THE INVESTMENT TREATY ARBITRATION REVIEW

Third Edition

Editor
Barton Legum

THE LAWREVIEWS

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PREFACE

The past year has confirmed the usefulness of *The Investment Treaty Arbitration Review*'s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This third edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Dentons
Paris
April 2018

Part I

Jurisdiction

Chapter 1

COVERED INVESTMENT

Can Yeginsu and Ceyda Knoebel[1]

I INTRODUCTION

The definition of a covered 'investment' is a key element in determining the applicability of protections under an investment treaty to a covered investor. It delineates the scope of a state's consent to arbitrate expressed in the dispute settlement provisions of the international instrument containing that consent. Accordingly, the question of what constitutes an 'investment' is often a critical threshold question of jurisdiction.

To date, much of the debate surrounding the definition of a covered investment has centred on whether the term has an objective meaning independent of the wording of the international instrument containing the state's consent to arbitrate, or whether the meaning is derived purely from the text of the relevant instrument. That question remains unresolved.

There is no uniform definition of investment under customary international law or recognised by states in international instruments. Most investment treaties adopt an asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list comprising all types of property and contractual rights, including, most commonly:

a movable and immovable property, and property rights such as mortgages, liens and pledges;
b equity and debt participation in a company, including shares, debentures and debt instruments;
c intellectual property rights, goodwill and know-how;
d claims to money and performance under a contract having an economic value; and
e concessions or licences granted under public law or contract.

This approach is reflected in a number of different permutations developed by specific treaty language, each of which has been the subject of arbitral jurisprudence that is considered in this chapter.

Any investment dispute submitted to the International Centre for Settlement of Investment Disputes (ICSID) for resolution under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is subject to a determination of an autonomous notion of 'investment' under Article 25 of the ICSID Convention, and must therefore meet the threshold requirements for a covered investment within the meaning of the ICSID Convention. These requirements are in addition

1 Can Yeginsu is a barrister at 4 New Square Chambers and Adjunct Professor of Law at Georgetown University Law Center; Ceyda Knoebel is a solicitor advocate at Gibson, Dunn & Crutcher LLP and visiting lecturer in law at King's College London.

to the requirements under the investment treaty or agreement at issue containing a state's consent to arbitrate. This is often referred to as the 'double-barrel' test,[2] and has given rise to significant controversy in arbitral jurisprudence, as discussed further below.

II DEVELOPMENT OF TREATY LANGUAGE

Historically, most definitions of 'investment' in investment treaties (or agreements) were widely drafted and open-ended, allowing for evolving types of investment to be covered by the definition. For example, the Energy Charter Treaty (ECT), which is a sectoral multilateral treaty born from the European Energy Charter between the European Union and the former Soviet Union countries in the 1990s, includes one of the broadest definitions of investment.[3] Other treaties refer extensively to 'any kind of property invested . . . in the territory of [a Contracting Party]'.[4]

That said, not all earlier treaties adopted such wide language. Some define investment in a circular manner, referring to 'investment' within the definition itself (i.e., 'investment means any kind of asset or right related to an investment'[5] or 'investment means every kind of investment').[6] Others embrace an exhaustive list. For example, the investment chapter in the 1994 North American Free Trade Agreement between the United States, Canada and Mexico (NAFTA) covers only interests in enterprises and property, other 'interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory' and 'contracts where remuneration depends substantially on the production, revenues or profits of an enterprise'.[7] The NAFTA list also refers to debt securities in, or loans to, a company (not state enterprises) but only if the maturity of the debt is at least three years and the enterprise is an affiliate of an investor. Certain claims to money are also expressly excluded from the definition.

The discrepancy between definitions has given rise to debate as to whether 'most favoured nation' (MFN) treatment clauses in treaties with a narrow definition of 'investment' could be deployed to import a broader definition from other treaties to which the defendant state is a party. However, consistent investment treaty jurisprudence has indicated that tribunals are not willing to widen the application of MFN clauses to import a more favourable definition

2 *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, para. 55.

