“Eighteen-Month” Requirement: Its Application in Investor-State Arbitration and Review by Domestic Court or ICSID Ad Hoc Committee

ข้อกำหนด “สิบแปดเดือน”: การปรับใช้ในการอนุญาโตตุลาการระหว่างรัฐและนักลงทุนต่างชาติและการตรวจสอบโดยศาลภายในหรือคณะกรรมการเฉพาะกิจของ ICSID

Amnart Tangkiriphimarn[†]

Lecturer, Faculty of Law, Thammasat University

อำนาจ ตั้งคีรีพิมาน

อาจารย์ประจำ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์

รับ 17 กุมภาพันธ์ 2562; แก้ไข 26 กุมภาพันธ์ 2562; ตอบรับ 26 กุมภาพันธ์ 2562

Abstract

In some bilateral investment treaties (“BITs”), recourse to domestic remedies for a certain period of time is required before an investment dispute can be submitted to international arbitration. If that requirement is not fulfilled, a question would arise as to whether investment treaty tribunals would be able to hear the case. Particularly, under

[†] น.บ. (เกียรตินิยมอันดับหนึ่ง) มหาวิทยาลัยธรรมศาสตร์, น.บ.ท., LL.M. and J.S.D. Yale Law School

which circumstances, where non-compliance with the requirement is found, should the case be dismissed? How should arbitral tribunals address this issue? And to what extent could their awards be reviewed by domestic courts or ICSID ad hoc Committee? Having reviewed the relevant provisions in the BITs and investment treaty tribunals' awards, this article proposes that the ordinary meaning of the provisions is obvious that the investor must comply with the requirement before its submission of dispute to arbitration. However, in certain circumstances, such interpretation may result in absurd or unreasonable consequences. For example, as a consequence of the host state's measures, the domestic remedies become so seriously deficient that referring cases to such proceedings would not lead to any advantages but unnecessary delay and useless costs. Hence, the requirement should not be treated as an absolute impediment to the submission of disputes to international arbitration since it will attenuate the efficiency of the international dispute settlement system that has long been axiomatically considered one of the most important mechanisms used to promote and facilitate foreign investment. Moreover, the arbitral tribunal's decision on this matter falls within its exclusive realm of authority, as it concerns the question of admissibility of dispute and not the tribunal's jurisdiction. Therefore, the national court or the ICSID ad hoc Committee cannot review the tribunal's award in this regard.

Keywords: investment arbitration, BIT, 18 months, jurisdiction, admissibility

บทคัดย่อ

ในสนธิสัญญาว่าด้วยการลงทุนทวิภาคีบางฉบับ การใช้กระบวนการเยียวยาตามกฎหมายภายในเป็นช่วงระยะเวลาหนึ่งถือเป็นสิ่งที่ต้องปฏิบัติก่อนที่คู่กรณีจะนำส่งข้อพิพาทว่าด้วยการลงทุนให้คณะอนุญาโตตุลาการระหว่างประเทศพิจารณา ในกรณีที่ข้อกำหนดดังกล่าวไม่ได้รับการปฏิบัติตามก็จะมีคำถามเกิดขึ้นตามมาว่าคณะอนุญาโตตุลาการระหว่างประเทศจะสามารถพิจารณาคดีได้หรือไม่ กล่าวคือ จะมีกรณีใดบ้างที่การไม่ปฏิบัติตามข้อกำหนดว่าด้วยการใช้กระบวนการเยียวยาภายในประเทศดังกล่าวจะนำไปสู่การไม่รับคดีไว้พิจารณา คณะอนุญาโตตุลาการควรจะพิจารณาประเด็นดังกล่าวอย่างไร และศาลภายในหรือคณะกรรมเฉพาะกิจของศูนย์ระหว่างประเทศเพื่อการระงับข้อพิพาททางการลงทุน (International Centre for Settlement of Investment Disputes หรือ ICSID) จะมีอำนาจเพียงใดในการตรวจสอบคำชี้ขาดในประเด็นดังกล่าว จากการพิจารณาบทบัญญัติที่เกี่ยวข้องในสนธิสัญญาว่าด้วยการลงทุนทวิภาคีฉบับต่าง ๆ และคำชี้ขาดของคณะอนุญาโตตุลาการ บทความนี้เสนอว่าบทบัญญัติเหล่านี้มีความหมายโดยทั่วไปที่มีความชัดเจนว่านักลงทุนจะต้องปฏิบัติตามข้อกำหนดดังกล่าวก่อนที่จะดำเนินการส่งข้อพิพาทให้คณะอนุญาโตตุลาการวินิจฉัย แต่อย่างไรก็ดี

ในบางกรณี การตีความเช่นนี้อาจจะนำมาซึ่งผลลัพธ์ที่ไม่สมเหตุสมผล ยกตัวอย่างเช่น กระบวนการระงับข้อพิพาทภายในประเทศอาจจะมีความบกพร่องอย่างมากอันมีสาเหตุมาจากมาตรการต่าง ๆ ของรัฐผู้รับการลงทุนเอง ส่งผลให้การนำคดีขึ้นสู่กระบวนการระงับข้อพิพาทภายในประเทศของรัฐผู้รับการลงทุนจะไม่นำมาซึ่งประโยชน์ใด ๆ แต่กลับจะทำให้การระงับข้อพิพาทล่าช้าและมีค่าใช้จ่ายเพิ่มขึ้นโดยไม่จำเป็น ด้วยเหตุนี้ คณะอนุญาโตตุลาการจึงไม่ควรพิจารณาว่าการไม่ดำเนินการตามข้อกำหนดดังกล่าวจะส่งผลให้การนำคดีขึ้นสู่กระบวนการอนุญาโตตุลาการระหว่างประเทศไม่สามารถดำเนินการได้ในทุกกรณี เพราะจะส่งผลให้กระบวนการระงับข้อพิพาทระหว่างประเทศซึ่งได้รับการยอมรับโดยทั่วไปว่าเป็นเงื่อนไขที่สำคัญอย่างหนึ่งของการเพิ่มขึ้นของการลงทุนในต่างประเทศมีประสิทธิภาพลดน้อยลง นอกจากนี้การวินิจฉัยของคณะอนุญาโตตุลาการในประเด็นดังกล่าวเป็นเรื่องที่อยู่ภายใต้เขตอำนาจของคณะอนุญาโตตุลาการโดยแท้เนื่องจากเป็นกรณีที่เกี่ยวข้องกับความเหมาะสมในการรับคดีไว้พิจารณาและไม่ได้เป็นเรื่องที่เกี่ยวข้องกับเขตอำนาจของคณะอนุญาโตตุลาการแต่อย่างใด ดังนั้นศาลภายในหรือคณะกรรมการเฉพาะกิจของ ICSID จึงไม่สามารถตรวจสอบคำชี้ขาดของคณะอนุญาโตตุลาการในประเด็นนี้

คำสำคัญ: อนุญาโตตุลาการการลงทุน สนธิสัญญาว่าด้วยการลงทุนทวิภาคี 18 เดือน เขตอำนาจการรับคดีไว้พิจารณา

1. Introduction

Under customary international law, foreign investors cannot directly file claims against host states in international adjudicative forum. The investors' only option is to request diplomatic protection from their respective home states; the exhaustion of local remedies in the host states is a prerequisite that has to be fulfilled before the home states could espouse the claims. This framework is not desirable for any parties involved. For instance, an investor-state dispute could escalate into a state-state dispute should the home state of the investor decide to espouse the claim. Additionally, the investors would have to settle disputes in hostile domestic venues with no guarantee that their home states would ultimately exercise diplomatic protection. As such, several mechanisms have been put in place to deal with this problem. Many international investment treaties have entitled the investors to bring claims against the host states to international arbitration. The International Centre for Settlement of Investment Disputes ("ICSID") was established specifically to administer cases between states and foreign investors.

That said, the use of local remedies does not entirely lose its role. In some bilateral investment treaties ("BITs"), recourse to domestic bodies for a certain period of time is required before an investment dispute can be submitted to international arbitration. If that requirement is not fulfilled, a significant question would arise as to whether arbitral tribunals would be able to hear the case. Arbitral awards addressing this issue have been inconsistent. Particularly, while some tribunals treat this matter as a jurisdictional question, others consider it an admissibility-related one. Tribunals in *Maffezini v. Spain,*[1] *Wintershall v. Argentina,*[2] and *Daimler v. Argentina*[3] have ruled that the requirement to submit disputes to competent domestic tribunals of the host state was a condition precedent to the host states' consent to international arbitration. Hence, a failure to fulfill such a requirement would result in the tribunal's lack of jurisdiction. In contrast, the tribunal in *Hochtief v. Argentina*[4] intriguingly rules that the

[1] *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections of Jurisdiction, 25 January 2000. [hereinafter *Maffezini*].

[2] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008. [hereinafter *Wintershall*].

[3] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, ICSID Case No. ARB/05/1, Award, 22 August 2012. [hereinafter *Daimler*].

[4] *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011. [hereinafter *Hochtief*].

issue is a question of admissibility. Yet, it refuses to decide on this controversial point and instead focuses on the application of the most-favored-nation ("MFN") clause in the BIT. Lastly, tribunals in *BG v. Argentina,*[5] *TSA Spectrum v. Argentina*,[6] and *Abaclat v. Argentina,*[7] rule that the requirement might be disregarded under certain circumstances.

