6

INVESTMENT

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A. Introduction

6.01 The question of what constitutes an investment is regularly a threshold jurisdictional question in treaty arbitrations.[1] Tribunals often need to consider the definition of 'investment' under two instruments:

(1) the investment treaty; and
(2) article 25 of the ICSID Convention.[2]

6.02 While the ICSID definition is of course only controlling in ICSID arbitrations, many of the awards and writings dealing with art 25 of the ICSID Convention are relevant to a consideration of the definition of investment under other investment treaties. Similarly,

[1] See further N Rubins, 'The Notion of "Investment" in International Investment Arbitrations' in N Horn (ed), *Arbitrating Foreign Investment Disputes* (2003) 292.

[2] Convention on the Settlement of Investment Disputes between States and Nationals of other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) (Appendix 12 below) art 25.

the approaches taken by tribunals considering the issue under bilateral investment treaties (BITs) have relevance to the consideration of investment in the ICSID context.

6.03 In this chapter, the issue is analysed in two sections:

(1) the definition of 'investment' in treaties; and
(2) the role played by arbitral tribunals in building upon treaty definitions in relation to specific property interests.

B. Definition of 'Investment' under Treaties

Under the ICSID Convention

6.04 Article 25 of the ICSID Convention[3] limits the Centre's jurisdiction to legal disputes arising 'directly out of an investment'. No definition of this central term is offered. The Report of the Executive Directors explains this lack of further clarification by saying: 'No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanisms 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)).'[4]

6.05 As Schreuer points out, this statement of the position is historically inaccurate. Schreuer explains how a number of differing views relating to the definition of 'investment' were discussed, but no resolution was reached.[5] The absence of any clarification in the ICSID Convention means that, within a wide area of discretion, the parameters of what constitutes an investment fall to be supplied by the parties' consent and ultimately by tribunals.

6.06 The importance of art 25 of the ICSID Convention in ICSID arbitrations is that it places a limit upon the parties' ability to consent to ICSID jurisdiction, whether that consent be expressed in a concession agreement or in a treaty. While the word 'investment' in art 25 has been construed widely, it is not without limits, as the discussion in this chapter will show. In the first edition of *The ICSID Convention: A Commentary*, Schreuer listed the various areas of economic activity that have come before ICSID tribunals as including:

> ... the building and operation of hotels, the production of fibres and textiles, the mining of minerals, the construction of a hospital ward, the exploration, exploitation and distribution of petroleum products, the manufacture of plastic bottles, the construction and operation of a fertilizer factory, the construction of housing units, the operation of a cotton mill, aluminium smelter, forestry, the conversion, equipping and operation of fishing vessels, the production of weapons, tourism resort projects, maritime transport of minerals, a synthetic fuels project, shrimp farming, banking, agricultural activities, the construction of a cable TV system and the provision of loans.[6]

6.07 Schreuer drew up this list in 2001. Since then, the categories of covered economic activities have continued to increase. Yet certain activities which would as easily fall into these

[3] Appendix 12 below.
[4] World Bank, '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 27.
[5] Schreuer 114–7, especially 116.
[6] Schreuer (1st edn, 2001) 138 para 119.

categories have also been excluded, such as the provision of guarantees,[7] power generation,[8] telecommunications licensing,[9] and consumer banking.[10] This indicates that the key issue is not the area of economic activity covered, but the form and nature of that activity. In the absence of a treaty definition, it has fallen to tribunals to add their own interpretations of the meaning of 'investment' on a case-by-case basis. As the following analysis will demonstrate, a trend may be emerging from the cases whereby tribunals initially attempted to supply their own definition and definitional criteria but are now preferring to retain a greater degree of flexibility. In considering the decided awards, it is important to bear in mind that not all tribunals were dealing with borderline cases, and this may have some bearing on the degree of precision they brought to bear upon any definitions they offered.

6.08 The earliest award to consider the meaning of 'investment' in depth was *Fedax NV v Venezuela.*[11] Fedax, a company claiming under the Netherlands–Venezuela BIT,[12] was the beneficiary, by way of endorsement, of debt instruments issued by Venezuela. Thus Fedax had not come into possession of the promissory notes as a result of any relationship with Venezuela, or any direct investment made in its territory. Venezuela argued that Fedax's holding of the promissory notes in question did not qualify as an investment because Fedax had not made a direct foreign investment involving a long-term transfer of financial resources. The Tribunal rejected this position. It adopted an approach based upon an article written by Schreuer in which he had suggested the use of five criteria in defining 'investment': 'The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.'[13]

6.09 The Tribunal considered the status of the promissory notes under Venezuelan law and concluded that they met the basic features of an investment. In particular, they pointed out the 'significant relationship' between the transaction and the host State's development.[14] *Fedax* was then applied by a subsequent tribunal whose reference to the five criteria has caused them to become known ever since as the *Salini* criteria.[15] The dispute in *Salini* arose out of an agreement to construct a highway in Morocco. When a dispute arose under the Italy–Morocco BIT,[16] one of Morocco's jurisdictional objections was that the transaction

[7] *Joy Mining Machinery Ltd v Egypt* (Award) ICSID Case No ARB/03/11, 13 ICSID Rep 123, IIC 147 (2004, Orrego Vicuña P, Weeramantry & Craig) paras 41–63, especially para 44.

