

The Scope of Investor-State Dispute Settlement in International Investment Agreements

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Abstract

International investment agreements contain a number of different investor-state dispute settlement clauses ranging from offering a very limited jurisdiction over specific compensation issues to broad options to arbitrate any (contractual or treaty based) investment dispute. Investment arbitration practice has demonstrated that uncertainty about the precise scope of dispute settlement clauses often leads to protracted jurisdictional battles. Reducing this uncertainty by drafting clearer dispute settlement clauses is likely to deter investors from bringing hopeless claims, and states from raising indefensible jurisdictional objections. A limited set of jurisdictional and procedural obstacles should allow tribunals to deal with the real (substantive) issues of investment law, ie whether and to what extent the standards of investment protection enshrined in bilateral investment treaties (BITs) and investment chapters of international investment agreements (IIAs) have been complied with or not. This would also serve the primary purpose of investment arbitration as protection of foreign investments.

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I. Introduction

With the advent of treaty arbitration, dispute settlement clauses in international investment agreements (IIAs) have become a crucial aspect of the protection afforded by such treaties. While initially the substantive standards of treatment (fair and equitable treatment, full protection and security, the non-discrimination standards of national treatment and most favoured nation treatment, as well as guarantees against uncompensated expropriation)¹ formed the main focus of investment protection in bilateral investment treaties (BITs), the surge of investment arbitration during the last two decades has demonstrated the crucial importance of effective tools of enforcing the above-mentioned standards.²

Currently, however, the successful system of direct or mixed arbitration between foreign investors and host states – investor/state dispute settlement (ISDS) – has come under increased pressure, being criticised as too investor-friendly and having a chilling effect on domestic regulation.³ Thus, some states have started to exit the system by denouncing the *ICSID Convention* (*Convention*

¹ See eg R Dolzer, Ch Schreuer, *Principles of International Investment Law* (2nd edition, 2012); A Newcombe, L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009); A Reinisch (ed), *Standards of Investment Protection* (2008).

² See eg *Eastern Sugar BV v Czech Republic*, SCC Case No 088/2004, Partial Award, 27 March 2007, para 165: 'Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state'.

³ The system of mixed arbitration 'taints the integrity of the legal system by contracting out the judicial function in public law'; see G van Harten, *Investment Treaty Arbitration and Public Law* 4 (2007).

on the Settlement of Investment Disputes between States and Nationals of Other States) and/or by abrogating BITs.⁴ However, such extreme responses were not followed by many states. Rather, contradictory reactions may be discerned. Thus, in a remarkable reversal of traditional attitudes, a number of OECD countries, like the United States (US) or Australia, are limiting or even outright banning access to direct investor-state arbitration,⁵ the European Union (EU)

⁴ In 2007, the Republic of Bolivia was the first state to denounce the *ICSID Convention*, which '[seemed] to constitute a new expression of hostility towards international arbitration', see E Gaillard, 'The Denunciation of the ICSID Convention' (2007) 237(122) *New York Law Journal*; Bolivia's withdrawal from the *ICSID Convention* was followed by the Republic of Ecuador in 2009 and, most recently, by the Bolivarian Republic of Venezuela in January 2012. The *ICSID Convention* regulates the withdrawal of states Parties in arts 71 and 72. See also Ch Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in M Waibel, A Kaushal, K-H Chung, C Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010), p 353-368; O M Garibaldi, 'On the Denunciation of the ICSID Convention' in Ch Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century* (2009), p 251; K Rastegar, 'Denouncing ICSID' in Ch Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century* (2009), p 278; A Escobar, 'Bolivia Exposes "Critical Date" Ambiguity' (2007) 2(3) *Global Arbitration Review*; S Manciaux, 'Bolivia's Withdrawal from ICSID', (2007) 5 *Transnational Dispute Management*; Ch Tietje, K Nowrot, C Wackernagel, *Once and forever? The Legal Effects of a Denunciation of ICSID* (2008).

⁵ See eg the Australia-US FTA (2005) which totally abolishes investor-state arbitration. While this has been a feature in North-North BITs, the Australian government has announced that it would generally abstain from including ISDS provisions in future BITs. See Australian Government, Department of Foreign Affairs & Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* 14 (12 April 2011); available at: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html>. See also L Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' (2011) 8(5) *Transnational Dispute Management*; L E Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 *Journal of World Trade* 83; W S Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflection on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law*.

demonstrated some uncertainty about how it should approach investment arbitration,⁶ while many Asian countries, among them in particular China, have

⁶ After the ‘take-over’ of an external investment power by the EU, there was some discussion whether the EU would maintain ISDS clauses in future EU BITs. Even though the Parliament stressed the importance of investor-state arbitration in para 32 of its Resolution of 6 April 2011 on the future European International Investment Policy (2010/2203(INI)), critics of such a system were given consideration in para 24 of that resolution: ‘Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements’. It is also interesting to note that the European Parliament considered in a separate resolution on the EU-Canada free trade negotiations, adopted on 8 June, ‘... that, given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes’ (para 12). Despite these considerations, it seems to be the policy to have a robust effective ISDS in such BITs, or investment chapters of FTAs, yet to be concluded. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a Comprehensive European International Investment Policy*, COM (2010) 343 final (7 July 2010), p 9-10; Council, *Conclusions on a Comprehensive European International Investment Policy*, 3041st Foreign Affairs Council Meeting, 25 October 2010, para 18; available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf; see also M Burgstaller, ‘Investor-State Arbitration in EU International Investment Agreements with Third States’ (2012) 39 *Legal Issues of Economic Integration* 207; M Parish, ‘International Courts and the European Legal Order’ (2012) 23 *EJIL* 141; N Lavranos, *Is an International Investor-to-State System under the Auspices of the ECJ Possible?* (SSRN, 16 December 2011); available at: <http://ssrn.com/abstract=1973491>; A Dimopoulos, ‘The Compatibility of Future EU Investment Agreements with EU Law’ (2012) 39 *Legal Issues of Economic Integration* 447; S Schill, ‘Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements’ in M Bungenberg, A Reinisch and Ch Tietje (eds), *EU and Investment Agreements – Open Questions and Remaining Challenges* (2013), p 37.

