Научная статья / Research Article
https://doi.org/10.17323/jil.2025.28169

The notion of a dispute in determining jurisdiction *ratione temporis* in international investment arbitration

D. Baktybekova

Resolut, Moscow, Russia

dilzhanbaktybekova@gmail.com
ORCID: 0009-0000-7461-8311

Abstract

This article examines the inconsistent and often problematic role of the notion of a dispute in establishing jurisdiction *ratione temporis* in international investment arbitration. It argues that the principle of non-retroactivity in investment law applies to the timing of the state's measures, not to the timing of the dispute. However, for treaties that do not explicitly exclude pre-existing disputes, tribunals often err by focusing on when the dispute arose to establish jurisdiction *ratione temporis*. This practice introduces a jurisdictional criterion not agreed upon by the contracting parties and misapplies the non-retroactivity principle. Conversely, for treaties that explicitly exclude pre-existing disputes from the scope of their application, the timing of the dispute is of critical importance. However, arbitral practice reveals a lack of a unified definition of a "dispute". Analysis of key cases shows that tribunals apply inconsistent standards to determine when a dispute has arisen. Furthermore, in some cases, even after establishing jurisdiction over a post-treaty dispute, tribunals have applied the treaty retroactively to the pre-treaty measures. The article further analyses the complexities of alleged continuing breaches. For treaties that do not exclude the pre-existing disputes, the test is whether a post-treaty act constitutes an "independently actionable breach". For treaties that explicitly exclude pre-existing disputes, the article critiques ambiguous tests like the "same subject matter" approach used in *Lucchetti v. Peru*, which allows states to avoid liability for post-treaty wrongful acts by linking them to older disputes. It concludes by advocating for a clearer analytical framework, proposing that tribunals should first identify an independently actionable breach and then determine when the dispute specific to that breach arose, thereby enhancing predictability and safeguarding investor rights.

Key words: the notion of a dispute, jurisdiction *ratione temporis*, bilateral investment treaty, retroactive application, pre-existing dispute, independently actionable breach

Citation: Baktybekova D. The notion of a dispute in determining jurisdiction *ratione temporis* in international investment arbitration. *HSE University Journal of International Law*. 2025. Vol. 3. No. 2. P. 51–78.

Dilzhan Baktybekova — junior associate.

Понятие спора при определении юрисдикции *ratione temporis* в международном инвестиционном арбитраже

Д. Бактыбекова

Resolut, Москва, Россия

dilzhanbaktybekova@gmail.com
ORCID: 0009-0000-7461-8311

Аннотация

В настоящей статье рассматривается непоследовательная и зачастую проблематичная роль понятия спора при установлении юрисдикции *ratione temporis* в международном инвестиционном арбитраже. В ней утверждается, что принцип неретроактивности в инвестиционном праве применяется к моменту принятия мер государством, а не ко времени возникновения спора. Однако в случае договоров, которые прямо не исключают ранее существовавшие споры из сфер их применения, арбитражные трибуналы часто совершают ошибку, концентрируясь на моменте возникновения спора для установления юрисдикции *ratione temporis*. Такая практика вводит юрисдикционный критерий, не согласованный договаривающимися сторонами, и приводит к неверному применению принципа неретроактивности. И наоборот, для договоров, прямо исключающих ранее существовавшие споры из сфер их применения, момент возникновения спора является крайне важным критерием. Однако арбитражная практика свидетельствует об отсутствии единого определения понятия «спор». Анализ ключевых дел показывает, что трибуналы применяют непоследовательные стандарты для определения момента возникновения спора. Более того, в некоторых случаях, даже установив юрисдикцию в отношении спора, возникшего после вступления договора в силу, трибуналы применяли договор ретроактивно к мерам, принятым до его вступления в силу. Далее в статье анализируются сложности, связанные с предполагаемыми длящимися нарушениями. Для договоров, не содержащих исключений для ранее возникших споров, тест заключается в том, представляет ли собой деяние, совершенное после вступления договора в силу, «самостоятельное нарушение, являющееся основанием для иска». Для договоров, содержащих такие исключения, в статье критикуются неоднозначные тесты, такие как подход «тождества предмета спора», использованный в деле *Lucchetti v. Peru*, который позволяет государствам избегать ответственности за противоправные действия, совершенные после вступления договора в силу, связывая их с ранее возникшими спорами.

В заключение автор выступает за более четкую аналитическую основу, предлагая трибуналам сначала определять наличие самостоятельного нарушения, являющегося основанием для иска, а затем устанавливать, когда возник спор, относящийся именно к этому нарушению, что будет способствовать повышению предсказуемости и защите прав инвесторов.

Ключевые слова: понятие спора, юрисдикция *ratione temporis*, двусторонний инвестиционный договор, ретроактивное применение, ранее возникший спор, самостоятельное нарушение, являющееся основанием для иска

Для цитирования: Бактыбекова Д. Понятие спора при определении юрисдикции *ratione temporis* в международном инвестиционном арбитраже. *Журнал ВШЭ по международному праву / HSE University Journal of International Law.* 2025. Том 3. № 2. С. 51–78.

Дилжан Бактыбекова — младший юрист.

Introduction

States build their jurisdictional defences in international investment arbitration in different ways. One way is to argue a lack of jurisdiction *ratione temporis*, claiming that the dispute before the tribunal arose before the treaty's entry into force or any other effective date, such as the date of making the investment (hereinafter — the Pre-Existing Dispute). States make this argument based on two different types of investment protection treaties — treaties that explicitly provide that they do not apply to Pre-Existing Disputes (hereinafter — the Non-Silent Treaties)[1] and even in cases where the treaty does not exclude such disputes from the scope of their application (hereinafter — the Silent Treaties).[2]

The first part of the article focuses on the correctness of the reference by parties and the tribunals to the timing of disputes in the Silent Treaties. The second part deals with the cases concerning the Non-Silent Treaties and discusses the notion of a dispute, as well as its role in further analysis. The third

[1] An example of such clause is Article 12 of Agreement Between the Government of the United Arab Emirates and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments of 28 June 2010 that states that it "shall not apply to investment disputes arisen or settled before its entry into force".
URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2234/download.

[2] An example of the Silent Treaty is the BIT between the Republic of Kyrgyzstan and the United States of America of 19 January 1993, where Article XIII states that the BIT "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter".
URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1864/download.

part elaborates on how tribunals decide if they have jurisdiction *ratione temporis* when parties claim that there has been a continuing breach in cases of the Silent Treaties, and how the tribunals decide if a dispute before them arose after the treaty entered into force, or is a continuation of a Pre-Existing Dispute in the Non-Silent Treaties.

1. The Silent Treaties

Neither investment arbitration practice nor literature has paid much attention to the correctness of arguments by parties that refer to the timing of disputes in cases of the Silent Treaties to argue a lack of jurisdiction *ratione temporis*. Even less attention has been given to the analysis of arbitral tribunals based on the timing of disputes. The author argues that by introducing an additional criterion for establishing jurisdiction *ratione temporis* — specifically, the timing of the disputes — tribunals appear to be interpreting treaties in a manner that introduces obligations or limitations not expressly agreed upon by the contracting parties.

States tend to frame their jurisdictional objections by relying on Article 28 of the Vienna Convention on the Law of Treaties (hereinafter — VCLT) and by arguing that, under the non-retroactivity rule, the treaties should not apply to *disputes* that arose prior to the treaty's entry into force. There has been a debate on whether Article 28 of the VCLT applies to "treaty provisions and instruments conferring jurisdiction" (Juratowitch & McArthur, 2024, p. 98). It has also been recognised that while Article 28 of the VCLT might seem to be clear, "the rule leaves a wealth of questions unanswered when applied to jurisdictional issues" (Gattini, 2017, p. 140) The answer has been provided in the International Law Commission's (hereinafter — ILC) commentaries to the Draft Articles on the Law of Treaties of 1966. The ILC stated that "when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application", the non-retroactivity principle may operate in relation to the jurisdiction as well, based on the timing of the alleged breach. As such, if the alleged breach is claimed to have happened before the entry into force of the treaty, the tribunal or a court will not have jurisdiction *ratione temporis* to hear the claims.[3] Essentially, the ILC refers to the timing of the alleged breaches rather than the timing of the disputes. This means that the tribunals will have jurisdiction *ratione temporis* over investors' claims as long as the alleged breaches take place after the treaty enters into force or any other

[3] International Law Commission, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, p. 212. URL: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

relevant critical date. However, arbitral tribunals have not consistently followed this approach.