3 See Article 1(6) of the ECT covering every kind of asset owned or controlled by a defined investor followed by a non-exhaustive, generous list of types of assets.

4 See, for e.g., Article 1(1) of the Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, 19 July 1997.

5 See, for e.g., Article 1(2) of the Treaty between The Republic of Bolivia and the Republic of Chile concerning the Reciprocal Encouragement and Protection of Investments, 22 September 1994.

6 See, for e.g., Article 1(a) of the Treaty between the United States of America and the Republic of Kazakhstan concerning the Reciprocal Encouragement and Protection of Investment, 19 May 1992. Such circular definitions have caused tribunals to seek to give a distinct and separate meaning to the word 'investment'.

7 See Article 1139 of NAFTA.

of 'investment' from other treaties, on the basis that the definition of 'investment' is a crucial element of a state's consent to arbitrate a particular dispute, which goes to the *ratione materiae* jurisdiction of an arbitral tribunal.[8]

More recently, investment treaties and investment chapters within multinational trade agreements have departed from a purely asset-based definition, and additionally require the investment to display the 'characteristics of an investment'.

For example, the investment chapter of the EU–Vietnam Free Trade Agreement (FTA) agreed in January 2016[9] and the investment chapter of the EU–Canada Comprehensive Economic and Trade Agreement (CETA), which was released in March 2016,[10] both refer to 'every kind of asset . . . that has the characteristics of an investment' including 'the commitment of capital or other resources, the expectation of gain or profit', or 'the assumption of risk', and 'a certain duration'. The investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11) signed between 11 Pacific Rim states on 8 March 2018 adopts a similar construction, save for the reference to 'a certain duration'.[11] Before the political developments of 2016, it was expected that the investment chapter of the EU–US Transatlantic Trade and Investment Partnership agreement (TTIP) under negotiation would follow this trend. However, the negotiations remain on ice following the Trump administration's voiced scepticism towards multilateral trading blocs. Regardless, we know the United States prefers a formulation similar to those in the recent multilateral trade agreements as reflected in the 2012 US Model Bilateral Investment Treaty (BIT).[12] It is clear that these new generation investment definitions seek to limit or clarify the scope of covered investments, in contrast to the broad, open-ended definitions found in earlier treaties encompassing 'every kind of asset'.

This recent trend may be explained by states' desire to exclude expressly one-off commercial transactions for the sale of goods or services, or purely contractual claims, from the scope of investments afforded treaty protections. These types of claims have previously been found by some tribunals to fall within a traditional definition of 'investment'

8 See *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, paras. 145–163; *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013, para. 220; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, para. 133.

9 See the EU–Vietnam FTA, Chapter 8 – Trade in Services, Investment and E-Commerce, General Provisions, Article 1.4(p) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (accessed on 13 March 2018).

10 See CETA, Chapter 8 – Investment, Section A, Article 8.1 available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (accessed on 13 March 2018).

11 See TPP11, available at http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/tpp-11-treaty-text.pdf (accessed on 13 March 2018). The treaty incorporates by reference the majority of the provisions of the Trans-Pacific Partnership (TPP) as signed by Ministers on 4 February 2016 in Auckland, New Zealand. The TPP never entered into force as a result of the formal withdrawal of the United States, per guidance from President Trump in January 2017. See also, TPP Chapter 9 – Investment, Section A, Article 9.1, available at http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/9-investment.pdf (accessed on 13 March 2018).

12 See 2012 US Model BIT, Article 1: '"investment" means every asset . . . that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.

encompassing 'claims to money and performance under a contract having an economic value'. Unfortunately, there is significant inconsistency in the jurisprudence on this issue, which is difficult to rationalise on the wording of the treaties.

