Panel Discussion

This panel will discuss the preliminary objections available to Respondent States under applicable rules of arbitration (e.g. Article 41(5) of the ICSID Rules of Arbitration, Article 45 of the ICSID Additional Facility Rules of Arbitration, Article 26 of the SIAC Investment Arbitration Rules, and Article 29 of the SIAC Rules of Arbitration) and the strategic pros and cons of formulating those objections (akin to summary judgment motions) at the early stages of arbitration proceedings. Panelists also will address the jurisdictional objections that may be available to Respondent States to seek dismissal of an investment case for lack of jurisdiction.

Panel Chair:
Toby Landau QC, Essex Court Chambers, London, United Kingdom

Speakers:
Swee Yen Koh, Wong Partnership LLP, Singapore
Whitney Debevoise, Arnold & Porter Kaye Scholer, Washington, DC
Eduardo Silva Romero, Dechert, Paris, France
Lijun Cao, Zhong Lun, Beijing, China

I. Introduction

An investment arbitration poses particular challenges for claimant and respondent between the initiation of the proceedings and the time when the arbitration gets to the merits. Those challenges involve preliminary and/or jurisdictional objections that claimant (usually the investor) could face, which could influence the decision to submit an investment claim, and his strategy to drive the case to the merits. For respondent (usually the host State of the investment), those objections constitute potential means to dismiss the entirety or part of the case, in some cases even before the case gets to the merits.¹

¹ Before the case gets to the merits, the tribunal may dismiss a claim on the following bases: (1) preliminary objections, under Article 41(5) of the ICSID Rules of Arbitration (providing that “a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit”), Article 46(5) of the ICSID Additional Facility Rules of Arbitration (providing that “a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.”), or provisions on preliminary objections of the applicable investment treaty, e.g., CAFTA Article 10.20.4 (providing that the Tribunal has the power to “decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made”), US-Colombia FTA Article 10.20.4 and US-Peru FTA Article 10.20.4 (providing that “a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made”); or (2) jurisdictional objections if the tribunal decides to bifurcate the proceedings by separately addressing the objections to jurisdiction before it hears the parties on the merits.
This paper discusses the main jurisdictional and preliminary objections available to respondent States in ICSID treaty cases, and provides preliminary comments on those objections from the perspective of claimant’s and respondent’s counsel, respectively.

II. Jurisdictional objections

In ICSID arbitrations a respondent State may object on the basis that one or more jurisdictional requirements, as set out in Article 25 of the ICSID Convention (“Convention”), is not satisfied. Such article provides in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.²

Accordingly, an ICSID tribunal will declare that it has jurisdiction over the case if the elements provided in Article 25(1) of the Convention, as well as the jurisdictional requirements provided in the investment treaty, are met. The investor must prove that (1) the case involves an investment, (2) the dispute arises directly out of such investment, (3) the dispute is between a State party to the ICSID Convention and a national of another State party to the ICSID Convention, and (4) the parties consented to ICSID arbitration.

Claimant must also satisfy the jurisdictional requirements and related definitions provided in the investment treaty. Such treaty — either a bilateral investment treaty (“BIT”) or free trade agreement (“FTA”) — would normally provide a definition of investment, determine who would qualify as an investor— either a natural person or a legal entity — of a State party to the investment treaty, and provide the requirements to determine if the parties to the dispute have given their consent to arbitration.

See ICSID Convention Article 41(3) (providing that “upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits”).
² ICSID Convention, Art. 25(1). (Emphasis added)
A dual analysis — i.e., (1) under the ICSID Convention or the Additional Facility Rules\(^3\), and (2) under the investment treaty that claimant invokes to submit the dispute to arbitration — must take place to determine whether the facts of the case satisfy the jurisdictional requirements.

A. Investment

In *Fedax v Venezuela*, the tribunal first analyzed whether certain promissory notes qualified as investment under the Netherlands – Venezuela BIT. It concluded that under such BIT the promissory notes, which were a form of debt and thus “titles to money”,\(^4\) qualified as investment under the BIT.\(^5\) In addition, the tribunal analyzed whether the promissory notes had the basic features of an investment:

The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short–term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter — i.e. “volatile capital.” The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development. The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.\(^6\)

It is worth noting that of these characteristics of investments (risk, commitment of capital, expectation of profit, and significance for the State’s development), the latter concerning a State’s development is subject of much controversy as to whether it is a characteristic of investment.\(^7\) — among investment tribunals and as reflected in investment treaties that refer to the characteristics of investments,

\(^{3}\) See ICSID Additional Facility Rules, Article 2(a). For cases in which either the disputing State or the State of nationality of the other disputing party is not an ICSID Convention Contracting State, claimant may submit the investment claim under the auspices of the ICSID Additional Facility Rules and the applicable investment treaty.

\(^{4}\) BIT Netherlands-Venezuela, Art. 1(a)(iii).

