Chapter 5.1.1

Initiation of Arbitral Proceedings by Investors

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A. INTRODUCTION

Preceding chapters of this handbook focused on the foundations of investment law, including investment protection standards developed over time in numerous Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs). This chapter focuses on **investor-state arbitration**, the most common procedural mechanism used by investors to obtain a remedy after an alleged host state violation of guaranteed investment protection standards.

Before going into a detailed discussion on the initiation of investor–state arbitration by an investor, it is helpful to start with a general discussion of 'arbitration' as a dispute settlement mechanism.

Arbitration is a dispute resolution process whereby the disputing parties mutually consent to submit their dispute to one or more individuals whose decisions they are willing to accept as final and binding.[1] This individual or panel of individuals, known as the 'arbitrator' or 'arbitral tribunal,' decides the 'dispute in accordance with neutral, adjudicative procedures affording the parties an opportunity to be heard.'[2]

There are four essential elements inherent in an arbitration. *First*, arbitration is consensual; no arbitral tribunal can exercise jurisdiction over a dispute outside the mutual will of the parties.[3] *Second*, the decision-makers, i.e. the arbitrators, are private individuals who are independent of any state or government and generally appointed by the parties themselves, or by a neutral authority, should the parties fail to reach an agreement on appointment.[4] *Third*, the decisions of an arbitral tribunal are final and binding, and only subject to limited grounds of review[5] or challenge.[6] The finality of arbitral awards, in comparison to court judgments subject to time–consuming appeals, has been identified as the 'strongest component of the architecture that undergirds international arbitration.'[7] *Fourth*, another essential characteristic of arbitration is that it is an adjudicatory procedure that affords parties an equal opportunity to present their case before a neutral decision maker, an independent and impartial individual or tribunal, in a procedure that follows due process guarantees. As rightly observed by *Habegger:*

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1 Blackaby et al., *Redfern and Hunter on International Arbitration*, Oxford Univ. Press, 6th ed. 2015, p. 2.

2 Born, *International Arbitration: Law and Practice*, Wolters Kluwer, 3rd ed. 2021, p. 2.

3 *Id.*, p. 3. However, the consensus just has to be given only once, for example in the original contract for the business transaction. The parties to the transaction can agree *ex ante* to submit any potential future disputes to arbitration or the parties can agree *ex post* that a dispute that has already arisen shall be submitted to arbitration.

4 Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators,* in Giorgetti (ed.), *Litigating International Investment Disputes – A Practitioners Guide*, Brill Nijhoff 2014, pp. 145-172, at p. 149; see also, for example, UNCITRAL Rules 2013, Arts. 8(2), 9(2), 9(3), 10(3).

5 For arbitration awards under the ICSID Convention, see Arts. 53 and 54 ICSID Convention.

6 For arbitration awards with nationality of an UNCITRAL Model Law (UML) country, see Art. 34 UML.

7 Bjorklund, *Enforcement,* in Schultz and Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford Univ. Press 2020, pp. 186-215, at p. 186.

> the arbitrator's central obligation is to resolve the parties' dispute in an adjudicatory manner. This duty usually entails the obligations to not only act fairly and impartially towards the parties, to grant them an opportunity to present their respective cases, but also to act expeditiously.[8]

Arbitration as a dispute settlement mechanism can be traced far back into ancient societies where legal disputes were often settled by a trusted individual or confidant, such as a village elder.[9] While the scope of this chapter does not include details on the historical evolution of arbitration, let alone international arbitration,[10] it is important to understand that international arbitration has evolved over time from providing a preferred means of settling *commercial disputes between private parties*, to also being the preferred means of settling *investor–state disputes*.

Traditionally, investor–state disputes had to be brought before the local courts of the host state by the affected investor,[11] unless the investor managed to persuade her home state to provide diplomatic protection.[12] Neither system was satisfactory for investors. Host state courts apply host state law, which can be changed unilaterally by host state authorities; furthermore, host state courts are not always trusted to provide impartial decisions within a useful time and following due process standards. Diplomatic protection, on the other hand, always involves an element of political discretion, and does not provide remedies for the investor herself. Even if the home state of the investor should pick up her case and manage to get compensation for the expropriation or other injury, the home state is under no (international) obligation to pass on the compensation to the injured investor. Given the ineffectiveness of the traditional system in protecting foreign investments against unlawful host state conduct, states began to negotiate and enter into BITs and IIAs to obtain international commitments for the protection of their nationals' investments abroad.[13] Since the 1980s, most of these BITs and IIAs include an investor–state arbitration clause. These kind of clauses offer 'private investors' direct recourse against a 'host state' before an international arbitral tribunal to remedy a breach of any guaranteed right or standard of protection afforded under an applicable IIA.[14] This is a systemic departure from the traditional model of diplomatic protection! The difference is further reinforced by the obligation of contracting states to give effect to investment dispute awards under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), and the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) by reducing them

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8 Habegger, *The Arbitrator's Duty of Efficiency: A Call for Increased Utilization of Arbitral Powers*, in Shaughnessy and Tung (eds.), The Powers and Duties of an Arbitrator, Wolters Kluwer 2017, p. 125.

9 Buchwitz, *Schiedsverfahrensrecht*, Springer 2019, p. 4.

10 For more details, see above, Chapter ???, as well as Born, *International Commercial Arbitration*, Kluwer Law International 2021, Vol. I, pp. 7-67.

11 See, Bray, *Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration* in Schill, Tams and Hofmann (eds.), *International Investment Law and History* (2018), pp. 102-135 (102); Baltag, *Chapter 1: The ICSID Convention: A Successful Story: The Origins and History of the ICSID,* in Baltag (ed.), *ICSID Convention after 50 Years: Unsettled Issues* (2017), pp. 1-24.

12 Choudhury, *International Investment Law as a Global Public Good* (2013) 2 *L&C. L. Rev.*, pp. 481-520 (486); see also, Bishop, Crawford and Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (2014), p. 998.

13 Howard, *Creating Consistency through a World Investment Court* (2017) 1 *Fordham Int'l L.J.*, pp. 1-52 (7).

14 For further in this regard, see Born, above note 2, pp. 491 et seq.

to national judgments.[15] Today, investor–state arbitration is the most common form of investor–state dispute settlement (ISDS), and a majority of the cases are administered by ICSID.[16] As recorded in the United Nations Conference on Trade and Development (UNCTAD) database, as of January 2023, out of 1229 known treaty–based ISDS cases, 761 were administered by ICSID.[17] In addition to ICSID, the Permanent Court of Arbitration (PCA) in The Hague, the Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce (ICC) in Paris, were also popular institutions for the administration of investor–state arbitration.[18]

After this introduction, the following sections will examine the vital issues to be considered for the successful initiation of investor–state arbitration. First, and most important, there needs to be a case assessment to determine whether there is a reasonable cause of action (section B). As part of this assessment, it has to be established that there is (I) consent to arbitral jurisdiction, and (II) a violation of host state obligations towards the investor. Once it is determined that there is a reasonable cause of action, the next consideration focuses on how to properly submit the dispute to arbitration (section C), followed by a focus on other important procedural issues that may require consideration upon initiation of investor–state arbitration (section D). The final section concludes the chapter (section E).

B. CASE ASSESSMENT – IS THERE A REASONABLE CAUSE OF ACTION

Careful assessment whether there is a reasonable cause of action is very important because an investor–state arbitration is a very expensive undertaking.[19] It cannot be overemphasized that an investor should have a reasonable degree of certainty as to the likelihood of success before a claimant–investor ventures on this path. For instance, just to lodge a request for arbitration with ICSID, a non-refundable fee of US$ 25,000 is required.[20] Filing of the request and payment of the fee does not guarantee that the request will be registered since the ICSID Secretary-General has the power to decline a request under certain conditions.[21] Significant non-recoverable cost of arbitration, including many hours of legal work, necessitate a meticulous study of the merits of a case from the very beginning. The claimant's legal team must assess the likelihood of getting an arbitral tribunal to assume jurisdiction over the dispute, as well as the likelihood of obtaining a favorable award on the merits of the case. These critical factors are considered in more detail below.

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15 See Art. 54, ICSID Convention 1965; and Art. III, New York Convention 1958; See also Donovan, *The Advocate in the Transnational Justice System*, in Caron, Schill, et al. (eds.), *Practicing Virtue: Inside International Arbitration*, Oxford Univ. Press 2015, pp. 215-224, at 219.

16 ICSID, *Caseload – Statistics*, available at https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

17 UNCTAD Database, *Arbitral Rules and Administering Institution*, available at https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000.

18 *Id*.

19 For details on the cost of investment arbitration, see Hodgson, Kryvoi and Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor–State Arbitration*, Allen & Overy, BIICL, available at: https://www.biicl.org/documents/.

20 ICSID, *How to File a Request*, available at https://icsid.worldbank.org/services/content/how-to-file-request.

21 Art. 36(3) ICSID Convention 1965 ('The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register').

I. Consent to Arbitral Jurisdiction (Procedural Considerations)

As previously mentioned, there is no access to arbitration without the mutual consent of the parties.[22] Investor–state arbitration is no different in this respect from any other form of arbitration.[23] Jurisdiction and consent are frequently controversial and there are many cases dealing with the issue of 'consent' as the cornerstone establishing jurisdiction of any arbitral tribunal.[24]

The ICSID Convention, under which the majority of ISDS cases are brought, requires the parties' consent to arbitration to be in writing.[25] This has been confirmed by numerous ICSID tribunals.[26] The New York Convention also requires a written arbitration agreement as a precondition for the recognition and enforcement of any arbitral award.[27] Thus, written consent of the parties to investor–state arbitration is indispensable. As far as ICSID jurisprudence is concerned, the requirement of written consent has no specific technical form and can, therefore, be manifested in more than one way.[28] Likewise, while Article II(2) of the 1958 New York Convention (NYC) specifies certain forms which a written arbitration agreement should take, the circumstances described

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22 See above, note 3.

23 Dolzer and Schreuer, *Principles of International Investment Law* (2008), p. 238.

24 *Chevron and TexPet v. Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility of 27 February 2012, para. 4.61*; Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 179; *Link Trading v. Moldova*, ad hoc arbitration, Award on Jurisdiction of 16 February 2001, para. 8.1; *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction of 24 June 1998, para. 59; 1965 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, paras. 23-25.

25 Art. 25(1), ICSID Convention 1965. ('The jurisdiction of the Centre shall extend to any legal dispute […], which the parties to the dispute consent in writing to submit to the Centre […]').

