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STATE CONSENT, TEMPORAL JURISDICTION, AND THE IMPORTATION OF CONTINUING CIRCUMSTANCES ANALYSIS INTO INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

The international investment law regime has recently been characterized as facing a "crisis of legitimacy" and exhibiting "an incumbent lack of transparency . . . and legal uncertainty." This crisis has arisen in large part from poor reasoning and real or perceived overreach by international investment tribunals, who derive their jurisdictional competence from the consent of states and private investors. To bolster the perceived fairness and thereby the authority of their decisions, investment tribunals must be vigilant about clearly stating their reasoning and explicitly grounding their legal analyses in the relevant treaties. In jurisdictional decisions, respect for the limits of parties' consent to arbitrate must be a fundamental concern of arbitrators.

Investment tribunals frequently face disputes involving continuing acts, facts, and situations that appear to have begun before the relevant treaties entered into force and continued after that point. When addressing such matters, tribunals have borrowed analyses of similar issues from outside international investment law. Thus, the question arises whether this borrowing is appropriately used to determine jurisdiction based on a particular investment treaty with a specific jurisdictional consent clause. Of particular concern is investment tribunals' adoption of human rights

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jurisprudence that uses continuing violations to expand temporal jurisdiction.

This paper will examine how investment tribunals have incorporated continuing circumstances analysis from human rights and other adjudicatory bodies. It will evaluate whether it is ever possible for investment arbitrators to appropriately use such "precedent" in their jurisdictional analyses and whether they have applied it correctly in particular awards. Continuing circumstances issues arise under two different categories of temporal restrictions, each serving distinct purposes. The first category of restrictions excludes from jurisdiction acts, facts, situations, or disputes occurring before the treaty entered into force. The second category of restrictions prescribes a limited time after breach within which a party can bring a particular claim. To determine whether continuing circumstances analysis has been and can be properly applied in investment arbitration, one must consider the specific language and purpose of the relevant treaty's temporal limitations. Thus, this Article examines the two types of restrictions separately, considering their purposes and examining in detail how international tribunals have analyzed continuing circumstances under each.

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I. INTRODUCTION

The international investment law regime has recently been characterized as facing a legitimacy crisis[1] and exhibiting "an incumbent lack of transparency, differentiation, partial contradiction and legal uncertainty."[2] This crisis has arisen in large part from poor reasoning and real or perceived overreach by international investment tribunals, whose jurisdictional competence is based completely on the consent of states and private investors.[3] In carefully negotiated and drafted agreements, states limit the

1. *See* Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, *The Backlash Against Investment Arbitration: Perceptions and Reality*, *in* The BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxxvii, xxxvii (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010); James Crawford, *Foreword* to ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, at xxi (2009); Charles N. Brower, Michael Ottolenghi & Peter Prows, *The Saga of CMS:* Res Judicata, *Precedent, and the Legitimacy of ICSID Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 843, 845 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009); Charles N. Brower, *A Crisis of Legitimacy*, NAT'L L.J., Oct. 7, 2002, at B9.

2. MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: INTERNATIONAL COMMERCE AND ARBITRATION 98 (Ingeborg Schwenzer ed., 2008).

3. *See* NICK GALLUS, THE TEMPORAL SCOPE OF INVESTMENT PROTECTION TREATIES 27 (2008); Andrea J. Menaker, *What the Explosion of Investor-State Arbitrations May Portend for the Future of BITs*, *in* THE FUTURE OF INVESTMENT ARBITRATION 157, 161–63 (Catherine A. Rogers & Roger P. Alford eds., 2009); *see also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25 (Oct. 14, 1966) (establishing the jurisdiction of ICSID and giving states parties the right to limit their consent to arbitrate investment disputes even after ratifying the Convention), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; Press Release, International Centre for Settlement of Investment Disputes, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), http://icsid.worldbank.org/

categories of disputes they consent to submit to jurisdiction. For example, temporal limitations may exclude ongoing disputes or future disputes based on pre-treaty events. To bolster the authority and perceived fairness of their decisions, investment tribunals should clearly state their reasoning and explicitly ground their analyses in the relevant treaty. Clear reasoning and express basis in the relevant treaty are particularly important in jurisdictional decisions to demonstrate respect for the limits states set on their consent to arbitration.

Temporal jurisdiction has long been a source of contention between states in international adjudication. The language of temporal jurisdiction provisions is often ambiguous. Additionally, ongoing acts, facts, and situations—that is, "continuing circumstances"[4]—present difficulties. Parties to arbitration often dispute whether a continuing circumstance is within the tribunal's jurisdiction. Disagreements also arise over whether a circumstance is in fact continuing or instead, whether a series of individual situations or disputes has occurred, some within jurisdiction and others outside. International tribunals have faced such questions for over a century and have developed a jurisprudence of continuing circumstances.

International investment tribunals have invoked continuing circumstances analysis developed in other areas of international law to find that they have jurisdiction over acts that appear on their face to have occurred outside the temporal scope of the relevant treaty. They have also used continuing circumstances analysis to find that they do not have jurisdiction when they might at first appear to. Given the importance of respecting the limits of consent to arbitration, the question arises whether it is appropriate for investment arbitration tribunals to apply continuing circumstances analysis from outside international investment law.[5] Particular concerns have been raised about investment tribunals' adoption of human rights jurisprudence that uses continuing violations to expand temporal jurisdiction.[6]

This Article will examine how investment tribunals have incorporated continuing circumstances analysis developed by human rights and other

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ICSID/Index.jsp (click on "Publications"; select "News Releases"; then select link for news release of Dec. 5, 2007) (notifying ICSID, pursuant to Article 25(4) of the ICSID Convention, that it withdraws consent to arbitrate investment disputes pertaining to investments in natural resources, such as oil, gas, and minerals).

4. This Article uses the phrase "continuing circumstances" to refer generally to all types of continuing behavior and situations that arise in international cases—including continuing facts, acts, situations, and disputes.

5. *Cf.* BG Group PLC v. Republic of Arg. (U.K. v. Arg.), Final Award, ¶ 408 (Dec. 24, 2007) (questioning whether principles of customary international law apply to investor-state disputes).

6. *See* Merrill & Ring v. Canada, Opinion of W. Michael Reisman with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, ¶¶ 45–51 (Apr. 22, 2008).

adjudicatory bodies and will evaluate whether this incorporation has been executed appropriately. It will also evaluate whether it is ever legitimate for investment tribunals to incorporate such "precedent" into their jurisdictional analyses. Continuing circumstances issues arise under two categories of treaty provisions restricting jurisdiction, each serving distinct purposes. One category of provisions excludes from jurisdiction acts, facts, situations, or disputes occurring before the treaty entered into force. The other category of provisions prescribes a limited time after a breach within which a party can bring a particular claim. To determine whether continuing circumstances analysis has been and can be properly applied in investment arbitration, the purpose of the underlying treaties' temporal restrictions must be considered. Therefore, this Article examines the two types of restriction separately, considering their purposes and examining in detail how international tribunals have analyzed continuing circumstances under each.

This Article proceeds as follows. Part II discusses the consensual basis of investment arbitration and identifies legal authority for arbitrators' use of sources of law outside the relevant investment treaty for interpretative guidance. Part III examines continuing circumstances under treaty provisions that exclude from jurisdiction facts, acts, situations, or disputes that began before the treaty entered into force. Part IV examines continuing circumstances as they interact with treaty-mandated periods of limitation. Part V concludes by discussing the legitimacy crisis in international investment law and proposing a principle to guide investment arbitrators in the proper use of outside sources of law to interpret jurisdictional consent clauses.

II. CONSENT: THE BASIS OF INVESTMENT TRIBUNAL JURISDICTION

Tribunals convened under the International Centre for Settlement of Investment Disputes (ICSID), which hear most investor-state arbitrations, obtain jurisdiction by consent of the state and investor parties to the arbitration, as specified in Article 25 of the International Convention on the Settlement of Investment Disputes (ICSID).[7] To grant an ICSID-sanctioned tribunal jurisdiction over a dispute, a state must have agreed, in addition to signing the ICSID Convention, to submit the specific dispute or a class of

7. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25 (Oct. 14, 1966).

disputes.[8] The instrument of consent may be a bilateral investment treaty (BIT) (most commonly), a multilateral treaty, or an agreement between a State and an individual investor.[9] Nothing in the ICSID Convention prevents parties from circumscribing their consent to a subset of disputes, and parties often do limit their consent in this way. Many investment treaties limit consent to arbitration to disputes arising after the treaty's entry into force,[10] or—even more restrictively—to disputes based on factual circumstances arising after the treaty's entry into force.[11]

Under the principle of consent, a tribunal should seek to ascertain and apply the shared intention of the parties to the relevant agreement regarding what disputes are within the tribunal's jurisdiction. As Professor W. Michael Reisman has described:

> In international law, the basic theory of arbitration is simple and rather elegant. Arbitral jurisdiction is entirely consensual. As in Roman law and the systems influenced by it, arbitration is a creature of contract. The arbitrator's powers are derived from the parties' contract. Hence, in the classic sense, an arbitrator is not entitled to do anything unauthorized by the parties: *arbiter nihil extra compromissum facere potest*. . . . [A] purported award which is accomplished in ways inconsistent with the shared contractual expectations of the parties is something to which they had not agreed. The arbitrator has exceeded his power or, to use the technical term, committed an *excès de pouvoir*. If the allegation of such an excess can be sustained, the putative award is null, and may be ignored by the "losing" party.[12]

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8. *Id.* art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.").

9. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, DISPUTE SETTLEMENT: INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES: 2.3 CONSENT TO ARBITRATION 11–24, UNCTAD/EDM/Misc.232/Add.2 (2003).

10. *See, e.g.*, Convenio entre el Gobierno de la República de Chile y el Gobierno de la República del Perú para la promoción y protección recíproca de las inversiones [Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments] art. 2, Feb. 2, 2000, *available at* http://www.sice.oas.org/BITS/chiper_s.asp [hereinafter Peru-Chile BIT] ("This Treaty shall apply to investments made before or after its entry into force . . . . It shall not, however, apply to differences or disputes that arose prior to its entry into force.").

11. *See* Industria Nacional de Alimentos, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 94 (Sept. 5, 2007) (discussing single versus double exclusion clauses).

12. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745.

Often, however, the shared intention of the parties is not obvious from the instrument of consent. A question that comes up repeatedly in ICSID arbitration is whether the dispute at issue falls within the temporal scope of the parties' consent to arbitration. When the answer cannot be determined from the instrument(s) of consent, where is the appropriate place to look for interpretive guidance?

One interpretive approach is to determine a default rule, which presumes that silence on a matter correlates to a particular intention. Alan Scott Rau and Edward F. Sherman have pointed out that default rules, which assert, "'if it had been the parties' intention to [*x*], they would have so provided in their contracts,' [are] nothing more than an extravagant form of question-begging."[13] Rau and Sherman suggest that the goal of a default rule is to "most closely mimic[] the 'hypothetical bargain' that the parties themselves would have chosen in a completely spelled-out agreement . . . ."[14] Given the difficulty of determining this position, a default rule might instead seek to mimic the bargain that similarly situated parties or rational parties would have chosen ex ante.[15] Even this approach seems speculative at best, particularly if attempted without regard to the context in which the agreement was made.

Another way to discern the intent of ambiguous treaty language is to look at the broad context in which the words were written. Context can also aid in determining a more plausible default rule. Such context includes similar language in earlier or contemporaneous agreements. It may be particularly useful to examine prior decisions of international tribunals interpreting similar treaty language to determine a default rule, as sophisticated treaty parties may be presumed to be aware of such decisions and to take them into account when drafting treaty language.[16]

This interpretive approach is consistent with the Vienna Convention on the Law of Treaties (Vienna Convention), the ICSID Convention, and many investment treaties. Under Article 31 of the Vienna Convention, a treaty should be interpreted according to the ordinary meaning of its terms in context and in light of the treaty's purpose. The Convention defines the

13. Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 113 (1995) (quoting Dominique T. Hascher, *Consolidation or Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. INT'L ARB. 127, 134 (1984)).

14. *Id.* at 115.

15. Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent'*, 24 J. INT'L ARB. 199, 221 (2008).

16. This presumption is problematic if one is looking at decisions rendered subsequent to the creation of the treaty.

relevant context as including the text, preamble, and annexes to the treaty. In addition to the context, "any relevant rules of international law applicable in the relations between the parties" should be taken into account.[17] ICSID Convention Article 42(1) provides that when the parties do not agree on the law to be applied, a tribunal shall apply, inter alia, "such rules of international law as may be applicable."[18] Many BITs also instruct arbitral tribunals to apply principles of international law. For example, Article 40(1) of the Canadian Model BIT provides, "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[19]

The vague language in all three of these instruments leaves arbitrators great discretion to choose which rules of international law to apply, including at minimum the sources of international law recognized by the International Court of Justice (ICJ) Statute: treaties, customary international law, and general principles of law. The tribunal in *M.C.I. Power Group v. Ecuador* listed the sources of law it would consider to determine its jurisdiction: the ICSID Convention, the relevant BIT, and applicable norms of general international law, which the tribunal listed as including the customary rules recognized in the International Law Commission's Draft Articles on State Responsibility (hereinafter ILC Draft Articles) and the Vienna Convention.[20] Finally, the tribunal stated it would "*refer to* precedents that state the legal implications of binding norms of conventional and customary international law that are applicable only to the extent that and insofar as they specifically relate to the present case."[21] The tribunal's qualified endorsement of international judicial and arbitral precedent reveals an attitude toward precedent similar to that expressed in the ICJ Statute. Article 38 of the Statute provides that the court shall apply judicial decisions only "as a subsidiary means for the determination of rules of law," and only subject to the principle that the court's decisions have no binding force outside the particular case.[22]

Like the ICJ, investment tribunals must avoid treating previous judicial and arbitral decisions as binding precedent because each ICSID tribunal

17. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

18. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 575 U.N.T.S. 159.

19. Canada 2004 Model BIT, art. 40(1), *available at* http://ita.law.uvic.ca/investmenttreaties.htm.

20. M.C.I Power Group L.C. v. Ecuador, ICSID Case No. ARB/03/6, Award, ¶¶ 42–43 (July 31, 2007).

21. M.C.I Power Group L.C. v. Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 44, (July 31, 2007) (emphasis added).

22. ICJ Statute of the Court, arts. 38 & 59, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

interprets one of thousands of different investment treaties. Nonetheless, it would be foolish to ignore prior published decisions interpreting identically worded provisions. Such decisions inform the language lawyers choose when drafting treaties and provide context that is helpful for determining reasonable understandings of treaty language. With temporal jurisdictional provisions, there is a strong foundation of decisions to draw from. Investment treaties use the same language to restrict jurisdiction *ratione temporis* that treaty drafters have used since at least the Permanent Court of International Justice was established in 1922.

