In light of this, it is arguable that the Tecmed tribunal determined its jurisdiction on the basis of allegations that an internationally wrongful act had occurred after the treaty had entered into force. Thus, the tribunal understood that in order to determine its jurisdiction it should consider the necessary existence of a dispute that arose under the terms of the BIT after the treaty had entered into force. In the view of that tribunal, events or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date. (19)

3. Composite Acts

12.16 State conduct composed of several distinct actions is known as a 'composite act'. By their nature, composite acts present an additional level of complexity in the *ratione temporis* analysis. The ILC defined the notion of a composite act in Article 15 of the ILC Articles:

> ***Breach consisting of a composite act***
>
> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation. (20)

12.17 Since a composite act in violation of international law 'extends over the entire period' from first to last act or omission, it is not necessarily a complete defence for the state to say that the conduct began before the applicable treaty came into force. Following this line of thinking, some tribunals have held states responsible for conduct that began before a treaty's entry into force, or recognized the possibility of a composite breach straddling a treaty's effective date. (21) In *Tecmed*, for example, Mexico had delayed the issuance of landfill permits before the applicable treaty came into force, and refused to renew the permit later, after the treaty had become effective. The tribunal concluded that Mexico's conduct was a composite breach, and confirmed its jurisdiction:

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> Although [the state entity] INE's initial [contradictory and ambiguous] behavior was before the effective date of the Agreement and the Arbitral Tribunal will not pass judgment on whether at that stage such conduct, considered in isolation, amounted to a breach of the provisions thereof before its entry into force, it cannot be ignored, in light of the good faith principle (Articles 18 and 26 of the Vienna Convention), that the conduct of the Respondent between the date of execution of the Agreement (in view of the Respondent's determination to ratify it subsequently) and the effective date thereof, is incompatible with the imperative rules deriving from Article 4(1) of the Agreement as to fair and equitable treatment. This is particularly so since, according to Article 2(2) of the Agreement, it is applicable to investments made before its entry into force, a circumstance to be certainly considered when analyzing the conduct attributable to the Respondent that took place before that time but after the Respondent having executed the Agreement. INE's contradictory and ambiguous conduct at the beginning of the relationship between INE, Cytrar and Tecmed before the entry into force of the Agreement has the same deficiencies as those encountered in such conduct during the last stage of the relationship, immediately preceding the Resolution [denying renewal of Tecmed's operational permit, which took place after the entry into force of the BIT]. Thus, INE's conduct during such time is added to the prejudicial effects of its conduct during the last stage, which breached Article 4(1) of the Agreement. (22)

4. Provisional Application

12.18 Another possible exception (or at least qualification) from the rule against retroactivity is the scenario where a treaty applies only provisionally pending its entry into force when an alleged breach occurs. The Vienna Convention provides detailed rules on provisional application:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. (23)

12.19 The issue of provisional application has arisen most frequently in relation to the
P 421 Energy Charter Treaty (ECT). This is in part because a number of signatory states either delayed ratification or (in the case of the Russian Federation) never ratified the ECT at all. Moreover, ECT Article 45 provides specific conditions for provisional application:

> 1. Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory . . ., to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
> 2. (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver . . . a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. (24)

12.20 Several tribunals have found states liable for violation of the ECT even though they had not yet ratified the treaty (and therefore according to its terms it had not yet come into force for them) when the alleged breach took place. The tribunal in *Kardassopoulos v. Georgia*, for example, assumed jurisdiction over claims based on conduct that occurred after Georgia had signed the ECT, but before it had ratified. (25)

12.21 Perhaps the most high profile decision of this sort came in the three parallel arbitrations initiated under the ECT as a result of the seizure of the oil company Yukos by the Russian government. (26) The tribunal there considered that the Russian Federation had failed to establish that the provisional application was inconsistent with internal Russian law. (27) As a result, they concluded that the ECT provisionally applied, even though the Russian Federation never ratified the treaty, and withdrew its signature in October 2009. (28) As we have discussed in more detail in Chapter XXII, ¶¶ 22.83–22.87, at the request of Russia, the Dutch courts at the District Court of The Hague, the seat of arbitration, later set aside these awards for excess of authority, on the ground that Russia's signature of the ECT did not bind Russia to the ECT's provisional application.

