Notice and Wait

by Christoph Schreuer

1. Introduction

Many treaties dealing with the protection of foreign investment require that an investor, before submitting a claim to arbitration, deliver a notice of intent or notice of dispute to the host State and wait for a certain period before submitting the claim to arbitration. Article 26 (1) of the ECT provides that a dispute between a Contracting Party and an investor of another Contracting Party shall, if possible, be settled amicably. Under Article 26 (2), if this is impossible within three months from the date of the request for amicable settlement, the investor may submit the dispute to one of several settlement procedures, including arbitration.

Article 14.D.3 (2) of the USMCA is more detailed:[1]

> At least 90 days before submitting any claim to arbitration under this Annex, the claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent). The notice shall specify:
> (a) the name and address of the claimant and, if a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
> (b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;
> (c) the legal and factual basis for each claim; and
> (d) the relief sought and the approximate amount of damages claimed.

Many bilateral investment treaties contain notice and wait provisions. For instance, Article 8(1) of the BIT between the Czech Republic and the United Kingdom of 1990 provides:

> Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.

A differently worded notice and wait requirement may be found in Article XII (2) of the Canada-Venezuela BIT of 1996:

> If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in

[1] Article 1119 of the NAFTA, the USMCA's predecessor, contained a similar provision.

> accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

The idea of provisions of this kind is to give the parties an opportunity for a negotiated settlement. In addition, they give the host State a chance to prepare for arbitration if a settlement is not possible. In *Supervisión y Control v Costa Rica*, the tribunal described the purpose of a notice and wait provision as follows:

> The purpose of this provision is for the parties to exhaust a friendly negotiation process prior to initiating a judicial or arbitration proceeding, and it implies that before filing a claim or a request for arbitration, the Investor must inform the State in reasonable detail what conduct or omissions it considers are in violation of the Treaty.[2]

In cases where the claimants had not complied with the requirement to first attempt an amicable settlement, the reactions of tribunals have not been uniform.[3] Discrepancies have arisen about the binding nature of these requirements, specifically whether they are jurisdictional or merely procedural and whether the period for amicable settlement could be completed after the institution of arbitration proceedings. Even where the claimants had submitted notices of dispute, the question arose whether related claims could be added at a later stage.

2. The Legal Nature of Notice and Wait Requirements

Some tribunals found that notice and wait provisions were merely procedural and not jurisdictional and that non-compliance did not carry serious consequences.[4] In *Biwater Gauff v Tanzania*, the UK–Tanzania BIT provided for a six-month period for settlement. There had been attempts to resolve the dispute, but the six-month period had not yet elapsed when the Request for Arbitration was filed. The tribunal held that this did not preclude it from proceeding. It said:

> this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where

[2] *Supervisión y Control v Costa Rica*, Award, 18 January 2017, para 332.

[3] Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' 5 JWIT (2004) 231, 232; Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements "A Dismal Swamp"' in Caron and others (eds), *Practising Virtue: Inside International Arbitration* (2015) 227.

[4] See also the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment (Jurisdiction and Admissibility), 26 November 1984, ICJ Reports 1984, pp 427-429.

> such settlement is not possible. 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:
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> —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;
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> —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.
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> … Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition.[5]

Other tribunals have also found that notice and wait provisions were procedural and that their non-observance did not affect the tribunal's jurisdiction.[6]

In some cases, tribunals decided that there was no need to comply with waiting periods prior to the institution of arbitration proceedings since they would not have served any useful purpose and would hence have been futile.[7] It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile.

Other tribunals have reached a different conclusion and found that notice and wait provisions had to be strictly observed.[8] In *Burlington v Ecuador*, the BIT between Ecuador and the United

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[5] *Biwater Gauff v Tanzania*, Award, 24 July 2008, paras 343, 345.

[6] *Ethyl v Canada*, Award on Jurisdiction, 24 June 1998, paras 76–88; *Sedelmayer v Russian Federation*, Award, 7 July 1998, p 82; *Wena Hotels v* Egypt, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 74, 82 and 87; *Metalclad v Mexico*, Award, 30 August 2000, paras 64–67; *Lauder v Czech Republic*, Final Award, 3 September 2001, paras 181-191; *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, para 184; *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 88–103; *Sistem Mühendislik v Kyrgyz Republic*, Decision on Jurisdiction, 13 September 2007; *Occidental Petroleum v Ecuador*, Decision on Jurisdiction, 9 September 2008, paras 90-95; *Al-Bahloul v Tajikistan*, Partial Award on Jurisdiction and Liability, 2 September 2009, paras 150-159; *Paushok v Mongolia*, Award, 28 April 2011, para 220; *AFT v Slovakia*, Award, 5 March 2011, paras 200-212; *Abaclat and others v Argentina,* Decision on Jurisdiction and Admissibility, 4 August 2011, para 564; *Stati v Kazakhstan*, Award, 19 December 2013, paras 828-829; *Enkev Beheer v Poland*, First Partial Award, 29 April 2014, paras 314-323; *Casinos Austria v Argentina*, Decision on Jurisdiction, 29 June 2018, para 280.