Even so, tribunals should interpret consent to jurisdiction particularly carefully to give effect to the parties' intentions. As the tribunal in *Mondev v. United States* explained, "[i]n the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties."[23] ICSID tribunals have repeatedly found that consent to jurisdiction should be interpreted by neither the principle of restrictive interpretation nor the principle of effective interpretation, by which an arbitrator interprets a treaty so as to give effect to the object and purpose of the treaty.[24] In *Amco v. Indonesia*, the tribunal rejected the argument that a state's consent to an arbitration convention should be construed restrictively because it limited the state's sovereignty.[25] The tribunal explained,

> [L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of international law and to international law.
>
> Moreover—and this is again a general principle of law—any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.[26]

The tribunal in *SPP v. Egypt* similarly reasoned, "jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather

23. Mondev v. United States, ICSID Case No. ARB(AF)/99/2, Award ¶ 43 (Oct. 11, 2002).
24. *See, e.g.*, *id*. *See generally* CHRISTOPH SCHREUER, ICSID: A COMMENTARY 249 (2001).
25. Amco v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶¶ 13–15 (Sept. 25, 1983) 1 ICSID REPORTS 389, 393–94 (1993).
26. *Id.* ¶ 14.

objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in favor of it is preponderant."[27] Objectivity and a good faith effort to determine the parties' intent are thus a tribunal's guiding principles for interpreting jurisdictional clauses. The remainder of this Article will examine investment tribunals' use of outside sources in light of these principles.

III. JURISDICTION OVER ACTS OCCURRING BEFORE ENTRY INTO FORCE OF THE RELEVANT TREATY

A. The Rule Against Retroactivity of Treaties

The obvious starting point for interpreting ambiguous temporal restrictions in an investment treaty is Article 28 of the Vienna Convention, which provides: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party."[28]

Regarding this rule, the International Law Commission (ILC) has said,

> The reasons for its existence are obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in one direction and divert it from another, this function can only be discharged if the obligations exist before the subjects prepare to act; secondly, and more important, the principle in question provides a safeguard for these subjects of law, since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others.[29]

The two primary rationales of the rule against retroactivity, then, are that treaties are meant to guide future conduct and that states must be given notice before they are held accountable.

The operative words from the Vienna Convention for the present discussion are, "unless a different intention appears."[30] States can agree to

27. SPP v. Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction ¶ 63, (Apr. 14, 1988), 3 ICSID REPORTS 131, 144.

28. Vienna Convention, *supra* note 17, art. 28.

29. *Report of the International Law Commission on the work of its twenty-eighth session*, 3 May—23 July 1976, [1976] 2 Y.B. Int'l L. Comm'n 1, 90, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Part 2).

30. Vienna Convention, *supra* note 17, art. 15.

grant or withhold jurisdiction over past actions, or over actions that began in the past and continue to the present. For example, they can preclude jurisdiction over disputes based on acts that began before but continue after a BIT enters into force.

One important and difficult question arises when a treaty provision granting arbitral jurisdiction does not expressly limit jurisdiction *ratione temporis*. In such cases, what is the default rule? Applying the non-retroactivity principle to jurisdictional consent is not straightforward. One must distinguish between the temporal scope of the treaty's substantive obligations and jurisdiction *ratione temporis* granted to an arbitral body constituted under the treaty. It is clear that—unless otherwise explicitly stated—conduct that begins and ends before a treaty entered into force cannot violate obligations created by the treaty. This result follows from the two bases for the non-retroactivity principle: obligations can only guide future conduct, and states must be given notice before they are held accountable.

However, these rationales do not apply as cleanly to jurisdictional treaties. Rather than imposing a substantive obligation meant to guide states' future conduct, a purely jurisdictional treaty might do nothing more than establish a mechanism for adjudicating disputes. It is easy to see how such a treaty with no express temporal limitations could reasonably be read to apply to all disputes that *exist* after the dispute adjudication mechanism is created—even those that predate the treaty. The only obligation imposed is that states arbitrate their disputes—an obligation which does not implicate past conduct. There is no notice problem because, when they sign the treaty, states know that their existing disputes will be subject to it.

Similarly, an agreement imposing substantive obligations may also create a dispute resolution mechanism that applies to *any* dispute between the parties, not just to disputes over the substantive obligations. In such cases, it is not clear that the default rule for arbitration provisions is that they apply only to disputes over future facts. If the dispute arose before the treaty and involved obligations that existed before the treaty entered into force, allowing a tribunal to hear the dispute is not a prima facie violation of the rule against retroactivity.

Indeed, some authorities have argued that the default for jurisdictional clauses is that they apply to all disputes existing after their entry into force. For example, the Third Report on the Law of Treaties, a precursor to Article 28 of the Vienna Convention, states the following:

> The word "disputes" according to its natural meaning is apt to cover any dispute which *exists* between the parties after the coming into

> force of the treaty. It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it; for the parties have agreed to submit to arbitration or judicial settlement all their *existing* disputes without qualification.[31]

Various international adjudicatory bodies have interpreted similar jurisdictional consent clauses divergently. The next section of this Article will describe four types of language used in jurisdictional provisions before turning to international jurisprudence to explore how this language has been interpreted.

B. Unless a Different Intention Appears: Four Categories of Temporal Limitations in Consent Provisions

I have identified four levels of temporal restriction on jurisdiction. When analyzing decisions on jurisdiction *ratione temporis,* keeping these levels in mind helps one to distinguish decisions interpreting different types of consent and faithfully extrapolate principles from these decisions. The way continuing circumstances affect jurisdiction depends on the temporal limitations in the relevant treaty.

The first level of consent contains no explicit limitation *ratione temporis*. I will refer to this type of jurisdictional grant as unrestrictive consent. I do not mean that it is in fact unrestricted, but that there are no explicit temporal jurisdiction restrictions in the treaty. An example of this type of agreement is the United States-Ecuador BIT, which contains no express limitations on temporal jurisdiction in Article VI, where the arbitral consent clause is located.[32] The only temporal clause in the treaty is in article XII, which states that the treaty "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter."[33]

The second level of temporal limitation has been called *single exclusion*.[34] These consent clauses explicitly exclude jurisdiction over disputes arising before the entry into force of the treaty. An example is the Peru-Chile BIT, which specifies that "[i]t shall not, however, apply to differences or disputes that arose prior to its entry into force."[35] There are actually two variants of

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31. Sir Humphrey Waldock, *Third Report on the Law of Treaties*, [1964] 2 Y.B. Int'l L. Comm'n 5, 11, U.N. Doc. A/CN.4/SER.A/1964/ADD.1.

32. *See* Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment art. VI, Aug. 27, 1993, S. TREATY Doc. No. 103–15 [hereinafter U.S.-Ecuador BIT].

33. *Id.* art. XII.

34. Industria Nacional, *supra* note 11, Decision on Annulment ¶ 94.

35. Peru-Chile BIT, *supra* note 10, art. 2.

single-exclusion clauses, but it is not necessary here to apply separate terminology to them. The clauses may exclude only "disputes" that arose prior to entry into force or, as seen above in the Peru-Chile BIT, "disputes" and "differences" arising before entry into force. Some international tribunals have interpreted differences to have a lower threshold than disputes; thus single exclusion clauses that include differences may be broader.[36]

The third level of restriction has been labeled a *double exclusion* clause.[37] A double exclusion clause states that the jurisdictional provision shall not apply to disputes *over facts or situations* that occurred prior to its entry into force. This language provides the broadest possible restriction because it can be interpreted to exclude even disputes that arise after the treaty entered into force, when the dispute involves actions or events that occurred prior to entry into force. An example appears in the Permanent Court of International Justice (PCIJ) case *Phosphates of Morocco*, in which the French Declaration accepting the court's jurisdiction submitted "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification . . . ."[38] Though some have interpreted double exclusion clauses as strictly curbing temporal jurisdiction to post-treaty acts, two minority opinions in *Phosphates in Morocco* took a different position.[39] These dissents reasoned that jurisdiction over situations or facts *subsequent to* the Declaration includes not only situations or facts *arising* subsequent to the Declaration, but all situations or facts *existing* subsequent to it.[40] An early report by the U.N. Special Rapporteur on State Responsibility shared this broader view of jurisdiction.[41]

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36. *See, e.g.*, Helnan Int'l Hotels v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Objections to Jurisdiction, ¶¶ 35–57 (Oct. 17, 2006). *But see* Empresas Lucchetti, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award, ¶¶ 38–62 (Feb. 7, 2005) (omitting to even mention the possibility of a difference between a "difference" and a "dispute" under the BIT and, accordingly, basing its determination of temporal jurisdiction entirely on when the dispute arose).

37. Industria Nacional, *supra* note 11, Decision on Annulment ¶ 94.

38. Phosphates in Morocco (It. v. Fr.), Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74, at 22 (June 14, 1938) (translating French Declaration of September 19, 1929) (original French: "tous les différends qui s'élèveraient après la ratification de la présente déclaration au sujet des situations ou des faits postérieurs à cette ratification").

39. It is difficult to discern whether the *Phosphates in Morocco* majority read the clause to mean "arising" or "existing". The majority focused its discussion on determining the real cause of the dispute. It found that the real cause of the dispute was a "fact"—a particular legislative act—that was completed before the Declaration granting jurisdiction. The majority therefore did not reach whether a continuing fact or situation that arose before entry into force but continued after could give the PCIJ jurisdiction. *See id.* at 23.

40. *See id.* at 35 (Eysinga, J., dissenting); *id*. at 36–37 (Tien-Hsi, J., dissenting).

41. Special Rapporteur, *Seventh Report on State Responsibility*, ¶¶ 31–32, U.N. Doc. A/CN.4/307 (1978) (agreeing with the dissenting opinions in *Phosphates in Morocco*); *see also* John Fischer Williams, *The Optional Clause*, 11 BRIT. Y.B. INT'L L. 63, 74 (1930) (recognizing the ambiguity in limiting jurisdiction to "disputes arising . . . with regard to situations or facts subsequent to . . .

A final type of temporal exclusion, *subject matter exclusion*, occurs indirectly or implicitly. Subject matter exclusion exists when the treaty grants jurisdiction only over disputes arising from interpretation of the agreement. This type of limitation on an arbitral tribunal's jurisdiction *ratione materiae* implicitly limits the tribunal's jurisdiction *ratione temporis* because of the principle of non-retroactivity. An example of such a clause appears in *Mavrommatis Palestine Concessions*, a case before the PCIJ. Jurisdictional consent came from the Palestinian Mandate and stated:

> The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations *relating to the interpretation or the application of the provisions of the Mandate*, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice . . . .[42]

Another example is Article 1116 of the North American Free Trade Agreement (NAFTA), which allows for claims of violations of specific NAFTA provisions:

> An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) . . . .[43]

ICSID tribunals interpreting NAFTA have held that conduct that began before but continued after the treaty's entry into force could become subject to the treaty's substantive obligations and thus to the tribunal's jurisdiction under Article 1116.[44] However, only the portion of the conduct occurring after entry into force is subject to the tribunal's jurisdiction.[45] Similarly, in *Mavrommatis*, the PCIJ held that a subject matter exclusion allowed jurisdiction over all disputes arising under the terms of the British Mandate,

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ratification": "If a state is in occupation of contested territory at the date of the ratification and continues in occupation afterwards, is this a situation 'subsequent', as well as prior, to ratification?").

42. Mavrommatis Palestine Concessions (Gr. v. U.K.), Judgment No. 2, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30) (emphasis added).

43. North American Free Trade Agreement art. 1116, U.S.-Can.-Mex., Dec. 17, 1992, 132 I.L.M. 289 (1993) [hereinafter NAFTA].

44. *See* Mondev, *supra* note 23, Award ¶ 58; Marvin Roy Feldman Karpa v. United Mex. States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶ 62 (Dec. 6, 2000).

45. *See id.*

even if the dispute involved acts that occurred before entry into force.[46] The PCIJ reasoned similarly to the *Mondev* tribunal: "[The] breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it."[47]

The next section of this Article will examine the history of the concept of continuing circumstances and how it has been used to determine jurisdiction over acts occurring before a treaty's entry into force.

C. The Origin of Continuing Circumstances Outside Human Rights Jurisprudence

Though the concept of continuing circumstances has been used for jurisdictional purposes extensively, and most familiarly, in human rights cases, it did not originate in human rights law. In fact, several of the first cases addressing continuing circumstances arose in a commercial context in disputes similar to those heard by ICSID tribunals, involving claims against states on behalf of foreign investors. Each of these early continuing circumstances cases before the Permanent Court of International Justice and the ICJ involves a consent provision with a double exclusion clause. Central to all of the decisions is an emphasis on determining the real cause of the dispute.

Preliminarily, before the PCIJ heard its first case involving continuing violations, it analyzed the effect of a subject matter exclusion clause on jurisdiction *ratione temporis* in 1924, in the case *Mavrommatis Palestine Concessions*.[48] The court's analysis provides useful background to its later decisions. It highlights the importance of reading a jurisdictional provision carefully to ascertain whether it focuses on when a dispute arose or when the facts giving rise to the dispute occurred. The jurisdictional clause in the Palestinian Mandate provided that any dispute arising between the Mandatory and another member of the League of Nations regarding the interpretation or application of the Mandate must be submitted to the Permanent Court of International Justice.[49]

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46. *See* Mavrommatis, *supra* note 42, Judgment No. 2 at 35. Several dissenting opinions argued that the court lacked jurisdiction because the dispute did not relate to the interpretation or application of the Mandate; however, they did not discuss non-retroactivity of substantive treaty obligation, focusing instead on the rationale that the subject matter of the dispute did not fit within any article of the Mandate. *See id.* at 38 (Dissenting Opinion of Lord Finlay); *id.* at 86 (Dissenting Opinion of Judge M. Oda); *id.* at 88 (Dissenting Opinion of Judge M. Pessôa).

47. *See* Mavrommatis, *supra* note 42, Judgment No. 2 at 35.

48. *Id.* at 35.

49. *Id.* at 11.

The case involved a dispute over concessions held by a Greek national in the Mandate. Greece alleged that the British authorities denied the investor the benefit of its concessions in violation of international agreements.[50]

Britain challenged the court's jurisdiction *ratione temporis* on the grounds that the facts giving rise to the dispute arose before the Mandate entered into force.[51] The court rejected this argument, holding that only the *dispute* must arise after the Mandate's entry into force for the court to have temporal jurisdiction. The court reasoned that "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment."[52] It pointed to the language of the Mandate—"any dispute whatsoever .... which may arise"—as supporting inclusive temporal jurisdiction.[53] The court further supported the default rule it propounded by pointing to the many arbitration treaties with reservations excluding disputes arising from pre-existing events. It reasoned that these reservations "seem[ed] to prove the necessity for an explicit limitation of jurisdiction."[54]

However, the court's analysis further considered the effect of the subject matter exclusion on temporal jurisdiction: "If the Court's jurisdiction is based on Article II of the Mandate, this clause must be applicable to the dispute, not merely *ratione materiae*, but also *ratione temporis*."[55] Thus, for a dispute to arise under the Mandate, it must arise after the Mandate's entry into force. Notice that what the court considered important was not when the facts or situations began, but when the *dispute* began. The court held that it is irrelevant that the concessions grant complained of was made before entry into force, because the concessions "still subsist[], and the provisions of the Mandate are therefore applicable . . . ."[56]

In *Phosphates in Morocco*, the PCIJ first heard the argument that a continuing violation overcame the limitation *ratione temporis* in the instrument of jurisdictional consent.[57] The court found that the real cause of the dispute before it was not a continuing act but a single, discrete act occurring before entry into force of the relevant jurisdictional agreement.[58]

50. *Id.* at 7–9.
51. *Id.* at 35.
52. *Id*.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id*.
57. Phosphates in Morocco, *supra* note 38, Preliminary Objections at 21–22.
58. *Id.* at 24–26 ("Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose. . . . The situation which the Italian government denounces as unlawful is a legal position resulting from the

Therefore, it did not reach whether a continuing act could have overcome the explicit limitations of jurisdictional consent. Nonetheless, this decision introduced a line of inquiry central to continuing circumstances jurisprudence: the examination of whether or not a series of events in fact constitutes one continuing act, fact, or situation.

