The Vienna Convention on the Law of Treaties in Investor-State Disputes

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History, Evolution and Future

Edited by

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Michael Waibel is a professor of international law at the University of Vienna. His teaching and writing focus on international law, international economic law, sovereign debt and international dispute settlement. He received the Deák Prize of the American Society of International Law, the Book Prize of the European Society of International Law and a Leverhulme Prize for his research. He is co-general editor of the ICSID Reports (with Jorge Viñuales) and co-editor-in-chief of the Journal of International Economic Law (with Kathleen Claussen and Sergio Puig).

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Summary of Contents

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List of Abbreviations

ARSIWA	International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in August 2001
BIT	Bilateral Investment Treaty
CFIA	Cooperation and Facilitation Investment Agreement
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EPA	Economic Partnership Agreement
EU	European Union
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICS	Investment Court System
ICSID (also referred to as the 'Centre' in certain chapters)	International Centre for Settlement of Investment Disputes
ICSID (AF) Rules	ICSID Additional Facility Rules

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded in Washington, D.C. on 18 March 1965 and entered into force on 14 October 1966 (also known as the Washington Convention)
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
IIA	International Investment Agreement
ILC	International Law Commission, established by the United Nations General Assembly in 1947
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored-Nation
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958 and entered into force on 7 June 1959
NIEO	New International Economic Order
NT	National Treatment
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development, established in 1964 as an Intergovernmental Organisation
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties concluded in Vienna on 23 May 1969 and entered into force on 27 January 1980
WTO	World Trade Organization

Foreword

The law applicable to international treaties was one of the first topics selected for codification by the International Law Commission in 1949. The project progressed under a series of eminent rapporteurs, leading to final draft articles in 1966. The draft articles were adopted in 1969 as the *Vienna Convention on the Law of Treaties* (VCLT), which entered into force on 27 January 1980.[1] As of 1 April 2022, there were 116 Parties and 45 signatories to the VCLT.[2] In addition, several States that have not ratified the treaty have expressed their view that portions of the VCLT codify customary international law and are binding on all States.[3] As a result, it has earned its reputation as one of the most consequential treaties in international law.

At the same time as the VCLT was under discussion, two distinct, investment treaty-specific, initiatives were also gaining momentum. These were developed by different institutions and drafted quite separately. Ultimately these instruments work in tandem with the VCLT to elaborate international investment law and procedure.

The first of these instruments was the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) by the Executive Directors of the World Bank, which was subsequently adopted by the World Bank Member States in 1966. The ICSID Convention, itself a treaty as defined by the VCLT,[4] established the framework for arbitration and conciliation of international investment disputes under the Convention.

The second relevant initiative was the negotiation of binding investment treaties offering dispute resolution (usually arbitration) to foreign investors with respect to

1. *See* Aust, Anthony, *Modern Treaty Law and Practice*, Cambridge Press (2000) p. 6. The VCLT is cited as 1155 U.N.T.S. 331, at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
2. United Nations Treaty Collection at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.
3. For example, the United States has not ratified the VCLT but has stated that it considers that many provisions of the VCLT constitute customary international law: https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.
4. *ICSID Convention*, Chapter X, at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

disputes arising from investments made in the host State. The first such treaty was the bilateral investment treaty concluded between Germany and Pakistan in 1959.[5] Bilateral investment treaties continued to be negotiated over the 1970s and 1980s, with record numbers concluded in the 1990s.

Not only has the number of investment treaties increased exponentially in the last fifty years – their profile has changed as well. Investment treaties have been concluded by different groups of States, for example, as regional or sectoral treaties, as treaties concluded by regional economic integration organisations, and with some placed in the framework of a free trade agreement (FTA). Overall, more than 3,100 such agreements have been concluded to date.[6]

The growth of investment treaties also brought about an increase in investment arbitration proceedings, the vast majority of which have been administered at the International Centre for Settlement of Investment Disputes. Since 1987, more than 1,100 arbitration cases have been commenced based on consent in an investment treaty or an investment chapter in a FTA.[7] In turn, investment treaties have been interpreted by numerous arbitral tribunals, by ad hoc committees (in ICSID Convention cases), and by domestic courts with review jurisdiction (in non-ICSID Convention cases), creating a substantial and growing body of international investment law. As the number of cases has grown so has the scope and complexity of treaties, frequently in response to an interpretation of their text. The VCLT has very much been a part of this evolution.

The impact of the VCLT in international investment arbitration is most evident in the overall approach taken to interpretation of an investment treaty. Most investment tribunals commence their analysis by referring to Article 31 of the VCLT and its fundamental rule that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its object and purpose. They may also apply Article 32 to justify resort to supplementary means of interpretation, or Article 33 where an interpretive issue arises from texts in multiple languages. While commentators debate whether individual tribunals have applied the VCLT rules properly in any individual case, or whether they have done a sufficiently detailed VCLT analysis,[8] there is no dispute that the VCLT interpretive rules are the relevant primary rules to apply in an investor-State arbitration proceeding.

Interestingly, the most recent generation of investment treaties may be altering this dynamic, or perhaps more correctly, supplementing it. New generation treaties often use numerous drafting techniques to guide the interpreter 'in the right direction'. Many new treaties include very detailed provisions or annexes explaining how to

5. Germany-Pakistan BIT 1959/1962, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1732/germany---pakistan-bit-1959-.
6. *See* UNCTAD Investment Treaty Navigator for individual treaties, at: https://investmentpolicy.unctad.org/international-investment-agreements.
7. UNCTAD, Investor-State Dispute Settlement Cases – Facts and Figures 2020, IIA Issues Note (September 2021), at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf.
8. *See* Chapters 2-8 of this book.

interpret a substantive obligation, most often expropriation,[9] fair and equitable treatment,[10] national treatment,[11] or most-favoured-nation treatment.[12] Recent treaties often contain 'for greater certainty' clauses, and increasingly use footnotes, again to direct the treaty interpreter to the correct understanding of the text.[13] Some recent treaties suggest how a clause should be construed, for example, that the challenged measures should not be construed as inconsistent with the treaty obligations where the investment activity is undertaken in a manner sensitive to environmental, health, safety or other regulatory objectives.[14] Where investment obligations are found in a FTA, they usually include rules of precedence to determine whether a potentially conflicting obligation in another chapter will prevail in an investment dispute[15] or rules of precedence with other treaties to which the signatories are also party.[16]

Another set of interpretive tools in new generation investment treaties expressly carves out a primary role for the treaty Parties to interpret the treaty. The best examples of this technique are clauses creating a joint committee of the treaty Parties and allowing them to issue notes of interpretation on the investment obligations.[17]

In a similar vein, recent treaties frequently give non-disputing treaty Parties the right to make submissions on the interpretation or application of the treaty, recognising the Parties' systemic interest in correct and consistent interpretation.[18]

Observers may debate whether this interpretive supplementation to the VCLT is necessary or useful, but it is certainly not surprising. The combination of a relatively large number of investment treaties and investment cases in the last fifty years has

9. *See*, for example, Art. 10.13 and Annex 10B, RCEP 2020/2022, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6032/download; or Annex 9B, CPTPP 2018, https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf.
10. *See*, for example, Art. 10.5 and Annex 10A, RCEP 2020/2022, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6032/download; or Art. 2.4 EU-Singapore IPA 2018 at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.
11. *See*, for example, Drafters' Note on Interpretation of 'In Like Circumstances' under Art. 9.4 (National Treatment) and Art. 9.5 (Most-Favoured-Nation Treatment) in Chapter 9, CPTPP 2018, at: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf; or Art. 2.3, EU-Singapore IPA 2018, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.
12. *See*, for example, CPTPP 2018, Art. 9.5(3), at: https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf.
13. *See*, for example, Chapter 9 of the CPTPP 2018 on Investment, which includes forty-eight footnotes and twelve Annexes.
14. *See*, for example, Art. 14.16 of USMCA 2018/2020, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-.
15. *See*, for example, Art. 14. 3 of USMCA 2018/2020, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-, providing that other chapters prevail to the extent of any inconsistency.
16. *See*, for example, Art. 1.4, Cambodia-Korea FTA 1997, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6388/download.
17. *See*, for example, Art. 25, Japan-Georgia BIT 2021, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download.
18. *See*, for example, Art. 10.20.2 of the CAFTA-DR 2004/2009, at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2693/download.

meant that numerous fact patterns have been interpreted under numerous treaties that are of a similar type but are by no means homogenous or identical. In addition, these provisions are interpreted by different panels of arbitrators and presented in different ways by different counsels. This has given rise to a lively debate about whether there is sufficient consistency, coherence, or correctness in investor-State jurisprudence, and indeed, to what extent one should expect consistency in a system with ad hoc arbitrators and no formal doctrine of precedent.

One might also ask what the practical impact of these supplementary interpretive tools will be. Will they ensure more consistent, coherent, or correct interpretations of treaty text? Conversely, could they contribute further to fragmentation and disharmony in the interpretation of similar but not identical obligations? And how will the VCLT continue to factor into the task of interpretation in the face of more specific and directive text drafted by treaty negotiators? These questions have yet to be examined systemically and will continue to arise in cases initiated pursuant to new generation treaties.