5. Article 18 of the Vienna Convention

12.22 Article 18 of the Vienna Convention raises yet another complicating factor in relation to the timing of investment claims. It provides that states must avoid conduct undermining the purpose of treaties they have signed, even before those treaties enter
P 422 into force:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. (29)

12.23 This situation is relatively uncommon, particularly outside the context of the ECT, which provides specific rules governing pre-ratification conduct. Very few tribunals have examined the impact of Article 18 on the timing of investment treaty claims. The tribunal in *Tecmed* took Article 18 into account when considering Mexico's conduct before the Spain–Mexico BIT took effect:

> Writings of publicists point out that Article 18 of the Vienna Convention does not only refer to the intentional acts of States but also to conduct which falls within its provisions, which need not be intentional or manifestly damaging or fraudulent to go against the principle of good faith, but merely negligent or in disregard of the provisions of a treaty or of its underlying principles, or contradictory or unreasonable in light of such provisions or principles. (30)

12.24 Ultimately, this reasoning was mere *dicta*, since the tribunal concluded that the offending acts of the host state had constituted part of a composite treaty breach, as explained earlier in this chapter.

12.25 As noted above, the tribunal in *MCI v. Ecuador* examined claims straddling the entry into force of the applicable treaty in light of the claimants' arguments about continuing or composite breaches. In doing so, the arbitrators also considered the impact of Article 18, and the allegation that Ecuador had undermined the treaty before its ratification in bad faith:

> [T]he distinction between the extent of the obligation not to defeat the object and purpose of a treaty and the retrospective application of clauses of that treaty to situations prior to the date of entry into force of the treaty should not be confused. It has not been proven in the present case that the omissions prior to the entry into force of the BIT and attributable to the Respondent had defeated the object and purpose of the Treaty. (31)

12.26 Thus, the tribunal appeared to narrow the practical application of Article 18 to situations where the applicable treaty actually envisaged retroactive effect, or where the
P 423 ● state has sought to take advantage of the time prior to a treaty's entry into force. (32) It remains to be seen whether this limited approach to the obligation codified in Article 18 will find favour in other situations.

6. Claims Based on Norms Besides the Treaty itself

12.27 The situation with respect to temporal jurisdiction is rather different in the relatively uncommon scenario where substantive claims are based on international norms other than those found in the applicable treaty. Some investment protection treaties include consent to arbitration that is broad enough to accommodate such claims, and in such cases the fact that the breach occurred prior to the entry into force of the investment treaty may not raise a jurisdictional bar. This reflects a distinction between jurisdiction (the temporal scope of consent to arbitrate) and admissibility (the existence over time of substantive obligations). Several investment treaty tribunals have addressed this distinction. In *Impregilo v. Pakistan*, the tribunal observed:

> care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT. . . . Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions. (33)

12.28 Where the BIT dispute resolution provision limits the scope of admissible claims to violations of the treaty's substantive provisions, there is no practical difference between temporal jurisdiction and the temporal application of substantive treaty provisions. The tribunal in *Feldman v. Mexico* made this clear:

> The Tribunal . . . observes that its jurisdiction under NAFTA Article 1117(1)(a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under . . . the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising out of an alleged violation of general international law or domestic Mexican law. . . . The

> reliance of the Tribunal on an alleged violation of NAFTA . . . also implies that the Tribunal's jurisdiction *ratione materiae* becomes jurisdiction *ratione temporis* as well. (34)

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12.29 But not all investor-state dispute resolution clauses are limited in this way. For example, the US–Ecuador BIT extends jurisdiction to 'investment disputes', which it defines in Article VI(1) as:

> a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. (35)

12.30 Professor Vandevelde, the former chief investment treaty negotiator for the United States, has observed that provisions with wording of this sort can be read to allow an investor to initiate arbitration relating to pre-existing disputes, such as those arising out of a permit, an investment agreement, or general international law. (36) This example illustrates the importance of reading the terms of a treaty's dispute resolution clause carefully to determine whether its temporal scope for jurisdictional purposes might differ from the temporal application of its substantive provisions.