For example, *Joy Mining v. Egypt* involved the non-performance of a contractual obligation by an Egyptian state entity as the counterparty under a contract for the provision of mining systems and supporting equipment. The definition of 'investment' in the relevant UK–Egypt BIT includes the formulations 'every kind of asset' and 'claims to money or to any other performance under contract having a financial value'. However, the tribunal refused to assume jurisdiction over the claim on the basis that it was necessary to draw a fundamental distinction between 'ordinary sales contracts, even if complex, and an investment', since otherwise 'any sales or procurement contract involving a State agency would qualify as an investment'.[13] The tribunal in *Nova Scotia Power v. Venezuela*, a case involving contractual rights under a coal supply agreement, reached a similar conclusion under the investment definition in the Canada–Venezuela BIT, which includes 'money, claims to money, and claims to performance under contract having a financial value'.[14] The tribunal commented that '[n]either the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute'.[15]

In contrast, in *Deutsche Bank v. Sri Lanka*, the tribunal found that a hedging agreement (under which the Sri Lankan national petroleum corporation contractually failed to make a required payment to the claimant) fell within the investment definition in the Germany–Sri Lanka BIT, which covered 'claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment'.[16] Similarly, the annulment committee in *Malaysian Historical Salvors v. Malaysia* found that non-payment under a contract to find and salvage a shipwreck for the government of Malaysia constituted an investment under the UK–Malaysia BIT definition of 'investment', even though the definition only included 'claims to money or to any other performance under contract having a financial value'.[17]

Perhaps in reaction to the inconsistency of these decisions, the new generation FTAs and BITs tend to adopt more specific wording, indicating expressly when a sale of goods or a purely contractual claim is not included in the definition of 'investment'. For example, the EU–Vietnam FTA and CETA categorically exclude sale of goods claims, clarifying that such transactions would not constitute a 'claim to money' referred to in the 'investment' definition.[18] The 2012 US Model BIT and the TPP11 text provide that 'claims to payment

13 *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 58. See also *Global Trading Resource Corp and Globex International Inc v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, paras. 56–57.

14 *Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)11/1, Award, 30 April 2014, paras. 75–78.

15 Id., para. 82.

16 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 284–286. Note that Sri Lanka has since applied for the annulment of the award, which is currently pending before the ICSID annulment committee.

17 *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 61, 73–74.

18 See the EU–Vietnam FTA, Chapter 8 – Trade in Services, Investment and E-Commerce, General Provisions, Chapter 1, Article 1.4(p)(v): 'For greater certainty, "claim to money" does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or juridical

that are immediately due and result from the sale of goods or services are less likely to have [the characteristics of an investment]'[19] without completely disqualifying them. By contrast, there are recent treaties such as the 2015 Australia–China and 2008 New Zealand–China FTAs which adopt the wider ECT formula that merely requires any 'claims to money or claims to any contractual performance' to be 'associated with an investment'.[20]

III COVERED INVESTMENT IN ICSID JURISPRUDENCE

While consent of the parties to resolve their investment disputes before an ICSID tribunal 'is an essential prerequisite for the jurisdiction of the Centre',[21] Article 25 of the ICSID Convention limits the Centre's jurisdiction to disputes arising 'directly out of an investment':

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

The term 'investment' is not defined in the Convention. In this regard, the World Bank's Report of the Executive Directors on the Convention states that:

> *No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*[22]

Suggestions to include a contribution or a duration requirement or an emphasis on host state development in the Article 25 notion of investment were rejected by the negotiating states.[23] It was agreed that the precise limitation on jurisdiction of an ICSID tribunal should

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person in the territory of a Party to a natural or juridical person in the territory of the other Party, or financing of such contract other than a loan covered by subparagraph (iii), or any related order, judgment, or arbitral award'; and CETA, Chapter 8 - Investment, Section A, Article 8.1: 'For greater certainty, claims to money does not include: (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party. (ii) the domestic financing of such contracts; or (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii).'