This book is an especially valuable contribution to thinking about the role of the VCLT in modern investment law and to answering these questions. Dr Shirlow and Professor Gore have focused on the nexus of the VCLT, international investment law, and investment arbitration, providing a unique perspective on the use of the VCLT to resolve investment treaty disputes. The large and growing body of these arbitrations and their use of the VCLT over the past decades make this book especially persuasive.

Dr Shirlow and Professor Gore very helpfully narrate the book by providing commentary for each part. Their introduction in Chapter 1 commences with an overview of the development of the VCLT, allowing the reader to situate the treaty in the public international law realm. This is an especially helpful foundation for considering the rest of the text. Part I looks in depth at how Articles 31 through 33 of the VCLT have been applied in practice. The chapters in this section grapple with the difficulty of applying the well-known words of the VCLT to specific factual contexts and legal arguments.

Part II moves to the creation and application of treaties. The focus of this part includes the relevance of the VCLT to a treaty's entry into force, the use of the VCLT in State territory and succession problems, and the application of the VCLT to resolve temporal issues arising in treaty interpretation. Part III considers the role of the VCLT in analyzing some of the most difficult questions currently faced in international investment arbitration. These include the modernisation and reform of investment treaties, the impact of the termination of intra-EU treaties, the proposal for a Multilateral Investment Court, and whether the ICSID Convention could accommodate an appeal mechanism in the future. Finally, Part IV features three chapters that consider the role of the VCLT as a unifying force in these discussions, including how the VCLT might be used to resolve bottlenecks in the New York Convention, the VCLT's role in resolving conflicts between successive treaties, and a discussion of *lex specialis*. Dr Shirlow and Professor Gore conclude the book with their views on how some of these conflicts will be addressed in the coming years and what can be expected in this area of the law in the future.

The editors and contributors have curated a superb collection that is educational and thought-provoking, and I have no doubt that readers will find this book extremely useful. This volume is the perfect way to celebrate the first half-century of the VCLT: a review of what it has done and an informed assessment of what it may yet do in the next half-century.

3 April 2022
Meg Kinnear
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CHAPTER 12

Legal Questions Concerning the Temporal Application of Treaties in International Investment Arbitration Cases

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The scope of treaties is subject to various limitations. One such limitation is the temporal applicability of a treaty. The starting point in many disputes relating to the temporal elements of the law of treaties is laid down in Article 28 Vienna Convention on the Law of Treaties (VCLT), which provides the general rule that treaties do not have retroactive effect. Despite the clear language of this provision, a review of the case law developed by international investment tribunals evidences that many unsettled questions remain insofar as the temporal aspects of the application of investment treaties are concerned. This chapter examines three different elements of temporality and assesses the singularities of international investment arbitration vis-à-vis general international law in this regard: (a) entry into force and non-retroactivity of the treaty; (b) obligations of States pending the entry into force of the treaty; and (c) temporal issues pertaining to the termination of a treaty. As is common for many areas of international law, international investment tribunals have not yet developed a clear and consistent case law on the temporal limitations of investment treaties. However, it should also be emphasised that the solutions offered by many international investment tribunals have demonstrated due regard for the principles laid down in the VCLT and are, in many aspects, compatible with rules of customary international law. In particular, international investment tribunals have repeatedly endorsed the principle provided by Article 28 VCLT and have declined to exercise jurisdiction if the text of the treaty, implicitly or explicitly, excludes disputes arising prior to the entry into force of the treaty. Although certain points of departure remain, this trend serves as a good starting point in the

endeavour to further develop the cohesiveness of international investment law with public international law.

§12.01 INTRODUCTION

The scope of a treaty is subject to various limitations. One such limitation is the temporal applicability of the treaty, which can either be specified by the treaty itself, or by the rules stipulated in the Vienna Convention on the Law of Treaties (VCLT) and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Both the VCLT and ARSIWA are, to a large extent, reflective of customary international law.[1]

Legal questions concerning the temporal scope of investment treaties include, but are not limited to, questions of non-retroactivity, the specific timing of an investment, the timing of the existence of a dispute, temporal aspects relating to the termination of treaties, and the determination of temporal (or interim) obligations incumbent on States pending the entry into force of a treaty.[2] These various aspects are part of a single fairly unexplored phenomenon in international law. Scholars have observed that the 'significance of temporal elements in relation to the law of treaties has not been addressed to any appreciable extent either in the literature …, or in the jurisprudence of international courts and tribunals'.[3] International investment tribunals have likewise devoted little attention to issues pertaining to the expression *ratione temporis* in international investment arbitration.[4] It is possible only to speculate as to the reasons for this, but this gap might indicate that issues concerning the temporal scope of treaties are complex matters of an intricate nature.

Furthermore, in past investment treaty cases where the temporal issues have been material to the dispute at hand – something that indeed has occurred on a perennial basis – arbitrators have inconsistently interpreted the temporal scope of investment protection treaties.[5] The starting point in many disputes relating to the temporal elements of the law of treaties is laid down in Article 28 VCLT. This provision

1. *See* generally Chapter 1 in this book. *See also Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Rep. 1999 p 1045; Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (CUP 2020).
2. *See* generally Barton Legum, Obiomo Ofego and Cathrine Gilfedder, 'Ratione Temporis or Temporal Scope' (June 2020) The Investment Treaty Arbitration Review, 5th edition.
3. DW Greig, *Intertemporality and the Law of Treaties*, British Institute of International and Comparative Law Occasional Paper No. 1 (2001), 1.
4. Legum et al. (n. 2).
5. *See, e.g.*, Legum et al. (n. 2). The temporal controversies in international investment arbitration have not been extensively discussed in literature. For an overview of existing literature, *see* Stanimir Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis' (2005) 4 The Law and Practice of International Courts and Tribunals, republished in (2005) 6(3) The Journal of World Investment and Trade 385; Andrea Gattini, 'Jurisdiction *Ratione Temporis* in International Investment Arbitration' (2017) 16 The Law and Practice of International Courts and Tribunals 139; Nick Gallus, *The Temporal Scope of Investment Protection Treaties*, British Institute of International and Comparative Law (2008).

provides the general rule that treaties do not have retroactive effect.[6] Furthermore, Article 13 ARSIWA reinforces Article 28 VCLT by recognising that '[a]n 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'. In its commentary on this provision, the ILC noted that 'the principle of the intertemporal law [does not] mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant'.[7] This can be relevant in circumstances involving continuing and composite acts, which are further addressed below.

Despite the lucid nature of Article 28 VCLT and Article 13 ARSIWA, a review of the case law developed under international investment tribunals evidences that many unsettled questions remain insofar as the temporal aspects of the application of investment treaties are concerned. This chapter thus analyses how international investment tribunals have sought to address certain issues pertaining to the temporal application of treaties in international investment arbitration.[8] It addresses three different elements of temporality in the following order: (a) entry into force and non-retroactivity of the treaty (section 12.02); (b) obligations of States pending the entry into force of the treaty (section 12.03); and (c) temporal issues pertaining to the termination of a treaty (section 12.04). Each section first gives a generic outlook of how the relevant temporal element is regulated under general international law, before delving into the singularities of international investment arbitration. The chapter ends with concluding remarks, which recap the various challenges facing international investment tribunals seeking to give meaning to the temporal challenges presented by the various treaties they aim to understand, interpret, and apply (section 12.05).

§12.02 ENTRY INTO FORCE AND NON-RETROACTIVITY OF TREATIES

[A] Entry into Force and Non-retroactivity of Treaties in International Law

[1] Entry into Force

The time of the entry into force of a treaty and the rights and obligations contained therein are in many instances crucial for determining the temporal scope of a treaty; a State can, through actions or omissions, only breach obligations that are in force and

6. The provision reads: '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.'
7. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 134.
8. Tribunals have emphasised that one must carefully distinguish 'between jurisdiction *ratione temporis* of an ICSID Tribunal (i.e., the existence of a dispute) and applicability *ratione temporis* of the substantive obligations contained in a BIT', *see Salini v. Jordan*, ICSID Case No. ARB/02/2013, Decision on Jurisdiction, 29 November 2004, para. 176.

binding on that State at the time of the action or omission.[9] Article 24 VCLT stipulates that a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.[10] This provision allows States themselves to formalise the requirements for the entry into force of the treaty; something which is commonly agreed upon in the treaty's final clauses.[11] Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.[12] However, the provisions of a treaty regulating the manner or date of its entry into force and 'other matters arising necessarily before the entry into force of the treaty', i.e., the treaty's final clauses, become operative from the time of the adoption of the text of the treaty.[13] Once the treaty has entered into force, it is binding upon the parties to it and must be performed by them in good faith.[14]

The precise date of the entry into force of a treaty is not always straightforward. In many multilateral investment treaties, there will be a period of time between the deposit of the required number of instruments of ratification and the entry into force of the treaty, and this period can vary from thirty days to up to twelve months.[15] When a State ratifies a treaty subsequent to its entry into force, and unless the treaty provides otherwise, the date of the exchange between the contracting States or the deposit of the instrument is decisive.[16] This is provided for by Article 16 VCLT, which stipulates that the instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon: (a) their exchange between the contracting States; (b) their deposit with the depositary; or (c) their notification to the contracting States or to the depositary, if so agreed. Under current practice with respect to multilateral treaties, alternative (b), i.e., the deposit of the instrument expressing the State's consent to be bound with the treaty depositary, seems to be the prevailing approach.[17]