[7] *Ethyl Corp. v Canada,* Award on Jurisdiction, 24 June 1998, paras 77, 84, 85; *LESI–DIPENTA v Algeria*, Award, 10 January 2005, para 32(iv); *Abaclat v Argentine Republic*, Decision on Jurisdiction and Admissibility, 4 August 2011, para 564; *Teinver v Argentina*, Decision on Jurisdiction, 21 December 2012, paras 126–129; *Ambiente Ufficio v Argentina*, Decision on Jurisdiction, 8 February 2013, para 582; *Philip Morris v Uruguay*, Decision on Jurisdiction, 2 July 2013, paras 227–229; *Yukos Universal v Russia*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014, para 1425; *Alemanni v Argentina*, Decision on Jurisdiction and Admissibility, 17 November 2014, paras 301–317; *Dreyfus v India*, Decision on Jurisdiction, 22 December 2015, paras 96-99; *Casinos Austria v Argentina*, Decision on Jurisdiction, 29 June 2018, paras 284, 311–313.

[8] *Goetz v Burundi*, Award, 10 February 1999, paras 90–93; *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, para 88; *Wintershall v Argentina*, Award, 8 December 2008, paras 133– 157; *Murphy v Ecuador I*, Award on Jurisdiction, 15 December 2010, paras 90–157; *Tulip v Turkey*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, paras 55–72; *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, Award,

States provided for consultation and negotiation in case of a dispute. ICSID arbitration would become available six months after the dispute had arisen. The tribunal found that the claimant had only informed the respondent of the dispute with its submission of the dispute to ICSID arbitration. It followed that the tribunal did not have jurisdiction:

> by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.[9]

Even if notice and wait requirements are mandatory and jurisdictional, initial non-compliance will not necessarily defeat the claim. In principle, the relevant date for the determination of jurisdiction is the date of the institution of proceedings.[10] However, the International Court of Justice[11] and investment tribunals have developed a practice whereby it is possible that jurisdictional requirements that are missing at the time proceedings are instituted can be complied with before a tribunal or conciliation commission decides on jurisdiction.[12] This avoids the paradoxical consequence that jurisdiction would need to be declined, even though the missing jurisdictional requirement has been complied with by the time a tribunal makes its decision.

It follows that if the request for arbitration was submitted before the expiry of the time period foreseen for a settlement, a tribunal need not decline jurisdiction if the possibility to reach a settlement continued after the institution of proceedings. By the time the decision on jurisdiction is made, the period for a settlement will typically have expired. Under these circumstances, there is little point in declining jurisdiction and sending the parties back to the negotiating table.

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2 July 2013, paras 6.2.8.- 6.2.9; *Supervisión y Control v Costa Rica*, Award, 18 January 2017, paras 336–348, 351; *Almasryia v Kuwait*, Award under ICSID Rule 41(5), 1 November 2019, paras 34-48.

[9] *Burlington v Ecuador*, Decision on Jurisdiction, 2 June 2010, para 315. Italics original.

[10] Christoph Schreuer, 'At What Time Must Jurisdiction Exist?' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (2015) 264, 266–270.

[11] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* PCIJ Rep Series A No 2, 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) 2008 ICJ Rep 412, paras 85, 87 and 89; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) 1996 ICJ Rep 595, para 26. But see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) 2011 ICJ Rep 70, para 141 and the dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja at 2011 ICJ Rep 142, para 35.

[12] For detailed treatment see: *Schreuer's Commentary on the ICSID Convention* (3rd ed, 2022, S. Schill *et al* eds) Art 25, paras 55-67.

Negotiations remain possible, while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical.

In several cases, tribunals have found that the obligation to seek an amicable settlement for a certain period of time need not be met before the institution of proceedings.[13] In *Bayindir v Pakistan*, 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.[14]

In *Casinos Austria v Argentina*, the tribunal similarly found that the requirement of a period for amicable settlement under the Argentina-Austria BIT could be met while proceedings were already under way. The tribunal said:

> unless pre-arbitral requirements are formulated clearly as conditions precedent for the respondent State's consent, they do not all necessarily need to be complied with prior to initiating the present arbitration, but can also be fulfilled, as further detailed below, subsequent to that point in time and until a decision on jurisdiction is taken. This is one way how excessive formalism, which is inapposite in investment treaty arbitration, should be avoided.[15]

Another possibility to deal with a notice and wait requirement that has not been complied with is to suspend proceedings to allow additional time for negotiations if these appear promising.[16]

3. The Substance of the Notice Requirement

In most cases tribunals noted that the claimants had complied with their duty to give advance notice of the disputes.[17] But the existence of a timely notice is not necessarily the end of the

[13] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, para 184; *Western NIS v Ukraine*, Order, 16 March 2006; *Biwater Gauff v Tanzania*, Award, 24 July 2008, para 343; *AFT v Slovakia*, Award, 5 March 2011, para 204. Contra: *Dreyfus v India*, Decision on Jurisdiction, 22 December 2015, para 95.

