
What is a Legal Dispute?

*Christoph Schreuer**

I. Do You Really Know It When You See It?

It may seem inappropriate to write about disputes in a volume dedicated to Gerhard Hafner. He is the most peaceable and good natured person one could possibly imagine. If international politics were run by people of his disposition, the world would be a much better place. Alas, this is not the case and Gerhard Hafner is fully aware of this reality. Indeed his work reflects the importance of methods for the peaceful settlement of international disputes.¹

Provisions on the peaceful settlement of disputes, by definition, presuppose the existence of disputes for their application. Article 33 of the UN Charter is an obvious example.² The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice the existence of a dispute may be in doubt and may itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal.

The existing definitions have done little to clarify questions that arise in this context. Black's Law Dictionary circumscribes 'dispute' as 'a conflict or controversy, esp. one that has given rise to a particular lawsuit'.³

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have addressed the issue of the existence of a dispute in several cases. In

* The author wishes to express his gratitude to Ursula Kriebaum and to Clara Reiner for valuable comments on an earlier version of this paper.

¹ G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', in United Nations (ed.), *International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law* 559 (1995); G. Hafner, 'Some Legal Aspects of International Disputes', 104 *The Journal of International Law and Diplomacy* 65 (2005).

² 1945 Charter of the United Nations, art. 33(1): 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

³ B. A. Garner (ed.), *Black's Law Dictionary* (1999).

the *Mavrommatis Palestine Concessions* case, the Permanent Court gave the following broad definition:

‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’⁴

In another case, the ICJ referred to

‘a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.’⁵

The Tribunal in *Texaco v. Libya* referred to a ‘present divergence of interests and opposition of legal views’.⁶

ICSID tribunals have adopted similar descriptions of ‘disputes’, often relying on the PCIJ’s and ICJ’s definitions.⁷

Gerhard Hafner has described these definitions as too wide and too narrow at the same time.⁸ A look at judicial practice proves him right. Whether a dispute in the technical sense exists is rather more complex than these definitions would suggest. Practice also demonstrates that, far from being a purely academic issue, the existence *vel non* of a dispute can be decisive to determine a court’s or tribunal’s jurisdiction.

The present contribution seeks to shed some light on the concept of disputes, particularly legal disputes, by reference to the practice of the International Court and investment tribunals. Taking the PCIJ’s definition in *Mavrommatis* as a starting point, it addresses the following issues:

- Under what circumstances does ‘a disagreement’ or ‘conflict’ become a dispute? Does the communication between the parties need to reach a certain level of intensity to qualify as a dispute?

⁴ *Mavrommatis Palestine Concessions* (Greece *v.* Great Britain), Judgment of 30 August 1924, 1924 *PCIJ* (Ser. A) No. 2, at 11.

⁵ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 *ICJ Rep.* 65, at 74.

⁶ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic*, Preliminary Award of 27 November 1975, 53 *ILR* 389, at 416 (1979).

⁷ *Maffezini v. Spain*, Decision on Jurisdiction of 25 January 2000, 40 *ILM* 1129, at paras. 93, 94 (2001); *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction of 29 April 2004, at paras. 106, 107; *Lucchetti v. Peru*, Award of 7 February 2005, at para. 48; *Impregilo v. Pakistan*, Decision on Jurisdiction of 22 April 2005, at paras. 302, 303; *AES v. Argentina*, Decision on Jurisdiction of 26 April 2005, at para. 43; *El Paso Energy Intl. Co. v. Argentina*, Decision on Jurisdiction of 27 April 2006, at para. 61; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction of 16 May 2006, at para. 29; *M.C.I. v. Ecuador*, Award of 31 July 2007, at para. 63.

⁸ G. Hafner, ‘The Physiognomy of Disputes and the Appropriate Means to Resolve Them’, *supra* note 1, at 560.

- Who determines whether the dispute is ‘on a point of law or fact or a conflict of legal views’? What if a party describes the dispute as political and hence as non-legal?
- How does the court or tribunal determine whether the dispute represents a conflict ‘of interests between’ the parties? How does it deal with the argument that the issue before it is hypothetical and not sufficiently concrete to be susceptible of judicial resolution?

In addition to definitional issues, certain jurisdictional arguments are closely related to the existence of a dispute:

- One party may argue that the dispute, if indeed there is one, is with a third party to which the claimant should turn.
- The existence of a dispute may be uncontested but it may be disputed whether it has arisen before a date critical for the jurisdiction of a court or tribunal.

II. The Process of Communication Leading to a Dispute

The existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant’s position if only indirectly. Practice demonstrates that the threshold required in terms of communication between the parties for the existence of a dispute is fairly low. In certain situations a dispute may exist even in the absence of active opposition by one party to the claim of the other party.

