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Cause of Action in Investment Arbitration

Key words:
Investment disputes | arbitral tribunal | Cause of action | jurisdiction | prima facie test | arbitrability | admissibility | forum clause | fork in the road clause

***Abstract** | A set of new legal instruments has emerged in investment law since investment disputes arose. Arbitrators have focused on such instruments to the detriment of conservative procedural principles. The cause of action test is one principle that can be considered as unfairly forgotten or at least deprived of its bygone significance in solving jurisdictional issues.*
However, arbitral tribunals considering international investment disputes cannot merely ignore the cause of action test, particularly when they are facing a respondent's arguments regarding the distinction between contractual claims and Bilateral Investment Treaty claims, or regarding the derivation of the putative identity of these claims from other alternative dispute-resolution mechanisms. There are plenty of awards where this test is mentioned in arbitral tribunals' conclusions on jurisdiction, but they seem to betray the ambivalent character of the arbitrators' incomplete comprehension at best, or a facile solution at worst.
This article examines the various approaches to the cause of action test that are being applied by arbitral tribunals in investment disputes.

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I. Introduction

6.01. The cause of action (COA) is an inextricable part of an arbitral tribunal's (tribunal's) findings at the jurisdictional stage in arbitration proceedings. The COA serves as a "first step" on the long road to transforming a claim into an award with certain legal consequences for the contending parties. When their dispute is considered as finally settled by the tribunal, it can't be resuscitated in any subsequent proceedings. Thus, one of the main aims of the COA test is to put greater emphasis on the prevention of multiple conflicting decisions by leading the tribunal to review the prior decisions rendered in other forums. Certainly, there are other ancillary functions of the above test which will also be examined in this paper.

6.02. Investment disputes are not necessarily settled in specific centres, such as the International Centre for Settlement of Investment Disputes (ICSID). Reference of these disputes to famous institutes of commercial arbitration is widely practiced. Also foreign investors prefer to protect their interests in court proceedings by attempting to exhaust all local remedies before the claim reaches an international level. Hence, tribunals frequently face the problem of concurrent jurisdiction. In these cases the COA test is a key instrument to apply, particularly when the claimant has already initiated proceedings in an alternative forum or this action is highly probable. Therefore, benchmarks need to be elaborated to set out clear and comprehensible rules that confine the tribunals' discretion and meet the contending parties' reasonable expectations.

II. Meaning of Cause of Action

6.03. There are two main COA arguments that are often raised by claimants or respondents in earlier proceedings and that are used to preclude subsequent proceedings. First, "cause of action estoppel" prevents a party or privy from contradicting an earlier declaration as to the existence or non-existence of a claim. Second, it "precludes the successful claimant from again recovering a second judgment for the same relief on the same claim in subsequent proceedings between the same parties."[1] According to the doctrine of merger, a claim brought in court proceedings ceases to exist upon the rendering of the judgment because the judgment merges the claim and extinguishes its legal

[1] Peter R. Barnett, Res Judicata, Estoppel and Foreign Judgments, New York: Oxford University Press Inc. 88 (2001).

force.[2] Therefore, it is very important to determine whether the legal foundation of the claim is included in the COA. In accordance with the conservative approach, the COA is comprehended only as the factual circumstances that give rise to a claim. More radical views allow widening the scope of analysis, and encompass the claimant's rights violated by respondents, the substance of the respondent's behaviour, and the legal rules considered to be a legal basis for the claim. Pursuing this logic, the causes of action may be different if they are based on different principles or rules of law, regardless of whether the claims refer to the same facts and circumstances or not.

III. Interaction of Cause of Action and Public Law

6.04. The COA test plays a significant role in determining the tribunal's jurisdiction. To pass this preliminary stage the claimant must demonstrate that the dispute possesses a key characteristic – a capacity to be settled by arbitration, so-called "arbitrability." This capacity depends on an accurate qualification of the claim, particularly the COA as one of its elements. The characterization of the dispute from this point of view is more important at the initial stage of arbitration proceedings. Therefore, the procedural nature of arbitrability outweighs its substantive connection with an arbitration agreement: "Although arbitrability is often considered to be a requirement for the validity of the arbitration agreement it is primarily a question of jurisdiction."[3]

6.05. It should be noted that only the conservative approach to determining the COA retains its meaning in terms of arbitrability. The ban on arbitrators from considering a dispute couldn't be justified merely by the fact that determination of the legal rules to be applied by the tribunal belongs to public law, which falls within the jurisdiction of the state authorities.