broken with their habitual, reserved position vis-à-vis mixed arbitration and included broad arbitration clauses in their BITs and other IIAs.⁷

These different attitudes towards investor-state arbitration are reflected in different types of dispute settlement clauses contained in IIAs. Since IIAs, BITs, as well as multilateral agreements are regularly the outcome of negotiations governed by past experiences, substantive compromises or unilateral bargaining power, it is often difficult to assess the underlying intentions of the parties. Further, the formulations governing dispute settlement finally agreed upon in IIAs often range from being merely imprecise, ambiguous and infelicitous to, at worst, nonsensical.

This contribution provides an overview of the different jurisdiction limiting and expanding elements of investment dispute settlement clauses in IIAs⁸ and assesses the policy reasons behind giving preference to one over the other element. It will briefly sketch how the uncertainty contained in many of these provisions has given rise to conflicting interpretations. It is clear that the uncertainty about the scope of investor-state arbitration has become a systemic problem that creates unnecessary cost. By seeking to identify the underlying purpose of ISDS, this article will attempt to make some recommendations regarding the formulation of ISDS clauses in order to achieve preferred outcomes.

⁷ See J Xiao, 'Chinese BITs in the Twenty-first Century: Protecting Chinese Investments' in J Chaisse and Ph Gugler (eds), *Expansion of Trade and FFDI in Asia* (2009) 122; W Shan, N Gallagher, S Zhang, *Bilateral Investment Treaty Overview – China*, Investment Claims Online, IC-OV 6 CN (2008); N Gallagher, W Shan, *Chinese Investment Treaties – Policies and Practice* (2009) 313 et seq; A Chen, *New Developments in International Investment Law and New Practice of Bilateral Investment Treaties in China* (2007); S Schill, 'Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China' (2007) 15 *Cardozo Journal of International and Comparative Law* 73; Q Kong, 'Bilateral Investment Treaties: The Chinese Approach and Practice' (1998-1999) 8 *Asian Yearbook of International Law* 105; P J Turner and M Mangan, 'China's Investment Treaties: Substantive and Procedural Rights' (*Asian Counsel*, (May 22, 2007); L E Peterson, 'Interpreting Narrowly Worded Arbitration Clauses in Soviet-era and Chinese BITs' (*Investment Treaty News*, Jan 17, 2008); G Smith, 'Chinese Bilateral Investment Treaties: Restrictions on International Arbitration' (2010) 78 *The International Journal of Arbitration, Mediation and Dispute Management* 58.

⁸ See A Parra and I Shihata, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Treaties on Investment' (1997) 12 *ICSID Rev-FILJ* 287; L Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen* (2010); M Dimsey, *The Resolution of International Investment Disputes: Challenges and Resolutions* (2008), p 16; with regard to the development of dispute settlement clauses in investment agreements, see in general R Dolzer, Ch Schreuer, *Principles of International Investment Law* (2nd edition, 2012), p 232 et seq; K Vandevelde, *Bilateral Investment Treaties: History, Policy, Interpretation* (2010), p 433; P Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *Netherlands Year Book of International Law* 91, 119, 129.

II. Types of Dispute Settlement Clauses in IIAs

The settlement of investment dispute can take many forms. As a result of its hybrid character, displaying both public international law and commercial arbitrations traits,⁹ investment dispute settlement is not limited to the business-oriented straightforward tradition of providing for arbitration clauses. Rather, it appears to be strongly influenced by international forms of dispute settlement as expressed in art 33 UN Charter, calling for a range of options available for peaceful dispute settlement from negotiation to binding adjudication without requiring any party to submit to any specific form of dispute settlement.¹⁰ However, contrary to the optional nature of the choices in art 33 UN Charter,¹¹ IIA dispute settlement clauses typically contain a graduated procedure according to which the parties proceed from voluntary consultations/negotiations to binding arbitration.¹² One of the specific features of investment treaty arbitration is the fact that the states parties to the IIA have given their advance consent to arbitrate investment disputes with private parties and that such offer may be accepted by the latter through the institution of arbitral proceedings.¹³

While this advance acceptance of the jurisdiction of arbitration is an important feature of investment dispute settlement, it is not always done in a comprehensive way. In fact, the contracting states of IIAs have sought to limit their acceptance of binding dispute settlement in various ways. The following is intended to give a brief, non-exhaustive overview of the most widely used types.

⁹ See Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYBIL 151. See also C Knahr, C Koller, W Rechberger, A Reinisch (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (2010).

¹⁰ Article 33(1) UN Charter: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.

¹¹ Ch Tomuschat, art 33 in B. Simma (ed), *The Charter of the United Nations: A Commentary* (2002), p 583-593.

¹² See eg art IX (1) of the 1992 Norway-Lithuania BIT: 'Any dispute which may arise ... in connection with an investment ... shall be subject to negotiations between the Parties in dispute'; see also art VII of the US-Argentina BIT (1994), or art 12 of the Austria-Macedonia BIT (2002) which both require the parties to attempt for an amicable settlement within a certain period of time before the claimant may institute proceedings. Nonetheless, the reaction of tribunals to such provisions has not been uniform so far; see R Dolzer, Ch Schreuer, *Principles of International Investment Law* (2nd edition, 2012), p 269; R Dolzer, M Stevens, *Bilateral Investment Treaties* (1995), p 121.

¹³ See J Paulsson, 'Arbitration without Privity' (1986) *ICSID Review – Foreign Investment Law Journal* 232; Ch Schreuer, 'Consent to Arbitration' in P Muchlinski, F Ortino, Ch. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p 843.

