Entretemps: Is There a Distinction Between Jurisdiction *Ratione Temporis* and Substantive Protection *Ratione Temporis*?

Veijo Heiskanen [*]

INTRODUCTION

Disputes relating to the time aspect may arise in a variety of forms in the context of investment treaty arbitration. They may arise in the form of a procedural issue,[1] or a jurisdictional issue,[2] or

[*] Partner, Lalive (Geneva). I would like to thank David Bonifacio and Anja Grabundzija for their diligent research assistance.

[1] A typical procedural issue relating to the time aspect is the question of whether the applicable cooling-off period or domestic litigation requirement has been respected, *i.e.*, whether the claimant has taken the procedural steps vis-à-vis the other party, or before local fora, that are required before filing the claim. These are procedural requirements in the sense that they may be cured, whereas a typical jurisdictional limitation *ratione temporis*, *e.g.*, the exclusion of jurisdiction over a dispute that arose prior to the entry into force of the treaty, is terminal and cannot be cured. *See, e.g.,* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction (F.P. Feliciano, President, A. Faurès, J.C. Thomas), 6 Aug. 2003, ¶ 184, 8 ICSID REP. 406 (2005); 18 ICSID REV. 307 (2003); 42 I.L.M. 1290 (2003); 129 INT'L L. REP. 387 (2007); 18(9) INT'L ARB. REP. A-1 (2003); 16 WORLD TRADE & ARB. MATERIALS 167 (2004); italaw website; excerpts in French in EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI, Vol. I, at 815 (Pedone, 2004); 131 J.D.I. 257 (2004) ("Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."); Ethyl Corp. v. Canada (NAFTA/UNCITRAL), Award on Jurisdiction (K.H. Böckstiegel, President, C.N. Brower, M. Lalonde), 24 June 1998, ¶ 58, 38 I.L.M. 708 (1999); italaw website ("It is important to distinguish between jurisdictional provisions, *i.e.*, the limits set to the authority

an issue of substance,[3] and they may also arise in the interface between these fields or categories. This paper deals with this latter aspect of the problem and focuses on whether there is a distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*. Recent arbitral jurisprudence suggests that such a distinction may indeed be made, and in certain circumstances should be made, although it remains less than clear what its practical relevance might be.

Indeed, the question, as formulated, appears on its face somewhat academic. Is it not the case that the jurisdiction *ratione temporis* of an arbitral tribunal established under an investment treaty and the substantive protections available under the treaty must be co-extensive in terms of time in the sense that tribunals generally have no jurisdiction *ratione temporis* to deal with acts or omissions that occurred prior to the entry into force of the treaty? And is it not the case that they must be co-extensive precisely because the State parties to the treaty are required to comply with the substantive obligations the treaty imposes only as of the date the treaty enters into force, and not before? Moreover, even if the tribunal did have jurisdiction to deal with such existing disputes based on the express terms of the treaty or otherwise, would such jurisdiction be of any practical relevance if the substantive

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of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction *ab initio,* but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim.").

[2] A typical jurisdictional issue relating to the time aspect is the question of whether the arbitral tribunal has jurisdiction *ratione temporis* over a dispute in circumstances where the treaty does not specifically exclude disputes arising out of acts or omissions that occurred prior to the entry into force of the treaty. For further discussion see *infra* Section II.

[3] Substantive disputes relating to the time aspect typically arise in terms of the doctrine of intertemporal law and the principle of retroactivity of treaties; *see infra* Section II.

obligations created by the treaty apply only as of the date the treaty entered into force and were not applicable at the time when the act or omission in question occurred? And similarly, even if the treaty did not create any new substantive legal obligations but simply confirmed applicable customary law standards, would the potential applicability of such obligations prior to the entry into force of the treaty be of any practical relevance if the treaty specifically excludes jurisdiction over existing disputes? In other words, is it not the case that there can be no remedy without right, just as there can be no right without remedy – *ubi ius ibi remedium*?

I. THE PRACTICAL RELEVANCE OF THE DISTINCTION BETWEEN JURISDICTION *RATIONE TEMPORIS* AND SUBSTANTIVE PROTECTION *RATIONE TEMPORIS*

While the distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis* does appear somewhat theoretical on its face, a number of investment treaty tribunals have stressed the existence and indeed the importance of the distinction. Thus, the Tribunal in *Impregilo v. Pakistan* stressed in its decision on jurisdiction that, in its view,

> care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT . . . . Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June

> 2001. Accordingly, only the acts effected after that date had to conform to its provisions.[4]

In *Pey Casado v. Chile*, the Tribunal was faced with a different set of issues, but similarly recognized the importance of the distinction. The Tribunal stated:

> A treaty's temporal application raises two distinct questions: the *ratione temporis* jurisdiction of the Arbitral Tribunal constituted on the basis of the BIT and the *ratione temporis* applicability of the substantive obligations under the BIT. The Chilean State can only be held liable on the ground of the BIT's provisions if the Tribunal has established its jurisdiction *ratione temporis* and if the BIT's substantive provisions apply *ratione temporis* to the alleged violations.[5]

There are many other arbitral decisions that endorse the distinction.[6] Although each of these decisions will obviously have

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[4] Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction (G. Guillaume, President, B.M. Cremades, T.T. Landau), 22 Apr. 2005, ¶¶ 309–11, 12 ICSID REP. 242 (2006); italaw website.

[5] "L'application dans le temps du traité soulève deux questions distinctes: celle de la compétence *ratione temporis* du Tribunal arbitral saisi sur le fondement de l'API et celle de l'applicabilité *ratione temporis* des obligations de fond de l'API . . . . En effet, pour que l'Etat chilien puisse voir sa responsabilité engagée en application des dispositions de l'API, il faut d'une part que le Tribunal soit compétent *ratione temporis* et, d'autre part, que les dispositions de fond de l'API soient applicables *ratione temporis* aux violations alléguées." (Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Award (P. Lalive, President, M. Chemloul, E. Gaillard), 8 May 2008, ¶¶ 423, 427, italaw website).

[6] *See, e.g.,* Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador (UNCITRAL (PCA Case No. 34877)), Interim Award (K.H. Böckstiegel, President, C.N. Brower, A.J. van den Berg), 1 Dec. 2008, ¶¶ 177–78, italaw website; Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13), Award (G. Kaufmann-Kohler, President, P. Mayer, B. Stern), 6 Nov. 2008, ¶¶ 135–37, 15 ICSID REP.

to be assessed in its legal and factual context, each of them appears to take the view that, as a matter of principle, there is a distinction to be made between jurisdiction *ratione temporis* and substantive protection *ratione temporis*, and that this distinction may, in certain circumstances, be of practical relevance. Indeed, from a broader legal perspective, decisions such as *Impregilo* and *Pey Casado* reflect two well-established and related principles of international law – the doctrine of intertemporal law and the principle of non-retroactivity of treaties.

The doctrine of intertemporal law is of long standing and has been endorsed in contemporary international law, for instance, in Article 13 of the International Law Commission's Articles on State Responsibility ("ILC Articles"). According to Article 13, an act of a State cannot constitute a breach of an international obligation "unless the State is bound by the obligation in question at the time the act occurs."[7] In other words, the legality of an act

437 (2010); italaw website; Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13), Decision on Jurisdiction (G. Guillaume, President, B. Cremades, I. Sinclair), 29 Nov. 2004, ¶¶ 167–78, 14 ICSID REP. 306 (2009); 20 ICSID REV. 148 (2005); 44 I.L.M. 573 (2005); ICSID website; excerpts in French in EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI, Vol. II, at 59 (Pedone, 2010); SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction (A.S. El-Kosheri, President, A. Crivellaro, J. Crawford), 29 Jan. 2004, ¶ 167, 8 ICSID REP. 518 (2005); 16 WORLD TRADE & ARB. MATERIALS 91 (2004); italaw website; excerpts in French in EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI, Vol. I, at 865 (Pedone, 2004).

[7] *See* International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, Fifty-third session, U.N. Doc. A/56/10, at 29 (2001). For a history of the codification project on State responsibility, and the text of the ILC Articles with commentaries, see also JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY – INTRODUCTION, TEXT AND COMMENTARIES (Cambridge University Press, 2002). *See also* ILC

or omission under international law is to be judged by reference to the law applicable at the time of such act or omission. Consequently, the State can breach an international obligation only if it was bound by that obligation at the time the act or omission occurred, but conversely, if it was not bound by such obligation, there can be no breach. The same principle also applies to treaty obligations. Accordingly a State party to an investment treaty cannot breach an obligation created by the treaty if the alleged breach occurred prior to its entry into force.[8] Formulated in these

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Articles, Art. 28. The classic formulation of the doctrine is that of Judge Huber in the *Island of Palmas* arbitration:

> [A] juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled . . . . As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

Island of Palmas Case (Neth. v. U.S.), II U.N.R.I.A.A. 829, 831, 845. For further discussion see, *e.g.,* T.O. Elias, *The Doctrine of Intertemporal Law*, 74(2) AM. J. INT'L L. 285 (1980).