How tribunals view this issue could have a significant implication on the scope of review of the award by the relevant control mechanisms (domestic courts or ICSID *ad hoc* Committee).[8] For instance, in *BG*, given that the arbitral award was made in accordance with the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, Argentina petitioned for an annulment of the award in the United States, which was the seat of arbitration, under the Federal Arbitration Act ("FAA"). The District Court for the District of Columbia Circuit denied the petition. The Court of Appeals for the District of Columbia Circuit then reversed the decision and vacated the award because the eighteen-month requirement was not fulfilled. Ultimately, the U.S. Supreme Court reversed the Courts of Appeals' decision. These judgments will be discussed in more detail below.

Under what circumstances, where non-compliance with the domestic legal remedies requirement in the BITs is found, should the cases be dismissed? How should arbitral tribunals and national courts address this issue? These are problems that this article aims to address. Part 2 will explore the relationship between domestic legal remedies and international arbitration. Relevant awards will be examined in Part 3. In Part 4, the concepts of jurisdiction and admissibility will be discussed. Next, Part 5 will explore the recent U.S. Supreme Court decision in *BG v. Argentina*. Part 6 will then appraise the current trend of the application of the eighteen-month requirement clause and suggest possible alternatives. Finally, conclusions will be provided in Part 7.

---

[5] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007. [hereinafter *BG*].

[6] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008. [hereinafter *TSA*].

[7] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011. [hereinafter *Abaclat*].

[8] Jan Paulsson, "Jurisdiction and Admissibility," in Gerald Aksen et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, (Paris: ICC Publishing, 2005), p.602.

2. Domestic Legal Remedies and International Investment Arbitration: Emergence of the Eighteen-Month Requirement

Interactions between domestic dispute settlement mechanisms, especially judicial organs, and international investment arbitration tribunals function on several levels. First, they may both have jurisdiction over the disputes, which could lead to competition between these forums.[9] Next, as international arbitral tribunals do not have sovereign power like states to facilitate or effectively conduct the proceedings, they will usually need support from domestic courts (especially, the court of the seat of arbitration), such as the court's indication of interim measures or enforcement of awards.[10] Thirdly, decisions rendered by local adjudicatory bodies and international arbitration tribunals can be subject to each other's scrutiny.[11] On the one hand, arbitral tribunals may assess domestic judgments in their application of the legal standards of denial of justice, expropriation, or fair and equitable treatment.[12] On the other hand, domestic courts may review non-ICSID awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[13] Last but not least, under some international legal instruments, the submission of dispute to relevant domestic forums is prescribed as a requirement before that dispute can be referred to international investment arbitration. It is this last form of interaction that is the focus of this article.

As previously mentioned, concerning the customary international law of diplomatic protection, it is the investor's home state that has absolute discretionary power to decide whether it would espouse the claim. In many cases, domestic legal remedies would be the investor's only option.[14] This situation apparently impedes the growth of foreign direct investment ("FDI"), since investors do not generally believe

---

[9] Christoph Schreuer, "Interaction of International Tribunals and Domestic Courts in Investment Law," in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010*, (Boston: Martinus Nijhoff Publishers, 2010), p.76.

[10] *Ibid*, p.83.

[11] *Ibid*, p.89.

[12] See e.g. *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009.

[13] See *New York Convention*, art. V.

[14] *The Barcelona Traction, Light and Power Company Limited* (Belg. v. Spain), Judgement (1970) ICJ Reports 3.

that, by referring disputes to domestic legal proceedings, the disputes will be resolved fairly. Their lack of confidence fundamentally results from the general concern in relation to the local decision makers' bias in favor of the state and the applicable domestic laws, which may not conform to international standard.[15] The problem subsequently undermines the overall prosperity of the world community as foreign direct investment is commonly regarded as a crucial element of national development, especially for developing countries.[16] For this reason, international arbitration, which is a neutral adjudicatory process, was introduced as an alternative dispute settlement forum. This dispute resolution method is usually included in international legal instruments (e.g., investment contracts and investment treaties) as a possible venue to which disputing parties can submit their disputes. Most of these instruments do not require exhaustion of local remedies before the institution of the arbitration proceedings. Article 26 of the ICSID Convention, for example, provides that exhaustion of local remedies shall be excluded when state parties have given their consent to arbitration.

That said, the use of domestic legal remedies is not totally excluded. Under several BITs, state parties have inserted various types of clauses concerning the use of local remedies.[17] First, some BITs designate domestic court as an option to settle a dispute in a provision known as the "fork in the road" clause. Under this clause, several dispute settlement forums, including domestic court, are specified; once one of these methods of dispute resolution is chosen, the other options will no longer be available.[18] Second, a few outdated BITs require investors to exhaust local remedies before their submission of disputes to arbitration.[19] Finally, state parties sometimes agree that arbitration can proceed only after certain procedural requirements have been met. One of these requirements is prior recourse to domestic dispute settlement proceedings for a

---

[15] Christoph Schreuer, *supra note* 9, p.71.

[16] R. Doak Bishop, James Crawford, and W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary, (Alphen aan den Rijn: Kluwer Law International, 2005) pp.7 – 8.

[17] Professor Schreuer refers to these provisions as "Calvo's Granchildren Clauses." See Christoph Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration," Law and Practice in International Courts and Tribunals, Vol. 4, pp.1 – 17 (2005). However, one may argue that the clauses cannot be categorized into the same group as the Calvo Doctrine since, according to the Calvo Clause, the option to refer a dispute to international tribunals is totally excluded. As investors will have to solely rely on the domestic dispute settlement mechanisms.

[18] *Argentina-France Bilateral Investment Treaty*, art. 8.

[19] *Romania-Sri Lanka Bilateral Investment Treaty*, art. 7.

certain period ranging from three months[20] to two years[21] and in many cases eighteen months. These domestic proceedings may refer to both administrative and judicial institutions[22] or only to the judiciary.[23]

This "eighteen-month requirement" clause is the focal point of this article. Tribunals' different interpretations of this requirement have constituted one of the most inconsistent jurisprudence in investment treaty arbitration. It should be noted that this clause is different from the fork in the road and the exhaustion of local remedies clauses. On the one hand, it is different from the fork in the road clause in that what investors are required to do in this case is to sequentially follow the proceedings prescribed in BITs, which usually start with amicable negotiation and move on to the use of local remedies and finally international arbitration. In other words, there is no option provided to the investors but compulsory and sequential proceedings.[24] On the other hand, it is different from the exhaustion of local remedies because the dispute need not be resolved domestically, as the investors are entitled to bring disputes to international arbitration as soon as the specified time elapses.[25]

A more complicated issue, however, may arise if local legislations prescribe that once a domestic judicial process has commenced, it must continue until a final decision is rendered. In this situation, one may ask if an arbitral tribunal would be able to hear the case even though the period of eighteen months has already elapsed. Given that the eighteen-month precondition stipulated in BITs only requires foreign investors to bring their disputes before the domestic adjudicatory proceedings during the specified period, once that time has elapsed, they would be entitled to refer the disputes to international arbitration notwithstanding the host state's ongoing domestic proceedings. However, this sequence of events would lead to the circumstance of parallel BIT arbitration and national court proceedings. Unlike international commercial arbitration where a domestic court is normally forced to refer the case to arbitration unless it finds

---

[20] *Egypt-United Kingdom Bilateral Investment Treaty*, art. 8.

[21] *France-Morocco Bilateral Investment Treaty*, art. 10.

[22] *Argentina-Netherlands Bilateral Investment Treaty*, art. 10.

[23] *Argentina-Germany Bilateral Investment Treaty*, art. 10.

[24] Jan Ole Voss, The Impact of Investment Treaties on Contracts between Host States and Foreign Investors, (Boston: Martinus Nijhoff Publishers, 2011), p.293.

[25] Mark Friedman, "Treaties as Agreements to Arbitrate - Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration," in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, (Alphen aan den Rijn: Kluwer Law International, 2007), pp.558-561; *Maffezini, supra note* 1, paras.27 - 28.

that an arbitration agreement is void,[26] investment treaties have no efficient and uniform tool to overcome this problem.[27]

The objective of the inclusion of this "prior recourse" clause[28] in BITs is to provide the host state an opportunity to right its wrong domestically and mitigate jurisdictional conflict between domestic and international forums.[29] In this regard, several scholars have criticized that the duration of eighteen months is ordinarily insufficient for a dispute to be effectively resolved.[30] For this reason, the criticisms continue, the clause does not serve any meaningful purpose, especially as the investors could still refer the dispute to international arbitration regardless of the domestic outcome. Thus, the aforementioned sequence merely prolongs the proceedings and incurs extra costs.[31] Therefore, an important question here is whether a tribunal should treat the investor's failure to comply with this requirement as an absolute barrier to the use of international arbitration.

That said, the tribunal's finding on this matter may not be the end of its analysis, as the claimant usually submits an alternative argument maintaining that the application of the MFN clause contained in the disputed BIT allows the investor to rely upon other BITs that are more favorable to them, as those BITs do not contain a prior recourse provision.[32] Thus, a controversy remains as to whether the MFN clause can also be applied to the dispute settlement provision, which is of procedural character, in addition to other substantive provisions. Some scholars opine that the MFN clause also applies to this matter.[33] However, there is currently no consensus on the issue. On the one hand, the tribunals in *Maffezini v. Spain* (2000),[34] *Siemens v. Argentina* (2004),[35] *Gas*

---

[26] *New York Convention*, art. 2; *UNCITRAL Model Law on International Commercial Arbitration*, art. 8.

[27] Mark Friedman, *supra note* 25, p.545.

[28] Antonio Crivellaro, "Consolidation of Arbitral and Court Proceedings in Investment Disputes," Law and Practice in International Courts and Tribunals, Vol. 4, 371, p.399 (2005).