In *Gramercy v. Peru,* for example, the tribunal rightly complied with the treaty language and followed the ILC's approach.[4] Here, the United States-Peru Free Trade Agreement (hereinafter — FTA) stated that "[f]or greater certainty, [it] does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement".[5] When Peru argued the lack of jurisdiction *ratione temporis* by claiming that the dispute before the tribunal was the Pre-Existing Dispute, the tribunal found that Peru's argument "suffers from a significant problem".[6] This is because Peru's argument does not conform to the *actual wording* of the FTA's temporal exclusion clause, which *does not refer to disputes*, but to measures" [emphasis added].[7] These measures included "'law, regulation, procedure, requirement, or practice' […] 'adopted or maintained' by the host State".[8] The tribunal noted that the disputed measures took place after the FTA entered into force,[9] and therefore fell within the tribunal's jurisdiction *ratione temporis*.[10]

In contrast, the tribunal in *ATA Construction v. Jordan*[11] presented a reasoning that did not follow the treaty language. In this case, the bilateral investment treaty (hereinafter — BIT) between Jordan and Turkey of 2006 applied to "investments existing at the time of entry into force as well as to

---

4 ICSID. *Gramercy Funds Management LLC, et al. v. The Republic of Peru*. Case No. UNCT/18/2, Final Award of 6 December 2022.
URL: https://jusmundi.com/en/document/decision/en-gramercy-funds-management-llc-and-gramercy-peru-holdings-llc-v-the-republic-of-peru-award-tuesday-6th-december-2022. The tribunal also provided a helpful analysis of the notions of "*dispute*" and "*measure*". With regard to the dispute, the tribunal set up the following criteria for its existence: (1) "*there must be a disagreement regarding a point of law or fact*;" (2) "*the disagreement must be between two parties, which hold opposite views*;" (3) "*both parties must be aware that the dispute exists, the matter having been raised by one party and the counter-party showing some sign of opposition*" (see paras. 323–325). As for the measures, the tribunal derived the definition from the United States-Peru FTA, which stated that a measure "*includes any law, regulation, procedure, requirement, or practice*" (see para. 318). This article treats the notions of a dispute and a measure in the same way.

5 Peru - United States Trade Promotion Agreement of 12 April 2006, Article 10.1(3).
URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2721/download.

6 ICSID. *Gramercy Funds Management LLC, et al. v. The Republic of Peru*. Case No. UNCT/18/2, Final Award of 6 December 2022. Para 333.
URL: https://jusmundi.com/en/document/decision/en-gramercy-funds-management-llc-and-gramercy-peru-holdings-llc-v-the-republic-of-peru-award-tuesday-6th-december-2022.

7 Ibid.

8 Ibid. Para 336.

9 Ibid. Para 343.

10 Ibid. Paras 337–338.

11 ICSID. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*. Case No. ARB/08/2. Award of 18 May 2010.
URL: https://jusmundi.com/fr/document/decision/en-ata-construction-industrial-and-trading-company-v-hashemite-kingdom-of-jordan-award-tuesday-18th-may-2010.

investments made or acquired thereafter",[12] meaning that it was a Silent Treaty. The disputed measures in this case took place after the Jordan-Turkey BIT entered into force when the Jordanian Court of Cassation upheld the annulment of an arbitral award and extinguished the arbitration agreement on 16 January 2007.[13]

Jordan argued that "it is well established" that a treaty "will not apply to a *dispute* that has arisen, fully developed, and been extensively pursued before the BIT's entry into force" [emphasis added].[14] It asserted that the dispute before the tribunal "had been extensively litigated, in both arbitral and judicial proceedings, for a period of nearly six years before the BIT's entry into force", resulting in a lack of jurisdiction *ratione temporis*.[15] ATA Construction counterargued that the dispute arose after the BIT entered into force.[16]

Despite the lack of language that would indicate the exclusion of the Pre-Existing Disputes in the Jordan-Turkey BIT from the scope of its application, the tribunal agreed with Jordan. The tribunal concluded that it may exercise jurisdiction only "if it finds that the *dispute* arose after the entry into force of the Treaty on 23 January 2006" [emphasis added].[17] The tribunal eventually found that the dispute in relation to the annulment of the arbitral award arose in 2003, ruling that the dispute was "really indistinguishable from the original dispute and, hence, like its progenitor, arose prior to the entry into force of the Turkey-Jordan BIT", therefore finding no jurisdiction *ratione temporis*.[18] As for the second disputed measure of extinguishment of the arbitration agreement, the tribunal found that the dispute arose in 2007, after the BIT entered into force, hence, falling within the scope of jurisdiction *ratione temporis*.[19]

---

12 Agreement Between the Hasihemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments of 2 August 1993, Article IX. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1769/download.

13 ICSID. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*. Case No. ARB/08/2. Award of 18 May 2010. Para 67. URL: https://jusmundi.com/fr/document/decision/en-ata-construction-industrial-and-trading-company-v-hashemite-kingdom-of-jordan-award-tuesday-18th-may-2010.

14 ICSID. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*. Case No. ARB/08/2. Award of 18 May 2010. Para 63. URL: https://jusmundi.com/fr/document/decision/en-ata-construction-industrial-and-trading-company-v-hashemite-kingdom-of-jordan-award-tuesday-18th-may-2010.

15 Ibid.

16 Ibid. Paras 67–68.

17 Ibid. Para 98.

18 Ibid. Para 104.

19 Ibid. Para 118.

Furthermore, to determine when the dispute between the parties arose, the tribunal referred to the award in *Lucchetti v. Peru*.[20] Such reference is incorrect, because the BIT between Chile and Peru of 2000 explicitly provided that it did not "apply to differences or to disputes that arose prior to its entry into force".[21] This means that the BIT in *Lucchetti v. Peru* provided for a completely different standard from the outset, but the *ATA Construction v. Jordan* tribunal proceeded to apply it. The fact that some states exclude the Pre-Existing Disputes from the scope of their treaties' application demonstrates that the Silent Treaties are not equivalent to the Non-Silent Treaties, and the very necessity to explicitly exclude Pre-Existing Disputes from the scope of a treaty's application demonstrates that such intention might not be found in the Silent Treaties, let alone the lack of the wording that would indicate such an agreement between the contracting parties.

The analysis of the tribunal demonstrates that the reference to the timing of the disputes was both unnecessary and incorrect in the context of determining jurisdiction *ratione temporis*. The Turkey-Jordan BIT language did not warrant the assessment of the timing of the disputes, as it was in the Chile-Peru BIT. The tribunal should have based its interpretations and analysis on the wording of the Turkey-Jordan BIT, employing the non-retroactivity principle in relation to the acts rather than disputes as a general rule. The reference to the timing of disputes would be appropriate if the contracting parties of the BIT agreed to exclude the Pre-Existing Disputes from the scope of its application. The tribunal, instead of referring to the timing of the disputes, could have employed an "independently actionable breach" test (discussed below) to analyse whether the disputed measures could be assessed without assessing the prior acts of Jordan that could relate to the disputed measures.

Based on the cases above, it is evident that the case law on interpretation of the Silent Treaties in the context of jurisdiction *ratione temporis* is inconsistent. States attempt to escape from the jurisdiction of investment tribunals by arguing that the treaties do not apply to the Pre-Existing Disputes. This is despite the fact that the treaties do not explicitly limit their application, unlike in the Non-Silent Treaties, as discussed below. Notably, it is not only the parties that refer to the timing of disputes as the basis for their arguments on the presence or absence of jurisdiction *ratione temporis*, but the tribunals themselves, as was

---

[20] ICSID. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*. Case No. ARB/08/2. Award of 18 May 2010. Para 99. URL: https://jusmundi.com/fr/document/decision/en-ata-construction-industrial-and-trading-company-v-hashemite-kingdom-of-jordan-award-tuesday-18th-may-2010.

[21] Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile for the reciprocal promotion and protection of investments of 2 February 2000. URL: https://jusmundi.com/en/document/treaty/es-convenio-entre-el-gobierno-de-la-republica-del-peru-y-el-gobierno-de-la-republica-de-chile-para-la-promocion-y-proteccion-reciproca-de-las-inversiones-peru-chile-tbi-2000-wednesday-2nd-february-2000.

shown in the *ATA Construction v. Jordan*. This demonstrates a confusion in relation to the role of the notion of a dispute in determining jurisdiction *ratione temporis* when the applicable treaty is a Silent Treaty in international investment arbitration.