19 TPP, Chapter 9 – Investment, Section A, Article 9.1, note 2.

20 2015 China–Australia FTA (ChAFTA), Chapter 9 – Investment, Section A, Article 9.1(d) available at http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf (accessed on 13 March 2018); see also 2008 New Zealand–China FTA, Chapter 11 – Investment, Section 1, Article 135 available at www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/text-of-the-new-zealand-china-fta-agreement/ (accessed on 13 March 2018).

21 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 1 ICSID Rep 23, para. 25.

22 Id., para. 27.

23 C Schreuer, *The ICSID Convention: A Commentary*, (CUP: 2009), 2nd ed. pp. 114–117, paras. 113–122; see also *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 63–71.

be determined by the consent of the parties expressed by means of investment agreements, national legislation or investment treaties. This freedom, however, does not mean that parties can submit any dispute for resolution by the Centre. There are 'outer limits' to the jurisdiction of an ICSID tribunal and arbitral tribunals interpreting the Article 25 reference to 'investment' have developed various criteria to define and maintain those limits. It is fair to say that the task of defining those limits has proved to be a complex one.

With the intention of distinguishing treaty claims from ordinary commercial disputes, the idea that a covered investment must also constitute an 'investment' under the ICSID Convention (independent of the definition of 'investment' in the treaty at issue) was first proposed by the *Fedax v. Venezuela* tribunal.[24] This approach was embraced by the *Salini v. Morocco* tribunal, which devised the following criteria as the typical characteristics of an investment – later known as the *Salini* test: (1) contribution; (2) assumption of risk; (3) duration; and (4) contribution to the economic development of the host state.[25] Subsequent ICSID tribunals have had differing opinions on the applicability of these criteria. Some have adopted them fully and applied the test rigidly as a jurisdictional requirement,[26] while others have taken a more flexible approach and preferred to apply only some elements of the test, finding that requirements on duration and contribution to economic development of the host state are too subjective to be consistently endorsed.[27] A number of other tribunals have chosen to view the *Salini* criteria as guidance rather than strict jurisdictional requirements capable of depriving a tribunal of its jurisdiction in the event they are not fully satisfied.[28] Some tribunals have even refused to apply the test altogether on the basis that, notwithstanding the reference to investment in Article 25 of the ICSID Convention, it is the investment treaty definition that should prevail as the ultimate expression of contracting parties' consent.[29] At

24 *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras. 18–20. Note that the *Fedax v. Venezuela* tribunal also referred to the 'basic features of an investment [that] have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development' citing from an academic source at para. 43 of the award.

25 *Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras. 50–52. The *Salini* tribunal omitted the fifth criteria of a 'certain regularity of profit and return' taken by the *Fedax* tribunal.

26 See, for e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, paras. 130–138; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras. 91–92; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision on Jurisdiction, 17 October 2006, para. 77; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras. 30, 33.

27 See, for e.g., *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 36, 43; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras. 110–112 ; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, paras. 220, 235.

28 See, for e.g., *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 479, 481; *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 165.

29 See, for e.g., *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 73–79; *Inmaris Perestroika Sailing*

the other end of the spectrum, one tribunal has added two further criteria to the *Salini* test, namely that assets be invested in good faith and in accordance with host state law[30] – an expansion criticised by subsequent tribunals.[31]

The *Salini* test has found little support outside the ICSID framework. Two notable exceptions are *Romak v. Uzbekistan* and *Alps Finance v. Ukraine*, in which UNCITRAL tribunals applied the elements of the *Salini* test as the 'objective characteristics of an investment', declining jurisdiction on both occasions.[32] However, the approach of these tribunals has been attributed to the specific facts of these cases[33] since *Romak v. Uzbekistan* involved a mere sale of wheat as the alleged investment and *Alps Finance v. Ukraine* an assignment of receivables. The definition of 'investment' in both BITs referred only to 'claims to money or to any other performance having an economic value' without linking such claims to an overarching economic activity; and a literal interpretation was found insufficient to determine the existence of a protected investment.[34] In both tribunals' conclusions, the perceived need to exclude one-off commercial transactions from the protection of a BIT was pivotal, while disregarding the four corners of the BITs in question.