[14] *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, para 100.

[15] *Casinos Austria v Argentina*, Decision on Jurisdiction, 29 June 2018, para 280.

[16] *Western NIS v Ukraine*, Order, 16 March 2006.

[17] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports (2002) 47, 54, 60–61; *AMT v Zaire*, Award, 21 February 1997, paras 5.40–5.45; *Metalclad v Mexico* (AF), Award, 30 August 2000, paras 64–69; *Salini v Morocco*, Decision on Jurisdiction, 23 July 2001, paras 15–23; *CMS v Argentina*, Decision on Jurisdiction, 17 July 2003, paras 121–123; *Generation Ukraine v Ukraine*, Award, 16 September 2003, paras 14.1–14.6; *Azurix v Argentina I*, Decision on Jurisdiction, 8 December 2003, para 55; *Tokios Tokelės v Ukraine*,

matter. In some cases, respondents have argued that the notice was defective or insufficient since the claims presented to the tribunals went beyond what had been anticipated in the notice of dispute.

a) Incomplete Notices

Most treaty provisions containing notice and wait requirements merely refer to 'the dispute' without specifying the detail that must go into describing the dispute. Only some treaties offer more detailed instructions. Article 1119 of the NAFTA specifies the contents of a notice of dispute as follows:

> The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
> (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
> (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
> (c) the issues and the factual basis for the claim; and
> (d) the relief sought and the approximate amount of damages claimed.

Some tribunals were confronted with the complaint that the notice of dispute had been incomplete when submitted and that the claimant, in its request for arbitration or at a later stage of the proceedings, had added claims that were not reflected in the notice. Tribunals have taken a generous view of the way claimants had described the dispute they would be submitting to arbitration. They found that there was no need for a notice of intent to be exhaustive, complete,

Decision on Jurisdiction, 29 April 2004, paras 101–107; *LG&E v Argentina*, Decision on Jurisdiction, 30 April 2004, para 80; *MTD v Chile*, Award, 25 May 2004, para 96; *Siemens v Argentina*, Decision on Jurisdiction, 3 August 2004, paras 163–173; *LESI-DIPENTA v Algeria*, Award, 10 January 2005, paras 32, 33; *AES v Argentina*, Decision on Jurisdiction, 26 April 2005, paras 62–71; *Continental Casualty v Argentina*, Decision on Jurisdiction, 22 February 2006, para 6; *El Paso v Argentina*, Decision on Jurisdiction, 27 April 2006, para 38; *Pan American v Argentina*, Decision on Preliminary Objections, 27 July 2006, paras 39, 41; *Cargill v Poland*, Final Award, 29 February 2008, paras 262-263; *Noble Energy v Ecuador*, Decision on Jurisdiction, 5 March 2008, paras 212–217; *Cargill v Mexico*, Award, 18 September 2009, para 183; *Urbaser v Argentina*, Decision on Jurisdiction, 19 December 2012, paras 62–63; *Arif v Moldova*, Award, 8 April 2013, paras 335–342; *Bosca v Lithuania*, Award, 17 May 2013, paras 117-118; *Infinito Gold v Costa Rica*, Decision on Jurisdiction, 4 December 2017, para 175f); *E energija v Latvia*, Award, 22 December 2017, paras 351-355; *Marfin v Cyprus*, Award, 26 July 2018, para 637; *Cortec Mining v Kenya*, Award, 22 October 2018, para 282; *Interocean v Nigeria*, Award, 6 October 2020, para 149.

or detailed.[18] All that was required was a reasonable degree of specificity that allowed the adequate identification of the dispute.[19]

In *Burlington v Ecuador*, the tribunal described the required degree of precision for a notice under Article VI of the US-Ecuador BIT as follows:

> Article VI does not require the investor to spell out its legal case in detail during the initial negotiation process; Article VI does not even require the investor to invoke specific Treaty provisions at that stage. Rather, Article VI simply requires the investor to inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal.[20]

In *A11Y v Czech Republic*, the respondent argued that the claimant had failed to comply with the notice and wait provision in the Czech-United Kingdom BIT. The respondent's complaint was that the claimant's notice of dispute had invoked only the BIT's provision on FET but not its other substantive standards. The tribunal rejected this objection finding that a notice of the dispute in general terms was sufficient. It said:

> … the Tribunal is of the view that, as of the date of the Notice of Dispute, the Respondent was clearly aware of the existence of a dispute, the facts from which it arose, the legal basis of the dispute (to wit the Treaty) and an estimate of the damages sought.[21]

Belenergia v Italy, involved the ECT's notice and wait provision. The respondent argued that the claimant's letter, triggering the waiting period, dealt only with claims on feed-in tariffs and on minimum prices, but not with its imbalance costs claim. The latter claim was raised only in the Statement of Claim.[22] The tribunal found that a broad reference to the dispute, which mentioned imbalance costs, was sufficient to satisfy the notice requirement. The tribunal said:

> The Tribunal finds that Belenergia's Amicable Solution Letter referred to a single dispute in relation to Italy's solar energy legal and regulatory framework, with express reference to imbalance costs. It would be unreasonable and inefficient to carve a single dispute into multiple slices by requiring Belenergia to make an additional request for negotiations when (i) the Amicable Solution Letter already

[18] *AMTO v Ukraine*, Award, 26 March 2008, para 57; *Salini v Morocco*, Decision on Jurisdiction, 31 July 2001, para 20; *ADF v United States*, Award, 9 January 2003, paras 134-139; *Generation Ukraine v Ukraine*, Award, 16 September 2003, para 14.5; *Chemtura v Canada*, Award, 2 August 2010, paras 100-105; *Arif v Moldova*, Award, 8 April 2013, para 339; *Greentech v Italy*, Final Award, 23 December 2018, para 213; *Silver Ridge v Italy*, Award, 26 February 2021, paras 275-283.

[19] *Abaclat et al v Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, para 560; *Khan Resources v Mongolia*, Decision on Jurisdiction, 25 July 2012, paras 401-409; *Tulip Real Estate v Turkey*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, paras 83, 92; *Tenaris and Talta v Venezuela*, Award, 29 January 2016, para 242; *Mesa Power v Canada*, Award, 24 March 2016, para 297.

[20] *Burlington v Ecuador*, Decision on Jurisdiction, 2 June 2010, para 338.

[21] *A11Y v Czech Republic*, Decision on Jurisdiction, 9 February 2017, para 148.

[22] *Belenergia v Italy*, Award, 6 August 2019, paras 227, 360.

> referred to imbalance costs; (ii) Belenergia clearly has a single dispute against Italy in relation to its regulatory and legal framework applying to PV plants; and (iii) the three-month waiting period had already elapsed at the time of the Hearing on 26 to 29 March 2018.[23]

b) Supervening Events

Where events had occurred after the date of the notice of dispute, respondents have sometimes argued that the tribunal did not have jurisdiction over claims arising from these subsequent events. Tribunals have found that claims additional to those listed in the notice of dispute that related to subsequent events did not require a separate notice and waiting period, provided these claims were a factual extension of the case and were related to the same dispute.[24]

In *RREEF v Spain*, the claimant had observed the ECT's notice and wait requirement but later extended its claim to three new measures adopted by Spain during the arbitration. Spain objected against the inclusion of these claims since they had not undergone the ECT's notice and wait procedure.[25] The tribunal dismissed the objection and held that it had jurisdiction also over the additional claims. It said:

> … the Tribunal is of the view that the core issue is whether the additional claims change the character of the case: if yes, then they are not part of the dispute, the new claims must be declared inadmissible and the Tribunal must abstain to exercise jurisdiction. If this is not the case, the objection must be dismissed since (i) it can be admitted that the cooling-off period will have elapsed at the time the Tribunal's decision is taken and (ii) it would be totally artificial and unreasonably heavy to request the Claimant to lodge new applications directed against facts which are but the continuation of those at stake in the initial Application.[26]

The tribunal added that it would impose an unreasonable burden to require the parties to go through another notice and wait procedure and to start new proceedings against measures which were a mere factual extension of the same dispute. What mattered was that the submission of the additional claims did not change the general character of the case.[27]

The situation in *Eiser v Spain* was similar. Spain contested jurisdiction in respect of three measures it had taken after claimant's notice and request for amicable settlement. The tribunal

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[23] At para 366.

[24] *Mesa Power v Canada*, Award, 24 March 2016, paras 298-318; *Crystallex v Venezuela*, Award, 4 April 2016, paras 445-457; *Valores Mundiales v Venezuela*, Award, 25 July 2017, paras 226-244; *Antaris v Czech Republic*, Award, 2 May 2018, paras 254-260; *Eco Oro v Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, 280, 304, 338.

[25] *RREEF v Spain,* Decision on Jurisdiction, 6 June 2016, para 223.