26 *Landesbank v. Spain*, ICSID Case No. ARB/15/45, Decision on the 'Intra-EU' Jurisdictional Objection of 25 February 2019, para. 91, holding that 'The Tribunal derives its authority […] from the ICSID Convention, but that Convention gives it jurisdiction over the case only if the Parties have consented in writing'; see also *Ambiente Ufficio and others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013, para. 206; *RFCC v. Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction of 16 July 2001, para. 31; *Lanco v. Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction of the Arbitral Tribunal of 8 December 1998, para. 43.

27 See Art. II and Art. V, 1958 New York Convention.

28 See *PNG Sustainable Development v. Papua New Guinea*, ICSID Case No. ARB/13/33, Award of 5 May 2015, para. 245; *UP and CD Holding v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction of 3 March 2016, paras. 195 et seq.; *Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014, para. 277; *Interocean Oil v. Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections of 29 October 2014, para. 61.

therein have been interpreted as non-exhaustive.[29] Regardless of the form in which consent to arbitration is manifested, it has to be unambiguous[30] and freely given.[31]

After these introductions, the discussion will now focus on the potential sources of the parties' written consent to investor–state arbitration (1), the preconditions that may be attached to such consent (2), and the scope of such consent to arbitration (3). Failure to meet either of the latter two factors can independently forestall the jurisdiction of an ISDS tribunal.

1. Source of Consent to Arbitration

In commercial arbitration, consent is typically given either *ex ante* in the original business contract, in form of an arbitration clause, or *ex post*, after a dispute has arisen, in a more detailed and specific agreement to arbitrate. In investment cases, consent is typically given *ex ante* in a BIT or IIA involving the home state of the investor and the host state of the investment, or as a clause in an investment contract between the investor and the host state. In some cases, consent is provided via host state domestic legislation on investor protection. Occasionally, consent can also be given *ex post* in a specific and detailed agreement to arbitrate between the investor and the host state.

a) Investment Treaty

The most important sources of consent to investment arbitration are modern investment treaties. Numbering in the thousands, these investment treaties are contracted at various levels of state-to-state relations, mostly in the form of BITs.[32] Consent to ISDS is increasingly also included in regional[33] and multilateral trade agreements[34] containing specific obligations on the part of the contracting states towards investors and investments from other contracting parties.[35] Although the contracting parties are states, most treaty obligations are owed to non-contracting parties, i.e. the private investors protected as third party beneficiaries by a treaty. While early friendship, commerce and navigation (FCN) and trade agreements had only limited substantial protections, the more recent treaties usually include consent to arbitrate investment disputes between a contracting party and an investor/national of another contracting party.[36] As of December 2020, 77% of all registered

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29 *Tutorial Video Transban v. Venezuela*, ICSID Case No. ARB/12/24, Award of 22 November 2017, para. 91.

30 See *Tenaris and Talta v. Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment of 28 December 2018, para. 337; *MMEA and AHSI v. Senegal*, ICSID Case No. ARB/15/21, Award of 5 August 2016, para. 130; *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits of 3 September 2013, para. 254; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, paras. 174 et seq.

31 *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, paras. 436 et seq.

32 See UNCTAD International Investment Agreements, available at https://investmentpolicy.unctad.org.

33 See Chapter 10, Association of South-East Asian Nations (ASEAN): Regional Comprehensive Economic Partnership (2020); Chapter 14, United States – Mexico – Canada Agreement (USMCA) 2018, replacing the North America Free Trade Agreement (NAFTA) 1994.

34 See The Energy Charter Treaty (1994).

35 See Schefer, *International Investment Law, Text, Cases and Materials* (2020), pp. 33 et seq.

36 See *Bureau Veritas v. Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction of 29 May 2009, para 65; *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award of 8 December 2008, para. 160; *Pan American v. Argentina*, ICSID Case No. ARB/03/13, Decision on

arbitrations under the ICSID Convention and Additional Facility rules derived their basis of consent from treaties, including 60% from Bilateral Investment Treaties (BITs).[37]

b) Direct Contract Between the Host State and the Investor–Claimant

Although investment treaties between home states and host states are the most important source of consent to investor–state arbitration, consent can sometimes be found in a direct contract between an investor and the host state of investment.[38] According to the latest ICSID report, 15% of arbitrations under the ICSID Convention and Additional Facility rules were invoked based on consent derived from an investor–state contract.[39] This percentage could go up in future if a trend against BITs continues,[40] forcing private investors hoping to preserve their access to international arbitration to rely more on direct investment contracts rather than pre-existing BITs. Consent to arbitration may be derived *ex ante* from a direct contractual agreement between an investor and a state via an explicit ISDS clause.[41] Alternatively, it may be obtainable *ex post*, if the parties are able to agree to submit the dispute to arbitration.[42] Examples of investor–state contracts that sometimes contain *ex ante* ISDS clauses are concession agreements, joint venture agreements, service contracts, as well as build–operate–transfer (BOT) agreements.[43]

c) Domestic Legislation in the Host State

In addition to or instead of investment treaties and investor-state contracts, some states have enacted national laws on the protection of foreign investments.[44] These national laws often provide substantive guarantees to foreign investors that parallel those found in most BITs and IIAs and, in addition may offer the state's consent to ICSID or other arbitration procedures for a defined set of disputes with foreign investors.[45] These national laws are typically adopted to attract Foreign Direct

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Preliminary Objections of 27 July 2006, para. 33.

37 See ICSID, The ICSID Case Load Statistics – Issue 2021–1, p. 11, available at https://icsid.worldbank.org.

38 See Giorgetti, → fn. 4, p. 22; *Noble Energy v. Ecuador*, ICSID Case No. ARB/05/12, Decision on Jurisdiction of 5 March 2008, paras. 178 et seq.; *Lighthouse v. Timor-Leste*, ICSID Case No. ARB/15/2, Award of 22 December 2017, para. 144; *CEMEX v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction of 30 December 2010, para. 58.

39 ICSID, → fn. 38.

40 Schreuer, *Evolution of Investment Law in Treaty Making and Arbitral Practice,* in Hobe and Scheu (eds.), *Evolution, Evaluation and Future Developments in International Investment Law* (2021), pp. 35-46 (36); See further on the recent backlash against BITs Osterwalder, Brewin, et al., *Terminating a Bilateral Investment Treaty*, IISD Best Practices Series, March 2020, p. 1, available at https://www.iisd.org; as well as European Commission, *EU Member States Agree on a Plurilateral Treaty to Terminate Bilateral Investment Treaties*, 24 October 2019, available at https://ec.europa.eu.

41 UNCTAD, *Dispute Settlement: ICSID – Consent to Arbitration*, p. 7, available at https://unctad.org/system.

42 See, for instance, *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, paras. 17, 26; *MINE v. Guinea*, ICSID Case No. ARB/84/4, Award of 6 January 1988, para. 30.

43 For further detail see Sessler, *Pitfalls to Avoid in the Drafting of Investor–State Contracts,* in Hobe and Scheu (eds.), → fn. 41, pp. 77-98 (82 et seq.).

44 See, UNCTAD Database on National Investment Laws and Regulations, available at https://investmentpolicy.unctad.org/investment-laws.

45 Born, (fn. 2), pp. 497; on 'consent to arbitration' based on national law see also *PNG Sustainable*

Investment (FDI) into the enacting state and cover all foreign investors regardless of nationality. This makes them potentially more useful than traditional investment treaties that only protect investors from specific nationalities. However, before a foreign investor relies on national law as the only source of host state consent to ISDS, the investor should be sure to determine whether the offered consent is binding – or simply permissive,[46] and whether the host state could escape its obligations with a simple change of the national law.

Regardless of whether consent to arbitration is sourced from an investor-state contract, investment treaty, or a domestic law on investment, consent to arbitrate based on the latter two sources originally emanates without privity.[47] More precisely, the parties' consent to arbitrate found in a treaty or domestic law originates from a unilateral state offer – which then becomes perfected in the case of a treaty claim, when an investor institutes an arbitration proceeding.[48] In the case of an arbitration offer in a state's domestic law, consent may be deemed perfected by an investor upon the 'filing of a license application with the relevant State authorities,'[49] or upon becoming an approved investor under the relevant laws of the concerned state.[50]

In any event, acceptance of a state offer to arbitrate will not be valid if there are preconditions attached to such acceptance, and those preconditions have not been met before an investor submits the dispute to arbitration.

2. Preconditions to Consent

When a state gives its consent to arbitration, it is entitled to subject such consent to the fulfilment of certain procedural requirements. If there is conditional consent, the requirements must be satisfied before a claim can be submitted to arbitration.[51] Usually, these preconditions to arbitration come in two forms:

Development v. Papua New Guinea, ICSID Case No. ARB/13/33, Award of 5 May 2015, paras. 246, 264; *Interocean Oil v. Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections of 29 October 2014, para. 65; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award of 24 January 2003, paras. 242, 331.

46 See Giorgetti, → fn. 4, p. 22.

47 On consent to arbitration without privity, see *Casinos Austria v. Argentina*, ICSID Case No. ARB/14/32, Decision on Jurisdiction of 29 June 2018, para. 272; *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, para. 244; *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010, para. 70; *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award (26 March 2008), para 45.

48 See *Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Partial Award on Jurisdiction (15 July 2020), para.125; *B3 Croatian Courier v. Croatia*, ICSID Case No. ARB/15/5, Excerpts of Award (5 April 2019), para. 540; *Swissbourgh and others v. Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal [2018] SGCA 81, [2019] 1 SLR 263, 27 November 2018, para. 75.

49 *ABCI Investments v. Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction of 18 February 2011, paras. 119 et seq.

50 *Id.*, Dissenting Opinion of Professor Brigitte Stern of 18 February 2011, para. 10.

51 See *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, para. 135; *Methanex v. USA*, ad hoc arbitration, Partial Award of 7 August 2002, para. 120; Wang, *Consent in Investor–State Arbitration: A Critical Analysis* (2014) *CJIL*, pp. 335-361 (338).

i) a 'cooling-off' period for a specified period of time during which the parties are expected to attempt an amicable solution to the dispute via negotiation;[52] and/or

ii) the exhaustion of local remedies, requiring the claimant-investor to exhaust all options to secure a remedy before the domestic courts of the host state prior to filing an arbitration claim.[53]

Although there is a split among tribunals as to whether these preconditions to arbitration affect the admissibility rather than the jurisdiction of a tribunal,[54] the aim here is not to go into a discussion on those split decisions. In the end, the outcome is the same, whether preconditions are treated as admissibility or jurisdictional issues, namely that non-compliance prevents a tribunal from hearing the claims. Accordingly, it is important for an investor to satisfy the necessary preconditions as expressed in the state's consent to arbitrate before initiating a claim. This can be done by taking all reasonable measures to comply with the specified preconditions to arbitration. These measures do not have to be successful to ensure that the claimant has succeeded in crossing the jurisdictional or admissibility hurdle necessary to gain standing before an arbitral tribunal.