[8] *See, e.g., Impregilo*, *supra* note 4, ¶ 311 ("Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only acts effected after that date had to conform to its provisions."); Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary Jurisdictional Issues (K.D. Kerameus, President, D.A. Gantz, J. Covarrubias Bravo), 6 Dec. 2000, ¶ 62, 7 ICSID REP. 327 (2005); 18 ICSID REV. 469 (2003); italaw website ("Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994."); *Jan de Nul*, *supra* note 6, ¶ 132 ("It is undisputed . . . that the legality of an act must be assessed in the light of the law

terms, the doctrine of intertemporal law is hardly controversial in international law and indeed is rooted in elementary legal logic.

The principle of non-retroactivity of treaties is embodied in Article 28 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[9] Pursuant to Article 28,

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applicable at the time of its performance."); Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award (N. Stephen, President, J. Crawford, S.M. Schwebel), 11 Oct. 2002, ¶ 68, 6 ICSID REP. 192 (2004); 42 I.L.M. 85 (2003); 125 I.L.R. 110 (2004); italaw website ("The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach."); Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2), Decision on Jurisdiction (K.H. Böckstiegel, F. Fielding, A. Giardina), 24 Dec. 1996, 5 ICSID REP. 47, 58 (2002); 14 ICSID REV. 161, 180 (1999); italaw website; XXV Y.B. COM. ARB. 221 (2000) (excerpts); excerpts in French in EMMANUEL GAILLARD, LA JURISPRUDENCE DU CIRDI, Vol. I, at 493 (Pedone, 2004); 127 J.D.I. 151 (2000) ("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."); M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), Award, 31 July 2007 (R.E. Vinuesa, President, B.J. Greenberg, J. Irarrázabal), ¶¶ 93–97, 22(8) INT'L ARB. REP. B-1 (2007); italaw website ("The Claimants' arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it."); Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award (J. Paulsson, President, E. Salpius, J. Voss), 16 Sept. 2003, ¶ 11.2, 10 ICSID REP. 240 (2006); 44 I.L.M. 404 (2005); italaw website ("The obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on one of the BIT standards of protection must have arisen after 16 November 1996.").

[9] Vienna Convention on the Law of Treaties 1969 (signed 23 May 1969, entered into force 27 Jan. 1980), 1155 U.N.T.S. 331 ("Vienna Convention"). For commentary, see II Y.B. INT'L L. COMM'N 211–13 (1966).

> [u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

The principle of non-retroactivity of treaties is effectively a reflection, or an application, of the doctrine of intertemporal law. Since the State parties to a treaty are bound to comply with the treaty only as of the date of its entry into force, "any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty" generally cannot serve as a basis for a claim under the treaty. Again, there can be no remedy where there is no right.

However, while the doctrine of intertemporal law and the principle of non-retroactivity of treaties are well established and hardly controversial in international law, in practice their application is less than straightforward and may raise complex legal issues.

First, the principle of non-retroactivity of treaties is not absolute. This is reflected in Article 28 of the Vienna Convention, which contains two different qualifications. The first qualification relates to continuing breaches, or breaches that did not "[cease] to exist before the entry into force of the treaty." Such continuing breaches become subject to the terms of the treaty as of the date the treaty enters into force and, consequently, may serve as a basis for a claim under the treaty.[10] Indeed the case of a continuing

[10] *See, e.g.*, Société Générale v. Dominican Republic (UNCITRAL (LCIA Case No. UN 7927)), Award on Preliminary Objections to Jurisdiction (F. Orrego Vicuña, President, R.D. Bishop, B. Cremades), 19 Sept. 2008, ¶¶ 87–88, italaw website:

> The Tribunal is persuaded . . . that there might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which

breach is not really an "exception" to the principle of non-retroactivity and is a misnomer in the sense that such a situation is not really one of a continuing "breach" but rather one of a continuing factual situation that becomes a breach only as of the date the treaty enters into force, and not before. It is only on this date that the legal qualification of the situation changes from "non-breach" to a breach.[11]

Another important qualification of the principle of non-retroactivity is reflected in the language of Article 28 of the Vienna Convention – a different intention may "[appear] from the treaty" or may be "otherwise established." Both the jurisdictional and the substantive provisions of the treaty may suggest such a subjective intention or objective qualification of the principle of non-

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> only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty. . . . In such a case, the act is indeed continuous but its legal materialization as a breach occurs when the Treaty has come into force and the investor qualifies under its requirements.

See also SGS v. Philippines, *supra* note 6, ¶ 167:

> It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.