6.06. Different scholars use different benchmarks for arbitrability. Some adhere to the freedom of the parties to exercise their private rights,[4] others consider public policy.[5] But there is no widely accepted tendency to prohibit arbitrators from interpreting legal rules of public law or from excluding disputes from arbitration because of their public nature.

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[2] *Ibid.*

[3] JULIAN D.M. LEW, LOUKAS A. MISTELIS, STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, The Hague: Kluwer Law International 193 (2003).

[4] ALAN REDFERN, MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, London: Sweet & Maxwell 164 (4th revised ed. 2004).

[5] GIUDITTA C. MOSS, INTERNATIONAL COMMERCIAL ARBITRATION. PARTY AUTONOMY AND MANDATORY RULES, Oslo: Tano Aschehoug (Universitetsforlaget) 293 (1999).

6.07. In investment arbitration disputes have a public nature *per se*. Therefore, the arbitrators' power to consider a case is not restricted by rules of public law as they are frequently amenable to the tribunal's assessment. It can't be said however that the legal foundation of a claim doesn't affect the COA. In *Occidental* v. *Ecuador I*[6] the central issue was whether the contending parties agreed to exclude the dispute from ICSID jurisdiction in the participation agreement. The burden of proof was moved from the interpretation of the host state's domestic law to the interpretation of the investment contract. The mutual will of the parties played a more significant role than the mandatory provisions of the Ecuadorian law where the subject matter of the dispute fell within the exclusive jurisdiction of state courts.

6.08. In *Burlington* v. *Ecuador*[7] the tribunal invoked the priority of international law over domestic law with the opposite result. The controversy between the parties regarding the jurisdiction of the tribunal was whether the relevant hydrocarbons law should be classified as a tax. The negative answer on this question would have allowed the tribunal to dispense with further findings regarding its jurisdiction as the "matters of taxation" were excluded from the relevant BIT. The tribunal concluded that it was international law, not Ecuadorian law that played a key role in determining the appropriate nature of the controversial issue, so the respondent's objections were upheld.[8]

IV. Interaction of Cause of Action and *Prima Facie* Test

6.09. Most jurisdictional issues are solved at a preliminary stage before the consideration of a case on the merits. This process of bifurcation is explained by the attempt to achieve more efficiency in the ADR mechanism and avoid the waste of cost and time. Also, it discourages claimants from acting in an abusive manner by bringing claims without a reasonable chance of winning.

[6] *Occidental Petroleum Corporation, Occidental Exploration and Production Company* v. *The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction of September 9, 2008, paras 81, 85, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC810_En&caseId=C80 (accessed on September 1, 2012).

[7] *Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of June 2, 2010, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1530_En&caseId=C300 (accessed on September 1, 2012).

[8] *Burlington* v. *Ecuador*, *supra* note 7, at para. 162.

6.10. However, these honourable intentions are thwarted by the absence of a consistent approach to identification of the matters of fact and law to be assessed at the beginning of the arbitration proceedings. The intrinsic characteristic of preliminary decisions is that they always imply a certain degree of inaccuracy, which may be corrected by the tribunal in a hearing on the merits, only if the respondent is successful in rebutting the initial presumption.

6.11. To determine jurisdiction in investment disputes, tribunals apply the so-called *prima facie* test. There are two approaches elaborated in ICJ case law to implement this test. According to the first approach, concluding that the respondent's actions "could" or "might" violate the relevant treaty is necessary. The second approach is softer as it proceeds from a "sufficient plausibility" and requires that the claim be only "capable of falling within the treaty." Such mildness is supposed to be justified when arbitrators consider provisional measures which may be granted even before tackling jurisdiction issues.[9] In *Paushok* v. *Mongolia* the claimant's request for interim measures was granted by the tribunal without prejudice to the issues of jurisdiction or merits.[10]

6.12. Another approach was demonstrated in *Glamis* v. *USA*. The respondent alleged that the claim was not ripe because the claimant had not sustained a loss caused by California state measures regarding back-filling and re-contouring requirements for mines. The tribunal concluded that such arguments automatically entailed the examination of expropriation issues, which were to comprise a part of the merits.[11]