Hence, the notion of a dispute and the time when it arises should be of no relevance in cases where the applicable treaty is a Silent Treaty. Otherwise, assessing when the dispute arose seems to be an incorrect and unnecessary exercise not warranted by the treaty language. This practice undermines, rather than furthers, the goal of making international investment law more predictable and consistent.[22] The investors will not know whether their arguments on jurisdiction *ratione temporis* will succeed, or whether the tribunal will find that the timing of the dispute matters, even when the treaty language does not exclude the Pre-Existing Disputes from its scope.

2. Non-Silent Treaties

While the principle of the non-retroactivity of treaties operates in relation to the application of treaties depending on when the "act or fact" or the "situation" takes place as a general rule,[23] states are still "masters of their treaties",[24] and design the scope of application of their treaties as they deem fit. To this end, states draft so-called "single exclusion clauses" that exclude the disputes that arise prior to the treaty's entry into force from their scope of application (Baumgartner, 2017, p. 214). They may also include "double exclusion clauses" that exclude the disputes that arise based on the acts or facts that took place prior to the entry into force of the treaty from their scope of application (Baumgartner, 2017, p. 214).

Such exclusion of the Pre-Existing Disputes from the scope of application of treaties prompts discussions on the notion of a dispute — its definition and the time when it arises. This is fundamental, as it determines whether the tribunals have jurisdiction *ratione temporis* to adjudicate the disputes brought by the investors. Baumgartner states that often, in cases of single measures, the disputes will follow thereafter (Baumgartner, 2017, p. 214). However, in other cases, the dispute might arise before an injury by the state has occurred, for example when the taking of a measure in the future has been announced by the host state and the investor has started engaging with the host state on a

---

22 International Bar Association – IBA Arbitration Subcommittee on Investment Treaty Arbitration. (2018). Consistency, efficiency and transparency in investment treaty arbitration, 6. URL: http://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.

23 Vienna Convention on the Law of Treaties, 23 May 1969. Article 28. URL: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

24 UNCTAD. (2011). Interpretation of IIAs: What States Can Do. UNCTAD IIA Issue Note, 3. URL: https://unctad.org/system/files/official-document/webdiaeia2011d10_en.pdf.

"conflict level" regarding the future measures (Ibid.). The following discusses how tribunals define a dispute and determine when it arises, as well as how the analysis of the timing of disputes in determining jurisdiction *ratione temporis* may create further implications in the analysis of the tribunals.

Arbitral tribunals tend to base their analysis on the fundamental definition of a dispute given in the *Mavrommatis Palestine Concessions* case by the Permanent Court of International Justice (hereinafter — PCIJ),[25] where the PCIJ defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[26] Yee is of the opinion that this definition is "too general to be useful" (Yee, 2019, para 40). On the other hand, Palchetti believes that the definition's breadth allows it to be readily applied to "a variety of situations", thus "greatly contribut[ing] to the idea that there exists a unitary concept of dispute", that is applicable "irrespective of the specific function or scope of jurisdiction of the dispute settlement body in question" (Palchetti, 2018, para 10). The arbitral practice shows that while the breadth of the definition allows it to be applied to many situations, it does not contribute to making a unified concept of a dispute, given that its generality leads to different further definitions of a dispute.

---

[25] ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*. Case No. ARB/18/5. Award of 19 April 2021. Para 133.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021#:~:text=The%20Respondent%20argues%20that%20the,scope%20of%20the%20Tribunal%E2%80%99s%20jurisdiction;
ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4, Award of 7 February 2005. Para 48.
URL: https://jusmundi.com/en/document/decision/en-industria-nacional-de-alimentos-s-a-and-indalsa-peru-s-a-formerly-empresas-lucchetti-s-a-and-lucchetti-peru-s-a-v-republic-of-peru-award-monday-7th-february-2005#decision_691:~:text=The%20Tribunal%20notes,the%20other.%223;
ICSID. *Agility Public Warehousing Company K.S.C. v. Republic of Iraq. Case No. ARB/17/7*. Decision on Jurisdiction of 9 July 2019. Para 172.
URL: https://jusmundi.com/en/document/decision/en-agility-public-warehousing-company-k-s-c-v-republic-of-iraq-none-currently-available-friday-24th-february-2017#decision_26121:~:text=The%20Parties%20are%20in%20agreement%20that%20the%20starting%20point%20for%20the%20Tribunal%27s%20analysis%20is%20the%20definition%20of%20%22dispute%22%20established%20in%20Mavrommatis%2C%20namely%20%22a%20disagreement%20on%20a%20point%20of%20law%20or%20fact%2C%20a%20conflict%20of%20legal%20views%20or%20of%20interest%20between%20two%20persons.%22204;
ICSID. *El Paso Energy International Company v. Argentine Republic*. Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006. Para 61.
URL: https://jusmundi.com/en/document/decision/en-el-paso-energy-international-company-v-argentine-republic-decision-on-jurisdiction-thursday-27th-april-2006 – decision_676:~:text=For this Tribunal,for objective determination".

[26] PCIJ. The *Mavrommatis Palestine Concessions*, PCIJ Series A. No 2, Judgment (Objection to the Jurisdiction of the Court) of 30 August 1924. P. 11.

The tribunal in *Maffezini v. Spain*[27] provided a helpful understanding of when a dispute can arise; however, its further application of the Argentina-Spain BIT to the substantive obligations was not without flaws. The BIT between Argentina and Spain therefore prescribed that it did not apply "to disputes or claims arising before its entry into force".[28] Spain argued that the claim of Mr Maffezini was based on the events and disagreements that took place before the Argentina-Spain BIT entered into force on 28 September 1992. In particular, Spain argued that the Argentina-Spain BIT did not apply to the dispute as Mr Maffezini relied on "facts and events that took place as early as 1989 and throughout 1990, 1991, and the first part of 1992".[29] These related to "the budget estimates, requirements of environmental impact assessment, disinvestment, and others, were indeed discussed during the period".[30] Mr Maffezini, on the contrary, submitted that these events were mere disagreements and differences in views between the parties, and did not "amount to a dispute as this concept is understood in international and domestic law".[31]

The tribunal sided with Mr Maffezini. It ruled that "there tends to be a natural sequence of events that leads to a dispute". The parties may express their disagreements and different views. These disagreements may "acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party". However, the conflict of legal views, as required under the fundamental definition of the dispute given in the *Mavrommatis Palestine Concessions* by the PCIJ, "will only be present in the latter stage, even though the underlying facts predate them". According to the tribunal, the dispute exists when there is "a minimum of communications between the parties", where the investor informs the state of the matter, and the latter opposes the investor's "position directly or indirectly". It must take into account the sequence of events in order to determine when the

---

27 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000.
URL: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0182.pdf.

28 Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments of 3 October 1991, Article II (2).
URL: https://jusmundi.com/en/document/treaty/en-agreement-between-the-argentine-republic-and-the-kingdom-of-spain-on-the-reciprocal-promotion-and-protection-of-investments-argentina-spain-bit-1991-thursday-3rd-october-1991.

29 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000. Para 92.
URL: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0182.pdf.

30 Ibid. Para 95.

31 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000. Para 93.
URL: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27 documents/CL - Exhibits/CL-0182.pdf.

dispute arose to establish if it is in the scope of its jurisdiction.[32] The tribunal also referred to the doctrinal statement in Schreuer et al. (2009, p. 94), which states that a "dispute must relate to clearly identified issues between the parties and must not be merely academic...The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim".[33] Hence, based on this explanation of the tribunal, it is evident that a dispute arises after a state takes measures, and both parties are aware of the disagreement, with minimal communication and opposing views.