[26] At para 226.

[27] At paras 230-231.

rejected the proposition that each additional measure required a new notice. It found that the new measures did not lead to

> a new dispute or disputes triggering [ECT] Article 26's requirement for another request for negotiations. Articles 26(1) and (2) do not require additional piecemeal requests for amicable settlement of new issues or elements arising in the course an ongoing dispute following a request for negotiations. It would be unreasonable and inefficient in case like this, involving an evolving situation, to interpret Article 26 to require the dispute to be carved into multiple slices, with each new development requiring an additional request for negotiations and a subsequent request for a separate additional arbitration.[28]

In *Kappes v Guatemala*, the tribunal applied Article 10.16 (2) of the DR-CAFTA,[29] which is similar to Art 1119 of the NAFTA quoted above. In its notice of intent, the claimant had outlined a national treatment claim. Based on measures taken after the notice of intent, the claimant added an MFN claim in its notice of arbitration. The respondent argued that the MFN claim could not be included without a corresponding notice of intent.[30] The tribunal found that Article 10.16 (2) established the requirements for initiating an arbitration, which included the identification of the then-intended claims, but allowed for the possibility of additional claims made subsequently without requiring a repetition of the notice of intent.[31] The tribunal said:

> [To] require a claimant to recommence the notice of intent and waiting period process with respect to any new State conduct after its original notice of intent, before it could present any claim in the proceedings regarding that subsequent conduct - would provide potential for disruption and duplication, as well as potential for mischief. Given the reality of procedural timetables, it would be very difficult to complete briefing on any new claim in time to be heard together with the original claims. This effectively would result in a choice between either (a) requesting the existing tribunal to suspend or elongate the procedural timetable, to allow the new claim to catch up, or (b) filing a new arbitration to address the new claim, so as not to delay resolution of the original claims - even though the old and new claims may be closely related and it would be more sensible for them to be resolved together by a single tribunal.[32]

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[28] *Eiser v Spain*, Award, 4 May 2017, para 318. To the same effect see *Antin v Spain*, Award, 15 June 2018, paras 347-357.

[29] Article 10.16 (2) of the DR-CAFTA: 'At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify: (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; (c) the legal and factual basis for each claim; and (d) the relief sought and the approximate amount of damages claimed.'

[30] *Daniel W Kappes v Guatemala*, Decision on Respondent's Preliminary Objections, 13 March 2020, paras 162-170.

[31] At para 195.

[32] At para 199.

c) *Additional Claimants*

In some cases, respondents objected to the addition of new claimants after the date of the notice of dispute.[33] In *B-Mex v Mexico*, the respondent opposed the addition of 31 further claimants after the original claimants had submitted their notice of intent under Article 1119 of the NAFTA.[34] That provision requires that the notice contains the name and address of the disputing investor. The tribunal found that the absence of a notice of intent by the additional claimants did not affect the existence of consent to arbitration and hence its jurisdiction.[35] The tribunal said:

> … the Tribunal concludes that the Respondent's consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a) to identify the Additional Claimants in the Notice. The Tribunal accordingly finds that it has jurisdiction over the Additional Claimants and dismisses the Respondent's objection insofar as it resisted the Tribunal's jurisdiction over the Additional Claimants.[36]

The *B-Mex* tribunal also rejected the suggestion that the claims by the additional claimants be declared inadmissible.[37] The tribunal said:

> … the addition of those names would not have expanded on the notice given to the Respondent as regards the nature of the dispute. The claims by the Additional Claimants being co-extensive with those asserted by the Original Claimants in the Notice, the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort.[38]

In *Adamakopoulos v Cyprus*, 21 claimants had complied with the six-month notice requirement under the Cyprus-Greece BIT through an initial notice of dispute, dated July 11, 2014. An additional 303 claimants gave notice on August 12, 2015, with respect to the same measures. The request for arbitration was dated November 18, 2015, i.e., earlier than the required six months after the second notice. In the request for arbitration, an additional 631 claimants joined the initial claimants, also with respect to the same measures.[39] The tribunal found that these irregularities did not affect its jurisdiction. It said:

> The terms of Article 9 of the Cyprus-Greece BIT do not always require, however, that each investor "involved" in a dispute provide a six-month notice to the

[33] See also *Merrill & Ring v Canada*, Decision on Motion to Add a Party, 31 January 2018.

[34] *B-Mex v Mexico*, Partial Award, 19 July 2019, paras 61-63, 70.

[35] At paras 79-120.

[36] At para 120.

[37] At paras 121-139.

[38] At para 132.

[39] *Adamakopoulos v Cyprus*, Decision on Jurisdiction, 7 February 2020, paras 305-322.