The French Declaration accepting the court's jurisdiction contained a double exclusion clause, consenting to submit "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification . . . ."[59] The "crucial date," the date of ratification, was April 25, 1931.[60]

The Italian government alleged that France and Morocco violated international obligations by monopolizing Moroccan phosphates.[61] Italy presented the monopolization as a regime instituted by *dahirs* (orders) in the 1920s, which reserved to the Maghzen the right to prospect for and work phosphates.[62] Italy argued that this regime, still in operation, had established a monopoly at odds with Morocco's and France's international obligations.[63] Italy characterized the violations in two alternatives. The first alternative was as a whole group of measures contrary to the international obligations of France and Morocco, including the *dahirs* (orders) of 1920, expropriation of Italian nationals, and participation of the Moroccan Administration in the North-African phosphate cartel.[64] The second, more limited, alternative was based on the January 8, 1925 decision of the Department of Mines rejecting the claim of an Italian investor. This alternative claim alleged denial of justice to him and his successors in interest.[65]

Italy submitted that the double exclusion clause did not preclude its complaint even though some of the facts or situations giving rise to the dispute occurred before the crucial date. The court summarized Italy's arguments:

> [F]irst[,] because certain acts . . . were actually accomplished after the crucial date; secondly, because these acts, taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing and progressive illegal act which was not fully

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legislation of 1920 . . . . [The] dahirs are "facts" which, by reason of their date, fall outside the Court's jurisdiction.").

59. *Id.* at 22 (see *supra* note 38 for original French text).
60. *Id.* at 21.
61. *Id.* at 15.
62. *Id.* at 12–13.
63. *Id.* at 15.
64. *Id.* at 13–15.
65. *Id.* at 14–15.

> accomplished until the crucial date; and lastly, because certain acts which were carried out prior to the crucial date, nevertheless gave rise to a permanent situation inconsistent with international law which has continued to exist after the said date.[66]

Thus Italy invoked continuing circumstances to characterize the acts or the situation at issue as occurring later and therefore falling within jurisdiction.

The court disagreed with Italy's claim that there was a single continuing act that gave rise to the dispute, holding instead that the *dahirs* alone created the situation. The ongoing situation was merely a "legal position" that resulted from a prior discrete act that was the real cause of the dispute.[67] Because the *dahirs* occurred at a single point in time before the crucial date, the dispute was excluded from jurisdiction by the double exclusion clause.[68] The court thus did not discuss whether a continuing violation could overcome the double exclusion clause.

Two of the dissents, however, did analyze how continuing acts would interact with the clause. They argued that the "outer exclusion" meant simply that the fact or situation that is the basis of the dispute must continue to exist after ratification—that is, parties could not bring old claims for reparation. Both dissents argued that a reading that requires the facts or situations to *arise* after entry into force reads restrictions that do not appear into the text.[69] As the dissenting opinion by Jonkheer van Eysinga pointed out in a careful textual analysis of the consent provision, the language does not specify (in either the original French or the English translation) facts or situations *arising* after the date of ratification—it says facts or situations "postérieurs à" or "subsequent to" the date.[70] Mr. Cheng Tien-Hsi's dissent pointed out the important purpose of the restriction to facts or situations subsequent—to exclude claims over completed wrongs. His view was that the denial of justice claim was rightly excluded because it was not a continuing situation or fact—"if . . . it was a wrong decision in 1925 . . . . it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation. Considered as a wrong, it is not an existing fact, but entirely a thing of the past."[71] These dissents thus represent a relatively expansive view of jurisdiction under a double exclusion clause.

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66. *Id.* at 23.
67. *Id.* at 25–26.
68. *Id.* at 26.
69. *See id.* at 35 (Dissenting Opinion by Jonkheer van Eysinga); *id.* at 36–37 (Dissenting Opinion of Mr. Cheng Tien-Hsi).
70. *Id.* at 35, at 327–28 (Dissenting Opinion by Jonkheer van Eysinga).
71. *Id.* at 36 (Dissenting Opinion of Mr. Cheng Tien-Hsi).

The PCIJ again addressed a continuing circumstances argument in 1939 in *Electricity Company of Sofia and Bulgaria*.[72] The case involved a dispute between Belgium and Bulgaria arising out of a concession owned by a Belgian company for power generation in Bulgaria. During World War I, the company was taken over by the Municipality of Sofia.[73] The 1919 Treaty of Neuilly gave the Belgian company the right to restitution of its property and gave the Belgo-Bulgarian Mixed Arbitral Tribunal (MAT) the task of adapting the concession contract to post-war economic conditions.[74] In 1923 and 1925 decisions, the MAT had instituted a formula for fixing the price per kilowatt-hour of power distributed.[75] Subsequently, the Belgian declaration, on March 10, 1926, of reciprocal consent to PCIJ jurisdiction established the countries' mutual consent to the compulsory jurisdiction of the Permanent Court. The Belgian Declaration contained a double exclusion clause identical to that in *Phosphates in Morocco*. The clause limited jurisdiction to "any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification . . . ."[76]

Belgium brought the PCIJ suit, claiming that Bulgaria failed in its obligations by imposing "a special artificially calculated tariff for coal supplied to power stations, in order to enable the Municipality of Sofia to distort the application of the [formula] given by the Mixed Arbitral Tribunal."[77] Belgium also alleged that decisions of Bulgarian courts "deprived the Electricity Company of Sofia and Bulgaria of the benefit of the said decisions of the Mixed Arbitral Tribunal . . . ."[78] The challenged court decisions allowed, inter alia, the use of a "fictitious value" in the formula and the use of an "official rate of exchange decreed by the National Bank of Bulgaria and not on the basis of the rate of exchange actually applied by that Bank . . . ."[79] Belgium also complained that changes in the Bulgarian tax on electricity distribution violated Bulgaria's obligations to Belgium.

Drawing from the court's reasoning in *Phosphates in Morocco*, the Bulgarian government argued that the court lacked jurisdiction *ratione temporis* because the real cause of the dispute was a fact that began and ended before the agreements: "[a]lthough the facts complained of by the

72. Electricity Co. of Sofia & Bulgaria (Bel. v. Bulg.), Judgment, 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4).
73. *Id.* at 69.
74. *Id.* at 70.
75. *Id.* at 81.
76. *Id.*
77. *Id.* at 65.
78. *Id*.
79. *Id*. at 65–66.

Belgian Government . . . all date from a period subsequent to March 10th, 1926, the situation with regard to which the dispute arose dates back to a period before that date."[80] In contrast to *Phosphates in Morocco*, here the continuing circumstance argument was presented to overcome jurisdiction rather than in favor of jurisdiction. Bulgaria argued that the situation was created in 1923 and 1925 by the price formula instituted by the MAT, and that because Belgium's complaints arose from Bulgaria's application of that formula, the formula was the focus of the dispute. Therefore, the dispute fell outside the date of consent to jurisdiction.

The court rejected this argument, first acknowledging that the awards of the MAT did establish a situation dating from before March 10, 1926, which still existed.[81] It found, nonetheless, that the dispute did not arise from this situation or from the MAT's awards.[82] Citing *Phosphates in Morocco*, the court stated: "The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction . . . are those which must be considered as being the source of the dispute. No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal."[83] The court distinguished the source of the rights at issue from the source of the dispute.[84] It reasoned that the awards of the MAT were ". . . the source of the rights claimed by the Belgian Company, but they did not give rise to the dispute, since the Parties agree as to their binding character and that their application gave rise to no difficulty until the acts complained of."[85]

In a discussion evocative of the distinction between but-for and proximate cause, the court said, "[I]t is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to the situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute."[86] The court found the source of the dispute to be the Bulgarian government's application of the formula after consent to jurisdiction, not the decisions of the MAT. It thus held that it had jurisdiction *ratione temporis*.[87] It again did not reach the issue of whether continuing acts could overcome the double exclusion clause. It merely determined that in this case, the dispute arose from acts subsequent to consent.

80. *Id*. at 81.
81. *Id*. at 81–82.
82. *Id*. at 82.
83. *Id.*
84. *Id*.
85. *Id.*
86. *Id.*
87. *Id.*

In *Right of Passage Over Indian Territory*, the ICJ held that it had temporal jurisdiction over a dispute between India and Portugal regarding a right of passage over Indian territory between Portuguese territories.[88] India's Declaration of February 28, 1940 contained a double exclusion clause, accepting the jurisdiction of the court "over all disputes arising after February 5th, 1930 with regard to situations or facts subsequent to the same date."[89] The court's analysis of the real cause of the dispute draws from the PCIJ analysis in *Phosphates in Morocco*;[90] however, whereas in *Phosphates* the PCIJ found the first-in-time act was the dispute's real cause, here the ICJ found that the dispute did not arise until the last-in-time act occurred.

Portugal brought the claim to require India to protect Portugal's right of passage between two Portuguese territorial enclaves within India. In 1954, anti-Portuguese insurgents revolted against the Portuguese in these territories.[91] The Indian government did nothing to prevent the insurrection or protect the Portuguese right of passage, enacted new rules making it more difficult for the Portuguese to travel between the two enclaves, and ceased issuing transit visas for travel between them.[92]

India countered that the real cause of the dispute was not the 1954 actions, but Portugal's claim to have a right of passage, which existed before India accepted the court's jurisdiction.[93] India essentially argued that the 1954 events were simply part of a continuing situation that arose prior to the date of India's acceptance of jurisdiction: the "situation . . . invoked by Portugal . . . was repeatedly the subject of difficulties prior to 5 February 1930 . . . ."[94]

Rejecting India's argument, the court reiterated that the facts to be considered were those that are the "real cause" of the dispute[95] and found that until 1954 there had been no controversy over the existence of a right of passage.[96] Without rejecting that there was an ongoing situation, the court found that the dispute did not arise until the final part of the situation. It emphasized that the dispute arose from "all of" the facts, including India's failure in 1954 to comply with the obligation of Portugal's right of passage.[97] It concluded that the facts giving rise to the dispute could only be said to

88. Right of Passage Over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. 6, 33–36 (Apr. 12).
89. *Id*. at 33.
90. *Id.* at 35.
91. *See id.* at 13.
92. *See id*.
93. *See id*. at 22.
94. *See id*.
95. *Id*. at 35.
96. *Id*.
97. *Id.*

have existed as of the occurrence of the last-in-time fact.[98] The holding that the first constituent fact is not a real cause of the dispute does not make *Right of Passage* inconsistent with *Phosphates*. The PCIJ in *Phosphates* rejected jurisdiction because it found that a pre-treaty act—the enactment of the *dahirs*—was the "real cause" of the dispute;[99] whereas in *Right of Passage* the court applied the same "real cause" analysis but found the dispute (the "conflict of legal views")[100] to have arisen only upon India's actions in 1954.

As the jurisprudence of the PCIJ and the ICJ shows, the concept of continuing violations was well established before the rise of human rights law. The PCIJ and the ICJ decisions emphasize ascertaining the real cause of a dispute to determine temporal jurisdiction. This emphasis stems directly from the language of the jurisdictional consent clauses that the courts were interpreting. Under double exclusion clauses, the courts did not have jurisdiction over disputes over facts or situations before entry into force. Thus the cause of a dispute—the facts or situation giving rise to it—is essential to determining whether a tribunal has jurisdiction.

D. Further Development of Continuing Circumstances Analysis: Human Rights Jurisprudence

Though the idea of continuing violations was thoroughly established in international law before the rise of international human rights law, human rights juridical bodies, particularly the European Court of Human Rights, used the doctrine extensively, applying the idea to various contexts. It has been argued that the distinctive nature of human rights treaties justifies specialized treatment of jurisdiction *ratione temporis* over human rights treaty violations.[101] Under this view, because human rights bodies deal with peremptory norms, they have greater leeway than investment tribunals to expand time limitations.[102] Thus human rights bodies' jurisdictional analysis could not properly be applied to investment arbitration.[103] The supervisory bodies for human rights treaties generally accept the view that these treaties are unique; however, it is not clear that tribunals have relied on this

98. *Id.*

99. Phosphates in Morocco, *supra* note 38, Preliminary Objections at 25–26.

100. *Id.* at 34.

101. *See, e.g.*, Antoine Buyse, A *Lifeline in Time-Non-retroactivity and Continuing Violations Under the ECHR*, 75 NORDIC J. INT'L L. 63, 71, 75 (2006); M. Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 491, 519 (2000).

102. Merrill & Ring, *supra* note 6, Opinion of W. Michael Reisman ¶ 46; Rocio I. Digon, *Jurisdiction Ratione Temporis under NAFTA Article 1116(2)*, Paper 74, STUDENT SCHOLARSHIP PAPERS, http://digitalcommons.law.yale.edu/student_papers/74.

103. *See Merrill & Ring*, Opinion of W. Michael Reisman, *supra* note 6, ¶¶ 45–52.

uniqueness when deciding to override states' jurisdictional consent.[104] Considering whether the uniqueness of human rights supports expansion of *ratione temporis* for human rights adjudicatory bodies, Antoine Buyse contends,

> That this may in theory be the case can be deduced from the 'different intention'[sic]-clause [of the Vienna Convention]. The International Law Commission (ILC) in its commentary emphasizes that the particular wording used in Article 28 was preferred over "unless the treaty otherwise provides" in order to allow for "cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects."[105]

Other writers have concluded that human rights treaties are not so unique and are instead part of general international law.[106] Further, similarities between human rights treaty obligations and investment treaty obligations are important to the discussion of whether investment tribunals should apply jurisdictional reasoning derived from human rights cases. The European Court of Human Rights (ECHR) has decided at least one case, and has another case pending, that could just as well have been heard by an ICSID tribunal. In *Sovtransavto Holding v. Ukraine*, the ECHR heard claims of several violations of the Convention: due process violations under Article 6, protection of property violations under Article 1 of Protocol 1, and discriminatory treatment under Article 14.[107] The applicant was a public company that held 49% of the shares of Sovtransavto-Lougansk (S-L), a Ukrainian public company in the transport sector.[108] Shareholders in S-L decided to convert the company to a private company, reducing the shareholding of Sovtransavto Holding (SH) dramatically and enabling other shareholders to assume control of the company's management and assets.[109] In SH's resulting claim before a local arbitration tribunal, the Ukranian President pressured the tribunal to "defend the interests of Ukrainian

104. *See* Loizidou v. Turkey, App. No. 15318/89, 523 Eur. H.R. Rep. 513, 526, Decision on the Merits, (1997) ("[m]indful of the Convention's special character as a human rights treaty"); Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶¶ 17–18 (Nov. 4, 1994) (denying that human rights treaties are simply a "web of inter-state exchanges of mutual obligations").

105. Buyse, *supra* note 101, at 66.

106. *See, e.g.*, E.W. Vierdag, *Some Remarks About the Special Features of Human Rights Treaties*, 25 NETH. Y.B. INT'L L. 119 (1994).