[29] Jan Ole Voss, *supra note* 24, p.294.

[30] Christoph Schreuer, *supra note* 17, p.4.

[31] *Ibid*, pp.4 – 5.

[32] See e.g. *Maffezini, supra note* 1; *Daimler*, *supra note* 3.

[33] See e.g. Nartnirun Junngam, "An MFN Clause and BIT Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference," UCLA Journal of International Law and Foreign Affairs, Vol. 15, 399 (2010).

[34] *Maffezini, supra note* 1.

[35] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

Natural v. Argentina (2005),[36] *Telefonica v. Argentina* (2006),[37] *Suez et al. v. Argentina* (2006),[38] *National Grid v. Argentina* (2006),[39] *RosInvest v. Russia* (2007),[40] *Renta 4 v. Russia* (2009),[41] and *Hochtief v. Argentina* (2011)[42] have endorsed such interpretation. On the other hand, the tribunals in *Salini v. Jordan* (2004),[43] *Plama v. Bulgaria* (2005),[44] *Berschader v. Russia* (2006),[45] *Telenor v. Hungary* (2006),[46] *Wintershall v. Argentina* (2008),[47] *Tza Yap Shum v. Peru* (2009),[48] *Austrian Airlines v. Slovak Republic* (2009),[49] *ICS Inspection and Control Services v. Argentina* (2012),[50] and *Daimler v. Argentina* (2012)[51] have reached the opposite conclusion.

---

[36] *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005.

[37] *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006.

[38] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006.

[39] *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006.

[40] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, October 2007.

[41] *Renta 4 S.V.S.A et al. v. The Russian Federation*, SCC Case No. 024/2007, Award on Preliminary Objections, 20 March 2009.

[42] *Hochtief, supra note* 4.

[43] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004.

[44] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

[45] *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006.

[46] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No.ARB/04/15, Award, 22 June 2006.

[47] *Wintershall, supra note* 2.

[48] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

[49] *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009.

[50] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.

[51] *Daimler, supra note* 3.

3. An Overview of Arbitral Awards Contemplating the Eighteen-Month Requirement

Arbitral tribunals have had numerous opportunities to determine the application of the eighteen-month requirement. Partly due to the fact that the principle of *stare decicis* does not apply in arbitration, these awards have been very inconsistent.[52] In general, these awards can fall into two main categories: A) the eighteen-month requirement is mandatory (the investor's failure to fulfill the requirement would lead to the tribunal's lack of jurisdiction); and B) the requirement is not a condition to the state's consent and can be waived under certain circumstances.

3.1 The Eighteen-Month Rule as a Mandatory Requirement

3.1.1 *Maffezini v. Spain*

Maffezini was an Argentinian national investing in the production and distribution of chemical products business in Spain. He alleged that Spanish agencies had mistreated his investment and brought the dispute to an ICSID tribunal under the Argentina-Spain BIT. [53] However, he had never referred this dispute to any competent Spanish tribunals.[54] Consequently, Spain challenged the ICSID tribunal on the ground that Maffezini did not fulfill the requirement set forth in Article X of the BIT, which reads:

> 1. Disputes which arise within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably by the parties to the dispute.
>
> 2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.

---

[52] Notably, such awards usually deal with the BITs entered into by Argentina who has been a very crucial actor in the investor-state arbitration during the past few decades because of the implications of the country's severe financial crisis in the early twenty-first century.

[53] *Maffezini, supra note* 1, para.1.

[54] *Ibid*, para.26.

3. The dispute may be submitted to international arbitration in any of the following circumstances:

a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues;

b) if both parties to the dispute agree thereto [...][55]

Having affirmed that the content prescribed in Article X was totally different from the concept of exhaustion of domestic remedies,[56] the tribunal stated that Article X(3)(a) served two functions: 1) it entitled either party to a dispute to go to domestic settlement bodies; and 2) it ensured that either party, after having participated in such domestic proceedings, would be able to seek recourse to international arbitration regardless of the domestic outcome.[57] Furthermore, the BIT parties' intention of inserting this clause was to provide their domestic authorities opportunities to resolve the dispute before the case went to international arbitration.[58] The tribunal thus concluded that, had the investor's argument on the tribunal's jurisdiction been solely based on the application of this provision, the tribunal would have lacked competence to hear the case because the eighteen-month requirement was crucial to the state parties and making a decision otherwise would make the provision meaningless.[59] Nonetheless, the tribunal referred to the Chile-Spain BIT through the application of the MFN provision in the Argentina-Spain BIT and ultimately ruled that it had jurisdiction over the dispute.[60]

3.1.2 *Wintershall v. Argentina*

Wintershall Aktiengesellshaft ("Wintershall") was a company incorporated in Germany having a wholly-owned subsidiary, Wintershall Energia S.A. ("WIAR"), which was incorporated in Argentina.[61] Wintershall submitted to an ICSID tribunal that Argentina had violated the Argentina-Germany BIT by adopting wrongful measures,

[55] *Ibid*, para.19.

[56] *Ibid*, paras. 27 – 28.

[57] *Ibid*, para.33.

[58] *Ibid*, para.35.

[59] *Ibid*, para.36.

[60] *Ibid*, para.64.

[61] *Wintershall, supra note* 2, para.1.

which adversely affected several hydrocarbon producers including WIAR.[62] One of Argentina's preliminary objections to the tribunal's jurisdiction was that Wintershall had not fulfilled the requirement under Article 10 of the BIT, which provides:

> (1) Any dispute arising between either of the Contracting Parties and the national or company of the other Contracting Party in connection with the investments under the terms of this Agreement shall, if possible, be amicably settled by the parties to the dispute.
>
> (2) If any dispute in the terms of paragraph 1 above could not be settled within the term of six months, counted as from the date on which any of the Parties had brought it forth, at the request of any of the parties, it shall be submitted to the courts of competent jurisdiction of the Contracting Party in whose territory the investment was made.
>
> (3) The dispute may be submitted to an international arbitral tribunal in any of the following events:
>
> (a) At the request of any of the parties in dispute, if no decision on the merits of the case had been reached following eighteen months from the date when the judicial proceeding provided for in paragraph 2 of this Article was initiated, or if the decision had been reached and the dispute between the parties still continued.
>
> (b) When both parties in dispute had so agreed.

Having explained that Wintershall must comply with the conditions specified in the treaty before it could exercise the rights thereunder,[63] the tribunal stated that the right to refer a dispute to ICSID arbitration is ostensibly contingent upon the submission of the dispute to the host state's domestic judicial jurisdiction for eighteen months.[64] This requirement, the tribunal noted, was a condition of Argentina's consent to arbitration.[65] Additionally, the tribunal emphasized the importance of the word "shall" in Article 10(2) as evidence of the legally-binding effect of the requirement.[66] It further explicated that the state parties' expressed will could not be denounced by Wintershall's argument that the provision was meaningless, nonsensical, or futile.[67]

---

[62] *Ibid*, para 4.

[63] *Ibid*, para.114; *Vienna Convention on the Law of Treaties of 1969*, art. 36(2).

[64] *Ibid*, para.115.

[65] *Ibid*, para.116.

[66] *Ibid*, paras.119 – 121.

[67] *Ibid*, para.128.

Interestingly, the tribunal based its opinion on the principle of contemporaneity—that the treaty shall be interpreted in accordance with the meaning it possessed at the time that it was concluded—and noted that as Argentina's judicial system in 1993, the time when the treaty was concluded, was effective, Article 10(2) should be interpreted effectively notwithstanding the status of Argentina's courts when the dispute arose.[68] Moreover, in contrast to *Maffezini*, the tribunal refused to apply the MFN provision to the dispute resolution matter.[69] For these reasons, the tribunal concluded that it had no jurisdiction over the dispute.

3.1.3 *Daimler v. Argentina*

Daimler Financial Services AG ("Daimler") was a company incorporated in Germany.[70] Relying upon Argentina's unilateral commitment to encourage foreign investment and stabilize its legal framework, Daimler purchased a local Argentinian company in 1995[71] and made several additional contributions to the investment.[72] However, given the country's economic crisis commencing in 2001, Argentina decided to substantially modify its regulations governing the investment.[73] This change brought about severe adverse effects upon Daimler. As a result, Daimler brought its claims to ICSID arbitration in accordance with Article 10 of the Argentina-Germany BIT. As Daimler had never submitted these claims before Argentina's domestic courts, Argentina raised this fact as an objection to the tribunal's jurisdiction. Even though the tribunal focused extensively on the application of the MFN clause and regarded the issue as "the most heated debate" matter in investment treaty arbitration,[74] it did provide an interesting analysis on the eighteen-month requirement.

The tribunal first examined Daimler's argument that the requirement should be treated as a mere procedural directive and not a condition of the tribunal's jurisdiction.[75] Daimler based this argument upon several arbitral awards dealing with the question of a waiting or cooling-off period during which disputing parties were

[68] *Ibid*, para.129.

[69] *Ibid*, para.197.

[70] *Daimler, supra note* 3, para.1.

[71] *Ibid*, para.38.

[72] *Ibid*, para.39.

[73] *Ibid*, para.40.

[74] *Ibid*, para.157.

[75] *Ibid*, para.184.

encouraged to amicably settle their disputes.[76] In these cases, several tribunals had decided to disregard the investors' failure to comply with such a waiting period.