B. Disputes Arising Before a Treaty's Entry into Force

12.31 Some investment treaties include specific provisions dealing with the temporal scope of jurisdiction. For example, the arbitration clause of the Peru–Chile BIT provides: '[The treaty] shall not, however, apply to differences or disputes that arose prior to its entry into force.' (37)

12.32 It was this provision that the tribunal in *Luchetti v. Peru* had to apply in dealing with claims relating to acts straddling the entry into force of the Peru–Chile BIT. The resulting test therefore focused on the precise wording of the treaty, and its use of the phrase 'differences or disputes that arose', rather than on the general rules of law applicable where the treaty is silent. The approach that resulted from the tribunal's consideration of the issues has nevertheless been taken up since in cases where treaties offered no particular guidance on issues of temporal jurisdiction. To find whether the case at hand involved a 'difference or dispute' that had arisen before the BIT came into force, the
P 425 arbitrators looked first to establish whether pre-ratification acts shared the same 'origin or source' as those underlying the claim, and then whether other legal elements existed distinguishing the post-ratification dispute.

> ***Empresas Luchetti SA and Luchetti Peru SA v. Peru* (Award of 7 Feb. 2005) ¶¶ 50–4**
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> The Tribunal notes that as a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,' or as a 'situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance' of a legal obligation. In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that 'the claim of one party is positively opposed by the other.'
>
> It is clear, and that does not appear to be in dispute between the parties, that by 1998, after Decree 01 was adopted and Claimants challenged that decree in the amparo proceedings, a dispute had arisen between Claimants and the municipal authorities of Lima. The Tribunal finds that at that point in time, the parties were locked in a dispute in which each side held conflicting views regarding their respective rights and obligations.
>
> The parties disagree, however, as to whether the earlier dispute ended with the judgments rendered by the Peruvian courts in Claimants' favor or whether it continued and came to a head in 2001 with the adoption of Decrees 258 and 259. The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other. According to a recent ICSID case [*CMS v Argentina*], the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter. The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject matter', it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later

dispute.

It is undisputed that the subject matter or origin of the 2001 dispute, if it was a new dispute, was the promulgation of Decrees 258 and 259. Decree 258 was designed to establish a regulatory framework for the permanent protection of the Pantanos de Villa as an ecological reserve. It authorized the municipal authorities of Lima to adopt measures necessary to achieve that objective. Decree 259 ordered the revocation of Claimants' operating license for the production of pasta and decreed the closing and removal of the factory. The lengthy preamble to Decree 259 lists the findings in justification of the decision. The list invokes● Lucchetti's failure to comply, since 1997, with the
P 426 legal rules applicable the construction of the plant near the Pantanos de Villa, thus endangering that ecological reserve. . . .

In setting out the administrative, legislative and judicial history of Claimants' efforts to obtain permission for and to operate their pasta factory in the vicinity of the environmental reserve of Pantanos de Villa, Decree 259 related the action it mandated directly to the measures the municipal authorities took in 1998 in order to force Claimants to comply with the environmental and zoning requirements applicable to the construction of their pasta factory. It also focuses on the failure of the municipal authorities to achieve their objective because of the judgments entered in Claimants' favor in 1998 that forced them to issue the licenses they had previously denied Claimants.

The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute. (38)

12.33 Other tribunals, most of which applied treaties without guiding language similar to that found in the Chile–Peru BIT, have adopted a more formal approach to defining 'dispute', focusing on the claimant's cause of action. (39) More generally, a number of panels have concluded that an investment treaty cannot provide jurisdiction over disputes that arose before entry into force, even where the treaty is silent in that regard. (40)

12.34 General international law does not prohibit an investment treaty from applying to a dispute that arises before its entry into force; after all, the state contracting parties are free to agree whatever terms they choose. Historically, submission agreements have been
P 427 not uncommon, the Algiers Accords (which created the US–Iran Claims● Tribunal, and specifically submitted past disputes to arbitration) being the most prominent modern example. Thus, Article 28 of the Vienna Convention (dealing with temporal limitations) focuses on the date of the *act* under examination, not the timing of the dispute, and it suggests that in the absence of agreement to the contrary jurisdiction should exist with respect to a situation that persists after the treaty enters into force.