107. Sovtransavto Holding v. Ukraine, 2002-VII Eur. Ct. H.R. 133.

108. *Id.* ¶ 10.

109. *Id.*

nationals" in the dispute,[110] and the subsequent, sparsely reasoned decisions of the tribunal bore the mark of political pressure.[111] Consequently, SH filed a complaint with the ECHR.

Yukos v. Russia is a pending case before the ECHR. The court has decided that a number of Yukos's claims are admissible[112] and has held a hearing on the merits[113] but has not yet issued a final decision. Yukos, a publicly traded company, alleges Russia committed a number of violations including expropriation, arbitrary treatment, and denial of justice, in contravention of Articles 6, 7, and 14 of the Convention and Article 1 of Protocol 1.[114] Yukos alleges that Russia instigated tax and criminal investigations for the purpose of destroying and eventually nationalizing Yukos. Russia allegedly imposed huge unjustified tax liabilities on Yukos, froze its assets, forced it to sell a crucial subsidiary for drastically less than its value, and forced Yukos into bankruptcy. Ultimately, a state-controlled oil company, Rosneft, bought the former Yukos's assets.[115] Shareholders of Yukos have concurrently pursued parallel claims against Russia arising from the same facts before investment tribunals under the Energy Charter Treaty and two bilateral investment treaties to which Russia is a party.[116]

These cases illustrate the similarities that may exist in the facts and rights involved in investment protection and human rights cases, thus weakening the argument that doctrines developed by human rights bodies should be strictly confined to human rights violations.[117]

Moreover, property is at the heart of any international investment, and the right to property has been recognized as fundamental since at least the late

110. Marius Emberland, *The European Convention on Human Rights as a Means for the Protection of Foreign Investment: A Look at Sovtransavto Holding v. Ukraine*, *in* INTERNATIONAL INVESTMENT PROTECTION AND ARBITRATION 107, 108–09 (Christian Tietje ed., 2008).

111. *Id.* at 109.

112. *See* Oao Neftyanaya Kompaniya Yukos v. Russia, ECHR Case No. 14902/04, Decision on Admissibility ¶¶ 448–99 (Jan. 29, 2009).

113. *See* European Court of Human Rights, Press Release, Chamber Hearing Oao Neftyanaya Kompaniya Yukos v. Russia (Mar. 4, 2010).

114. *See Yukos*, ¶¶ 1, 433–38.

115. *See Yukos*, ¶¶ 1–236.

116. *See* RosInvestCo UK Ltd. v. Russian Federation, SCC Arbitration V 079/2005, Final Award (Sept. 12, 2010) (holding, under the UK-Russia BIT, that Russia expropriated shareholders' property); Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility (Nov. 30, 2009) (finding jurisdiction under the Energy Charter Treaty over Yukos shareholders' claims against Russia); Renta 4 S.V.S.A. v. Russian Federation, SCC Arbitration V 024/2007, Award on Preliminary Objections, Mar. 29, 2009 (dismissing the claims of some shareholders and holding those of other shareholders admissible under the Spain-Russia BIT).

117. *See generally* Matthias Ruffert, *The Protection of Foreign Direct Investment by the European Convention on Human Rights*, 43 GER. Y.B. INT'L L. 116–48 (2000); MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION (2006).

Eighteenth Century.[118] Further, some of the principles governing treatment of foreign investors correspond closely with principles of international human rights, particularly economic and civil rights. One such principle is that of non-discrimination.[119] Another is the requirement of fair and equitable treatment of foreign investors, which has been interpreted quite broadly and called a requirement of customary international law. The fair and equitable treatment requirement has apparently merged into the general principle of international human rights law that "a 'well-governed state' must . . . ensure the respect of basic human rights in its territory, including, under some conditions, private property rights."[120] Similarly, the concept of denial of justice in international investment law has been described as entailing the obligation to make available to foreigners a fair and effective justice system, as required by customary international law. This formulation is strikingly similar to the right to a fair trial in Article 14 of the International Covenant on Civil and Political Rights.[121]

Thus, given the parallels between many of the rights guaranteed in human rights treaties and the rights guaranteed foreign investors in investment treaties, it is not immediately clear that human rights jurisprudence should be off limits to investment arbitrators. Moreover, continuing circumstances reasoning did not originate in human rights jurisprudence; rather, the ECHR, Inter-American Court of Human Rights (IACHR), and United Nations Human Rights Committee (HRC) borrowed from earlier decisions from the PCIJ and the ICJ. This fact renders the arguments about specificity of human rights obligations largely moot in this context. Building on the early international cases discussed above, human rights jurisprudence offers reasoning that investment arbitrators can examine for issues such as what acts should be considered continuing and how the obligation at stake affects the continuing or completed character of an act. The rest of this section will discuss human rights tribunals' contribution to continuing circumstances jurisprudence.

The jurisdiction of the ECHR, established in Article 32 of the European Convention of Human Rights, is temporally limited by a subject matter exclusion, since the court has jurisdiction only over breaches of the

118. *See* Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45, 45 (P.M. Dupuy, F. Francioni & E.U. Petersmann eds., 2009).

119. *See id.* at 50.

120. *Id.*

121. *Id.* at 51; *see generally* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 118.

Convention: "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols . . . which are referred to it . . . ."[122] The jurisdictions of the IACHR and of the HRC are similarly limited.[123] Because these tribunals have jurisdiction only over acts that violate their governing conventions, their continuing circumstances analyses focus on when an act began and ended, and whether, as a result, the act became subject to the convention's substantive obligations.

Article 14 of the International Law Commission Draft Articles on State Responsibility (ILC Draft Articles) covers continuing breaches and draws its principles heavily from human rights cases.[124] Article 14(2) provides that the breach of an international obligation by an act having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.[125] However, it must first be determined whether an act has a continuing character: Article 14(1) states: "[t]he breach of an international obligation by an act of a State *not* having a continuing character occurs at the moment when the act is performed, even if its effects continue."[126] In human rights jurisprudence, whether an obligation falls under Article 14(1) or Article 14(2) is a fact-specific determination.[127]

The commentary to Article 14 reiterates the importance of distinguishing an act from its effects:

> An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required

122. European Convention on Human Rights art. 32, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222.

123. *See* First Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976); Organization of American States, American Convention on Human Rights art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

124. *See* ILC Draft Articles on State Responsibility for Internationally Wrongful Acts, art.14, cmt. 1 n.236, *reprinted in* [2001] II Y.B. Int'l L. Comm'n, Part Two.

125. *Id.* art. 14.

126. *Id.* (emphasis added).

127. *See* X & Y v. Portugal, App. Nos. 8560/79, 8613/79 16 Eur. Comm'n H.R. Dec. & Rep. 209 (1979).

> by Part Two of the articles. . . . They do not, however, entail that the breach itself is a continuing one.[128]

This reasoning is consistent with the PCIJ and ICJ's early analysis of continuing violations and the real cause of a dispute; recall the distinction in *Phosphates in Morocco* that the ongoing situation complained of was merely a "legal position" that resulted from a discrete act, which was the real cause of the dispute.[129]

Other authorities argue that effects are part of the determination of whether an act is continuing. Pauwelyn argues that the ECHR does take effects into account, in contradiction to the approach set out in the Draft Articles:

> From the outset, one of the decisive elements in the Commission's decision on whether a continuing situation exists has been whether the position in which the victim is placed represents a continuing situation in violation of the Convention or, on the contrary, a violation of its rights and freedoms which clearly dates from the past (i.e. an instantaneous fact). In other words, the Commission focuses on the *effects* on the *victim* of the act . . ., taking into account all relevant circumstances of the case, rather than on the objective qualification of the *act* as such or the subjective intentions of its *author* . . . . In this sense all rights and freedoms protected by the Convention can be the object of a continuing violation.[130]

ECHR cases explicitly distinguishing acts from effects when analyzing jurisdiction *ratione temporis* seem to call this analysis into question.[131] However, ECHR jurisprudence supports a refined version of Pauwelyn's proposition: human rights bodies look to effects on the victim *if* these effects themselves violate an obligation.

James Crawford has pointed out that under the ILC Draft Articles "both the primary obligation and the circumstances of the given case" determine whether a breach or wrongful act is continuing.[132] A desire to depict an act as continuing may guide how a plaintiff or a tribunal characterizes the

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128. ILC Draft Articles, *supra* note 124, art.14 cmt. 6.

129. *Phosphates in Morocco*, *supra* note 38, Preliminary Objections at 325.

130. Joost Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 66 BRITISH Y.B. INT'L L. 415, 421 (1996).

131. *See* McDaid v. United Kingdom, App. 25681/94, 22 Eur. H.R. Rep. CD197 (1996); Odabaşi v. Turkey, App. 50959/99 (2006).

132. James Crawford, THE INTERNATIONAL LAW COMMISSSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 136 (2002).

obligation allegedly violated.[133] According to the ILC Draft Articles, "[i]f the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act."[134] Conversely, if the state is obligated to end or foreclose a potentially ongoing state of affairs, the violation will continue for as long as the state of affairs exists.

The HRC has found Article 27 of the ICCPR to be an obligation with an ongoing character, which can give rise to a continuing violation. Article 27 prohibits states from denying members of minority groups the right to enjoy their culture, speak their language, and practice their religion.[135] In *Lovelace v. Canada*, the applicant was born a member of the Maliseet Indian tribe, but under the Indian Act, she lost legal status as a tribe member because she married a non-Indian.[136] The Committee held that it did not have jurisdiction over the part of the claim pertaining to how the Indian Act operated at the time of her marriage to deprive her of her Indian status, because her marriage occurred before Canada adopted the ICCPR.[137] It went on to say, however, that it "recognize[d] . . . that the situation may be different if the alleged violations, although relating to events occurring before [the date the Covenant entered into force], continue, or have *effects which themselves constitute violations*, after that date."[138] The notion of a continuing violation of Mrs. Lovelace's rights guided the Committee to focus its analysis on Article 27 of the ICCPR. Considering the various ICCPR provisions Lovelace claimed Canada had violated, the Committee found Article 27 was the most relevant:

> [Article 27] concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause.[139]

The Committee reasoned that the right of Lovelace to "access her native culture and language 'in community with other members' of her group, has

133. *See* ILC Draft Articles, *supra* note 124, art. 14 cmt. 11.
134. *See id.* art 14 cmt. 14 (dealing with failures to prevent as continuing breaches).
135. Human Rights Committee, Sandra Lovelace v. Canada, ¶ 3.2 U.N. Doc. A/36/40; GAOR; 36th Sess., Supp. No. 40 at 166 (1981).
136. *Id.* ¶ 1.
137. *Id.* ¶ 10.
138. *Id.* ¶ 11 (emphasis added).
139. *Id.* ¶ 13.1.

in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists."[140] The Committee thus had jurisdiction over the Article 27 portion of the claim.[141]

The decision of the IACHR in *Velásquez-Rodríguez* was the first to state that forced disappearance is a continuing violation,[142] a position later codified in the U.N. Declaration on the Protection of all Persons from Forced Disappearance.[143] In *Velásquez-Rodríguez*, the Inter-American Court of Human Rights did not draw conclusions affecting *ratione temporis* from its finding that the act was continuing, but this case laid the foundation for the court to do so later in *Blake v. Guatemala*.[144]

Like *Lovelace v. Canada*, *Blake* focused on the effects of a completed act because those effects occurred within the court's temporal jurisdiction and independently violated an obligation. That obligation then became the basis for a claim, and the effect became the act or omission at issue. The court could not address Blake's kidnapping and murder because they were completed before Guatemala accepted the court's jurisdiction. However, the court reasoned,

> [A]lthough some of the acts had been completed, their effects could be deemed to be continuing until such time as the victims' fate or whereabouts were determined. Inasmuch as in this case Mr. Nicholas Blake's fate or whereabouts were not known until . . . after the date on which Guatemala accepted the contentious jurisdiction of this Tribunal, the Court considers itself competent to hear the case with regard to the possible violations which the Commission imputes to the State in connection with those effects and actions.[145]

Though the court used the language of "effects", it cited an ongoing pattern of behavior on the part of the state as the basis for the violations. This was not a case in which jurisdiction was based on lingering effects of a singular act.

Similarly, in *Solórzano v. Venezuela*, the U.N. Human Rights Committee held that it did not have jurisdiction over the complained of arrest, search and seizure, and torture, because these acts occurred prior to the entry into force

140. *Id.* ¶ 15.
141. *Id.* ¶¶ 15–17.
142. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 155 (July 29, 1988).
143. *See* U.N. Declaration on the Protection of All Persons from Forced Disappearance art. 17, G.A. Res. 47/133, 47 U.N. GAOR Supp. No. 49, U.N. Doc A/47/49, at 207 (Dec. 18, 1992).
144. *See* Blake v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (1998).
145. *Id.* ¶ 54.

of the ICCPR and its Optional Protocol, which permitted individuals to file complaints for violations of the ICCPR.[146] However, the Committee did examine on the merits the complainant's continued detention and alleged ill treatment after the date of entry into force.[147]

In their continuing circumstances analyses of acts beginning before a treaty's entry into force, human rights bodies have provided well-reasoned, persuasive analysis that is applicable to the issue as it arises in investment arbitration. Their contributions include the distinction between "what constitutes an instantaneous breach with lasting negative effects on the one hand and a continuing violation on the other."[148] Another related concept is how the nature of the relevant treaty obligation determines whether a breach is continuing.

E. Continuing Circumstances and Pre-Treaty Acts and Disputes in Investment Arbitration

International investment arbitral decisions have addressed how circumstances straddling a BIT's entry into force affect jurisdiction *ratione temporis* under three of the four types of jurisdictional consent provisions: unrestrictive clauses, single exclusion clauses, and subject matter exclusion clauses. This section of the Article will examine their treatment of each type in turn.

1. Arbitral Decisions Based on Unrestrictive BITs

Impregilo v. Pakistan was brought under the Pakistan-Italy BIT. The BIT contains an unrestrictive jurisdictional provision covering "[a]ny disputes arising between a Contracting Party and the investors of the other."[149] Impregilo complained of a series of acts occurring both before and after the BIT, alleging these claims constitute a single continuing dispute, "a systematic and continuous pattern of conduct that has resulted subsequent to

146. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* Mar. 23, 1976.

147. Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Right*, ¶ 5.5, U.N. Doc. CCPR/C/27/D/156/1983 (Mar. 26, 1986).

148. *See id.* at 75.

149. Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments [hereinafter Italy-Pakistan BIT] art. 9, ¶ 1, July 19, 1997.

the BIT's entry into force, in the current and continuing breach of the BIT."[150]

The tribunal declared a default rule opposite of that in the PCIJ *Mavrommatis* case, where the jurisdictional provision similarly covered "any dispute . . . which may arise."[151] In *Mavrommatis*, the PCIJ presumed that if the treaty was silent about pre-existing disputes, "jurisdiction based on an international agreement embraces all disputes referred to it after its establishment."[152] In *Impregilo*, the tribunal concluded that because the BIT was silent, jurisdiction did not extend to disputes that arose before entry into force.[153] Pointing specifically to the treaty language, "any dispute arising between a contracting Party and the investors of the other," the tribunal determined that "such language—and the absence of specific provision for retroactivity—infers that" pre-existing disputes are excluded.[154] Though the tribunal did not explain what about the language of this provision implies exclusion of pre-BIT disputes, the interpretation may have focused on the word "arising." The tribunal may have reasoned that since a pre-existing dispute does not "arise" after entry into force, the parties must have meant to exclude such disputes from jurisdiction.