The tribunal disagreed with Daimler and observed that such interpretation could not be treated as a general principle since, in those cases,[77] 1) the "cooling off" (i.e. negotiation or conciliation) period of six months prescribed in the BITs had passed during the arbitration proceedings, and 2) the provision was proven to be futile.[78] Because the tribunal opined that the eighteen-month requirement is not merely a cooling off period but a requirement that the disputing parties must perform by submitting their disputes to domestic courts, it stated that the other tribunals' reasoning could not be applied to this case "by rote but rather *mutatis mutandis*."[79] As such, the tribunal succinctly concluded that as the dispute had never been submitted to Argentina's domestic court, it could not be said that the eighteen-month period had passed during the arbitration proceedings.[80]

With respect to the question of futility, whereas the parties focused their arguments on whether Argentina's courts could practically render a conclusive decision within eighteen months, the tribunal neglected to rely on such indication. Instead, it noted that the objective of the eighteen-month condition was only to give domestic courts an opportunity to resolve disputes and did not guarantee that a final resolution had to be rendered.[81] The tribunal further explained that this was not a question of admissibility, on which its discretionary power could be exercised, but a jurisdictional one, as this issue concerns the sovereign parties' consent to arbitration.[82] The tribunal finally concluded that "since the 18-month domestic court's provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter."[83]

---

[76] *Ibid*, para.185, *referring to* Claimant's Counter-Memorial on Jurisdiction, paras. 98 - 102.

[77] *Ibid*, para.187.

[78] *Ibid*, para.188.

[79] *Ibid*, para.189.

[80] *Ibid*, para.191.

[81] *Ibid*.

[82] *Ibid*, paras.192 – 193.

[83] *Ibid*, para.194.

3.2 Eighteen-Month Rule as a Requirement that Can Be Waived

3.2.1 *BG v. Argentina*

In this case, a British corporation, BG Group Plc. ("BG"), invested in MetroGAS S.A. (MetroGAS), an Argentinian natural gas distribution company.[84] Since Argentina had encountered a number of problems arising from its acute economic crisis,[85] the government adopted several measures, including the suspension of the application of the U.S. producer price index ("PPI"),[86] the enactment of the *corralito*,[87] emergency law, and ancillary regulations,[88] and the renegotiation process,[89] all to mitigate the severity of the crisis. These measures, however, had adverse effects on BG's investment. The company accordingly brought a claim against Argentina to arbitration under the UNCITRAL Arbitration Rules pursuant to Article 8 of the Argentina-United Kingdom BIT, which provides:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
>
> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) If one of the Parties so requests, in any of the following circumstances:
>
> (i) Where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the

---

[84] *BG, supra note* 5, para.1.

[85] *Ibid*, para.62.

[86] *Ibid*, paras.63 – 69.

[87] *Ibid*, paras.70 – 72.

("Fearing an economic crash and a devaluation, many Argentines, especially companies, were transforming pesos to dollars and withdrawing them from the banks in large amounts, usually transferring them to foreign accounts. … On 1 December 2001, the government enacted Decree 1570/01 in order to stop this process from further threatening the banking system. This Decree froze all bank accounts, initially for 90 days. Only a small amount of cash was allowed for withdrawal on a weekly basis, initially 250 pesos.")

[88] *Ibid*, paras.73 – 77.

[89] *Ibid*, paras.78 – 82.

Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) Where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [...][90]

As BG had not brought the dispute to Argentina's courts, Argentina challenged the admissibility of the case.[91] BG, in contrast, contended that the requirement could not bar it from submitting the dispute to arbitration since a court's decision could by no means be rendered within eighteen months, and, therefore, such a condition was meaningless.[92]

The tribunal opined that Article 8 "cannot be construed as an absolute impediment to arbitration" as this "would lead to the kind of absurd and unreasonable result" under Article 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT),[93] as the effectiveness of Argentina's courts was immensely undermined due to the state's enactment of several regulations: 1) Decree 214/02 was promulgated to stay all suits of those whose rights were affected by the emergency measures;[94] 2) Decree 320/02 allowed governmental intervention to prevent the use of judicial adjudication during the emergency period;[95] and 3) Resolution 308/02 and Decree 1090/02 provided that submissions of disputes to the courts would bar investors from renegotiation processes of the license assignments in the future.[96] With these weighty challenges before it, the tribunal believed it was reasonable to scrutinize the appropriateness of the requirement to go to domestic courts when the host state's executive branch had undermined the effective and appropriate use of its own judicial system.[97] Ultimately, the tribunal concluded that the case was admissible because deciding otherwise would lead to an absurd and unreasonable outcome.[98]

---

[90] *Ibid*, para.3.

[91] *Ibid*, para.141.

[92] *Ibid*, para.142.

[93] *Ibid*, para.147.

[94] *Ibid*, para.149.

[95] *Ibid*, para.152.

[96] *Ibid*, para.154.

[97] *Ibid*, paras.153, 155.

[98] *Ibid*, paras.156 – 157.

3.2.2 *TSA v. Argentina*

Thales Spectrum de Argenina S.A. (“TSA”) was incorporated in Argentina and had TSI Spectrum International N.V. (“TSI”), a Dutch company, as its sole shareholder.[99] TSA was awarded a concession to administer, manage, and control a range of radio spectrum in Argentina. In 2004, Argentina terminated the concession agreement on the ground that TSA alleged to be illegitimate.[100] As a result, TSA, considering itself a Dutch investor under Article 25(2)(b) of the ICSID Convention and Article 1(b)(iii) of the Argentina-Netherland BIT, submitted a request for ICSID arbitration in 2005.[101] Argentina argued that the tribunal did not have jurisdiction over the dispute since TSA had failed to fulfill the eighteen-month requirement under Article 10 of the BIT, which reads:

> 1) Disputes between one Contracting Party and an investor of the other Contracting Party regarding issues covered by this agreement shall, if possible, be settled amicably.
>
> 2) If such disputes cannot be settled according to the provisions of paragraph (1) of this Article within a period of three months from the date on which either party to the dispute requested amicable settlement, either party may submit the dispute to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made.
>
> 3) If within a period of eighteen months from submission of the dispute to the competent organs mentioned in paragraph (2) above, these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation. Each Contracting Party hereby consents to the submission of a dispute as referred to in paragraph (1) of this Article to international arbitration.[102]

The tribunal started its analysis by recognizing the difficulties that arose from the interpretation of this provision.[103] It then considered whether there was a final decision rendered pursuant to Article 10(3) in which “there is no legal remedy which

---

[99] *TSA, supra note* 6, para.1.

[100] *Ibid*, para.9.

[101] *Ibid*, para.23.

[102] *Ibid*, para.67.

[103] *Ibid*, para.99.

would give a party a reasonable chance of having the decision changed." According to the fact, after the termination of the concession contract, TSA had sought remedies from some administrative bodies in Argentina. However, no final decision had been made when the request for arbitration was filed to the ICSID, and the latest administrative appeal was still pending.[104] Such an appeal was finally rejected and conveyed to TSA three months before the eighteen months period had elapsed. Even though the Tribunal recognized that TSA still possessed the option to bring its dispute to Argentina's domestic courts, it pointed out that there was minimal chance, if any, that a final decision could be made within three months.[105] Therefore, it concluded:

> [D]espite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from immediately instituting new ICSID proceedings on the same matter.[106]

3.2.3 *Abaclat v. Argentina*

The claimants in this case were Italian nationals and corporations holding Argentinian sovereign bonds.[107] Because of Argentina's default and restructuring of the bonds without the holders' consent, the claimants alleged that Argentina had breached its obligations under the Argentina-Italy BIT and brought the dispute to ICSID arbitration under Article 8, which reads:

> 1. Any dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement shall be settled, if possible, by means of amicable consultation between the parties to the dispute.
>
> 2. If the dispute has not been settled in such consultation, it may be subject to the competent ordinary or administrative court of the Contracting Party in the territory of which the investment is located.
>
> 3. If, after 18 months from the notification of commencement of an action before the national courts indicated in the above paragraph 2, the dispute

[104] *Ibid*, para.103.

[105] *Ibid*, paras.109 – 110.

[106] *Ibid*, para.112.

[107] *Abaclat, supra note* 7, para.3.

between the Contracting Party and the investors still continues to exist, it may be subject to international arbitration.

With this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration.

As in most cases, it was not disputed in *Abaclat* that the claimants had never submitted their claims to Argentina's courts before the arbitration proceedings.[108] This was invoked by Argentina as a ground for the tribunal's lack of jurisdiction.[109] The tribunal first asserted that Article 8 required the parties to use the dispute settlement mechanisms sequentially as stipulated.[110] It then elaborated that the objective of Article 8, which was to provide for a fair and efficient dispute resolution means, had to be considered in the its interpretation; mere determination of the text would not suffice.[111] Accordingly, the tribunal decided not to dismiss the case on the sole fact that the eighteen-month requirement had not been fulfilled; rather it proceeded to investigate whether the claimants' failure would jeopardize the objective of Article 8.[112] In particular, as the main function of the eighteen-month requirement was to provide the respondent state with an opportunity to settle the dispute domestically,[113] the tribunal had to determine whether such opportunity would be prejudiced by the disregard of the eighteen-month condition.[114] In its opinion, Argentina would suffer no harm, as in reality an effective decision related to this complex dispute could not be rendered within such a short period,[115] for there were many obstacles.[116] As a result, the claimants' interest to rely on efficient arbitration outweighed the host state's interest in the strict application of the requirement.[117] Therefore, the tribunal dismissed Argentina's objection.[118]

---

[108] *Ibid*, para.576.

[109] *Ibid*, para.572.

[110] *Ibid*, paras.577 – 578.

[111] *Ibid*, para.579.

[112] *Ibid*, para.580.

[113] *Ibid*, para.581.

[114] *Ibid*, para.582.