A. Limitation to treaty claims

Some IIAs contain dispute settlement clauses referring to ‘any dispute relating to an investment’.¹⁴ Such a broad subject matter definition has been regarded as including so-called contract claims, ie claims that arise from the contractual relations between an investor and a host state.¹⁵ However, states often opt for a more restrictive approach subjecting only disputes arising under the IIA itself or concerning the breach of IIA standards to the jurisdiction of an arbitral tribunal.¹⁶ This would imply that only so-called treaty claims can be brought before an investment tribunal.¹⁷ A variation of dispute settlement clauses limited to treaty claims, explicitly referring to ‘obligations of host states’,¹⁸ has recently been interpreted as excluding counterclaims before an ICSID tribunal.¹⁹

¹⁴ See eg art 9(1) of the Austrian 2008 Model BIT: ‘Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.’; Australia-Indonesia BIT (1992), art XI: ~~‘Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party’~~; Austria-Chile BIT (1997) art 2 (4): ‘In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations’.

¹⁵ On the ‘analytical distinction’ between treaty and contract claims see *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 262. See also Y Shany, ‘Contract Claims vs Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims’ (2005) 99 *AJIL* 835.

¹⁶ See eg art 1121 NAFTA; By contrast, art 10 (1) ECT contains a much broader subject matter definition: ‘Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party’.

¹⁷ See eg *Joy Mining Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Decision on Jurisdiction of 6 August 2004, para 82: ‘... the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company’s contract rights’.

¹⁸ Article 9 Greece-Romania BIT: ‘Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way ...’ (emphasis added)

¹⁹ *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, para 869.

B. Temporal limitations

Most IIAs require that the parties to an investment dispute first seek to settle their dispute amicably. Typically, this requirement is expressed in the form of an obligation to engage in consultations, negotiations or other forms of amicable dispute settlement for a certain period of time.²⁰ Only after the lapse of such a waiting period, investors are permitted to institute investment arbitration.²¹ Some IIA dispute settlement clauses require a notice of intent before a dispute may be submitted to international arbitration.²² This in effect often also means that a dispute can only be arbitrated after a certain waiting period.

C. Obligations to litigate before domestic courts

Another technique used by states to limit the availability of investor-state arbitration lies in different forms of requiring investors to use the internal legal remedies available in the host state.²³ The most extreme form of a *Calvo Doctrine*²⁴-inspired preference for domestic remedies would deny a foreign investor access to international arbitration at all,²⁵ since they should not gain any more favourable position than domestic investors. However, that is rarely found in IIAs²⁶ and, in fact, such total absence of investor-state arbitration would hardly merit being called an ISDS provision.

²⁰ See (note 12 above).

²¹ See Ch Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella. Clauses and Forks in the Road' (2004) 5 *The Journal of World Investment and Trade* 231; Ch Schreuer, 'Consent to Arbitration' in P Muchlinski, F Ortino, Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p 830-867, 846.

²² See eg art 1119 NAFTA.

²³ Ch Schreuer 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *The Law and Practice of International Courts and Tribunals* 1.

²⁴ The *Calvo Doctrine* dates back to the 19th century and was set forth by the Argentinean Carlos Calvo, who developed this concept in his book *Teórico y Práctico de Europa y América* (1868). Under this regime, foreigners conducting business in a foreign country shall be treated exactly the same way as nationals of that country. In the context of investment claims, this means that foreigners are restricted to domestic courts. See D R Shea, *The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy* (1955).

²⁵ See (note 5 above).

²⁶ The majority of modern BITs contain obligations for non-discrimination, ie national treatment, according to which foreign investors may not be treated less favourable than nationals of the host state. See eg art 3(1) US Model BIT 2004; art 1102(2) NAFTA; see also A Bjorklund, 'National Treatment' in A Reinisch (ed), *Standards of Investment Protection* (2008), pp 29-58.

Typically, a preference for domestic courts is expressed in requirements to use domestic courts. Some IIAs require the exhaustion of local remedies²⁷ – which may take quite considerable time. Others allow for the dispute to be submitted to international arbitration only if the investor has submitted it first to the national courts for a certain period of time and the dispute has not been resolved.²⁸ Thus, they combine waiting periods with the obligation to litigate in a domestic forum.

D. Fork-in-the-road clauses

Yet another type of dispute settlement clauses combines the obligation to pursue domestic remedies with implications for the availability of investment arbitration in often complex ways. So-called fork-in-the-road clauses typically provide that a choice to submit an investment dispute to one of the alternatives, provided

²⁷ Supra (note 23 above), p 3; U Kriebaum ‘Local Remedies and Standards for Protection’ in Ch Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century* (2009), p 417. See also art 26 of the *ICSID Convention*: ‘A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention’.

²⁸ See eg art 10 Argentina-Germany BIT, which provides that the dispute may be submitted to an international arbitration tribunal ‘if no decision on the merits of the claim has been rendered after the expiration of a period of eighteen months from the date in which the court proceedings ... have been initiated, ...’. Generally, the time period foreseen in various treaties for the attempt to settle the dispute before domestic courts varies from three months (eg the Egypt-United Kingdom BIT, art 8(1)) to two years (eg the France-Morocco BIT, art 10).