Articles 16 and 24 need to be distinguished from the stipulations of Article 78 VCLT. This provision lays down that any communication or notification by a State is considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary. If transmitted to a depositary, the communication is to be considered as received by the State for which it was intended only when the latter State has been

9. *See* Heike Krieger, 'Article 24' in Oliver Dorr and Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 423.
10. Article 24 VCLT.
11. Krieger (n. 9) 433.
12. Article 24 VCLT.
13. Article 24(4) VCLT.
14. This is in accordance with the principle *pacta sunt servanda*, *see* Art. 26 VCLT.
15. Krieger (n 9) 436.
16. Article 24(3) VCLT.
17. *See* Summary of Practice of the Secretary General as the Depositary of Multilateral Treaties, UN Doc Srr/LEG/7/Rev.1.

informed by the depositary.[18] In *Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice (ICJ) clarified that:

> Article 78 of the Convention is only designed to lay down the modalities according to which notifications and communications should be carried out. It does not govern the conditions in which a State expresses its consent to be bound by a treaty and those under which a treaty comes into force, those questions being governed by Articles 16 and 24 of the Convention. Indeed, the International Law Commission, in its Report to the General Assembly on the draft which was subsequently to become the Vienna Convention, specified that if the future Article 78 included in limine an explicit reservation, that was 'primarily in order to prevent any misconception as to the relation' between that Article and the future Articles 16 and 24.[19]

[2] Non-retroactivity

As a general rule of international law, a treaty, when in force, does not apply retroactively.[20] This is provided by Article 28 VCLT, which stipulates that '[u]nless 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'. Article 4 VCLT does itself specify its non-retroactivity.[21]

The ICJ has confirmed that Article 28 is a rule of customary international law,[22] and some international investment tribunals have followed suit.[23] The ILC has stated that the two main reasons for the rule of non-retroactivity are obvious:

> first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in one direction and divert it from another, this function can only be discharged if the obligations exist before the subjects prepare to act; secondly, and more important, the principle in question provides a safeguard for these subjects of law, since it enables them to establish in advance what their

18. This has caused certain issues with respect to the effect of unilateral declarations deposited under Art. 36(2) of the ICJ Statute, accepting the compulsory jurisdiction of the ICJ. In *Case Concerning Right of Passage over Indian Territory* (*Portugal v. India*) (Preliminary Objections), (Judgment) ICJ Rep. I957, p. 125, at 146 and *Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections), (Judgment) ICJ Rep. 1998, p. 275, at para. 22, the Court confirmed that the crucial date establishing the legal relations between the parties is the date of deposit of the instrument, and not the date of notification by the depositary. Thus, the contractual relation between the Parties and the compulsory jurisdiction of the ICJ resulting therefrom are established by the fact of the making of the Declaration.
19. *Maritime Boundary between Cameroon and Nigeria* (n. 18) para. 31.
20. Article 28 VCLT.
21. Article 4 reads: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.'
22. *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*) (Judgment) ICJ Rep. 2012, p. 422, para. 100.
23. *See, e.g., Aaron C. Berkowitz et al (formerly Spence International Investments et al) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) para. 215.

> conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others.[24]

Thus, in principle, treaties are typically intended to regulate future behaviour, and States must be given sufficient notice before being held responsible for wrongful conduct. This provision represents the antithesis to an old United States (US) doctrine that a treaty would not enter into force on the day of ratification, acceptance, approval, or accession (or any other means of expressing consent to be bound, including definitive consent), but would instead enter into force from the date of signature, and, accordingly, operate retroactively.[25]

Thus, whereas the general starting point is that treaties do not apply retroactively, States are nevertheless, as per the language of Article 28 VCLT, free to give the treaty or some of the treaty's provisions retroactive effect, provided that it can be ascertained by reference to the intention of the parties or is otherwise established.[26] It has been suggested that this intention does not necessarily need to be explicitly laid down in the text of the treaty, but it suffices that the 'very nature of the treaty' supports its retroactive effect.[27] In contrast, the phrasing 'unless a different intention appears from the treaty' has been said to refer 'to the case where the retroactivity is expressly formulated in a treaty provision'.[28] Examples of this include Article 7(2) of the 1978 Vienna Convention State Succession,[29] as well as the Canadian, Chinese, German, Malaysian and Turkish model bilateral investment treaties (BITs), which expressly provide that the treaty covers investments made prior to the treaty's entry into force.[30] The formula 'otherwise established' 'refers to cases where the retroactivity emanates from the nature of the treaty'.[31] The application of this test in the context of international investment arbitration is not always straightforward, but it has been argued that if an investment treaty is silent on the issue of investments made prior to the entry into force of the treaty, such investments nevertheless fall under the scope of the treaty.[32]

The scope of Article 28 VCLT covers both acts and facts that took place prior to the entry into force of the relevant treaty. An 'act' has been defined as 'behaviour that is attributable to a subject of law',[33] and a 'fact' is 'either the factual or legal result of an act (emissions, damage, prescription, acquisition) or something that occurs independently of an act (natural disaster, the passage of time)'.[34] Importantly, both the relevant acts or facts must have taken place and been completed before the entry into

24. Report of the International Law Commission on the work of its twenty-eight session, 3 May-23 July 1976, Yearbook if the International Law Commission 1, 90, UN Doc A/CN.4/SER.A /1976/Add.1 (Part II).
25. Karl Klaus von der Decken, 'Article 28' in Dorr and Schmalenbach (n. 9) 509.
26. Article 28 VCLT.
27. von der Decken (n. 25) 510.
28. *Ibid.* (footnote omitted).
29. Vienna Convention on State Succession, 1946 UNTS 3.
30. *See* Legum et al. (n. 2).
31. von der Decken (n. 25) 511.
32. *See*, *e.g.*, Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 340-41.
33. *Ibid.* 513.
34. *Ibid*.

force of the treaty in order to render the non-retroactivity clause applicable.[35] This inevitably creates some uncertainties with respect to acts whose beginning or end is indeterminable, as well acts that began before the entry into force of the treaty but which continue after the date of entry into force. For instance, in *Aaron C. Berkowitz et al v. Republic of Costa Rica*, an investment tribunal recognised that facts which took place prior to the entry into force of a treaty cannot in and of themselves constitute a cause of action, but 'may' constitute circumstantial evidence that either confirms or cast doubt on a breach which occurred after the entry into force of the treaty. In such circumstances, the facts occurring prior to the entry into force can be taken into account in assessing the damages for the post-entry into force breach.[36]

Intertemporal law does not prevent facts occurring prior to the entry into force of a particular obligation to be taken into account in the analysis of the breach of that obligation, where these are relevant. In this regard, Article 14 ARSIWA addresses acts of a continuing character, and sets out three fundamental principles: (a) the 'breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue'; (b) the 'breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation'; and (c) the 'breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation'. In *Rainbow Warrior*, the tribunal found that the failure on the part of France to return its agents to an Island on which these individuals were to be present for a specified period of time constituted a continuing act.[37]

Article 15 ARSIWA regulates the concept of composite acts and stipulates that:

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

The ILC has explained that the word 'remain':

> is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or

35. *Ibid.* 514.
36. *Berkowitz v. Costa Rica*(n. 23) paras 217-18.
37. *Rainbow Warrior* (*New Zealand v. France*) 20 RIAA 217 (1990), paras 88-101.

> omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.[38]

Thus, the acts occurring before the entry into force of the treaty can be taken into account 'in order to establish a factual basis for the later breaches or to provide evidence of intent',[39] and acts of a continuous or composite character can trigger responsibility for acts that took place even before the entry into force of the treaty. For instance, in *Certain Properties*, the ICJ found that certain decisions by German judicial institutions in the 1990s were 'inextricably linked' to the interpretation of the Settlement Convention with regard to Germany in 1954 and the Czechoslovakia Benes Decrees of 1945, which were considered to be the 'real cause' of the dispute.[40] In *Jurisdictional Immunities of the State* case, the Court found that the duty on part of Germany to pay monetary compensation to Italian nationals was 'inextricably linked' to the Italian waiver contained in Article 77(4) of the 1947 Italian Peace Treaty.[41] International investment tribunals have found non-payment of amounts specified in contract,[42] continuing delay by national courts,[43] and the continuous withholding of permits to constitute continuous acts.[44] However, as will be further demonstrated below, an analysis of BITs and the application of Article 28 VCLT and Articles 13-15 ARSIWA to BITs evidence the complexities that arise in determining the temporal application of treaties.[45]

[B] Entry into Force and Non-retroactivity in International Arbitration

As outlined above, a State cannot be held responsible for a breach of an obligation that was not in force at the time the action took place. However, this does not preclude a tribunal from examining claims, to a greater or lesser extent, pertaining to actions which occurred after the date of the entry into force of the treaty.[46] This section examines how international investment tribunals have approached issues of non-retroactivity, and focuses on the timing of the existence of a dispute and the specific timing of an investment.