12.35 This principle appears to be reflected in general international law as noted by the Permanent Court of International Justice in *Mavrommatis*:

> Finally one last point remains which concerns the question of retrospective effect raised by His Britannic Majesty's -Agent. If the Court's jurisdiction is based on Article II of the Mandate, this clause must be applicable to the dispute, not merely *ratione materiae*, but also *ratione temporis*.
>
> It must in the first place be remembered that at the time when the opposing views of the two Governments took definite shape (April 1924), and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever . . . . which may arise' shall be submitted to the Court. The reservation made in many arbitration' treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above. The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether as regards tests of time, jurisdiction exists, whereas any

definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute. (41)

C. *Laches* and Extinction

12.36 One of the most important differences between municipal and international law is the absence in the international legal system of any strict period after which claims will be inadmissible as time-barred. The concept of 'laches', which bars 'stale claims due to passage of time', (42) takes the place of 'prescription' periods (43) in general
P 428 international law, and it is this rather amorphous and permissive regime that appears to form the only obstacle to investment treaty claims left long dormant prior to the initiation of arbitration. When the tribunal in *Grand River v. USA* held that '[t]he principle of extinctive prescription (bar of claims by lapse of time) is widely recognized as a general principle of law constituting part of international law', (44) it was doubtless referring broadly to the doctrine of *laches*.

12.37 One prominent commentator described the *laches* principle as follows:

> The doctrine is derived from a particular application of the Latin maxim *vigilantibus non dormientibus aequitas subvenit*, translated as 'equity aids the vigilant, and not those who sleep on their rights,' and may have existed in early Roman Law. Unlike statutes of limitations, which are legislatively created and mechanically applied in courts of law, the doctrine of laches developed as an affirmative defense in courts of equity—historically outside the statute of limitations' purview. As a result, the doctrinal underpinnings of the laches principle are not based upon extrajudicially prescribed time limits, but instead upon a rich history of justice, fairness, and the equitable balancing of rights. . . .
>
> In public international law, where there is no established, supra-judicial legislative body to prescribe an international statute of limitations, stale claims before international tribunals are even more problematic. Judicial and arbitra tribunals applying international law must look elsewhere for principles that will allow them to deny claims that are either decades old or patently unfair to a particular party due to the passage of time. . . . An international court applying the doctrine could invoke principles of equity and fairness to expel a stale claim. Yet, an international tribunal's authority to invoke such an equitable principle as an established 'rule' of international law is hardly a settled issue, perhaps on account of the doctrine's lethal consequences to a claim. Moreover, the precise scope of the laches doctrine is an even less settled question, as its sparse application in international law has been neither uniform nor consistently reasoned. (45)

12.38 Naturally, the situation is quite different when the applicable investment treaty includes a specific provision dealing with the extinction of claims, and it is unsurprising that some states have taken care to incorporate time limitation clauses in their treaties.
P 429 The NAFTA is just one of the many investment treaties (including the majority of Canadian BITs) that imposes a relatively short (in that case three-year) statute of limitations. (46)

12.39 Where treaties have not included such limitation periods, tribunals have been reluctant to dismiss claims on grounds of prescription, particularly when the aggrieved party has been proactively seeking redress. The tribunal in *Wena Hotels v. Egypt* found that the claimant's expropriation claim, brought seven years after the expropriatory act, was not time-barred, because the claimant had diligently pursued its claim and Egypt had ample notice of the dispute. (47) The tribunal in *Kardassopoulos v. Georgia* likewise found that the investor was not precluded from bringing its claim after a ten-year delay, because the claimant reasonably believed that a non-litigious solution could be reached and Georgia received ample notice of the dispute and therefore suffered no prejudice from the delay. (48)

12.40 The tribunal in *H&H v. Egypt* extended the pattern established in *Wena* and *Kardassopoulos*, finding that a delay of seven years since the termination of the claimant's investment did not preclude the claimant from bringing its treaty claim:

> The Tribunal is of the view that the burden of proof rests on the Respondent to establish the existence of a prescription rule. Respondent has not demonstrated the existence of a prescription rule under the ICSID rules or the BIT. The Tribunal contends that references to other systems such as NAFTA are neither relevant nor demonstrative of a trend or so persuasive that the Tribunal should consider them. (49)

12.41 By distinguishing the case at hand from a dispute under NAFTA, with its three-year statute of limitations, the *H&H* tribunal rejected the proposition that claims should be time-barred based on general equitable considerations that may result from protracted delay in advancing formal claims in arbitration. Even under NAFTA, the tribunal in *UPS v. Canada* noted that a continuing breach could extend the limitations period, (50) setting an additional obstacle to the affirmative defence that claims should be rejected due to

P 430 the passage of time (whether by *laches* or express statute of limitations).