²⁹ See eg art 8 Argentina-France BIT 1991: ‘1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned. 2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the investor, be submitted: – Either to the domestic courts of the Contracting Party involved in the dispute; – Or to international arbitration under the conditions described in paragraph 3 below. Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final’. See also Ch Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 *JWIT* 231; Z Douglas, *The International Law of Investment Claims* (2009), p 152; Ch Liebscher, ‘Monitoring Domestic Courts in BIT Arbitrations’ in Ch Binder, U Kriebaum, A Reinisch, S Wittich (eds), *International Investment Law for the 21st Century* (2009), p 108; J J Van Haersolte-Van Ho, A K Hoffmann, ‘The Relationship Between International Tribunals and Domestic Courts’ in P Muchlinski, F Ortino, Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), p 998; R Dolzer, C Schreuer, *Principles of International Investment Law* (2nd edition, 2012), p 267; Ch Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: A Commentary* (2nd edition, 2009), p 365.

in a treaty, will be a final.²⁹ Thus, investors should effectively choose whether they use domestic courts or international arbitration. However, such clauses have raised particularly difficult interpretation questions since it is often unclear whether the disputes litigated in the domestic courts are identical with the disputes brought before investment tribunals.³⁰ Where claims before a domestic court are considered co-extensive with a dispute under the BIT, the fork-in-the-road clause may be considered to have been triggered, leading to the rejection of investment arbitration.³¹

E. Subject-matter limitations

Some IIAs carve out certain areas from their scope of application, including dispute settlement. Most frequently, such subject-matter limitations concern tax issues.³²

More extreme forms of substantive limitations of what may be arbitrated can be found in restricting international arbitration to certain kinds of disputes. The most typical narrow dispute settlement clauses cover only disputes over

³⁰ See (note 53 below).

³¹ See the *obiter dictum* in *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v Argentine Republic*, Decision on Annulment, ICSID Case No ARB/97/3, 3 July 2002, para 55: 'In the Committee's view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán, would prima facie fall within Article 8 (2) and constitute a "final" choice of forum and jurisdiction, if that claim was co-extensive with a dispute relating to investments made under the BIT'. See also Ch Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered' in T J Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), p 281.

³² See eg art X US/Ecuador BIT: '1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI(1)(a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time'. This implies that only in narrow situations tax disputes may fall under the jurisdiction of an investment tribunal. See also the interpretation of this clause in the *Occidental case* (note 59 below).

³³ See the overview in A Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2 *Journal of International Dispute Settlement* 1-60.

the amount and method of compensation in case of expropriation.³³ For a long time, the Soviet Union³⁴ and many former communist states in Eastern Europe, and also China,³⁵ adopted such dispute settlement clauses.³⁶ They suggest that disputes about the actual occurrence of an expropriation (eg indirect expropriation) or about its legality may not be arbitrated but should be determined by the national courts of the host state.

Thus, in *Berschader v Russia*,³⁷ an investment tribunal set up according to the arbitration rules of the Stockholm Chamber of Commerce found that a dispute settlement clause referring to disputes ‘concerning the amount or mode of compensation’ had to be interpreted according to its ‘ordinary meaning’ which excluded arbitration of ‘disputes concerning whether or not an act of

³⁴ See eg art 7 Austria-USSR BIT (1990); Article 10 Belgium and Luxembourg-Czechoslovakia BIT (1989); Article 8 UK-USSR BIT (1989).

³⁵ See eg art 8 China-Peru BIT 1994 (1994): ‘1. Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. 2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment. 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington D.C., on March 18, 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the disputes so agree. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article’. This provision was applicable in *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

³⁶ See N Gallagher, W Shan, *Chinese Investment Treaties. Policies and Practice* 313 (2009); S Schill, ‘Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China’ (2007) 15 *Cardozo Journal of International and Comparative Law* 73, 89 et seq; L E Peterson, ‘Interpreting Narrowly Worded Arbitration Clauses in Soviet-era and Chinese BITs’ (*Investment Treaty News*, Jan 17 2008); G Smith, ‘Chinese Bilateral Investment Treaties: Restrictions on International Arbitration’ (2010) 78 *The International Journal of Arbitration, Mediation and Dispute Management* 58.

³⁷ *Vladimir and Moise Berschader v The Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006.

³⁸ *Berschader v Russia*, para 153.

expropriation actually occurred'.³⁸ Similarly, the tribunals in *Austrian Airlines AG v Slovakia*³⁹ and in the *RosInvest* case⁴⁰ concluded that an almost identical clause 'does not include jurisdiction over the questions whether an expropriation occurred and was legal'.⁴¹

III. Attempts to Overcome Limited Dispute Settlement Clauses

Limitations of the availability of ISDS are usually closely observed by investment tribunals. They generally view the jurisdictional provisions of IIAs as express stipulations of host states that cannot be widely interpreted and follow mostly a strict literal interpretation.

However, there are a number of techniques adopted by investment tribunals to overcome such limitations of their adjudicatory powers. This had led to a situation where it is often difficult to anticipate whether a tribunal will uphold or decline jurisdiction in a particular case.

A. Reliance on umbrella clauses

Dispute settlement clauses limited to the adjudication of treaty claims appear to exclude the possibility to have other disputes, especially so-called contract disputes being settled by investment tribunals. In practice, this limitation may be overcome through reliance on umbrella clauses.

However, this depends upon the interpretation given to umbrella cases, an

³⁹ *Austrian Airlines AG v The Slovak Republic*, UNCITRAL Final Award, 9 October 2009.

⁴⁰ *RosInvestCo UK Ltd v The Russian Federation*, Award on Jurisdiction 2007, SCC Case No Arb V079/2005. See also K Hobér, 'MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?' in Binder C, Kriebaum U, Reinisch A, Wittich S (eds), *International Investment Law for the 21st Century* (2009) 31.

⁴¹ *Ibid*, para 114.