3. Scope of Consent to Arbitration

Notwithstanding the foregoing considerations, a tribunal cannot exercise jurisdiction over an investment dispute unless it is satisfied that the dispute falls within the scope of the consent granted by the parties in their arbitration agreement. The following discussion will primarily focus on consent in treaty-based arbitration. For ICSID arbitration, this also includes satisfying the jurisdictional limits foreseen under the Convention.[55] Since the claimant has the primary burden of establishing jurisdiction,[56] three fundamental factors must be present for the claimant to successfully do so.

a) Personal Scope

The personal scope of an arbitration agreement delineates the person/s over whom an arbitral tribunal is competent to exercise jurisdiction. In treaty-based arbitration, the identity of the state(s) for purposes of the personal jurisdiction of a tribunal should be a non-issue as the state(s) are direct signatories to the relevant treaty. However, the same is not true for investors as potential claimants, since they are not signatories to the BITs or IIAs. Therefore, a tribunal will have to rely on the definition of an investor as provided by the treaty parties to ascertain if its personal jurisdiction

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52 See Art. 26 Energy Charter Treaty (1994); Art. VI, Ecuador – United States of America BIT (1993); Art. 8 Argentina – Austria BIT (1992); The cooling–off requirement is also found in some domestic investment laws, see for example Art. 9 Rwandan Law Relating to Investment Promotion and Facilitation (2015); Art. 13 Law of the Republic of Belarus on Investments (2013); Sec. 16 Sierra Leone, Investment Promotion Act (2004).

53 Art. 10(2) United Arab Emirates – Viet Nam BIT (2009); Art. 26(5) Morocco – Nigeria BIT (2016).

54 See Waibel, *Investment Arbitration: Jurisdiction and Admissibily* in Bungenberg et al. (eds.), *International Investment Law, A Handbook* (2015), pp. 1212-1287 (para. 268).

55 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, paras. 22 et seq., p. 43; *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras.169, 173.

56 *National Gas v. Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014), para. 118; *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), para. 495*; ICS v. Argentina (I)*, PCA Case No. 2010-09, Award on Jurisdiction (10 February 2012), para. 280.

(*ratione personae*) over the claimant is established.[57] While there are diverse definitions of the term 'investor' in the plethora of existing investment treaties, one common feature that they cover both 'natural' and 'juridical persons' with nationality of the treaty parties. In some cases, the sovereign parties themselves may also qualify as an investor.[58]

Essentially, the nationality of an investor (natural or juridical person) is a critical consideration that determines if an investor is within the *ratione personae* jurisdiction of a tribunal as consented to by the treaty parties. In principle, under international law, the domestic laws of states determine the question of nationality.[59] However, a determination of nationality under domestic law is not final on the matter. Whether host-state determination of investor nationality will have legal effect for ISDS procedures under an international investment treaty is a question of international law.[60]

Natural Persons

With respect to natural persons, evidence of nationality under the laws of a state may still be disregarded by an international tribunal if there is no genuine link between the individual and the state or in cases of involuntary acquisition of nationality or revocation of nationality contrary to international law.[61] Furthermore, the investment protection regime is based 'on the principle that its protections extend to investors who are nationals of a contracting state other than the host state in which the investment is made'.[62] Hence, as a general rule, an investor who is a national of one treaty party, the home state, cannot bring a claim against the other treaty party, the host state, if this person is also a national of the host state. However, to avoid a general ban on investment claims by dual nationals, the principle of dominant and effective nationality has been accepted by tribunals to determine nationality in such cases.[63] In some treaties, this principle is expressly provided to guarantee protection for dual nationals.[64] Factors such as habitual residence, personal

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57 Note further that the same requirement must be met under the ICSID Convention if the arbitration is brought under the Convention; see further, Reed and Davis, *Ratione Personae: Who is a Protected Investor* in Bungenberg et al. (eds.), → fn. 55, pp. 614-637 (615).

58 Art. 8.1 EU – Canada Comprehensive Economic and Trade Agreement – Hereinafter 'EU – Canada CETA', (definition of an investor: 'investor means a Party, a natural person or an enterprise of a Party […]'); Art. 1(2)(b) Kuwait – South Africa BIT; see also, in general, Poulsen, *States as Foreign Investors* (2016) Vol. 31/1 *ICSID Rev.*, pp. 12–23.

59 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award of 7 July 2004, para. 55. The Tribunal held *inter alia* that 'it is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality […]'; *Ioan Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008), para. 86; see also Art. 4 and Art. 9 ILC, Draft Articles on Diplomatic Protection, 2006.

60 *Dawood Rawat v. Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction of 6 April 2018, para. 168.

61 See *Waguih Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05, Decision on Jurisdiction and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña of 11 April 2007, para. 145.

62 McLachlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (2017), p. 156.

63 *Carrizosa and others v. Colombia*, PCA Case No. 2018-56, Award (7 May 2021), paras.183 ff; *Uzan v. Turkey*, SCC Case No. V 2014/023, Judgment in the Svea Court of Appeal (26 February 2018), para. 83; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award (3 September 2019), para. 58.

64 Art. 8.1 EU – Canada CETA (definition: natural person); Art. 1(w)(i) Canada – Jordan BIT (2009); Art. 1(b)(i)

attachment to a country, the center of socio-economic and family life, and the circumstances in which the second nationality was acquired, have been considered as decisive factors in determining the dominant and effective nationality of a dual national investor.[65] It should be noted, however, that disputes brought under the ICSID Convention exclude claims brought by dual nationals with host state nationality, and tribunals are reluctant to remedy this by means of the dominant and effective nationality test.[66]

Juridical Persons

For juridical persons, a term used in different treaties and synonymous to company,[67] enterprise,[68] or legal person,[69] nationality is commonly determined by the state of incorporation.[70] Such incorporation confers on the juridical person what is called a 'corporate nationality'. If a treaty provides no additional criteria to determine corporate nationality beyond incorporation under the laws of a particular state, tribunals are reluctant to read in an additional criterion not expressly required by the treaty parties.[71] However, many treaties require more than just incorporation for a juridical person to qualify as a protected investor. For example, to secure the corporate nationality of a treaty party, some treaties require having the seat (effective place of management),[72] place of substantial business activity,[73] or place of real economic activity,[74] in the contracting state party. Treaty parties will be deemed not to have consented to treaty protection for investors that fail to meet any criteria independently or collectively required under the relevant treaty. These additional criteria are typically intended to prevent treaty abuse or treaty shopping, whereby investors set up shell companies in the territory of a state just to gain treaty benefits, although these shell companies have no economic link to or benefit for the state of incorporation.

Japan – Morocco BIT (2020).

65 *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, → fn. 64, para. 559.

66 *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013), para.359; *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 61, 73f; *Ioan Micula and others v. Romania (I)*, → fn. 60, para. 100.

67 Art. 1(7) Energy Charter Treaty (1994).

68 Art. 1 Canada –- Moldova BIT (2018), definition "Investor of a Party."

69 Article 1.2 Argentina –- United Arab Emirates BIT, signed 16 April 2018, not in force.

70 See definition *'enterprise'*: Article 3.1.1 Brazil – United Arab Emirates BIT (2019); definition *'company of a Party'*: Article 1 Australia – Uruguay BIT (2019); definition *'legal person'*: Article 1.2(b) Cabo Verde – Hungary BIT (2019). Note that there are exceptions to this common approach, for instance, Article 1.4 of the Argentina – Germany BIT (1991) provides that 'companies' means legal entities with or without legal personality that have their seat in the territory of one of the contracting Parties.

71 *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020), para. 296; *Hulley Enterprises v. Russia*, PCA Case No. 2005-03/AA226, Judgment of the Hague Court of Appeal (18 February 2020), para. 5.1.7.2; *Juvel and Bithell v. Poland*, ICC Case No. 19459/MHM, Partial Final Award (26 February 2019), para. 393; *Gambrinus v. Venezuela*, ICSID Case No. ARB/11/31, Award (15 June 2015), para. 144.

72 Art. 1(2)(a) China – Germany BIT (2003)

73 Art. 1(2)(b) Turkey – Ukraine BIT (2017); Art. 8.1 EU – Canada CETA (definition: Enterprise of a Party).

74 Art. 1(1)(b) Iran – Switzerland BIT (1998).

Tribunals in investor-state arbitration are also more and more looking at control of a corporation when determining its nationality.[75] Since the goal of an arbitration clause in a treaty is to protect investors of certain nationalities, the parties' consent to arbitration may be found to be lacking if a juridical person is controlled by natural or juridical persons not intended to be beneficiaries under the relevant treaty. For example, in addition to incorporation, some treaties require juridical control by nationals of the contracting states[76] to ensure that primarily those nationals benefit from the investment protection afforded under the treaty. The ICSID Convention also requires an element of control in certain circumstances. More precisely, a juridical person incorporated under the laws of the host state must establish 'foreign control' by nationals of another contracting state to have standing to submit a claim under Article 25(2)(b) of the Convention.

In summary, the determination of nationality, whether of a natural or juridical person, can present a number of complex issues beyond what is covered in this chapter, including that state parties' may also qualify as investors – with *personae standi* to initiate an ISDS claim under certain conditions.[77] The foregoing discussion is simply to introduce the very basic elements a claimant-investor must bear in mind to determine if it falls under the *category of persons* with whom the treaty parties have consented to be joined in an arbitration dispute.

b) Material Scope

A state's consent to arbitration – whether based on a treaty, contract, or domestic law – may be limited to certain disputes. If this is the case, disputes found to fall outside the limited scope automatically fall outside the state's consent to arbitrate.[78] These specified disputes constitute the material scope of an arbitration agreement to which a tribunal is bound and ignoring this scope would amount to an abuse of powers.[79] Thus, a potential claimant must assess whether its claim falls under the material scope of the relevant arbitration clause, to successfully have a tribunal exercise jurisdiction over it.