38. Crawford (n. 7) 144.
39. *Ibid*.
40. *Certain Property* (*Liechtenstein v. Germany*) Preliminary Objections (Judgment) ICJ Rep. 2005, p 26, para. 51.
41. *Jurisdictional Immunities of the State* (*Germany v. Italy*), Counterclaim, Order of 6 July 2010, ICJ Rep. 2010, p 310, para. 28.
42. *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004) paras 166-167.
43. *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. The Republic of Ecuador* [I], PCA Case No. 34877, Interim Award (1 December 2008) para. 298.
44. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) para. 3.43.
45. *See* Gallus (n. 5) especially 503 ff.; *MCI Power Group LC and New Turbine Inc v. Ecuador*, ICSID Case ARB/03/6, 31 July 2007, paras 45 ff.
46. Gallus (n. 5) 7.

[1] Disputes Arising Before the Entry into Force of a Treaty

The starting point is, as for all legal means of settling disputes, that State consent is fundamental; international investment tribunals can only exercise jurisdiction through the consent of both the State and investor parties to the relevant dispute.[47] Typically, an international investment tribunal can only hear disputes that arose subsequent to the entry into force of the treaty, and international investment tribunals have repeatedly endorsed the principle provided for by Article 28 VCLT. For instance, in *Feldman v. United Mexican States*, relating to the temporal scope of the North American Free Trade Agreement (NAFTA), the tribunal stated that:

> Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.[48]

This line of reasoning is perfectly consistent with Article 28 VCLT (and Article 13 ARSIWA); as no different intention appears from NAFTA or is otherwise established, the treaty cannot be accorded retroactive effect. Similar conclusions were reached in *Mondev v. US*,[49] and *Salini v. Jordan*.[50]

Moreover, it is not uncommon for BITs to limit consent to arbitration to disputes arising after the treaty's entry into force. An example of this limitation is included in Article 11 of the Ecuador-Peru BIT, which stipulates that '[t]his agreement shall not apply to disputes relating to facts and acts that took place prior to its entry into force even if the effects of these facts and acts last after the entry into force of this Agreement'.[51] In this vein, some BITs even limit jurisdiction to disputes based on factual circumstances which arose subsequent to the entry into force of the treaty.[52] One example of such is Article 2(3) of the US Model BIT 2004, which stipulates that '[f]or greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the Treaty'.[53]

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47. Article 25 of the ICSID Convention. *See also* Michael Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration' (1989) Duke Law Journal 739, 745.
48. *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, para. 62.
49. In which the Tribunal said as follows: '[t]he basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach', *see Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 68.
50. *Salini* (n. 8) para. 177. *See also Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision of Jurisdiction, 6 July 2007, para. 254.
51. *See* similarly Chile-Peru BIT 2000/2001, Art. 2.
52. Sadie Blanchard, 'State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration' (2011) 10(3) Washington University Global Studies Law Review 419, 424. *See also Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 94. (5 September 2007).
53. *See* Art. 2(3) U.S. Model BIT 2004, available at https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last accessed 20 January 2021).

Some international investment tribunals have taken a fairly restrictive approach when applying such limitation clauses. For instance, in *Pey Casado v. Chile*, the tribunal clarified that a provision which explicitly excluded disputes which arose prior to the entry into force of the treaty did not, even implicitly, confer jurisdiction on the tribunal over all other disputes arising after the treaty entered into force.[54] In addition, the tribunal stated that the inclusion of a treaty clause expressly protecting investments made before the entry into force of the treaty did not entail the retroactive effect of the treaty.[55]

The practice in relation to disputes involving continuing or composite acts is less straightforward. Such disputes – involving acts, facts, and situations that began before the relevant treaty entered into force and continued thereafter – have frequently confronted international investment tribunals.[56] It has been noted that 'a number of international investment tribunals have been cautious in attributing significant weight to such acts, so as to avoid an overreaching retroactive application of the substantive provisions of a treaty'.[57] Furthermore, some tribunals have considered continuous or composite acts which started before the entry into force of the treaty only as a mere factual background, whereas other tribunals have relied more on such acts as relevant to the merits of the dispute.[58]

As a general starting point, international investment tribunals have tended to take into consideration facts which occurred before the entry into force of a treaty when determining whether the treaty was subsequently breached.[59] In *Tecmed v. Mexico*, whilst noting that acts which took place in their entirety before the treaty became operative could not violate the terms of the treaty, the tribunal also observed that:

> it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force … [C]onduct, acts, or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor, or aggravating or mitigating elements of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.[60]

Importantly, the tribunal argued that irrespective of whether the wrongful acts in question were of a composite or continuing nature, they needed to be examined as a single overarching entity; 'it is only by observation as a whole or as a unit that it is

54. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008 paras 578-84.
55. *Ibid.* para. 579. *See also Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/02, Award of 29 May 2003 para. 53; *Société Générale* (n. 42), para. 166.
56. Blanchard (n. 52) 419.
57. Legum et al. (n. 2).
58. *Ibid.*
59. *Ibid.*
60. *Tecmed* (n. 55) paras 66- 68.

possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused'.[61]

Likewise, in *Mondev v. the United States*, the tribunal stated that 'events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation'.[62] Thus actions occurring prior to the entry into force of a treaty may assist arbitrators in clarifying and understanding the background, causes, and scope of violations of the relevant treaty once in force[63] may provide a factual basis for breaches occurring through later conduct[64] and may provide context to actions occurring subsequent to entry into force.[65] As seen above, these various ways of taking into consideration acts which occurred prior to the entry into force of the treaty are compatible with the standpoint of the ILC, which has stated that this can be done 'in order to establish a factual basis for the later breaches' and 'to provide evidence of intent'.[66] It is noteworthy that no international investment tribunal has yet referred to the purpose of evidencing intent when taking into consideration actions occurring prior to the entry into force of the treaty.[67]

Insofar as jurisdiction *ratione temporis* over disputes is concerned, scholars have identified four levels of temporal restrictions: (a) unrestrictive clauses; (b) 'single exclusion' clauses; (c) 'double exclusion' clause; and (d) 'subject matter' exclusion.[68]

Unrestrictive Clauses

Unrestrictive clauses were at issue in *Impregilo v. Pakistan* and *Salini v. Jordan*. In situations of treaties which contain unrestrictive clauses, there is no express limitation on the States' consent to jurisdiction *ratione temporis*.[69] In *Impregilo*, the claimant argued that Pakistan, through certain conduct, had violated the stipulations of the Italy-Pakistan BIT.[70] Pakistan, on its side, argued that the tribunal was not competent *ratione temporis* to hear the claim as the acts complained of occurred prior to the entry into force of the BIT.[71] Article 9 of the Treaty provided that it applied to any 'disputes arising between a Contracting Party and the investors of the other'. In this regard, the tribunal noted that 'such language – and the absence of a specific provision for the retroactivity – infers that disputes that may have arisen before the entry into force of the BIT are not covered'.[72] This reasoning is compatible with the stipulations of Article

61. *Ibid*.
62. *Mondev* (n. 49) para. 70.
63. Emphasised by the Tribunal in *MCI Power* (n. 45) para. 93.
64. *Mondev* (n. 49); *Generation Ukraine, Inc v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 11.4.
65. *Pey Casado* (n. 54) para. 611.
66. Crawford (n. 7) 144.
67. *See* Gallus (n. 5) 24.
68. Blanchard (n. 52) 430.
69. *Ibid*.
70. *See Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 paras 15-25.
71. *Ibid.* paras 61-75.
72. *Ibid.* para. 300.

28 VCLT; the retroactivity of a treaty to cover disputes which arose before the entry into force of the treaty can only be inferred if it is implied by nature of the treaty or is otherwise established.

In *Salini*, similar reasoning was advanced. Article 9 of the Italy-Jordan BIT conferred jurisdiction over 'any dispute which may arise between one of the contracting Parties and the investors of the other contracting Party on investments'. The tribunal stated that this provision covers 'any dispute which may arise between one of the contracting Parties and the investors of the other contracting Party on investments', but only covers disputes which arose after the entry into force of the BIT.[73]

Thus, in situations when a BIT covers any 'disputes arising between a Contracting Party and the investors of the other', international investment tribunals have interpreted such unrestrictive clauses as applying to any dispute, but only insofar as the dispute arose subsequent to the entry into force of the treaty. In other words, 'since a pre-existing dispute does not "arise" after entry into force, the parties must have meant to exclude such disputes from jurisdiction'.[74] In essence, investment tribunals have interpreted unrestrictive clauses in a manner so as to avoid that the effect of their application in practice is not incompatible with the stipulations of Article 28 VCLT and Article 13 ARSIWA.