⁴² Ch Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 *The Journal of World Investment and Trade* 231; A Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 *Arbitration International* 411; T Wälde, 'The "Umbrella" Clause on Investment Arbitration – A Comment on Original Intentions and Recent Cases' (2005) 6 *The Journal of World Investment and Trade* 183; S Alexandrov, 'Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v Pakistan* and *SGS v Philippines*' (2004) 5 *The Journal of World Investment and Trade* 555.

issue that is fraught with controversy,⁴² especially since an ICSID tribunal in *SGS v Pakistan*⁴³ rejected the view that ‘breaches of a contract ... concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international law’.⁴⁴ In *SGS v Philippines*, however, another tribunal adhered to the traditional view that an umbrella clause ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law’.⁴⁵

Since then, some tribunals such as *El Paso*,⁴⁶ *Pan American*,⁴⁷ or *Salini v Jordan*,⁴⁸ adhere to the restrictive approach taken by the *SGS v Pakistan* tribunal. A majority, however, appears to side with the *SGS v Philippines* approach. Most explicit in this regard was the final award in *Noble Ventures v Romania*,⁴⁹ where an ICSID tribunal concluded that a clause providing that ‘[e]ach Party shall observe any obligation it may have entered into with regard to investments’⁵⁰ was ‘[a]n umbrella clause [which] is usually seen as transforming municipal law obligations into obligations directly cognizable in international law’.⁵¹

Such an interpretation of the effect of an umbrella clause permits investors to raise contract violations as issues subject to treaty arbitration.⁵²

⁴³ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003.

⁴⁴ *SGS v Pakistan*, para 172.

⁴⁵ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction, 29 January 2004, para 128.

⁴⁶ *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006, para 85.

⁴⁷ *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No ARB/03/13, Decision on Jurisdiction, 27 July 2006, para 113.

⁴⁸ *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction of 15 November 2004.

⁴⁹ *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005.

⁵⁰ Article II(2)(c) Romania-US BIT.

⁵¹ *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, para 53.

⁵² See most recently, *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case No ARB/07/29, Award, 12 February 2012, para 91.

B. Taming fork-in-the-road provisions

Fork-in-the-road clauses can be deprived of their practical impact where investment tribunals qualify treaty claims as genuinely different from contract claims. Where they are willing to make the ‘analytical distinction’⁵³ between treaty claims and contract claims – as expressed in the *Impregilo* case – they may be willing to uphold a treaty claim even though it arises from the same facts because it is based on different legal grounds and thus constitutes a different dispute. A number of investment tribunals have upheld jurisdiction over treaty claims even though the underlying disputes concerned contracts with arbitration clauses.⁵⁴ On this logic, it is only a small step to permit a treaty claim, even where a fork-in-the-road clause is found in an IIA, as long as the investment tribunal only deals with the treaty claims and the causes of action are different.⁵⁵

⁵³ *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, para 262.

⁵⁴ See *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006, para 44: ‘Many other international arbitral tribunals have taken the position that a dispute resolution clause in an underlying contract whereby contractual disputes are within the exclusive jurisdiction of local courts or arbitrations does not preclude an investor who is a party to such contract from bringing an arbitration proceeding to enforce its rights under a bilateral investment treaty’; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006, para 133: ‘... the claims brought in this arbitration are separate and juridically distinct from the contract claims asserted before the Egyptian courts. As such, they are not covered by the contract dispute settlement clause’.

⁵⁵ In the *CMS v Argentina* case, an ICSID tribunal remarked by way of an *obiter dictum* that it would have exercised jurisdiction as long as the underlying cause of action of an investment treaty clause was different from the one before a domestic forum. *CMS Gas Transmission Company v Argentina*, ARB/01/8, Decision on Jurisdiction, 17 July 2003, para 80: ‘Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration. This Tribunal is persuaded that with even more reason this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so – which is not the case –, this would not result in triggering the “fork in the road” provision against CMS. Both the parties and the causes of action under separate instruments are different’. See also *MCI Power Group LC and New Turbine Inc v Ecuador*, Award, ICSID Case No ARB/03/6; *Toto Costruzioni Generali SpA v Lebanon*, Decision on Jurisdiction, ICSID Case No ARB/07/12; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, Third interim award on jurisdiction and admissibility, PCA Case No 2009-23.

C. Overcoming subject-matter limitations

As mentioned above a number of BITs exclude certain areas either from the scope of substantive protection or from dispute settlement. Tribunals have managed to reduce this limiting impact. For instance, in *Tza Yap Shum v Republic of Peru*⁵⁶ an ICSID tribunal reduced the exclusion of tax matters from ISDS⁵⁷ by qualifying taxation measures as violations of the BIT's expropriation standard.⁵⁸ In *Occidental v Ecuador*,⁵⁹ another investment tribunal managed to uphold jurisdiction over tax issues as long as they were considered to fall under a limited dispute settlement clause.⁶⁰

D. Broad interpretation of narrow dispute settlement clauses

As mentioned above, narrow dispute settlement clauses limiting the adjudicatory power of arbitral tribunals to the determination of the quantum of compensation will often be of little help to investors whose investments were affected by host state measures – the impact of which may amount to (indirect) expropriation since such determination appears to be excluded from the jurisdiction of investment tribunals. The 2009 ICSID decision on jurisdiction in *Tza Yap Shum v Republic of Peru*⁶¹ changed that; it broadly addressed the proper scope of narrow dispute settlement clauses. In the specific case, the China-

⁵⁶ *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Award, 7 July 2011.

⁵⁷ As a result of the narrow dispute settlement clause of the China/Peru BIT, *supra*, note 35, only disputes concerning expropriation could be heard by the tribunal.

⁵⁸ The tribunal found that interim measures imposed by the Peruvian authorities in the course of a tax audit constituted an indirect expropriation because of their significant interference with the investment. *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Award, 7 July 2011, paras 152-170.

⁵⁹ *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA No UN 3467, Award, 1 July 2004.

⁶⁰ *Ibid*, para 77: 'The Tribunal accordingly finds that, because of the relationship of the dispute with the observance and enforcement of the investment Contract involved in this case, it has jurisdiction to consider the dispute in connection with the merits insofar as a tax matter covered by Article X may be concerned, without prejudice to the fact that jurisdiction can also be affirmed on other grounds as respects Article X as explained above'. See for the text of this article, note 32 above.

⁶¹ *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009. See also L Petersen, *ICSID panel interprets narrow-looking jurisdictional clause so as to permit arbitration of dispute over alleged expropriation of Chinese-owned assets in Peru*, (*Investment Arbitration Reporter* Vol 2 No 11, 29 June 2009).