[11] *See, e.g., Société Générale*, *supra* note 10, ¶¶ 87–88:

> Thus, [in the case of a 'continuing breach'] there is no strict issue of retroactive application of the treaty concerned, and Article 28 of the Vienna Convention is not implicated. If it is merely the continuing effects of a one-time individual act that as such has ceased to exist that is involved, then the non-retroactivity principle fully applies, but when both the existence of the wrongful act and its effects continue both before and after the critical date, then the non-retroactivity principle will not exclude the application of the obligations of the treaty to the acts and omissions that occur after its effective date (footnote omitted).

retroactivity. It is in this context where the distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis* may in practice become relevant and indeed inevitable.

First, the applicable treaty may not specifically preclude existing claims or disputes, *i.e.*, claims or disputes that arose prior to its entry into force but that remain unsettled at the time of its entry into force. This issue is different from and more general than the case of a continuing breach. Here, the act or omission giving rise to the dispute may no longer be continuing and therefore this situation – except for the dispute that arose out of the situation – may have ceased to exist. If a treaty does not specifically exclude such existing disputes, will the tribunal's jurisdiction *ratione temporis* necessarily extend to such claims? The Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case answered the question in the affirmative, holding that in case of doubt the jurisdiction of an international tribunal embraces all disputes referred to it after its establishment:

> The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. . . . *The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction*. . . .[12]

According to the Permanent Court, unless the treaty includes an express exclusion – a "reservation" – of existing claims, the jurisdiction *ratione temporis* of an international court or tribunal extends to such existing disputes. The Permanent Court's holding is frequently cited in investment arbitrations. Thus, in

[12] *Case of the Mavrommatis Palestine Concessions* (Greece v. UK), Judgment of 30 August 1924 (Objection to the Jurisdiction of the Court), 1924 P.C.I.J. Series A, No. 2, at 35 (emphasis added).

Chevron v. Ecuador, where the parties argued the issue extensively, the *Mavrommatis* holding was cited as the *locus classicus*. The Tribunal noted that the applicable treaty, the Ecuador-United States bilateral investment treaty ("BIT"), applied to investments existing at the time of its entry into force and considered that, since the BIT's temporal limitations referred to investments and not disputes, it covered "any dispute as long as it [was] a dispute arising out of or relating to 'investments existing at the time of entry into force.'"[13] By implication, the Tribunal appeared to take the view that the assumption of jurisdiction *ratione temporis* over existing disputes would not amount to giving retroactive effect to the treaty – and precisely because such disputes would continue to "exist" on the date the treaty entered into force.[14]

However, the case of existing disputes remains controversial in arbitral practice, and other tribunals have adopted a different approach. In *MCI v. Ecuador*, Ecuador specifically challenged the jurisdiction of the Tribunal on the basis that the applicable BIT did not apply retroactively to disputes that arose prior to its entry into force. The Tribunal agreed, stating that

> [t]he non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. *The silence of the text of the BIT with respect to its*

[13] *Chevron, supra* note 6, ¶ 265. In any event, the Tribunal also found that the dispute had arisen after the entry into force of the treaty (*id.* ¶ 269).

[14] *Id.* ¶ 267 (citing Arthur Watts's ILC Commentary, II THE INTERNATIONAL LAW COMMISSION 1949–1998 (Sir Arthur Watts ed., Oxford University Press, 2000) and noting that the Permanent Court's decision in *Mavrommatis Palestine Concessions* did not "give retroactive effect to the agreement because, by using the word 'disputes' without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement" (emphasis in original).

> *scope in relation to disputes prior to its entry into force does not alter the effects of the principle of non-retroactivity of the treaties*.[15]

Similarly in *Walter Bau v. Thailand*, an UNCITRAL arbitration dealing with a dispute arising under the Germany-Thailand BIT, the Tribunal held that even if the BIT applied to investments made prior to its entry into force and remained silent on existing disputes, it did not confer jurisdiction *ratione temporis* "to consider disputes which had come into existence before the date of coming into force of the treaty."[16] The Tribunal specifically took issue with the Permanent Court's reasoning in *Mavrommatis*:

> The *Mavrommatis* dictum. . . may have led to many treaties (including many of the Respondent's) containing an express provision against retrospective temporal operation. However, such practice can be seen as states acting under an abundance of caution. The practice is not a helpful guide to interpretation of this particular Treaty. This is particularly so when the Treaty replaced had no provision for investor-state claims.[17]

Two contextual factors seem to have influenced the Tribunal's interpretation of the jurisdictional provisions of the treaty. First, the BIT in question had replaced an earlier BIT which did not contain provisions for investor-State arbitration. Second, the Claimant wished to apply retroactively the BIT's substantive provisions, which also did not exist previously.[18]

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[15] *M.C.I.*, *supra* note 8, ¶ 61 (emphasis added). *See also id.* ¶¶ 93–97.