[8] *Mihaly International Corp v Sri Lanka* (Award) ICSID Case No ARB/00/2, 6 ICSID Rep 310, IIC 170 (2002, Sucharitkul P, Rogers & Suratgar).

[9] *Nagel v Czech Republic* (Award) SCC Case 049/2002, IIC 176 (SCC, 2003, Danelius C, Hunter & Kronke).

[10] *Genin v Estonia* (Award) ICSID Case No ARB/99/2, 6 ICSID Rep 236, IIC 10 (2001, Fortier P, Heth & van den Berg).

[11] *Fedax NV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/96/3, 5 ICSID Rep 183, IIC 101 (1997, Orrego Vicuña P, Heth & Owen).

[12] Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands–Venezuela) (signed 22 October 1991, entered into force 1 November 1993) 1788 UNTS 45 Tractatenblad 1993, 154.

[13] *Fedax* para 43; C Schreuer, 'Commentary on the ICSID Convention' (1996) 11 ICSID Rev-FILJ 316, 372.

[14] *Fedax* para 43.

[15] *Salini Costruttori SpA v Morocco* (Decision on Jurisdiction) ICSID Case No ARB/00/4 (2001, Briner P, Cremades & Fadlallah).

[16] Treaty for the Promotion and Protection of Investments (Italy–Morocco) (signed 18 July 1990, entered into force 26 April 2000).

in question should be characterised as a contract for services and not as an investment contract.[17] The Tribunal listed the criteria as follows:

> The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transactions. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.[18]

6.10 In formulating the *Salini* criteria, the Tribunal only listed four. It omitted the fifth criteria of 'a certain regularity of profit and return' taken by the *Fedax* Tribunal from the Schreuer article. It also went on to say that the various elements may be interdependent and should be assessed globally. However, the Tribunal went on to consider them individually, including a statement that the minimum length of transaction is between two to five years,[19] before reaching its conclusion that the transaction fell within the four criteria, and thus within the definition of investment contained in art 25 of the ICSID Convention. It is widely accepted that the *Salini* criteria should not be viewed in isolation. Thus, the Tribunal in *Joy Mining v Egypt* stated that 'a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole …'.[20]

6.11 The duration aspect of the *Salini* criteria was specifically considered in *Jan de Nul v Egypt*.[21] The investment consisted of a dredging operation in the Suez Canal. While the parties agreed that the magnitude, complexity, and risk profile of the project met the definition of investment, there was a dispute over the significance of the project's duration. Both parties agreed that a two-year duration would be sufficient, but Egypt pointed out that a time-scale measured from the date of the contract to the date of completion would fall short of two years. The claimant contended that the time it had spent on pre-contractual activities should be taken into consideration. The Tribunal did not decide this point as it held that the twenty-three-month period starting from the contract's signature would suffice.[22]

6.12 Another objection raised by Venezuela in *Fedax* was that the dispute did not arise 'directly out of an investment' because the disputed transaction was not a direct foreign investment. However, the Tribunal found that the term 'directly' relates to the 'dispute' and not to the 'investment'. Accordingly, jurisdiction can exist even in respect of investments that are not made directly into the host State's economy, so long as the dispute arises directly from the transaction.[23]

6.13 The Tribunal in another early case, *CSOB v Slovakia*, also applied the *Salini* criteria while looking at the transaction broadly.[24] This ICSID case, brought under the Czech

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[17] *Salini* para 38.

[18] ibid para 52, citations omitted.

[19] ibid para 54.

[20] *Joy Mining v Egypt* para 54.

[21] *Jan de Nul NV v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/04/13, IIC 144 (2006, Kaufmann-Kohler P, Mayer & Stern).

[22] ibid paras 90–5.

[23] *Fedax* para 24. Almost all of the jurisdiction decisions made in the Argentine cases come to the same conclusion on this point, eg *Siemens AG v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/02/8, 12 ICSID Rep 174, IIC 226 (2004, Rigo Sureda P, Bello Janeiro & Brower) para 150; *Metalpar SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/5, IIC 164 (2006, Oreamuno Blanco P, Cameron & Chabaneix) paras 84–93.

[24] *Ceskoslovenska Obchodni Banka AS v Slovakia* (Decision on Jurisdiction) ICSID Case No ARB/97/4, 5 ICSID Rep 330, IIC 49 (1999, Buergenthal P, Bernardini & Bucher) ('*CSOB v Slovakia*').