A. Intensity of Communication

In a number of cases the question arose as to whether the communications between the parties, before the initiation of proceedings, had reached an intensity that deserved the designation as a dispute.⁹ In the *Interpretation of Peace Treaties* case the ICJ was confronted with the question as to whether the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand, and certain Allied and Associated Powers signatories to the Peace Treaties on the other, amounted to a dispute. The Court gave an affirmative response on the basis of a finding that the two sides had expressed clearly opposing views concerning their treaty obligations. The Court said:

‘Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the

⁹ See also *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, 1988 *ICJ Rep.* 12, at para. 35.

diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.¹⁰

In the *South West Africa* cases, the ICJ found that it had to address the preliminary question as to the existence of a dispute since its competence under the Mandate and under Articles 36 and 37 of its Statute depended on a positive finding on this issue. After quoting the well-known definition from *Mavrommatis* it said:

‘In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.’¹¹

In the *Certain Property* case, there had been bilateral consultations between Germany and Liechtenstein. Germany argued that ‘a discussion of divergent legal opinions should not be considered as evidence of the existence of a dispute in the sense of the Court’s Statute “before it reaches a certain threshold”’.¹² After quoting from the *South West Africa* cases and briefly describing the divergences between the parties, the Court said:

‘The Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence (...), the Court concludes that ‘[b]y virtue of this denial, there is a legal dispute’ between Liechtenstein and Germany.’¹³

These cases indicate that the threshold for the existence of a dispute in terms of prior communication between the parties is fairly low. The exchanges between the parties

¹⁰ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, *supra* note 5, at 74.

¹¹ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, 1962 *ICJ Rep.* 319, at 328.

¹² *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, 2005 *ICJ Rep.* 6, at para. 23.

¹³ *Ibid.*, para. 25.

do not require a high degree of intensity or acrimony. The formulation of opposing positions by the parties is sufficient.

B. Absence of Opposition

If a dispute and hence the jurisdiction of international courts and tribunals depends on the formulation of opposing positions, what if the respondent simply acknowledges the position of the claimant yet fails to provide a remedy? The mere admission of liability cannot be a valid defence in legal proceedings and will not deprive the court or tribunal of its jurisdiction. Under these circumstances, the absence of an overt disagreement between the parties will not negate the existence of a dispute.

Sir Robert Jennings has described this dilemma in the following terms with respect to the ICJ:

‘[C]an the Court, in its contentious jurisdiction, pass upon a question of law or fact, even if that point is not strictly *disputed* between the parties? For it is not difficult, certainly in municipal law, to imagine cases in which there is no real legal dispute between two persons; yet a court might have undoubted competence. If a debtor freely acknowledges the sum and due day of a debt but simply does nothing about it, the creditor can surely sue and get the court to enforce payment of the debt, even if there is no true ‘legal dispute’ or even dispute about fact, before the Court. [...] Even in a case which follows normal procedures there is often agreement between the parties on certain points of law or fact, often quite important ones. It has never been suggested that this absence of dispute removes the point from the Court’s competence.’¹⁴

The *Headquarters Agreement* case¹⁵ concerned the Headquarters Agreement between the United Nations and the United States. The United Nations, noting the existence of a dispute, invoked the Agreement’s Article 21 that provides for arbitration. The United States took the position that it ‘had not yet concluded that a dispute existed’.¹⁶ The General Assembly requested an advisory opinion from the ICJ on the question as to whether the United States was under an obligation to enter into arbitration under Article 21 of the Agreement.¹⁷ One of the questions before the Court was whether there was, in fact, a dispute triggering the obligation to go to arbitration. The United Nations had on several occasions asserted the incompatibility of certain US legislation with the Headquarters Agreement. But the United States had never formally contested that

¹⁴ R. Jennings, ‘Reflections on the Term “Dispute”’, in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* 401, at 404 (1993).

¹⁵ Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9.

¹⁶ *Ibid.*, 29, para. 39.

¹⁷ *Ibid.*, 13.

position. The Court found that the lack of refutation of the UN position by the United States did not negate the existence of a dispute. The Court said:

'37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken 'irrespective of any obligations the United States may have under the [Headquarters] Agreement' [...].

38. In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.'¹⁸

In *AGIP v. Congo*,¹⁹ the Government had expropriated the Claimant's assets without compensation in violation of a prior agreement. Before the ICSID Tribunal, the Government declared that there was no longer any dispute since it had recognised the principle of compensation.²⁰ The Tribunal found that the declarations made by the Government were so lacking in precision that the continuing existence of the dispute was not in doubt. It noted that the Claimant had not, in fact, received any compensation. In addition, the claim was directed not only at compensation for the nationalisation but also at damages for losses resulting from the Government's violations of its contractual obligations.²¹

C. Failure to Respond

Failure to respond to the demands of the other party will not exclude the existence of a dispute. Silence of a party in the face of legal arguments and claims for reparation by the other party cannot be taken as expressing agreement and hence the absence of a dispute. In the *Headquarters Agreement* case, the ICJ, referring to the *Teheran Hostages* case,²² noted the lack of appearance of Iran in that case. It saw no obstacle

¹⁸ *Ibid.*, 28.