[115] *Ibid*, para.583.

[116] *Ibid*, paras.585 – 588.

[117] *Ibid*, paras.583 – 584.

[118] *Ibid*, para.590.

3.2.4 *Hochtief v. Argentina*

Hochtief Aktiengesellschaft ("Hochtief") was a company registered in Germany.[119] It and a consortium of construction companies together incorporated an Argentinian subsidiary construction company named Puentes del Litoral SA ("PdL"), of which Hochtief owned 26% of the total shares. PdL was a vehicle used by Hochtief and its partner to implement a concession for the construction, maintenance, and operation of several transportation routes in the country.[120] Dissatisfied with Argentina's measures against the business, Hochtief brought its case to ICSID arbitration under the Argentina-Germany BIT without prior recourse to Argentina's domestic courts. As a result, Argentina argued that Hochtief did not fulfill "a mandatory condition upon which the jurisdiction of the Tribunal depends."[121]

The tribunal first analyzed Article 10 of the BIT. It regarded the provision as an offer by a disputing state—Argentina—to submit disputes to arbitration, which was open for foreign investors to accept.[122] Since this offer was contained in a treaty, it was subject to the interpretation rules under Articles 31, 32, and 33 of the VCLT.[123]

The tribunal noted that Article 10 of the BIT did not require the disputing parties to submit their dispute to the host state's domestic court[124] but rather obliged either party to submit the dispute to the jurisdiction of the domestic courts if the other disputing party so requested.[125] Therefore, the real question before the tribunal was whether the arbitration option would be totally excluded, should no party submit such request to the domestic court.[126] The tribunal's answer was in the negative. It elaborated that even though the submission of disputes to domestic courts benefited both sides,[127] it would be meaningless to demand the parties to spend eighteen months in the courts when they were not obliged to place any credence or value upon the rendered decisions, which may or may not be rendered within the specified

[119] *Hochtief*, *supra note* 4, para.1.

[120] *Ibid*, para.4.

[121] *Ibid*, para.13.

[122] *Ibid*, para.22.

[123] *Ibid*, para.26.

[124] *Ibid*, paras.46, 53.

[125] *Ibid*, para.36.

[126] *Ibid*, para.46.

[127] *Ibid*, para.50.

period.[128] The tribunal, moreover, referred to the fact that Argentina had the right to refer the dispute to domestic courts, but it chose not to do so. As a result, it was barred from raising such a prerequisite against the investor.[129] For these reasons, the tribunal concluded that it did not believe that the eighteen-month requirement was an absolute condition to the investor's unilateral submission of the dispute to international arbitration.[130] Notwithstanding this strong opinion, the tribunal stated that it need not make a decision on this point[131] and instead confirmed its jurisdiction by the application of the MFN clause in the BIT.[132] This outcome more or less suggested the tribunal's concerns as to whether its mere interpretation regarding the prior recourse clause was strong enough to prevent the decision from being criticized or even overruled by the ICSID *ad hoc* Committee.

In addition, the tribunal interestingly clarified the distinction between jurisdiction and admissibility in its elaboration under the head of "MFN and jurisdiction limits."[133] It first defined the concept of jurisdiction as "a new, independent, right to arbitrate," whereas the question of admissibility concerned "the manner in which an existing right to arbitrate must be exercised."[134] It additionally considered the jurisdiction as a qualification of the tribunal and admissibility as an attribute of the claim.[135] Furthermore, tribunals could scrutinize the question of jurisdiction *proprio motu*, whereas the question of admissibility would be exclusively left to the disputing parties: should the parties not challenge the admissibility of the dispute, they would be deemed to have acquiesced to any defect concerned. Besides, even though tribunals found the cases to be inadmissible, once the defects had been cured, the claims could be reintroduced.[136] For these reasons, the tribunal concluded that the eighteen-month requirement was not a matter of jurisdiction but admissibility.[137]

---

[128] *Ibid*, para.51.

[129] *Ibid*, para.89.

[130] *Ibid*, para.54.

[131] *Ibid.*

[132] *Ibid*, para.125.

[133] *Ibid*, part VII.

[134] *Ibid*, para.90.

[135] *Ibid*.

[136] *Ibid*, paras.94 – 95.

[137] *Ibid*, para.96.

Having reviewed these awards, the author finds that there are several factors that tribunals take into consideration when interpreting the 18-month requirement. The first factor is the text of the provision. However, given the similarity of the texts of the relevant BITs in these disputes, how the provision is drafted may not be the decisive factor from which the tribunal's conclusion derives. Thus, one should also look at the factual circumstance within which the parties operate. For instance, in *BG*, the tribunal downplays the requirement's rigidity following its finding that the effectiveness of Argentina's domestic court system was severely impaired by the state's action. Additionally, an individual arbitrator's perception of the arbitral tribunal's function and authority in general—the arbitrator's "representation"—would also affect how he or she views the matter.[138] Lastly, the tribunal's analysis largely depends upon its view on the character of this requirement. That is, for the tribunal viewing this requirement as a prerequisite to the respondent's consent to arbitration, it tends to apply the provision very stringently and holds that, should it find that the claimant fails to follow the procedures stipulated, the tribunal would not have jurisdiction. On the other hand, should the tribunal opine that the requirement merely concerns procedural matter, it would apply the provision more flexibly, taking account of all relevant circumstances.

4. The Eighteen-Month Rule: A Jurisdictional or Admissibility-Related Issue?

As one can infer from these arbitral awards, some tribunals have, on the one hand, regarded the eighteen-month requirement as a question of jurisdiction. On the other hand, some tribunals referred to the issue as a question of admissibility. These two legal terms have occasionally been discussed by several international tribunals, notably the International Court of Justice ("ICJ"). Nonetheless, the ICJ has usually abstained from clarifying the definition of admissibility and its difference from jurisdiction.[139] It, nevertheless, once provided a concise explanation in *Oil Platforms*:

---

[138] See Emmanuel Gaillard, Legal Theory of International Arbitration, (Leiden: Martinus Nijhoff Publishers, 2010), pp.13 – 66; Emmanuel Gaillard, "International Arbitration as a Transnational System of Justice," in Albert Jan Van Den Berg (ed), *Arbitration – The Next Fifty Years*, (The Hague: Kluwer Law International, 2008), pp.67 – 70; Emmanuel Gaillard, "The Representations of International Arbitration," Journal of International Dispute Settlement, Vol. 1, 271 (2010).

[139] Anthony Aust, Handbook of International Law, 2nd edition (Cambridge: Cambridge University Press, 2010), p.406.

> Objections to admissibility (*recevabilité*) normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.[140]

With regard to the ICSID Convention, the terms "jurisdiction" and "competence" are prescribed under Article 25.[141] Throughout the Convention, these two terms are referred to as "the jurisdiction of the Centre" and "the competence of the tribunal." In practice, they are used interchangeably as synonyms.[142] In contrast, the term "admissibility" cannot be found in the Convention. Notwithstanding its absence, the term, however, has been used by many ICSID tribunals.

As well as other international arbitral tribunals, the jurisdiction of the investment arbitral tribunal is based on the disputing parties' consent. Such consent can be restricted in several ways including *ratione personae, ratione matariae,* and *ratione temporis*.[143] By contrast, the concept of admissibility is referred to as:

> [T]he requirements laid down by customary international law or by treaty (e.g. as to nationality of claims or exhaustion of local remedies) which an applicant before an international tribunal must fulfill if the tribunal, although it has jurisdiction to hear the case, is to be able to go on to determine the merits. An objection to the admissibility of a complaint will be of a preliminary character as, if successful, it will prevent the tribunal from proceeding to hear the case on the merits.[144]

In addition, William W. Park defines the term as follows:

---

[140] *Oil Platforms (Iran v. U.S.)*, Judgement (2003) ICJ Reports 161, para.29.

[141] Christoph Schreuer et al, The ICSID Convention: A Commentary, 2nd edition (New York: Cambridge University Press, 2009), pp.85 – 86.

[142] Gerold Zeiler, "Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings," in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (New York: Oxford University Press, 2009), p.79.

[143] Andrew Newcombe, "Investor Misconduct: Jurisdiction, Admissibility or Merits?," in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (New York: Cambridge University Press, 2011), pp.192 – 193.

[144] John P. Grant and J. Craig Barker, Parry & Grant Encyclopaedic Dictionary of International Law, 3rd edition (Oxford: Oxford University Press, 2009), p.10.

> [A] term used to describe constraints on the right to file claims in cases clearly subject to arbitration. Admissibility might relate to whether a claim is ripe enough (or too stale) for adjudication, or arbitral preconditions (such as mediation) or the passage of time bars.[145]

According to Jan Paulsson, the concepts of jurisdiction and admissibility are considered as different as night and day although there is a twilight zone.[146] The difference laid down by Fitzmaurice is generally regarded as a seminal explanation[147] and frequently cited by scholars. This explanation reads:

> [T]here is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule the claim to be inadmissible on same ground other than its ultimate merits: the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim. A successful challenge to the jurisdiction stops all further proceedings in the case, or at any rate ensures that there is no finding on the merits. But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim.[148]

Although both jurisdictional and admissibility-related matters can be raised by respondents in preliminary objection phases, tribunals generally have to identify their jurisdiction first before addressing the question of admissibility. This protocol is in place because the objection to jurisdiction relates to the party's consent that can affect the authority of the tribunal to decide the case. If the tribunal had decided that it had jurisdiction over the claim, it would have had power to proceed and determine other pertinent factors and *vice versa*. By contrast, the objection to admissibility is relevant to whether it is appropriate, or the claim is "ripe" enough or too stale, for the competent

---

[145] William W. Park, Arbitration of International Business Disputes: Studies in Law and Practice, (New York: Oxford University Press, 2006), p.77.