The next indicator of the *prima facie* test is the legal foundation of the claim. In determining the appropriate legal regulation, the contending parties try to achieve opposite results. The claimant expends all its efforts to demonstrate that the claim amounted to international protection of investments set out in the relevant BIT, while the respondent attempts to emphasize the contractual nature of the claim. In *CCC* v. *Argentina* the tribunal explicitly called the legal foundation of the case one of the three aspects of the *prima facie* test.[12]

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[9] *Islamic Republic of Iran* v. *United States of America* (Oil Platform case), ICJ, Order on Preliminary Objections to Jurisdiction on December 12, 1996, I.C.J. REPORTS (1996), II, 810, paras. 16-17, Judge Higgins' separate opinion, para. 32.

[10] *Sergei Paushok, CJSG Golden East Company, CJSG Vostokneftegaz Company* v. *The Government of Mongolia*, Arbitration ad hoc, constituted under UNCITRAL Rules, Order on Interim Measures on September 2, 2008, (unpublished), paras. 48, 55.

[11] *Glamis Gold, Ltd* v. *United States of America*, NAFTA case (UNCITRAL Rules), Procedural Order 2 on May 31, 2005, para. 25, available at: http://www.naftaclaims.com/disputes_us_glamis.htm (accessed on September 1, 2012).

[12] *Continental Casualty Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/09, Decision on Jurisdiction on February 22, 2006, para. 60, available at:

6.13. In the *SGS* v. *Pakistan* and *SGS* v. *Philippines* cases, the tribunals achieved opposite results in solving the jurisdiction issue. In the first case, the tribunal shared the traditional meaning of the COA associated with the factual base rather than the legal regulation. The tribunal interpreted the relevant BIT provisions setting out the jurisdiction of investment arbitration as a description of the subject matter of the dispute rather than the legal foundation of the claim. This phrase can be contemplated as a rebuttal of the claimant's comprehension of the COA: "Even though a claim for breach of contract and a claim for violation of the BIT may be based on similar or identical facts, they rely on fundamentally different legal bases and are assessed according to different standards."[13] Actually, the tribunal's interpretation of the COA remains the sole legal ground for the distinction between contract claims and BIT claims. The problem is whether this approach can be assessed as an effective and sufficient remedy for achieving fairness and justice in investment arbitration.

6.14. In *SGS* v. *Philippines* the tribunal tried to justify implementation of the *prima facie* test and called the traditional benchmarks to establish identity of the COA "technical distinctions," which "give rise to overlapping proceedings and jurisdictional uncertainty."[14]

6.15. In *Azurix* v. *Argentina* the respondent's appeal to have the COA perceived as residing in its factual base rather than the legal regulation was set aside by the tribunal as a specific NAFTA regulation, which could not be applied in the case.[15] In *CMS* v. *Argentina Republic* the respondent's attempts to flesh out the subject matter by enumerating factors to be taken into account in determining the identity of different disputes, such as the time of their arising, the origin, scope, circumstances, causes and treatment, were also unsuccessful. The tribunal simply referred to the same nature of the disputes and refused to consider their different backgrounds, including the source and time of emergence, as deciding factors: "As long as they (the respondent's actions) affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources

http://ita.law.uvic.ca/documents/ContinentalCasualty-Jurisdiction.pdf (accessed on September 2, 2012).

[13] *SGS Societe Generale de Surveillance SA* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of August 6, 2003, 8 ICSID REPORTS (2005), para. 92.

[14] *SGS Societe Generale de Surveillance SA* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of January 29, 2004, 8 ICSID REPORTS (2005), para. 132.

[15] *Azurix Corp* v. *The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of December 8, 2003, 10 ICSID REPORTS (2006), para. 87.

or emerge at different times does not necessarily mean that the disputes are separate and distinct."[16]

V. Interaction of Cause of Action and Forum Clause

6.16. The intricacy of the relationships emanating from an investment project that is governed by an investment contract on the one hand and a BIT on the other hand, can be unravelled if tribunals do not confuse the substantive and procedural issues. There can be no doubt that the terms of an investment contract may be taken into account in assessing a claimant's allegations of a respondent's breach of a BIT. But this type of consideration cannot be classified by asserting its contractual jurisdiction. Establishing the connection between "the fundamental basis of a claim" and the "independent standards" envisaged in a BIT takes priority over enforcement of any forum clauses set out in investments contracts.