Republic–Slovakia BIT,[25] arose after the separation of the Slovak and Czech Republics. The claimant bank was privatised and its portfolio of certain non-performing loan receivables was assigned to a so-called 'Collection Company'. The Collection Company was to pay CSOB for the assigned receivables. This payment was guaranteed by an obligation of the Ministry of Finance of the Slovak Republic.

6.14 When a dispute arose, Slovakia contended that it did not arise out of an investment. The Tribunal accepted that, viewed in isolation, CSOB's undertaking did not involve any spending, outlays, or expenditure in Slovakia.[26] However, rather than look at the single transaction underlying the dispute, the Tribunal looked at the question more broadly:

> ... the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the [ICSID] Convention ...
>
> ... CSOB's claim and the related loan facility made available to the Slovak Collection Company are closely connected to the development of CSOB's banking activity in the Slovak Republic ...[27]

6.15 The Tribunal was thus again looking at the entire concept of what should constitute an 'investment' rather than narrowly focusing on the particular economic activity giving rise to the dispute.[28] Further, although the Tribunal conducted its analysis though the prism of what would become known as the *Salini* criteria, it pointed out that the criteria tend to be present in most investments, but are not formal prerequisites for a finding that an investment exists within the meaning of art 25 of the ICSID Convention.[29]

6.16 The first case utilising the *Salini* criteria and finding that no investment existed was *Joy Mining Machinery Ltd v Egypt*.[30] The claim, brought under the UK–Egypt BIT,[31] related to performance guarantees given by the claimant to an Egyptian State-controlled enterprise. The underlying contract related to the supply (and related activities) of mining equipment. The Tribunal looked at the transaction in its broader context: 'a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole'.[32]

6.17 On the basis of this examination, by reference to the criteria, the Tribunal found that no investment had been made and thus denied jurisdiction. The Tribunal considered the

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[25] Dahoda medzi vládou Slovenskej republiky a vládou Ceskej republiky o podpore a vzájomnej ochrane investicii ('Agreement Regarding the Promotion and Reciprocal Protection of Investments') (signed 23 November 1992, entered into force 1 January 1993) Zbierka zákonov c 231/1993.

[26] *CSOB v Slovakia* para 69.

[27] ibid paras 88 and 91. For a more recent example of looking at a series of contracts as a whole, see *Ickale Insaat Ltd Sirketi v Turkmenistan* (Award) ICSID Case No ARB/10/24 (2016, Heiskanen P, Lamm & Sands) para 293.

[28] In *Link-Trading Joint Stock Co v Moldova* (Decision on Jurisdiction) (UNCITRAL, 2001, Hertzfeld P, Buruiana & Zykin) 8, the Tribunal concluded, based only on the broad definition of 'investment' in the USA–Moldovia BIT, that debt financing qualified as an 'investment'.

[29] ibid paras 76, 78 and 90.

[30] *Joy Mining v Egypt*.

[31] Agreement for the Promotion and Protection of Investments (UK–Egypt) (signed 11 June 1975, entered into force 24 February 1976) 1032 UNTS 31.

[32] *Joy Mining v Egypt* para 54.

contract as a whole and listed with some particularity the specific obligations the claimant had undertaken to perform. However, it concluded that the contract amounted to no more than a sales contract on 'normal commercial terms'[33] and this had to be distinguished from investment activity.[34] It fell short on every one of the criteria.

6.18 Borderline cases are often useful for gaining deeper understanding of where the line between investment assets and non-investment assets should be placed. There are two cases, *Mitchell v Congo*[35] and *Malaysian Salvors v Malaysia*[36] where the original tribunal and an annulment committee reached different conclusions as to whether an investment existed.

6.19 In *Mitchell v Congo*, the asset in question was a law firm. The original Tribunal had regard to Mr Mitchell's moveable property, documents, know-how, and goodwill in qualifying his business as an investment pursuant to the USA–Democratic Republic of Congo BIT. It dismissed the respondent's objection that the claimant's activity did not qualify as an investment under the ICSID Convention since it had not been important to the State's economy for a long-term operation, saying that 'these elements, while they are frequently present in investment projects, are not a formal requirement for the finding that a particular activity or transaction constitutes an investment.'[37] The Annulment Committee took the opposite view. It referred to the characteristics of investment identified by previous ICSID case law[38] and in particular, took the view that a contribution to the economic development of the host State was essential.[39] It concluded that Mr Mitchell's law firm did not fall within the ICSID definition of investment. While it would have been prepared to accept that it was bound by the BIT definition of investment as including 'every kind of investment … including … service and investment contracts,' this did not stretch to including 'every kind of service' as an investment.[40]

6.20 In *Malaysian Salvors*, the original Tribunal and the Annulment Committee reached different conclusions on the question as to whether a ship salvage contract was an investment. The approach of the sole arbitrator could perhaps be said to mark the high water mark of the *Salini* criteria approach. While he did say that the criteria needed to be looked at holistically,[41] he examined the transaction under five criteria. It failed to meet the duration test and the significant contribution test, and thus failed to be considered an investment for the purposes of the ICSID Convention. The Annulment Committee disagreed with this approach. It looked to the ordinary meaning of the term investment as:

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[33] ibid para 56.