\(^{5}\) *Fedax NV v Venezuela, Decision on Jurisdiction*, ICSID Case No ARB/96/3 (11 July 1997), ¶¶ 29 - 34.

\(^{6}\) *Fedax NV v Venezuela, Decision on Jurisdiction*, ICSID Case No ARB/96/3 (11 July 1997), ¶ 43.

\(^{7}\) Among investment tribunals there is no consensus on whether such characteristics are necessary to determine whether there is an investment in an ICSID arbitration, and on whether the significance of the alleged investment to the State’s development should be one of the characteristics at all.
B. Dispute directly related to an investment

The Fedax Tribunal further elaborated that such element was also satisfied as the case “concerns the different views of the parties on questions of legal rights and obligations in connection with the existence of an investment.”

C. Investor

1. Nationality

On nationality, the ICSID Convention prevents submission of ICSID Convention claims under the auspices of an investment treaty entered into by the States of which a person is a dual national. As to the analysis under a BIT of whether a natural person is a national of a State and therefore qualifies as an investor of that State, in Soufraki v. UAE claimant produced certificates of Italian nationality with a view to benefit from the BIT. However, as the tribunal learned that claimant had lost his Italian nationality as a consequence of becoming Canadian, it concluded that as a Canadian national, claimant could not rely on the Italy – UAE BIT.

2. Corporate nationality

In Tokios Tokeles v. Ukraine a Lithuanian constituted corporation alleged that it was targeted by Ukraine, thereby breaching the Lithuania-Ukraine BIT. Such treaty provides that an investor is “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.” It does not require that the alleged investor have substantial economic activities or operations in the country whose nationality it predicates having. Ukraine objected to the Lithuania-established corporation being a “genuine investor” since it was ultimately owned and controlled almost entirely (99%) by Ukrainians. Following a treaty interpretation mainly based on the ordinary meaning of the terms of the treaty, the majority of the Tribunal ruled that the Lithuanian-established corporation was an investor considering that the BIT “contain[ed] no additional requirements for an entity to qualify as an “investor” of Lithuania.”

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8 Fedax NV v Venezuela, Decision on Jurisdiction, ICSID Case No ARB/96/3 (11 July 1997), ¶ 15.
9 ICSID Convention, Article 25(2)(a) (“National of another Contracting State” means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.”)
10 Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7 (Award), ¶¶ 53, 83-84.
11 Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 (Decision on Jurisdiction) (29 April 2004).
12 Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 (Decision on Jurisdiction) (29 April 2004), ¶¶ 21, 29; see to the contrary, Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 (Dissenting Opinion by President Prosper Weil) (29 April 2004), ¶ 30 (dissenting on following basis: “The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing — and even less encouraging — nationals of a State party to the ICSID Convention
D. Consent

Consent to arbitration is not only a jurisdictional requirement but the centerpiece of arbitration. Under the auspices of the ICSID Convention and the ICSID Additional Facility Rules, consent must be given in writing. In investment treaty cases, the offer by the State to arbitrate disputes that may arise with a national from another State is normally contained in the investment treaty. After the dispute arises, the investor may accept such an offer in the request for arbitration, thus perfecting the arbitral agreement between the two disputing parties.

Investment treaties such as the U.S.-Colombia FTA and the DR-CAFTA, which are modeled after the NAFTA, contain certain requirements of consent, often titled “Conditions and Limitations on Consent of Each Party.” Those requirements must be met for a Tribunal to conclude that the State has given its consent to arbitration.

For example, Article 10.18.1 of the DR-CAFTA provides that no claim may be submitted to arbitration if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . has incurred loss or damage.” Another requirement which may be found in modern investment treaties refers to “waiv[ing] any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach [of the investment treaty].”

E. Jurisdiction rationae temporis

In addition, respondent State may object to the jurisdiction of the tribunal, depending on the language provided in the applicable investment treaty, on the basis that the tribunal lacks jurisdiction rationae temporis. Under certain investment treaties, mainly those drafted from the old model used by western European countries during the 80s and 90s if the dispute arises before the treaty entered into force, the dispute is outside the jurisdiction of the tribunal. In Vieira v Chile the tribunal concluded that the dispute related to the denial of Chile to grant a fisheries permit in Chilean external waters had arisen before the entry into force of the treaty.

See e.g., DR-CAFTA, Art. 10.18; see also, US-Colombia FTA, Art. 10.18.

See DR-CAFTA, Art. 10.18.2.

applicable treaty, the Spain-Chile BIT. For treaties that follow the NAFTA model, on the other hand, the temporal scope of the tribunal is determined not by the date when the dispute arises but by the date when claimant learns or should have learned that the investment treaty was breached by the State. If claimant fails to submit its claim to arbitration within three years of such date, the tribunal would lack jurisdiction to hear the case.

