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Institut pour l'Arbitrage International**

**Jurisdiction
in
Investment Treaty Arbitration**

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Paris**

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JURIS

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TABLE OF CONTENTS

INTRODUCTION	<i>Emmanuel Gaillard</i>	1
<i>PART I</i>		
JURISDICTION <i>RATIONE MATERIAE</i>:		
THE NOTION OF INVESTMENT		5
Economics and the Meaning of ‘Investment’	<i>Boaz Moselle</i>	7
Is There a Legal Definition of ‘Investment’?... ..	<i>Stanimir Alexandrov</i>	27
About the Definition of an International Investment – The Requirement of a Contribution to the Economic Development of the Host State	<i>Pierre-Marie Dupuy</i>	37
Does the Consent of the Contracting Parties Govern the Requirement of an ‘Investment’ as Specified in Article 25 of the ICSID Convention?.....	<i>Stephen M. Schwebel</i>	55
The Legality Requirement in Investment Arbitration.....	<i>Michael Polkinghorne and Sven-Michael Volkmer</i>	65
Is There a “Nationality” of Investment? Origin of Funds and Territorial Link to the Host State	<i>Margaret Clare Ryan</i>	97

Table of Contents

Determining State Intention when Negotiating and Entering into Investment Treaties – A Canadian Perspective	<i>Megan Clifford and Christophe Douaire de Bondy</i>	127
Determining State Intention when Negotiating and Entering into Investment Treaties – A Developing Country Perspective	<i>Roberto Echandi-Gurdián</i>	139
Determining State Intention when Negotiating and Entering into Investment Treaties – A South Korean Perspective	<i>Jae-Hoon Kim</i>	171
Discussion		177
 PART II		
JURISDICTION <i>RATIONE PERSONAE</i>		197
Jurisdiction <i>Ratione Personae</i> – Is There a Standard Definition of an ‘Investor’ in Investment Treaties?	<i>Doak Bishop and Margrete Stevens</i>	199
Taking Into Account Control Under Denial of Benefits Clauses	<i>Yas Banifatemi</i>	223
Defining the Respondent State in Investment Treaty Arbitration: Are There Specific Standards of Jurisdiction?	<i>Geneviève Bastid-Burdeau</i>	269
Discussion		283
 PART III		
JURISDICTION <i>RATIONE TEMPORIS</i>		295
<i>Entretempis</i> : Is There a Distinction Between Jurisdiction <i>Ratione Temporis</i> and Substantive Protection <i>Ratione Temporis</i> ?	<i>Veijo Heiskanen</i>	297
When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action	<i>Zachary Douglas</i>	321
Discussion		359

<i>ANNEXES</i>	367
ANNEX 1	
ICSID Case No. ARB/00/4, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction, 16 July 2001	369
ANNEX 2	
ICSID Case No. ARB/06/5, Phoenix Action, Ltd. v. The Czech Republic, Award, 15 April 2009	379
ANNEX 3	
ICSID Case No. ARB/05/10, Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia, Decision on the Application for Annulment, 16 April 2009	413
ANNEX 4	
ICSID Case No. ARB/07/20, Saba Fakes v. Republic of Turkey, Award, 14 July 2010.....	443
ANNEX 5	
Cross-references in Investment Arbitration Case Law – The Notion of Investment under Article 25(1) of the ICSID Convention	467
ANNEX 6	
List of Participants to the IAI Conference Held in Paris on 14 October 2010.....	499
ANNEX 7	
Table of Authorities	505
ANNEX 8	
Table of Abbreviations	543

Introduction

Emmanuel Gaillard *

International arbitration involves jurisdictional issues that go beyond those encountered in traditional judicial proceedings. This is especially true of investment treaty arbitration, where the scope of an arbitral tribunal's jurisdiction varies considerably depending on the underlying instrument of consent, be it an investment contract, an investment law, or an international investment agreement ("IIA"). The ICSID Convention itself raises specific jurisdictional issues. The jurisdictional phase of an investment treaty arbitration may indeed be more lengthy and hard fought than any eventually ensuing merits phase. In many instances, jurisdiction becomes the focal point of the arbitration, not only because jurisdictional objections give rise to some of the most difficult and challenging legal questions, but also because jurisdiction may be the entry and last point for an investor: there are cases where a respondent State prevails on jurisdiction even though, *prima facie*, there may have been clear breaches of a treaty's substantive protections.

The parts of this volume are organized according to the three jurisdictional thresholds that a claimant must cross in order to reach the merits phase of an investment treaty arbitration. Part I concerns the requirements for jurisdiction *ratione materiae*, or the existence of an investment, which is at the heart of the investor-State arbitration system. Boaz Moselle opens the discussion by considering the notion of investment from an economic, rather than

* Emmanuel Gaillard is a Professor of Law and teaches at Yale Law School as a Visiting Professor of Law. He is the founder and Head of Shearman & Sterling's International Arbitration Group.

a legal, standpoint. Stanimir Alexandrov addresses the question whether there is a legal definition of “investment” by reference to the definition chosen by State parties to bilateral and multilateral investment treaties or free trade agreements. Professor Pierre-Marie Dupuy discusses the meaning of investment under the ICSID Convention, which establishes the jurisdiction of ICSID tribunals, and which has intentionally left the notion of “investment” undefined. Judge Stephen Schwebel addresses whether the consent of the State parties governs the requirement of an investment as specified in Article 25 of the ICSID Convention. Michael Polkinghorne and Sven Michael Volkmer address the legality requirement in investment protection. Margaret Clare Ryan discusses whether an investment must meet any nationality requirements in order to enjoy treaty protection.

A second series of contributions discuss the intention of State parties when negotiating and entering into treaties for the protection of foreign investments. Megan Clifford and Christophe Douaire de Bondy address the perspective of Canadian Government officials when they develop Canada’s IIA policy, negotiate IIAs, and represent Canada in investor-State disputes. Robert Echandi considers factors impacting the decisions of developing States to enter into IIAs. Jae-Hoon Kim addresses these same issues from the perspective of the Government of the Republic of South Korea.

Part II of the present volume addresses the requirements for a tribunal’s jurisdiction *ratione personae*, *i.e.*, which individuals or entities may be a party to an investment treaty arbitration. Doak Bishop and Magrete Stevens examine whether there is a standard definition of a protected “investor” in international investment agreements. Yas Banifatemi analyses denial of benefits clauses, which enable State parties to an IIA, under certain conditions, to exclude from the treaty’s protection certain types of investors. Professor Geneviève Bastid-Burdeau addresses whether there are

accepted criteria for identifying and defining a respondent State to an investment treaty arbitration.

Finally, Part III of this Volume examines one of the most complex questions in matters of jurisdiction, that of jurisdiction *ratione temporis*, or the temporal jurisdiction conferred by a treaty. Veijo Heiskanen focuses on whether there is a distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*, while Zachary Douglas analyses the nature of the cause of action and the point in time in which an investment treaty claim arises.

With the exception of the contributions of Boaz Moselle and Margaret Clare Ryan who stepped in for the original speakers, all articles in the present volume are based on the talks given in October 2010 at the IAI Conference on “Jurisdiction in Investment Treaty Arbitration”, under the chairmanship of Dr. Laurent Lévy (jurisdiction *ratione personae*), Judge Charles Brower (jurisdiction *ratione temporis*) and the undersigned (jurisdiction *ratione materiae*). Given the time that elapsed between the Conference and the issuance of this publication, the editors are grateful to the authors for having completed and updated their contributions where such updates were necessary.