Depending on the wording of an arbitration clause, the material scope of disputes a state has consented to arbitrate may be broadly or restrictively interpreted. For example, in treaty-based arbitration clauses, wordings such as 'disputes relating to an investment,'[80] or 'disputes concerning

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75 Schlemmer, *Investment, Investor, Nationality and Shareholders,* in Muchlinski et al. (eds.), *The Oxford Handbook of International Investment Law* (2008), p. 79.

76 See Art. 1.1(b) BLEU (Belgium – Luxembourg Economic Union) – Philippines BIT (1998); Art. 1.1, Iran – Switzerland BIT (1998), requiring control in certain circumstances; See also *Venoklim v. Venezuela (I)*, ICSID Case No. ARB/12/22, Award of 3 April 2015, para. 141, 148.

77 See → fn. 59.

78 See *Swissbourgh and others v. Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal [2018] SGCA 81, [2019] 1 SLR 263 - 27 Nov 2018, para. 79; *Murphy v. Ecuador (II)*, PCA Case No. 2012-16, Separate Opinion of Georges Abi-Saab (Partial Award on Jurisdiction) (13 Nov. 2013), para. 16; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004), para. 19.

79 *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment (12 February 2015), para. 76; *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment (29 May 2019), para. 59.

80 Article 26(1) Energy Charter Treaty (ECT): 'Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.'

an investment,'[81] have been broadly interpreted to include contractual claims, that is, claims arising not from a breach of a treaty obligation itself, but from a breach of a contractual relationship external to the treaty.[82] Alternatively, a treaty arbitration clause may be narrowly worded to specify the specific subject matters for which an investment dispute may be submitted. For example, the European Union – Canada CETA explicitly narrows investor–state disputes that may be submitted for violation of section C of the investment chapter to post–establishment breaches.[83] This reference stops any tribunal from admitting claims outside the explicitly defined scope. The CETA ISDS clause (Art. 8.18) also incorporates a reference to covered investments – which include inter alia investments made in accordance with the applicable law of the host party.[84] Tribunals have interpreted failure to satisfy this condition as striking at the very root of the state's offer to arbitrate,[85] and the consequence has been the tribunal's refusal to hear the claim. There are other investment treaties which limit disputes that may be submitted to investor–state arbitration to expropriation claims or compensation due in cases of expropriation.[86] Such provisions have been interpreted as restricting the tribunal's jurisdiction to encompass only expropriation–related claims.[87] As a consequence, an alleged failure to comply with any other treaty obligation is excluded from the state's consent to investor–state arbitration.

The above treaty-based analysis similarly applies in the context of *consent to arbitration* derived from a direct contract or a state's domestic law. Ultimately, a careful study of a state offer to arbitrate in the relevant arbitration agreement is necessary, to determine whether an investor's claim is within the material scope of disputes that can be submitted to arbitration, as consented to by the respondent state.

c) Designated Forum

While an investor–claimant may have in its favor all of the factors discussed above to initiate an arbitration claim against a state, it must further ensure that its claim proceeds before the consented forum, to avoid a costly exercise in futility. Arbitration agreements usually not only express the parties' consent to arbitrate but also designate the arbitral forum to which the parties have consented to submit their disputes. Depending on the source of consent to arbitrate, a claimant may have the option to pursue its claim in either an institutional or ad hoc arbitral process. Institutional

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81 Article 10(1) Germany – Oman BIT (2007): 'Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.'

82 See Reinisch, *The Scope of Investor–State Dispute Settlement in International Investment Agreements* (2013) 21(1) *APLR*, pp. 3-26 (3 ff.); Reinisch and Stifter, *European Investment Policy and ISDS* (2015) *ELTE L.J.*, pp. 11-26 (12).

83 See Art. 8.18 EU – Canada CETA.

84 See Art. 8.1 EU – Canada CETA (definition: covered investment).

85 *Fraport v. Philippines (II)*, ICSID Case No. ARB/11/12, Award (10 December 2014), para. 467; *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), para. 129; *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), para. 185 ff.

86 See Art. 10(1) Hungary – Netherlands BIT (1987); Art. 8(3) China – Mongolia BIT (1991); Article 4(3) Bulgaria – Germany BIT (1986).

87 *Beijing Shougang and others v. Mongolia*, PCA Case No. 2010-20, Award (30 June 2017), paras. 436 ff; *Emmis v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), paras. 142 ff; *ST-AD v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013), paras. 372 f.

arbitration is managed by an institution that provides limited administrative support to the tribunal who decides the dispute, while an ad hoc proceeding is managed by the parties themselves without institutional support.[88] According to the available record of ISDS cases on UNCTAD's database, only 75 disputes between 1994 and 2020 were conducted ad hoc.[89] Therefore, the majority of the cases, numbering in the hundreds, were administered by one institution or the other, with a majority administered by ICSID.[90] Besides ICSID, the PCA,[91] SCC,[92] and ICC,[93] amongst others, are also players in the institutional arbitration field for ISDS.

Importantly, whenever an ISDS clause designates a particular institution for the administration of an investor-state arbitration proceeding, the claimant-investor must submit the claim under the auspices of the designated arbitral institution for a tribunal to have jurisdiction over the claim.[94] Any precondition applicable to the submission of a claim to a particular forum must also be satisfied for a tribunal constituted under such forum to successfully acquire jurisdiction over the matter. For example, an ISDS clause may provide that 'upon the agreement of the disputing parties' an arbitration may be referred to institutional forums such as ICSID, or ICC, or even ad hoc under the UNCITRAL Rules.[95] In this case, a claimant is restricted from unilaterally submitting a claim to any alternative forum absent the agreement of the host state. These kind of clauses typically also provide a default forum in the event the parties fail to reach an agreement on the preferred forum within a specified period of time. In this case, the investor is restricted from submitting their dispute to the default forum prior to expiry of the specified period, and from submitting to any other forum.[96]

In summary, while a state might have consented to international arbitration, this does not automatically mean that it has consented to arbitration before the forum in which it is brought. An express offer to arbitrate disputes before a specific forum may still be subject to case-by-case consent requirements and, therefore, failure to properly understand the state's offer of designation, and submission of the dispute to a forum outside the consent of the state, may have detrimental effects on the successful initiation of a claim.

d) Territorial Scope

Under the general rules of international law, a treaty is binding upon a party with regard to its entire territory except when a different intention is shown.[97] This general rule equally applies to

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88 See further on this, Born, → fn. 2, pp. 28ff.

89 See UNCTAD ISDS database, available at https://investmentpolicy.unctad.

90 ICSID, → fn. 16.

91 See UNCTAD, → fn. 17: Permanent Court of Arbitration (PCA) - 179 ISDS cases as of December 2020.

92 See UNCTAD, → fn. 17: Stockholm Chamber of Commerce (SCC) - 50 ISDS cases as of December 2020.

93 See UNCTAD, → fn. 17: International Chamber of Commerce (ICC) – 20 ISDS cases as of December 2020.

94 See, *Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010), paras. 79 ff.

95 See, for instance, Art. 8(2) Turkmenistan – United Kingdom BIT.

96 *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013), paras. 37 ff.

97 Art. 29, Vienna Convention on the Law of Treaties (1969).

international investment treaties. Thus, it is not unusual to find in both multilateral[98] and bilateral investment treaties[99] an express reference that coverage is limited to 'investment made in the territory of the host state party,' with further definitions provided for the term 'territory.'[100] Consequently, an investor must show a territorial nexus between its investment and the respondent-state to successfully fall within the ambit of the tribunal's jurisdiction as consented to by the host state under the applicable treaty.[101] This is, of course, in keeping with the principles of jurisdiction under international law pursuant to which states cannot be reasonably expected to protect investments outside their territorial jurisdiction.[102] Hence, a state's consent to arbitration can be deemed as intertwined with disputes arising from investments made in its territory and not outside of it. Even though the determination of an investment located in the territory of a party should not be problematic,[103] some cases can still prove quite challenging. For example, investments involving purely financial instruments or payments with no direct physical activity in the host state have been fairly disputed on the issue of territorial nexus.[104] In this kind of dispute, where there is no evidence of physical assets, tribunals have determined that the territorial linkage is satisfied if the respondent state is the ultimate beneficiary of the financial instruments and this has aided its economic development.[105]

Even investments with obvious physical contributions can still present complex issues for the determination of the necessary territorial nexus. For instance, there are cases in which the execution of an investment in a host state's territory requires certain activities to take place abroad. Such was the case in *SGS v. Pakistan*,[106] and *SGS v. Philippines*.[107] In these cases, the tribunals considered the degree of the investment activities taking place abroad vis-à-vis in the host state, and the non-severability of these activities, to determine whether or not a sufficient territorial nexus existed.[108] As affirmed by the tribunal in *Lesi v. Algeria,* 'nothing prevents investments from being

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98 Art. 8.1 EU – Canada CETA (definition: covered investment); Art. 1(6) (last para.) Energy Charter Treaty.

99 Art. 1.1 Bahrain – Germany BIT (2007); Art. 1 Bahrain – United States of America BIT (1999) (definition: investment, covered investment).

100 Art. 1.3 EU – Canada CETA (general definition: geographical scope of application); Art. 1(10) Energy Charter Treaty (definition: 'area').

101 See *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), paras. 113 et seq.; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004), para. 99.

102 Waibel, → fn. 55, para. 144.

103 See Knahr, *The Territorial Nexus Between an Investment and the Host State* in Bungenberg et al. (eds.), → fn. 55, pp. 590-597 (590 et seq.).

104 Bischoff and Wühler, *The Notion of Investment,* in Mbengue and Schacherer (eds.), 'Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)' (2019), pp. 19-42 (30).

105 See *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997), para. 41; *Abaclat and Others v. Argentina*, → fn. 31, paras. 341 ff.

106 *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 August 2003), (2003) 42 ILM 1290, (2005) 8 ICSID Rep. 406.

107 *SGS v. Philippines*, → fn. 101.