> prospective respondent Contracting Party. In circumstances where the prospective respondent has had a full opportunity to seek a settlement of the dispute with the prospective claimant over the prescribed six-month period, it is consistent with the terms of Article 9 of the Cyprus-Greece BIT in their context and in the light of its object and purpose for additional investors "involved" in the same dispute to be added as claimants for commencing an ICSID Convention arbitration. All Greek Claimants have therefore complied with the access requirements of Article 9 of the Cyprus-Greece BIT.[40]

d) Unrelated Additional Claims

The flexibility of tribunals to entertain claims that are not explicitly listed in a notice of dispute is not unlimited. Tribunals are unwilling to accept jurisdiction over unrelated additional claims that were not covered by the notice of dispute.

In *Guaracachi v Bolivia*, Article 8 of the UK Bolivia BIT provided that a dispute 'shall after a period of six months from written notification of a claim be submitted to international arbitration'. The claimants had made a notification concerning their claims arising from an expropriation. Before the tribunal they raised new claims arising from prior disputes relating to spot prices and capacity payments. The tribunal found that the new claims were distinct and separate from the main claim for compensation for the nationalization and noted that no notification had been made in relation to the additional claims.[41] The tribunal refused to assume jurisdiction over the new claims and said:

> The Tribunal cannot agree with Rurelec's position regarding the spot prices and capacity payments, since it considers that it has not been demonstrated that those regulatory changes—made years before the nationalisation—were connected to the nationalisation dispute, let alone that they formed part of that dispute. The Tribunal thus cannot accept Rurelec's allegation that the "New Claims" "arise out of the same dispute."[42]

In *Supervisión y Control v Costa Rica*, Article XI (1) of the Spain-Costa Rica BIT contained the following notice requirement:

> Notice of any investment-related dispute arising between one of the Parties and an investor of the other Party with respect to matters governed by this Treaty shall be given in writing, including detailed information, by the investor to the Party receiving the investment. To the extent possible, the parties to the dispute shall try to settle such disputes by an amicable agreement.

[40] At para 318.

[41] *Guaracachi and Rurelec v Bolivia*, Award, 31 January 2014, paras 385-401.

[42] At para 396.

Claimant's notice of dispute contained a carefully circumscribed list of grievances as being the cause of the dispute.[43] In its Memorial, the claimant expanded its claims. Some of the additional claims were directly related to the dispute as notified to respondent, but others were not.[44] The tribunal noted that the claims that were not directly linked to the issues in the notification were inadmissible:

> The new claims not notified to Respondent nor directly related to those included in the Notice of Intent are inadmissible in these arbitration proceedings because Claimant has not complied with the aforementioned requirement established in Article XI.1 of the Treaty.[45]

e) Conclusion

The case law on notice and wait provisions in treaties, as outlined above, shows that tribunals show flexibility in treating additional claims, raised after a claimant has submitted its notice of dispute. What matters is that the additional claims are a factual extension of or are related to the same dispute and that the submission of the additional claims does not change the general character of the case but is part of a single ongoing dispute. Under these circumstances, tribunals held that it made no sense to go through another notice and wait procedure and to start new proceedings.

This observation applies particularly where claims additional to those listed in the notice of dispute related to events that had occurred only after the submission of the notice of dispute. Tribunals found that claims arising from subsequent events did not require a separate notice and waiting period if they related to the same dispute and constituted no more than a factual extension of the original case.

Tribunals admitted additional claimants without separate notices of intent if the notice issued by the original claimants provided sufficient information about the dispute and a full opportunity for its settlement.

Only where investors had made unrelated additional claims that were not covered by the notice of dispute, have some tribunals insisted upon the observance of waiting periods and declared the additional claims inadmissible.

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[43] *Supervisión y Control v Costa Rica*, Award, 18 January 2017, para 342.

[44] At paras 344-345.

[45] At para 346.

4. Ancillary Claims under the ICSID Convention

Article 46 of the ICSID Convention provides for the determination of incidental or additional claims arising directly out of the subject-matter of a dispute before the tribunal. These incidental or additional claims must be covered by the consent to arbitration and must also be otherwise within ICSID's jurisdiction. These ancillary claims may be raised at any time during the proceeding but no later than the reply. Therefore, the introduction of ancillary claims is not tied to the time restraints of a notice and wait provision and may take place even after the request for arbitration.

The idea of Article 46 of the ICSID Convention is to deal with closely related claims in one set of proceedings. Parallel or consecutive proceedings relating to different aspects of the same dispute are not only costly and inefficient but are also liable to lead to conflicting outcomes.[46] The principles of economy and of finality militate in favour of hearing and deciding all aspects of a dispute in one set of proceedings.[47]

Article 46 of the ICSID Convention provides:

Article 46

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

The ICSID Arbitration Rules supplement Article 46 as follows:

Rule 40
Ancillary Claims

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

[46] Article 22 of the UNCITRAL Arbitration Rules similarly deal with the amendment and supplementation of claims during the course of the arbitral proceedings.