[16] Walter Bau AG (in liquidation) v. Kingdom of Thailand (UNCITRAL), Award (I. Barker, President, M. Lalonde, J. Bunnag), 1 July 2009, ¶ 9.67, 22(4) WORLD TRADE & ARB. MATERIALS 681 (2010); italaw website.

[17] *Id.* ¶ 9.70.

[18] *Id.* ¶ 9.80. The Tribunal in *Feldman v. Mexico* reached a similar conclusion, although the factual context was not identical:

Thus the Tribunal's discussion of *Mavrommatis* must be considered in its context.

In any event, while not fully consistent on the level of *dicta*, arbitral jurisprudence suggests that the retroactive application of an investment treaty to existing disputes depends not only on the terms of the jurisdictional clause, *i.e.*, whether or not it specifically excludes existing disputes, or disputes that existed at the time the treaty entered into force. It also depends on the applicability *ratione temporis* of the substantive standards of protection available under the treaty. If the treaty establishes novel substantive obligations that did not exist prior to its entry into force, such obligations cannot be applied to resolve existing claims or disputes, *i.e.*, claims or disputes that arose prior to the entry into force of the treaty but that continue to exist on the date the treaty enters into force, even if the treaty does not specifically exclude them. This would amount to the retroactive application of novel substantive obligations, which runs contrary to the doctrine of intertemporal law. Conversely, if the treaty does not create any novel substantive obligations but simply requires that the State parties comply with customary international law standards, or even if it creates novel obligations but also confirms the applicability of customary international law and the existing claim in question is based on customary international law, and assuming further that

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> The Tribunal. . . observes that its jurisdiction under NAFTA Article 1117 (1) (a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law. . . . The reliance of the Tribunal on alleged violations of NAFTA Chapter Eleven Section A also implies that the Tribunal's jurisdiction *ratione materiae* becomes jurisdiction *ratione temporis* as well.

(*supra* note 8, ¶¶ 61–62). That the non-retroactivity principle may operate so as to limit *ratione temporis* the application of a jurisdictional clause was also recognized by the ILC in its Commentary; *see supra* note 7, at 213.

the treaty does not specifically exclude existing claims, the tribunal may properly deal with such existing claims or disputes.[19]

Such an approach does not contravene the doctrine of intertemporal law, which, as noted above, requires that the compliance of an act of State with international law be measured by reference to international law as it existed at the time the act occurred.[20] If the treaty merely confirms that the acts of the State parties to the treaty must conform to customary international law, no retroactive application of substantive law is required to assess the legality of such acts under the treaty. Accordingly, there is no inconsistency with the doctrine of intertemporal law. In such circumstances, if the jurisdictional provisions of the treaty permit,

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[19] Along similar lines see, *e.g.*, Herbert W. Briggs, *Reflections on Non-Retroactivity of Treaties*, 21 REV. ESP. DER. INT. 321, 327 (1968):

> Although the Court's approach in *Mavrommatis* might be possible in the application of [Article 28 of the Vienna Convention], perhaps the Article should be redrafted to make it clear that the purpose of the non-retroactivity rule is not thwarted by the application of a treaty to past acts so long as the treaty creates no substantive liability which did not previously exist in relation to those acts.

But see Generation Ukraine, *supra* note 8, ¶ 11.3:

> It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law. The Tribunal does not, however, have general jurisdiction over causes of action based on the obligations of states in customary international law.

The Tribunal's reasoning begs the question since it confuses the distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*. While an arbitral tribunal cannot have jurisdiction *ratione temporis* over existing disputes if the substantive obligations created by the treaty did not exist at the time the dispute arose, it may have such jurisdiction if the treaty adopts customary international law standards that existed at the time, and if the tribunal's jurisdiction *ratione temporis* over existing disputes is not excluded, either because the treaty is silent on the matter or specifically provides for jurisdiction over existing disputes. For further discussion see *infra.*

[20] *See supra* notes 7 and 8 and accompanying text.

an arbitral tribunal may exercise jurisdiction over acts or omissions that took place before the treaty's entry into force and may assess their legality under the treaty, even if such acts or omissions do not constitute continuing breaches.

The *locus classicus* here is again the *Mavrommatis* case, where the defendant State (the United Kingdom) contested the jurisdiction of the Permanent Court on the grounds, *inter alia*, that the acts that were complained of had taken place before the relevant treaty, Protocol XII of the Treaty of Lausanne, had come into force. The Permanent Court rejected this submission and found that the treaty applied retroactively to acts that had occurred before its entry into force because that was the very purpose of Protocol XII:

> Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognized therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol *guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place*.[21]

The Permanent Court's conclusion is consistent with modern treaty law. As set out above, Article 28 of the Vienna Convention specifically envisages that a treaty may be intended to

[21] *Mavrommatis, supra* note 12, at 34 (emphasis added).

apply retroactively, or that such retroactivity may be otherwise established. In other words, there are treaties that are specifically intended to operate retroactively, or whose very purpose is to have retroactive effects.