D. Termination and Survival or Sunset Clauses

12.42 In recent years, a number of countries have terminated investment protection treaties. (51) In light of the European Commission's instructions to EU member states that they should begin the process of terminating intra-EU BITs, this trend is likely to continue. (52) This reality underlines an additional temporal issue of vital importance—the persistence of jurisdiction and substantive rights after a treaty has been brought to an end.

12.43 Article 42(2) of the Vienna Convention sets out the basic rule for withdrawing from treaties: 'The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention.' (53) Article 56(1) of the Vienna Convention establishes a rebuttable presumption against a finding that a treaty has been terminated:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. (54)

12.44 Article 56(2) further provides that, absent express agreement to the contrary, termination requires advance notice of twelve months. (55)

12.45 The effects of termination are enumerated in Article 70 of the Vienna Convention:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. (56)

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12.46 However, these baseline rules are largely superseded in the investment treaty context, since most such instruments include specific provisions governing their own termination. Conditions that are often stipulated include the procedure for renewing the effectiveness of the treaty after a given initial period of time, the earliest date when one of the parties may terminate, the notice period which must precede effective termination, and the survival of rights and obligations for a particular duration after termination.

12.47 Clauses governing the post-termination application of the treaty, known as 'sunset' or 'survival' clauses, have been the subject of attention recently, as a result of the spate of BIT terminations. Such clauses typically provide that a treaty remains effective for a certain period of time following termination. For example, Article XII(3) of the US–Ecuador BIT provides:

> With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provision of all the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such a date of termination. (57)

12.48 These almost ubiquitous provisions are intended to mitigate the disruption in terms of investment flows and conditions that can result from the early termination of an investment treaty. The Czech Republic has sought to avoid the application of survival clauses through a two-step process, first agreeing with its counterparties a treaty amendment to excise the survival clause, and then terminating the BIT by mutual consent. (58)

12.49 Whether this 'end run' around survival clauses will be effective has not yet been tested before an arbitral tribunal. It remains to be seen whether contracting states are capable of entirely eliminating the rights of qualifying investors, who could be characterized as third-party beneficiaries. (59) Some commentary suggests that investors may in future insist that the rights conferred under investment treaties are vested, and no longer subject to revocation at the will of the contracting states. (60)