Based on this reasoning, the tribunal determined that the dispute "in its technical and legal sense began to take shape in 1994", when the parties were discussing the disinvestment proposals.[34] During this time, it was possible to clearly establish the "conflict of legal views and interests", and based on that, Mr Maffezini was able to present his claims in the arbitration.[35] Since the dispute "took shape" in 1994, the tribunal found jurisdiction under the Argentina-Spain BIT, which entered into force on 28 September 1992.[36]

The Decision on Objections to Jurisdiction[37] does not provide sufficient detail regarding the timing of the measures and interactions between the parties to establish what exactly the tribunal took into account when determining the existence of the dispute. However, an examination of the Award on the merits[38] reveals that the facts based on which the tribunal found the violations of the Argentina-Spain BIT took place *before the BIT entered into force* and *before* the period when the tribunal found that *the dispute between the parties arose*.[39]

---

32 Ibid. Para 96.

33 Ibid. Para 94.

34 Ibid. Para 98.

35 Ibid.

36 Ibid.

37 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000. URL: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0182.pdf.

38 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7. Award of 13 November 2000. URL: https://jusmundi.com/fr/document/decision/en-emilio-agustin-maffezini-v-the-kingdom-of-spain-award-monday-13th-november-2000#decision_869.

39 ICSID. *Emilio Agustín Maffezini v. The Kingdom of Spain*. Case No. ARB/97/7, Award of 13 November 2000. Paras 74–85. URL: https://jusmundi.com/fr/document/decision/en-emilio-agustin-maffezini-v-the-kingdom-of-spain-award-monday-13th-november-2000#decision_869. Namely, the discussions about Mr Maffezini's company's financial difficulties and Mr Maffezini's offer to make provide funds for the company took place in late 1991. In November 1991, Mr Maffezini authorised his bank to transfer funds, but this was on the *assumption* that a proper loan contract would precede. This contract never materialised. The "loan" was not approved by EAMSA's board, and Mr Maffezini had not consented to the specific terms under which the funds were ultimately utilised or characterised. In February 1992, Mr Soto Baños (state organ official) acted on the state organ's authorisation to transfer the funds, not Mr Maffezini's, regarding the use and terms, despite Mr Maffezini having given the initial bank authorisation for transfer. This showed that the state organ took control of the

In other words, the tribunal found that the dispute arose in 1994, based on Spain's measures that took place before the Argentina-Spain BIT entered into force. This is an incorrect application of the substantive provisions of the treaty and a violation of the rule against non-retroactivity under Article 28 of the VCLT. While the tribunal had jurisdiction *ratione temporis*, as the dispute arose after the BIT entered into force, it was by no means allowed to retroactively apply the BIT to Spain's measures and find a violation thereunder. Professor C. Schreuer notes, if a tribunal's jurisdiction covers pre-treaty measures, "the applicable law is not to be found in that treaty". Instead, the tribunal must apply the treaty that was in force during the period when the pre-treaty measures took place (Schreuer, 2014, p. 21).

Hence, while the tribunal in *Maffezini v. Spain* helped contribute to the understanding of the notion of a dispute, it incorrectly applied the substantive provisions of the Argentina-Spain BIT to the pre-BIT acts of Spain. This case shows that, although the timing of a dispute is relevant for jurisdiction under a Non-Silent Treaty, it does not permit the retroactive application of that treaty's substantive obligations. Furthermore, it also demonstrates that the analysis focused on the definition of a dispute, and the time of its arising may effectively confuse the tribunal, leading to decisions that apply treaties retroactively against the general rule.

The definition of disputes within the context of determining jurisdiction *ratione temporis* was also analysed by the *Helnan v. Egypt* tribunal.[40] Notably, the Denmark-Egypt BIT, which entered into force on 29 January 2000, provided that it was not "applicable to *divergences* or *disputes*, which have arisen prior to its entry into force" [emphasis added].[41]

Egypt argued that the divergences began in 1993, long before the Denmark-Egypt BIT came into effect, when Helnan was making statements on

---

situation without full, transparent consent from Mr Maffezini on the final terms. The transfer of funds was ambiguously treated, sometimes labeled a loan, but also inquired about as an "increase of the investment" for registration purposes. The Argentina-Spain BIT entered into force on 28 September 1992. In 1994, Mr Maffezini was actively trying to negotiate a way out of the failed investment and settle outstanding debts with the state organ. This involved proposing a deal where EAMSA's assets would be transferred to the state organ in exchange for cancelling the debts. The tribunal decided that the "dispute in its technical and legal sense began to take shape in 1994, particularly in the context of the disinvestment proposals discussed between the parties".

40 ICSID. *Helnan International Hotels A/S v Arab Republic of Egypt*. Case No ARB/05/19. Decision of the Tribunal on Objection to Jurisdiction of 17 October 2006.
URL: https://jusmundi.com/en/document/decision/en-helnan-international-hotels-a-s-v-arab-republic-of-egypt-decision-of-the-tribunal-on-objection-to-jurisdiction-tuesday-17th-october-2006.

41 Agreement Between the Government of the Kingdom of Denmark and the Government of the Arab Republic of Egypt Concerning the Promotion and Reciprocal Protection of Investments of 24 June 1999, Article 12.
URL: https://jusmundi.com/en/document/treaty/en-agreement-between-the-government-of-the-kingdom-of-denmark-and-the-government-of-the-arab-republic-of-egypt-concerning-the-promotion-and-reciprocal-protection-of-investments-denmark-egypt-bit-1999-thursday-24th-june-1999.

the refusal of further investments and offering the hotel (the investment) for sale.[42] The events that took place after the Denmark-Egypt BIT entered into force in 2000, specifically, the downgrade of the hotel from five to four stars by the Egyptian Ministry of Tourism. The subsequent arbitration against Helnan by the owner of the hotel for the downgrade, and the eviction of Helnan from the hotel, were the *culmination* of the 1993 events.[43] On the contrary, Helnan argued that the "*real source*" of the dispute was the actions that took place after 2000, starting with the downgrade in September 2003 and the final eviction of Helnan from the hotel in March 2006.[44]

When analysing whether the dispute falls within the scope of its jurisdiction, the tribunal noted that the notions of "divergences" and "disputes" have different meanings. While they might be similar in the fact that both parties are aware that a disagreement exists between them, in cases of divergence, the parties do not pursue "the difference in an active manner". On the other hand, for a dispute to arise, the parties should actively exchange views, expressing their "wish to resolve the difference, be it before a third party or otherwise". Essentially, the divergence turns into a dispute when one or both parties attempt to resolve the difference.[45]

Eventually, the tribunal found that the divergence arose only in the context of the privatisation project after 15 October 2002, which commenced after the BIT entered into force. The tribunal did not analyse exactly the divergence between the parties arose, but it was implied that it arose after 15 October 2002. It was "satisfied" that the divergence before it related to the privatisation process, and therefore dismissed Egypt's jurisdictional objections.[46]

Such reasoning demonstrates that, since the parties are in dispute, there is both a divergence and a dispute, and the tribunal will have jurisdiction *ratione temporis* as long as they are connected to the post-BIT acts. While the reasoning of the tribunal makes sense, it seems that the tribunal failed to apply its own distinction between a "divergence" and a "dispute" to the facts of the case. It was merely satisfied that the divergences were connected to the post-BIT acts without discussing when and how exactly the divergence arose. It makes the provision that excluded the pre-existing divergences and disputes from the scope of the BIT's application redundant, since, as discussed above, the tribunals will have jurisdiction *ratione temporis* in relation to the post-treaty

---

42 ICSID. *Helnan International Hotels A/S v Arab Republic of Egypt*, Case No ARB/05/19. Decision of the Tribunal on Objection to Jurisdiction of 17 October 2006. Para 37. URL: https://jusmundi.com/en/document/decision/en-helnan-international-hotels-a-s-v-arab-republic-of-egypt-decision-of-the-tribunal-on-objection-to-jurisdiction-tuesday-17th-october-2006.

43 Ibid.

44 Ibid. Paras 39–47.

45 Ibid. Para 52.

46 Ibid. Paras 56–57.

acts, even in the absence of an explicit exclusion of the Pre-Existing Disputes from their scope.

Therefore, while the tribunal provided a helpful explanation on the differences between divergences and disputes, adding the criterion that the parties must wish to resolve the disagreement, it did not apply it to the facts of the case. The analysis of the tribunal was similar to the analysis in cases with the Silent Treaties. This raises questions about the rationale for including such clauses if, at the end of the day, the reasoning of the tribunal is ultimately the same as if the relevant provisions were absent, in accordance with the rule against non-retroactivity. Such inconsistency also demonstrates that, in practice, the parties and the tribunals do not differentiate between the notion of a dispute and a measure. This makes one think that the discussion on the timing of a dispute is redundant, because tribunals still consider the timing of the measures at the core of the analysis. However, such a conclusion would nullify the intent of the contracting parties to exclude the Pre-Existing Disputes from the scope of the application of treaties. Therefore, in the absence of any other subsequent clarification on the interpretation of the treaties from the contracting parties, the author believes that the tribunals should start their analysis on jurisdiction *ratione temporis* in accordance with the treaty language, determining when the disputes before them arose.