In this context, and in order to provide a more concrete conceptual framework, it may be instructive to distinguish between two different types of international treaties – "regulatory treaties," and "compromissory treaties." Most investment protection treaties are predominantly regulatory. They establish new substantive standards of protection that apply to the conduct of the host State vis-à-vis foreign investors after the entry into force of the treaty and thus purport to regulate the conduct of the host State on a prospective rather than retroactive basis. On the other hand, the very purpose of an inter-State treaty may be the exact opposite – to confirm the applicability of existing legal standards and to establish a mechanism to deal with outstanding claims and disputes. Unlike the generally prospective "regulatory" treaties, such retrospective treaties may properly be called "compromissory" treaties because their very purpose is to settle existing claims and disputes and to regularize a situation that has arisen as a result of such existing claims or disputes.

Indeed, such compromissory treaties, or *compromis* submitting a particular dispute or a series of disputes between the parties to international arbitration, are a classic form of inter-State treaties in the field of international dispute resolution. Many renowned inter-State arbitrations, including the *Jay Treaty* arbitrations and the *Alabama* arbitration, were a result of such compromissory treaties. Perhaps the best-known recent example of a compromissory treaty in the field of investment protection is the Algiers Accords which established the Iran-United States Claims Tribunal. One of the principal purposes of the Algiers Accords was to settle existing claims, or claims that had already arisen at the time the Accords were concluded, by establishing an

international arbitral Tribunal to deal with those claims.[22] Article 2 of the Claims Settlement Declaration specifically requires that the claim be outstanding on the date of the agreement in order to fall within the Tribunal's jurisdiction.[23] In other words, from the point of view of the Tribunal's jurisdiction *ratione temporis*, the rule is reversed when compared with the jurisdictional limitations of a typical BIT tribunal. Unlike BIT tribunals, which usually deal with claims arising after the entry into force of the treaty, the jurisdiction of the Iran-United States Claims Tribunal was specifically limited to claims that were outstanding on

[22] Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 Jan. 1981, *reprinted in* 1 IRAN-U.S. CL. TRIB. REP. 9 (1983). This principal purpose is particularly reflected in the introductory Declaration of General Principles and in Declaration 17 concerning the Settlement of Disputes.

[23] *Id.* Article II(1) states:

> An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, *if such claims and counterclaims are outstanding on the date of this Agreement*, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position. (emphasis added)

However, the Tribunal's jurisdiction was not purely retrospective. To the extent that the Tribunal had jurisdiction to deal with disputes between the two Governments concerning the interpretation and application of the Algiers Accords (so-called category "A" claims), its jurisdiction may be characterized as "regulatory."

19 January 1981, the date the Algiers Accords entered into force, *i.e.*, claims that arose *prior to* the critical jurisdictional date.

While the Iran-United States Claims Tribunal may look like an exotic example in the context of modern investment treaty arbitration (even if one should keep in mind that that Tribunal dealt with causes of action such as expropriation and other similar measures, which are also typically available under BITs),[24] there are also more recent examples showing the relevance of the distinction between regulatory and compromissory treaties in the context of modern investment treaty arbitration. A case in point is the ICSID arbitration between Hrvatska Eletroprivreda ("HEP"), a Croatian electricity company, and Slovenia involving a dispute over the operation of the Krško nuclear power plant.[25] The plant had been built in the 1970s with funds contributed by the national power industries of the Socialist Republics of Slovenia and Croatia when they were both part of the former Yugoslavia. In the 1990s, after both countries declared their independence, a dispute arose between HEP, the successor in interest to the Croatian investors, and Slovenia as a result of certain measures taken by Slovenia, including the termination of electricity deliveries to HEP in 1998. Following inter-governmental negotiations, on June 30, 2001 Croatia and Slovenia concluded an agreement to resolve the dispute (the "2001 Agreement"). The 2001 Agreement specified that June 30, 2002 was the relevant date by which Slovenia was to restore HEP's rights and to resume electricity deliveries. HEP claimed in the arbitration that Slovenia had failed to meet this deadline. However, Slovenia ratified the 2001 Agreement only in February 2003, some six months after the relevant date, and the

[24] For discussion see, *e.g.*, Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal*, 8 J. WORLD INV. & TRADE 215 (2007).