6.17. The procedural nature of a forum clause can be required in pursuing the same aim – support for ICSID jurisdiction. In substantiating the enforceability of the forum clause, James Crawford elaborates the second qualification, which confines its scope to "an investment contract with the state itself, not with a separate state entity, having its own legal personality and *a fortiori* not with a third party."[17] His main argument qualifies all controversial issues arising out of the forum clause as a jurisdictional question. Breach of a BIT or "attribution of conduct to the state" relate to the other stage – settlement of the dispute on the merits.[18] Hence, the contractual jurisdiction has to be squeezed in favour of investment arbitration.

6.18. It is also worth noting that some puzzles emanating from the ignoring of a legal nature or the juggling of legal instruments are supposed to be solved by certain existing definitions adjusted to the current needs of arbitration practice. In order to prevent awkward situations where the claim is based on a BIT and the state makes a counterclaim on the investment contract, Mr. Crawford proposes considering a BIT as a contract in terms of Article 19.3. of the UNCITRAL Rules to make the counterclaim admissible.[19] It cannot be done without distorting the

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[16] *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003), para. 109.

[17] James Crawford, *Treaty and Contract in Investment Arbitration*, 24 (3) ARB. INT. 363 (2008).

[18] *Ibid.*, at 363.

[19] *Ibid.*, at 366.

nature of a BIT, which is not a private agreement, but an international treaty.

6.19. In *SGS* v. *Pakistan* the fact that the forum clause preceded the relevant provision of the BIT was the main tribunal's refusal to accept the respondent's view based on the exclusive choice of domestic arbitration. The prior agreement "could hardly constitute a waiver of rights under this treaty."[20] The tribunal demonstrated a "rigid dualism" approach, which allows the forum clause not only to compete with the "standing offer" of a BIT but also to exclude ICSID's jurisdiction. ICSID's encroachment on the settlement of commercial claims would entail its concurrent jurisdiction with that of alternative forums: the national courts and institutes of international commercial arbitration.[21] Thus, it is vitally important to consider the forum clause as a waiver of the right to investment arbitration under a BIT. Otherwise, the investor will have an advantage over the state, as the former "will have a choice between the forum stipulated in the contract and ICSID while the state will have no choice so long as the investor has not accepted ICSID's jurisdiction."[22]

6.20. The arbitral tribunal in *SGS* v. *Philippines* rejected the "rigid dualism" expressed in *SGS* v. *Pakistan*.[23] The decision to stay the ICSID proceedings pending settlement of the contractual issues in the national court should be interpreted as depriving the "standing offer" of its overriding effect in relation to the forum clause set out in the investment contract. However, the tribunal's arguments are more complicated than they seem to be at first glance.

6.21. There can be no doubt that contractual relationships are "the materialization of the investment" and "a condition precedent" to trigger the provisions of a BIT. Apparently, it doesn't mean an automatic amalgamation of contract claims and BIT claims or transubstantiation. But if the claimant's submissions refer to contractual issues, they can't be settled in investment arbitration proceedings if there is an exclusive forum clause in the investment contract. According to the tribunal's opinion in *SGS* v. *Philippines,* it is not a question of jurisdiction, but of admissibility. The sole opportunity for overcoming contractual jurisdiction is to exclude all dissension regarding the contending parties' performance of investment contracts.[24] This approach seems to sidestep establishing the COA in

[20] Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 (2) ARB. INT. 196 (2004).

[21] *Ibid.*, at 192.

[22] *Ibid.*, at 197.

[23] *Ibid.*, at 198.

[24] *SGS* v. *Philippines*, *supra* note 14, para. 154.

accordance with the legal rules governing the relationships in question – the favourable option from the claimant's point of view. The tribunal stringently confined the claimant's broad leeway to single out the legal grounds which it considered suitable for jurisdictional purposes and flagged the submissions based on contractual issues as the key factors indicating the tribunal's enforcement of the exclusive choice of alternative forums, rather than invocation of investment dispute-settlement procedures.