Looking to the PCIJ and the ICJ, the tribunal found that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties."[155] On the basis of this definition, it concluded that Impregilo's claims appeared on their face to fall within the tribunal's jurisdiction, since the dispute arose after entry into force.[156] Up to this point, the tribunal had no cause to consider Impregilo's argument that Pakistan's alleged violations were continuing, since it was only concerned with when the dispute arose, not when the facts giving rise to the dispute arose.

However, the tribunal further considered that all of Impregilo's claims were of BIT violations (even though the BIT did not limit jurisdiction to treaty claims).[157] It thus engaged in an additional analysis *ratione temporis* as though the BIT contained a subject matter exclusion. On this basis, it reasoned that even though the dispute arose after entry into force, Pakistan could not be responsible for breaches of the substantive obligations of the

150. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 297 (Dec. 22, 2003).

151. Mavrommatis, *supra* note 42, Judgment No. 2 at 35 .

152. *Id.*

153. Impregilo, *supra* note 150, Decision on Jurisdiction at ¶¶ 299–300.

154. *Id*.

155. *Id.* ¶ 302 (quoting Mavrommatis, *supra* note 42, Judgment No. 2 at 11 (the slight difference in wording is attributable to differences in translation from the French text)).

156. *Id.* ¶ 308.

157. *Id.* ¶ 309.

BIT occurring before it was in force.[158] In this analysis the tribunal turned to and rejected Impregilo's claim that the acts were continuing and thus were brought under the treaty's substantive obligations once the treaty entered into force.[159] Distinguishing between continuing acts and acts with continuing effects, the tribunal found that the pre-BIT acts complained of were not of a continuing character.[160] The tribunal cited Article 14 of the Draft Articles on State Responsibility, but its analysis falls directly along the line of cases beginning with *Phosphates in Morocco* and continuing through ECHR cases distinguishing between acts and effects.[161]

Chevron v. Ecuador[162] was decided under the U.S.-Ecuador BIT, which is unrestrictive as to *ratione temporis*. Article VI of the BIT defines a relevant dispute as one "arising out of or relating to" one of the enumerated types of investment transactions.[163] The *Chevron* decision demonstrates a strong understanding of the subtleties of differing treaty language and its effect on *ratione temporis*. On the basis of the BIT's unrestrictive language and the tribunal's finding that an investment existed after the BIT's entry into force, the tribunal found it had temporal jurisdiction.[164] However, because the parties argued extensively about jurisdiction *ratione temporis* over pre-existing disputes, the tribunal addressed their arguments.[165]

The claimants argued that absent restrictive language, the general rule is that a dispute resolution clause applies to all disputes that exist while the treaty is in force, regardless of when they first arose.[166] The claimants cited *Mavrommatis* and a commentary to the Third Report on the law of treaties, a precursor to Article 28 of the Vienna Convention.[167] There was authority that:

> [t]he word "disputes" according to its natural meaning is apt to cover any dispute which *exists* between the parties after the coming into force of the treaty. It matters not either that the dispute concerns events which took place prior to that date or that the dispute itself arose prior to it; for the parties have agreed to submit to arbitration or

158. *Id.* ¶¶ 306–10.
159. *Id.* ¶¶ 311–14.
160. *Id.* ¶¶ 312–13.
161. *See* ILC Draft Articles, *supra* note 124, art. 14; McDaid v. United Kingdom, *supra* note 131; Odabaşi v. Turkey, *supra* note 131.
162. *See* Chevron v. Ecuador (U.S. v. Ecu.), Interim Award (Dec. 1, 2008).
163. U.S.-Ecuador BIT, *supra* note 32, art. VI(1).
164. *See* Chevron v. Ecuador, *supra* note 162, Interim Award ¶¶ 43, 177–79, 187–90.
165. *See id.*
166. *See id.* ¶¶ 248–49.
167. *See id.* ¶¶ 249–50.

> judicial settlement all of their *existing* disputes without qualification.[168]

The claimants also cited *Mavrommatis* for the distinction between jurisdiction *ratione temporis* and the temporal application of the substantive provisions of a BIT.[169] They distinguished *Lucchetti v. Peru* because the BIT in that case contains a single exclusion clause: "[i]t shall not . . . apply to differences or disputes that arose prior to its entry into force."[170] They distinguished *Impregilo v. Pakistan* as excluding only claims of substantive breaches based on conduct that occurred before entry into force.[171]

Accepting the claimants' arguments, the tribunal returned to the original default rule in *Mavrommatis*, finding that although jurisdictional clauses do not have default retroactive application, the language of most disputes clauses constitutes consent to jurisdiction over *all* disputes *existing* after the entry into force, "[b]y using the word disputes without any qualification."[172] That is the case with the U.S.-Ecuador BIT.[173] The tribunal recognized that this was not an issue of retroactivity, but of applying the language of the consent provision of the BIT.[174] Some other BITs specifically impose temporal limitations on *disputes* and not just investments.[175] Though the tribunal did not distinguish *Impregilo* on the basis of different treaty language, it is possible to distinguish the language of the jurisdictional clause in that case. The BIT in *Impregilo* provided jurisdiction over "[a]ny disputes *arising* between a Contracting Party and the investors of the other."[176] Here, on the other hand, the language is "arising out of *or relating to*" investments between the parties. A plausible reading is that the latter formulation is temporally broader and does not require the dispute to arise after the treaty's entry into force.

In stark contrast to *Chevron v. Ecuador*, *M.C.I. Power Group v. Ecuador* is an example of how investment tribunals should *not* use prior adjudicative decisions. The tribunal egregiously misapplied rules from prior decisions with complete disregard for differences in treaty language. Despite the absence of any temporal restriction in the BIT, the tribunal found not only

168. *See id.* ¶¶ 248–49 (quoting Waldock, *supra* note 31, at 11).
169. *See* Chevron, *supra* note 164, Interim Award ¶ 250.
170. *Id.* ¶ 251 (quoting Lucchetti, *supra* note 36, Award ¶ 25).
171. *Id.* ¶ 253.
172. *Id.* ¶ 267.
173. *See id.* ¶ 177.
174. *See id.* ¶ 267 (quoting 11 THE INTERNATIONAL LAW COMMISSION 1949–1998 670 (Arthur Watts ed., 2000)).
175. *Id.*
176. Italy-Pakistan BIT art. 9, ¶ 1, *supra* note 149 (emphasis added).

that it did not have jurisdiction over pre-BIT *disputes*, but also that there was no jurisdiction over disputes relating to pre-BIT *acts*.[177] It thus created a default rule with the same effect as a double exclusion clause. Its reasoning is meandering and muddled. In declining to annul the award, the ad hoc Committee took great pains to emphasize its limited power to overturn awards.[178] The Committee pointed out that the tribunal had complied with its own declaration early in the decision that it would look to "'applicable norms of international law.'"[179] As the ad hoc Committee tellingly noted, "[i]t is another matter—over which the *ad hoc* Committee has only a very limited competence–whether the Tribunal's application of the law was well-founded and legally tenable."[180]

The tribunal first held that the intention of the parties regarding retrospective application is not evident from the language and background of the BIT.[181] After quoting Article XII of the BIT, which states that the treaty "shall apply to *investments* existing at the time of entry into force as well as to *investments* made or acquired thereafter," the tribunal bafflingly concluded: "[t]he non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force."[182] The first flaw here is that nothing in article XII speaks to non-retroactivity—if anything, the article's inclusion of pre-existing investments may evidence an intent to apply the treaty retroactively. The tribunal next mentioned the "principle of the non-retroactivity of treaties," apparently referring to Article 28 of the Vienna Convention.[183] However, the tribunal blindly stated this rule without reference to the caveat, "unless a different intention appears," and without considering the nuances of how Article 28 applies to jurisdictional clauses.[184]

Next, the tribunal stated two principles, taken respectively from double exclusion and subject matter exclusion analysis, without explaining where the principles come from or why they might be applicable:

> The Tribunal distinguishes acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT. The Tribunal holds that a dispute that arises that is subject to its Competence is necessarily related to the violation of a

177. M.C.I., *supra* note 21, Award, ¶¶ 59–61.
178. M.C.I., *supra* note 21, Decision on Annulment ¶¶ 49, 51.
179. *Id.* ¶ 41 (quoting M.C.I., *supra* note 177, Award ¶ 42).
180. *Id.* ¶ 41.
181. M.C.I., *supra* note 177, Award ¶ 61.
182. *Id.* ¶¶ 60–61 (emphasis added).
183. *Id.* ¶ 61.
184. *See id.* ¶ 61; *see also* Vienna Convention, *supra* note 17, art. 28.

> norm of the BIT by act or omission subsequent to its entry into force.[185]

The principle stated in the first sentence of this quotation, distinction of pre-treaty acts from post-treaty acts, originated in analysis of double exclusion clauses. The focus on when *acts* occurred is appropriate in that context because double exclusion clauses exclude jurisdiction over disputes relating to facts before entry into force.[186] The jurisdictional clause in the U.S.-Ecuador BIT contains no such limitation;[187] thus this principle is inapposite. The second sentence in the quotation is appropriate for analyzing either jurisdiction under a BIT with a subject matter exclusion clause or claims of substantive BIT violations. The U.S.-Ecuador BIT contains no subject matter exclusion clause, and the tribunal does not limit this rule to BIT claims.

The tribunal continued its flawed analysis by delving into continuing acts analysis without any reference to how this doctrine interacts with the jurisdictional provision in the U.S.-Ecuador BIT.[188] The effect of a continuing acts argument on temporal jurisdiction depends on the jurisdictional limitations in the relevant treaty. For example, if a jurisdictional provision excludes jurisdiction over disputes arising from pre-treaty facts or situations, a continuing acts argument may be used to show there is no jurisdiction because a situation began before entry into force. If, on the other hand, a treaty—like the U.S.-Ecuador BIT—does not limit jurisdiction based on when the facts or situations giving rise to the dispute occurred, such a continuing acts argument is inapposite.

2. Arbitral Decisions Based on Single Exclusion Clauses

Where jurisdiction over a dispute arises under a BIT with a single exclusion clause, arbitral tribunals focus on when the dispute arose. For example, in *Maffezini v. Spain*, the tribunal considered a dispute under the Argentine-Spain BIT.[189] The temporal limitation in the BIT contains a single exclusion clause excluding disputes arising before the BIT: "this agreement shall not apply to disputes or claims originating before its entry into force."[190]

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185. M.C.I., *supra* note 177, Award ¶ 62.

186. *See supra* Parts III.B & III.C.

187. *See* U.S.-Ecuador BIT, *supra* note 32, art. VI.

188. M.C.I., *supra* note 177, Award ¶¶ 82–97.

189. *See* Maffezini v. Kingdom of Sp., ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 1 (Jan. 25, 2000).

190. Acuerdo para la promocion y law proteccion reciproca de inversions entre la Republica Argentina y el Reino de España [Agreement for the Promotion and Protection of Investments between the Republic of Argentina and the Kingdom of Spain] art. II.2, Oct. 3, 1991, *available at* http://www.

Because the temporal clause draws the line based on when the dispute or claim arose, rather than when the acts in question occurred, the tribunal's focus is on when the dispute began.[191] The analysis is thus quite similar to that in *Impregilo*, where the court read into the BIT an exclusion of pre-BIT disputes.

Like *Impregilo*, several tribunals use the PCIJ/ICJ definition of a dispute as a disagreement on a point of law or fact, which must relate to clearly identified issues between the parties and must not be merely academic; it must be able to be stated as a concrete claim.[192] There is usually a sequence of events that leads to the crystallization of a dispute, and the tribunal must examine this sequence to determine when the dispute "arose" for the purpose of determining jurisdiction under the BIT.[193]

In the context of a single exclusion clause, alleged continuing situations are used to argue that a dispute began before the treaty's entry into force and should thus be excluded from jurisdiction. In *Lucchetti v. Peru*, an arbitration under the Chile-Peru BIT, Lucchetti claimed that there were two disputes, that the earlier one had been fully resolved before the BIT by judgments in Lucchetti's favor before Peruvian courts, and that a new dispute later arose after the BIT.[194] Peru contended that there was one continuing dispute that began before entry into force, thus excluding it from jurisdiction.[195]

Siding with Peru, the tribunal found there was one continuing dispute arising before entry into force; thus it did not have jurisdiction *ratione temporis*.[196] To determine whether the disputes were distinct or continuing, the tribunal sought to ascertain the "real cause" of each, drawing from the early reasoning of the PCIJ in *Electricity Company of Sofia and Bulgaria*.[197] Finding that the disputes arose from the same subject matter, the tribunal held "the present dispute had crystallized" before the BIT entered into force.[198]

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sice.oas.org/Investment/BITSbyCountry/BITs/ARG_Spain_s.pdf ("[E]l presente Acuerdo no se aplicará a las controversias o reclamaciones que se hubieran originado antes de su entrada en vigor.").

191. *See* Maffezini, *supra* note 189, Decision on Objections to Jurisdiction ¶¶ 93–94.

192. *Id.* ¶ 94; Lucchetti, *supra* note 36, Award ¶ 48; M.C.I., *supra* note 21, Award ¶ 63; Victor Pey Casado v. Chile, ICSID Case No. ARB/98/2, Award ¶¶ 442–44 (May 8, 2008). *But see* Lucchetti, Annulment ¶ 91 ("The concept of 'dispute' can clearly be defined in different ways depending on the context.").

193. *See* Maffezini, *supra* note 189, Decision on Objections to Jurisdiction ¶ 96 (quoted in Impregilo, *supra* note 150, Decision on Jurisdiction ¶ 304).

194. Lucchetti, *supra* note 36, Award ¶ 40.

195. *Id.* ¶ 41.

196. *Id.* ¶¶ 49, 62.

197. *Id.* ¶ 50 n.4 (citing *Electricity Co. of Sofia & Bulgaria* (Bel. v. Bulg.), Preliminary Objection, 1939 P.C.I.J. 64, 82).

198. *Id.* ¶ 53.

Victor Pey Casado v. Chile involved a claim under the Chile-Spain BIT based on actions beginning with the 1973 Pinochet coup and spanning to the date of the ICSID claim.[199] Article 2 of the BIT contains a single exclusion clause, stating the temporal limitation that the BIT does not apply to claims or controversies arising before its entry into force.[200] Finding that the word *controversias* in the BIT corresponds to the English word *disputes* as used in *Maffezini*,[201] the tribunal found that the dispute arose after the BIT, because only then did Pey Casado first present a claim for restitution in Chilean courts that was opposed by the Chilean government.[202] The disputes were thus within jurisdiction *ratione temporis*.[203]

However, because the BIT's substantive obligations could only apply to actions occurring after its entry into force, the tribunal then undertook a subject matter exclusion analysis.[204] In this analysis it rejected the claimant's argument that Chile's actions at the time of the coup were the beginning of a continuing act ending after the treaty came into force.[205] It denied the expropriation claim because the expropriation occurred before the BIT's entry into force.[206] However, it held that Chile breached the fair and equitable treatment provisions of the BIT when, after entry into force, it compensated third parties for the expropriation of the newspaper instead of the claimants.[207]

3. Arbitral Decisions Based on Subject Matter Exclusion Clauses

Duke Energy v. Peru is a rightly decided arbitral decision that failed to explicitly ground its reasoning in the instrument of jurisdictional consent. Peru consented to arbitration through its investment protection legislation and a "legal stability agreement" (LSA) between Duke Energy and Peru.[208] The LSA limited jurisdiction by subject matter: the parties agreed to submit "any dispute, controversy or claim between them, concerning the

199. *See Pey Casado*, *supra* note 192, Award ¶ 466.