'Single Exclusion' Clauses

The second category of temporal limitation has been coined 'single exclusion'.[75] These clauses explicitly exclude jurisdiction over disputes arising before the entry into force of the treaty. An example is the Chile-Peru BIT 2000/2001, which specifies that it does not apply to disputes that arose prior to the entry into force of the treaty.[76]

In *Maffezini v. Spain*, the claimant brought a claim against Spain under the Argentina-Spain BIT. This treaty included a single exclusion clause which stipulated that 'this agreement shall not apply to disputes or claims originating before its entry into force'.[77] As has been recognised, since 'the temporal clause draws the line based on when the dispute or claim arose, rather than when the acts in question occurred', the primary focus of the tribunal was the time at which the dispute arose.[78] The alleged impugned actions took place in March 1992, and the Argentina-Spain BIT entered into force in September 1992.[79] The claimant had a debt with the respondent, and in June 1994, the claimant offered to exchange certain assets in return for cancelling his debt. Spain initially rejected the proposal, but later changed its mind. However, at the time Spain changed its mind, the claimant had instituted International Centre for Settlement of Investment Disputes (ICSID) proceedings. Spain argued that the dispute arose before

73. *Salini* (n. 8) para. 170.
74. Blanchard (n. 52) 449.
75. *Ibid.* 419; *Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 94 (5 September 2007).
76. *See* Art. 2 of the Treaty.
77. Argentina-Spain BIT 1991/1992, Art. 2(2).
78. Blanchard (n. 52) 454.
79. *See* Argentina-Spain BIT 1991/1992; *Emilio Augustin Maffezeini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

the entry into force of the treaty and that the tribunal accordingly lacked jurisdiction.[80] Responding to these contentions of the parties, the Tribunal stated that:

> the dispute in its technical and legal sense began to take shape in 1994, particularly in the context of the disinvestment proposals discussed between the parties. At that point, the conflict of legal views and interests came to be clearly established, leading not long thereafter to the presentation of various claims that eventually came to this Tribunal.[81]

Thus, the claimant was successful in asserting temporal jurisdiction.[82] In *Luchetti v. Peru*, the Chile-Peru BIT 2000/2001 also included a clause which stipulated that the treaty shall not apply to disputes that arose before its entry into force.[83] The Chile-Peru BIT entered into force on 3 August 2001. The case revolved around the revocation of permits to construct a pasta-making factory. The permits were revoked in 1997 and 1998. Luchetti successfully challenged the revocation before domestic courts and proceeded with the construction until 2001, when the permits were revoked once again. The tribunal was tasked with determining whether the 1997 dispute was the same as the 2001 dispute. To this end, the tribunal posed two questions: (1) whether the 'facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute'; and (2) whether the disputes were of the same source of origin.[84] The tribunal found that the facts that gave rise to the earlier dispute continued to be central to the later dispute.[85] It went on to consider whether there were 'other legally relevant elements that would compel a ruling that the 2001 dispute must nevertheless be treated as a new dispute'[86] but eventually found that no such new element existed. It accordingly rejected the claim as the real dispute arose before the BIT entered into force.[87]

In contrast, in *Jan de Nul v. Egypt*, the tribunal took a different approach to a similar matter. Although the claimant had already challenged the actions before Egyptian domestic courts, the tribunal found itself competent to exercise jurisdiction and concluded that the first dispute was based on domestic law, and the second was based on the relevant BIT, wherefore the second dispute was covered by the BIT.[88]

Thus, in essence, where jurisdiction over a dispute arises under a BIT containing a single exclusion clause specifying that the treaty does not apply to disputes or claims originating before its entry into force, arbitral tribunals have focused on the specific

80. *Ibid.* paras 90-95.
81. *Ibid.* para. 96.
82. *Ibid.* para. 99.
83. Article 2 of the treaty.
84. *Empresas Lucchetti, SA and Lucchetti Peru, SA v. Republic of Peru*, ICSID Case No. ARB/03/04, Award, 7 February 2005, paras 36, 48-53.
85. *Ibid.* para. 53.
86. *Ibid.* para. 54.
87. *Ibid.* para. 59. Please note that this chapter does not address the doctrine of abuse of rights, which is a distinct principle from jurisdictional issues *ratione temporis*. *See* in this regard Legum et al. (n. 2) and *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para. 527.
88. *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 117.

timing as to when the dispute arose, and whether the facts that gave rise to an earlier dispute continued to be central to the later dispute. If those acts were not considered to be central to the later dispute, i.e., if a 'new' dispute was not found to have occurred, tribunals have been reluctant to exercise jurisdiction.

'Double Exclusion' Clauses

The third category of temporal restriction is known as the 'double exclusion' clause.[89] It has been observed that:

> [a] double exclusion clause states that the jurisdictional provision shall not apply to disputes over facts or situations that occurred prior to its entry into force. This language provides the broadest possible restriction because it can be interpreted to exclude even disputes that arise after the treaty entered into force, when the dispute involves actions or events that occurred prior to entry into force.[90]

In *Eurogas v. the Slovak Republic*, the relevant Canada-Slovak BIT only applied to disputes 'which have arisen not more than three years prior to its entry into force'. The BIT entered into force on 14 March 2012. This limitation clause prompted the tribunal to consider what the *real* cause of the dispute was. Eventually, the tribunal declined to exercise jurisdiction. It found that the action complained of was the revocation of the claimant's exclusive rights for mining activities.[91] The revocation took place three years before the BIT entered into force, i.e., in 2009, and the subsequent actions of the Slovak authorities merely maintained the effects of this revocation.[92] Professor Gaillard dissented from the majority view and advocated a more liberal approach.[93] He argued that an analysis of all the factual and legal circumstances leading to the dispute evinced that later conduct of the Slovak authorities in fact constituted the definitive revocation of the mining rights.[94] The dispute was therefore inextricably linked to these subsequent actions, and could not have arisen before the constituent elements of the dispute only fully came into existence, which, in this case, would have been in 2012, i.e., after the entry into force of the BIT.[95] In his view, the tribunal should therefore have exercised jurisdiction.[96]

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89. Blanchard (n. 52) 431.
90. *Ibid*. A double exclusion clause was topical in an early case adjudicated by the Permanent Court of International Justice (PCIJ); the *Phosphates of Morocco* case. In this case, France had submitted a declaration accepting the Court's jurisdiction on 25 April 1931. This declaration covered disputes which arose after the ratification of the declaration with regard to situations or facts subsequent to such ratification. The initial task of the PCIJ was to try a claim that a continuing violation overcame the temporal limitation provided for in France's declaration. When examining this claim, the Court sought to identify the real cause of the dispute and found that the real was not a continuing act but rather a single and isolated act which occurred before entry into force of the relevant jurisdictional agreement, *see Phosphates in Morocco (Italy v. France)*, 1938 PCIJ Ser A/B No. 74, Preliminary objections, p 22, 24-26.
91. *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 paras 455-61.
92. *Ibid.* para. 453.
93. *Ibid.*, Dissenting Opinion of Professor Emmanuel Gaillard.
94. *Ibid*.
95. *Ibid*.
96. *Ibid*.

In effect, the majority view in *Eurogas* reflects the restrictive nature of double exclusion clauses as tribunals cannot exercise jurisdiction over facts or situations that occurred prior to the entry into force of a treaty, and, under certain circumstances, not even over disputes arising post-entry into force of the treaty if the relevant dispute involves or pertains to actions which took place prior to the entry into force of the treaty at hand.

Subject-Matter Exclusion

The fourth and last category of temporal exclusion, i.e., the subject-matter exclusion, occurs indirectly or implicitly. Subject matter exclusion has been said to exist when the treaty grants jurisdiction only over disputes arising from the interpretation of the agreement. Furthermore, '[t]his type of limitation on an arbitral tribunal's jurisdiction *ratione materiae* implicitly limits the tribunal's jurisdiction *ratione temporis* because of the principle of non-retroactivity'.[97] An example of a subject matter exclusion clause is Article 1116 NAFTA. This provision specifies that an investor may submit a claim of violation of certain specific NAFTA obligations only.[98] The subject matter test was applied by the tribunals in *Feldman* and *Mondev*, in which both concluded that they had no temporal jurisdiction to hear claims alleging violations of certain NAFTA obligations as the actions complained of occurred before the entry into force of NAFTA in 1994.[99] These two cases fall under the 'subject matter' category as NAFTA's arbitral clauses in Articles 1116 and 1117 confer jurisdiction on tribunals only over claims of NAFTA violations, and the relevant claims related exclusively to breaches of certain obligations contained in NAFTA but which occurred prior to its entry into force. Thus, investment tribunals have refrained from exercising jurisdiction over disputes which, at the time they occurred, did not fall under the temporal scope of a treaty granting jurisdiction only over disputes arising from the interpretation of the relevant agreement.