6.22. Unfortunately, it cannot be said that subsequent tribunals have adhered to the approach demonstrated in *SGS* v. *Philippines*. For instance, in *Impregilo* v. *Pakistan* the tribunal took a tougher stance on the distinction between contract and BIT claims. It proceeded from the view that the respondent's failure to fulfil its investment obligations can give rise to a contract claim and to a BIT claim at the same time.[25] But this identification of the time with the factual circumstances did not entail the identification of the COAs. The tribunal introduced a new benchmark to distinguish them from each other – different analyses and inquiries. In the tribunal's view, a stay of proceedings couldn't be considered as an appropriate approach because it "would confuse the essential distinction between the Treaty Claims and the Contract Claims."[26]

6.23. Although the tribunal in *Impregilo* v. *Pakistan* rejected *SGS* v. *Philippines*' approach, it reluctantly acknowledged that the claimant based its claim on the same factual circumstances. The attempt to disclose the meaning of the COA through the new words – "fundamentally different enquiries" makes no contribution to tackling the problem. It only reiterates the comprehension of the COA as the legal rules governing the controversial relationships in question. The tribunal did not solve those issues, which were supposed to carve out the activity carried out by the host state as a sovereign and could be considered a breach of the BIT standards. The arbitrators confined themselves by the assumption that the claimant might establish the above facts. Moreover, they confessed that they had no choice but to defer all these issues to the stage of the proceedings that considered the case on the merits.

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[25] *Impregilo S.p.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB 03/3, Decision on Jurisdiction on April 22, 2005, paras. 219, 258, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC642_En&caseId=C224 (accessed on September 1, 2012).

[26] *Ibid.*, para. 289.

VI. Cause of Action and the "Fork in the Road" Clause

6.24. Alongside forum clauses, "fork in the road" clauses are called upon to demarcate disputes arising out of investment contracts from international investment arbitration. These clauses envisage the negative consequences to an investor that has submitted a dispute to the national court of a state. The investor is considered to be deprived of the right to bring the claim before a specific center for settlement of investment disputes.

6.25. In contrast to forum clauses, the fork in the road mechanism is set out directly in a BIT. Hence, it possesses more power to be considered as a waiver of international investment arbitration.

6.26. The claimant's objections to the interpretation of the COA alleged by the respondent frequently make up a significant part of the arguments against triggering the fork in the road clause. The tribunal in *CMS* v. *Argentina* agreed with the claimant that the nature of the two claims in question was not the same. The first one brought before the Federal Supreme Court concerned the contractual arrangements under the license and the second affected BIT rights. Also, as noted above, the tribunal pointed out that the parties to the court process and investment arbitration proceedings were different.[27]

6.27. In contrast to *CMS* v. *Argentina*, in *Occidental* v. *Ecuador II* the claimant wasn't able to use the latter argument. Therefore, the COA seemed to be the sole benchmark for refuting the identity of disputes considered in court hearings and investment arbitration proceedings: "The Claimant contends in this respect that for two disputes to be considered identical, not only is identity of the parties and the object required, but also that of the causes of action."[28] The tribunal dismissed fork in the road objections despite the non-contractual nature of controversial issues raised in connection with the interpretation of the Ecuadorian tax law. Obviously, COAs in the state court process and investment arbitration proceedings emanated from the same factual background – the tax authorities' refusal to reimburse VAT. The factual identity of both cases was referred to by the tribunal as "cumulative effects" and "reciprocal interaction." However, bearing in mind the claimant's attempt to substantiate its claim not with reference to a breach of the participation contract, but as a breach of the BIT

[27] *CMS* v. *Argentina*, *supra* note 16, paras. 78, 80.

