

At What Time Must Jurisdiction Exist?

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I. Introduction

Inter-temporal questions are among the trickiest in international adjudication. Not infrequently, the already complex requirements for an international court or tribunal's jurisdiction are linked to temporal requirements that must be observed to establish a court's or tribunal's competence. The jurisdiction of international courts and tribunals is often subject to limitations *ratione temporis*. Typically, jurisdiction will extend only to events that occurred after a certain date—most often the effective date of the instrument expressing consent to jurisdiction. The relevant events may be actions leading to the dispute, but may also be the dispute itself. Therefore, the existence of a dispute at a particular date may be of importance for a court's or tribunal's jurisdiction.

The International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), have addressed inter-temporal issues of jurisdiction in a number of decisions. Some of these cases concerned declarations of states under the optional clause of Article 36(2) of the Courts' Statute.¹ Another case concerned jurisdiction under the European Convention for the Peaceful Settlement of Disputes.² What these cases have in common is that the acceptances of the Court's jurisdiction excluded disputes relating to facts or situations prior to a certain date.³

In all four cases, the disputes arose after the critical dates. But the decisive issue was not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose. In the *Phosphates in Morocco* case and in the *Certain Property* case, the facts with regard to which the dispute had arisen were found to have pre-dated the critical date. The objections *ratione temporis* were consequently upheld.⁴ In the *Electricity Company* case and in the *Right of Passage* case, the disputes were found to have had their source in facts or situations subsequent to the critical date. The objections *ratione temporis* were consequently rejected.⁵

* It is a particular pleasure to participate in this venture to celebrate the achievements and personality of one of the giants of international adjudication. Charles N Brower first introduced me to international investment arbitration over twenty-five years ago. My numerous contacts with him in the years to follow have been a rich learning experience and a constant source of intellectual enrichment.

¹ *Phosphates in Morocco (Italy v France)*, Judgment [1938] PCIJ Rep Series A/B No 74; *Electricity Co of Sofia and Bulgaria (Belgium v Bulgaria)*, Judgment [1939] PCIJ Rep Series A/B No 77; *Right of Passage over Indian Territory (Portugal v India)*, Judgment [1960] ICJ Rep 6.

² *Certain Property (Liechtenstein v Germany)*, Judgment [2005] ICJ Rep 6.

³ A detailed overview of the earlier cases can be found in *ibid* 22–5, paras 40–5.

⁴ *Phosphates in Morocco* (n 1) 25; *Certain Property* (n 2) 25–7.

⁵ *Electricity Co of Sofia and Bulgaria* (n 1) 82; *Right of Passage over Indian Territory* (n 1) 6, 35.

By contrast, investment tribunals have, in a number of cases, had to decide whether a particular dispute was in existence at a critical date. Many bilateral investment treaties (BITs) limit consent to arbitration to disputes arising after their entry into force.⁶ Under a provision of this kind, the time at which the dispute has arisen will be of decisive importance for the applicability of the consent to arbitration. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminating acts must have occurred at some time before the dispute. A number of tribunals have grappled with the question at what time the disputes in the respective cases had arisen.⁷

Other instruments providing for jurisdiction also specify at what time particular jurisdictional requirements must be fulfilled. For instance, Article 25(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) contains an elaborate definition of the term 'National of another Contracting State', which contains references to several points in time.⁸ But the Convention offers no information on the date at which other jurisdictional requirements must be met. Thus, the ICSID Convention does not specify at what time there must have been an investment, the date when consent must have existed, the date at which the state party to the dispute must have become a contracting state, the date at which a contracting state's constituent subdivision or agency must have been designated to the Centre, the date at which the state of the investor's nationality must have become a contracting state, or the date at which the approval or notification under Article 25(3) ICSID Convention relating to the consent of a constituent subdivision or agency must have been given.

⁶ See, eg, Art II(2) of the Argentina–Spain BIT: 'This agreement shall apply also to capital investments made before its entry into force by investors of one Party in accordance with the laws of the other Party in the territory of the latter. However, this agreement shall not apply to disputes or claims originating before its entry into force.'