[2] Investments Prior to Entry into Force

A treaty, when in force, does not apply retroactively, and this raises certain questions in cases where the investment was made prior to the entry into force of the treaty; does such investment fall outside the temporal scope of the treaty? The answer depends on the language of the relevant treaty and the intention of the parties to it. It is not uncommon for investment treaties to lay down that investments made prior to the entry into force of the treaty are nevertheless covered by it.[100] In contrast, if the treaty is silent on the matter and unless a different intention is established, the rule under Article 28 VCLT entails that the treaty would not apply retroactively to cover investments made prior to the date of the entry into force of the treaty. This has frequently been confirmed by international investment tribunals, which, in the absence of clear

97. Blanchard (n. 52) 433.
98. For a detailed analysis, *see* Blanchard (n. 52).
99. *Mondev* (n. 49) para. 68; *Feldman* (n. 48) para. 62.
100. Legum et al. (n. 2).

language to the contrary, have refrained from applying the treaty retroactively to cover investments made prior to the entry into force of the treaty.[101] Such logic was for instance confirmed in *Mondev,*[102] *Salini,*[103] *Pey Casado,*[104] and *Walter Bau v. Thailand*.[105] When doing so, tribunals have relied on both Article 28 VCLT and Article 13 ARSIWA.[106]

§12.03 INTERIM OBLIGATION AND PROVISIONAL APPLICATION OF TREATIES

A pending treaty is capable of imposing certain obligations on States notwithstanding the fact that the treaty is not yet in force and, typically, would not yet have acquired any legal effects. This usually occurs under two circumstances: either by virtue of what is known as the 'interim obligation' under Article 18 VCLT or through the provisional application of the treaty under Article 25 VCLT. The following section addresses each circumstance in turn.

[A] Interim Obligation

Article 18 VCLT imposes an obligation on States to refrain from acts which would defeat the object and purpose of a treaty when: (a) a State has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. The interim obligation has its roots in the principle of good faith. The underlying principle 'is not that signed treaties are binding; it is instead that fundamental fairness requires a State to refrain from undermining an agreement on which another State is relying …'.[107] Thus, Article 18 imposes certain limitations upon the freedom of States that have signed or ratified a treaty but are not yet bound by it.[108] Since the treaty-making procedure more often than not is a multi-stage process which can stretch over a significant period of time, Article 18 protects the integrity of a treaty's provisions and the effort of the negotiating States by ensuring that the principal aim and objective of the treaty is still relevant at the time of its entry into force.[109]

101. *Ibid*.
102. *Mondev* (n. 49) para. 68.
103. *Salini* (n. 8) para. 177.
104. *Pey Casado* (n. 54) paras 581-84.
105. *Walter Bau v. Thailand*, UNCITRAL, Award of 1 July 2009, paras 9.67-9.69.
106. *See* Crawford (n. 7) 131.
107. Robert F. Turner, 'Legal Implications of Deferring Ratification of SALT' (1981) 21 Va J Int'l L 747, 777. *See also* SB Crandall, *Treaties: Their Making and Enforcement* (2nd edn, John Byrne & Company 1916) 34; Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 267-268, 284.
108. Arnold McNair, *Law of Treaties* (OUP 1961) 199.
109. Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 243-244.

Case law on this provision is sparse, both within and beyond the investment arbitration context. However, in the early case of *Megalidis*, a Greek claimant sought the return of certain items taken forcibly by Turkish authorities from him and relied on a treaty that had been signed but was not yet binding on Turkey. A Turkish-Greek Mixed Arbitral Tribunal held in 1928 that this seizure of the Greek national's property was a violation of international law, and concluded that 'already with the signature of a treaty and before its entry into force there exists for the parties an obligation to do nothing which may be prejudicial to the treaty by diminishing the significance of its provisions …'.[110]

The normative nature, as well as the precise scope and content of the interim obligation, is not straightforward, and Article 18 VCLT has been criticised for being phrased in vague and ambiguous language.[111] Whereas early attempts to codify the law of treaties were favourable to treating the interim obligation as a mere moral obligation,[112] later approaches have tended to perceive Article 18 as establishing a legally binding obligation on States. This notwithstanding, Article 18 VCLT does not give full effect to the substance of the treaty by requiring States to comply with the explicit treaty provisions, or even the object and purpose of individual treaty provisions if such can be identified. It instead imposes an obligation on States not to thwart the very *raison d'etre* of the treaty.[113] It must be emphasised that Article 18 is an autonomous obligation under international law, being declaratory of customary international law, and does not derive from the content of a treaty itself. It is not a retroactive extension of the principle *pacta sunt servanda* (Article 26 VCLT), nor does it constitute an exception to the principle of non-retroactivity of treaties (Article 28 VCLT) or the rules on entry into force of treaties (Articles 16 and 24 VCLT).[114]

The interim obligation of a State signatory terminates when that State makes clear its intention not to become a party to the treaty. This is sometimes categorised as

110. *A.A. Megalidis v. Turkey*, Reported in Annual Digest 1927-1928, p. 395.
111. Werner Morvay, 'The Obligation of a State Not to Frustrate the Object of a Treaty Prior to Its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaöRV 451; Joni S Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 Geo Wash J Int'l L & Econ 71; Jan Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest Intent' (2001) 34 Vand J Transnatl L 283; Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic JIL 383; Davis S Jonas and Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 Vand J Transnat'l L 565; Palchetti, 'Article 18 of the 1969 Vienna Convention' in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 29; Dörr (n. 109) 244; Anneliese Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 314.
112. J.L. Brierly, *Second Report: Revised Articles of the Draft Convention* (1951) Yearbook of the International Law Commission, Vol. II, UN Doc. A/CN.4/SER.A/1951/Add.1; *Harvard Draft Convention on the Law of Treaties,* Supplemented to 29 AJIL 653 (1935) 781-82.
113. Martin Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 Me L Rev 263, 267-68; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 248; Curtis A Bradley, 'Treaty Signature' in Duncan B Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2012) 208; Klabbers (n. 111) 283 and Quast Mertsch (n. 111) 313. Cf. Dörr (n. 111) 256.
114. Dörr (n. 111) 244. von der Decken (n. 25) 508.

'unsigning',[115] which is however not a legally accurate term. Examples of States making their intention not to become parties to a treaty include Russia's notification in relation to the Energy Charter Treaty (ECT), when, on 20 August 2009, the Russian Federation officially informed the Portuguese Government, acting as the treaty depositary, that it did not intend to become a Contracting Party to the Treaty. Besides the obligation laid down in Article 18 VCLT, this notification also terminated, in accordance with Article 45(3)(a) of the ECT, its provisional application by Russia as of 18 October 2009.[116] This is further elaborated upon below.

[B] Provisional Application

In contrast to Article 18 VCLT, the provisional application of a treaty entails that a State must comply with some or all provisions of a treaty that is not yet in force. Article 25 VCLT lays down that a treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. A treaty applied provisionally is legally binding and enforceable under international law.[117] To this end, it falls under the scope of *pacta sunt servanda*, and a State will normally incur international responsibility if it violates any of the obligations under the treaty, or part of the treaty, that is applied provisionally.[118]

The VCLT provision on provisional application of a treaty is commonly used when a signatory State needs to submit the relevant treaty to a constitutional ratification process to close the gap in the time period between the conclusion and entry into force of the treaty.[119] It has been noted that '[t]o provide for the provisional application of a treaty is only useful, and hence, in practice only done if the entry into force of a treaty is subject to the constitutional approval and ratification by at least one of the negotiating states'.[120] Thus, the provisional application allows for an immediate response to the needs that the treaty seeks to address, and can 'guarantee that sensitive compromises which have been reached in treaty negotiations will not be endangered in the period between signature and entry into force'.[121] Both Articles 18 and 25 may 'serve to guarantee that sensitive compromises which have been reached in treaty

115. Bradley (n. 113).
116. *See* information available at www.energycharter.org (last accessed 14 November 2020), *see* generally ECT 1994/1998.
117. Krieger (n. 9) 453.
118. Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Martinus Nijhoff Publishers 2012); Krieger (n. 9) 443-445.
119. Krieger (n. 9) 441.
120. René Lefeber, 'The Provisional Application of Treaties' in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierday* (Martinus Nijhoff Publishers 1998) 81.
121. Krieger (n. 9) 442-3.

negotiations, will not be endangered in the period between signature and entry into force, for instance if one of the parties reconsiders its position and refuses ratification'.[122] To this end, it has been argued that Article 25 VCLT is a more efficient tool to safeguard the integrity of a treaty's provisions pending its entry into force than Article 18 VCLT, and Article 25 can to that end 'supplement or reinforce Article 18 and fulfil a purpose as a confidence-building measure promoting trust among the signatory States'.[123]

Provisional application can be agreed upon in the treaty itself, included in a protocol or annex,[124] or provided by separate agreement.[125] It is generally left for the States to decide in what manner the treaty will be applied provisionally.[126] As per the language of Article 25 VCLT, either a part of a treaty or a treaty as a whole may be applied provisionally, and the choice is left for the negotiating States to decide on the date of the start of the provisional application. A lengthy example elaborating in depth on the provisional application is Article 45(1-7) ECT. The practice of States in this regard indicates that negotiating States tend to choose the date of signature as the starting date for the provisional application of the treaty.[127]

For a State to apply a treaty provisionally, it seems that it least must have formally signed the treaty as a minimum requirement. However, a provisional application is also possible when a State has ratified a treaty, whether in force or not, and even in circumstances where a State has acceded to a treaty in force but pending the entry into force of the treaty with respect to the acceding State.[128] Importantly, this does not mean that a State must have expressed its consent to be bound by the treaty, but rather:

> the institution of provisional application is an invitation to detach the treaty's application from lengthy constitutional treaty-making procedures, i.e. to apply the treaty provisionally without prior completion of normally necessary international procedures ... .[129]

The provisional application of a treaty usually terminates when the treaty enters into force with respect to that State. If a State has not ratified the treaty when it enters into force, the provisional application of the treaty continues with respect to that State.[130] Per the stipulations of Article 25(2) VCLT, unless otherwise agreed, the provisional application of a treaty is terminated when a State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

122. *Ibid*.
123. *Ibid*.
124. *See*, *e.g.*, the case of the Treaty on Conventional Armed Forces in Europe.
125. For example, the case of the 1947 Protocol of Provisional Application of the GATT and Agreement relating to the Implementation of Part XI of the UNCLOS 1982.
126. Krieger (n. 9) 441.
127. *Ibid.* 448.
128. *Ibid.* 451.
129. Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Bowman and Kritsiotis (n. 111) 308.
130. Krieger (n. 9) 452.