108 *SGS v. Pakistan*, → fn. 106, paras. 136 ff.; *SGS v. Philippines*, → fn. 101, paras. 101 et seq.; see also, *SGS v. Paraguay*, ICSID, Decision on Jurisdiction (12 February 2010), para. 113.

committed, at least in part, from the contractor's home country, as long as they are allocated to the project to be carried out abroad.'[109] However, when investments are structured in this manner, reliance on the host state's consent to arbitrate (in the event of a claim) requires a much more thorough evaluation of the law and facts, to ascertain whether the territorial nexus requirement is satisfied, notwithstanding the lack of a full presence of the investment in the host state's territory.

e) Temporal Scope

It is recognised in investor–state arbitration that jurisdiction must exist on the date of instituting the proceeding.[110] In other words, the parties' consent to arbitration as the source of jurisdiction must exist at the time of initiation of a claim. While a request for arbitration by an aggrieved investor will suffice as proof of the investor's consent to arbitration, the consent of the state necessary to perfect the arbitration agreement may not exist, despite consent being present beforehand in a treaty. While treaties commonly adopt a temporal scope (time of application) permitting application to investments made prior to or after entry into force of the treaty,[111] an investor may not rely on a state's consent to arbitrate to initiate claims based on alleged actions or events that occurred prior to entry into force of the treaty. This is in line with the settled principle of international law that a treaty shall not have retroactive effect.[112] This same principle is reflected in Article 13 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, stating 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.'[113] The same is also true for alleged breaches that occurred prior to the making of a protected investment.[114] In other words, pre-existing disputes, or the making of a protected investment in the host state's territory prior to the entry into force of a treaty will normally be deemed as falling outside the scope of a host state's consent to arbitrate unless a different intention is shown in the treaty or the relevant agreement on which the claim is based.

II. Violation of Host State Obligation (Substantive Consideration)

Even if all the keys necessary to unlock the jurisdictional gates are at hand, an aggrieved investor must not only be certain of their ability to get into the tribunal – but also of their ability to get the desired or favourable award out of the tribunal. Since consent to arbitration is primarily given to remedy a breach of a host state's obligations towards an investor which resulted in damages, it follows that there must have been a breach of obligation, and an injury to the investor injury as a result of the host state's action. Without a breach, an injury, and a causal link between the two,

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109 *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Award (10 January 2005), para. 14.

110 *Awdi v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015), para. 190; *Achmea v. Slovakia (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014), para. 268.

111 Art. 8(1) EU–Canada CETA (definition: covered investment); Art. XII(1) Estonia–United States of America BIT (1994); Art. 1101 NAFTA (1994) (Investment coverage).

112 Now codified in Article 28 VCLT (1969): '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.'

113 See further the commentary to Article 13 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001).

114 See *Philip Morris v. Australia*, → fn. 57, para. 529; *Levy and Gremcitel v. Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015), paras. 146 ff; *Cervin and Rhone v. Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction (15 December 2014), para. 278.

there would be no reasonable cause of action worth proceeding in arbitration, even when there is no question about the tribunal's jurisdiction.

1. Breach of a Treaty or a Contractual or Domestic Law Obligation

While a state's obligations towards foreign investors are usually derived from the terms of the applicable investment treaty,[115] they can also be derived from an investor–state contract,[116] or from the domestic law on foreign investment of the host state.[117] When an investor's claim is based on an alleged breach of a treaty obligation, the common duties often challenged in this regard include the non-arbitrariness and non-discriminatory treatment standard (i.e., the MFN and NT standard); the fair and equitable treatment standard; guarantees against expropriation; and the requirements of full protection and security. While this chapter will not discuss the content of these standards, or how they can be breached by host states, as this has already been covered in earlier chapters, it is important to emphasize that investment treaty protection is not one-sided. Exceptions and derogations to these protection standards have been introduced to give states a certain margin of action.[118] A state cannot be found responsible for any injury to an investor while derogating from its treaty obligation within the margin it has preserved for itself in the treaty. Essentially, the investor must, from the onset, weigh its claim vis-à-vis the defenses available to the host state, to determine whether a claim should be pursued. A tribunal will ultimately interpret a state's treaty obligations in light of the treaty's ordinary meaning, the context, and the treaty's object and purpose.[119] In this regard, the 'title' and the 'preamble' of the treaty also offer guidance to tribunals in reaching their conclusions.[120] Therefore, an investor–claimant must be able to convince the tribunal that its claim is not just consistent with the ordinary meaning of the treaty obligation, but also consistent with its object and purpose as deductible from the treaty's title and preamble.

When a state obligation arises from an investment contract, the host state's contractual undertaking determines its obligation towards the investor party. Investor–state contracts are often known for their complexities, and neither the host state's laws nor the treaties to which the host state is a party may conclusively cover all the legal issues that may arise. Therefore, such contracts are *sui generis* to the investment, to cover rights, tasks, and responsibilities, which may not be covered under any relevant treaty or domestic law applicable to the parties. One example of a state obligation commonly found in investor–state contracts is a 'stabilization clause' used to protect an investor party from detrimental amendments to the host state law.[121] Simply put, this is a promise of legal stability to the contracting investor. When this is directly included in a contract, a state is obliged to honor it and the specific privileges it grants to the investor.[122] However, whether a state has acted in

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115 *MTD v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007), para. 67; *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), para. 56.

116 McLachlan, Shore and Weiniger, → fn. 63, para. 7.166.

117 See *Interocean Oil v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Award of the Tribunal (6 October 2020), para. 193; *Stans Energy and Kutisay Mining v. Kyrgyzstan (II)*, PCA Case No. 2015-32, Award (20 August 2019), para. 9.

118 Nanteuil, *International Investment Law* (2020), p. 250.

119 Art. 31 VCLT 1969 (general rule of treaty interpretation).

120 See *Cairn v. India*, PCA Case No. 2016-07, Final Award (21 December 2020), paras. 1710 f.

121 Sessler, → fn. 44, pp. 88 f; see also Crawford, *Principles of Public International Law* (2019), p. 606.

122 *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award (17 December 2015), para. 826.

breach of a stabilization clause or any other specific privileges granted to an investor will depend on the type and scope of the commitments that have been granted, and those have to be interpreted according to their specific wording.[123] In this regard, the choice of law agreed upon by the parties for the interpretation of the investment contract is critical. It is not uncommon for states to insist on a choice of law provision in favor of their domestic law, thereby ensuring 'that its rules and regulations relating to foreign investment are mandatorily applied to the contract […]'[124]. Such mandatory rules can put the state at an advantage in the interpretative outcome, compared to an interpretation under the lens of international law.

Finally, a breach of host state obligations may be founded on a state's domestic law providing certain guarantees to foreign investors.[125] These kind of national laws are aimed at creating an investment-friendly environment to attract foreign investors, and they often provide guarantees that are similar if not identical to those found in BITs or multilateral agreements, for example, non-discriminatory treatment,[126] or guarantees against expropriation.[127] In these cases, the host state's obligations to investors are primarily governed by the applicable domestic law, although international law may be relevant in the interpretation of the host state's obligation in appropriate circumstances.[128] An aggrieved investor needs to examine how the host state courts have interpreted certain rights relevant to potential investor claims to determine whether international arbitration would be promising. The reason is that in applying domestic law, an international tribunal has to 'apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the state's judicial authorities'[129]. When domestic law applies to the merits of a dispute, international law can only play a supplemental and corrective function,[130] in particular to ensure that the domestic court's interpretation is consistent with customary international law. As long as this is the case, an international tribunal may have no justification for interpreting domestic law inconsistently with national jurisprudence, even if there is a more favourable interpretation for the claimant–investor under international law. As held by the ICSID Tribunal in *ConocoPhillips v. Venezuela*, the

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123 Dolzer and Schreuer, *Principles of International Investment Law* (2012), p. 82.

124 Sornarajah, *The Settlement of Foreign Investment Disputes* (2000), pp. 227 f.

125 See, for example, Chapter II Azerbaijan Law on the Protection of Foreign Investments (1992); Art. 8 and 9 Albania Foreign Investment Act (1990); Art. 10 Cameroon Investment Charter (2002).

126 See, for example, Art. 8 Cambodia Law on Investment (1994); Art. 9 Central African Republic Investment Law (2001); Art. 2 Colombia Foreign Investment Decree (2000).

127 Art. 26 Democratic Republic of Congo Investment Code (2002); Art. 4 Cuba Foreign Investment Act (2014); Art. 39 Djibouti Investment Code (1984).

128 *Stans Energy and Kutisay Mining v. Kyrgyzstan (II)*, → fn. 118, para. 387; *Zhinvali Development Ltd. v. Republic of Georgia*, → fn. 46, para. 339.

129 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007), para. 96.

130 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017), paras. 290, 294.

> principle of priority of international law over domestic law has its own limitations. International law does not prevail over national law in a matter not governed by international law.[131]

Therefore, when a foreign investment claim is to be brought under the domestic investment law of a state, the claimant's legal team must not only be confident of a reasonable cause of action under international law but equally confident of their claim under the relevant domestic law related to the dispute. It is advisable in these cases to secure the services of one or more local counsel and experts in the interpretation of the applicable domestic laws relevant to the final determination of the dispute in the claimant's favor.

2. The Breach Is Attributable to the Host State

A state cannot be found in breach of its international obligation to an investor if the alleged conduct constituting the breach is not attributable to the state. The term attribution is 'used to denote the operation of attaching a given action or omission to a State'[132]. In essence, the state must be found responsible for the given act or omission challenged by the investor. However, this finding is not always straightforward. The mere fact that an investor has suffered an unlawful treatment in the host state's territory does not automatically mean that the host state is responsible for it under international law. Particularly in treaty-based arbitration, tribunals usually defer to the 'International Law Commission's Articles on State Responsibility and its Commentary' (hereinafter 'ILC Draft Articles') to determine questions regarding attribution. The scope of this study does not permit a detailed analysis of the ILC Draft Articles regarding the issue of attribution but it is worth noting that the ILC Draft codifies from 'Article 4 through to 11' the customary international law rules on the issue of attribution of conduct(s) to a state, and tribunals often refer to it, especially since most IIAs, including the ICSID Convention, do not have their own provisions about attribution.[133] It should also be noted that the rules governing the attribution may differ from the ILC Draft Articles if the breach is domestic investment law protections since the ILC Draft relates specifically to claims under international law.[134] Therefore, the claimant's legal team must assess the applicability of the ILC Draft on the question of attribution, particularly in non-treaty-based proceedings. In addition, if a BIT or IIA includes express provisions on attribution, those rules will apply as *lex specialis* to determine state responsibility to the exclusion of the ILC Draft.[135]

Finally, there is no concordance among tribunals as to when exactly the issue of attribution can be raised. In arbitral practice, attribution has been considered as a jurisdictional issue,[136] as well as

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131 *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Award (8 March 2019), para. 89.

132 Art. 2 (commentary para. 12), ILC Draft Articles.

133 *Ortiz v. Algeria*, ICSID Case No. ARB/17/1, Award (29 April 2020), para. 155; *Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), para. 171*; Bayindir v. Pakistan,* ICSID Case No. ARB/03/29, Award (27 August 2009), para.113.