⁷ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000) paras 90–8; *Empresas Lucchetti SA and Lucchetti Peru SA v The Republic of Peru*, ICSID Case No ARB/03/4 (also known as *Industria Nacional de Alimentos AS and Indalsa Perú SA v The Republic of Peru*), Award (7 February 2005) paras 48–59; *Jan de Nul NV and Dredging International NV v The Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) paras 110–33; *Helnan International Hotels A/S v The Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction (17 October 2006) paras 33–57; *Railroad Development Corp v The Republic of Guatemala*, ICSID Case No ARB/07/23, Second Decision on Jurisdiction (18 May 2010) paras 114–38.

⁸ Art 25(2) ICSID Convention provides: "National of another Contracting State" means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered* pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who *on either date* also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit such dispute to conciliation or arbitration* and any juridical person which had the nationality of the Contracting State party to the dispute *on that date* and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention' (emphases added).

For an uncontested application of the first part of Art 25(2)(b), see *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Jurisdiction (18 April 2008) para 79.

II. The Basic Rule: Jurisdiction at the Time of Institution of Proceedings

In the absence of a specific provision on relevant dates, it is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. In principle, all jurisdictional requirements must be met on that date. Measures and events that take place before that date may affect jurisdiction. Measures and events that take place after that date will not affect jurisdiction.

The International Court of Justice has developed a *jurisprudence constante* to this effect. In the *Lockerbie Case* (Preliminary Objections), Libya relied on the Montreal Convention to establish the Court's jurisdiction. The ICJ said:

36. In the present case, the United States has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, those rights could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention ...

37. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established.⁹

The same principle also applies to the question of admissibility. In the *Lockerbie Case* (Preliminary Objection), the ICJ also said:

42. Libya furthermore draws the Court's attention to the principle that '[t]he critical date for determining the admissibility of an application is the date on which it is filed.' It points out in this connection that its Application was filed on 3 March 1992; that Security Council Resolutions 748 (1992) and 883 (1993) were adopted on 31 March 1992 and 11 November 1993, respectively ...

43. In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council Resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date.¹⁰

⁹ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v The United States of America) (Preliminary Objections)* Judgment [1998] ICJ Rep 115, 128-9 (referring to *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objections)* Judgment [1953] ICJ Rep 111, 122; *Right of Passage over Indian Territory* (n 1) 142)

¹⁰ *Lockerbie* (n 9) 605 (citing *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* Judgment [1988] ICJ Rep 95, para 66).

The ICJ has since confirmed this principle in the *Arrest Warrant Case*.¹¹ In that case, the ICJ said:

The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction.¹²

Investment tribunals, too, have applied this principle consistently. For instance, they have determined in a number of cases that the decisive date for the applicability of the ICSID Convention was the date of the institution of arbitration proceedings.¹³

The same principle applies to the entry into force of a BIT. The Tribunal in *Goetz v Burundi* said in this respect:

Quant à la compétence du Tribunal et à la recevabilité de la requête, elles s'apprécient, selon le principe rappelé récemment par la Cour internationale de Justice, à la date du dépôt de la requête, c'est-à-dire, dans la présente affaire, au 8 décembre 1995, donc, là encore, à la lumière, entre autres, de la Convention belgo-burundaise d'investissement en vigueur depuis le 13 septembre 1993.¹⁴

In *Bayindir v Pakistan*,¹⁵ the respondent developed an argument to the effect that its recent ratification of the 1958 New York Convention created a conflict with the ICSID Convention.¹⁶ The tribunal not only found this argument unmeritorious, but also noted that the ratification had occurred after the institution of the ICSID proceeding. It said:

Moreover, Pakistan's ratification of the New York Convention in the course of the present proceedings cannot have any bearing on the jurisdiction of the Tribunal in the present case. The contrary would entail, amongst other things, that a unilateral

¹¹ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment [2002] ICJ Rep 1.

¹² *Ibid* para 26 (citing *Nottebohm* (n 9) 122; *Right of Passage over Indian Territory* (n 1); *Lockerbie* (n 9) 23–4, para 38 and 129, para 37).

¹³ See Pierre Lalive, 'The First "World Bank" Arbitration (*Holiday Inns v Morocco*)—Some Legal Problems' (1980) 51 *British Year Book of International Law* 142–6; *Amco Asia Corpn, Pan American Development Ltd, PT Amco Indonesia v The Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) (1993) 1 ICSID Reports 403; *Liberian Eastern Timber Corpn (LETCO) v The Government of the Republic of Liberia*, ICSID Case No ARB/83/2, Decision on Jurisdiction (24 October 1984) (1994) 2 ICSID Reports 351.