¹⁹ *AGIP v. Congo*, Award of 30 November 1979, 1 *ICSID Rep.* 306 (1993).

²⁰ *Ibid.*, 307, 317.

²¹ *Ibid.*, 317, 326.

²² *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 *ICJ Rep.* 3, at 24.

to the existence of a dispute and hence to its jurisdiction in the lack of response to the claims of the United States on the part of Iran. The Court said:

‘Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a ‘dispute’; in order to determine whether it had jurisdiction [...].’²³

Investment tribunals have similarly noted the lack of response by a party to the demands of the other.²⁴ This did not affect the existence of a dispute between them.

It follows that normally a dispute will be characterized by a certain amount of communication demonstrating opposing demands and denials. This is obviously what the PCIJ had in mind in *Mavrommatis* when it referred to a ‘conflict of legal views or of interests between two persons’. But an acknowledgement of the other side’s position unaccompanied by a remedy or even a simple failure to respond will not exclude the existence of a dispute. The decisive criterion for the existence of a dispute is not an explicit denial of the other party’s position but a failure to accede to its demands.

III. The Legal Nature of the Dispute

If dispute settlement is to be achieved by judicial means, such as the ICJ or investment arbitration, the use of these means is conditioned on the existence of a *legal* dispute. Article 36(3) of the UN Charter states that legal disputes should, as a general rule, be referred to the ICJ.²⁵ Article 36(2) of the ICJ’s Statute refers to legal disputes when providing for submission by States under the so-called optional clause. Article 38(1) of the Statute states that the ICJ’s function is to decide the disputes submitted to it in accordance with international law.²⁶ The ICSID Convention in Article 25(1) refers to legal disputes that may be resolved by conciliation or arbitration.²⁷

²³ Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9, at 28, para. 38.

²⁴ *Tradex v. Albania*, Decision on Jurisdiction of 24 December 1996, 5 *ICSID Rep.* 60, at 61 (2002); *AAPL v. Sri Lanka*, Award of 27 June 1990, 4 *ICSID Rep.* 251 (1997).

²⁵ 1945 Charter of the United Nations, art. 36(3): ‘In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.’

²⁶ 1945 Statute of the International Court of Justice, art. 38(1): ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...]’

²⁷ 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 ICSID Convention), 575 *UNTS* 159, 4 *ILM* 524 (1965), art. 25(1): ‘The

Even where the existence of a dispute is admitted, its legal nature may be contested. Some respondents have argued that the nature of the dispute at issue was not legal and that hence the court or tribunal lacked jurisdiction.

The legal nature of disputes is sometimes described in terms of factual situations and the consequences engendered by them. Examples are the use of force, application of a treaty, expropriation or breach of an agreement. But fact patterns alone do not determine the legal or non-legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not. Thus, it is entirely possible to react to a breach of an agreement by relying on moral standards by invoking concepts of justice or by pointing to the lack of political wisdom of such a course of action. The dispute will only qualify as legal if legal rules contained, for example, in treaties or legislation are relied upon and if legal remedies such as restitution or damages are sought. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms.

The ICJ has looked unfavourably upon the argument that disputes before it were of a political rather than legal nature and were hence outside its jurisdiction. It has stated repeatedly, both in contentious proceedings and in proceedings leading to advisory opinions, that it will not abdicate its function, merely because a case before it has political implications.

In the *Teheran Hostages* case,²⁸ Iran advanced the argument that the question before the ICJ represented only a marginal and secondary aspect of an overall situation containing much more fundamental and complex elements. The Court should examine the whole political dossier of the relations between Iran and the United States over the last 25 years.²⁹ The Court rejected this argument. After noting that the seizure of the US Embassy and Consulate and the detention of internationally protected persons as hostages cannot be considered as something marginal or secondary, it said:

'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.'³⁰

jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...].'

²⁸ United States Diplomatic and Consular Staff in Tehran, *supra* note 22.

²⁹ *Ibid.*, 19, para. 35.

³⁰ *Ibid.*, 20, para. 37.

In the *Nicaragua* case,³¹ the United States objected to the claim not because the dispute was political but because the matter was essentially one for the Security Council since it involved a complaint involving the use of force.³² This argument also did not find favour with the ICJ:

[T]he Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*. [...] The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the *Corfu Channel* case (*I.C.J. Reports* 1949, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.³³

The ICJ restated its dismissal of a ‘political questions doctrine’ in 2004 in an advisory opinion. In the *Israeli Wall* case,³⁴ it rejected the view that it had no jurisdiction because of the political character of a question put before it. The fact that a legal question also has political aspects was not sufficient to deprive it of its character as a legal question. The Court summarized its own practice in the following terms:

[T]he Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the ‘political’ character of the question posed. As is clear from its long standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

“as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to deprive the Court of a competence expressly conferred on it by its Statute’ (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports* 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports* 1947 1948, pp. 61 62; *Competence of the General Assembly for*

³¹ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 *ICJ Rep.* 293.