[34] See also *Middle East Cement Shipping and Handling Co SA v Egypt* (Award) ICSID Case No ARB/99/6, 7 ICSID Rep 173, IIC 169 (2002, Böckstiegel P, Bernardini & Wallace) para 164, where the Tribunal concluded that a claim based upon the liquidation of a letter of guarantee fell outside the Greece–Egypt BIT as it was 'a commercial matter'.

[35] *Mitchell v Democratic Republic of the Congo* (Award) ICSID Case No ARB/99/7 (2004, Bucher P, Agboyibo & Lalonde).

[36] *Malaysian Historical Salvors Sdn Bhd v Malaysia* (Award) ICSID Case No ARB/05/10, IIC 289 (2007, Hwang (sole)).

[37] *Mitchell v Democratic Republic of the Congo* para 56.

[38] *Mitchell v Democratic Republic of the Congo* (Decision on Annulment) ICSID Case No ARB/99/7, IIC 172 (2006, Dimolitsa P, Dossou & Giardina) para 27.

[39] ibid para 33.

[40] ibid para 37.

[41] *Malaysian Historical Salvors* paras 70, 106(c) and (e), 107 and 111.

> the commitment of money or other assets for the purpose of providing a return. In its context and in accordance with the object and purpose of the treaty [ICSID Convention]—which is to promote the flow of private investment to contracting countries by provision of a mechanism which, by enabling international settlements of disputes, conduces to the security of such investment—the term 'investment' is unqualified.[42]

6.21 It criticised the *Salini* criteria as imposing 'outer limits' on the ICSID Convention definition that did not appear in the *travaux préparatoires*.[43] Any exclusions other than simple sales contracts have no support from the *travaux préparatoires*. The Annulment Committee found that the contract fell squarely within the wide definition of investment contained in the BIT, and considering the matter '[i]n the light of this history of the preparation of the ICSID Convention and of the foregoing analysis of the Report of the Executive Directors and adopting it, the Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction.'[44]

6.22 The decision of the Annulment Committee in *Malaysian Salvors* was a robust rejection of the *Salini* criteria. In making its finding, the Annulment Committee was influenced by the cogent criticism directed by the *Biwater v Tanzania* Tribunal. In *Biwater*, the respondent had argued that the water project was a loss leader, and thus could not be characterised as an investment due to its inherent unprofitability. In analysing this objection, the Tribunal described the *Salini* test as 'problematic'

> ... if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible text, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.[45]

6.23 In conclusion, the Tribunal held that 'even if the Republic could demonstrate that any, or all, of the *Salini* criteria are not satisfied in this case, this would not necessarily be sufficient—in and of itself—to deny jurisdiction.'[46]

6.24 The outer limits of the ICSID Convention definition of investment, as identified by the *Malaysian Salvors* Annulment Committee decision, were applied by the tribunal in *Global Trading v Ukraine* in a rare award applying the summary dismissal procedure contained in art 41(5) of the ICSID Arbitration Rules. The claimants' business was the supply of poultry. The Tribunal decided that the claim arose out of mere sales contracts—the business was just the 'outlay of money in performing a contract for the transboundary purchase and sale of

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[42] *Malaysian Historical Salvors Sdn Bhd v Malaysia* (Decision on Annulment) ICSID Case No ARB/05/10, IIC 372 (2009, Schwebel P, Shahabuddeen & Tomka) para 57.

[43] ibid para 69.

[44] ibid para 74.

[45] *Biwater Gauff (Tanzania) Ltd v Tanzania* (Award) ICISD ARB/05/22, IIC 330 (2008, Hanotiau P, Born & Landau) para 314.

[46] ibid para 318.

goods'.[47] This was not more than a standard commercial transaction and the fact that the trade could be seen as furthering the policy priorities of the purchasing State did not bring it within the ICSID Convention definition of investment.[48]

6.25 Since *Biwater* and *Malaysian Salvors*, it has become difficult to predict the approach that will be taken by tribunals to the threshold question of defining the meaning of 'investment' as contained in ICSID Convention art 25. Even if tribunals are inclined to apply the *Salini* criteria, they may not apply all of them. For example, in *Saba Fakes v Turkey*, the Tribunal considered whether the assignment of an ownership stake in a very valuable telecoms venture constituted an investment. The Tribunal mentioned that there are currently two distinct approaches to the notion of investment under the ICSID Convention.[49] It referred to the backlash against the *Salini* criteria,[50] but stated its view that the notion of investment could not be defined simply by reference to the parties' consent and that an objective definition must exist. However, it limited the criteria to three, namely: (i) a contribution, (ii) a certain duration, and (iii) an element of risk.[51] The Tribunal in *Alps Finance v Slovakia* ignored the controversy and came out in favour of the *Salini* criteria. It described as common ground that the necessary conditions or characteristics to be satisfied included a contribution, a significant duration, and a sharing of risks with long-term commitments.[52]