Peru BIT provided for ICSID arbitration of disputes ‘involving the amount of compensation for expropriation’.⁶² Claimant successfully argued that this also gave the tribunal competence to decide on the merits of his expropriation claim. First, the tribunal broadly reviewed the existing split opinions of investment tribunals on narrow dispute settlement clauses.⁶³ By reaching its conclusion,⁶⁴ the *Tza Yap Shum* tribunal effectively broadened the narrow confines of a dispute settlement clause which had become largely useless in a time where states do no longer (directly) expropriate and where a determination whether an (indirect) expropriation has taken place has become a central issue for investment tribunals.

E. MFN clauses

Where the interpretative room for manoeuvre is exhausted, the discovery of the potential reach of MFN clauses, routinely contained in BITs and other IIAs, has provided investment tribunals with another tool to overcome limited dispute settlement clauses.

However, after the ICSID tribunal in *Maffezini v Spain* first held in 2000 that an MFN clause may be relied upon in order to avoid a waiting period of 18 months in the basic BIT between Argentina and Spain,⁶⁵ tribunals have been split on the precise reach of MFN clauses beyond the importation of substantive

⁶² Article 8(3) China-Peru BIT.

⁶³ The tribunals in *Vladimir and Moise Berschader v The Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006; *RosInvestCo UK Ltd v The Russian Federation*, Award on Jurisdiction 2007, SCC Case No Arb V079/2005; and *Austrian Airlines AG v The Slovak Republic*, UNCITRAL Final Award, 9 October 2009, basically held that such clauses did not include jurisdiction over the questions whether an expropriation occurred and was legal. See text at note 37 above.

However, already in *European Media Ventures SA v Czech Republic*, UNCITRAL Award on Jurisdiction, 15 May 2007 (not public), the applicable clause referring to ‘disputes – concerning compensation’ was considered to cover ‘issues of entitlement as well as quantification’, as confirmed by the English High Court in *European Media Ventures SA v Czech Republic*, Judgement of the High Court of England and Wales, 5 December 2007, (2007) EWHC 2851 (Comm), paras 43, 44.

⁶⁴ *Tza Yap Shum v Peru*, para 188: ‘... to give meaning to all the elements of the article, it must be interpreted that the words “involving the amount of compensation for expropriation” includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any’.

⁶⁵ *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/17, Decision on Jurisdiction, 25 January 2000.

protection.⁶⁶ For some time, the rather inconsistent rulings of investment tribunals could be rationalised by two broad distinctions: MFN clauses appeared to be apt to help claimants overcome merely procedural obstacles, such as waiting periods, while they were generally not regarded as appropriate instruments to import jurisdiction where the basic treaty does not provide for investor-state arbitration. After the awards in *Wintershall v Argentina*⁶⁷ and in *RosInvest v Russia*,⁶⁸ however, this consensus also fell apart and tribunals now follow the entire range of possible outcomes, from denying any effect of MFN clauses beyond substantive protection to permitting the importation of all (substantive, procedural and jurisdictional) advantages of other BITs.

IV. Hurdles to Deciding on the Merits Created by Jurisprudence

In contrast to the jurisdiction expanding techniques used by tribunals to overcome limited ISDS provisions, a number of investment tribunals have also imposed limitations on their own jurisdiction by interpreting dispute settlement clauses or aspects contained therein in a restrictive fashion.

A. The nature of waiting periods

As already mentioned, waiting periods are a standard feature in many dispute settlement clauses of BITs and other IIAs.⁶⁹ Most investment tribunals

⁶⁶ See only A Reinisch, 'Maffezini v Spain Case' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2012) 973; Z Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97; S Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas' (2011) 2(2) *Journal of International Dispute Settlement* 353; J Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is There any Hope for a Consistent Approach?' (2011) 14(1) *Journal of International Economic Law* 157; E Gaillard, 'Establishing Jurisdiction Through a Most-Favoured-Nation Clause' (2005) 233 *New York Law Journal* 105; G Valentini, 'The Most Favoured Nations Clause as a Basis for Jurisdiction in Foreign Investor-Host State Arbitration' (2008) 24 *Arbitration International* 447.

⁶⁷ *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008.

⁶⁸ *RosInvestCo UK Ltd v The Russian Federation*, Award on Jurisdiction 2007, SCC Case No Arb V079/2005.

⁶⁹ See also Ch Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella. Clauses and Forks in the Road' (2004) 5 *The Journal of World Investment and Trade* 231; Ch Schreuer, 'Consent to Arbitration' in P Muchlinski, F Ortino, Ch Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 830-867, 846.

have treated ‘consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature’,⁷⁰ ie they considered compliance with such provisions as questions of admissibility or procedure and not of jurisdiction. This implied that they either ignored non-compliance with them⁷¹ or suspended proceedings in order to permit the parties to reach an amicable settlement.⁷²

In 2010, this seemingly established case law was shaken by two ICSID cases where tribunals found that non-compliance with a waiting period would not be merely a procedural or admissibility problem, but constituted a jurisdictional defect.⁷³ In effect, such an approach limits the (temporal) scope of dispute settlement clauses, albeit by faithfully sticking to the wording of the respective clauses.

B. The inherent subject-matter limitation to ‘investments’

The Article 25 *ICSID Convention* *ratione materiae* ‘investment’ requirement is another example of a largely jurisprudentially created obstacle to investment

⁷⁰ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (August 6, 2003), para 184.

⁷¹ The tribunal in *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (Sept 3, 2001), para 190, was of the opinion that insistence on the expiry of a waiting period before the commencement of arbitration proceedings would ‘amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties’. The tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (Nov 14, 2005), para 100 gave the policy reason for not insisting on the expiry of a waiting period by stating that it ‘would simply mean that [an investor] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one’s advantage’.