¹⁴ *Antoine Goetz et Consorts v République du Burundi*, ICSID Case No ARB/95/3, Award (10 February 1999) para 72 (referring to *Lockerbie* (n 9) paras 37 and 42) ('As regards the jurisdiction of the Tribunal and its capacity to hear this claim, it should be examined, according to the principle recently reasserted by the International Court of Justice, at the date of the filing of the claim, that is to say, in the present case, on 8 December 1995, therefore, there again, in the light, among other documents, of the Belgium-Burundian treaty on investment in force since 13 September 1993' (translation from (2004) 6 ICSID Reports 26, footnote omitted)).

¹⁵ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v The Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005).

¹⁶ *Ibid* para 174.

act by the respondent to an arbitral proceeding could retrospectively affect (to the respondent's own benefit) the arbitral tribunal's jurisdiction which, according to the long-established jurisprudence of international tribunals of all kinds, is fixed as of the time the proceedings are commenced, and is not subject to *ex post facto* alteration.¹⁷

Investment tribunals have also applied this principle to cases where the claimants had transferred the rights that had given rise to the dispute after the institution of proceedings. Tribunals have rejected the argument that, as a consequence, the claimants in the proceedings were no longer the real parties in interest.

In *CSOB v Slovakia*,¹⁸ the claimant had agreed to assign its claims against the respondent to the Czech Republic. The respondent argued that these assignments had transformed the Czech Republic into the real party in interest and that the tribunal should dismiss the case for lack of jurisdiction because the claimant no longer had the requisite standing under Article 25(1) of the ICSID Convention. The tribunal rejected this argument since the assignments had taken place after the institution of the ICSID proceedings:

... at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.¹⁹

The tribunal added that the absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute did not affect the standing of a claimant in ICSID proceedings.²⁰

In *Vivendi v Argentina*,²¹ the original claimant had been CGE, which subsequently changed its name to Vivendi SA while the ICSID proceedings were pending. Vivendi SA then merged with several other companies to form the company Vivendi Universal. Vivendi Universal continued to hold the majority stake in CAA, the company incorporated in Argentina. Argentina's objection that there had been a change in CAA's corporate ownership was rejected by the tribunal.²² One of the reasons for this decision was as follows:

¹⁷ Ibid para 178.

¹⁸ *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, ICSID Case No ARB/97/4, Decision on Jurisdiction (24 May 1999).

¹⁹ Ibid para 31. ²⁰ Ibid para 32.

²¹ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (formerly *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic*), Resubmitted Case: Decision on Jurisdiction (14 November 2005).

²² Ibid para 82; see also *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) para 2.6.8.

... it is generally recognized that the determination of whether a party has standing in an international judicial forum, for purposes of jurisdiction to institute proceedings, is made by reference to the date on which such proceedings are deemed to have been instituted. ICSID Tribunals have consistently applied this Rule ... The consequence of this rule is that, once established, jurisdiction cannot be defeated. It simply is not affected by subsequent events. Events occurring after the institution of proceedings ... cannot withdraw the Tribunal's jurisdiction over the dispute.²³

In *EnCana v Ecuador*,²⁴ a case decided under the UNCITRAL Rules, the Claimant sold its local subsidiary after the institution of the proceedings but retained the right to the major part of any VAT refunds it should have received while it owned the subsidiary.²⁵ The tribunal found that the sale did not affect the claimant's standing.²⁶ The disposition of the subsidiary while the proceedings were pending did not affect jurisdiction to entertain the claim.²⁷

In *El Paso v Argentina*,²⁸ the claimant sold its shares in the local companies shortly after the institution of proceedings.²⁹ Argentina argued that, as a consequence, El Paso had lost its *ius standi*.³⁰ The tribunal found that an examination of the BIT, of the ICSID Convention, and of the case law revealed that there is no rule of continuous ownership of the investment. The decisive point was that at the time the claim was registered by the Secretary-General of ICSID, El Paso had owned the investment.³¹ The tribunal gave the following rationale for the absence of a rule of continuing ownership:

The reason for there not being such a rule in the ICSID/BIT context is that the issues addressed by those instruments are precisely those of confiscation, expropriation and nationalisation of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required.³²