[47] *Schreuer's Commentary on the ICSID Convention* (3rd ed, 2022, S. Schill *et al* eds) Art 46, para 1.

Article 46 provides that the tribunal 'shall determine' any incidental or additional claim or counterclaim brought before it. Therefore, a decision on an ancillary claim is not discretionary, but obligatory. The obligation to decide ancillary claims is a special manifestation of the more general rule contained in Article 48(3) of the ICSID Convention that the award shall deal with every question submitted to the tribunal.

Rule 40 in its heading refers to incidental or additional claims collectively as 'ancillary claims.' There is no clear distinction between 'incidental' and 'additional' claims. No legal consequences are attached to any such distinction.[48]

Under Article 46, ancillary claims must arise directly out of the subject-matter of the dispute. The close relationship of the ancillary claim to the primary claim was explained in Note B (a) to Arbitration Rule 40 when published in 1968:

> to be admissible such claims must arise 'directly' out of the 'subject-matter of the dispute' (French version: '*l'objet du différend*'; Spanish version: '*la diferencia*'). The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter.[49]

Tribunals have applied Article 46 of the ICSID Convention whenever the ancillary claims were sufficiently closely related to the dispute as originally submitted.[50] In some of these cases the tribunals addressed the issue of notice and wait provisions, finding that ancillary claims did not trigger another notice of intent requirement nor the need to observe another waiting period.[51]

In *CMS v Argentina*, Argentina contended that CMS had submitted two separate disputes. One relating to actions taken by the Argentine Ombudsman and the judiciary, the second relating to measures adopted by the executive and legislative. The second dispute had not been registered in accordance with the BIT's notice and wait provision. Argentina also objected to claims concerning events that had taken place after the introduction of the request for arbitration. CMS

[48] *ADF v United States*, Award, 9 January 2003, para 144.

[49] Note B (a) to Arbitration Rule 40 of 1968, 1 ICSID Reports 100, at 105-106.

[50] *TANESCO v IPTL*, Award, 12 July 2001, paras 40–42; *Middle East Cement v Egypt*, Award, 12 April 2002, paras 64–65; *LG&E v Argentina*, Decision on Jurisdiction, 30 April 2004, paras 41 and 81; *EDF and others v Argentina*, Award, 11 June 2012, paras 400–402, 1091-1092; *Cervin and Rhone v Costa Rica*, Award, 7 March 2017, para 445-448; *Hela Schwarz v China*, Procedural Order No 4 – Reasoned Decision on the Claimant's Request to Amend the Request for Arbitration, 15 May 2019, paras 8, 44, 47.

[51] See also *Eco Oro v Colombia*, Decision on Bifurcation, 28 June 2018, paras 52–53.

argued that it was entitled to pursue additional or incidental claims under Article 46 of the Convention and Arbitration Rule 40.[52]

The *CMS* tribunal emphasized that its task was not to decide whether there were one or two disputes, but rather, to decide whether the investor's additional claims arose directly out of the same subject-matter. The tribunal interpreted Note B to Arbitration Rule 40 as supporting the conclusion that the events subsequent to the request for arbitration gave rise to incidental or additional claims. The tribunal concluded that there was undoubtedly a close connection between the additional claims and the main claims, which required adjudication of both to achieve the final settlement of the dispute.[53] As a consequence, there was no need for a separate waiting period. The tribunal said:

> there is a single dispute which contains, however, incidental or additional claims. It is clear from the ICSID Arbitration Rules that such claims do not require either a new request for arbitration or a new six-month period for consultation or negotiation, before the submission of the dispute to arbitration under the Treaty…. [Since] the disputes are not separate and independent and relate to the same subject-matter, it is immaterial whether the pertinent events occurred before or after the submission of the dispute to arbitration as long as any ancillary claim is made before [the] reply, as required by Arbitration Rule 40(2).[54]

In *Metalclad v Mexico*, a NAFTA arbitration under the Additional Facility, Metalclad amended its original claim to include an Ecological Decree issued by Mexico after the initiation of the proceedings. Mexico objected that the tribunal did not have jurisdiction to consider events that had occurred after the filing of the claim. Mexico relied on the notice and wait requirement of Article 1119 of the NAFTA arguing that it took precedence over the possibility to file ancillary claims.[55]

The tribunal ruled that Article 48 (now Article 47) of the Arbitration (Additional Facility) Rules,[56] dealing with ancillary claims, allowed amendments to claims and the consideration of facts and events taking place after the filing of a notice of claim. NAFTA's notice and wait provision was no obstacle to the acceptance of ancillary claims. The tribunal stated that it preferred a position:

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[52] *CMS v Argentina*, Decision on Jurisdiction, 17 July 2003, paras 101–106.