[146] Jan Paulsson, *supra note* 8, p.603.

[147] Zachary Douglas, The International Law of Investment Claims, (New York: Cambridge University Press, 2009), p.146.

[148] Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 2 (Cambridge: Grotius Publications, 1986), pp.438 – 439.

tribunal to decide a particular case at a particular time.[149] Highet, who was an arbitrator in *Waste Management v. Mexico*, asserted in his dissenting opinion that "[j]urisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective–whether it is appropriate for the tribunal to hear it."[150]

There have been attempts to draw a definite line between these two separate legal concepts as they can lead to different legal outcomes.[151] These differences can be divided into two fundamental categories. The first is a matter of reviewability. The second is a matter of curability.

With regard to reviewability, once arbitral awards are rendered by arbitral tribunals, they are subject to control to ensure that arbitral tribunals vested with limited adjudicatory powers discharge their designated powers properly.[152] Nonetheless, the system of control of arbitral award is different from the system of appeal of judgment generally found in domestic judicial systems. This is because an award can be successfully challenged under very limited grounds stipulated exhaustively in relevant legal instruments.[153] For example, the ICSID arbitration's grounds for challenging arbitral awards are stipulated in Article 52 of the ICSID Convention. As per non-ICSID arbitration, such grounds can be found in Article V of the New York Convention and Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").[154] As for the responsible entities exercising this control function, for arbitral award

---

[149] James Crawford, Brownlie's Principles of Public International Law, 8th edition (Oxford: Oxford University Press, 2012), p.693.

[150] W*aste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, Highet's Dissenting Opinion, 2 June 2000, para.58.

[151] For example, the question that has drawn much attention is whether an investor's misconduct should be treated as an issue of jurisdiction or admissibility. See Andrew Newcombe, *supra note* 143, p.187; Cameron A. Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims," Journal of International Dispute Settlement, Vol. 3, 329, (2012).

[152] W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair, (Durham: Duke University Press, 1992), p.1.

[153] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd edition (Oxford: Oxford University Press, 2012), p.300.

[154] *ICSID Convention,* art. 52; *New York Convention*, art. V; *UNCITRAL Model Law on International Commercial Arbitration*, arts. 34 and 36. According to Article 52 of the ICSID Convention, there are five annulment grounds, which are: 1) the tribunal was not properly constituted; 2) the tribunal has manifestly exceeded its power; 3) there was corruption on the part of a member of the tribunal; 4) there has been a serious departure from a fundamental rule of procedure; and 5) the award has failed to state the reasons on which it is based. With regard to Article V of the New York Convention and Articles 34 and 36 of the

governed by the New York Convention, they would be the court of the country in which the award is made and the court of the country in which the award is enforced. Concerning the ICSID arbitration, the award would be controlled by the ICSID's self-contained mechanism—the *ad hoc* committee appointed by the Chairman of the ICSID Administrative Council.[155]

As a matter of principle, that a tribunal lacks jurisdiction over a dispute is a ground of refusal of enforcement[156] or annulment[157] of the tribunal's award. An arbitral tribunal would lack jurisdiction if there is no agreement to arbitrate or the agreement to arbitrate is invalid.[158] The ICSID Convention describes this as a situation where the "tribunal has manifestly exceeded its power."[159] This annulment ground under the Convention would cover both the situations where the tribunal fails to exercise its jurisdiction and where the tribunal asserts the jurisdiction that it does not possess.[160] Nevertheless, the situation is completely different where the tribunal's award concerns an admissibility-related matter because in so doing the tribunal actually exercises its jurisdictional authority.[161] In other words, for the tribunal to be able to address the issue of admissibility, it must first be satisfied that it certainly has jurisdiction. As a result, a tribunal's discretion on admissibility-related issues would not be subject to any national court's or *ad hoc* committee's review on the ground of the tribunal's lack of jurisdiction.[162]

UNCITRAL Model Law on International Commercial Arbitration, the grounds to review the awards are more expansive compared to the ICSID system. These grounds are: 1) the parties were under some incapacity or the agreement is invalid; 2) there is no proper notice of the appointment of the arbitrator or of the proceedings; 3) the tribunal has exceeded its power; 4) the composition of tribunal or procedure is not in accordance with the agreement or the relevant law; 5) the award is set aside; 6) the dispute is not arbitrable; and 7) the award is contrary to the public policy.

[155] W. Michael Reisman, *supra note* 152, p.46; *ICSID Convention*, arts. 5, 52.

[156] *New York Convention*, arts. V(1)(a), V(1)(c).

[157] *UNCITRAL Model Law on International Commercial Arbitration*, arts. 34(2)(a)(i), 34(2)(a)(iii); *ICSID Convention*, art. 52(1)(b).

[158] *Ibid.*

[159] *ICSID Convention*, art. 52(1)(b).

[160] *Hussein Nuaman Soufraki v. the United Arab of Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, paras.41 – 46.

[161] Jan Paulsson, *supra note* 8, p.602; Andrew Newcombe, *supra note* 143, p.199.

[162] William W. Park, "The Arbitrator's Jurisdiction to Determine Jurisdiction," in Albert Jan Van Den Berg (ed), *International Arbitration 2006: Back to Basics?*, (Alphen aan den Rijn: Kluwer Law International, 2007), p.102.

As such, the annulment decision of the BG Award by the United States Court of Appeals on the ground that the case had never been brought to Argentina's domestic courts prior to its submission to the arbitration was rightfully disregarded by the Supreme Court, for it is within the arbitral tribunal's jurisdiction to exercise discretion on the question of admissibility of the claim. As a result, the BG Tribunal did not exceed its power in deciding the case. Moreover, no indication had been found indicating corruption or flaws in the procedural issues in BG's proceedings. Therefore, there is no ground for the Court to vacate the Award under §10(a) of the FAA.[163]

Concerning the curability matter, on the one hand, because admissibility is a matter dealing with defects of the claim, once such defects are cured or, in Park's words, "ripe enough," the claims can be resubmitted to the tribunal. On the other hand, a tribunal that does not have jurisdiction would not be able to hear the case under any circumstance.

As can be seen in the preceding Part, investment treaty awards have not been uniform on the question of whether the 18-month requirement is of a jurisdictional or admissibility-related nature. Having reviewed the awards in Part III, the most crucial factor that should be considered is whether the requirement is a condition of the parties' consent to arbitrate. In other words, if the disputing parties, especially the investor, have not complied with the requirement, would it then be deemed that there is no consent to arbitration given by the host state? If the answer is in the affirmative, this would be a matter of jurisdiction since it affects the parties' consent, which is the core foundation of the tribunal's jurisdiction.[164] Conversely, if the answer is in the negative, it would be a question of admissibility.

---

[163] See Part 5; The Federal Arbitration Act, section 10 provides:

(a)In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[164] Andrea Marco Steingruber, Consent in International Arbitration, (Oxford: Oxford University Press, 2012), p.191, para.11.08.

In the author's opinion, the texts of the BITs that are applied by the tribunals in cases discussed in Part III, all of which have Argentina as a state party, do not refer to the eighteen-month requirement as a condition of the parties' consent to arbitration. There is no content stating that if this condition were not fulfilled, it would be deemed that no consent had been given by the parties to the BITs. Rather, in most cases, the relevant BITs expressly enable the use of investor-state arbitration, stating that the disputes "shall be submitted to international arbitration [...] if one of the Parties so requests"[165] or that "[e]ach Contracting Party hereby consents to the submission of [disputes between a Contracting Party and a foreign investor] to international arbitration,"[166] and merely specify a procedural requirement before the arbitral tribunals should hear the disputes. In other words, by incorporating effective arbitration provisions in the BITs, state parties have already given consent to arbitration and merely prescribed additional procedural steps to be fulfilled so that the dispute be mature enough to be settled by international arbitration. Therefore, it is within the arbitral tribunal's competence to rule on this matter. As such, the tribunal's application of the prior recourse clause cannot be reviewed by either the ICSID *ad hoc* Committee (under the ICSID Convention) or the domestic court (under the New York Convention), as it concerns whether the tribunal *should admit* the dispute and not whether the tribunal *is entitled to decide* the dispute. Furthermore, once the defects of the claim are cured (i.e., that the dispute be referred to the domestic court for eighteen months), the tribunal must exercise its jurisdiction.[167]

5. The U.S. Supreme Court Decision in *BG*: A Gold Standard?

After the tribunal in *BG* rendered the award,[168] Argentina decided to challenge it. As this case was a non-ICSID arbitration, its award would be controlled by the national court of the country in which the arbitration had its seat, which was the United States in this case. Section 10(a)(4) of the FAA provides that the court may vacate the award on the ground that the tribunal had exceeded its power. Thus, Argentina filed a petition to challenge the award to the District Court for the District of Columbia Circuit. The court

---

[165] *Argentina-Germany Bilateral Investment Treaty*, art. 10; *Argentina-United Kingdom Bilateral Investment Treaty*, art. 8.

[166] *Argentina-Netherlands Bilateral Investment Treaty*, art. 10.

[167] For a further discussion on this opinion, please see Parts 5 – 6.