In *National Grid v Argentina*,³³ a case decided under the UNCITRAL Rules, the claimant had sold the shares that were the basis of the claim after the institution of the proceedings. Argentina argued that, as a consequence, National Grid had lost the quality of an investor.³⁴ The tribunal found that the critical date to meet the jurisdictional requirements was the date when the proceedings were instituted. Interestingly, in that case Argentina argued that any right to pursue the claims would have been transferred to the purchaser of the shares. The tribunal observed that this right was retained by the claimant as part of the terms of the sale.³⁵

In *Enron v Argentina*,³⁶ long after the institution of the proceedings, the claimants sold most of their holding in the local company to another investor together with a

²³ *Vivendi* (n 21) paras 60, 63 (footnotes omitted).

²⁴ *EnCana Corp v The Republic of Ecuador*, LCIA Case No UN 3481, Award (3 February 2006).

²⁵ *Ibid* para 123. ²⁶ *Ibid* para 126. ²⁷ *Ibid* para 132.

²⁸ *El Paso Energy Int'l Co v The Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006).

²⁹ *Ibid* para 130. ³⁰ *Ibid* para 117. ³¹ *Ibid* paras 135, 136. ³² *Ibid* para 135.

³³ *National Grid Plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006).

³⁴ *Ibid* paras 95–100. ³⁵ *Ibid* para 121.

³⁶ *Enron Corp and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007).

right to a further purchase of the balance, thus effectively withdrawing from their investment.³⁷ The tribunal held that jurisdictional standing was determined by reference to the date on which the proceedings were instituted and that jurisdiction was not altered by later transactions. It also noted that the sales transaction expressly safeguarded the claimant's rights in the litigation.³⁸ The tribunal said:

... the Tribunal wishes to recall that the disposal of Enron's participation in TGS does not affect its jurisdiction to decide in this case. As discussed above, ICSID jurisdiction is determined on the date the arbitration is instituted and subsequent changes in their ownership of TGS does not affect jurisdiction.³⁹

In *Teinver v Argentina*,⁴⁰ the respondent sought to rely on a number of events that post-dated the institution of the arbitration proceedings to contest jurisdiction. The tribunal rejected this attempt and said:

Based on the fact that each of the allegations made by Respondent concerns an event—the Claimants' reorganizations, the Assignment Agreement and the Funding Agreement—that postdates the filing of the arbitration, the Tribunal finds this sufficient grounds to reject Respondents' objection.⁴¹

*Loewen v United States*⁴² is a singular case that is at odds with this otherwise consistent practice. While the NAFTA proceedings were in progress and well advanced, the corporate claimant lost its Canadian nationality as a consequence of bankruptcy proceedings induced by the very acts that were the basis of the complaint. Its business operations were reorganized as a US corporation. The tribunal held that the claim had to fail for lack of diversity of nationality. The tribunal postulated a continuous nationality requirement that applied beyond the institution of the arbitration proceedings and persisted to the date of the resolution of the claim.⁴³

It may therefore be concluded that, in the absence of a specific provision to the contrary, the critical time for the determination of jurisdiction is the date of the initiation of proceedings. Once jurisdiction is established at that critical date, any subsequent change of relevant facts will not defeat jurisdiction. This residual rule creates legal certainty and precludes any attempt by the respondent to interfere with the jurisdictional requirements of the case. Once proceedings are underway, it would be unacceptable for jurisdiction to disappear as a result of subsequent events. In particular, a state might bring about changes that defeat jurisdiction while a case is pending, such as changing its legislation, denouncing a treaty, or changing the nationality of a person. The *Loewen* case is a good example for the undesirable consequences of accepting a change of the jurisdictional parameters while proceedings are in progress.

³⁷ Ibid para 192. ³⁸ Ibid paras 196–8. ³⁹ Ibid para 396.

⁴⁰ *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012).

⁴¹ Ibid para 259.

⁴² *Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003).

⁴³ Ibid paras 220–38. For a critical evaluation, see Maurice Mendelson, 'Runaway Train: The "Continuous Nationality" Rule from the *Panavezys-Saldutiskis Railway Case* to *Loewen*' in Todd Weiler (ed), *International Investment Law and Arbitration* (Cameron May 2005) 97.