[C] Interim Obligation and Provisional Application of Treaties in International Arbitration

[1] Interim Obligation

In similarity with general international law, Article 18 VCLT has not been extensively relied upon in international investment arbitration. To the knowledge of the present authors, only in two instances have investors relied upon the interim obligation to challenge actions which occurred in the time period between signature or expression of consent to be bound and the entry into force of the treaty; *Tecmed* and *MCI Power v. Ecuador*.

In *Tecmed*, the claimant referred to Article 18 VCLT to claim that Mexico, by granting Tecmed a one-year permit to operate a landfill site, had acted contrary to the interim obligation and breached its obligations under the Mexico-Spain BIT pending the entry into force of the treaty. When examining this argument under Article 18 VCLT, the tribunal stated that it:

> shall take into account the principle of good faith … in its particular manifestation embodied in Article 18 … with respect to the Respondent's conduct between … the date on which the Agreement was signed by the Contracting Parties – and the date of its entry into force.[131]

In an interesting passage, the tribunal sought to ascertain what sort of conduct would reach the threshold of defeating the object and purpose of a treaty, reasoning as follows:

> Writings of publicists point out that Article 18 [VCLT] … does not only refer to the intentional acts of States but also to conduct which falls within its provisions, which need not be intentional or manifestly damaging or fraudulent to go against the principle of good faith, but merely negligent or in disregard of the provisions of a treaty or of its underlying principles, or contradictory or unreasonable in light of such provisions or principles.[132]

The tribunal referred to one publicist only.[133] It is doubtful whether the tribunal engaged in an entirely accurate analysis of Article 18 VCLT. Article 18 may indeed prohibit fraudulent and negligent actions which are intended to defeat the object and purpose of a pending treaty. At the same time, it is imperative to bear in mind that by incorporating the word 'defeat', Article 18 sets a very high threshold.[134] The provision does not refer to an obligation to comply with or act consistent with the provisions of a pending treaty, or even the object and purpose of individual treaty provisions,[135] but

131. *Tecmed* (n. 55) para. 70.
132. *Ibid.*, para. 71.
133. *See* footnote 42 of the judgment, referring to A Remiro Brotons, Derecho Internacional Publico, 2 Derecho de los Tratados (Tecnos, Madrid, 1987).
134. Palchetti (n. 111) 29.
135. Klabbers (n. 111); Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Bowman and Kritsiotis (n. 111) 313. Cf. Dörr (n. 111) 256; Villiger (n. 113) 248-49.

prohibits conduct which defeats the very *raison d'etre* of the treaty. Accordingly, it is not coincidental that the tribunal's reasoning insofar as Article 18 is concerned has been subjected to substantive criticism.[136]

In contrast to *Tecmed*, the tribunal in *MCI Power* adopted a more restrictive reading of Article 18. The claimant's argument that Ecuador had defeated the object and purpose of the Ecuador-US BIT when it interfered with MCI Power's power plants pending the entry into force of the BIT was rejected by the tribunal, which nevertheless pointed out that Article 18 VCLT is an application of the principle of good faith and does not amount to the retroactive application of a treaty's clauses.[137]

[2] Provisional Application

As mentioned above, a State can incur rights and obligations under a treaty which is not yet in force if that State applies the treaty on a provisional basis. This is often opted for when there is a need to close the gap in the time period between the conclusion and entry into force of the treaty, for instance in relation to treaties involving sensitive and/or political matters. The issue of provisional application and the date of termination of the provisional application of a treaty arose in the much-discussed *Yukos* arbitration, related to the provisional application of the ECT. The ECT was applied provisionally by Russia on the basis of Article 45 ECT and Article 25 VCLT. The ECT included a 'sunset' clause providing for the applicability of treaty guarantees in favour of covered investors for a period of twenty years following the effective date of termination of the treaty. On 20 August 2009, Russia issued an official notification to the treaty depositary that it did not intend to become a Party to the ECT. In accordance with Article 45(3) ECT, Russia thus terminated its provisional application of the treaty. Article 45(3) stipulates that '[t]ermination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depositary'.

The issue that arose was whether the twenty-year protection clause was applicable in relation to Russia, notwithstanding the fact that Russia had never ratified the ECT, but merely applied the treaty on a provisional basis, i.e., the issue was whether a clause on the termination of a treaty could be applied by analogy to the termination of the provisional application. In the *Yukos* Interim Award on Jurisdiction and Admissibility of 30 November 2009, the tribunal answered this question in the affirmative. Since Russia's notification of termination became effective on 19 October 2009, the tribunal concluded that any energy-related investment made in Russia before

136. Jack Coe and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

137. *MCI Power* (n. 45) para. 114. *See* generally US-Ecuador BIT 1993/1997 (since terminated).

19 October 2009 would continue to be protected for another twenty years.[138] Following this Award, the Russian Federation initiated proceedings before the District Court in The Hague seeking to set aside the interim awards on jurisdiction of 2009, as the final arbitral awards on the merits of 2014,[139] on grounds, *inter alia*, that the arbitral tribunal did not comply with its mandate, was constituted irregularly, and there was no valid arbitration agreement. On 20 April 2016, the District Court in The Hague annulled the awards rendered against Russia in excess of USD 50 billion in July 2014.[140] On 18 February 2020, the Court of Appeal reversed this decision,[141] and on 15 May 2020, the Russian Federation submitted an appeal to the Dutch Supreme Court.[142] At the time of writing, the matter is still unresolved, and it remains to be seen what investment protection obligations were incumbent on Russia by virtue of its provisional application of the ECT.

In *Ioannis Kardassopoulos v. Georgia*,[143] a Greek investor argued that Georgia had expropriated a pipeline construction concession and failed to reimburse him for the loss of his investment. Both Greece and Georgia signed the ECT on 17 December 1994 and applied the treaty on a provisional basis. The measures complained of took place between 1995 and 1997. Georgia argued that the provisional application of the ECT was merely 'aspirational' and that it accordingly had no *legal* obligation to refrain from expropriation as the ECT was applied on a mere provisional basis but was not yet in force. Georgia relied on Article 1(6) ECT, which stipulates that the ECT only applies to matters affecting investments after the treaty enters into force. However, the tribunal disagreed with this argument and stated that Article 45(1) ECT obliged both States to apply the whole treaty as if it had entered into force on 17 December 1994, the date of their respective signatures. With regard to the conflict between Articles 1(6) and 45 ECT, the tribunal stated that:

> [a]n inevitable consequence of a provisional application clause in a complex treaty is that some of the treaty's language, which will have been drafted with the intention of providing for the permanent situation which would exist upon and after the treaty's definitive entry into force, may not fit precisely with the situation created by its provisional application.[144]

Moreover, the tribunal stated that so 'long as the intention of the negotiating States clearly shows that they intended the treaty to be provisionally applied, it cannot

138. *See Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility.
139. *See also Yukos Universal Ltd (Isle of Man) v. Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014) para. 1888(f)-(h).
140. *The Russian Federation v. Veteran Petroleum Limited and Yukos Universal Limited*, Case Nos C/09/477160 / HA ZA 15-1 and C/09/477162 / HA ZA 15-2, Judgment of 20 April 2016.
141. *The Russian Federation v. Veteran Petroleum Limited and Yukos Universal Limited*, Case Nos C/09/477160 / HA ZA 15-1; C/09/477162 / HA ZA 15-2 en C/09/481619 / HA ZA 15-112, Judgment of 18 February 2020.
142. *See, e.g.*, https://www.yukoscase.com/news/in-the-news/russian-federation-submits-appeal-dutch-supreme-court/ (last accessed 21 January 2021).
143. For an overview of the case, *see* Danae Azzaria, Provisional Application of Treaties' in Duncan Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2020) 240.
144. *Kardassopoulos v. Georgia* (n. 50) para. 220.

be accepted that that clear intention could be undermined by an insistence on applying the terms of the treaty in their strictly literal form'.[145]

§12.04 TEMPORAL ISSUES PERTAINING TO TERMINATION OF TREATIES

[A] Consequences of Termination in International Law

Just as a State cannot breach an obligation of a treaty that is not yet in force, a State cannot breach an obligation in a treaty through an action that occurs after the treaty is no longer in force. Article 70 VCLT provides that unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the provisions of the VCLT releases the parties from any obligation further to perform the treaty, and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. The Commentary to Article 13 ARSIWA also confirms that 'once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law'.[146]

[B] Consequences of Termination in International Investment Arbitration

The question as to the consequences of termination has arisen in investment arbitration principally in relation to the applicability of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) to States after their withdrawal as ICSID parties.[147] Article 71 of the ICSID Convention provides that '[a]ny Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice'. Furthermore, Article 72 makes clear that:

> [n]otice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

However, the ICSID Convention does not define the conditions for terminating consent. This has raised certain questions, including whether a claim can be initiated after the treaty has been terminated with respect to that State. This debate was not least

145. *Ibid.* para. 221.
146. Crawford (n. 7) 133.
147. For an overview, *see* Tania Voon and Andrew D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31(2) ICSID Review 413.

relevant when Bolivia, Ecuador and Venezuela, in 2007, 2009 and 2012 respectively, withdrew from the ICSID Convention,[148] and tribunals have since disagreed on the scope and effect of Articles 71 and 72 of the ICSID Convention.