134 *Gavrilovic v. Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018), paras. 852, 856, 864; *Ampal-American and others v.* Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017), para. 81; *Salini v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (29 November 2004), para. 157.

135 *Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), para. 321.

136 *Venezuela US v. Venezuela*, PCA Case No. 2013-34, Declaration of Professor Marcelo Kohen – Jurisdiction and Liability (5 February 2021), para. 2*; Nordzucker v. Poland*, Ad Hoc Arbitration, Partial Award – Jurisdiction (10 December 2008), paras. 129 et seq.

an issue for the merits of a case.[137] For the present discussion, the important lesson to draw is that whatever the approach a tribunal decides to take, the effect is the same: if the breaching conduct is found not to be attributable to the host state under international law, the state will not be responsible for any injury suffered by the investor.

3. The Breach by the Host State Resulted in Damages to the Investor

In most cases, the ultimate goal of initiating an investor–state arbitration is to obtain an award of monetary damages. For a tribunal to grant a monetary award, the claimant must not only establish a breach of an obligation that is attributable to the host state, but also prove that it has suffered damages as a result of the unlawful host state actions.[138] Such damages may be classified as 'material,' that is, actual loss of funds the investor has put into the investment,[139] and/or lost profits,[140] and may in some cases also include interest.[141] 'Moral damages' are another type of injury to an investor for which monetary damages could be sought. This applies to cases of direct injury to the investor's person, for example physical duress, arbitrary arrest, loss of reputation and prestige, etc.[142] In essence, a claimant must be able to prove a relationship, i.e., a causal link, between the breach and the alleged damage.[143] This has sometimes been referred to as the 'but for test'.[144]

Causality in non-investment treaty arbitration should be determined in accordance with the relevant provisions of the contract or domestic law upon which the arbitration is based. However, in (international) investment treaty arbitration, causality, like attribution, is decided by tribunals guided by the commentaries on the ILC Draft Articles.[145] Importantly, Article 31 of the ILC Draft Articles[146]

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137 *Consutel v. Algeria*, PCA Case No. 2017-33, Final Award (3 February 200), para. 316; *Tulip Real Estate v. Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014), paras. 276 et seq.

138 *MNSS and RCA v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016), para. 356.

139 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Final Award (27 May 2020), para. 288; *Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits (29 July 2014), paras. 608 f.; *RosInvest v. Russia*, SCC Case No. 079/2005, Final Award (12 September 2010), para. 675.

140 *Flemingo DutyFree v. Poland*, PCA Case No. 2014-11, Award (12 August 2016), para. 865; *ADM v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), para. 281.

141 *ESPF and others v. Italy*, ICSID Case No. ARB/16/5, Award (14 September 2020), para. 928; *RREEF v. Spain*, ICSID Case No. ARB/13/30, Award (11 December 2019), para. 65; *Foresight and Greentech v. Spain*, SCC Case No. 2015/150, Final Award (14 November 2018), para. 544.

142 *Oxus Gold v. Uzbekistan*, → fn. 123, paras. 895 ff; *Von Pezold and others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para. 916; *Al Warraq v. Indonesia*, Ad Hoc Arbitration, Final Award (15 December 2014), para. 653; *Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award (28 March 2011), para. 333.

143 *Cervin and Rhone v. Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017), paras. 699 f; *B3 Croatian Courier v. Croatia*, → fn. 49, para. 1121; *Deutsche Telekom v. India*, → fn. 139 para. 121.

144 *El Jaouni v. Lebanon*, ICSID Case No. ARB/15/3, Award (14 January 2021), paras. 61 et seq.; *Muszynianka v. Slovakia*, PCA Case No. 2017-08, Award (7 October 2020), para. 618; *Tethyan Copper v. Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019), para. 286.

145 *SolEs Badajoz v. Spain*, ICSID, Award (31 July 2019), paras. 477f; *Pey Casado v. Chile (I)*, ICSID Case No. ARB/98/2, Award (13 September 2016), para. 205; *Copper Mesa v. Ecuador*, PCA Case No. 2012-02, Award (15 March 2016), para. 6.87.

146 Art. 31 (commentary, para. 10), ILC Draft Articles.

foresees two categories of causality that must be established by a claimant for a state to be deemed responsible for an internationally wrongful act: (1) factual cause, and (2) legal cause. Essentially, in addition to 'factual cause', legal notions such as 'foreseeability,' 'directness,' and 'remoteness,' are necessary assessments to show whether the host state's action is also a 'legal cause' of the claimant's injury. For example, as opined by the ICSID Tribunal in *Quiborax v. Bolivia*,

> a wrongful act may cause a particular damage as a matter of fact. However, if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the damage may not be recoverable.[147]

In other words, a state's action may be the factual cause of an injury, but as a matter of law, the state might not be responsible if it was not objectively foreseeable that its actions would cause the injury or if its actions were too remote or indirect.[148] In addition, the burden of proving the damages is on the claimant who alleges injury, and this must be done with reliable evidence. Compensable damage must not be too speculative, remote, or uncertain.[149] Therefore, the probative value of the claimant's evidence in securing the desired award is of critical importance at the case assessment phase, notwithstanding the clear evidence of a treaty breach.

Provided the causality test can be satisfied, recoverable damages in pecuniary form will also depend on the kind of claim for damages that is at issue. In this regard, two distinctions are important: damages under customary international law for the expropriation of an investment, versus damages for breach of an investment protection treaty. For the former, due compensation widely adopted in investment treaties is the 'adequate, prompt, and effective compensation' standard.[150] Arbitral tribunals widely value this as the amount equivalent to the 'fair market value' of the investment immediately before the expropriation took place.[151] The market value normally reflects also any reasonably certain profit expectations. However, for treaty violations other than expropriation, full reparation as conceived by Article 31 of the ILC Draft Articles is due,[152] including in cases of unlawful expropriation.[153] Full reparation implies an award that will 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'[154]. This may or may not include compensation for lost

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147 *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Award (16 Sept 2015), para. 383.

148 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017), para. 333; also, Lemire v. Ukraine (II), → fn. 144, paras.170 et seq.

149 *Murphy v. Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award (6 May 2016), para. 487; *Myers v. Canada*, Ad Hoc Arbitration, Second Partial Award (Damages) (21 October 2002), para. 156; *Gold Reserve v.* Venezuela, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), para. 685.

150 Marboe, *Valuation in Cases of Expropriation,* in Bungenberg et al. (eds.), above, note 55, pp. 1057-1081 (1058).

151 Johnson and Pinsky, *Representing Claimant: Pre-Arbitration Considerations*, in Giorgetti (ed.), above, note 4, pp. 19-40 (33).

152 *Cavalum SGPS v. Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020), para. 659; *Watkins Holdings v. Spain*, ICSID Case No. ARB/15/44, Award (21 January 2020), para. 673.

153 *Caratube v. Kazakhstan (II),* above, note 131, para. 1083; also see, Marboe, above, note 153, p. 1068.

154 *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Award (13 March 2015), para. 132.

profits.[155] The state's obligation to make full reparation may also be diminished by 'mitigating factors, such as remoteness of the damage, intervening or concurrent causes, the existence of contributory negligence on the part of the investor, or the application of the principle of proportionality.'[156] Therefore, whether the claimant will be awarded the actual sum requested in damages in its prayer for relief will largely depend on the factual matrix and the strength of the investor's claim in justifying the requested sum. While the scope of this chapter will not permit a discussion of the complex topic of valuation of damages in investment arbitration, it is important to point out that the services of a valuation expert are required from the very onset to provide a watertight valuation of the investment that was lost due to the host state's unlawful act. When a reliable expert valuation report indicates that it would make economic sense to seek recovery in arbitration, proceeding to arbitration would be reasonable. Otherwise, an aggrieved investor may end up spending more on the procedures than can be ultimately recovered in damages.

C. SUBMITTING THE DISPUTE

An investor–claimant who is satisfied that all the procedural and substantive considerations are in their favor would have a reasonable cause of action to submit an arbitration claim. The procedure to be followed at this point depends on the rules of the forum to which the dispute shall be submitted as identified in the initial case assessment.[157] When the investment arbitration is to be administered by an institution, as is most common, it is critical to comply with all requirements stipulated in the procedural rules of the designated arbitral institution.

For instance, in ICSID administered proceedings, Article 36 of the ICSID Convention, including the ICSID Institutional Rules and the Administrative and Financial Regulations, provides the governing rules for filing a request for arbitration under the Convention.[158] To begin, the request must be made in writing addressed to the Secretary-General[159] and must detail the issue in dispute,[160] including the identity and contact details of the disputing parties; date of consent and instrument of consent;

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155 In this regard, the system of compensation envisaged by the ILC Draft has to be taken into account. Art. 31 provides for "full reparation" and defines "injury" as including "any damage, whether material or moral." Art. 34 elaborates that reparation "shall take the form of restitution, compensation and satisfaction, either singly or in combination." Art. 35 explains that restitution requires re-establishment of "the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriv ing from restitution instead of compensation." The commentary clarifies that Art. 35 takes a narrow approach and does not require "a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed." Thus, restitution merely refers to the return or property or reversal of an administrative or judicial act. Art. 36 provides for "compensation" defined as "any financially assessable damage including loss of profits insofar as it is established." Moral damages are understood as not financially assessable and dealt with in Art. 37. That provision deals with "satisfaction" for any injury "insofar as it cannot be made good by restitution or compensation." Art. 37 provides the examples of "an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality," and also stipulates that "[s]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

156 *Quiborax v. Bolivia*, → fn. 149, para. 330.

157 See above, Section B(I)(3)(c).

158 ICSID, *How to File a Request for Arbitration*, available at: https://icsid.

159 Art. 36(1) ICSID Convention.

160 Art. 36(2) ICSID Convention.

and information about nationality on the date of consent. Upon receipt, the Secretary-General sends the request for arbitration to the respondent state to determine whether it can be registered and screens the request based on the information contained therein.[161] The Secretary-General shall register the request unless he/she finds, based on the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.[162]

In *ad hoc* proceedings based on the UNCITRAL Arbitration Rules, Article 3(3)-(4) of the UNCITRAL Rules detail what is required in the notice of arbitration.[163]

Regardless of the forum, there are several principles related to the request for arbitration that are always applicable for the successful submission of an investment dispute to arbitration. In addition to the identification of the parties and detailed information about the issue or issues in dispute, a request or notice of arbitration should lucidly describe the investor's claims and concisely and factually state the relief sought, without arguing the case on the merits. That is a task reserved for the full written submission in the main proceedings.[164]

In general, an investor–claimant has to pay careful attention to the submission requirements as determined by the specific rules of the forum adopted by the parties for the resolution of their dispute. These will vary from one forum or tribunal to another. Even when all jurisdictional requirements are met, a tribunal may refuse to hear a case for failure to meet any of the formal or submission requirements.