III. Subsequent Compliance with Jurisdictional Requirements

The implications of this seemingly simple rule are not as straightforward as may appear at first sight. The cases summarized above tell us that, once established on the relevant date, jurisdiction will not disappear if subsequent events affect one of its elements. But that is only one half of the story. What about requirements for jurisdiction that are missing at the time proceedings are instituted, but are later complied with while proceedings are underway?

Situations of this type may arise in several ways. After proceedings are instituted, but before the court or tribunal makes a decision on its jurisdiction, a treaty providing for jurisdiction may enter into force. Or a waiting period for amicable settlement or domestic litigation may expire. A consistent application of the basic rule that only the time of the institution of proceedings is relevant could have anomalous consequences. The court or tribunal would have to decline jurisdiction because a requirement was missing when proceedings were commenced. In the intervening period, the missing requirement may have been met and all elements for a positive decision on jurisdiction may be present. A decision declining jurisdiction under these circumstances would have paradoxical consequences: the claimant, having just received a negative decision on jurisdiction, would be entitled immediately to institute fresh proceedings in exactly the same matter. In a situation where the conditions for jurisdiction and admissibility are met by the time the court or tribunal rules on its decision, it makes no sense to stall proceedings and start anew just because there has been some defect in the past which has since been remedied.

The ICJ has accepted jurisdiction in several cases in which the requirements for its jurisdiction were not fully satisfied at the time of the institution of proceedings, but were met subsequently. Already in the *Mavrommatis* case,⁴⁴ the Court's predecessor, the PCIJ, found that a jurisdictional requirement missing at the time of the institution of proceedings could be supplied later on. The Court said:

Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.⁴⁵

More recently, the ICJ found in the *Genocide (BiH v Yugoslavia)* case⁴⁶ that the applicability, as between the parties, of the Genocide Convention, which formed the basis for

⁴⁴ *Mavrommatis Palestine Concessions (Greece v UK)*, Judgment [1924] PCIJ Rep Series A No 2.

⁴⁵ *Ibid* 34.

⁴⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* Judgment [1996] ICJ Rep 595.

jurisdiction

the Court's jurisdiction, had commenced only more than two-and-a-half years after the institution of the proceedings. This did not affect the Court's jurisdiction:

... the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.⁴⁷

In the *Genocide (Croatia v Serbia)* case, the issue was that Serbia had only become a party to the ICJ's Statute after the proceedings had been instituted. The Court found that this did not affect its jurisdiction since the claimant could at any time bring fresh proceedings:

What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew—or to initiate fresh proceedings—and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled ...

It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently ...

As stated above ... it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings.⁴⁸

The *Racial Discrimination (Georgia v Russia)* case⁴⁹ appears to represent a rare deviation from this principle. In that case, the Court had to apply Article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). That Article provides:

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

The Court held that it had to consider whether the reference to negotiations in this compromissory clause established a precondition to the initiation of proceedings before the Court.⁵⁰ The Court, without discussing the possibility of negotiations while

⁴⁷ Ibid para 26.

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections)* Judgment [2008] ICJ Rep 412, 441–3, paras 85, 87, 89.

⁴⁹ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections)* Judgment [2011] ICJ Rep 70.

⁵⁰ Ibid para 136.

the case was already before the court, found that under Article 22 of CERD, negotiations were not only a condition for its jurisdiction, but that this condition had to be met at the time of the institution of proceedings. The Court said:

... the Court concludes that in their ordinary meaning, the terms of Article 22 of CERD, namely '[a]ny dispute ... which is not settled by negotiation or by the procedures expressly provided for in this Convention', establish preconditions to be fulfilled before the seisin of the Court.⁵¹

Judges Owada, Simma, Abraham, Donoghue, and Gaja appended a forceful Joint Dissenting Opinion.⁵² The judges found that the Court's interpretation was not in accord with the provision's literal meaning:

By itself, the language 'any dispute which is not settled by' neither suggests nor requires that an attempt at settlement must necessarily have been made before reference to the Court.⁵³

The Opinion also summarized the earlier practice of the Court: where a condition, not met when the proceedings are begun, comes to be fulfilled by the time it decides on its jurisdiction, the Court will take due account of the subsequent development. The Opinion states:

While it is true that in principle the Court, in determining whether the conditions governing its jurisdiction or the admissibility of an application are met, looks to the date on which it was seised, it has progressively relaxed this principle since the Judgment in the *Mavrommatis Palestine Concessions* case ... to address the situation in which a condition not met when the proceedings were begun comes to be fulfilled between then and the date on which the Court decides on its jurisdiction (or on the admissibility of the application). In such a case it would be pointlessly formalistic to refuse to take account of the fulfilment of the initially unmet condition after the filing of the application.⁵⁴