For instance, in *Venoklim v. Venezuela*, the tribunal found that during the six-month period after denunciation, Venezuela was in fact still a Contracting State to the ICSID Convention. As such, its consent to arbitration subsisted was still in existence during the six-month period, and this consent was capable of being accepted and acted upon by an investor who wished to bring a claim for breach.[149] This was confirmed in the *Blue Bank v. Venezuela* dispute.[150] In contrast, however, the tribunal in *Fabrica de Vidrios v. Venezuela* took a different approach. In this case, the tribunal considered 'consent' under Article 72 of the ICSID Convention to entail consent that was already perfected. As such, a State which had notified the treaty depositary of its withdrawal from the treaty could not be viewed, during the six-month termination period, to still have consented to arbitration, and as soon as the notification of withdrawal had been deposited, an investor could no longer act upon consent previously given.[151]

This inconsistency in case law raises uncertainty as to the legal effects of Articles 71 and 72 of the ICSID Convention respectively. It is yet to be determined whether consent to jurisdiction would remain effective and valid even after the lapse of the six-month termination period, but if a tribunal would answer this question in the affirmative, this would ultimately result in a scenario where ICSID arbitration is available until the termination of the treaty.[152]

§12.05 CONCLUSION

The temporal application of treaties has proven to be a complex undertaking, and international investment tribunals have frequently faced disputes involving intricate questions of temporality and the expression *ratione temporis*. This chapter has examined three different elements of temporality and assessed the singularities of international investment arbitration vis-à-vis general international law in this regard.

With respect to the entry into force and the non-retroactivity of the treaty, international investment tribunals have repeatedly endorsed the principle provided for by Article 28 VCLT and Article 13 ARSIWA and confirmed that unless a different intention appears from the treaty or is otherwise established, the provisions of an investment treaty cannot bind a party in relation to any act or fact which took place or

148. *See, e.g.*, Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010).
149. *Venoklim Holding BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, 3 April 2015, para. 63.
150. *Blue Bank International & Trust Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, para. 119.
151. *Fabrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award (13 November 2017), paras 250-306.
152. Arbitrator Christer Soderlund advanced this opinion in *Blue Bank* (n. 150), *see* Separate opinion of Christer Soderlund, para. 45.

any situation which ceased to exist before the date of the entry into force of the investment treaty.[153] Where an investment treaty limits consent to arbitration to disputes arising after the treaty's entry into force – which is often the case – some investment tribunals have taken a fairly restrictive approach by clarifying that a provision which explicitly excluded disputes which arose prior to the entry into force of the treaty did not, even implicitly, confer jurisdiction of the tribunal over other disputes arising after the treaty entered into force.[154] Furthermore, international investment tribunals have taken into account acts occurring before the entry into force of the treaty in order to clarify and understand the background, causes, and scope of violations of the relevant treaty once in force,[155] to provide a factual basis for breaches occurring through later conduct,[156] and to provide context to actions occurring subsequent to entry into force.[157] These means of assessing acts or conduct that took place prior to the entry into force of the investment treaty are fully compatible with the standpoint of the ILC.[158]

The most controversial issue with respect to the non-retroactivity of investment treaties perhaps arises when tribunals have sought to identify the real cause and source of origin of a dispute. In *Luchetti*, the tribunal found that the facts that gave rise to the earlier dispute continued to be central to the later dispute, and accordingly rejected the claim as the real dispute arose before the BIT entered into force.[159] A more lenient approach is perhaps evident in the case law of the ICJ, when, for instance, in *Certain Properties*, the ICJ found that certain decisions by German judicial institutions in the 1990s were 'inextricably linked' to the interpretation of the Settlement Convention with regard to Germany in 1954 and the Czechoslovakia Benes Decrees of 1945, which were considered to be the 'real cause' of the dispute.[160]

Regarding the obligations incumbent on States pending the entry into force of a BIT, and more specifically the interim obligation, Article 18 VCLT has, in similarity with international law in general, not been extensively relied upon in international investment arbitration. In cases where the provision has been invoked, tribunals have opted for two different approaches; an extensive reading of Article 18,[161] and a narrow, more accurate, reading of Article 18.[162] The narrower understanding of Article 18 in *MCI Power* is doubtlessly favourable to the reasoning in *Tecmed* as the latter effectively lowers the threshold of Article 18 to a level which was not anticipated by its drafters. The provisional application of treaties has also troubled some international investment tribunals, not least in the context of the ECT. In *Yukos*, the tribunal concluded that a

153. *Feldman* (n. 48) para. 62; *Mondev* (n. 49) para. 68; *Salini* (n. 8) para. 177; *Kardassopoulos* (n. 50) para. 254.
154. *Pey Casado* (n. 54) para. 579. *See also Tecmed* (n. 55) para. 53; *SGS Société Générale* (n. 42) para. 166.
155. Emphasised by the Tribunal in *MCI Power* (n. 45) para. 93.
156. *Mondev* (n. 49).
157. *Pey Casado* (n. 54) para. 611.
158. Crawford (n. 7) 144.
159. *Lucchetti* (n. 84) para. 59.
160. *Certain Property* (n. 40) para. 51.
161. *Tecmed* (n. 55) para. 71.
162. *MCI Power* (n. 45) para. 114.

clause on the termination of a treaty could be applied by analogy to the termination of the provisional application.[163] Arbitral tribunals have also confirmed the legally binding nature of a provisionally applied treaty, notwithstanding the fact that the treaty in question included a specific clause stipulating that it only applies to matters affecting investments after the treaty enters into force.[164] As outlined above, a treaty which is applied on a provisional basis is not yet in force, but the tribunal justified its conclusion by emphasising that as 'long as the intention of the negotiating States clearly shows that they intended the treaty to be provisionally applied, it cannot be accepted that that clear intention could be undermined by an insistence on applying the terms of the treaty in their strictly literal form'.[165]

Another issue evident in the case law of international investment tribunals is an inconsistent understanding of temporal aspects relating to the termination of treaties, and in particular, the scope and effect of Articles 71 and 72 of the ICSID Convention. In accordance with the law of treaties, the termination of a treaty releases the parties from any obligation further to perform the treaty and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[166] As established above, Article 72 of the ICSID Convention makes clear that a withdrawal notice does not affect the rights or obligations under the Convention arising out of consent to the jurisdiction of ICSID given by one of them before such notice was received by the depositary. One tribunal has found that during the six-month period after denunciation, a State was in fact still a Contracting State, whose consent to arbitration subsisted was still in existence during the six-month period, and this consent was capable of being accepted and acted upon by an investor who wished to bring a claim for breach.[167] Another tribunal considered 'consent' under Article 72 to entail consent that was already perfected. As such, a State which had notified the treaty depositary of its withdrawal from the treaty could not be viewed, during the six-month termination period, to still have consented to arbitration.[168]

These issues are, to reiterate, delicate and complicated, and until international investment tribunals develop clear and consistent case law, the temporal scope of investment treaties remains somewhat uncertain. At the same time, it should also be borne in mind that in the context of the temporal scope of investment treaties, the solutions offered by many international investment tribunals have demonstrated due regard for the principles laid down in the VCLT and ARSIWA and are in many aspects compatible with rules of customary international law. Although many points of departure still remain, this attitude serves as a good starting point in the endeavour to further develop the cohesiveness of international investment law with public international law. In order to avoid a fragmented system of international law, international investment law may also go further in recognising the complementary and mutually

163. *See Yukos* (n. 138).
164. *Kardassopoulos* (n. 50) para. 220.
165. *Ibid.* para. 221.
166. Article 70 VCLT.
167. *Venoklim Holding* (n. 149) para. 63.
168. *Fabrica de Vidrios Los Andes* (n. 151) paras 250-306.

corresponding relationship between different sub-categories of international law. As such, it is important that international investment law, although possessing some unique characteristics peculiar to its own sub-branch, is not developed in isolation but is rather perceived as forming part of a broader legal regime of public international law. To this end, it is equally important that international investment tribunals are mindful of this mutually corresponding relationship between different sub-categories of international law and continue to pursue coherent approaches to questions of international investment law.