IV EXTENT OF PROTECTION

Apart from traditional types of investments involving interests in infrastructure and public projects, tribunals have extended protection to different types of economic activity including financial instruments (such as promissory notes,[35] hedging agreements[36] and

Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 129; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, paras. 311–312; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paras. 204–206; *Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 197–199; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 93.

30 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114.

31 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 112.

32 *Romak SA (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL Rules), Award, 26 November 2009, paras. 205–207; *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras. 240–241.

33 See *Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 364, noting that these two cases are 'very fact-specific that can partially explain their reasoning'; see also *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 7.4.9.

34 *Romak SA (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL Rules), Award, 26 November 2009, paras. 182, 185; *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, para. 230.

35 *Fedax NV v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997.

36 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012.

sovereign bonds[37]), contracts for the provision of services[38] and arbitral awards crystallising a party's rights and obligations.[39] Some tribunals have preferred to look at the totality of the investment activity rather than individual elements of it to decide whether the entire operation constitutes an 'investment'.[40] To date, most tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.[41]

37 See the trio of Argentine government bond cases: *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011; *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013; *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014. But note the recent *PoŠtová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 decision at paras. 318–324, concerning the Greek sovereign bonds in which the tribunal refused to assume jurisdiction because 'sovereign debt, as indebtedness of a sovereign state has special features and characteristics' and 'cannot be equated to private indebtedness or corporate debt' so that it ruled that the definition of investment referring to 'loans, claims to money or to any performance under contract having a financial value' in the relevant BIT could not be extended to sovereign debt.

38 See, for e.g., *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, where a contract for the pre-shipment inspection services with respect to goods to be exported from the host state were accorded protection; see also *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision for the Application for Annulment, 16 April 2009 in which the annulment committee held that a contract for the salvage of a shipwreck would qualify as a covered investment under the BIT, criticising the original tribunal in limiting itself to the analysis of the *Salini* criteria when rejecting jurisdiction.

39 In *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 117, the tribunal held that the right to arbitration is a distinct investment based on the BIT definition, 'claims to . . . any other rights to legitimate performance having financial value related to an investment'.

40 See, for e.g., *Saipem SpA. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 110, which considered that the entire operation including the underlying contract, the construction itself, the retention money, the warranty and the related ICC Arbitration was an investment under Article 25 of the ICSID Convention; see also *White Industries Australia Limited v. The Republic of India*, Final Award, para. 7.6.8, where the tribunal regarded the rights under an ICC award as 'a continuation or transformation of the original investment' after India inordinately delayed the enforcement of the arbitral award in India; see also *Chevron Corp & Texaco Petroleum Co v. The Republic of Ecuador*, Third Interim Award on Jurisdiction and Admissibility, PCA Case No, 2009-23, 27 February 2012, paras. 4.35–4.36; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 285–288.

41 See *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras. 48–51, where after extensive negotiations the parties never signed a contract for the construction and operation of a power plant. In *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, however, the tribunal found jurisdiction because a concession contract was actually signed for a power plant, and was valid and legally binding even though the project was never carried out.