F. Corruption and Fraud

The jurisdiction of a tribunal may also be challenged on the basis that the investment was not made in accordance with the laws of the host State, contrary to international public policy, or in breach of the general principle of law of good faith by incurring in corruption or fraud when the investment is made. As ruled by the Inceysa v. El Salvador tribunal:

El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors. By falsifying the facts, Inceysa violated the principle of good faith [...] it did not make [the investment] in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa’s complaint.

Recently in 2017 the Spentex v Uzbekistan tribunal followed a “connecting the dots” approach, assessing the individual factors, forming an overall picture and concluding that corruption had occurred when the investment was made. Therefore, the tribunal declared that it lacked jurisdiction.

III. Preliminary objections

Even before an arbitration reaches a separate jurisdictional phase, if the proceedings are bifurcated, or a combined jurisdiction and merits phase in proceedings that are not bifurcated, the State may submit preliminary objections seeking early dismissal of the case.

Article 41(5) of the ICSID Convention provides in relevant part:

[A] party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.

Similarly, Article 46(5) of the ICSID Additional Facility Arbitration Rules provides in relevant part:

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16 Vieira v. Chile, ICSID Case No. ARB/04/17 (Award) (21 August 2007), ¶303.
17 See e.g., DR-CAFTA, Art. 10.18.1.
18 Inceysa v. El Salvador, ICSID Case No. ARB/03/26 (Award) (2 August 2006), ¶¶238-239.
[A] party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.

Investment treaties may contain similar provisions. For example Article 10.20.4 of the U.S.-Peru FTA provides in relevant part:

[A] tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made

Provisions on preliminary objections have been used by respondent States to request summary dismissals of investment arbitration claims. For example, in Global Trading v. Ukraine the tribunal ruled as follows:

[T]he purchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention” and therefore “manifestly without legal merit within the meaning of Article 41 (5) of the ICSID Arbitration Rules” and thus dismiss the claims.20

IV. The Perspectives of the Investor and the State

Depending on the facts relevant to the case, the above jurisdictional and preliminary objections can be decisive for a case. For claimant, even though the investor will be at the receiving end of the process contradicting respondent State and explaining to the tribunal that the alleged objection should not affect the jurisdiction of the tribunal, the prospect of a phase on preliminary or jurisdictional objections should certainly shape the strategy of claimant.

A. Counsel for the investor

For experienced counsel representing investors, provisions establishing a limitation period to submit an investment arbitration claim from the time that the violation of the investment treaty and the alleged damage took place (or from the time that such violation and damage should have been known to the investor)(e.g., CAFTA Article 10.18.1), would determine the time at which the investor first understands that certain act/s of respondent State has breached the investment treaty. Such provisions would also influence the time at which the investment claim is submitted, which must be within the limitation period set out by the treaty.

Other potential objections — e.g., that the alleged investment fails to qualify as such under the terms of the applicable investment treaty — will shape the facts and narrative that claimant will

20 Global Trading Resource Corp. and Globez International Inc. v. Ukraine (ICSID Case No. ARB/09/11) (Award), ¶¶56 -58,
lay out before the tribunal, months (and perhaps years) before respondent State objects to the jurisdiction of the tribunal.

The potential objection that a dual national has submitted an ICSID Convention claim against one of the State of which the investor is a national should direct the choice not to submit the case under the ICSID Convention, but under other rules of arbitration — e.g., the UNCITRAL Rules of Arbitration.

Similarly, the nationality of the investor will determine which investment treaty may be invoked, if there is an investment treaty in force to invoke at all.

While claimant would mainly appear to defend its case from those preliminary and jurisdictional objections launched by respondent State, sophisticated counsel for claimant would have made the correct choices to shield, to the extent possible, its case from those objections — e.g., choices on the rules of arbitration, the investment treaty, the time to inform the State that certain acts of State organs have breached the investment treaty, the time to submit an arbitration claim, the way the alleged investments are described in the narrative of the case.

B. Counsel for the State

With respect to respondent State, detailed knowledge of the various available objections based on the applicable investment treaty and rules of arbitration is of course necessary. The particular objections that counsel for respondent State should choose will depend on the facts of the case, and on the supporting evidence that can be submitted when objecting to the tribunal’s jurisdiction or alleging, for example in ICSID cases, that a claim is manifestly without merit.

If alleging, for example, that a claim was submitted outside the time limitation period established by CAFTA Article 10.18.1, respondent State should be able to submit evidence demonstrating that claimant knew or should have known of the alleged breach and damage more than three years before the claim was submitted. Another example concerns the objection that there is no investment because the transaction involved in the case, is purely commercial. If such were the objection, respondent State should be able to substantiate that the transaction at issue is solely commercial and lacks the characteristics of an investment, i.e., risk, commitment to contribute capital, and expectation of profits.

The facts of the case, the evidence supporting the potential objections, and the time when such evidence unearths will in many respects determine the timing of the submission of the objections, and whether they should be submitted preliminarily or as a regular jurisdictional objection.

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