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References

1) On issues of temporal jurisdiction generally, *see* Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (BIICL 2009); Noah Rubins and Ben Love, Ratione Temporis, in *Revolution in the International Rule of Law: Essays in Honor of Don Wallace, Jr.* (Juris 2014); Jorum Baumgartner, *Treaty Shopping in Investment Arbitration* (Oxford University Press 2017), Chapter 6 on Jurisdiction Ratione Temporis; Andrea Gattini, Jurisdiction ratione temporis in International Investment Arbitration, 16(1) L. & Pract. Int'l Ct. & Tribs (Brill 2017); Veijo Heiskanen, Entretempe: Is There A Distinction between Jurisdiction Ratione Temporis and Substantive Protection Ratione Temporis, in *IAI Series on International Arbitration No. 8* (Banifatemi ed. 2018).
2) *Island of Palmas (Netherlands v. USA)* (Decision of 4 Apr. 1928) II UNRIAA 829, 845 (2006).
3) James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), art. 13, 131–4.
4) Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, art. 28.
5) *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1 (Interim Decision on Preliminary Jurisdictional Issues of 6 Dec. 2000) ¶ 62.
6) *Ping An Life Insurance Company of China, Ltd and Ping An Insurance (Group) Company of China, Ltd v. Kingdom of Belgium*, ICSID Case No. ARB/12/29 (Award of 30 Apr. 2015) ¶¶ 168–9; *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12 (Decision on the Respondent's Jurisdictional Objections of 1 June 2012) ¶ 2.103; *Victor Pey Casado and Foundation 'Presidente Allende' v. Chile*, ICSID Case No. ARB/98/2 (Award of 8 May 2008) ¶ 610; *Salini Costruttori SpA and Italstrade Spa. v. Jordan*, ICSID Case No. ARB(AF)/99/2 (Award of 11 Oct. 2002) ¶¶ 170, 175; *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9 (Award of 16 Sept. 2003) ¶ 11.2; *Tradex Hellas SA v. Albania*, ICSID Case No. ARB/94/2 (Decision on Jurisdiction of 24 Dec. 1996, 14 ICSID Rev.–FILJ 161 (1999)) 178–80.
7) *Pac Rim, supra* note 6, at ¶ 2.105; *Chevron Corporation and Texaco Petroleum Corp. v. Ecuador*, UNCITRAL (Interim Award of 1 Dec. 2008) ¶ 283. *Pey Casado, supra* note 6, at ¶ 611; *MCI Power Group LC and New Turbine v. Ecuador*, ICSID Case No. ARB/03/6 (Award of 31 July 2007) ¶ 93; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 (Decision on Jurisdiction of 6 July 2007) ¶ 255; *Técnicas Medioambientales Tecmed, SA v. Mexico*, ICSID Case No. ARB(AF)/00/2 (Award of 29 May 2003) ¶ 66; *Mondev International Ltd v. USA*, ICSID Case No. ARB(AF)/99/2 (Award of 11 Oct. 2002) ¶¶ 69–70.
8) *Mondev, supra* note 7, at ¶¶ 68–70 (internal cites omitted).
9) *See, e.g.* Chile–Spain BIT (1994), art. 2(2) ('*El presente Tratado se aplicará a las inversiones que se realicen a partir de su entrada en vigor por inversionistas de una Parte Contratante en el territorio de la otra. No obstante, también beneficiaría a las inversiones realizadas con anterioridad a su vigencia y que, según la legislación de la respectiva Parte Contratante, tuvieren la calidad de inversión extranjera.*').
10) Vienna Convention on the Law of Treaties, *supra* note 4, art. 28.
11) International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, (1966) YBILC vol. II, 187, 212 (commenting on what was then art. 24, but became art. 28).
12) *Tecmed,, supra* note 7, at ¶ 68. *See also United Parcel Service of America v. Canada*, UNCITRAL (Award of 11 June 2007) ¶ 28 ('continuing courses of conduct constitute continuing breaches of legal obligations').
13) *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6 (Decision of the Tribunal on Objections to Jurisdiction of 29 Jan. 2004) ¶ 167.
14) Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 ICLQ 501, 506 (1997) (the concept of continuing breach 'is not an easy one').
15) *SGS v. Philippines, supra* note 13, at ¶ 167. *See also Impregilo SpA v. Pakistan*, ICSID Case No. ARB/03/30 (Decision on Jurisdiction of 22 Apr. 2005) ¶ 312 (refusing to classify non-payment of an obligation as a continuing act because the respondent did not recognize its obligation to pay under the contract).
16) *Chevron et al v. Ecuador, supra* note 7, at ¶ 298.
17) *LG&E Energy Corp., LG&E Capital Corp., and LG&E International v. Argentina*, ICSID Case No. ARB/02/1 (Award of 25 July 2007) ¶ 85 ('the abrogation of the basic guarantees of the gas tariff regime constitutes a continuous breach that extends to the entire period during which such abrogation continues and remains not in conformity with the Treaty'). *See also* Crawford, *supra* note 3, at 136 (citing 'the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State' as an example of a continuing breach).
18) *Pac Rim, supra* note 6, at ¶ 3.43. By contrast, the tribunal in *Pey Casado* held that a single act of formal expropriation did not constitute a continuing act. *Pey Casado, supra* note 6, at ¶ 608.
19) *MCI Power Group LC and New Turbine v. Ecuador*, ICSID Case No. ARB/03/6 (Award of 31 July 2007) ¶¶ 59–84.