6.26 In *Toto v Lebanon*, a dispute arising out of a construction project, the Tribunal recognised the controversy and applied both approaches to resolving a dispute over the existence of an investment.[53] Similarly, in *GEA Group v Ukraine* the Tribunal described the doctrinal differences between tribunals as 'a controversy that need not be resolved' while considering all potentially applicable criteria '[o]ut of an abundance of caution …'.[54]

6.27 Other tribunals have continued the criticism of the *Salini* criteria. In *Philip Morris v Uruguay*, Uruguay sought to rely upon the *Salini* criteria to defend the claim brought by Philip Morris, challenging measures introduced by Uruguay aimed at regulating tobacco. Uruguay argued that smoking harmed rather than helped economic development. In rejecting this submission, the Tribunal rejected the *Salini* criteria absolutely, describing their relevance as 'very doubtful'. It cast doubt upon the relevance of arbitral awards as a source of international law and pointed out that the accepted criteria could not be described as *jurisprudence constante*.[55]

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[47] *Global Trading Resource Corp and Globex International Inc v Ukraine* (Award) ICSID Case No ARB/09/11, IIC 466 (2010, Berman P, Gaillard & Thomas) para 55.

[48] ibid para 56; *Nova Scotia Power Inc v Venezuela* (Award) ICSID Case No ARB(AF)/11/1, IIC 654 (2014, van Houtte P, Vinuesa & Williams) paras 92–109.

[49] *Saba Fakes v Turkey* (Award) ICSID Case No ARB/07/20, IIC 439 (2010, Gaillard P, Lévy & van Houtte) para 98.

[50] ibid para 106.

[51] ibid para 110; *LESI SpA and Astaldi SpA v Algeria* (Decision on Jurisdiction) ICSID Case No ARB/05/3, IIC 150 (2006, Tercier P, Gaillard & Hanotiau) para 72; *Pey Casado v Chile* (Award) ICSID Case No ARB/98/2, IIC 324 (2008, Lalive P, Chemloul & Gaillard) para 232; *Nova Scotia Power v Venezuela* para 139.

[52] *Alps Finance and Trade AG v Slovakia* (Award) IIC 489 (UNCITRAL, 2011, Crivellaro P, Klein & Stuber) para 241. The Tribunal in *Malicorp v Egypt* (Award) ICSID Case No ARB/08/18, IIC 476 (2011, Tercier P, Olavo Baptista & Tschanz) also supported the application of the *Salini* criteria.

[53] *Toto Costruzioni Generali SpA v Lebanon* (Decision on Jurisdiction) ICSID Case No ARB/07/12, IIC 391 (2012, van Houtte P, Moghaizel & Schwebel) paras 81–5.

[54] *GEA Group Aktiengesellschaft v Ukraine* (Award) ICSID Case No ARB/08/16, IIC 487 (2011, van den Berg P, Landau & Stern) para 143.

[55] *Philip Morris Brands Sàrl v Uruguay* (Decision on Jurisdiction) ICSID Case No ARB/10/7, IIC 597 (2013, Bernadini P, Born and Crawford) para 204.

Pantechniki v Albania was another case in which the respondent argued that a construction project could not amount to an investment. The Tribunal allowed faint praise to the *Salini* criteria, describing them as 'a respectable attempt to describe the characteristics of investments.' However, it went on to criticise their use stating: **6.28**

> ... broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function. They may introduce elements of subjective judgment on the part of arbitral tribunals (such as 'sufficient' duration or magnitude or contribution to economic development) which (a) transform arbitrators into policy-makers and above all (b) increase unpredictability about the availability of ICSID to settle given disputes.[56]

Instead, the tribunal approved a formulation set out by Douglas in *The International Law of Investment Claims*[57] defining investment as: **6.29**

> the economic materialisation of an investment requires the commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return.