[28] *Occidental Exploration and Production Company* v. *The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award on July 1, 2004, para. 41, available at: http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf (accessed on September 1, 2012).

standards, the tribunal concluded that "the causes of action might be separate and the nature of the disputes different."[29]

6.28. Also, the tribunal pointed out that the claimant hadn't had a choice between arbitration proceedings and application before the local courts. The fear of forfeiting the right to challenge the tax authorities' decisions was assessed by the tribunal as a determinative factor in dismissing the fork in the road objections. These local procedural regulations envisaged in most national systems were considered as a form of duress, which excluded freedom in choosing the appropriate forum for settlement of disputes.[30]

6.29. To summarize, the recent trend in investment arbitration could be characterized as discrediting the role of the COA test. A tribunal's arguments against the identity of the claims are not persuasive from a strict procedural point of view. As noted above, this approach was demonstrated by the tribunal in *Occidental* v. *Ecuador II*, when the "cumulative effects and reciprocal interaction" between the cases seemed to be facile or at least insufficiently similar to distinguish them. The same attempt was made by the tribunal in *Impregilo* v. *Pakistan,* which proposed focusing on the above problem through a "fundamentally different analysis or enquiries." Such sophisticated linguistic tricks lead tribunals to deviate from confronting the controversial issues, rather than to their appropriate implementation of the COA test.

VII. Conclusion

6.30. As this article demonstrates, strict observance of the COA test does not eliminate concurrent jurisdiction between investment arbitration and other forums, including other ADR mechanisms and state courts. Tribunals settling investment disputes are not considered to be a sole remedy for the protection of the parties' interests. In this context, the legal foundation of the claim can be the required benchmark to distinguish BIT claims and contract claims, although it contradicts the conservative comprehension of the COA. The latter proceeds from the predominant role of the factual background as a key determinant of the COA test. References to the legal rules governing the dispute perform only an ancillary function. However, adherence to the conservative approach could prove, for specific centers for settlement of investment disputes, an insuperable hindrance to their acceptance of jurisdiction regarding claims submitted by investors. Certainly, it should be noted

[29] *Ibid.*, para. 58.

[30] *Ibid.*, paras. 60, 61.

that the approach that gives priority to the legal foundation of the claim confers an unfettered discretionary power on tribunals and leads to more uncertainty for the parties and unpredictability as to the outcome of their reasonable expectations. The various linguistic tricks employed by tribunals and discussed in this research serve to hide the identity of claims and distort the meaning of the COA test.

6.31. The urgent problem is determining which one of the two above approaches should be chosen. Apparently, the former is suitable from a political point of view and would encourage the popularization of investment arbitration, while the conservative approach, on the contrary, although conforming to classical procedural theories, poses an inconvenient obstacle to passing the COA test.

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Summaries

DEU [***Der Klagegrund im Schiedsverfahren in Investitionssachen***]

Im Investitionsschutzrecht ist seit der Zeit, als Investitionsstreitigkeiten als eigenständiges Konzept entstanden, eine Reihe neuer rechtlicher Instrumente aufgetaucht. Schiedsrichter haben sich auf Kosten konservativer Prozessgrundsätze auf diese Instrumente eingeschworen. So ist das Kriterium des Klagegrunds ein Prinzip, welches als zu Unrecht vernachlässigt bezeichnet werden darf, bzw. doch wenigstens als Prinzip, welches seiner ursprünglichen Bedeutung für die Lösung von Fragen der Zuständigkeit (Jurisdiktion) beraubt wurde. Dennoch können Schiedstribunale, die sich mit internationalen Investitionsstreitigkeiten befassen, das Kriterium des Klagegrunds nicht einfach außer Acht lassen, vor allem insoweit sie sich Einwendungen seitens der beklagten Partei ausgesetzt sehen, was die Diskrepanz zwischen vertraglichen Ansprüchen und den Ansprüchen gemäß bilateralen Investitionsschutzabkommen anbelangt, bzw. deren vorgebliche Übereinstimmung, die aus der Geltendmachung anderer alternativer Streitbeilegungsmethoden hergeleitet wird. In einer Reihe von Schiedssprüchen wird dieses Kriterium im Rahmen der Entscheidung des Schiedstribunals über seine eigene Zuständigkeit erwähnt; es scheint aber so zu sein, dass die dort getroffenen Schlussfolgerungen (im besseren Falle) den ambivalenten Charakter des Verständnisses der Schiedsrichter zum Ausdruck bringen, bzw. (im schlechteren Falle) lediglich eine oberflächliche Lösung darstellen. Gegenstand dieses Beitrags ist eine Analyse der fallweise unterschiedlichen Art und Weise, mit der Schiedstribunale in Investitionssachen an das Kriterium des Klagegrunds herantreten.