[53] At paras 107–119.

[54] At paras 123, 125.

[55] *Metalclad v Mexico*, Award, 30 August 2000, para 64.

[56] Arbitration (Additional Facility) Rule 47 (1) provides: '**Ancillary Claims** (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.'

> that construes NAFTA Chapter Eleven, Section B, and Article 48 of the Rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.[57]

In *ESPF v Italy*, the claimants had given a notice of their claim under Article 26 of the ECT. The respondent argued that the claimants had not properly satisfied the ECT's notice requirement with respect to two additional tax-related claims.[58] Although the tribunal dismissed the tax-related claims under Article 21 of the ECT, it also addressed the unnotified tax claims' ancillary character. It found that the lack of a specific subsequent notice regarding these claims would not have deprived it of its jurisdiction to hear these claims.[59] The tribunal said:

> ICSID Arbitration Rule 40 allows the submission of ancillary claims at later points in the proceedings. Article 47 of the ICSID Additional Facility and Article 22 of the UNCITRAL Arbitration Rules similarly provide for additional claims.
>
> It would be contrary to the need for orderly and cost-effective procedure to halt this arbitration at this advanced juncture and require the Claimants first to consult with the Respondent with regard to the two claims, before re-submitting all of the claims to this Tribunal.[60]

It follows from these cases, that Article 46 of the ICSID Convention (and Rule 47 of the Additional Facility Rules) allow claimants to submit incidental or additional claims up to the time of the reply on the merits provided they arise directly out of the subject-matter of the dispute. Even if the treaty providing for consent to arbitration contains a notice and wait requirement, these incidental or additional claims are not subject to separate procedures for the notification of claims and for the observance of a waiting period.

There is, however, a potential conflict between the ICSID Convention's provision on ancillary claims, which may be raised in the course of the proceedings, and a provision in a treaty requiring advance notice of the claims to be submitted. Article 46 of the ICSID Convention provides for the determination of ancillary claims if they are within the scope of the parties' consent and otherwise within ICSID's jurisdiction. If notice and wait requirements are jurisdictional, as some tribunals seem to believe, failure to comply with them would rule out the possibility to introduce ancillary claims during the proceedings. On the other hand, a notice

[57] *Metalclad v Mexico*, Award, 30 August 2000, para 67.

[58] *ESPF v Italy*, Award, 14 September 2020, paras 378-380.

[59] At para 387.

[60] At paras 389-390.

of dispute that precedes the arbitration, will almost by definition, not cover ancillary claims that arise only while proceedings are under way.

This would lead to the awkward result that a notice and wait provision in a treaty providing for ICSID arbitration, excludes the application of the Convention's Article 46. In *Kappes v Guatemala*, the tribunal found that the DR-CAFTA's reference to the ICSID Convention and its Arbitration Rules indicated that it must have envisage incidental or additional claims regardless of their presentation in the notice of intent. The tribunal said:

> DR-CAFTA was clearly prepared with knowledge of the ICSID Arbitration Rules, the ICSID Additional Facility Rules and the UNCITRAL Rules, and nothing in the Treaty text suggests an intent to displace those rules with respect to the admissibility of additional claims. In the case of the ICSID Arbitration Rules, the relevant rule is Rule 40 …[61]

The tribunal added that it was unable to accept the proposition that the DR-CAFTA's requirement of a prior notice of intent would supplant ICSID's provision on ancillary claims given the express reference to the ICSID Rules in the same treaty provision.[62] The tribunal noted that the object and purpose of requiring a notice of intent or waiting period was to enable the respondent State to investigate the claim, conduct appropriate settlement negotiations and take initial steps to organize its defence. The possibility of introducing ancillary claims was perfectly compatible with these aims:

> Once an arbitration has commenced, the addition of an ancillary claim does not significantly prejudice these objectives, provided that the claim is related to the existing dispute and is added early enough in the proceedings that the State will have appropriate opportunity to investigate, discuss and respond.[63]

The fact remains that a strict interpretation of a notice and wait requirement is difficult to reconcile with the possibility to present ancillary claims in ICSID proceedings. If notice and wait provisions are regarded as jurisdictional, a clear failure to submit a notice of dispute would block the introduction of an ancillary claim under Article 46 of the ICSID Convention. A harmonizing interpretation that accepts notice and wait clauses as procedural rather that jurisdictional avoids this dilemma.

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[61] *Kappes v Guatemala*, Decision on Respondent's Preliminary Objections, 13 March 2020, para 197.

[62] *Loc. cit*.

[63] At para 198.