⁷² *Western NIS Enterprise Fund v Ukraine*, ICSID Case No ARB/04/2, Order (March 16, 2006), paras 6, 7, but the fact that ‘[p]roper notice of the present claim was not given “did not” in and of itself, affect the Tribunal’s jurisdiction’.

⁷³ *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (PetroEcuador), ICSID Case No ARB/08/5, Decision on Jurisdiction (June 2, 2010); *Murphy Exploration and Prod Co Int’l v Republic of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction (Dec 15, 2010), para 149: ‘... the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, ‘a procedural rule’ or a ‘directory and procedural’ rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules’.

arbitration. It is well known that the *ICSID Convention*⁷⁴ left the core jurisdictional requirement of an ‘investment’ undefined. Investment tribunals have stepped in and required, *inter alia*, a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host state’s development in order to qualify a transaction as an investment subject to the jurisdiction of the Centre. These criteria are often referred to as *Salini* criteria pursuant to a leading case.⁷⁵ Though the precise scope of the inherent elements of an ‘investment’ remain controversial,⁷⁶ it is worth remembering that some tribunals have added further elements, making access to ISDS even more difficult.⁷⁷ But it is generally accepted that the *Salini* test is primarily used in order to exclude purely ‘commercial’ disputes from investment arbitration.⁷⁸

A 2009 ICSID case broadly addressed the issue of ‘investment’ as a *ratione materiae* requirement under the *ICSID Convention*. The tribunal in *Phoenix v Czech Republic*⁷⁹ declined to exercise jurisdiction over a claim brought by an Israeli investor against the Czech Republic because it found that the acquisition of two Czech companies was not a ‘*bona fide*’ investment since it was made solely for the purpose of arbitrating a dispute before ICSID.

⁷⁴ Article 25(1) *ICSID Convention*, 18 March 1965, 575 UNTS 159: ‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally’.

⁷⁵ In the aftermath of *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52, investment tribunals have focused on: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host state’s development. See Ch Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: A Commentary* 128 *et seq* (2nd edition, 2009).

⁷⁶ *Global Trading Resources Corp and Globex International, Inc v Ukraine*, ICSID Case No ARB/09/11, Award (Dec 1, 2010), para 55: ‘The existing case law has thrown up no uniform approach as to the identification and respective importance of the criteria that may be resorted to by ICSID tribunals having to define an investment for the purposes of Article 25(1)’.

⁷⁷ *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 114 added the following two criteria: ‘assets invested in accordance with the laws of the host State’ and ‘assets invested *bona fide*’.

⁷⁸ *Global Trading v Ukraine*, para 56: ‘... purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention’.

⁷⁹ *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009.

It is widely accepted that these inherent requirements of an ‘investment’, whatever their precise scope, are a specific ICSID requirement.⁸⁰ Thus, it may appear surprising to see that also non-ICSID investment tribunals have started to use the *Salini* criteria in order to decide on their jurisdiction.⁸¹ Again such a spill-over may have the effect of an additional jurisprudentially created obstacle to arbitration.

V. Policy Implications Regarding the Scope of ISDS

The last two decades of investment arbitration have shown that investors are increasingly facing serious jurisdictional challenges. Thus, a considerable number of cases fail on the jurisdictional stage and do not reach the merits.⁸² While this may be welcome as a strategic victory of respondent states which might tend to regard any claims as unfounded (otherwise they may have sought an amicable settlement of the dispute as often an envisaged option in IIA dispute settlement clauses) it comes at a cost: It prevents claimants and their host states to litigate the substance of a dispute and to establish ‘who is right’.

⁸⁰ This view has found expression in the notion that ICSID tribunals apply a double-barrelled test, according to which a transaction has to satisfy both the notion of an ‘investment’ under art 25 *ICSID Convention* and the specific definition of ‘investment’ under the applicable BIT or IIA.

⁸¹ In *Alps Finance v Slovak Republic*, UNCITRAL, Award, 5 March 2011, para 245, an UNCITRAL tribunal held that in spite of a broad asset-based definition of investment in the applicable BIT, it had to look at the inherent meaning of investment in order to assess whether the acquisition of ‘receivables’ from a private company constituted an investment for jurisdictional purposes. The *Alps Finance* tribunal found that the underlying contract must satisfy the *Salini* criteria of duration, contribution and risk and held that a ‘mere one-off sale transaction’ would not qualify as an investment.

⁸² From 2010-2012, an average 22.5 per cent of the arbitration proceedings under the *ICSID Convention* and *ICSID Additional Facility Rules* resulted in awards declining ICSID jurisdiction (see The ICSID Caseload-Statistics; available at: <https://icsid.worldbank.org/>).

Of course, this needs qualification. It is clear that the investment dispute settlement system was created for a particular purpose and that some kind of disputes, eg of a purely commercial nature⁸³ or of a trade character,⁸⁴ were not meant to be arbitrated before investment tribunals.⁸⁵ Similarly there may be valid policy reasons for some host states to clearly exclude certain types of disputes.⁸⁶

⁸³ Investment tribunals have declined jurisdiction over disputes where they found that the underlying transaction was a purely commercial one, not an investment. This issue is closely related to the jurisdictional requirement of an 'investment' pursuant to art 25 ICSID Convention, but logically separate and may be relevant also in non-ICSID cases. See eg *Global Trading Resources Corp. and Globex International, Inc v Ukraine*, ICSID Case No ARB/09/11, Award (Dec 1 2010), para 56.

⁸⁴ Sometimes disputes may be characterised both as trade and as investment disputes. A number of Chapter 11 NAFTA lumber cases brought by investors that were consolidated (see eg at: http://www.naftaclaims.com/disputes_us_softwood.htm). At the same time, softwood lumber cases were litigated between the US and Canada under both WTO and NAFTA rules (see eg at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds264_e.htm and at: http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/other-autres/disp_Settlement-reglement_diff.aspx?lang=eng&view=d). Most recently an inter-state lumber dispute led to a LCIA award: *The United States of America v Canada*, London Court of International Arbitration, Arbitral Tribunal Case No 111790, Final Award of July 26, 2012; available at: http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/ruling-London_Court_pub_ver-decision.pdf. See also Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9 *Journal of International Economic Law* 197-20.