With reference to the passage from the *Genocide (Croatia v Serbia)* case, quoted above, the Dissenting Opinion stated:

The language quoted above from paragraph 85 of that Judgment is obviously general in scope. In that case the condition not met until after the application had been filed was not a condition requiring an attempt at negotiated settlement, but the Court expressed itself in terms precluding all doubt as to the fact that its reasoning applies to any initially unmet condition for jurisdiction or admissibility that is fulfilled between the date the proceedings were initiated and the date on which the Court decides on its jurisdiction. And it is hard to see any reason why it should be otherwise. It was this reasoning that allowed the Court to find jurisdiction to entertain

⁵¹ Ibid para 141.

⁵² *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections)*, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham, and Donoghue and Judge ad hoc Gaja [2011] ICJ Rep 142.

⁵³ Ibid para 23. ⁵⁴ Ibid para 35.

Croatia's application. Hence, in the present case the Court has departed from its own most recent jurisprudence, without offering the slightest justification for doing so.⁵⁵

Therefore, the practice of the ICJ overwhelmingly indicates that compliance with a requirement, whether it relates to jurisdiction, admissibility, or procedure, may take place after the institution of proceedings. The ICJ has stated repeatedly that non-compliance with conditions at the time of the institution of proceedings will not defeat its jurisdiction if these conditions had been met subsequently. A decisive argument for this principle is the fact that it would be open for claimants to restart proceedings immediately. The majority decision in the *Racial Discrimination* case is an exception to this otherwise consistent practice, which may well have been influenced by the particular circumstances of the case.

Most investment tribunals have adopted the same rationale. Where procedural requirements, missing at the time of the institution of proceedings, had been met by the time the case was ripe for a decision on jurisdiction and admissibility, tribunals have rejected objections based on these requirements. The reason was that under these circumstances it served no legitimate purpose to send the claimant back to square one and to go through the motions of reinstating the proceedings and reconstituting the tribunal.

The picture of near unanimity is only slightly affected by an early decision in *Tradex v Albania*.⁵⁶ In that case, the tribunal noted that the BIT between Albania and Greece had only entered into force after the request for arbitration had been submitted to ICSID. The tribunal found that 'both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim'.⁵⁷ The tribunal noted that under the BIT both the prohibition of expropriation and the right to institute arbitration were cast in the future tense. The tribunal's conclusion was as follows:

From these provisions it seems clear that the Contracting Parties had the intention to only submit to ICSID jurisdiction regarding alleged expropriation and requests for arbitration occurring in the future, even if they concerned investments made earlier.

As both the alleged expropriation and the Request for Arbitration in this procedure occurred before the entry into force of the Bilateral Treaty, that Treaty cannot establish jurisdiction in this case.⁵⁸

Other investment tribunals have accepted that it was possible to comply with conditions for their competence, even after the institution of proceedings. These cases all concerned procedural requirements, such as waiting periods to allow an amicable settlement or the obligation to first seek redress before the host state's domestic courts.

In *SGS v Pakistan*,⁵⁹ Article 9(2) of the Pakistan-Switzerland BIT provided for consultations and the possibility to proceed to arbitration '[i]f these consultations do not

⁵⁵ Ibid para 37.

⁵⁶ *Tradex Hellas SA v The Republic of Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction (24 December 1996) (1999) 14 ICSID Review—FILJ 161, 179–80.

⁵⁷ Ibid 179.

⁵⁸ Ibid 180. The tribunal's strict interpretation of its jurisdiction under the BIT was counterbalanced by a finding of jurisdiction under Albania's Investment Law of 1993.