[168] See the discussion of the award in Part 3.2.1.

ultimately denied the plaintiff's petition.[169] Since Argentina challenged the Award on many grounds, the court had to consider every matter and did not thoroughly discuss the issue of the eighteen-month requirement. In a few paragraphs, the court explained that as the tribunal had correctly interpreted the term in the U.S.-Argentina BIT and relevant international law, it did not exceed its power. Therefore, the court did not have the authority to disturb the tribunal's decision.[170]

Subsequently, the plaintiff appealed to the Court of Appeals for the District of Columbia Circuit, which reversed the District Court's order and vacated the award.[171] According to the Court of Appeals' reasoning, this case presented the main question of "arbitrability"[172]—whether a foreign investor could go to international arbitration when the requirement stipulated in Article 8 of the BIT had not yet been fulfilled.[173] It then held that the tribunal would have the power to rule upon its jurisdiction only when Article 8 of the BIT had been complied with:[174]

> [T]he Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when the precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide.[175]

Finally, the Court decided to set aside the award and concluded that:

> Where the contracting parties agree to require dispute resolution in a court prior to arbitration, and the aggrieved party initiating the dispute disregards the requirement [...]. BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained.[176]

---

[169] *Republic of Argentina v. BG Group plc*, 715 F.Supp.2d 108 (2010).

[170] *Ibid*, p.122.

[171] *Republic of Argentina v. BG Group plc*, 665 F.3d 1363 (2012).

[172] George A. Bermann, "The 'Gateway' Problem in International Commercial Arbitration," Yale Journal of International Law, Vol. 37, 1, pp.10 – 13 (2012).

[173] *Republic of Argentina v. BG Group plc*, *supra note* 171, p.1369.

[174] *Ibid*, p.1370.

[175] *Ibid*, p.1371.

[176] *Ibid*, p.1373.

On March 5, 2014, the Supreme Court delivered a seminal decision clarifying the issue.[177] The Court framed its main task as specifying who—the court or the arbitration tribunal—has principal responsibility to interpret the eighteen-month requirement. To gain the majority support, especially from his nationalist colleagues including Justices Roberts, Scalia, Thomas, and Alito, Justice Breyer who wrote the Court's opinion treated the BIT as if it were an ordinary contract, and proceeded from this foundation. While the Court acknowledged that, when the contract is silent, the parties intend the court, not the arbitrator, to decide the dispute about "arbitrability," it indicated that if the dispute is about procedural preconditions for the use of arbitration, the duty would fall upon the arbitrator.[178] The Court, moreover, explained that Article 8 of the BIT "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."[179] That is, although the Court did not use the same nomenclature, it implied that this is not the question of jurisdiction but admissibility. Since the provision is a purely procedural requirement, the Court continued, it was for the arbitrator, not the court, to primarily interpret and apply the provision.[180]

In part IV of the judgment, the Court attempted to clarify a distinction between "conditions of consent" and the procedural requirements, which was the concern of the case.[181] It then briefly elaborated that if the disputing issue concerns the condition of consent, the result might be different, as the court, not the arbitrator, would probably assume a primary role in the interpretation and application of the clause.[182] As the present BIT did not stipulate that the eighteen-month requirement was a condition of consent to arbitration, the Court cautiously decided to remain silent and wait until the question actually arises in the future.[183] However, Justice Sotomayor, albeit concurring with the majority on the outcome, did not agree with the majority on this particular point. In her concurring opinion, she promptly concluded that if it could be proven that the eighteen-month requirement is a condition of consent, it would be clear that the

---

[177] *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014).

[178] *Ibid*, p.34.

[179] *Ibid*, p.35.

[180] *Ibid*, p.36.

[181] *Ibid*, pp.36 – 43.

[182] *Ibid*, p.38.

[183] *Ibid*, p.39.

court possesses decisive power to interpret the provision as the question becomes whether the parties have agreed to arbitrate.[184]

That said, notwithstanding the Court's explanation that the arbitral tribunal would have the final say in this case, rather than leaving the award intact, the Court decided that it would merely provide high deference to it.[185] Accordingly, the Court then reviewed the tribunal's reasoning and finally affirmed the award; the judgment of the Court of Appeals was thus reversed.[186]

Arbitrators and other participants in the arbitration community should welcome this U.S. Supreme Court decision. Although many matters remain unsettled, the Court decision in this author's opinion is essentially a correct one. The Court rightly decided that the provision of procedural requirement, unlike the condition of consent, should be primarily interpreted and applied by arbitrators. In other words, as the dispute concerns the question of admissibility, the arbitrators would, as discussed in Part IV of this article, be capable of exercising its jurisdictional authority to determine the matter.

One may, however, question the Court's approach in reviewing the award. That is, while the Court admitted that the issue should be left primarily to the tribunal, it nonetheless, albeit trivially, scrutinized the tribunal's reasoning. This conduct was somewhat controversial since the ground to challenge the award was whether the tribunal had exceeded its power. As such, once the Court held that the tribunal had carried out its function within the scope of its assigned authority, the Court should not have reviewed the award further.

Furthermore, the majority controversially applied the U.S. domestic contract law to the interpretation of the BIT, which is an international treaty. This outcome did not cause much surprise among American scholars who are well acquainted with the U.S. Supreme Court's decision-making process. There are, in short, two camps of justices in the Supreme Court at the time of the judgment: First, the transnationalists, including Justices Breyer, Ginsburg, Kagan, and Sotomayor, and, second, the nationalists, including Justices Roberts, Scalia, Thomas, and Alito. And Justice Kennedy who usually casts a

[184] *Ibid*, pp.47 – 48.

[185] *Ibid*, p.44.

[186] *Ibid*, pp.44 – 45.

swing vote on international issues.[187] As such, to gain support from the nationalists, it is inevitable to have a collegial opinion that would not rely too heavily on foreign or international law. It is now not clear if this approach would generate any downsides in the future.

The majority opinion also left open another significant question—should the contracting states stipulate clearly in their treaty that the eighteen-month requirement is a condition of consent to arbitrate, would the result be different? On the one hand, some scholars may agree with Justice Sotomayor on this point, as they believe that the insertion of such clarification would make the requirement a matter of jurisdiction—whether there is any basis for the arbitral tribunal to hear the case. National courts, thus, would be able to review this matter either in the annulment or the recognition and enforcement process as recognized by the New York Convention. On the other hand, other scholars may find it to be too early to answer the question. Accordingly, the Supreme Court was correct not to hastily and unnecessarily make the issue conclusive, and there should be room left for arbitrators to use their discretion in the case that Argentina-like situation reoccurs.

6. An Appraisal: Interpretation of the Prior Recourse Clause

6.1 A General Observation on Treaty Interpretation

Disputing parties always raise the question of interpretation as part of their arguments regardless of how well legal instruments, particularly treaties, are drafted.[188] The function of interpretation is to find the genuine meaning of the text written therein.[189] As a result, this ritual has to be performed before the process of legal application can be appropriately made.[190] Generally, there are two competing canons of treaty interpretation that fundamentally contradict each other. They are the objective approach, which focuses on the text, and the subjective approach, which focuses on the

---

[187] On this point, see Harold Hongju Koh, "Keynote Address: A Community of Reason and Rights," Fordham Law Review, Vol. 77, 583, p.596 (2008).

[188] Anthony Aust, Modern Treaty Law and Practice, 1st edition (New York: Cambridge University Press, 2000), p.184.

[189] Malgosia Fitzmaurice, "The Practical Working of the Law of Treaties," in Malcolm D. Evans (ed), 3rd edition, *International Law*, (New York: Oxford University Press, 2010), p.172.

[190] J. Romesh Weeramantry, Treaty Interpretation in Investment Arbitration, (Oxford: Oxford University Press, 2012), p.30 para.2.37.

parties' intention. Generally, the former should trump the latter as the text is supposed to represent a genuine expression of what the parties intend.[191]

International tribunals have axiomatically applied Articles 31 and 32 of the VCLT as the laws governing the interpretation of treaties. The ICJ has typically recognized the provisions as a reflection of customary international law.[192] Concerning the relationship between these provisions, given the mandatory character of the word "Rule" in Article 31 and the instrumental character of the word "means" in Article 32, Article 31 is considered the provision regarding "General Rule of Interpretation" while Article 32 is referred to as the supportive one.[193] Article 31 of the VCLT reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

According to this provision, international tribunals' task is to find the ordinary meaning of the treaty from its text. This is because the ordinary meaning of the text is considered the reflection of the parties' intention.[194] Moreover, achieving such an interpretation requires that it be made in good faith. Additionally, the context of the terms and the object and purpose of the provision must also be taken into consideration. However, in a case where the ordinary meaning of the treaty in accordance with Article 31 would lead to an absurd or unreasonable outcome, Article 32 provides a solution that shifts focus from its text to other supplementary means including its *travaux préparatoires*. This redirection demonstrates that the VCLT will not tolerate results that are absurd or unreasonable even though they are products of the interpretation under Article 31. Therefore, it can be implied that although the

---

[191] James Crawford, *supra note* 149, p.184.

[192] *Territorial Dispute (Libya v. Chad)*, Judgment (1994) ICJ Reports 6, 21 para.41; *Oil Platforms (Iran v. U.S.)*, Preliminary Objections (1996) ICJ Reports 803, 812 para.23; *Kishikili/Sedudu Island (Bots. v. Namib.)*, Judgment (1999) ICJ Reports 1045, 1059 para.18; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, Judgment (1991) ICJ Reports 53, 70 para.48; *Sovereignty over Palau Ligitan and Palau Sipadan (Indon. v. Malay.)*, Judgment (2002) ICJ Reports 625, 645 para.37; *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment (2004) ICJ Reports 12, 48 para.83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment (2007) ICJ Reports 47, 110 para.160.