An example of the tribunal's analysis regarding the time when a dispute arises through communication is evident in the case of *Tekfen and TML v. Libya (II)*.[47] In this case, on 7 March 2011, the investors sent a letter to Libya to inform the Libyan authorities of the "extraordinary, unsafe and insecure conditions" in Libya, which made it impossible for the contractor to continue working on the project.[48] Additionally, the investors had to evacuate their staff from Libya due to the lack of security and threats to personnel.[49] In the letter, the investors also requested Libyan authorities to "organize and take appropriate controls and measures for ensuring safety" of the abandoned works and equipment because the investors were no longer able to protect them.[50] Additionally, the letter included a proposal to organise a meeting to discuss how to resolve the situation, remobilise, and address compensation for losses.[51] Libya argued that this letter demonstrated the existing dispute between the parties, and since the

---

47 ICC. *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*. Case No. 21371/MCP/DDA. Final Award of 11 February 2020. URL: https://jusmundi.com/en/document/decision/en-tekfen-tml-tekfen-tml-joint-venture-v-libya-none-currently-available-thursday-1st-january-2015.

48 Ibid. Para 7.4.10.

49 Ibid. Paras 7.4.10, 7.4.14.

50 Ibid. Para 7.4.10.

51 Ibid. Paras 7.4.10, 7.4.18.

Libya-Turkey BIT entered into force on 22 April 2011 (after the letter was sent), the dispute fell outside the scope of the tribunal's jurisdiction.[52]

The tribunal analysed the letter and concluded that the letter lacked the necessary elements of "insistence" or reference to the state's "duty" to "guarantee the safety" to prove the existence of a dispute.[53] According to the tribunal, the letter was a mere "notice of force majeure" and a request for future discussion, not evidence of an existing communicated disagreement.[54] Hence, the tribunal concluded that since there was no other communication between the parties before the BIT entered into force, the dispute could only have arisen after this date without going into a detailed analysis, and therefore found jurisdiction *ratione temporis*.[55]

Besides the analysis of the letter, what was notable in this case was that the investors claimed that Libya had failed in its obligation to provide protection and security to their investments, particularly during the escalating unrest in February and March 2011, which culminated in the investors' evacuation from Libya by 25 February 2011.[56] This was before the Libya-Turkey BIT entered into force on 22 April 2011. Hence, the underlying facts that the investors claimed to have constituted a breach took place before the BIT entered into force. Having found jurisdiction *ratione temporis*, the tribunal assessed whether Libya had breached its obligation to provide full protection and security under customary international law (specifically between 20 February and 6 March 2011).[57] In essence, the tribunal found jurisdiction *ratione temporis* based on the timing of the dispute, but applied customary international law to assess if Libya breached its obligations. The tribunal reasoned this because Article 8 of the BIT allowed for disputes "*in connection with his investment*" to be submitted to arbitration, which it interpreted broadly.[58] The tribunal also assessed whether the alleged breach to provide full protection and security continued after the BIT entered into force under the BIT provisions, because the investors claimed that the breach continued post-BIT.[59] Although the tribunal found no violation, it is still surprising that the tribunal proceeded to assess whether Libya had violated its obligations with regard to the pre-BIT acts under customary international law. It is in line with the rationale provided by Professor C. Schreuer, who states that

---

52 Ibid. Para 7.4.13.
53 Ibid. Paras 7.4.13, 7.4.15.
54 Ibid. Paras 7.4.17–7.4.18.
55 Ibid. Para 7.4.19.
56 Ibid. Para 3.7.19, 3.8.
57 Ibid. Para 7.7.93.
58 ICC. *Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*. Case No. 21371/MCP/DDA. Final Award of 11 February 2020. Paras 7.4.20, 7.5. URL: https://jusmundi.com/en/document/decision/en-tekfen-tml-tekfen-tml-joint-venture-v-libya-none-currently-available-thursday-1st-january-2015.
59 Ibid. Para 7.8.

"jurisdiction may exist in respect of a dispute that arises from facts which are not subject to the treaty's substantive standards" (Schreuer, 2014, p. 21).

This shows that the provisions that exclude the Pre-Existing Disputes from the scope of treaties' application can serve as a loophole for the hearing of the dispute, and even apply other instruments to assess the pre-treaty acts of the state. By these means, investors may raise their disagreements after the treaty comes into force in order to prove jurisdiction *ratione temporis* and somehow find a different applicable instrument for the pre-treaty acts. This case also provides a clearer example of what must be communicated to the host state by the investor for the dispute to arise. The communication must indicate that the investor clearly shows its disagreement and insists that the state takes measures to fulfill its obligations. In this case, the pre-BIT letter of the investors did not show that there was a disagreement between the parties on the obligation of Libya to protect the investors' investment or prove that the dispute arose before the entry into force of the BIT.

In conclusion, the jurisprudence on the Non-Silent Treaties reveals a discrepancy between the doctrinal definition of a dispute and its practical application when determining jurisdiction *ratione temporis*. While tribunals in cases like *Maffezini v. Spain*, *Helnan v. Egypt*, and *Tekfen and TML v. Libya (II)* have helped clarify when a dispute arises, their application of these concepts has proven inconsistent and problematic. This has led to the wrongful retroactive application of a treaty's substantive obligations, the rendering of specific exclusion clauses redundant, and the creation of jurisdictional "loopholes" to hear claims based on pre-treaty acts.

3. Continuing breaches and continuing disputes

The issue of determining jurisdiction *ratione temporis* and the role of the notion of a dispute in such determination becomes even more complex when the parties claim that there has been a continuing breach or that there has been a continuing dispute. In cases of the Silent Treaties, the notion of a dispute plays no role in determining jurisdiction *ratione temporis*. However, in cases of the Non-Silent Treaties, states often argue that the dispute brought before the tribunal is based on the measures that began pre-treaty and continued thereafter, with the dispute arising pre-treaty. In these cases, the tribunals are faced with the task of deciding whether a dispute before them is the continuation of a Pre-Existing Dispute or a new, distinct dispute that arose after the effective date. The latter outcome would grant the tribunal jurisdiction *ratione temporis*. Arbitral practice in the context of continuing breaches demonstrates that a dispute may arise even before the state finishes taking the disputed measures.

The following cases of *Cervin and Rhone v. Costa Rica* and *Carrizosa v. Colombia* demonstrate how the tribunals deal with the question of jurisdiction *ratione temporis* in the context of measures that predate and postdate the entry into force of the relevant treaties or any other critical date in cases of the Silent Treaties. They also demonstrate that the timing of the disputes is irrelevant in such cases.

In the case of *Cervin and Rhone v. Costa Rica*,[60] Costa Rica argued that the claims brought by the investors were not in the scope of the tribunal's jurisdiction as they were a "part of a prior dispute concerning the same issues".[61] Costa Rica raised the *ratione temporis* jurisdiction objection based on the timing of the dispute, despite the fact that the Switzerland-Costa Rica BIT did not specify if it only applied to disputes that arose after the BIT entered into force. It merely stated that it applied to investments made or acquired "whether prior to or after the entry into force of the [BIT]".[62] The parties in this case also did not dispute that the tribunal "would not have jurisdiction to rule on allegedly unlawful acts committed prior to the date of the investment",[63] thereby setting the critical date as of the date of making the investment.

The tribunal reasoned that, in order to determine "whether *a dispute* predates or postdates the investment" [emphasis added], the timing of Costa Rica's measures that the investors claim gave rise to Costa Rica's responsibility should be assessed.[64] Therefore, if the investors claim that the disputed measures, which give rise to Costa Rica's international responsibility, took place after they made their investment, then the tribunal has jurisdiction *ratione temporis* to hear the claims based on these measures.[65]

---

60 ICSID. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*. Case No. ARB/13/2. Decision on Jurisdiction of 15 December 2014. URL: https://jusmundi.com/en/document/decision/es-cervin-investissements-s-a-rhone-investissements-s-a-c-republic-of-costa-rica-decision-on-jurisdiction-monday-15th-december-2014#decision_57.