⁵⁹ *SGS Société Générale de Surveillance SA v The Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction (6 August 2003).

result in a solution within twelve months'. The consultation requirement of twelve months had not been complied with when SGS started the proceedings, but the period had expired by the time the tribunal was ready to make its decision on jurisdiction. The tribunal said:

... it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.⁶⁰

In *Bayindir v Pakistan*,⁶¹ Article VII of the Pakistan-Turkey BIT provided for a formal notification of the dispute and a period of six months for consultations and negotiations. The claimant had not complied with the obligation to give a notice of the dispute prior to the institution of proceedings. The tribunal said:

As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage.⁶²

In *Biwater Gauff v Tanzania*,⁶³ Article 8(3) of the Tanzania-United Kingdom BIT provided for a six-month settlement period before any initiation of arbitration. The six-month period had not yet elapsed when the claimant started the proceedings. The tribunal found that the six-month period was procedural and directory rather than jurisdictional and mandatory. The tribunal said:

Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the time the Arbitral Tribunal considers the matter.⁶⁴

In *AFT v Slovakia*,⁶⁵ Article 9 of the Slovakia-Switzerland BIT provided that the parties should first try to settle a dispute by consultations for six months before the investor activates arbitration. The tribunal found that the claimant had, in fact complied with this requirement, but added a quotation that said:

Even if the institution of arbitration was premature, compelling the claimant to start the proceeding anew would be a highly uneconomical solution.⁶⁶

⁶⁰ Ibid para 184.

⁶¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (n 15) paras 88–103.

⁶² Ibid para 100.

⁶³ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008).

⁶⁴ Ibid para 343.

⁶⁵ *Alps Finance and Trade AG v The Slovak Republic*, UNCITRAL, Award (5 March 2011).

⁶⁶ Ibid para 204.

The reaction of the tribunal in *TSA Spectrum v Argentina*⁶⁷ was similar. Article 10 of the Argentina-Netherlands BIT provides that disputes should first be submitted to the host state's administrative or judicial agencies; if after eighteen months there is no final decision or if the dispute persists, it is possible to go to international arbitration. TSA had submitted its case to ICSID before the end of that period. The tribunal said:

... despite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter.⁶⁸

In *Teinver v Argentina*,⁶⁹ Article X(3) of the Argentina-Spain BIT required that a claimant first pursue its claim in the host state's domestic courts for eighteen months before going to arbitration. The eighteen months had not lapsed when the claimants requested arbitration. By the time the tribunal was ready to decide on its jurisdiction, the dispute had been before Argentine courts for well over eighteen months.⁷⁰ The tribunal said:

... while Claimants concede that the 18-month local court period had not lapsed at the time they filed their Request for Arbitration, they are correct to note that 18 months have subsequently passed, and the local suit remains pending. As such, the core objective of this requirement, to give local courts the opportunity to consider the disputed measures, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.⁷¹

*Philip Morris v Uruguay*⁷² concerned a very similar issue: the domestic litigation requirement under Article X(2) of the Switzerland-Uruguay BIT had not been satisfied when the arbitration was instituted. The tribunal stated that it was satisfied by events after the arbitration had been instituted.⁷³ It said:

The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken).⁷⁴

⁶⁷ *TSA Spectrum de Argentina SA v The Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008).

⁶⁸ *Ibid* para 112.

⁶⁹ *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic* (n 40).

⁷⁰ *Ibid* para 101.

⁷¹ *Ibid* para 135 (footnote omitted).

⁷² *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v The Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013).

⁷³ *Ibid* paras 144–9.

⁷⁴ *Ibid* para 144 (footnote omitted).

An analysis of cases decided by the PCIJ and the ICJ led the Tribunal to the following conclusion:

... it would be perfectly possible for the Claimants to commence these same proceedings on the day after a decision by this Tribunal is handed down, a situation where dismissal of the Claimants' claims would merely multiply costs and procedures to no use.⁷⁵

It may be concluded from this consistent line of decisions that a court or tribunal will take events subsequent to the commencement of proceedings into account if they are relevant to establish jurisdiction and admissibility. If a condition is met by the time the tribunal is ready to decide on preliminary matters, compliance will be accepted.

IV. Suspension of Proceedings to Await Requirements for Jurisdiction

The question remains how a tribunal should react if a requirement remains unfulfilled even at the time the tribunal addresses the issue of its jurisdiction. If a time period for negotiations or an attempt to obtain redress through domestic remedies is likely to expire in the foreseeable future, the court or tribunal may be expected to simply await that event. In a similar way, if a treaty that is essential to jurisdiction has been ratified and is about to enter into force, it is likely that a tribunal will take that fact into account.