200. Acuerdo entre la Republica de Chile y el Reino de España para la proteccion y foment reciprocos de inversions [Agreement Between the Republic of Chile and the Kingdom of Spain for the Protection and Promotion of Investments] art. 2(3), Apr. 27, 1994, *available at* http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CHI_Spain_s.pdf.

201. *Pey Casado*, *supra* note 192, Award ¶¶ 442–43.

202. *See id.* ¶¶ 444–46.

203. *See id.*

204. *See id.*

205. *See id.*

206. *Id.* ¶ 466.

207. *Id.* ¶¶ 459–64.

208. *See* Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Decision on Jurisdiction, ¶¶ 25–27 (Feb. 1, 2006).

interpretation, performance or validity of this Agreement" to ICSID.[209] The tribunal rightly understood that the issue it had to determine was the time the dispute arose, and rightly held that it had temporal jurisdiction.[210] However, it is troubling that the tribunal did not explicitly point out that it reached this conclusion based on the language of the agreement. By citing to *Maffezini v. Spain* with no discussion of whether the respective jurisdictional consent clauses in the two cases were parallel,[211] the tribunal offered weak reasoning and risked misleading readers and future arbitrators to believe that the focus on when the dispute arose is a default rule in jurisdictional consent.

Feldman v. Mexico involved a claim under NAFTA.[212] Unlike many BITs, NAFTA's arbitral clauses in Articles 1116 and 1117 provide arbitral jurisdiction only over claims of NAFTA violations.[213] Claimed violations of customary law or breach of contract are excluded by the provisions' language defining what claims may be brought;[214] thus jurisdiction is limited to alleged violations occurring after NAFTA's entry into force, creating a subject matter exclusion. In a preliminary decision on jurisdiction, the tribunal held that because NAFTA came into force on January 1, 1994, no NAFTA obligations existed, and the tribunal's jurisdiction did not extend, before that date.[215] This holding comports with the principle of non-retroactivity of treaties, which uncontroversially applies to all substantive treaty provisions where—as in NAFTA—the treaty contains no explicit statement to the contrary.[216]

The tribunal's holding concerning continuing violations is also supported by NAFTA's jurisdictional language. If a continuing course of action began before NAFTA's entry into force and continued after that date, only the part of the alleged activity post-NAFTA is subject to the tribunal's jurisdiction, and only if it breaches a substantive NAFTA obligation. This holding is consistent with the holding of the PCIJ in *Mavrommatis*, where there was a similar jurisdictional limitation.[217]

Mondev v. United States demonstrates good use of reasoning borrowed from human rights cases. Mondev brought NAFTA claims alleging expropriation, denial of justice, denial of minimum standard of treatment,

209. *Id.* ¶ 75.
210. *Id.* ¶¶ 148–51.
211. *Id.* ¶ 148.
212. *Feldman*, *supra* note 44, ¶ 1.
213. NAFTA, *supra* note 43, arts. 1116–17.
214. *See id*.
215. Feldman, *supra* note 44, Preliminary Decision on Jurisdiction ¶¶ 61–63.
216. *Id.* ¶ 62.
217. *See* Mavrommatis, *supra* note 42, Judgment No. 2 at 35.

and denial of national treatment.[218] All of the acts alleged to constitute violations occurred prior to NAFTA's entry into force, except decisions of Massachusetts courts rejecting Mondev's claims.[219] Reminiscent of Italy's claim in *Phosphates in Morocco*, Mondev argued that all the actions constituted a continuing breach that was "perfected" under the final court decisions.[220] The pre-NAFTA acts allegedly created a continuing situation with an obligation to remedy, which, after NAFTA, the United States failed to remedy, breaching the treaty.[221]

The tribunal held that pre-NAFTA conduct could not constitute a breach of NAFTA, but that it might be relevant to whether post-NAFTA conduct constituted a breach.[222] The post-NAFTA conduct—in this case, the Massachusetts court decisions—must itself violate NAFTA for there to be such a breach.[223] Recalling the principle of non-retroactivity, the tribunal stated that in certain circumstances conduct committed before the entry into force of a treaty might continue after that date, and at that point the conduct could become subject to treaty obligations and thus give rise to a claim under the treaty.[224] The tribunal also distinguished between continuing acts and completed acts with continuing effects, citing the ILC Draft Articles, which in turn cite the early PCIJ cases and ECHR cases dealing with continuing acts.[225] Drawing from this dichotomy, the tribunal reasoned that whether a breach is continuing depends on the nature of the obligation said to have been breached and the facts.[226] Characterizing the claim in three alternative ways, the tribunal proceeded to analyze whether under each characterization, the series of acts could have been said to have continued after NAFTA, and concluded they could not.[227] In each characterization, the tribunal found that there was a date before entry into force that the alleged conduct was completed.[228]

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218. *Mondev*, *supra* note 23, Award ¶ 2.
219. *See id.* ¶¶ 47–67.
220. *Id.* ¶ 48.
221. *Id.*
222. *Id.* ¶ 68–69.
223. *Id.* ¶ 70.
224. *Id.* ¶¶ 57–58 n.9.
225. *Id.* ¶ 58 n.9; ILC Draft Articles, *supra* note 124, art. 14 n.236 (citing Mavrommatis, *supra* note 42, Judgment at 35, Phosphates in Morocco, *supra* note 38, Preliminary Objections at 33–39; Electricity Co. of Sofia and Bulgaria, *supra* note 72, Judgment at 80–82; Right of Passage Over Indian Territory, *supra* note 88, Judgment at 33–36; De Becker v. Belgium, App. No. 214/56, 1958–59 Y.B. Eur. Conv. on H.R. 214, 234, 244 (Eur. Comm'n on H.R.); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. B) at 64 (1978)).
226. *Id.* ¶ 58.
227. *Id.* ¶¶ 59–65.
228. *See id.*

Finally, the tribunal held that Articles 1105 (minimum standard of treatment) and 1110 (expropriation and compensation) cannot resurrect remedial claims for breaches of customary international law occurring before NAFTA where the breaches were based on conduct that ended before NAFTA's entry into force.[229] The tribunal concluded that the only possible bases of a claim—the only acts that could have breached NAFTA—were the U.S. court decisions handed down after NAFTA dismissing Mondev's claims.[230]

F. Should Arbitral Tribunals Borrow Continuing Circumstances Analysis When Deciding on Jurisdiction Over Pre-BIT Circumstances?

Continuing circumstances analysis in this context grew out of early interstate disputes, where the jurisprudence contributed the practice of scrutinizing the facts to determine a dispute's real cause. Human rights jurisprudence further developed the idea of continuing acts in this context, contributing two useful lines of reasoning: expanded analysis of the distinction between acts and effects, and a focus on the nature of the obligation to determine whether a violation is continuing. It is not evident that this analysis should never be extended to other areas of international law, including investment law. Human rights jurisprudence draws from the early analysis of the PCIJ and ICJ distinguishing a past fact from its ongoing effects. The body of human rights law addressing this issue does not rely on foundations specific to human rights or on peremptory norms of international law to justify continuing acts analysis, but focuses instead on the character of particular acts and obligations and how they relate to one another.

Arbitral tribunals may appropriately use continuing circumstances analysis drawn from international law sources outside investment law. However, they must apply the doctrine carefully, in keeping with the jurisdictional consent clauses in the governing BIT. When looking at international "precedent", arbitral tribunals must be mindful of the language of the treaty the prior decision was interpreting, and of how the relevant BIT might differ. Among investment treaties, NAFTA's jurisdictional limitation is the most similar to the limitations in the PCIJ, ICJ, and human rights cases. This is because NAFTA contains a subject matter exclusion, which effectively limits jurisdiction to conduct occurring after entry into force, with the possibility that conduct continuing after entry into force could become

229. *Id.* ¶ 74.
230. *Id.* ¶ 75.

subject to jurisdiction.[231] Because of the fundamentally different language in unrestrictive and single exclusion BITs, tribunals interpreting them must be more cautious when extracting principles from these earlier decisions.

IV. EXPANSION OF THE PERIOD OF LIMITATION THROUGH CONTINUING CIRCUMSTANCES

A. The Doctrine of Extinctive Prescription and Periods of Limitation

Extinctive prescription, or laches, is the extinction of a title or right due to failure to exercise it over a long time period. Bin Cheng identifies a definition of the doctrine from 1903: "When a right of action becomes extinguished because the person entitled thereto neglects to exercise it after a period of time, this extinction of the right is called prescriptive of action."[232] There is no particular time limit recognized by the general principle in international law.[233] However, the doctrine is the basis for statutes of limitations in domestic legal systems and is so ubiquitous that it is considered a general principle of law.[234] Like statutes of limitations, clauses setting specific periods of limitation for bringing a claim appear in many investment treaties. For example, Article 22(2) of the 2004 Canada Model BIT states: "An investor of a Party may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[235]

Graeme Mew elaborates four categories of reasons for a limitations system: "peace and repose", evidentiary concerns, economic and public interest considerations, and judgmental reasons.[236] The English Law Commission has explained the rationale of predictability:

> [T]he public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called into question. . . . [T]he state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to

231. NAFTA, *supra* note 43, arts. 1116–17.

232. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 373 (1953).

233. *Id.* at 373; GALLUS, *supra* note 3, at 94–95.

234. *Id.* at 93.

235. Canada 2004 Model BIT art 22(2), *supra* note 19.

236. Graeme Mew, THE LAW OF LIMITATIONS 12 (2d ed. 2004).

> [be] disturbed by a long-forgotten claim. Financial institutions giving credit to businesses, for example, have an interest in knowing that a borrower's affairs will not be damaged by the revival of years old litigation. Buyers who want to purchase land or goods held by a potential seller want to know that their title cannot be disturbed by a third party to the deal.[237]

Limitation periods also address the concern that loss of evidence may place the defendant in a difficult position. The rule presumes negligence by the claimant. Where he has allowed his claim to sit for so long that it becomes difficult to establish facts, they are resolved against him.[238]

The next section of this Article will discuss derogation from prescriptive extinction in international law in light of the doctrine's purposes.

B. The History of Derogations from Extinctive Prescription and Periods of Limitation

Most scholars and students of international law are most familiar with the use of continuing circumstances to overcome periods of limitation in human rights jurisprudence, particularly in the context of forced disappearances.[239] However, the idea of derogating from extinctive prescription predates international human rights law,[240] indicating that there are reasons to derogate besides the unique nature of human rights.

First, the principle has been recognized that a period of limitation does not begin to run until a breach has ended. Pauwelyn states that "[t]he general principle is that a claim can only be *in*admissible on the ground of lapse of time *once the breach has ceased to exist*, that being the earliest date from which any time limit can possibly start to run . . . ."[241] This principle is recognized by the International Law Commission;[242] many national legal systems, including Australia, Belgium, England, Japan, and the United States; and European law.[243]

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237. ENGLAND AND WALES LAW COMMISSION, CONSULTATION PAPER ON LIMITATION OF ACTIONS, ¶¶ 1.30–31 (1998) (quoting Cholmondeley v. Clinton, (1820) 27 Eng. Rep. 1036).

238. Cheng, *supra* note 232, at 378–79.

239. *See, e.g.*, Blake v. Guatemala Inter-Am. C.H.R., Judgment (Jan. 24, 1998).

240. *See* King, *supra* note 1, at 88; Frans Viljoen, *International Human Rights Law: A Short History*, U.N. CHRONICLE, http://www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/Issues2009/internationalhumanrightslawashorthistory?ctnscroll_articleContainerList=1_0&ctnlistpagination_articleContainerList=true (last visited Apr. 3, 2011).

241. Joost Pauwelyn, *supra* note 130, at 431.

242. Rep. of the Int'l L. Comm'n, 30th Sess., May 8–July 28, 1978, 88 n.425, 91 n.427, U.N. Doc. A/33/10; GAOR, 33d Sess., Supp. No. 10 (1978).

243. *See* GALLUS, *supra* note 3, at 104.

Second, international tribunals have long recognized that the customary international law principle time-barring the delayed presentation of a claim may be derogated from in certain circumstances, most importantly where the plaintiff has good reason for the delay—that is, where he was not negligent in presenting his claim.[244]

An early case declining to apply laches appeared before the Italian-Venezuelan Claims Commission in 1903.[245] In the *Tagliaferro Case*, the claimant had been wrongly imprisoned by Venezuelan authorities and brought his claim over thirty years later.[246] Finding the claimant had good reason for the delay, the commission held: "When the reason for the rule of prescription ceases, the rule ceases, and such is the case now."[247] The claimant had first petitioned the Venezuelan courts and then Italian diplomats in Venezuela immediately after his arrest, but his requests for protection were denied.[248] The commission thus found Venezuela liable for the wrongful imprisonment and for denial of justice.[249]

Similarly, in the *Stevenson Case*, the Mixed Claims Commission for Great Britain-Venezuela held that a forty-year-old claim was not barred because the delay was the fault of the respondent state rather than the claimant or the claimant state.[250] The claim had previously been presented decades earlier. Venezuela responded that it could not hear claims because of its civil war and classified the claim as "unrecognizable."[251] The Commission reasoned,

> When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party—in this case the Government—is prevented from accumulating the evidence on its part which would oppose the claim . . . . In such a case the delay of the

244. *See* Case of Ann Eulogia Garcia Cadiz (U.S.-Venezuela Comm'n 1890), *in* 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY 4199, 4203 (1898); King, *supra* note 1, at 88–89 ("That failure to press, for good reasons (i.e., without negligence), is no bar has been held by Plumley, Umpire, in the *Stevenson case*, and by Sir Edward Thornton in the '*Canada*.'").

245. Tagliaferro Case, 10 R.I.A.A. 592 (It.-Venez. Cl. Comm'n 1903).

246. *Id.* at 593.

247. *Id.*

248. *Id.*

249. *Id.*

250. Stevenson Case, 9 R.I.A.A. 385 (Mixed Cl. Comm'n Gr. Brit.-Venez. 1903).

251. *Id.* at 385–86.