61 Ibid. Para 277.

62 Agreement between the Swiss Confederation and the Republic of Costa Rica on the Promotion and Reciprocal Protection of Investments of 1 August 2000, Article 2. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3160/download.

63 ICSID. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*. Case No. ARB/13/2. Decision on Jurisdiction of 15 December 2014. Para 276. URL: https://jusmundi.com/en/document/decision/es-cervin-investissements-s-a-rhone-investissements-s-a-c-republic-of-costa-rica-decision-on-jurisdiction-monday-15th-december-2014 - decision_57.

64 Ibid. Para 278.

65 ICSID. *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*. Case No. ARB/13/2. Decision on Jurisdiction of 15 December 2014. Para 278. URL: https://jusmundi.com/en/document/decision/es-cervin-investissements-s-a-rhone-investissements-s-a-c-republic-of-costa-rica-decision-on-jurisdiction-monday-15th-december-2014#decision_57.

The tribunal rejected Costa Rica's argument that investors' claims are a part of the prior dispute. That is because, according to the tribunal, the tribunal would only analyse the post-investment measures in order to determine whether Costa Rica had committed acts that would give rise to international responsibility.[66] Therefore, the tribunal found that it had jurisdiction *ratione temporis*.[67]

Hence, it is evident that in cases of the Silent Treaties, when the treaty does not prescribe a restriction on its application to the disputes arising prior to a critical date, such as the date of the making of the investment in this case, states still try to argue that some acts are connected to the prior disputes or measures that took place before the critical date. Furthermore, despite the fact that the tribunal mentioned the term "disputes" and the determination of their timing, the tribunal still focused on the timing of the measures. This demonstrates that there is confusion between the notions of "measures/ breaches" and "disputes," which leads to the conclusion that the role of the notion of disputes has not been attentively analysed by the tribunals in these cases. The fact that there are "blurred boundaries" between these two notions is also supported by scholars (Sabahi & Rubins, 2019, p. 412).

In the case of *Carrizosa v. Colombia*,[68] the tribunal used an "independently actionable breach" test in order to determine if it had jurisdiction *ratione temporis* over the measures that took place after the effective date. In this case, Article 10.1.3 of the US-Colombia Trade Promotion Agreement (hereinafter — the TPA) provided that the investment chapter did not "bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement".[69] Colombia argued that the tribunal lacked jurisdiction *ratione temporis* because the acts of which Ms Carrizosa complained took place before the TPA entered into force.[70] According to Colombia, even though one of the acts, i.e., the Constitutional Court order of 2014 (hereinafter — 2014 Order), took place after the TPA entered into force, it

---

66 Ibid. Para 284.

67 Ibid. Paras 276–286.

68 ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5. Award of 19 April 2021.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021.

69 Colombia - United States Trade Promotion Agreement of 22 November 2006, Article 10.1.3.
URL: https://www.italaw.com/sites/default/files/laws/italaw11095_0.pdf.

70 ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*. ICSID Case No. ARB/18/5. Award of 19 April 2021. Para 108.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021.

merely "confirmed" the pre-TPA decisions.[71] Colombia also argued that the 2014 Order was not "independently actionable" because it would not be possible to assess it without "finding on the lawfulness of pre-treaty conduct".[72] Colombia further argued that it is not just the "claims" that fall outside the scope of the temporal jurisdiction, but also the "legal dispute as a whole".[73] Based on this, Colombia asserted that the dispute in question arose before the TPA entered into force, and the 2014 Order did not trigger a new dispute.[74]

Ms Carrizosa countered that the 2014 Order was a post-TPA measure that finalised the alleged expropriation and denial of justice, thus bringing the dispute within the TPA's temporal scope.[75] She argued that while the TPA does not apply retroactively to acts, this does not prevent a tribunal from considering a dispute that might have origins in pre-treaty events if a culminating act or a distinct breach occurs post-treaty.[76] She also correctly asserted that there "is no general principle of international law that would render the TPA inapplicable to 'disputes', as distinct from 'acts', predating its entry into force".[77]

Before the tribunal proceeded with determining whether the 2014 Order was an independently actionable breach, the tribunal noted that it was not "*persuaded*" that the temporal scope of the TPA was limited only to the post-TPA disputes, since the TPA was "silent on pre-treaty disputes".[78] However, the tribunal ultimately found that the 2014 Order was not an independently actionable breach of the TPA.[79] It reasoned that the 2014 Order merely confirmed the pre-TPA measures and did not, in itself, introduce a new violation.[80] The tribunal noted that Ms Carrizosa did not allege any specific illegality in the 2014 Order separate from her complaints about the earlier, pre-TPA measures.[81] According to the tribunal, to assess the 2014 Order would

---

71 Ibid. Para 109: "With respect to the 2014 Order, Colombia submits that, when faced with conduct postdating the entry into force of the treaty, the test is whether the conduct changes the pre-treaty status quo of the claimant's investment. That is not the case of the 2014 Order, which merely confirmed the 2011 Decision".

72 Ibid. Para 111.

73 Ibid. Para 112.

74 ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*. ICSID Case No. ARB/18/5. Award of 19 April 2021. Paras 113–114.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021.

75 Ibid. Paras 115, 123.

76 Ibid. Paras 115–116.

77 Ibid. Para 117.

78 Ibid. Para 135.

79 Ibid. Para 167.

80 ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*. ICSID Case No. ARB/18/5. Award of 19 April 2021. Paras 156, 161.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021.

81 Ibid. Para 158.

inevitably require the tribunal to rule on the lawfulness of the pre-TPA measures, which were outside its temporal jurisdiction.[82] Thus, while the tribunal acknowledged that a dispute arising before a treaty's entry into force does not automatically bar jurisdiction over subsequent, independently wrongful acts post-entry into force,[83] the specific facts of the case led it to conclude that the 2014 Order was not an independently actionable breach.[84]

These cases demonstrate that within the context of the Silent Treaties and when the disputed measures are continuing, tribunals do not assess when the dispute arose to determine jurisdiction *ratione temporis*. What the tribunals assess is whether the acts that took place after the treaty entered into force or any other critical date can constitute an independently actionable breach. At the same time, they reinforce the understanding that the notion of a dispute, as well as when the dispute arises, should not affect the analysis of the *ratione temporis* jurisdiction.

In cases of the Non-Silent Treaties, the approach of tribunals in determining if they have jurisdiction *ratione temporis* over the disputed measures that might or might not be connected to the Pre-Existing Dispute differs from the approach of the tribunals in cases of the Silent Treaties. In such cases, the tribunals must decide if the dispute before them arose after the treaty entered into force or is a mere continuation of the Pre-Existing Dispute. The analysis of these tribunals' approach demonstrates that the tribunals have not established a clear test for differentiating disputes for the purposes of determining jurisdiction *ratione temporis*.

An example of a case in which the tribunal was tasked to determine if the dispute brought for arbitration arose after the treaty entered into force or was a mere continuation of the Pre-Existing Dispute is *Lucchetti v. Peru*.[85] The tribunal rendered a 25-page award, eventually deciding that it had no jurisdiction to hear Lucchetti's claims.

---

82 Ibid. Paras 161, 163.

83 Ibid. Paras 147–149.

84 Ibid. Para 166. A similar criterion was set by other tribunals in assessing whether the post-treaty measures were in the scope of jurisdiction of investment tribunals. For example, the tribunal in *Spence v. Costa Rica* noted that "[t]o *be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be independently actionable*". See ICSID. *Spence International Investments et al. v. Republic of Costa Rica*. Case No. UNCT/13/2. Interim Award of the Tribunal on Jurisdiction of 25 October 2016. Paras 217-222.
URL: https://jusmundi.com/en/document/decision/en-aaron-c-berkowitz-brett-e-berkowitz-and-trevor-b-berkowitz-v-republic-of-costa-rica-v-republic-of-costa-rica-interim-award-tuesday-25th-october-2016#:~:text=In%20common%20with,218.