This definition is easier to satisfy than the full application of all five *Salini* criteria, but the *Pantechniki* tribunal was probably going too far to suggest that the definition 'may well encapsulate an emerging synthesis.'[58] Going forward, tribunals are likely to set out the test they apply in slightly different linguistic formulations but it is appropriate to require some contribution to the economic development of a host State in addition to satisfying a treaty's formal requirements. **6.30**

The relationship between the ICSID definition and other treaty definitions

It could theoretically be possible for a particular asset to constitute an investment under an investment treaty but not under art 25 of the ICSID Convention. Schreuer observes that the ICSID Convention 'does not imply unlimited freedom for the parties ... the term "investment" has an objective meaning independent of the parties' disposition'.[59] As a result, it is necessary to check carefully the context in which dicta from awards have been made before applying them in considering the status of an investment under the ICSID Convention or under some other instrument. **6.31**

Petrobart v Kyrgyz Republic,[60] a Stockholm Chamber of Commerce arbitration arising out of the Energy Charter Treaty (ECT),[61] is a case where an investment was found to exist under an investment treaty but where none would have existed under the ICSID Convention had the tribunal applied the criteria set out in *Fedax* and *Salini*. **6.32**

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[56] *Pantechniki SA Contractors and Engineers v Albania* (Award) ICSID Case No ARB/07/21, IIC 383 (2009, Paulsson (sole)) para 43.

[57] Douglas 189 *et seq*, cited in *Pantechniki* para 36.

[58] ibid para 36. Other tribunals refusing to apply the *Salini* criteria include: *Alpha v Ukraine* (Award) ICSID Case No ARB/07/16, IIC 464 (2010, Robinson P, Alexandrov & Tubowicz) para 311; *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/08/8, IIC 431 (2010, Alexandrov P, Cremades & Rubins) para 129; and *Abaclat v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5, IIC 504 (2011, Tercier P, Abi-Saab & van den Berg) para 364.

[59] Schreuer 117 paras 122–3.

[60] *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case 126/2003, IIC 184 (SCC, 2005, Danelius C, Bring & Smets).

[61] Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100.

6.33 The dispute in *Petrobart* arose out of a contract to sell 200,000 tons of gas condensate over a period of twelve months. As part of its reasoning, the Tribunal made reference to the *Salini* line of authority to support the proposition that 'investment' can have a wide meaning. However, it did not consider the criteria for defining 'investment' laid down in those awards. Instead it based its finding that an investment existed upon the definition contained in the ECT. The ECT's wide definition of investment includes 'Economic Activity in the Energy Sector' which in turn refers to a further defined term: 'economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products'. Thus marketing and sale are explicitly covered by the ECT's definition of 'investment' with no exclusion based upon concepts such as duration or importance for the development of the host State's economy.[62]

6.34 The fact that investment falls to be defined both under investment treaties and the ICSID Convention has led to some perceiving that the relationship between the two creates a 'double-barrelled' test. If this test applies, the asset in question must amount to an investment both within the terms of the investment treaty and the terms of the ICSID Convention.

6.35 An example of a Tribunal applying the double-barrelled test is *Malicorp v Egypt*, a claim arising out of a concession to build an airport. The Tribunal defined the test as requiring it to have regard:

- on the one hand, to the meaning given to the term by the treaty, which defines the framework of the consent given by the State, and also
- on the other, to the meaning given in the ICSID Convention, which determines the jurisdiction of the Centre and the arbitral tribunals acting under its auspices.[63]

6.36 The Tribunal said that the two aspects were in reality complementary as both the investment agreement and the ICSID Convention existed to promote investments.[64] In a non-ICSID case, *Romak v Uzbekistan*, the Tribunal applied the ICSID test in considering whether contracts for the supply of wheat satisfied the definition of investment contained in the Switzerland–Uzbekistan BIT. The claimant had alleged that the Tribunal could simply read the literal wording of the categories of investment listed in the BIT, but the Tribunal disagreed. Such an approach would deprive the term 'investment' of any inherent meaning. It would also require the Tribunal to construe the BIT while ignoring the preamble and its reference to the need to promote and protect foreign investments with the aim to foster economic prosperity. A mechanical application of the literal wording of the BIT would produce a manifestly absurd or unreasonable result eliminating any practical limitation to the scope of the context of 'investment'. This would be 'untenable as a matter of international law'.[65]

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[62] See observations by G Petrochilos and N Rubins on the award in 2005:3 Stockholm International Arbitration Review 100, 107–115. The award is criticised by B Poulain, '*Petrobart v The Kyrgyz Republic*—a few reservations regarding the Tribunal's constructions of the material, temporal and spatial application of the Treaty' (2005) 2(5) TDM. Poulain states that the tribunal should have confined itself to a traditional view of investment before seeking reasons and justifications to extend the definition (at 5).

[63] *Malicorp Ltd v Egypt* (Award) ICSID Case No ARB/08/18, IIC 476 (2011, Tercier P, Baptista & Tschanz) para 107. A further example is *Ambiente Ufficio SpA v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/08/9, IIC 576 (2013, Simma P, Böckstiegel & Torres Bernárdez) para 435, where both parties and the Tribunal accepted the existence of the 'double-barrelled test'.

[64] *Malicorp* para 110.

[65] *Romak SA v Uzbekistan* (Award) PCA Case No AA280, IIC 400 (UNCITRAL, 2009, Mantilla-Serrano P, Molfessis & Rubins) para 188.