³² *Ibid.*, 431-436, paras. 89-98.

³³ *Ibid.*, paras. 93, 95, 96; see also Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, 1986 *ICJ Rep.* 14, at 26-28, paras. 32-35.

³⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 *ICJ Rep.* 136.

the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155).” (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that,

“in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate ...”. (*I.C.J. Reports 1980*, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that

“the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion” (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.³⁵

The ICSID Convention specifically refers to a ‘legal dispute’ when circumscribing the competence of tribunals.³⁶ The legal character of disputes gave rise to some debate in the Convention’s drafting.³⁷ The Report of the Executive Directors offers the following clarification:

‘26. [...] The expression ‘legal dispute’ has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.’³⁸

Investment tribunals were also confronted with the argument that disputes before them, or certain aspects of these disputes, were not legal in nature and hence outside

³⁵ *Ibid.*, 155, para. 41.

³⁶ 1965 ICSID Convention, art. 25(1): ‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.’

³⁷ C. Schreuer, *The ICSID Convention: A Commentary*, art. 25, at paras. 39, 40 (2001).

³⁸ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, 1 *ICSID Rep.* 23, at 28 (1993).

their jurisdiction. *CSOB v. Slovakia* arose from arrangements for the privatization and consolidation of the Claimant, a former State bank, after the separation of the Czech and Slovak Republics.³⁹ Under these arrangements, Slovakia had assumed a guarantee for a loan but then defaulted on this obligation. Before the Tribunal, Slovakia, while not questioning the legal nature of the dispute, stressed its political nature and its close link with the dissolution of the former Czech and Slovak Federal Republic. The Tribunal pointed out that the claim was based on an agreement between the parties to the dispute. It said:

‘While it is true that investment disputes to which a State is a party frequently have political elements or involve governmental actions, such disputes do not lose their legal character as long as they concern legal rights or obligations or the consequences of their breach.’⁴⁰

In *Continental Casualty v. Argentina*⁴¹ the Claimant had invested in the insurance business in Argentina. It claimed that Argentina had enacted a series of decrees and resolutions that destroyed the legal security of the assets held by the investor. Argentina submitted that in order to meet the requirement of a legal dispute the claim must concern rights, obligations and legal titles, not some undesirable consequences whose proximate cause is not the host State’s conduct in respect of its investment.⁴² The Tribunal found that the Claimant had made legal claims. It said:

‘67. In this case, the Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.’⁴³

In *Suez v. Argentina*,⁴⁴ the Claimants had invested in water distribution and waste water services in Argentina. When the Argentine economy experienced a severe crisis, the government enacted measures that resulted in a significant depreciation of the Argentine Peso. Claiming that these measures injured their investments in violation of the commitments made to them, the Claimants sought to obtain adjustments in the tariffs as well as modifications in their operating conditions.⁴⁵ Argentina argued that there was no legal dispute but rather a business or commercial dispute. The dispute

³⁹ *CSOB v. Slovakia*, Decision on Jurisdiction of 24 May 1999, 5 *ICSID Rep.* 335 (2002).

⁴⁰ *Ibid.*, paras. 60, 61.

⁴¹ *Continental Casualty v. Argentina*, Decision on Jurisdiction of 22 February 2006.

⁴² *Ibid.*, para. 37.

⁴³ *Ibid.*, para. 67.

⁴⁴ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, *supra* note 7.

⁴⁵ *Ibid.*, para. 24.

over the effects of the devaluation measures was one over policy and fairness and hence not legal in nature. The Tribunal rejected this objection and said:

‘A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. [...] In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. [...] [T]he dispute as presented by the Claimants is legal in nature.’⁴⁶

Other ICSID tribunals have similarly held that the decisive factor in determining the legal nature of the dispute was the assertion of legal rights and the articulation of the claims in terms of law.⁴⁷

It follows from the practice, as set out above, that the legal nature of a dispute depends not on the factual circumstances of a case but on the position taken by the claimant. If the claimant presents its claim in terms of rights and legal remedies, the argument that the dispute is not legal will be to no avail.

IV. Hypothetical Disputes

In order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. It is not the task of international adjudication to clarify legal questions *in abstracto*.⁴⁸ The dispute must relate to clearly identified issues between the parties and must be more than academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. Actual or concrete damage is not required before such a party may bring legal action. But the dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.

⁴⁶ *Ibid.*, paras. 34, 37.