85 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

Article 2 of the Peru-Chile BIT of 2000 stated that it did not "apply to differences or to disputes that arose prior to its entry into force".[86] Based on this provision, Peru argued that the dispute before the tribunal arose before the Peru-Chile BIT entered into force, and the measures taken after its entry into force were the continuation of that dispute.[87] Specifically, Peru insisted that the dispute arose in 1997-1998 when municipal authorities took administrative actions, including ordering to stop the work, ordering the cessation of work and declaring Luchetti's construction license null and void.[88] Peru claimed that the decrees it issued in 2001, after the Peru-Chile BIT entered into force, which revoked the operating license, were not the start of a new dispute. Instead, they were merely the "latest legal measures" in the same ongoing conflict over the plant's environmental impact.[89] Peru argued that the court judgments Lucchetti won in 1998 did not resolve the underlying conflict. They were just an "episode" in the ongoing dispute, which Peru alleged was obtained through corruption.[90] The dispute was "suppressed, not settled".[91] Peru asserted that the subject matter of the pre- and post-BIT measures was identical, which is the environmental threat the plant posed to the protected Pantanos de Villa wetlands.[92]

Conversely, Lucchetti contended that the Pre-Existing Dispute concerned the *construction* of the plant and was definitively resolved by final and conclusive Peruvian court judgments in 1998.[93] Lucchetti asserted that after the Peru-Chile BIT entered into force and Peru issued new decrees in 2001, a new dispute arose.[94] It argued that the dispute was substantively different because it involved the revocation of the *operating* license and an order for the plant's removal, whereas the earlier dispute concerned the *construction* license.[95] Lucchetti also attempted to differentiate the two disputes by arguing that it claimed a violation of its rights under the BIT, an obligation that did not exist until after the BIT entered into force.[96]

---

86 Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile for the reciprocal promotion and protection of investments of 2 February 2000. URL: https://jusmundi.com/en/document/treaty/en-agreement-between-chile-and-peru-for-the-promotion-and-reciprocal-protection-of-investments-chile-peru-bit-2000-wednesday-2nd-february-2000.

87 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. Paras 27–37. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

88 Ibid. Para 29.

89 Ibid. Para 44.

90 Ibid. Para 43.

91 Ibid. Para 37.

92 Ibid. Para 44.

93 Ibid. Para 36.

94 Ibid. Para 40.

95 Ibid. Para 42.

96 Ibid. Paras 46, 58.

The tribunal sided with Peru. In order to determine whether the prior dispute continued into a new dispute after the Peru-Chile BIT entered into force, the tribunal employed the "same subject matter" and the "same real causes" test.[97] In other words, it analysed whether "the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute".[98] The tribunal analysed the text of Decree 259 and noted that its lengthy preamble explicitly recounts and relies on the events of the 1997-1998 conflict, including the environmental concerns and the earlier litigation.[99] Based on these references, the tribunal found that "the reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute".[100] Therefore, it concluded that the disputes shared the "same origin or source".[101] The tribunal also rejected Lucchetti's argument that the Peruvian court rulings in 1998 had a *res judicata* effect (i.e. the effect of ending the prior dispute) because the facts indicated that the "original dispute continued" as a practical and political matter.[102] Finally, the Tribunal rejected the argument that simply alleging a BIT violation could create a new dispute. It stated that such an interpretation would have the effect of "nullifying or depriving of any meaning the *ratione temporis* reservation" in Article 2 of the Peru-Chile BIT.[103]

This award is flawed for several reasons. First, the tribunal employed the "same subject matter" and the "same real causes" test with no proper explanation of why it would be applicable in that case. The tribunal referred to the *CMS v. Argentina* case,[104] where the "same subject matter" test was employed.[105] However, the tribunal failed to mention that this test was employed by the *CMS v. Argentina* tribunal for a purpose other than determining jurisdiction *ratione temporis*. In that case, the purpose of this test was to determine whether later government actions could be included as "ancillary claims" within a single, ongoing arbitration or whether CMS had to file a new request for arbitration, as argued by Argentina.[106]

---

97 Ibid. Para 50.
98 Ibid.
99 Ibid. Para 51.
100 Ibid. Para 53.
101 Ibid. Para 53.
102 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. Para 56. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.
103 Ibid. Para 59.
104 Ibid. Para 50.
105 ICSID. *CMS Gas Transmission Company v. The Argentine Republic*. Case No. ARB/01/8. Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003. Para 109. URL: https://jusmundi.com/fr/document/decision/en-cms-gas-transmission-company-v-the-argentine-republic-decision-on-jurisdiction-thursday-17th-july-2003#decision_774:~:text=At%20the%20outset%20of,burden%20has%20been%20met.
106 Ibid. Para 101.

Second, the *CMS v. Argentina* tribunal focused on analysis under the "same subject matter" test on the effect Argentina's measures had on CMS's investment. Namely, the tribunal found that "alleged loss by CMS of its investment… caused… by the interference… with the tariff regime".[107] By contrast, the *Lucchetti v. Peru* tribunal focused on Peru's stated motivation for the enactment of the measures (protecting the Pantanos de Villa wetlands),[108] and not on the effect on Lucchetti's investment. This approach is state-centered as it provides the leverage for the state to dictate what its motivation was for certain measures. In such a case, the state may provide the same rationale for the post-treaty measures as the rationale for the pre-treaty measures.

Third, the Singapore High Court in the set-aside proceedings of the Permanent Court of Arbitration (hereinafter — PCA) award in *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho*, provided its opinion regarding the test employed by the *Lucchetti v. Peru* tribunal. The Singapore High Court stated that it was unclear which test was employed by the tribunal, because the award mentions both "subject matter" and "real causes" and treats them as "synonymous", with which the Singapore High Court disagreed. The court referred to the Concise Oxford Dictionary, which defines "'subject matter' as 'the matter treated of in a … lawsuit'", while the "cause" was defined as something that "gives rise to an action", and "'origin' as 'a beginning or starting-point.'"[109] The Singapore High Court noted its preference for the "cause of action" approach over the "subject matter" test, arguing that the former provides a clear distinction between the "facts that are background to the dispute from the facts that are core to the claim", in which the subject matter test does not assist.[110] The author agrees with the comment of the Singapore High Court, as the

---

107 Ibid. Para 118.

108 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. Para 51. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

109 PCA. *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho*. Case No. 2013-29, Judgment of the High Court of Singapore [2017] SGHC 195. Para 128.
URL: https://jusmundi.com/en/document/decision/en-swissbourgh-diamond-mines-pty-limited-josias-van-zyl-the-josias-van-zyl-family-trust-and-others-v-the-kingdom-of-lesotho-judgment-of-the-high-court-of-singapore-on-the-set-aside-application-monday-14th-august-2017#decision_1567:~:text=It%20is%20not%20clear,beginning%20or%20starting%2Dpoint.%22.

110 PCA. *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho*. Case No. 2013-29, Judgment of the High Court of Singapore [2017] SGHC 195. Para 130.
URL: https://jusmundi.com/en/document/decision/en-swissbourgh-diamond-mines-pty-limited-josias-van-zyl-the-josias-van-zyl-family-trust-and-others-v-the-kingdom-of-lesotho-judgment-of-the-high-court-of-singapore-on-the-set-aside-application-monday-14th-august-2017#decision_1567:~:text=It%20is%20not%20clear,beginning%20or%20starting%2Dpoint.%22.

tribunal failed to analyse the facts that are core to the claim, but merely relied on the preamble of Decree 259 that referred to the Pre-Existing Dispute. The tribunal essentially allowed the background (the 1997-1998 conflict) to swallow the core claim (the 2001 revocation of an operation license). Instead, the tribunal should have analysed the core of Lucchetti's claim.

Fourth, the approach of the tribunal in *Lucchetti v. Peru* in deciding whether disputes are the same or distinct shows that the states can continue taking measures post-treaty by even artificially linking them to the Pre-Existing Dispute. In such cases, the investors will be fully deprived of their investment, and the states will not be liable for their wrongdoing. Instead of simply concluding that the preamble of Decree 259 referred to the Pre-Existing Dispute, therefore forming a single dispute, the tribunal should have employed the "independently actionable breach" test as the first step to analyse whether Decree 259 could be adjudicated without first deciding on the pre-treaty measures. If the outcome were positive, it should then have decided when the dispute based on this independently actionable breach arose.

Fifth, such an approach puts the investor in an unequal position with the state, as the state that is aware of the language of its treaties on investment protection with the home state of the investor, or is even aware of the draft versions of such treaties. Therefore, the state can craft its measures in a way that may lead to the avoidance of jurisdiction *ratione temporis*. This allows a state to create its jurisdictional defence, undermining the stability and predictability that investment treaties are meant to provide.