[193] W. Michael Reisman, "Expert Opinion with Respect to Jurisdiction in the Interstate Arbitration Initiated by Ecuador Against the United States," para.13, (24 April 2012) accessed 28 January 2018, from https://www.italaw.com/sites/ default/files/case-documents/ita1061.pdf, para.13.

[194] Anthony Aust, *supra note* 188, p.188.

words are clear enough to find the ordinary meaning, when that meaning is manifestly absurd or unreasonable, other methods of interpretation must be sought.[195] The ICJ confirms this notion:

> [T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.[196]

6.2 The Prior Recourse Clause

Considering the prior recourse clauses in BITs, their ordinary meanings are obvious; the BITs outline some procedural requirements to be fulfilled before the investors could bring disputes to international arbitration. In most BITs,[197] state parties used the word "shall," which imposes mandatory duty upon disputing parties to amicably settle disputes for six months and to refer disputes to domestic competent tribunals for eighteen months, respectively. In some other BITs,[198] even though the parties insert the word "may," it is also clear that the process of international arbitration could not be instituted until the disputing parties went through some forms of local reparatory procedures.[199] Therefore, typically, so long as the eighteen-month requirement is not fulfilled, the arbitration cannot proceed.

However, as discussed earlier, although the text is clear enough to find its ordinary meaning, its application should be omitted, and another mode of interpretation should be sought if such interpretation would lead to manifestly absurd or

---

[195] Aust reaches this same conclusion but with a different approach—that the interpretation must be made in good faith under Vienna Convention on the Law of Article 31 of the VCLT. *Ibid*, p.187; *Vienna Convention on the law of Treaties*, art. 31.

[196] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion (1950) ICJ Reports 8.

[197] *Argentina-United Kingdom Bilateral Investment Treaty; Argentina-Spain Bilateral Investment Treaty; Argentina-Germany Bilateral Investment Treaty.*

[198] *Argentina-Netherland Bilateral Investment Treaty; Argentina-Italy Bilateral Investment Treaty.*

[199] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, paras.79 – 94.

unreasonable results. Accordingly, a conscientious decision maker must further determine whether the default mode of interpretation would cause manifestly absurd or unreasonable implications. In considering this issue, this author will simulate three distinct situations, apply the eighteen-month requirement to each of them, and evaluate the outcomes. These three scenarios are 1) an ordinary situation where an investor inexcusably fails to comply with the condition, 2) a situation where the investor has partially complied with the requirement, and 3) an unusual situation where existing domestic remedies are ineffective due to the host state's action.

6.2.1 Ordinary Situation

As the eighteen-month period is generally considered too short for a dispute to be settled satisfactorily in domestic forums, many critics have expressed their concerns that the requirement is of no advantage. This notion is also supported by the fact that, notwithstanding the domestic dispute settlement outcomes, investors are still capable of submitting their disputes to international arbitration as soon as the specified time elapses. As a consequence, some participants assert that this condition serves no purpose in practice and only causes undue delay and extra costs to the disputing parties. For these reasons, they argue that the ordinary meaning of the text of this requirement should be denied on the ground of futility. As Weeramantry observes, this prior recourse provision interpretation "has been an area in which—exceptionally—[foreign investment arbitral tribunal] has by and large not applied the Convention Rules."[200] For instance, the *Abaclat* tribunal assesses the interests protected under the dispute settlement provision and rules that the requirement be disregarded because the claimant's interest in having an efficient dispute settlement mechanism outweighs the state's interest in the strict application of the prior recourse clause.[201]

However, in general, this author does not believe that such an unconventional interpretation should be accepted. Although the stipulated period is rightly described to be statistically too short for the domestic authority to reach a decisive verdict, this is what state parties to the BITs have agreed upon and expressly stipulated in the treaties; these arrangements must be respected in accordance with the principle of *pacta sunt servanda*. The parties should be the ones who decide

[200] J. Romesh Weeramantry, *supra note* 190, p.198 para.6.113.

[201] See the discussion of *Abaclat* in Part 3.2.3.

whether the condition is beneficial and preferable. As some tribunals suggest, this requirement provides the host state with an opportunity to right the wrong by the use of its domestic settlement means. As such, one cannot subjectively conclude that the application of the term in an ordinary circumstance is futile. Additionally, making an interpretation otherwise would be disadvantageous to investors who comply with the rules and suffer extra expenses and delay compared to those who do not.[202] Therefore, if the investor does not comply with such a requirement, the arbitral tribunal should dismiss the case and order the disputing parties to take the required domestic legal remedies for a prescribed period before they could resubmit the case to the tribunal.

6.2.2 The Condition Has Partly Been Fulfilled

This situation can be found in *TSA* where the investor had already filed the dispute to some competent administrative tribunals, and their decisions were rendered against the company. Although there were three months left before the eighteen-month period elapsed, recourse to the domestic judicial tribunals was still available. The tribunal rendered its award approximately four and a half years after the first domestic settlement proceeding commenced. It held that the case should not be dismissed solely on the ground that the eighteen-month period had not elapsed when the claimant instituted the ICSID proceeding, as the claimant could immediately resubmit the case because the temporal requirement had been satisfied during the arbitration proceeding.[203]

The situation in *TSA* is different from the case where the domestic remedy has never been sought. In *TSA*, the eighteen-month period had started since the first filing of the claim to the domestic competent tribunal. This author agrees with the *TSA* tribunal that the strict interpretation of the prior recourse provision—that the time must elapse before the ICSID proceeding could proceed—would lead to a manifestly absurd and unreasonable result. Namely, the arbitral tribunal would have had to dismiss the case on the ground of admissibility, and the investor could then file the same dispute immediately had eighteen months passed since the institution of the domestic proceeding. Hence, the claim should be admissible. However, in the case where, at the time when the tribunal has to decide on the issue of admissibility,

---

[202] J. Romesh Weeramantry, *supra note* 190, p.201 para.6.120.

[203] See the discussion of *TSA* in Part 3.2.2.

the eighteen-month period has not yet elapsed, it should temporarily withhold the award and wait until the time expires before it continues the proceeding. This approach would preserve the true meaning of the provision and at the same time facilitate the use of international arbitration in practice.

6.2.3 Extraordinary Ineffective Domestic Legal Remedies

In *BG*, the tribunal addresses certain special circumstances that immensely affected its decision: Argentina enacted several executive decrees that had utterly aggravated the efficiency of the country's judiciary. These measures were the stay of all cases related to the application of the country's emergency measures, the interference with the court proceedings, and the sanction imposed upon the investors bringing their disputes to the courts.[204] The question was thus whether this kind of situation would exempt the investor from complying with the eighteen-month requirement as it was due to the host state's actions that the domestic legal remedies became meaningless.

A strict application of the eighteen-month condition here would allow the host states to unilaterally issue measures to undermine the use of its local remedies and benefit from such actions. The measures would definitely make the recourse to domestic competent tribunals useless, and the eighteen-month prerequisite would be nothing but a prolonged meaningless period. Therefore, this author opines that such an interpretation leads to an absurd and unreasonable application of the treaty and concurs with the *BG* tribunal's decision. However, this author does not believe that Article 32 can be directly applied in this case, for the provision only provides the interpreter with an option to refer to other supplementary means such as the BIT's *travaux préparatoires*. In other words, the approach that has to be applied in this circumstance is not to refer to those supplementary means but to find other interpretations that would not lead to absurd or unreasonable results. Nonetheless, Article 32 can be indirectly applied as a signaling tool that the finding of the ordinary meaning of the text resulting in an absurd or unreasonable outcome is not acceptable under the VCLT. Hence, other methods of interpretation should be applied in such exceptional circumstances.

Moreover, this author does not agree with the tribunal's approach of interpretation in *Wintershall,* which adopts the principle of contemporaneity and concludes that the situation of Argentina's courts at the time of the dispute was not

[204] See the discussion of *BG* in Part 3.2.1.

relevant to its determination. Under this contemporaneity principle, the treaty must be interpreted in a way that reflects its original meaning at the time of the conclusion, which may or may not be appropriate to the contemporary situation. Therefore, this principle should be used limitedly; it should not be applied in the case where contemporary surrounding circumstances are markedly different from those in the past.[205]

7. Conclusion

Under modern BITs, the contracting states generally ascribe foreign investors with the right to refer investment disputes to international arbitration. However, according to certain BITs, the aggrieved investor may not be able to institute international arbitration immediately after the dispute arises because the state parties have prescribed some procedural conditions to be fulfilled before arbitral tribunals, though having jurisdiction over the dispute, can hear the cases. Prior recourse to host states' domestic administrative and judicial tribunals is one of such procedural requirements. Having reviewed the relevant provisions in some representative BITs, this author opines that they clearly prescribe that the investor has to fulfill such requirement before international arbitration can be brought into play.

However, sometimes, this interpretation may result in absurd or unreasonable consequences. For example, the domestic proceedings may be defective as a result of host states' measures, that referring cases to such proceedings would not lead to any advantages but unnecessary delay and useless costs. Hence, the requirement should not be treated as an absolute impediment to the submission of disputes to international arbitration since it will attenuate the efficiency of the international dispute settlement system that has long been considered a necessary factor behind the rise of foreign investment.

Therefore, the system should provide the arbitral tribunal with discretionary power to decide whether disputes should be heard on a case-by-case basis. That said, the tribunal should prudently exercise this competence by properly balancing the object and purpose of such requirement as agreed upon by the contracting states and the consequences of their legal application. In any case, because this decision is admissibility-related, once a tribunal has, within its authority, decided on the matter,

[205] See *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment (2009) ICJ Reports 214.

its controlling organ, either a domestic court or an ICSID *ad hoc* committee, would not be entitled to review such discretion.