[25] Hrvatska Elektroprivreda D.D. v. Republic of Slovenia (ICSID Case No. ARB/05/24), Decision on the Treaty Interpretation Issue (D.A.R. Williams, President, C.N. Brower, J. Paulsson), 12 June 2009, italaw website.

electricity deliveries started only in April 2003, almost a year after the relevant date.[26]

The dispute centered on the interpretation of Article 17 and Exhibit 3 of the 2001 Agreement, and in particular on whether these two provisions amounted to a "financial settlement" based on the restoration of rights and the waiver of claims as of June 30, 2002, and whether Slovenia was liable for such losses by having failed to ratify the treaty by this date and to compensate HEP for its losses. Article 17 ("Past Financial Issues") provides as follows:

> (1) Mutual financial relations existing up to the signing of this Agreement between NEK d.o.o., ELES d.o.o., and HEP d.d. shall be regulated in accordance with the principles set forth in Exhibit 3 to this Agreement.
>
> (2) The Contracting Parties agree that, as of the date of entry into force hereof, all obligations of NEK d.o.o. to the Fund for financing the dismantling of the NE Krško and disposal of radioactive waste from NE Krško, which obligations arose from the application of the Act on Fund for Financing of Dismantling of NE Krško and Disposal of Radioactive Waste from NE Krško. . . shall cease to exist.[27]

Exhibit 3 provided, *inter alia*, that "ELES GEN d.o.o. assumes the financial results of all power and electricity produced during the period from July 31, 1998 until the date HEP d.d. begins to take over the electricity again, but no later than June 30, 2002."

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[26] *Id.* ¶¶ 1–12.

[27] *Id.* ¶ 129. NEK d.o.o. is a company established as a joint venture by the national electricity companies of Croatia and Slovenia to build and operate the Krško nuclear power plant. ELES-GEN d.o.o. is a wholly-owned subsidiary of ELES, the national electric power transmission company of Slovenia. *Id.* ¶¶ 4–5.

On the one hand, the 2001 Agreement, which had been signed on December 19, 2001, foresaw that the electricity deliveries would resume on June 30, 2002. On the other hand, the 2001 Agreement was ratified by Slovenia only in February 2003. The question thus arose as to the legal consequences of the difference between the formal effective date of the treaty and its substantive content, which in HEP's submission established June 30, 2002 as the date of resumption of deliveries. Should the former trump the latter, or conversely, should the latter trump the former?

The Tribunal began its analysis by noting that the 2001 Agreement spoke of "a settlement, on the basis set forth in Exhibit 3, of outstanding disputes."[28] Accordingly, even if the treaty had entered into force only after the relevant date, June 30, 2002, Slovenia's failure to ratify and enforce the terms of the treaty before the relevant date was not without legal consequences:

> While of course NEK could not be compelled actually to deliver electricity to HEP until such time as the 2001 Agreement would enter into force, the terms of the financial settlement concluded, and which perforce took effect with the entry into force of the 2001 Agreement, were based on the financial facts that would flow had HEP been supplied electricity starting 1 July 2002.[29]

Based on its analysis of the relevant provisions of the 2001 Agreement, the Tribunal concluded that it was "in general terms a settlement agreement," and that its purpose was to "draw a line in time, on June 30, 2002, as of which all past financial disputes were to be settled and from which new financial terms were to take effect."[30] For this reason, there was no "issue of retroactivity," and

[28] *Id.* ¶ 171.

[29] *Id.* ¶ 174.

[30] *Id.* ¶ 177.

even if there was, it would "clearly be resolved in HEP's favor."[31] In the Tribunal's interpretation, this was because the relevant provisions of the 2001 Agreement, Article 17 and Exhibit 3, embodied a settlement agreement that was prospective and/or retrospective, depending on whether one focuses on the date of signing or the date of entry into force:

> The case here is not one of breach of that obligation [*i.e.*, the obligation to deliver electricity as of June 30, 2002], which clearly could not arise prior to the 2001 Agreement entering into force. Rather it is one to enforce, following entry into force of the 2001 Agreement, the financial settlement that its Article 17 and Exhibit 3 embody. Hence, this in no event would be a true case of retroactive application. At the time the 2001 Agreement was signed on 19 December 2001, the obligations HEP asserts under Exhibit 3 would in fact have been *prospective*; they became 'retroactive' only as the treaty's entry into force became delayed. As the International Law Commission's commentary to what became VCLT Article 28 noted, retroactive application may be permitted by a 'special clause' or 'special object' necessitating retroactivity.[32]

In other words, even if Slovenia could not be considered in breach of the treaty before the treaty entered into force, it could nonetheless be held liable for its failure to ratify and comply with the treaty – or to enforce the "financial settlement" embodied in the treaty – once it had entered into force.