Sixth, the tribunal failed to properly analyse the nature of a legal dispute, which, in the author's opinion, must be linked to the specific measures being challenged. Lucchetti's claim on its face was triggered by the 2001 Decrees.[111] The tribunal should have assessed whether it had jurisdiction over a claim framed in this way. This is particularly pertinent given that the tribunal noted that the dispute must have "clearly conflicting legal or factual claims bearing on their respective rights or obligations".[112] The parties could not have had "clearly conflicting legal or factual claims bearing on their respective rights or obligations" in relation to all measures of Peru and led to the arising of the dispute in 1997–1998, if the disputed measures took place in 2001. Lucchetti simply could not have had any claims relating to the 2001 measures in 1997–1998.

---

111 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. Para 40. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

112 Ibid. Para 48.

This approach is flawed because the notion of a dispute must include the timing of the disputed measures. Lucchetti argued that the 1997–1998 dispute ended with Peru's court confirming the illegality of the municipality's measures.[113] Lucchetti then initiated arbitration, arguing that the dispute before the tribunal was triggered by "Decrees 258 and 259, which resulted in the cancellation of Claimants' production license and the order for the removal of their plant" in 2001.[114] This means that Lucchetti initiated arbitration based on the post-BIT measures. This is different from cases where investors argue that there is jurisdiction *ratione temporis* based on a post-treaty court decision (that is based on the pre-treaty acts), claiming that it is a denial of justice. In such cases, tribunals decide that framing the claims as a denial of justice to pass the jurisdictional bar is not sufficient if the tribunal still must assess the pre-treaty measures to find that the court's decision constituted a denial of justice, meaning that it will not satisfy the "independently actionable breach" test.[115] Hence, if the tribunal in *Lucchetti v. Peru* did not have to assess the legality of the pre-BIT measures to decide on the legality of the post-BIT measures, the tribunal could have determined when the dispute arose based on the post-BIT measures only.

Based on this case, it is evident that provisions excluding the Pre-Existing Disputes play a significant role in determining jurisdiction *ratione temporis*. The problem with the differentiation of disputes for such a purpose is rooted in the fact that there is no unified approach to defining a dispute. The definition provided by the PCIJ in the *Mavrommatis Palestine Concessions* case gives a broad idea of the concept of a dispute; however, it does not explain what the essential components of the dispute are to be able to differentiate between two disputes. While it is clear that there should be a disagreement, it is not clear whether the disagreement must be based on all measures taken by the state or whether one can conclude that a dispute arose because there was a disagreement over one measure and connect the subsequent measures to the existing dispute. This article argues against the position that a dispute can only arise based on the initial measures in a sequence, as it may lead to a dangerous situation in which the tribunal is found not have jurisdiction *ratione temporis* because the post-BIT measures are connected to the Pre-Existing Dispute (and the method of such finding might also be questionable). This would

---

113 Ibid. Para 18.

114 ICSID. *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*. Case No. ARB/03/4. Award of 7 February 2005. Para 40. URL: https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

115 ICSID. *Astrida Benita Carrizosa v. Republic of Colombia*. ICSID Case No. ARB/18/5. Award of 19 April 2021. Paras 156, 161.
URL: https://jusmundi.com/en/document/decision/en-astrida-benita-carrizosa-v-republic-of-colombia-award-monday-19th-april-2021.

allow the state to continue taking measures by linking them to the Pre-Existing Dispute. In such a case, the investor's rights will not be protected, and investment arbitral practice will not achieve its goal of becoming more predictable.

Conclusion

The notion of a dispute should not play any role in determining jurisdiction *ratione temporis* when investment protection treaties do not explicitly provide for the exclusion of pre-existing disputes from the scope of their application. While some parties and tribunals do understand this, others base their arguments and analysis on jurisdiction *ratione temporis* on when the dispute arises. This additional exercise is unnecessary and incorrect in the absence of an explicit treaty exclusion, as it introduces a new criterion for passing the jurisdictional bar despite the lack of the contracting parties' agreement. Such practice demonstrates that there is a confusion between the notions of "disputes" and "measures", and not enough importance is given to the difference between them. If we indeed follow the approach of considering the timing of the dispute, even in cases of the Silent Treaties, it makes the clauses excluding the Pre-Existing Disputes in the Non-Silent Treaties simply redundant. This blurs the boundaries between the two types of treaties. Such a line of thinking would go against the principle of non-retroactivity under which it is the timing of the measures that affects the scope of the treaty's application, and not the timing of disputes.

As for the investment arbitration cases with the Non-Silent Treaties, the tribunals also tend to be inconsistent in their explanations of when a dispute arises to determine jurisdiction *ratione temporis*. What is clear is that there should be a disagreement between the parties over disputed measures. However, some tribunals do not exactly apply their explanation of when the disputes may arise to the facts of the cases before them, or do so with little detail. Even worse, some tribunals, after having established that a dispute arose post-treaty, apply the treaty to the pre-treaty acts to find a violation. However, just because the dispute arises post-treaty and therefore falls within the scope of the tribunal's jurisdiction does not allow for application of the treaty to the pre-treaty acts of the state in violation of the non-retroactivity principle. This would give a greater role to the notion of a dispute than it has, i.e., it is limited to the determination of jurisdiction *ratione temporis* in cases of the Non-Silent Treaties. To avoid the violation of the non-retroactivity principle, tribunals can apply either a previous investment protection treaty in force or customary international law to substantive obligations if the treaty in question does not extend its scope of application to the pre-treaty measures.

Lastly, when tribunals must decide if they have jurisdiction when investors claim that there has been a continuing breach in cases of the Silent Treaties, tribunals will only have jurisdiction *ratione temporis* over the post-treaty acts if they can constitute an independently actionable breach. However, in cases of the Non-Silent Treaties, when tribunals must determine whether a dispute before them arose post-treaty, or is a continuation of the Pre-Existing Dispute, they sometimes fail to provide a more detailed analysis of the case by employing ambiguous legal tests. This leads to a risky situation, where a tribunal, employing a vague test, decides that the dispute before it is connected to a Pre-Existing Dispute, without going into detail in relation to the measures taken by the state post-treaty. This allows the state to continue taking measures against the investor by linking the post-treaty measures to the Pre-Existing Dispute, even artificially. Such a situation puts an investor at risk of being deprived of their investment, and with no subsequent remedy. Hence, tribunals in cases of the Non-Silent Treaties should also employ the "independently actionable breach" test as the first step, and as the second step, determine when the dispute arose in relation to this independently actionable breach. Otherwise, a dispute could arise before the state takes the rest of the measures, even if the investor claims that there has been a breach only in relation to the post-treaty measures.

Список литературы / References

1. Baumgartner, J. (2017). The significance of the notion of dispute and its foreseeability in an investment claim involving a corporate restructuring. *Journal of World Investment & Trade*, *18*(2), 201–231. https://doi.org/10.1163/22119000-12340035
2. Gattini, A. (2017). Jurisdiction *ratione temporis* in international investment arbitration. *The Law and Practice of International Courts and Tribunals*, 16, 139–158. https://doi.org/10.1163/15718034-12341345
3. Juratowitch, B., & McArthur, J. (2024). Article 28 of the VCLT: Non-retroactivity of treaties. In A. Kulick & M. Waibel (Eds.), *General International Law in International Investment Law: A Commentary*. Oxford University Press, 85–99. https://doi.org/10.1093/law/97801928499
4. Palchetti, P. (2018). Dispute. *Max Planck Encyclopedia of International Procedural Law*, 1–18.
5. Sabahi, B., & Rubins, N. (2019). Jurisdiction *ratione temporis*. In B. Sabahi, N. Rubins, & D. Wallace Jr. (Eds.), *Investor-State Arbitration* (2nd ed., pp. 412–431). Oxford University Press. https://doi.org/10.1093/law/9780198755760.003.0012

6. Schreuer, C. (2014). Jurisdiction and applicable law in investment treaty arbitration. *McGill Journal of Dispute Resolution*, *1*(1), 1–25.
7. Schreuer, C. H., Malintoppi, L., Reinisch, A., & Sinclair, A. (2009*). The ICSID Convention: a commentary* (2nd ed.). Cambridge University Press.
8. Yee, S. (2019). Article 40. In A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, & C. J. Tams (Eds.), *The Statute of the International Court of Justice* (3rd ed.). Oxford University Press, 1623–1749.