⁴⁷ *Lanco v. Argentina*, Decision on Jurisdiction of 8 December 1998, at para. 47; *Gas Natural SDG, S.A. v. Argentina*, Decision on Jurisdiction of 17 June 2005, at paras. 20-23; *Camuzzi v. Argentina*, Decision on Jurisdiction of 11 May 2005, at para. 55; *AES Corp. v. Argentina*, *supra* note 7, at paras. 40-47; *Sempra Energy Intl. v. Argentina*, Decision on Jurisdiction of 11 May 2005, at paras. 67, 68; *Bayindir v. Pakistan*, Decision on Jurisdiction of 14 November 2005, at paras. 125, 126; *El Paso Energy Intl. Co. v. Argentina*, *supra* note 7, at paras. 47-62; *Jan de Nul et al. v. Egypt*, Decision on Jurisdiction of 16 June 2006, at para. 74; *National Grid PCL v. Argentina*, Decision on Jurisdiction of 20 June 2006, at paras. 142, 143, 160; *Pan American and BP Argentina Exploration Company v. Argentina*, Preliminary Objections, Judgment of 27 July 2006, at paras. 71-91; *Saipem v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, at paras. 93-97.

⁴⁸ *See also AES Corp. v. Argentina*, *supra* note 7, at para. 43.

In the *Headquarters Agreement* case,⁴⁹ the United States had passed legislation designed to lead to the closure of the PLO Mission to the United Nations, but had not actually taken action to close the Mission. The United States took the position that there was no dispute, since the legislation had not yet been implemented. Also, pending litigation in the domestic courts, no other action to close the Mission would be taken.⁵⁰ The ICJ refused to accept, under these circumstances, that there was no dispute. It said:

“The Court cannot accept such an argument. While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts. [...] [T]he Court is obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement.”⁵¹

In the *Arrest Warrant Case*,⁵² the ICJ ruled that Belgium had violated international law by allowing a Belgian judge to issue and circulate an arrest warrant against the incumbent Foreign Minister of the Congo. No actual arrest had ever taken place under the arrest warrant. The Court did not accept the distinction between actual arrest and the circulation of a document that may lead to an arrest. It found that the mere issue of the warrant violated immunity, which the Foreign Minister enjoyed.⁵³

In *Enron v. Argentina*,⁵⁴ some provinces of Argentina had assessed taxes that the Claimants described as exorbitant and sufficient to wipe out the entire value of their investment. Argentina argued that the claim was hypothetical since the taxes had been assessed but not collected. Claimants pointed out that the taxes had not been collected only because the Supreme Court ordered a temporary injunction. The Tribunal refused to accept, under these circumstances, that the dispute was merely hypothetical. It said:

“The Tribunal is mindful of the fact that once the taxes have been assessed and the payment ordered there is a liability of the investor irrespective of the actual collection of those amounts. This means that a claim seeking protection under the Treaty is not hypothetical but relates to a very specific dispute between the parties.”⁵⁵

⁴⁹ Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9.

⁵⁰ *Ibid.*, 29-30, paras. 39-43.

⁵¹ *Ibid.*, paras. 42-43.

⁵² Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002, 2002 *ICJ Rep.* 3.

⁵³ *Ibid.*, 29-30, paras. 70-71.

⁵⁴ *Enron v. Argentina*, Decision on Jurisdiction of 14 January 2004, 11 *ICSID Rep.* 273 (2007).

⁵⁵ *Ibid.*, para. 74. See also *Continental Casualty v. Argentina*, *supra* note 41, at para. 92.

In some cases, the allegedly hypothetical nature of the claims is related to the *quantum* of damages. In *Pan American v. Argentina*,⁵⁶ the Respondent complained that the damages claimed were hypothetical, conjectural and speculative.⁵⁷ The Tribunal found that a certain degree of uncertainty about the *quantum* of damages was inevitable at the jurisdictional stage. This did not affect its jurisdiction, provided the Claimants were able to demonstrate *prima facie* that some damage had occurred. The Tribunal said:

‘177. It is, [...] in the nature of disputes such as the present one that some of the damage is concrete and specific in that it has occurred already, while some, which may occur later, is not yet specified but is more or less foreseeable under the circumstances. As shown in *Enron I* [...], the threshold of certainty in that respect is relatively low.