⁸⁵ See eg *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Award on Jurisdiction (July 11, 1997), para 15: '... the Tribunal must first consider whether there is a legal dispute between the parties as required by Article 25 (1) of the Convention... Although the term "legal dispute" is not defined in the Convention, ... [t]he discussions held on the drafts leading to this provision also evidence that legal disputes were meant to exclude moral, political, economic or purely commercial claims'.

⁸⁶ Recently, there has been quite some debate about the suitability of investment arbitration for resolving 'class actions' by bondholders in a sovereign insolvency scenario. See eg M Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 *AJIL* 711-759; in the first ICSID bondholders' case, reaching a decision on jurisdiction, *Abaclat v Argentina*, the tribunal qualified the acquisition of financial instruments from Argentina as 'investments' and did not see any incompatibility of such claims with the ICSID arbitration system. *Abaclat and ors v Argentina*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras 366, 515 et seq.

But in general the concern of establishing the rule of law in investment relations or, as it is often quasi-economically rationalised, of securing a favourable investment climate is to make sure that disputes are decided on their merits.

It will be difficult to empirically assess this, but it can be presumed that applicants whose investment claims fail on the jurisdictional stage will be more dissatisfied than those that had their 'day in court' on the merits and will try to pursue their claims elsewhere. Often this leads to follow-up arbitration, as in cases where one of more options is denied and investors continue to pursue their claims before another arbitration system.

Failure on the jurisdictional level may lead to a reactivation of diplomatic protection⁸⁷ with all the risks of a 'politicization' of the dispute that the system of investment arbitration was designed to avoid.⁸⁸ Otherwise, it will force investors to seek redress through domestic courts which may be inefficient, if not outright biased against foreign investors. This in turn may have negative implications on the investment climate and consequently reduce the inflow of foreign investment.

Any of these reactions do not only lead to frustration and lengthy proceedings, they also imply additional costs and it is questionable whether this accords to the spirit of efficient dispute settlement.

The availability of broad ISDS is important not only for the individual investor facing a problem with its host state, but also for the community of potential future investors in a country. It sends a clear message that investors will be entitled to have their claims heard by an independent and impartial tribunal. It is this 'spill-over' effect of investment arbitration that can transform the short-term loss of host states – by having to litigate an individual investment case on the merits, and potentially losing it – into a long-term gain – by attracting future investors confident that their investments will be effectively protected.

⁸⁷ See C F Amerasinghe, *Diplomatic Protection* (2008).

⁸⁸ Cf F I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) *ICSID Review – Foreign Investment Law Journal* 1.

⁸⁹ See S Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement' in M Waibel, A Kaushal, K-H L Chung and C Balchin (eds), *The Backlash Against Investment Arbitration* (2011) 29.

It is this perspective which calls for a limitation of jurisdictional/procedural hurdles in investment arbitration. Access to ISDS with insignificant jurisdictional and procedural obstacles contributes to an effective protection of investments which serves the proposition that the availability of fair and efficient dispute settlement as such is part of a broader protection of investments.⁸⁹ Thus, the view expressed by a number of arbitral tribunals that the availability of dispute settlement is a crucial, if not the crucial, aspect of investment protection seems to be well taken.⁹⁰

In a system with limited jurisdictional hurdles, the importance of shielding against unwarranted frivolous claims is even heightened. But this may be achieved by provisions permitting dismissal of claims that are ‘manifestly without legal merit’.⁹¹

⁹⁰ See already *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the tribunal on objections to jurisdiction of 25 January 2000, para 54, finding that ‘today dispute settlement arrangements are inextricably related to the protection of foreign investors’; see also *Eastern Sugar BV v Czech Republic*, SCC Case No 088/2004, Partial Award, 27 March 2007, para 165, considering that ‘... from the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties’; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, Decision on Jurisdiction of 30 April 2010, para 77, describing investor-state arbitration as ‘one of, if not the most important feature of the BIT regime’.

⁹¹ See eg the amended ICSID Arbitration Rule 41(5), Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006; available at: <<https://icsid.worldbank.org/>>. Cf Ch Schreuer, L Malintoppi, A Reinisch, A Sinclair, *The ICSID Convention: A Commentary* (2nd edition 2009) 684; A Antonietti, ‘The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules’ (2006) 21 *ICSID Review – Foreign Investment Law Journal* 427. This rule was first applied in *Trans-Global Petroleum, Inc v Jordan*, ICSID Case No ARB/07/25, Decision on the Respondent’s Objection under rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para 92, where an ICSID tribunal held that it was authorised to uphold objections to claims which were ‘patently unmeritorious’.

VI. Conclusions

It is ultimately the Contracting Parties' intentions that should determine what kind of disputes are to be settled by ISDS. The changed pattern of global investment flows implies that BITs and IIAs are increasingly becoming 'reciprocal', not only in name but also in substance. The likelihood that IIA parties may find themselves on either side of investment arbitration, as a respondent host state or as a no-longer-directly-involved home state of an investor has increased. Thus, it may be less clear 'in whose favour' a narrow or a wide dispute settlement clause may ultimately be.

Thus, negotiating states should help to avoid unnecessary litigation by drafting dispute settlement clauses as precise as possible. Reducing uncertainty about the scope of ISDS will deter investors from bringing hopeless claims and states from raising indefensible jurisdictional objections. Given the overall function of investment arbitration as protection of foreign investments, a limited set of jurisdictional and procedural obstacles should allow tribunals to deal with the real (substantive) issues of investment law, ie whether and to what extent the standards of investment protection enshrined in BITs and investment chapters of IIAs have been complied with or not.