V IRRELEVANCE OF ORIGIN OF CAPITAL

Unlike some treaties – such as the 1987 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, which commands that investments are brought into, or derived from investments brought into the host state territory[42] – most treaties are silent on the origin of capital for the covered investment. In the absence of an express requirement in the treaty, investments made by foreign investors from local funds raised in the host state are treated in the same manner as investments funded with imported capital. Arbitral jurisprudence is settled: the origin of capital is irrelevant for the purposes of finding a covered investment and it is not a requirement that a foreign investor finances the investment from its own resources or that the assets or funds be imported from abroad.[43]

In a well-known dissenting opinion in *Tokios Tokelés*[44] Professor Weil differed sharply from his co-arbitrators by taking the view that economic reality should prevail over formal legal structure when it comes to the interpretation of both the ICSID Convention and the specific provisions of BITs for the purposes of ascertaining an international investment. In his view, the ICSID system dictates a 'transborder flux of capital'; for that reason he disagreed with the majority in *Tokios Tokelés* who permitted claims against Ukraine by a Lithuanian entity wholly owned by Ukrainian nationals, while concluding that the origin of capital is irrelevant. Professor Weil's opinion advocating the imposition of a jurisdictional requirement without a textual foundation as to the origin of capital is yet to find support in arbitral jurisprudence.

VI TERRITORIAL LIMITATIONS ON COVERED INVESTMENT

Most treaties place a territorial limit requiring that a covered investment be 'made in the territory of the host state'. Some do not expressly refer to such territorial limits in the definition of 'investment' but instead refer to 'investments in the territory of a Contracting Party' within the context of the substantive obligations and protections under the treaty. Either way, arbitral tribunals examine the territorial nexus of an investment to the host state at the jurisdictional stage regardless of where this requirement is postulated.[45]

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42 See *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, applying the relevant wording in Article II of the treaty providing that: 'This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.'

43 *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 418; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, paras. 81–82; *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 100–101, 110; *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 106; *Wena Hotels LTD v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 126; see also *Wena Hotels LTD v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, 5 February 2002, para. 54.

44 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil, 29 April 2004, paras. 19–20.

45 See, for e.g., *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paras. 113–121; *Philippe Gruslin v. Malaysia*, ICSID

Two examples from NAFTA cases illustrate the relevance of territorial connection. *Bayview v. Mexico*[46] was a claim brought by an American claimant in relation to its investment in farm and irrigation facilities in the United States involving alleged deleterious effects of Mexico's use of the waters of the Rio Grande, on which the claimant's enterprise was dependent. The NAFTA tribunal did not allow the claim under NAFTA Article 1101 on the basis that the investment in question was wholly confined to the territory of the United States. A similar issue arose in *Canadian Cattlemen for Fair Trade v. United States*, in which a group of Canadian cattle producers challenged a US prohibition on live-cattle imports from Canada after an outbreak of mad cow disease. The cattle businesses of the claimants were located entirely in Canada and therefore the tribunal dismissed the claim for lack of investment in the territory of the United States.[47]

Contrary to traditional investments, such as acquisition of interests in immovable property or companies, tribunals draw a distinction for territorial nexus when it comes to investments of a financial nature. It is well-established that, with regard to investments of a purely financial nature, the territorial determination should focus on where, or for the benefit of whom, the funds are ultimately used and not the place where the funds were paid out or transferred. Therefore, the relevant question is whether the benefit is enjoyed in the host state.[48]

At times, respondent states have questioned whether a portfolio investment bought and paid for outside the host state with no flow of direct funds into the host state can be deemed to be invested 'in the territory' of the host state. For example, a trio of cases against Argentina involving bondholders who purchased Argentinian sovereign bonds in the secondary market turned on this question. Argentina argued that these transactions outside Argentina did not involve a direct flow of funds into the territory of Argentina and therefore the claims in relation to these bonds were not claims in relation to a covered investment. The dissenting opinion by Professor Abi-Saab in *Abaclat v. Argentina* found that submission to be persuasive, stating that 'such financial products with high velocity of circulation . . . traded within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State' lacked the necessary territorial link to the host state.[49] However, most tribunals considering financial investments (such as the Argentinian sovereign bonds or the hedging agreements as

Case No. ARB/99/3, Award, 27 November 2000, paras. 13.9–13.12.

46 *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paras. 93–108.

47 *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, paras. 126–127.