6.37 In contrast, the Tribunal in *RosInvest v Russia*[66] assessed the concept of investment by looking at the treaty definition of 'investment' as 'every kind of asset' and concluded that 'in drafting this straightforward and very wide definition, the State parties to the IPPA clearly expressed the intention that *any* asset should be included'.[67] A similar approach was taken in the ICSID case of *Anderson v Costa Rica*[68] where the Tribunal concluded that a deposit of funds resulting in an obligation to make repayment fell within the literal wording of investment as set out by the BIT and therefore satisfied the treaty definition of investment. The ICSID art 25 requirement was not even considered.

6.38 Between the two extremes of either applying or rejecting a double-barrelled test, some tribunals have sought to combine the standards. For example, it is not necessary to set up the ICSID art 25 concept of investment as being in any way different to what State parties may have agreed in investment treaties. The Tribunal in *Lemire v Ukraine* suggested that 'where the ICSID Convention is open to interpretation, such interpretation should seek compatibility rather than contradiction.'[69]

6.39 The tribunal in *Abaclat v Argentina* adopted a different approach to harmonisation. It declared that the definition of investment set out in the Italy–Argentina BIT and art 25 of the ICSID Convention could not necessarily be expected to cover the same ground because they each focused on a different aspect of investment. These perspectives are complementary. The BIT definition focuses on what is to be protected, whereas in art 25 of the ICSID Convention, the focus is on the contributions:

> In summary, a certain value may only be protected if generated by a specific contribution, and—vice versa—contributions may only be protected to the extent they generate a certain value, which the investor may be deprived of. In other words, if it is to be applied, the 'double-barrelled' test does not mean that one definition, namely the definition provided by two Contracting Parties in a BIT, has to fit into the other definition, namely the one deriving from the spirit of the ICSID Convention. Rather, it is the investment at stake that has to fit into both of these concepts, knowing that each of them focuses on another aspect of the investment.[70]

6.40 As well as creating this novel approach to applying the investment treaty definition at the same time as art 25 of the ICSID Convention, the *Abaclat* Tribunal set out three different versions of how the interplay between the two could be addressed. The first was the 'double-barrelled' test. The second was the alternative view that as long as any particular asset fell within the investment treaty definition, the ICSID Convention requirements would be satisfied by the parties' agreement. The third view was to say that the term 'investment' had its own objective meaning and accordingly, any particular asset would need to satisfy this objective meaning even if it could be squeezed within the literal terms of the investment treaty definition.[71]

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[66] *RosInvestCo UK Ltd v Russia* (Award) SCC Case No V079/2005, IIC 471 (SCC, 2010, Böckstiegel C, Berman & Steyn).

[67] ibid para 388.

[68] *Anderson v Costa Rica* (Award) ICSID Case No ARB(AF)/07/3, IIC 437 (2010, Morelli Rico P, Salacuse & Vinuesa).

[69] *Lemire v Ukraine* (Decision on Jurisdiction and Liability) ICSID Case No ARB/06/18, IIC 424 (2010, Fernández-Armesto P, Paulsson & Voss) para 93; *OI European Group v Venezuela* (Award) ICSID Case No ARB/11/25, IIC 678 (2015, Fernandez-Armesto P, Mourre & Orrego Vicuna) para 219.

[70] *Abaclat v Argentina* paras 350–1.

[71] ibid paras 370–2.

6.41 Yet, the *Abaclat* Tribunal accepted that the result in the case it was considering would be identical whichever of these three approaches were adopted. This is consistent with the fact that much of the discussion in the awards summarised in the above paragraphs had little effect on the ultimate result. That is why the best guidance for analysis of the approach adopted by tribunals is to consider the specific investments that have been ruled upon in borderline cases such as *Mitchell v Congo* or *Malaysian Salvors v Malaysia*.

Under bilateral investment treaties

6.42 Almost all BITs adopt a similar formula to define 'investment'. The formula commences with a wide inclusive phrase and then lists approximately five specific categories of rights. These categories generally include property, shares, contracts, intellectual property rights, and rights conferred by law. For example, the UK model BIT provides that:

> For the purposes of this Agreement:
>
> (a) 'investment' means every kind of asset and in particular, though not exclusively, includes:
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
> (iii) claims to money or to any performance under contract having a financial value;
> (iv) intellectual property rights, goodwill, technical processes and know-how;
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[72]

6.43 Similar provisions are found in, for example, the Germany, France, and Netherlands model BITs.[73]

6.44 The US model BIT adopts a different approach to other models currently used. Its definition of 'investment' (footnotes included) is as follows:

> 'investment' means every asset that an investor owns or controls, directly or indirectly, 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. Forms that an investment may take include:
>
> (a) an enterprise;
> (b) shares, stock, and other forms of equity participation in an enterprise;
> (c) bonds, debentures, other debt instruments, and loans;[74]
> (d) futures, options, and other derivatives;
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
> (f) intellectual property rights;

[72] UK model BIT (Appendix 4 below) art 1.