D. OTHER NOTABLE CONSIDERATIONS FOR THE CLAIMANT

In the process of pursuing a claim in arbitration, some other issues often arise in practice that must be addressed before a tribunal can proceed with the full examination and adjudication of the substance of the dispute. These issues are not only those raised by claimants in investment disputes. They can also arise for determination at the request of the respondent state. For the purpose of this chapter, three of these common procedural issues that a claimant may either have to raise or contend with for the successful prosecution of its claim in arbitration are briefly discussed.

I. Bifurcation/Trifurcation of the Proceedings

Upon initiation of arbitration, a party may request the tribunal to bifurcate or trifurcate the legal issues before the tribunal for determination. Bifurcation simply means the splitting of the issues to be determined by the tribunal into two separate phases of the proceedings.[165] Such bifurcation often involves splitting the proceedings on a jurisdictional challenge from the merits of the case.[166] In this

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161 ICSID, Screening and Registration, available at: https://icsid.

162 Art. 36(3) ICSID Convention.

163 It is noteworthy that, by contrast to ICSID where the Secretary General acts as a gate-keeper for disputes brought under the convention, arbitration under the UNCITRAL Rules is deemed to have commenced on the date on which the notice of arbitration is received by the respondent. See Art. 3(2) with Art. 3(5) UNCITRAL Arbitration Rules.

164 Johnson and Pinsky, → fn. 153, p. 40.

165 See, Commission and Moloo, *Procedural Issues in International Investment Arbitration* (2018), pp. 70 et seq.

166 *Bacilio Amorrortu v. Peru*, PCA Case No. 2020-11, Procedural Order No. 3 (Decision on Bifurcation) (21 January 2021), para. 7; *Orazul v. Argentina*, ICSID Case No. ARB/19/25, Decision on the Respondent's Request for Bifurcation (7 January 2021), para. 8; *Westmoreland v. Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 3 (Decision on Bifurcation) (20 October 2020), para. 60; *Apotex v. USA* ICSID, Case

case, the jurisdictional challenge is heard and determined before any consideration of the merits. Bifurcation may also be requested to split the proceedings on the merits into two phases, in other words a separate examination of liability before any consideration as to quantum.[167] In other instances, the request may even be for a trifurcation of the proceedings, i.e. three separate phases dealing with jurisdiction, merits, and quantum.[168] In practice, a request for bifurcation is often raised by the respondent,[169] although there are also cases in which the request is made by the claimant.[170]

The procedure to be followed after a request for bifurcation depends on the procedural rules governing the proceedings. In this chapter, the ICSID Convention and Rules, and the UNCITRAL Arbitration Rules, are discussed in some detail.

Under Article 41(2) ICSID Convention and Article 41(3)(4) ICSID Arbitration Rules 2006, an arbitral tribunal is empowered to decide whether a challenge to its jurisdiction should be dealt with as a preliminary question or whether it should be joined to the merits of the dispute. The same discretion applies when the request concerns a trifurcation of the issues for determination. An ongoing review process of the ICSID Arbitration Rules foresees the introduction of new rules specifically dedicated to providing guidance to tribunals faced with a bifurcation or trifurcation request from a party. *First*, the forthcoming amendment to the 2006 Rules[171] provides general guidance to tribunals when dealing with a request for 'bifurcation;' *second*, it provides specific guidance for situations involving 'preliminary objections with a request for bifurcation;' and *third*, it provides specific guidance when there is a 'preliminary objection without a request for bifurcation.'[172] Common to the three separate instances are the timing, procedure, and factors to be considered when deciding on a question of bifurcation.

A request for bifurcation is also possible in arbitration proceedings based on the UNCITRAL Rules. Article 23(3) of the UNCITRAL Rules 2010 provides a tribunal with discretion to rule on a plea that it has no jurisdiction either as a preliminary question or in an award on the merits. This provision

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No. ARB(AF)/12/1, Procedural Order No. 3 Deciding Bifurcation and Non-Bifurcation (25 January 2013), para. 4.

167 *Renco v. Peru (II)*, PCA Case No. 2019-46, Procedural Order No. 3 (Bifurcation) (17 September 2020), para. 2.1; *Manolium Processing v. Belarus*, PCA Case No. 2018-06, Decision on Bifurcation (1 August 2018), para. 6.

168 See, Gjuzi, *The Appropriate Use of Bifurcation as a Means for Promoting Efficiency and Fairness in Investment Arbitration* in Akbaba and Capurro (eds.), 'International Challenges in Investment Arbitration' (2019), pp. 181-197 (182).

169 *Nord Stream 2 v. EU*, PCA Case No. 2020-07, Procedural Order No. 4 – Decision on Request for Preliminary Phase on Jurisdiction (31 December 2020), para. 12; *Canepa v. Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 – Decision on Bifurcation (28 August 2020), para. 4; *Red Eagle Exploration v. Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation (3 August 2020), para. 6; *CMC v. Mozambique*, ICSID Case No. ARB/17/23, Award (24 October 2019), para. 31; *LMC v. Mexico*, ICSID Case No. ARB(AF)/15/2, Decision on Bifurcation (29 May 2017), paras. 3f.

170 *Renco v. Peru (II)*, → fn. 169, para. 1.5; *Austrian Airlines v. Slovak Republic*, Ad Hoc Arbitration, Final Award (9 October 2009), paras. 37 et seq.

171 Proposal for Amendment of the ICSID Rules (Working Paper #5), available at: https://icsid.worldbank.org.

172 Ibid, Rule 45.

has been acknowledged by tribunals as implying the discretionary power to decide whether or not to bifurcate a proceeding.[173]

Overall, a decision to bifurcate a proceeding comes down to considerations of procedural economy, efficiency, and fairness.[174] For this determination, tribunals examine a number of factors, which most importantly include:

- The merits of the objection (objection is substantial, not frivolous).[175]
- A material reduction in time and cost of the proceedings.[176]
- The facts and issues to be raised regarding jurisdiction are not intertwined with the merits in a way that would make it impractical to separate them.[177]

When deciding whether to file an investment claim in arbitration, the claimant's legal team would do well to consider the potential for a bifurcation request and to examine the specific factual and legal circumstances necessary to successfully defend against one by the respondent. In some cases, bifurcation may also be requested by the claimant, in particular a bifurcation of the liability and quantum phases.

II. Requests for Provisional Measures

A provisional measure is a form of relief sought by a party, either claimant or respondent, to secure its rights and prevent an aggravation of the dispute pending its final resolution.[178] Such an interim relief may be necessary when special circumstances exist that suggest a future judicial decision may be worthless if the rights in question are not preserved pending the final determination of the dispute. Today, 'provisional measures' are part of the general principles of law that are common to all legal systems.[179] They are equally recognized in the world of international arbitration, both commercial and investment. As held by the *Biwater* tribunal,

> It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1)

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173 *Burmilla Trust and others v. Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1 – Suspension, Bifurcation and Procedural Timetable (3 November 2016), para. 43; see also, *Philip Morris v. Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Decision on Bifurcation (14 April 2014), para. 108.

174 J. Commission and Moloo, → fn. 167, p. 81.

175 *Hope Services v. Cameroon*, ICSID Case No. ARB/20/2, Procedural Order no. 2 – Decision on the Request for a Bifurcation (19 Oct. 2020), para. 23; *Red Eagle Exploration v. Colombia*, → fn. 171, para. 60.

176 *Sastre et al. v. Mexico*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 – Decision on Bifurcation (13 August 2020), para. 45; *Rand Investments v. Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 – Bifurcation (24 June 2019), para. 15.

177 *Patel Engineering v. Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3 – Decision on the Motion for Bifurcation (14 December 2020), para. 61; *Hela Schwarz v. China*, ICSID Case No. ARB/17/19, Procedural Order No. 3 – Decision on the Respondent's Request for Bifurcation (17 December 2018), para. 74.

178 L. Bars and Shiroor, *Provisional Measures in Investment Arbitration: Wading Through the Murky Waters of Enforcement* (2017) 6 *Indian J. ARB. L.*, pp. 24-42 (24).

179 Sarooshi, *Provisional Measures and Investment Treaty Arbitration* (2013) 3 *Arb. Int'l*, pp. 361-380 (362).

> harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute. Both may be seen as a particular type of provisional measure...[180]

If the prevailing facts of a case present the likelihood of aggravated losses to a claimant while the claim is being pursued in arbitration, claimant's legal team may at least want to request the tribunal to order the maintenance of the status quo to prevent further aggravation of the dispute pending the final determination of the case. Besides non-aggravation and maintenance of status quo, a claimant may also request a provisional measure for specific performance, i.e. an order that respondent has to do something,[181] or an injunction, i.e. and order that the respondent has to refrain from doing something.[182] Finally, there is the option or requesting an order to stop parallel domestic proceedings,[183] including criminal proceedings,[184] while the arbitration is in progress.

The power of a Tribunal to grant provisional measures is typically provided in the applicable rules for the proceedings.[185] The ICSID Rules, ICSID Additional Facility Rules, or UNCITRAL Rules are reported to govern over 90% of provisional measures that have been sought in investment arbitration.[186] Even where the applicable rules are silent, tribunals have assumed this mandate as inherent in their power to preserve the integrity of the process.[187] Some of the rules provide conditions to be considered by a tribunal when deciding whether an interim measure should be granted,[188] while others do not. The ICSID Rules are silent on any conditions to be satisfied. However, the relevant provisions in the proposed amendment to the ICSID Arbitration Rules provide a non-exhaustive list of situations in which a tribunal may grant an interim measure, including factors to be considered before granting such interim relief.[189]

In practice, tribunals generally consider the granting of a provisional measure upon satisfaction of the following five conditions:[190]

1) The tribunal has prima facie jurisdiction;

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180 *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 of 29 September 2006, para. 135.

181 E.g., an interim order directing respondent to disclose information, *id.* para. 71.

182 E.g., an interim order directing respondent to discontinue surveillance activities, see *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009), para. 39.

183 E.g., *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 Sept 2005), para. 2.

184 E.g., *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (3 March 2016), paras. 3.18ff.

185 See Art. 47 ICSID Convention; Art. 39 ICSID Arbitration Rules (2006); Art. 46(1) ICSID Arbitration Additional Facility Rules (2006); Art. 26(1) UNCITRAL Arbitration Rules (2013); Art. 28(1) ICC Arbitration Rules (2021); Art. 37 SCC Arbitration Rules (2017).