178. This fact is easily explained. Many investment disputes arise from situations with continuing adverse effects on the claimants and these will have to be taken into account by the arbitral tribunal called upon to deal with those disputes, at least regarding damage that was uncertain at the jurisdictional phase but crystallised at the merits stage. This is one of the reasons why the present Tribunal, at this point, dismisses the present objection, all the more so because the Claimants, *prima facie*, have demonstrated their assertion that some damage *has* occurred. The final amount of damages will of course have to be determined during the proceedings on the merits if the Respondent is held liable. At that stage, a final assessment will have to be made, and damage that remains contingent or hypothetical at that moment will have to be ruled out.’⁵⁸

In other cases, tribunals rejected arguments by respondents to the effect that they had recognized their liability to pay compensation but had not yet managed to calculate the amounts due.⁵⁹ Also, in a number of decisions, tribunals rejected the argument that pending negotiations between the parties made their claims premature or hypothetical.⁶⁰

These cases demonstrate that disputes will not be found hypothetical and unfit for judicial resolution because actual damage has not yet occurred. A dispute may well be the result of preliminary steps that are likely to lead to subsequent prejudicial action. Also, difficulties in quantifying damages or uncertainties about the outcome of negotiations do not negate the existence of a dispute.

⁵⁶ *Pan American and BP Argentina Exploration Company v. Argentina*, *supra* note 47.

⁵⁷ *Ibid.*, paras. 162-168.

⁵⁸ *Ibid.*, paras. 177, 178.

⁵⁹ *AGIP v. Congo*, *supra* note 19, at 317; *Siemens v. Argentina*, Decision on Jurisdiction of 3 August 2004, paras. 152, 158-161.

⁶⁰ *AES Corp. v. Argentina*, *supra* note 7, at paras. 62-71; *Camuzzi v. Argentina*, *supra* note 47, at paras. 92, 94, 97; *Sempra Energy Intl. v. Argentina*, *supra* note 47, at para. 108; *Continental Casualty v. Argentina*, *supra* note 41, at para. 93.

V. The Proper Parties to the Dispute

In a number of cases before the ICJ, respondents have argued that, even if a dispute existed, they were not the proper party. In the *Northern Cameroons* case, the United Kingdom objected that no dispute existed between itself and Cameroon and that, if any dispute did exist, it was between Cameroon and the United Nations. The ICJ rejected this contention and said:

‘The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, [...] the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute [...] between the Republic of Cameroon and the United Kingdom at the date of the Application’⁶¹

In the *East Timor* case, Australia contended that no dispute existed between itself and Portugal. Rather, Australia was being sued in place of Indonesia.⁶² The Court, after repeating the definition given by the PCIJ in *Mavrommatis*, rejected this argument and said:

‘[I]t is not relevant whether the “real dispute” is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.’⁶³

The Court found that on the record, it was clear that Portugal and Australia were in disagreement on points of law and fact. Therefore, it upheld its jurisdiction.

In the *Certain Property* case, Germany argued that the only dispute was one between Liechtenstein and the successor States of the former Czechoslovakia. Liechtenstein argued that the dispute that it had with the Czech Republic did not negate the existence of a separate dispute between itself and Germany, based on Germany’s unlawful conduct in relation to Liechtenstein.⁶⁴ The ICJ found that complaints of fact and law had been formulated by Liechtenstein against Germany and denied by the latter. It followed that a legal dispute existed between these two countries.⁶⁵

In *Wena v. Egypt*, the Claimant had been deprived of its investment by actions of Egyptian Hotel Company (EHC), a State controlled entity. Before the Tribunal, Egypt

⁶¹ Case concerning the Northern Cameroons (*Cameroon v. United Kingdom*), Preliminary Objections, Judgment of 2 December 1963, 1963 *ICJ Rep.* 15, at 27.

⁶² *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, 1995 *ICJ Rep.* 90, at 99, para. 21.

⁶³ *Ibid.*, para. 22.

⁶⁴ *Certain Property*, *supra* note 12, at 17-18, paras. 21, 22.

⁶⁵ *Ibid.*, para. 25.

contended that Wena's dispute was with EHC and that no dispute existed between Egypt and the Claimant. The Tribunal rejected this contention. It said:

'Wena has raised allegations against Egypt – of assisting in, or at least failing to prevent, the expropriation of Wena's assets – which, if proven, clearly satisfy the requirement of a "legal dispute" under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt's possible culpability.'⁶⁶

What matters for the establishment of a dispute for purposes of jurisdiction is the formulation of claims by one side that are opposed by the other side. Therefore, at the stage of jurisdiction, an international court or tribunal will be disinclined to entertain arguments as to the true parties to the conflict underlying the case. Whether these claims should be directed at another person will be decided at the merits stage of proceedings.

VI. The Time of the Dispute

The jurisdiction of international courts and tribunals is often subject to limitations *ratione temporis*. Typically, jurisdiction will extend only to events that occurred after a certain date – most often the effective date of the instrument expressing consent to jurisdiction. The relevant events may be actions leading to the dispute but may also be the dispute itself. Therefore, the existence of a dispute at a particular date may be of importance for a court or tribunal's jurisdiction.