48 *Fedax NV and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras. 41–43; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374; *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 498–499, 508–510; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, paras. 206–207.

49 *Dissenting Opinion of Abi-Saab in Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 56–57, 78, 105. Note that Argentina's appointee in the sister case *Ambiente v. Argentina*, Professor Santiago Torres Bernardez, held a similar opinion to Professor Abi-Saab; see *Dissenting*

in *Deutsche Bank v. Sri Lanka*) have not followed the approach of Professor Abi-Saab in his dissenting opinion.[50] Rather, they have been satisfied that a sufficient territorial nexus exists as long as funds were made available to host states and served to finance their economy or needs. They all assigned weight to the fact that it was the state itself that ultimately benefited from the disbursement of funds even if these funds never entered their territory directly.[51]

VII COMPLIANCE WITH HOST STATE LAW

Some treaties expressly require that an investment be made in accordance with host state law, while others are silent on the point.[52] For treaties that include a form of conformity with host state law as part of the covered investment definition, tribunals have accepted that any illegality or breach of local law in the making of the investment would act as a jurisdictional bar.[53] Where the treaty is silent on the issue, however, tribunals have reached different conclusions when addressing questions of non-conformity with local laws. A number of tribunals, such as the *Phoenix* tribunal, have suggested that conformity with host state law is an implied requirement for an investment to be a protected investment under an investment treaty and Article 25 of the ICSID Convention, even if the definition of investment in the treaty is silent on this issue.[54] These tribunals have concluded that a state cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of its own law.[55]

Other tribunals have, however, disagreed with this rationale, suggesting that states are at liberty (or not) to condition their consent to arbitrate, as well as the protections they offer, on compliance with host state law. If they have not done so, conformity with host state law cannot be part of the objective definition of 'investment' and relied upon to deprive the tribunal of its jurisdiction. It may give rise to an admissibility defence or a defence on the

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Opinion of Bernardez in Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 262–263.

50 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 288, 292. See also *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013.

51 Contrast with *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras. 293-349, where the opposite conclusion was reached.

52 Some treaties have a specific provision clarifying that the host state shall admit investments made in accordance with its laws from which tribunals have also inferred the same requirement, See, for e.g., *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 204.

53 See, for e.g., *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No, ARB/03/26, Award, 2 August 2006, para. 335; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 398; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paras. 46, 55, 57–58.

54 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101. Note that the tribunal cited *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, which held that the conformity requirement is implicit even when it is not expressly cited in the BIT (see *Plama v. Bulgaria* at paras. 138–143).

55 *SAUR International SA v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, paras. 307–310; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 467.

merits since recourse to treaty arbitration and substantive treaty protections may in certain circumstances breach the prohibition of abuse of rights that is an emanation of the principle of good faith. However, that does not mean that these elements are part of the definition of 'investment'. An illegal or bad-faith investment remains an investment.[56]

Tribunals have not always sought to draw a clear distinction between the different types of non-conformity with local law. In the face of an investor's non-conformity, some tribunals have only penalised the investor for a breach of domestic regulation relating to the investment activity or admission of the investment.[57] Other tribunals have interpreted non-conformity to condemn a wider illegality or iniquity in the investor's behaviour;[58] some have even extended the analysis of non-conformity beyond domestic law to encompass breaches of general principles of international law and international public policy.[59]

Where arbitral tribunals have resorted to general principles of law or international public policy, they have mostly framed this as an emanation of the clean hands doctrine, on the basis that protection should be denied to investments that are made by way of fraud, corruption or deceitful conduct, and that denial is required to prevent the misuse of the international investment protection system by those who come with unclean hands.[60] That means, regardless of whether the treaty includes an express requirement for compliance with domestic or international law, there is the possibility that a tribunal may deny treaty protection to a clearly abusive claim based on general principles of law on its own accord.

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56 See, for e.g., *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 226; *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 127; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, para. 187; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras. 114, 119.