20) Crawford, *supra* note 3, art. 15, at 141–4. On composite acts in general *see Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16 (Award of 6 July 2012) ¶¶ 275–300; *OAO Tatneft v. Ukraine*, PCA UNCITRAL (Award on the Merits of 29 July 2014) ¶¶ 462–6; *Rusoro Mining Ltd v. Venezuela*, ICSID Case No. ARB(AF)/12/5 (Award of 22 Aug. 2016) ¶ 226; and *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italy*, ICSID Case No. ARB/14/3 (Award of 27 Dec. 2016) ¶ 361.
21) *See Tecmed, supra* note 7, at ¶ 172.
22) *Tecmed, supra* note 7, at ¶ 172.
23) Vienna Convention on the Law of Treaties, art. 25.
24) The Energy Charter Treaty of 17 December 1994, art. 45.
25) *Ioannis Kardassopoulos v. Georgia, supra* note 7, at ¶¶ 247, 248. The tribunal later found that Georgia had expropriated the claimant's investment.
26) *Yukos Universal Ltd (Isle of Man) v. Russia*, PCA Case No. AA 227 (Interim Award on Jurisdiction and Admissibility of 30 Nov. 2009); *Hulley Enterprises Ltd v. Russia*, PCA Case No. AA 226 (Interim Award on Jurisdiction and Admissibility of 30 Nov. 2009); *Veteran Petroleum Ltd v. Russia*, PCA Case No. AA 228 (Interim Award on Jurisdiction and Admissibility of 30 Nov. 2009).
27) *Yukos Universal Ltd (Isle of Man) v. Russia, supra* note 26, at ¶ 394; *Hulley Enterprises Ltd v. Russia, supra* note 26, at ¶ 394; *Veteran Petroleum Ltd v. Russia, supra* note 26, at ¶ 394.
28) *Yukos Universal Ltd (Isle of Man) v. Russia, supra* note 26, at ¶ 388; *Hulley Enterprises Ltd v. Russia, supra* note 26, at ¶ 388; *Veteran Petroleum Ltd v. Russia, supra* note 26, at ¶ 388.
29) Vienna Convention on the Law of Treaties, *supra* note 4, art. 18.
30) *Tecmed, supra* note 7, ¶ at 71, fn. 42.
31) *MCI Power, supra* note 7, at ¶ 116.
32) Ibid. at ¶¶ 108–17.
33) *Impregilo SpA v. Pakistan, supra* note 15, at ¶¶ 309, 311. *See also Pey Casado, supra* note 6, at ¶ 423; *Walter Bau AG v. Thailand*, UNCITRAL (Award of 1 July 2009) ¶ 9.71 (stating that a BIT's jurisdictional clause is also a substantive provision when it allows investor-state claims for the first time, even though art. 10 of the Germany–Thailand BIT does not expressly limit admissible disputes to those for breach of the treaty).
34) *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1 (Interim Decision on Preliminary Jurisdictional Issues of 6 Dec. 2000) ¶ 62. *See also Railroad Development Corp. (RDC) v. Guatemala*, ICSID Case No. ARB/07/23 (Second Decision on Objections to Jurisdiction of 18 May 2010) ¶ 116.
35) US–Ecuador BIT (1993), art. VI(1).
36) Kenneth Vandevelde, *United States International Investment Agreements* 188–9 (Oxford University Press 2009) ('during negotiation of the Panama BIT [which contains the standard US BIT dispute resolution clause], it was assumed by both parties that investors could invoke the investor-to-state disputes provision for disputes existing at the time a BIT entered into force'). *See also* Kenneth Vandevelde, *United States Investment Treaties: Policy and Practice* 66 (Kluwer 1992).
37) *See* Peru–Chile BIT (2000), art. 2 ('It shall not, however, apply to differences or disputes that arose prior to its entry into force').
38) *Empresas Luchetti SA and Luchetti Peru SA v. Peru* (Award of 7 Feb. 2005) ¶¶ 50–4.
39) *See Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13 (Decision on Jurisdiction of 16 June 2006) ¶¶ 126–9. *See also RDC, supra* note 34, at ¶ 131 (applying the triple identity test to define 'dispute' for *ratione temporis* purposes); *Societa Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7 (Award of 21 Aug. 2007) ¶¶ 218–19.
40) *Salini v. Jordan,* supra note 6, at ¶ 170; *Walter Bau, supra* note 33, at ¶ 9.67.
41) *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, 1924 PCIJ Series A, No. 2, at 35.
42) Ashraf Ray Ibrahim, *The Doctrine of Laches in International Law*, 83 Va. L. Rev. 647, 647 (1997).
43) '[P]rescription appears to constitute a positive legal rule in almost all systems of law. It is an expression of a great principle of peace which is at the basis of common law and of all civilized systems of jurisprudence. Stability and security in human affairs require that a delay should be fixed which it should be impossible to invoke rights or obligations . . . Prescription being an integral and necessary part of every system of law must be admitted in international law.' *Sarropoulos v. Bulgarian State*, in Annual Digest and Reports of Public International Law Cases, 1927–28, Case No. 173, at 263–4. In 1925, the Institute de Droit International confirmed that the prescription or 'extinctive prescription' is a general principle of law: 'Practical considerations of order, stability and peace, long held by the arbitral jurisprudence, must place the extinctive prescription of obligations between States among the general principles of law recognized by the civilized nations which international tribunals are bound to apply.' Resolution concernant la prescription libératoire en droit international public, in *Annuaire de L'Institut de Droit International*, Vol. 32, 1925, 559, para. I (English translation of French original). *See also* Kai Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (lustus Förlag 2001).
44) *Grand River Enterprises Six Nations, et al. v. USA*, UNCITRAL (Decision on Objections to Jurisdiction of July 20, 2006) ¶ 33.