> claimant . . . would work injustice . . . to the respondent Government. This case presents neither of these features.[252]

The Commission went on to explain that the claim had first been presented within a reasonable time period, so Venezuela knew of its existence and had the opportunity to collect and preserve evidence.[253] The Commission concluded that it would be unjust to use laches to block the claim when the delay was the fault of Venezuela.[254]

In the 1926 arbitration case *Cayuga Indians (Great Britain) v. United States*, the arbitral tribunal held that the claim of the Indian tribe for a situation that had existed for eighty years was not time-barred.[255] As in *Tagliaferro* and *Stevenson*, the reason for the derogation from laches was that the complainant was not responsible for the delay.[256] The tribe had no international legal status and was dependent on the guardianship of, respectively, Great Britain and Canada, to press its claim in an international forum.[257] Though Great Britain had been negligent in pressing the claim, its negligence could not be imputed to the Cayuga Indian Tribe, which had pressed its claim "continuously and persistently since 1816."[258] The tribunal based its holding on:

> [T]he general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability. . .[259]

An additional consideration was that New York had not been prejudiced by the delay, because the case had been brought to the legislature's attention and a public commission had recommended the state settle the claim.[260] These cases show that derogation from extinctive prescription did not originate in human rights jurisprudence. There is longstanding authority for the principle

252. *Id*. at 386.
253. *Id.* at 386–87.
254. *Id.* at 387.
255. Cayuga Indians (Great Britain) v. United States, 6 R.I.A.A. 173 (Arb. Trib. (Gr. Brit.-U.S.) 1926).
256. *Id.* at 189.
257. *Id.* at 179, 189.
258. *Id.* at 189.
259. *Id.*
260. *Id.*

that a claimant should not be time-barred from presenting a claim where he is not responsible for the delay.[261]

C. Derogation from the Period of Limitation in Human Rights Law

The ECHR and the IACHR have used continuing violations to find that claims were not barred by periods of limitation. The body of human rights law applying continuing violations to overcome periods of limitation is less extensive than that applying continuing violations analysis to acts that began before a treaty's entry into force. The reasoning in the former set of cases does not draw on previous international adjudication, either explicitly or apparently. Neither do the human rights courts refer to the traditional rationales for a period of limitation or justify why they derogate from them. These characteristics of the human rights jurisprudence on this issue make it poor material on which to rely when interpreting investment treaties.

In *Jėčius v. Lithuania*, the ECHR held that illegal detention was a continuing act that overcame the rule that a claim must be brought within six months of the violation.[262] Lithuania objected to the application on the grounds that although the applicant remained in detention through the time he filed his claim in December 1996, the original "preventive detention" on which the claim was based had ended more than six months before.[263] The authorities had changed the basis for his detention from "preventive detention" to "detention on remand". The court rejected the objection because "there had been no visible signs of a change of the applicant's status when his preventive detention had been replaced with detention on remand."[264]

The court explained that "[i]n respect of a complaint about the absence of a remedy for a continuing situation, such as a period of detention, the six-month time-limit . . . starts running from the end of that situation—for example, when an applicant is released from custody . . . ."[265] In *Jėčius*, the court propounded the rule as generally applicable but did not offer an analysis of why the statute of limitations should not have begun to run earlier. It is puzzling that the court did not distinguish between the alleged violations that were apparent prior to the six-month period and those that

261. *See also* Ambatielos Claim (Gr. v. U.K.), 12 R.I.A.A. 83 (1956) (allowing delayed claim where Greece and claimant pursued various avenues of redress during the interim time, including judicial and diplomatic).

262. Jėčius v. Lithuania, 2000 IX Eur. Ct. H.R. 235, ¶¶ 43–44.

263. *Id.*

264. *Id.* ¶ 43.

265. *Id.* ¶ 44.

arose later. For example, Article 5 of the European Convention on Human Rights protects against deprivation of liberty without due process,[266] so the violation of this right should have been apparent shortly upon his arrest. In contrast, the alleged violation on the grounds of excessive length of detention of sixteen months and one day could not have been brought within six months of the applicant's arrest; therefore, postponing the tolling of the six-month rule for this violation was appropriate. The court did not explicitly reason that the applicant's persistence in pressing his claim affected its decision, but the opinion's facts section lays out his early and frequent objections presented to domestic authorities up to the time he filed an application with the ECHR.[267]

In *Cyprus v. Turkey*, the court again stated the rule that for the purpose of the six-month rule, time begins to run when an ongoing situation ends.[268] Here the court took a more nuanced approach, distinguishing between situations that ended before the six-month period and those that continued.[269] The acts that were held to be continuing and thus allowed under the six-month rule include the following: Turkey's failure to investigate the whereabouts of disappeared persons,[270] to provide their relatives any information about the same,[271] refusal to allow displaced persons to return to their homes,[272] and de facto expropriation of property.[273]

It remains puzzling that the court did not offer a rationale for allowing claims where the applicant knew or should have known of the violations more than six months before—that is, that the court distinguished claims based on when the violation ended rather than whether it by its nature required an extended time period to ripen. There are several possible explanations. The court may have reasoned that a strict application of the six-month rule would eviscerate the Convention's protections by allowing states to continue violating rights with impunity. Additionally, because the statute of limitations here is extremely short, several of the jurisprudential considerations on which laches is based are implicated only weakly, if at all. The risk of loss of evidence after six months' passage of time is low; the risk probably remains low for years. The requirement that the violation be

266. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5 § 1, Nov. 4, 1950, 213 U.N.T.S. 221.
267. *See Jėčius*, *supra* note 262, ¶¶ 8–31.
268. *See* Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, ¶ 104.
269. *Id.* ¶ 104.
270. *Id.* ¶¶ 136, 150.
271. *Id.* ¶ 157.
272. *Id.* ¶ 169.
273. *Id.* ¶ 189.

ongoing decreases the likelihood that relevant evidence will be lost. It is also unlikely that parties' rights will be harmed because they relied on the foreclosure of litigation after a six-month period of limitation; however, the longer the violation continues, the more likely this concern will become substantial.

Because the human rights bodies and courts are not clear about their reasons for using continuing acts analysis to overcome the period of limitation, their decisions do not offer persuasive analysis that can be applied to investment disputes. Investment arbitral tribunals should not adopt rules propounded by human rights bodies (or any other international bodies for that matter) without an understanding of the basis for the rules. With respect to this particular issue, the basis of the rules is unclear; thus, the rules should not be adopted.

This does not mean, however, that a tribunal should never derogate from a period of limitation or that continuing acts analysis has no place in decisions on periods of limitation in investment law. *Tagliaferro*, *Stevenson*, and *Cayuga Indians* demonstrate international legal recognition that enforcing a period of limitation may not be appropriate where the delay in presenting the claim is not the fault of the claimant.

D. Continuing Violations and the Period of Limitation in Investment Arbitration

Allegations of continuing violations raised before ICSID tribunals to overcome periods of limitation have had mixed success. Several ICSID cases under NAFTA have involved arguments about whether the conduct in question occurred within NAFTA's three-year period of limitation. Articles 1116 and 1117 of NAFTA impose a strict limitation period, stating that an investor cannot bring a claim on its own behalf or on behalf of an enterprise if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred loss or damage. Thus there are three points in time a tribunal must pinpoint to determine whether a claim has been brought within the period of limitation. First, the tribunal must determine the date on which the investor first acquired knowledge of the alleged breach. Second, even if the date of actual knowledge is found to be within the period, the tribunal must determine whether there was a different point at which the investor should have first acquired this knowledge. Third, the tribunal must determine when the claimant acquired, or should have acquired, knowledge that it incurred a loss as a result of the breach.

The tribunal in *Feldman v. Mexico* considered the meaning of Articles 1116 and 1117 in its Interim Decision on Preliminary Jurisdictional Issues and in its Final Award.[274] The discussion in the Interim Decision focused on the definition of "making a claim" for the purpose of determining the cut-off date for the limitation period.[275] The tribunal's analysis on this issue fully supports the applicability of the three-year limitations period and does not touch on continuing acts. Though *UPS v. Canada* cited *Feldman* for the proposition that continuing acts can overcome NAFTA's three-year limitations period,[276] *Feldman* in no way supports this contention.

The *UPS* tribunal confused *Feldman's* holding on jurisdiction over acts beginning before but continuing after NAFTA's entry into force for a decision about jurisdiction over acts outside the three-year time limitation. Section IV of the *Feldman* Interim Decision covers "Time Limitation" and does not discuss continuing acts.[277] Later, in Section VI, the tribunal addressed the "Relevance of Claims Pre-Dating NAFTA's Entry into Force."[278] In this discussion the tribunal addressed how continuing acts interact with NAFTA's subject matter exclusion *ratione temporis*:

> Since NAFTA . . . delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis.* 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.[279]

The tribunal then reasoned that continuing actions may become breaches of NAFTA after the treaty's entry into force.[280] This discussion is completely separate from the application of NAFTA's period of limitation, which acts as a further bar to jurisdiction *ratione temporis*.

The *Feldman* tribunal added two questions to the merits: (1) whether the limitations period should be suspended for the period in which the parties had allegedly temporarily reached an agreement remedying the situation, and (2) whether the respondent should be equitably estopped from invoking any

274. Feldman, *supra* note 44, Award, ¶¶ 53–65; *id.*, Interim Decision on Preliminary Jurisdictional Issues, ¶¶ 39–49.

275. Feldman, Interim Decision, ¶¶ 40–47.

276. *See* United Parcel Service of America v. Canada, Award, ¶¶ 27–29 (June 11, 2007).

277. *See* Feldman, Interim Decision, ¶¶ 39–49.

278. *See id.* ¶¶ 60–63.

279. *Id.* ¶ 62.

280. *See id*. The tribunal reiterated its holding in the Final Award, where it also separated the discussion of "Relevance of Claims Pre-Dating NAFTA's Entry into Force" from other jurisdictional issues, including the period of limitation. *See* Feldman, Final Award, ¶¶ 51–65.

limitation period because it assured the claimant that the situation would be resolved and remedied.[281] In the Final Award, it found that no suspension of the period of limitation was warranted and that the respondent was not estopped from invoking the three-year limitation period.[282]

Though the investor in *Merrill & Ring Forestry v. Canada* cited the *Feldman* Final Award in support of its contention that continuing acts overcome the limitation period,[283] the decision says no such thing. To the contrary, *Feldman* states unequivocally that "NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification."[284] The *Merrill & Ring* investor ignored this language and *Feldman*'s entire discussion of the limitation period and turned to the decision on the merits of Feldman's discriminatory treatment claim.[285] In the paragraph quoted by Merrill, *Feldman* finds the "[c]laimant has been effectively denied [tax] rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates . . . ."[286] The period of limitation cutoff in *Feldman* was April 30, 1996, while the rebates were "effectively denied" over a period beginning before April 30.[287] The apparent contradiction of these dates is the basis for Merrill's argument that the *Feldman* tribunal accepted jurisdiction over a continuing act beginning before the period of limitation.[288] However, this interpretation is incorrect. The measure through which Feldman was "effectively denied" these rebates occurred in 1998, after the Mexican tax authority audited Feldman's company and demanded that it repay the rebates received during this period.[289] The measure at issue thus occurred well within the period of limitation and does not support an expansion of the period of limitation through continuing acts.

In *Mondev v. United States*, the United States invoked the NAFTA period of limitation, arguing that Mondev was aware of the alleged breaches more than three years before it filed its claim, and thus had sat on its rights. The United States' contention was that Mondev knew or should have been aware of the breaches when the City of Boston's actions that formed the basis of the

281. Feldman, Interim Decision, ¶ 48–49.
282. Feldman, Final Award, ¶¶ 58, 63.
283. Merrill & Ring v. Canada, Investor Submission, ¶ 468 (Feb. 13, 2008).
284. Feldman, Final Award, ¶ 63 (citation omitted).
285. Merrill & Ring, Investor Submission, ¶ 468 n.526 (citing and quoting Feldman, Final Award, ¶ 187).
286. Feldman, Final Award, ¶ 187.
287. *Id.* ¶¶ 49, 59, 187–88.
288. *Merrill*, *supra* note 6, ¶ 468.
289. *Id.* ¶¶ 22, 175.

complaint occurred.[290] These actions included allegedly obstructing Mondev's execution of its option to purchase a parcel of land and threatening to take measures that would render previously agreed-upon development of the land unviable.[291]

Mondev, in turn, put forth a continuing acts argument, alleging that:

> [T]he breaches did not occur until the decisions of the United States courts which finally failed to give [Mondev] any redress; alternatively, until those decisions, Mondev was not in a position to be sure whether it had suffered loss. Thus it was not until those decisions that Mondev "first acquired, or should have first acquired . . . knowledge that the investor has incurred loss or damage."[292]

Though the tribunal found the claims barred on other grounds, it asserted that it "would not have accepted Mondev's argument that it could not have 'knowledge of . . . loss or damage' arising from the . . . [other claims until] the court decisions."[293] It reasoned that "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[294]

In *Grand River Enterprises v. United States*, the tribunal heard a NAFTA claim by a Native American tribe in the cigarette business against the United States, arising out of various state actions undertaken as part of a Master Settlement Agreement ("MSA") to settle lawsuits against tobacco manufacturers.[295] The MSA required states to enact legislation requiring non-participating tobacco manufacturers to place a portion of their sales in escrow in a state-administered account.[296] States enacted the legislation, which described in detail the portion of sales to be escrowed, the length of time the funds would be escrowed, and a requirement that the funds be escrowed by April 15th of the year following the year in which the cigarettes were sold.[297] Within a few years, in response to market adjustments to the MSA and escrow legislation, states intensified efforts to enforce their escrow laws and began enacting complementary legislation to strengthen enforcement of escrow laws and close a perceived loophole in the laws.[298]

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290. Mondev, *supra* note 23, Award at ¶ 51.
291. *Id.* ¶¶ 37–39.
292. *Id.* ¶ 52 (quoting NAFTA art. 1116).
293. *Id.* ¶ 87.
294. *Id.*
295. *See* Grand River Enterprises Six Nations, Ltd. v. United States of America, Decision on Objections to Jurisdiction (July 20, 2006).
296. *Id.* ¶ 11–12.
297. *Id.* ¶ 12.
298. *Id.* ¶¶ 15–16.

The tribunal rejected Grand River's contention that it did not incur loss until it paid funds into the escrow accounts, finding that "becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years . . . is to incur loss or damage as those terms are ordinarily understood," and that Grand River should have known it faced loss or damage prior to March 12, 2001 (the date marking three years before it brought its claim).[299] On this basis, the tribunal held that Grand River's claims with respect to "the MSA, the escrow statutes, any related measures and enforcement actions taken prior to [that date]" were time-barred by NAFTA Articles 1116 and 1117.[300]

However, the tribunal considered related state actions after March 12, 2001 separately and found that they were not time-barred.[301] This may very well be the right result, but the reasoning is unsound. The tribunal's continuing dispute discussion is baffling. Quoting the PCIJ's "real cause" analysis from *Electricity Company of Sofia and Bulgaria*, the tribunal appears to have reasoned that even if the state actions after March 12, 2001 were related to the time-barred actions, this would not bar claims based on the later actions if the later actions gave rise to a separate dispute: "while 'a dispute may presuppose the existence of some prior situation or fact . . . it does not follow that the dispute arises in regard to the situation or fact.'"[302] After quoting this reasoning, the tribunal undertook no analysis of whether there was one ongoing dispute or a series of separate disputes. Since NAFTA Articles 1116(2) and 1117(2) do not reference "disputes" at all, one wonders how the disputes reasoning is relevant.

The tribunal misapplied the reasoning of *Electricity Company of Sofia and Bulgaria*, which addressed a continuing act in the context of acts beginning before entry into force, not a period of limitation. The PCIJ in that case was concerned with a provision limiting jurisdiction to acts after entry into force because the purpose of the treaty was to guide future conduct. It made sense there to hone in on whether the behavior giving rise to the dispute was completed—and thus not susceptible to alteration by treaty provisions—or continuing. Its analysis, however, was irrelevant to the period of limitation question considered by the *Grand River* tribunal.