The issue before the Tribunal was less than clear-cut, and largely because the relevant "substantive" date, June 30, 2002, fell between the two other relevant dates – the date of signing and the date of entry into force. Indeed, the Tribunal's decision appears to

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[31] *Id.* ¶ 196.

[32] *Id.* ¶¶ 196–97 (emphasis in original).

be the result of considerable conceptual labor, and it is perhaps not surprising that one of the arbitrators appended a vigorous dissenting opinion to the decision, arguing that neither the terms of the agreement nor its object and purpose required retroactive application.[33] Both the decision and the lengthy dissenting opinion deserve to be read by anybody who wishes to explore in more detail the reasoning of the Tribunal and of the dissenting arbitrator, and in particular how the parties argued their respective cases. For the present purposes it suffices to note that, as the brief account above suggests, the 2001 Agreement was not a typical regulatory BIT. Its principal aim was not to establish general standards of investment protection applicable to State conduct. Rather, the Agreement dealt with one particular investment, the Krško nuclear power plant, in respect of which a dispute had already arisen. Nor was the 2001 Agreement a pure settlement agreement, a *compromis* that focused exclusively on the settlement of outstanding claims and disputes. The 2001 Agreement was effectively a mixed agreement which contained both regulatory and compromissory elements. On the one hand, it contained a provision dealing with waiver of claims relating to past financial issues, as set forth in Article 17 and Exhibit 3 of the Agreement. On the other hand, it contained regulatory provisions dealing with issues such as the future operation and dismantling of the plant. The particular problem posed by *HEP v. Slovenia* was that, to the extent that HEP's claims related to Slovenia's obligations associated with the June 30, 2002 date, it was not *prima facie* clear whether such obligations were regulatory or compromissory.

Consequently, while the distinction between regulatory and compromissory treaties is instructive and may assist in analyzing

[33] Hrvatska Elektroprivreda D.D. v. Republic of Slovenia (ICSID Case No. ARB/05/24), Decision on the Treaty Interpretation Issue (D.A.R. Williams, President, C.N. Brower, J. Paulsson), Individual Opinion of Jan Paulsson (pursuant to Article 48(4), ICSID Convention), 12 June 2009, ICSID website.

issues relating to the time aspect, in practice the distinction is not always clear. There may be mixed treaties containing both regulatory and compromissory elements – and, as *HEP* indicates, there may be treaty provisions that can be interpreted in *regulatory and/or compromissory terms*. In other words, there may be treaty provisions that are open to conflicting interpretations because the parties – whether deliberately or not – have left the issue open during the negotiations. It is hardly surprising that such open issues also tend to give rise to disputes.[34]

CONCLUSION

Is there a distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*?

The answer is yes, there certainly is, and in certain instances the distinction may also be of practical relevance – although such instances are likely to be rare in practice. In many if not the majority of cases the date when the treaty enters into force is also the critical date for purposes of jurisdiction *ratione temporis* – either because the treaty expressly excludes existing claims or because there can be no jurisdiction *ratione temporis* over such

[34] One of the lessons to be learned from *HEP* is a lesson for treaty negotiators: if the treaty foresees that a particular act or event is to take place before a particular date, and if it is not certain that such act or event will indeed take place before the treaty is ratified, it is worthwhile to include a specific clause in the treaty setting out the legal implications of the various options. Had the 2001 Agreement contained such a clause, the parties would have saved a considerable amount of trouble, and possibly an international arbitration. However, it is always easy to apply hindsight. If all international treaties were watertight and immune to differences of opinion regarding their interpretation and application, there would be no disputes and therefore no need for the practice of international arbitration – nor for international dispute resolution professionals for that matter. For better or worse, the world where we need them is the world we live in.

claims because the treaty establishes novel substantive standards of protection which could not have provided substantive protection *ratione temporis* prior to its entry into force. However, it is possible that the treaty not only specifically allows existing claims, or at least remains silent on whether such claims may be asserted, but also incorporates customary international law standards as the applicable law. In such cases it is possible that claims may be brought before a treaty tribunal based on breaches of the applicable law that occurred before the entry into force of the treaty, and that the tribunal assumes jurisdiction over such claims.

In all other instances the distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis* tends to mark the distinction between claims that can be entertained by a treaty tribunal and those that cannot, even if a cause of action under international law has already arisen. In the latter cases, tribunals will decline jurisdiction either because the treaty precludes existing disputes or because it establishes novel substantive standards of protection that would not exist but for the treaty. In other words, in such circumstances the distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis* tends to mark the distinction between claims that can be made and claims that cannot be made because there is no forum before which they may be asserted – unless, of course, one is created after the fact, by way of a *compromis*.