The case for a finding of lack of jurisdiction or inadmissibility is stronger if the claimant has not taken the requisite steps to comply with the procedural conditions prescribed in a treaty's arbitration clause. Some tribunals have declined jurisdiction under these circumstances.⁷⁶

Even in a situation of this type, an award terminating the case is not necessarily the only option. Under some circumstances, the best solution may be not to decline jurisdiction or to terminate the case on the ground of inadmissibility, but to suspend the proceeding in order to give the parties an opportunity to comply with the requirement.

This was the solution adopted by the tribunal in *Western NIS Enterprise Fund v Ukraine*.⁷⁷ The tribunal found that the applicable BIT provided for proper notice by the claimant to the respondent and that this notice had not been given. It stated that proper notice was an important element of the state's consent to arbitration, but did not in and of itself affect the tribunal's jurisdiction. In order to afford the parties an opportunity to remedy the situation, the tribunal gave the claimant thirty days to furnish evidence of the proper notice and suspended the proceeding for six months from the date of the notice.

⁷⁵ Ibid para 147.

⁷⁶ *Wintershall AG v The Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 114–57; *Impregilo SpA v The Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) paras 79–94; *Ömer Dede and Serdar Elhüseyni v Romania*, ICSID Case No ARB/10/22, Award (5 September 2013) paras 186–92, 223–5, 228–64.

⁷⁷ *Western NIS Enterprise Fund v Ukraine*, ICSID Case No ARB/04/1, Order (16 March 2006).

A similar solution may be adopted in a situation where the claimant has bypassed an attempt to reach a friendly settlement or has failed to pursue its claim through domestic courts. Whether it makes sense for the tribunal to afford a claimant an additional chance to comply with the preconditions for arbitration will very much depend on the particular circumstances of the case.

In *Kılıç v Turkmenistan*,⁷⁸ Article VII of the Turkey-Turkmenistan BIT provided that an investor would first have to give a notification of the dispute in writing followed by an attempt at settlement through consultation and negotiations lasting for at least six months. The dispute may be submitted to ICSID arbitration if it has been brought to the host state's domestic courts and a final decision has not been rendered within a year. The claimant had complied with the consultation and negotiation requirement, but not with the 'one year in domestic courts' requirement. The tribunal's majority found that the obligation to first go to domestic courts affected its jurisdiction and declined to entertain the claimant's application to suspend the proceedings. It said:

The Claimant has therefore recognised that if the conditions set forth in Article VII.2 are to be treated as going to the existence of a jurisdictional basis, as is the case, it is not open to a Tribunal to suspend the proceedings. In short, the conditions for jurisdiction not having been met, the Tribunal has no jurisdiction to suspend the proceedings. It follows that Claimant's alternative claim, that these proceedings be suspended, is not one that can be accepted.⁷⁹

Arbitrator Park disagreed.⁸⁰ He found that the requirement to go to domestic courts was procedural rather than jurisdictional. He would have suspended the arbitration proceeding to allow the claimant to go to the domestic courts:

The proper course would be to put proceedings into abeyance for a reasonable time to permit filing local litigation. If a timely judgment proves acceptable to the investor, proceedings end. If the investor remains aggrieved, arbitration resumes for claims falling within the scope of the BIT.⁸¹

Even if the requirement to go to domestic courts for a limited period of time was jurisdictional, it is unconvincing to deny the tribunal's power to order a temporary suspension of proceedings until that condition is fulfilled. Once it is accepted that jurisdictional requirements may be met after the institution of proceedings, it must follow that the tribunal is competent to take the necessary procedural steps leading to a decision on jurisdiction. There is no good reason why this power should not include the possibility to defer its decision where there are clear prospects that the conditions for jurisdiction will be met in the foreseeable future.

⁷⁸ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013).

⁷⁹ *Ibid* para 6.4.2; see also para 1.2.70.

⁸⁰ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Separate Opinion of Professor William W Park (20 May 2013).

⁸¹ *Ibid* para 8.

V. Conclusion

It is generally accepted that the jurisdiction of an international court or tribunal will be determined by reference to the date on which judicial proceedings are instituted. This means that developments subsequent to the institution of proceedings will not affect jurisdiction. If a jurisdictional requirement remains unfulfilled at the time of the institution of proceedings but is met subsequently, an international court or tribunal will normally take that fact into account. In some situations, it is appropriate for a tribunal to suspend proceedings to give the claimant an opportunity to take procedural steps that are a precondition for the exercise of jurisdiction.