CZE [***Žalobní důvod v investičním rozhodčím řízení***]
V právu ochrany investic se od okamžiku vzniku investičních sporů objevila řada nových právních nástrojů. Rozhodci se na tyto instrumenty zaměřili na úkor konzervativních procesních zásad. Kritérium žalobního důvodu je principem, který lze považovat za neprávem opomíjený, či alespoň zbavený svého dřívějšího významu při řešení jurisdikčních otázek.
Nicméně rozhodčí senáty zabývající se mezinárodními investičními spory nemohou kritérium žalobního důvodu jednoduše přehlížet, zejména pokud čelí námitkám žalovaného ohledně rozdílů mezi smluvními nároky a nároky plynoucími z dvoustranné dohody o ochraně investic, či jejich domnělé totožnosti odvozené z uplatnění jiných alternativních způsobů řešení sporů. V řadě rozhodčích nálezů je toto kritérium zmiňováno v rozhodnutí rozhodčího senátu o jeho pravomoci (příslušnosti), nicméně se zdá, že tyto závěry vykazují ambivalentní povahu co do chápání ze strany rozhodců (v tom lepším případě), či jsou pouze povrchním řešením (v tom horším případě).
Předmětem tohoto příspěvku je rozbor různých přístupů ke kritériu žalobního nároku, tak jak jej používají rozhodčí senáty v investičních sporech.

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POL [***Podstawa skargi w inwestycyjnym postępowaniu arbitrażowym***]
Podstawa skargi jest jednym z aspektów rozstrzygania w sprawie uprawnień (właściwości), często stosowanym przez trybunały arbitrażowe zajmujące się sporami inwestycyjnymi. Ponieważ chodzi o czysto krajowy instrument procesowy, podstawa skargi stała się integralną częścią argumentacji sędziów arbitrażowych pochodzących z różnych krajów w ramach uzasadniania pozytywnych lub negatywnych wniosków względem istnienia uprawnień (właściwości) w danej sprawie. Przedmiotem artykułu jest określenie problemów pojawiających się w związku z implementacją wyżej wymienionej procedury, kiedy wnioski trybunałów arbitrażowych są sprzeczne z konserwatywnymi zasadami prawa.

FRA [***Le motif de recours dans une procédure d'arbitrage d'investissement***]
Le motif de recours est un des aspects de l'examen de la compétence souvent utilisé par les tribunaux d'arbitrage s'occupant de litiges relatifs à des investissements. Étant donné qu'il s'agit d'un outil procédural relevant stricto sensu du droit national, le motif de recours est devenu un peu partout un élément inhérent à l'argumentation des arbitres pour

justifier leurs conclusions positives ou négatives relativement à l'existence d'une compétence dans l'affaire examinée. L'objet de l'article est d'identifier les problèmes créés par l'application de la procédure décrite ci-dessus et d'examiner en particulier les cas où les conclusions du tribunal arbitral sont en contradiction avec des principes conservateurs.

RUS [***Основание иска в инвестиционном арбитраже***]
Основание иска является одним из аспектов юрисдикционного теста, часто применяемого арбитражными трибуналами, рассматривающими инвестиционные споры. Будучи исключительно национальным процессуальным институтом, основание иска стало неотделимой частью аргументов, разрабатываемых арбитрами из разных стран, при обосновании или отрицании ими юрисдикции. Цель статьи заключается в том, чтобы раскрыть спорные вопросы применения вышеназванного института, особенно, случаи, когда выводы арбитражных трибуналов не согласуются с традиционными принципами права.

ESP [***Motivos de recurso en el procedimiento del arbitraje de inversiones***]
El motivo de recurso es uno de los aspectos del estudio de la competencia (ámbito de aplicación), que es utilizado, a menudo, por los tribunales de arbitraje encargados de pleitos relativos a las inversiones. Considerando que se trata de un instrumento procesal puramente nacional, el motivo de recurso se ha convertido en parte integrante de los argumentos utilizados por los árbitros procedentes de varios países para explicar los motivos de su laudo positivo o negativo sobre la existencia de la competencia (ámbito de aplicación) en la causa. El argumento del artículo es la identificación de los problemas derivados de la implementación del procedimiento previamente citado, en particular, en los casos cuyos laudos arbitrales resultan contrarios a los principios legales conservadores.

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