186 Commission and Moloo, → fn. 167, p. 31.

187 *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (8 April 2016), paras. 185f.; *Lao Holdings v. Laos (I)*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Second Application for Provisional Measures (18 Mar 2015), para. 21.

188 See Art. 26(3) UNCITRAL Arbitration Rules (2013); Art. 26(3) PCA Arbitration Rules (2012).

189 See Art. 47 Proposal for Amendment of the ICSID Rules (Working Paper #5), → fn. 173.

190 For further analysis on this, see J. Commission and Moloo, → fn. 167, p. 33.

2) The claimant has presented a prima facie case for success on the merits;

3) Urgency, i.e. imminent irreparable harm;

4) Necessity, i.e. the harm cannot be otherwise avoided; and

5) Proportionality of the requested measures, i.e. a reasonable relationship between the risk and severity of additional harm to the claimant and the burden on the respondent.

To satisfy these conditions, the standard of proof is quite high since provisional measures are only granted in exceptional circumstances and not taken lightly.[191] While a provisional measure doesn't need to be requested at the same time the arbitration is initiated, the claimant's legal team will do well to request a provisional measure already at this time if there are existing circumstances that could prejudice the proceedings or render an eventual award by the tribunal nugatory without such a provisional order.

III. Challenge of an Arbitrator

One of the most distinguishing attributes of arbitration as a means of dispute resolution is the parties' power to select the neutral decision-maker(s) of their choice, i.e. the arbitrator(s) to adjudicate over their dispute. This frequently takes the form that each side nominates one arbitrator and the two then agree on the third and presiding arbitrator. Sometimes, in particular if the parties prefer a sole arbitrator but want to avoid delays over the agreement on that person, the appointment can be delegated to an arbitral institution by agreement of the parties. Whether appointed directly by the parties or by an arbitral institution, arbitrators must always remain neutral umpires and cannot serve the party that selected and appointed them. They have to be 'independent' and 'impartial'. A perceived lack of one of these qualities may alone be sufficient to justify the disqualification of an arbitrator at the request of a party to the proceeding. While challenges to arbitrators are historically grounded on the lack of independence and impartiality, arbitrator challenges in investment arbitration are also possible on grounds of 'nationality' and 'incapacity'.[192]

For example, if the ICSID Rules are applicable, nominated arbitrators are obliged to complete a declaration form prior to accepting their appointment in which they disclose past or present relationships, if any, to the parties.[193] Under UNCITRAL Rules, disclosure of any circumstance likely to create justifiable doubt as to the independence and impartiality of an arbitrator is similarly required.[194] Likewise, the IBA Guidelines on Conflict of Interest in International Arbitration, which are considered persuasive authority on the issue,[195] place a duty of disclosure on arbitrators to

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191 *Occidental v. Ecuador (II)* ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), para. 59; *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures (6 April 2007), para. 33.

192 Kinnear, 'Challenge of Arbitrators at ICSID – An Overview' (2014) 108 *ASIL P.*, pp. 412-416 (414ff); See also Art. 12(3) PCA Arbitration Rules (2012); Rule 8(1) ICSID Arbitration Rules (2006).

193 Rule 6(1) ICSID Arbitration Rules (2006).

194 Art. 11 UNCITRAL Arbitration Rules 2013.

195 *Highbury v. Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal for Disqualification of Professor Brigitte Stern (9 June 2015), para. 79; *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2010), para. 56.

inform parties of circumstances that may give rise to doubt as to their independence and impartiality.[196] A similar duty is foreseen in the ICSID and UNCITRAL jointly released Draft Code of Conduct for arbitrators in investment disputes.[197] If a disclosure made by an arbitrator or a due diligence research conducted by a party brings to light circumstances which suggest an appointed arbitrator may be objectively unable to adjudicate the merits of a case with an independent and impartial mind, the claimant may finds themselves challenging and requesting the disqualification of the arbitrator, or defending "their" arbitrator against a challenge by the respondent.

The legal standard to secure the disqualification of an arbitrator varies, depending on the rules that govern the dispute. For instance, Article 57 of the ICSID Convention provides that a party may request the disqualification of an arbitrator if there are facts indicating a 'manifest lack' of the qualities required by Article 14(1) ICSID Convention. Although the qualities required by Article 14(1) make no explicit reference to independence and impartiality, it is nevertheless settled in practice that they are included.[198] To disqualify an arbitrator for lack of independence or impartiality, the ICSID jurisprudence has interpreted the term 'manifest lack' as meaning 'highly probable', 'obvious' or 'evident'.[199] However, this does not impose a burden on a challenging party to prove actual dependence or bias (partiality) to justify disqualification. It is sufficient to establish the appearance of lack of independence or impartiality to a reasonable third person to justify disqualification.[200]

In contrast to the ICSID 'manifest lack' standard, the UNCITRAL Rules foresee the challenge of an arbitrator if there exist circumstances that give rise to 'justifiable doubt' as to the independence or impartiality of an arbitrator.[201] A challenging party under Article 12(1) UNCITRAL Arbitration Rules must demonstrate that the doubt is justifiable based on objective facts,[202] that is, a reasonable, fair-minded third person would have justifiable doubts as to the independence or impartiality of the

196 IBA Guidelines on Conflicts of Interest in International Arbitration (Adopted 23 October 2014).

197 See Art. 10, Draft Code of Conduct for Adjudicators in International Investment Disputes (Version 3), published September 2021.

198 Schreuer et al., *The ICSID Convention: A Commentary* (2009), pp. 49ff, 511ff; *Meijer v. Georgia*, ICSID Case No. ARB/20/28, Decision on the Proposal to Disqualify Professor Dr. Klaus Sachs (15 July 2021), paras. 71ff; *Landesbank v. Spain*, ICSID Case No. ARB/15/45, Decision on the Proposal for Disqualification of Christopher Greenwood, Charles Poncet and Rodrigo Oreamuno (15 December 2020), para. 128; *Ayat Nizar Raja Sumrain v. Kuwait*, ICSID Case No. ARB/19/20, Decision on the Claimant's Proposal to Disqualify Prof. Zachary Douglas and Mr. V. V. Veeder (2 January 2020), para. 104.

199 *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (15 December 2015), para. 56; *VM Solar Jerez v. Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil (24 July 2020), para. 83.

200 *Meijer v. Georgia*, → fn. 202, paras. 74f.

201 Art. 12 UNCITRAL Arbitration Rules 2013.

202 *Vito G. Gallo v. Government of Canada*, NAFTA/UNCTIRAL, Decision on the Challenge of Mr. J. Christopher Thomas, QC (14 October 2009), para. 19; *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008), para. 22; Bottini, 'Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration' (2009) 2 *STLR*, pp. 341-366 (345); Malintoppi and Yap, *Challenges of Arbitrators in Investment Arbitration. Still Work in Progress?* in Yannaca-Small (ed.), 'Arbitration Under International Investment Agreements: A Guide to the Key Issues' (2018), pp. 153-182 (para. 8.27).

challenged arbitrator. Similarly, the PCA Arbitration Rules foresee 'justifiable doubt' as the standard of proof needed to be satisfied to successfully challenge an arbitrator.[203]

Furthermore, the applicable rules may specify the time limit within which a challenge must be brought. For instance, both the UNCITRAL and PCA Arbitration Rules provide such temporal limits: While the former affords 15 days after receiving notification of the appointment of the challenged arbitrator or 15 days after the challenging party became aware of the circumstances giving rise to the challenge,[204] the latter affords 30 days in the respective situations.[205] In contrast, the current ICSID Rules do not specify a time limit for such a challenge but simply require promptness,[206] which is determined on a case-by-case basis.[207] That being said, the current proposal for amendments to the ICSID Arbitration Rules explicitly foresees a time limit for filing a challenge, namely that a challenge must be filed within 21 days after the constitution of the tribunal, or 21 days after the challenging party became aware of the facts upon which the challenge is based.[208]

The discussions in this section are only meant to provide a general introduction and insight into some of the procedural hurdles which are not necessarily tied to the merits of a claim, but still present unavoidable hurdles the claimant may have to cross in the quest for a remedy. Beyond this limited introduction, it must be stressed that a comprehensive understanding of the standards and procedures to be satisfied under the '*applicable arbitration rules*,' or '*laws*' of a dispute is essential if any of these issues should surface when an investor-claimant prepares or files a claim.

E. CONCLUSION

This chapter provides students, academics, and practitioners who are new to the field of investment dispute settlement with a checklist to be considered for successful initiation of an investment claim against a state in arbitration. While it is settled that mutual consent of the parties is the key to arbitration,[209] efficient legal representation of a potential claimant must go far beyond establishment of the parties' consent and fulfilment of the necessary formal preconditions. While any assessment must begin from this point, the assessment must continue with the establishment that there is legal and factual merit to the claim that the host state has breached its international obligation(s) towards the claimant, which has resulted in damages that must be remedied. Only under this circumstances is it reasonable for an investor to initiate and proceed with an expensive arbitration journey to secure a remedy.

This chapter also emphasizes the importance of a detailed understanding of the procedural rules the parties have agreed upon to govern their dispute, whether these are the often-used ICSID, or the UNCITRAL, or PCA Rules, etc. Apart from providing the precise details on the required formalities for initiating an arbitration, these rules explicitly regulate other procedural issues that may come up, including bifurcation, provisional measures, and challenges to an arbitrator.

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203 Art. 12(1) PCA Arbitration Rules (2012).

204 Art. 13(1) UNCITRAL Arbitration Rules (2013).

205 Art. 13(1) PCA Arbitration Rules (2012).

206 Rule 9(1) ICSID Arbitration Rules (2006).

207 *Landesbank v. Spain*, ICSID Case No. ARB/15/45, → fn. 202, para. 117; *Kazmin v. Latvia*, ICSID Case No. ARB/17/5, Decision on the Proposal to Disqualify All Members of the Tribunal (14 October 2020), para. 58.

208 Rule 22, Proposal for Amendment of the ICSID Rules (Working Paper #5), → fn. 173

209 Blackaby et al., → fn. 1, p. 3.

Finally, while investment arbitration has been facing a backlash from the international investment law community in recent years, it still factually remains the most preferred procedure for the settlement of investor–state disputes in the field of investment law.[210]

[210] Nanteuil, → fn. 118, p. 200.