The ICJ and its predecessor have addressed inter-temporal issues of jurisdiction in a series of decisions.⁶⁷ Three of these cases concerned declarations of States under the optional clause of Article 36(2) of the Court's Statute.⁶⁸ The fourth case concerned jurisdiction under the European Convention for the Peaceful Settlement of Disputes.⁶⁹ What these cases have in common is that the acceptances of the Court's jurisdiction excluded disputes relating to facts or situations prior to a certain date.⁷⁰

In all four cases the disputes arose after the critical dates. But the decisive issue was not the date when the dispute arose but the date of the facts or situations in relation

⁶⁶ *Wena Hotels v. Egypt*, Decision on Jurisdiction of 29 June 1999, 41 *ILM* 881, at 891 (2002).

⁶⁷ *Phosphates in Morocco (Italy v. France)*, Preliminary Objections, Judgment of 14 June 1938, 1938 *PCIJ* (Ser. A/B) No. 74; *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Preliminary Objections, Judgment of 4 April 1939, 1939 *PCIJ* (Ser. A/B) No. 77; *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, 1960 *ICJ Rep.* 6; *Certain Property*, *supra* note 12.

⁶⁸ *Phosphates in Morocco, Electricity Company of Sofia and Bulgaria, Right of Passage over Indian Territory*, all *supra* note 67.

⁶⁹ *Certain Property*, *supra* note 12.

⁷⁰ A detailed overview of the earlier cases can be found in the case concerning *Certain Property*, *supra* note 12, at 22-25, paras. 40-45.

to which the dispute arose. In the *Phosphates in Morocco* case and in the *Certain Property* case, the facts for which the dispute arose were found to have predated the critical date. The objections *ratione temporis* were consequently upheld.⁷¹ In the *Electricity Company* and in the *Right of Passage* cases, the disputes were found to have had their source in facts or situations subsequent to the critical date. The objections *ratione temporis* were consequently rejected.⁷² It follows that in these cases before the International Court, the exact date of the dispute was not decisive. Rather, the date of the events leading to the dispute determined jurisdiction.

By contrast, investment tribunals in a number of cases have had to decide whether a particular dispute was in existence at a critical date. Many bilateral investment treaties (BITs) limit consent to arbitration to disputes arising after their entry into force.⁷³ For instance, the Argentina-Spain BIT provides:

‘This agreement shall apply also to capital investments made before its entry into force by investors of one Party in accordance with the laws of the other Party in the territory of the latter. However, this agreement shall not apply to disputes or claims originating before its entry into force.’

Under a provision of this kind, the time at which the dispute arises will be of decisive importance for the applicability of the consent to arbitration. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date should not be read as excluding jurisdiction over events occurring before that date.⁷⁴ A dispute requires not only that the events have developed to a degree where a difference of legal positions can become apparent but also communication between the parties that demonstrates that difference.

In *Maffezini v. Spain*,⁷⁵ the Respondent challenged ICSID’s jurisdiction alleging that the dispute originated before the entry into force of the Argentina-Spain BIT. The Claimant relied on facts and events that antedated the BIT’s entry into force but argued that a ‘dispute’ arises only when it is formally presented as such. This, according to Claimant,

⁷¹ *Phosphates in Morocco*, *supra* note 67, at 25; *Certain Property*, *supra* note 12, at 25-27.

⁷² *Electricity Company of Sofia and Bulgaria*, *supra* note 67, at 82; *Right of Passage over Indian Territory*, *supra* note 67, at 35.

⁷³ The Tribunal in *Salini v. Jordan*, Decision on Jurisdiction of 29 November 2004, at para. 170 found that the phrase ‘any dispute which may arise’ did not cover disputes that had arisen before the BIT’s entry into force. *See also Impregilo v. Pakistan*, *supra* note 7, at paras. 297-304.

⁷⁴ For a case that fails to make this distinction *see M.C.I. v. Ecuador*, *supra* note 7.

⁷⁵ *Maffezini v. Spain*, *supra* note 7.

had occurred only after the BIT's entry into force.⁷⁶ The Tribunal, after quoting the definitions by the International Court of Justice,⁷⁷ distinguished between the events giving rise to the dispute and the dispute itself. After noting that the events on which the parties disagreed began years before the BIT's entry into force it said:

'But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.'⁷⁸

The Tribunal described the development towards a dispute in the following terms:

'[T]here tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.'⁷⁹

On that basis, the Tribunal reached the conclusion that the dispute in its technical and legal sense had begun to take shape after the BIT's entry into force:

'At that point the conflict of legal views and interests came to be clearly established leading not long thereafter to the presentation of various claims that eventually came to this Tribunal.'⁸⁰

It followed that ICSID had jurisdiction and that the Tribunal was competent to consider the dispute.

In *Lucchetti v. Peru*,⁸¹ the BIT between Chile and Peru also provided that it would not apply to disputes that arose prior to its entry into force. A series of administrative measures by local authorities had denied or withdrawn construction and operating licenses from the investors. The investors had successfully challenged the earlier administrative acts through court proceedings that took place entirely before the BIT's entry into force. A few days after the BIT's entry into force, the municipality issued

⁷⁶ *Ibid.*, paras. 92, 93.