45) Ashraf Ray Ibrahim, The Doctrine of Laches in International Law, 83 Va. L. Rev. 647, 648–649 (1997).
46) North American Free Trade Agreement (1994), arts 1116(2) and 1117(2) (a claim may not be brought to arbitration if more than three years have elapsed from the date on which the investor or its investment first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or its investment incurred loss or damage).
47) *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4 (Award of 16 Dec. 2002) ¶¶ 104–6.
48) *Kardassopoulos, supra* note 7, ¶¶ 258–68.
49) *H&H Enterprises Investments v. Egypt*, ICSID Case No. ARB/09/15 (Decision on Jurisdiction of 5 June 2012) ¶ 87. *See also Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Award of 13 Nov. 2000) ¶¶ 92–3.
50) *UPS, supra* note 12, at ¶ 28 ('The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly'). *See also Feldman Karpa, supra* note 34, at ¶ 62 (holding that the portion of continuous state action that falls within NAFTA's three-year limitations period is not time-barred under NAFTA, art. 1116).
51) UNCTAD, *IIA Issues Note No 2: Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims* (December 2010) 1, fn 3. ('In 2008, Ecuador terminated nine BITs—with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Other denounced BITs include those between . . . the Netherlands and the Bolivarian Republic of Venezuela. In 2010, Ecuador's Constitutional Court declared arbitration provisions of six more BITs (China, Finland, Germany, the UK, Venezuela and United States) to be inconsistent with the country's Constitution. It is possible that Ecuador will take action to terminate these (and possibly other) BITs.').
52) The Czech Republic took the lead in this regard, terminating BITs with Denmark, Slovenia, Malta, and Italy in 2011. *See* Luke Eric Peterson, *Czech Republic Terminates Investment Treaties in Such a Way as to Cast Doubt on Residual Legal Protections for Existing Investments*, IAR, 1 Feb. 2011 *available at*http://www.iareporter.com/articles/20110201_13.
53) Vienna Convention on the Law of Treaties (1969), art. 42(2).
54) Vienna Convention on the Law of Treaties (1969), art. 56(1)(a)(b).
55) Vienna Convention on the Law of Treaties (1969), art. 56(2) ('A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty').
56) Vienna Convention on the Law of Treaties (1969), art. 70.
57) US–Ecuador BIT (1993), art. XII(3).
58) *See* Peterson, *supra* note 52. The Czech Republic employed this method to terminate its BITs with Denmark, Italy, Malta, and Slovenia. Using this process, the Czech Republic managed to terminate some of its BITs together with the sunset clauses. Indonesia and Peru have reportedly managed to do the same. *See* Agnieszka Zarowna, *Termination of BITs and Sunset Clauses—What Can Investors in Poland Expect?* 28 Feb. 2017, *available at*http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/.
59) Some of the Czech Republic's BITs also stipulate that survival clauses only apply in case of unilateral termination. *See, e.g.* Denmark–Ecuador BIT (1991), art. 16.
60) *See Occidental Exploration & Production Company v. Ecuador*, [2005] EWCA Civ. 1116, [2006] QB, ¶¶ 17–18 (noting that the right under investment treaties belong to investors and that '[i]t would potentially undermine the efficacy of the protection held out to individual investors, if such protection was subject to the continuing benevolence and support of their national State').