57 See, for e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 398; *Alasdair Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, para. 55; *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paras. 289–344.

58 See, for e.g., *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICISD Case No. ARB/07/24, Award, 18 June 2010, para. 123; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101; *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No, ARB/03/26, Award, 2 August 2006, paras. 208–209, 229–247; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, paras. 104–105.

59 See *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No, ARB/03/26, Award, 2 August 2006, paras. 224–227 and *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 144–146, where both tribunals directed themselves back to international law based on the reference to international law in the applicable substantive law.

60 See, for e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 141, 143–144; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paras. 123–124 ('an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention[;] or . . . if it is made in violation of the host State's law . . . These are general principles that exist independently of specific language to this effect in the Treaty.'); *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, paras. 488-508. See also *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award 4 October 2006, paras. 137–157, where the question arose under an investment agreement governed by English law as opposed to a treaty under international law.

Unlawfulness is a difficult issue and one that is potentially open to abuse by states that have been complicit in the alleged wrongdoing on which they rely as a defence to an arbitration claim. There is also the question of degree; tribunals are reluctant to refuse a claim where the contravention of law in question is one of a technical or *de minimis* nature[61] and it is uncertain as to where the line between fundamental versus trivial breaches should be drawn. Even where the contravention is more serious, there remains the issue of whether a state is released from an investment treaty claim if the state itself has required the investor to contravene the laws when making the investment.

VIII CONCLUSION

The definition of a covered investment remains one of the most controversial topics in investment law and it is impossible to identify one agreed definition; the wording of the international treaties is inconsistent and the arbitral jurisprudence is, in places, contradictory. The preponderance of generic definitions of investment within treaties means that a substantial degree of subjectivity cannot be excluded in their application to the specific facts of each case. The conflicting ways in which arbitral tribunals have construed similar wording do not make the task any more straightforward. Critics of investor–state arbitration find encouragement from the perceived lack of consistency and coherence in arbitral awards. For example, the paucity of tribunal agreement on the precise scope and application of the *Salini* criteria to the definition of investment within the ICSID framework (let alone in general) is cited as one of the principal reasons for questioning the legitimacy of the system and its participants.

That said, there does appear to be a trend emerging in the new generation FTAs and BITs in favour of an objective definition of 'investment' whereby states expressly import chosen aspects of the *Salini* criteria directly into their definitions of 'investment'. It remains to be seen how tribunals interpreting these instruments will contribute to the current debate.[62] Certainly, if states choose to make the *Salini*, or any other, criteria part of the 'investment' definition in the text of a treaty, tribunals would be expected to give weight to such express wording when interpreting the treaty's terms 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' as required under Article 31 of the Vienna Convention on the Law of Treaties.

61 For e.g., the minor defect in company paperwork at issue in *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 297, did not prevent the tribunal from assuming jurisdiction. Similarly, in a recently released award, *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014 at paras. 92-94, the tribunal characterised non-compliance with exchange control legislation by claimant as 'inadvertent and technical' and noted that there was nothing offensive to public policy or tainted with criminality. It further concluded that in the absence of the breach of fundamental legal principles of Barbados there is no reason to deny jurisdiction.

62 For example, a recent UNCITRAL claim filed in June 2016 by US hedge funds, Gramercy Funds Management LLC and Gramercy Peru Holdings LLC against Peru under the US–Peru Trade Promotion Agreement of 2009 (TPA) is a case to watch. Similar to the new generation FTAs discussed in this chapter, the definition of investment in the TPA incorporates 'characteristics of investment' into the definition including 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. See the Statement of Claim as reported in *IA Reporter*, 9 June 2016: http://www.iareporter.com/articles/analysis-as-gramercy-fund-pursues-1-6-billion-bond-arbitration-against-peru-how-does-its-initial-case-stack-up-on-key-jurisdictional-fronts/ (accessed on 13 March 2018).

Appendix 1

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