⁷⁷ East Timor, *supra* note 62, at para. 22, with reference to earlier decisions of both the PCIJ and the ICJ.

⁷⁸ Maffezini v. Spain, *supra* note 7, at para. 95.

⁷⁹ *Ibid.*, para. 96 (footnote omitted).

⁸⁰ *Ibid.*, para. 98.

⁸¹ *Lucchetti v. Peru*, *supra* note 7.

further adverse decrees. The Tribunal found that the dispute had arisen already before the BIT's entry into force and declined jurisdiction.⁸²

In *Jan de Nul v. Egypt*,⁸³ the BIT between the BLEU⁸⁴ and Egypt also provided that it would not apply to disputes that had arisen prior to its entry into force. A dispute already existed when in 2002 the BIT replaced an earlier BIT of 1977. At that time, the dispute was pending before the Administrative Court of Ismaïlia, which eventually rendered an adverse decision in 2003, approximately one year after the new BIT's entry into force. The Tribunal accepted the Claimants' contention that the dispute before it was different from the dispute that had been brought to the Egyptian court:

'[W]hile the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs [...]'⁸⁵

This conclusion was confirmed by the fact that the court decision was a major element of the complaint. The Tribunal said:

'The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.'⁸⁶

It followed that the Tribunal had jurisdiction over the claim.

*Helnan v. Egypt*⁸⁷ concerned a clause in the BIT between Denmark and Egypt that excluded its applicability to divergences or disputes that had arisen prior to its entry into force. The Tribunal distinguished between divergences and disputes in the following terms:

'Although, the terms "*divergence*" and "*dispute*" both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which

⁸² *Ibid.*, paras. 48-59. An application for the annulment of the Award was not successful: *Industria Nacional de Alimentos (Lucchetti) v. Peru*, Decision on Annulment of 5 September 2007.

⁸³ *Jan de Nul & Dredging International v. Egypt*, *supra* note 47.

⁸⁴ Belgo-Luxembourg Economic Union.

⁸⁵ *Jan de Nul & Dredging International v. Egypt*, *supra* note 47, at para. 117.

⁸⁶ *Ibid.*, para. 128.

⁸⁷ *Helnan International Hotels A/S v. The Arab Republic of Egypt*, Decision on Jurisdiction of 17 October 2006.

indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a “*divergence*” when they are mutually aware of their disagreement. It crystallises as a “*dispute*” as soon as one of the parties decides to have it solved, whether or not by a third party.⁸⁸

On that basis, the Tribunal found that, even though a divergence had existed before the BIT’s entry into force, the divergence was of a nature different from the dispute that had arisen subsequently. It followed that the Tribunal had jurisdiction over the dispute.⁸⁹

The cases involving inter-temporal issues differ from the cases discussed earlier in one important respect: whereas in other contexts the existence of a dispute will lead to a finding of jurisdiction, here it is the non-existence of a dispute before a certain date that supports jurisdiction. Whether this situation influences the way tribunals establish the existence of a dispute and whether they will apply a higher threshold to this test as a consequence is an interesting question. The cases involved are too fact-specific and the available sample is too small to draw any reliable conclusions.

VII. Conclusion

Arguments attempting to deny the existence of a dispute have hardly ever succeeded. Therefore, an objection to jurisdiction based on the denial of a dispute between the parties is not a promising strategy.

Very little is required in the way of the expression of opposing positions by the parties to establish a dispute. In particular, the denial of the existence of a dispute by one party will be to no avail. A dispute may exist even if one party does not oppose the other party’s position but fails to provide a remedy.

The existence of a legal dispute is determined by the type of claim put forward and by the nature of the arguments supporting it. A dispute will be legal if the claim is based on treaties, legislation and other sources of law and if remedies such as restitution or damages are sought. It is in the hands of the claimant to present its claim in legal terms. Attempts by respondents to characterize disputes as political rather than legal have not succeeded. What matters are not the political circumstances but the assertion of legal rights.

A dispute must relate to clearly identified issues and must have specific consequences in order to serve as a basis for jurisdiction. A disagreement on a theoretical question is not sufficient. This does not mean that actual damage must have occurred, but merely that the issue must have some practical relevance.

The argument that the dispute is really with a third party to which the claimant should turn is unlikely to succeed. Jurisdiction will not be defeated by the fact that

⁸⁸ *Ibid.*, para. 52 (emphasis in original).

⁸⁹ *Ibid.*, paras. 53-57.

a claimant has a related dispute with another party. What matters is the existence of legal claims against the party named in the application.

The question as to whether a dispute existed at a certain point in time for purposes of jurisdiction has received diverse responses. Interestingly, in these cases it is the non-existence of a dispute before a certain date that supports jurisdiction.