Perhaps the tribunal was trying to get at whether a new action is significantly distinct in some way from a previous action so that it can

299. *Id.* ¶ 82–83.
300. *Id.* ¶ 83.
301. *Id.* ¶ 84–94.
302. *See id*. ¶ 86 n.39 (quoting *Electricity Co. of Sofia and Bulgaria*, *supra* note 72, Judgment at 82).

constitute a new breach, or whether it is a mere continuation of a previous breach. This idea is captured by the term "measure" in NAFTA. Article 201 defines "measure" as including "any law, regulation, procedure, requirement or practice."[303] NAFTA Chapter 11 "applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."[304] Since Chapter 11 applies to measures, investors may challenge only measures under this chapter.[305]

The measure is useful for elucidating an important distinction between acts that may constitute breaches and those that may not. As Reisman has explained, a set of regulations setting out how a law or policy will be implemented "fall squarely within the class of legal phenomena designated as 'a measure'; a routine application of one of those phenomena would not."[306] This conclusion follows logically from the NAFTA definition of measure. It would strain the ordinary meaning of the terms to consider each individual application of a regulation "a law, regulation, procedure, requirement or practice."[307] NAFTA considers a "measure" to be the implementation of a new law, regulation, procedure, requirement, or practice as a whole, rather than each discrete instance of its application.

This ordinary-reading interpretation of "measure" comports with the primary purpose of NAFTA's period of limitation, which is to promote certainty. If each routine application of a particular practice constituted a measure that could be challenged under Chapter 11, the period of limitation would be eviscerated, and even decades-old regulations would be subject to challenge. States and the actors in their economies would always face this added risk of upheaval.

The use of the measure concept to distinguish actions that can reset the limitation period from those that cannot also has appeal on grounds of fairness. It is unlikely that a mere routine application of a measure would "fundamentally change [the claimant's] situation and [inflict] new and significant injury," as the claimant asserted that the later legislation and enforcement policies did.[308] It would seem unfair to time-bar a claim based on a state action that caused such an upheaval to an investor's situation if the

303. NAFTA, *supra* note 43, art. 201.
304. NAFTA art. 1101.
305. *See* Merrill & Ring v. Canada, Opinion of Reisman, *supra* note 6, ¶ 17.
306. *See id*. ¶ 19.
307. *See id*.
308. *See* Grand River, *supra* note 295, ¶ 85.

upheaval was unforeseen. Since a routine application of a measure will generally be foreseeable, a sophisticated investor should be able to estimate within the three-year window the loss it will occur from ongoing routine applications of the measure. Thus investors should generally be able to bring any claims within this period. It would seem that an unforeseen new substantial injury would tend to be caused only by a change in practice or a fundamentally altered application of a regulation, which would constitute a measure under NAFTA and thus fall within a new period of limitations.

Keeping in mind the measure as the unit of action to which NAFTA applies, we can see how the *Grand River* tribunal's determination that the actions after March 2001 were not time-barred was perhaps correct. These actions should not be time-barred if they amounted to measures and not mere routine application of pre-existing measures.

In *United Parcel Service v. Canada*, Canada objected that NAFTA Articles 1116 and 1117 barred UPS's claims.[309] UPS argued that "on-going conduct constitutes a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day."[310] Canada countered by pointing that a rule that a continuing course of conduct constitutes a new breach each day would completely undermine the goals of certainty and finality.[311]

The tribunal agreed with UPS, holding that the claims are not time-barred because "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly."[312] It distinguished *Mondev* on the grounds that the actions in that case were completed—the actions did not become continuing acts by virtue of the pending state court challenges.[313]

At first glance, UPS's argument that a continuing act should extend the limitation period with each new application has intuitive appeal. UPS argued "on the basis of logic . . . that an investor cannot know whether a NAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct."[314] Though the tribunal did not elaborate on UPS's logic, it might have proceeded as follows. An investor may first learn of some action by a state that it considers a violation; at this point, the investor may even know that the action will cause

309. United Parcel Service, *supra* note 276, Award ¶¶ 32–33.
310. *Id.* ¶ 24.
311. *Id.* ¶ 25.
312. *Id.* ¶ 28.
313. *Id.* ¶ 29.
314. *Id.* ¶ 26.

some loss. However, in the cost-benefit analysis of whether to initiate a claim, the party may at that point determine that the expense and time are not worth it given the seriousness of the conduct at issue and the estimated loss. If the conduct continues, the party may suffer a greater loss, leading to a different result from the cost-benefit analysis. It would be unfair to preclude a party from bringing a claim at this later time given the new information it has about the continuing nature of the conduct and the change in its expected loss.

This logic ignores the purpose of the limitation period, as Canada pointed out.[315] A reading that resets the limitation period with each new application of a regulation eviscerates the limitation. Also, as explained above, sophisticated international investors should be able to estimate their losses from a new regulation or policy within the three-year window. If a new state action truly causes unforeseen losses, it will likely fall within the definition of a measure and thus begin a new limitation period.

Merrill & Ring Forestry v. Canada is the most recent NAFTA arbitration in which continuing acts were invoked to overcome the three-year limitation period. The tribunal did not reach the temporal jurisdiction issues because it found the claims failed on other grounds.[316] However, this is unlikely to be the end of this line of argument; NAFTA investment tribunals will continue to grapple with it.

E. Should Investment Arbitral Tribunals Borrow Continuing Circumstances Analysis to Overcome the NAFTA Period of Limitation?

The reasoning of NAFTA investment tribunals on this issue has been poor. They have egregiously misapplied previous decisions. They have adopted the reasoning from decisions on whether pre-treaty circumstances should fall within jurisdiction, and applied this reasoning to the distinct issue of acts beginning outside the period of limitation. As this paper has shown, jurisdictional exclusion of pre-treaty circumstances is based on rationales entirely distinct from periods of limitation.

At least one NAFTA tribunal, in *UPS v. Canada*, appears to have accepted as general rules of international law rules propounded by human rights bodies absent any reasoning.[317] In the recent case *Merrill & Ring Forestry*, the investor offered human rights cases to support its contention

315. *Id.* ¶ 25.
316. *See* Merrill & Ring Forestry L.P. v. Canada, Award, ¶ 269 (Mar. 31, 2010).
317. United Parcel Service, *supra* note 276, Award ¶ 28.

that continuing acts overcome the period of limitation.[318] Though the tribunal did not reach the issue because it denied the claim on other grounds,[319] this argument will likely be pressed again. Because the human rights cases do not offer reasons for their position on this issue, investment tribunals should not adopt their holdings. Tribunals must look to the purposes of the NAFTA period of limitation and derogate from it only when doing so comports with those purposes.

There may be appropriate reasons to derogate from the period of limitation. The one that appears in prior jurisprudence is where the claimant is not to blame for failing to bring a claim on time. It may be argued that this was the case in *Feldman*, where Mexico allegedly assured the investor that the situation would be remedied.[320] However, it is less likely in the international investment context than in other contexts that a claimant will have a good reason for sitting on its rights. Unlike early arbitrations involving individuals and Native American tribes dependent on states to press their claims,[321] the actors in the international investment regime are large, sophisticated business enterprises which, by virtue of their participation in the regime, have access to adjudication to remedy harms they suffer.

V. CONCLUSION

Investment arbitral tribunals are authorized by the Vienna Convention on the Law of Treaties, the ICSID Convention, and often by individual BITs to look to outside sources of international law. There are no clear limitations on which outside sources arbitrators should apply, except that they should apply only those that are relevant to the BIT at issue and be mindful of differences in jurisdictional consent.

Because ICSID jurisdiction is based on consent, tribunal overreach jeopardizes the legitimacy of the investment protection legal regime. The regime's characterization as facing a "crisis of legitimacy"[322] and "an incumbent lack of transparency, differentiation, partial contradiction and legal uncertainty"[323] raise the importance of maintaining and restoring its

318. *See* Merrill & Ring v. Canada, Investor's Observations on Preliminary Objections, at 3–4 & nn.6–7.

319. *See* Merrill & Ring v. Canada, Award, ¶ 269.

320. Feldman, *supra* note 44, ¶ 55.

321. *See* Tagliaferro Case, *supra* note 245, at 592; Stevenson Case, *supra* note 250; Cayuga Indians, *supra* note 255.

322. Brower, *A Crisis of Legitimacy*, *supra* note 1.

323. DIMSEY, *supra* note 2, at 98.

perceived competence and fairness. As Jan Paulsson observed early in the investment arbitration regime's history, whether national governments agree to participate depends on "the degree of sophistication shown by arbitrators when called upon to pass judgment on governmental actions. . . . A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash."[324] Even perceived overreach or arbitrariness can undermine the credibility of the international investment protection system: "[I]nternational legal regimes depend for their survival on perceptions of legitimacy . . . . To generate perceptions of legitimacy, legal regimes must operate predictably, conform to historical practice, and incorporate fundamental values shared by the governed community."[325]

When they enter into investment treaties, states obligate themselves "to participate in potential arbitrations in an as-yet-unknown scope and against as-yet-unknown claimants."[326] If they believe they face unpredictable liability, states may withdraw from the regime or decline to enter into more BITs.[327] Indeed, many states have recently re-examined their involvement in the international investment arbitration system. In 2007, Venezuela terminated its BIT with the Netherlands, and Ecuador declared it would withdraw from its investment treaties.[328] Ecuador threatened to terminate its BIT with the United States. Subsequently, the foreign minister retracted the threat, but insisted the country would rethink its participation.[329] Ecuador has since withdrawn consent to arbitrate disputes over natural resources.[330] Bolivia withdrew from ICSID completely in May 2007, citing ICSID's alleged bias in favor of corporations. Bolivia also announced its intention to revise its twenty-four BITs, specifically to make changes to the provisions concerning the scope of covered investments.[331] The recent Philippines-Japan Agreement does not provide for investor-state arbitration of disputes.[332]

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324. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.-For. Investment L.J. 232, 257 (1995).

325. Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51 (2003).

326. DIMSEY, *supra* note 2, at 226.

327. *See* Reisman, *supra* note 12, at 743.

328. GALLUS, *supra* note 3, at 27.

329. *See Ecuador Says Won't Extend U.S. Investment Treaty*, REUTERS (May 6, 2007), http://www.reuters.com/article/politicsNews/idUSN0626423520070507; Menaker, *supra* note 3, at 161; see generally note 3.

330. Menaker, *supra* note 3, at 161.

331. *See* News Release, ICSID, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention* (May 16, 2007), http://icsid.worldbank.org/ICSID/Index.jsp (click on "Publications"; select "News Releases"; then select link for news release of May 16, 2007)(reporting May 2, 2007

Additionally, a number of countries have publicly decried the investment legal regime. A Philippine government official reportedly claimed investor-state arbitration was biased in favor of developed countries.[333] "Argentina, unable to cope with the sheer number of proceedings brought against it, has even gone so far as to announce its desire to return to the Calvo doctrine, whereby foreigners are to be subjected to no more favourable treatment than locals and, particularly, are to exhaust local judicial remedies."[334] Pakistan's Attorney General questioned, in light of an arbitration filed by Société Générale de Surveillance S.A., "whether states should continue to enter into BITs given what he described as the open-ended concepts contained in the agreements along with the significant policy considerations involved."[335]

Sornarajah attributes these negative reactions to the investment regime to expansionary trends in jurisdiction.[336] Menaker argues that states enter into cost-benefit analyses when deciding whether to participate in the international investment legal regime.[337] BITs offer states the benefit of signaling that they are protective of foreign investment and thereby attract it. The state's costs may include, in addition to the obvious costs of defending a case before an arbitration tribunal and the possibility of losing, the cost of initial policy adjustments to comply with substantive obligations.[338] Another cost is reputational cost if a state is found to have violated its obligations.[339]

However, Menaker points out that a state's perceived cost of losing an arbitration will be lower if the state believes the tribunal interpreted and applied the BIT accurately, particularly if the state believes a similar result would have obtained in a domestic court: "[s]tates will undoubtedly monitor

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letter of denunciation); *Bolivia Expounds on Reasons for Withdrawing from ICSID Arbitration System*, INV. TREATY NEWS, May 27, 2007; Menaker, *supra* note 3, at 161.

332. Menaker, *supra* note 3, at 162 (citing Bernie Cahiles-Magkilat, *Under RP-Japan Economic Partnership Agreement Local Settlement of Disputes Agreed On*, MANILA BULL., Aug. 30, 2006, *reprinted at* http://www.bilaterals.org/spip.php?page=print?id_article=5714).

333. *Id.*

334. DIMSEY, *supra* note 2, at 101.

335. Menaker, *supra* note 3, at 162 (citing Luke Eric Peterson, *Pakistan Attorney General Advises States to Scrutinize Investment Treaties Carefully*, INV. TREATY NEWS (Dec. 1, 2006)).

336. M. Sornarajah, *The Retreat of Neo-Liberalism in Investment Treaty Arbitration*, *in* THE FUTURE OF INVESTMENT ARBITRATION 273, 291–92 (Catherine A. Rogers & Roger P. Alford eds., 2009). An alternative possibility is that parties may start to create more detailed BITs with clearer, more explicit language about temporal jurisdiction. Andrea J. Menaker contends that this change is already underway: "Negotiating parties are increasingly sophisticated and familiar with existing investor-state cases. As a result, treaties are becoming much longer and more detailed. There has been a trend in recent agreements towards clarifying and elaborating on the scope of obligations in order both to ensure that the parties understand what obligations they are undertaking and also to provide greater guidance to tribunals in interpreting the provisions." Menaker, *supra* note 3, at 160.

337. Menaker, *supra* note 3, at 158.

338. *Id*.

339. *Id.* at 159.

whether the obligations imposed on them by arbitral tribunals are coterminous with the obligations they believe they have undertaken. Their view of the benefits and costs of the BIT will unquestionably be shaped by this assessment."[340]

It is therefore important that decisions are well reasoned, consistent, and clear as to how their jurisdictional interpretations relate to the consent evidenced in the BIT. This is particularly true when a tribunal draws from reasoning in other international law contexts like human rights law. The increasing prominence of human rights in all areas of international law makes it likely that investors and host states will press human rights principles and cases with increasing frequency in investment arbitration.[341] As this happens, it may become difficult to cabin which issues human rights principles should be applied to and which they should not.

Arbitrators may properly look to human rights or other decisions on jurisdictional issues as far as these decisions offer persuasive analysis that can be applied to the BIT and facts at issue. "Like cases must be treated alike," but more importantly, "appropriate, substantiated distinctions need to be drawn, rather than relying on arbitrary, formalistic factors as a basis of differentiation."[342] It is appropriate for investment tribunals to use relevant sources of international law, including persuasive reasoning drawn from prior decisions in human rights and other areas of international law, because these sources provide context for interpreting treaty language. However, arbitrators should borrow from prior decisions based on the strength of the reasoning of those decisions and on the similarity of the underlying treaties, always remembering that their role is to discern the intention of the parties.

340. *Id.*
341. *See* Dupuy, *supra* note 118, at 53–62.
342. DIMSEY, *supra* note 2, at 101–02.