[73] See Appendices 7, 8 and 10 below.

[74] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

(g) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law;[75,76] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.

6.45 It is noteworthy that the preamble to this definition takes up the *Fedax* criteria, albeit without referring to the cases directly. This more specific definition is likely to lead to more certainty by crystallising issues that have been developed in the case law into the wording of the BITs.

6.46 Tribunals have been reluctant to base decisions solely on the wide inclusive phrase commonly found at the beginning of definitions of 'investment'. *Petrobart v Kyrgyz Republic*[77] and *Jan de Nul v Egypt*[78] are two cases where tribunals have found an investment to exist by reference to the detailed criteria contained in the ECT and Belgo–Luxemburg Economic Union–Egypt BIT respectively. It is, however, noteworthy that in neither case did the Tribunal base its decision on the wide opening phrases in the treaty definitions, 'every kind of asset'[79] and 'any kind of assets'[80] respectively. Before deciding that the asset in dispute was an 'investment,' the tribunals sought confirmation from the non-exhaustive list following the introductory phrase. This is perhaps particularly surprising in *Petrobart* because the Tribunal ultimately found an investment to exist where the usual criteria for investment under the ICSID Convention were not met. If the Tribunal was not going to be bound by any considerations of the usual meaning of investment in international investment arbitration it is difficult to see why it could not have rested its finding on the wide phrase 'every kind of asset' above.

6.47 In any event, the very fact that the *Petrobart* Tribunal found an investment to exist demonstrates an intention, similar to that shown by the Tribunal dealing with nationality in *Tokios Tokelės v Ukraine*,[81] not to read limiting phrases into treaties where none exist in the text.[82] The requirement in the US model BIT that an 'investment' should have 'the characteristics of an investment' is precisely such a limiting phrase.

6.48 The award in *Nova Scotia Power v Venezuela* is a clear example of a tribunal looking for wider indications of the existence of an investment, beyond the wording of the BIT. The *Nova Scotia* Power arbitration was conducted under the ICSID Additional Facility Rules but the

[75] Whether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the domestic law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[76] The term 'investment' does not include an order or judgment entered in a judicial or administrative action.

[77] *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case 126/2003, IIC 184 (SCC, 2005, Danelius C, Bring & Smets).

[78] *Jan de Nul NV and Dredging International NV v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/04/13, IIC 144 (2006, Kaufmann-Kohler P, Mayer & Stern).

[79] ECT, art 1(6).

[80] Agreement on the Reciprocal Promotion and Protection of Investments (Belgo-Luxembourg Economic Union–Egypt) (signed 28 February 1999, entered into force 24 May 2002) 2218 UNTS 4, art 1(1).

[81] *Tokios Tokelės v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, IIC 258 (2004, Weil P, Bernardini & Price).

[82] ibid para 52.

Tribunal concluded that even in the absence of the controlling effect of ICSID Convention art 25, '… the BIT itself calls for consideration of inherent features'.[83]

6.49 The analysis in this chapter has focused on general principles applied by tribunals in construing investment treaties. It would be less useful to consider whether protection has been afforded to specific types of investments. The award in *Postova Banka v Greece* serves as a fitting conclusion to this approach and to this section as a whole. As with *Abaclat* and *Alemanni* the Tribunal was considering the question whether sovereign bonds fall to be covered by an investment treaty. In reaching its decision the Tribunal paid close regard to the wording of the Slovakia–Greece BIT. Consistent with previous Tribunals, it looked not only at the text but also the context and did not make its decision solely on the 'every kind of asset' assertion in the chapter. It denied jurisdiction taking note that the reference to debentures in the detailed definition of covered assets was limited to 'debentures of a company'. Similarly, the reference to 'loans' in the definition 'loans, claims to money or to any performance under contract having a financial value' could not on its own be read so widely as including sovereign bonds which do not involve contractual privity as well as conventional commercial loans which do. Taking these factors into account the Tribunal denied jurisdiction over a claim involving sovereign bonds. The *Postova Bank* award thus stands in contrast with the cases involving Argentinian sovereign debt, although all the tribunals were purporting to apply the same interpretative principles.[84]

Under multilateral investment treaties

NAFTA

6.50 The definition of 'investment' in the North American Free Trade Agreement (NAFTA) follows the conventional format of listing types of investment. However, claims that arise solely from 'commercial contracts for the sale of goods' or 'the extension of credit in connection with a commercial transaction' are expressly excluded.[85]

6.51 An example of a claim being rejected by a Tribunal utilising the NAFTA definition of investment is *Apotex v USA*. The claimant manufactured pharmaceuticals in Canada and exported them to the USA. In order to do so, it had to incur expenses in seeking approval via ANDA (Abbreviated New Drug Application) submissions. The tribunal viewed this process as an application to permit the sale of goods within the USA rather than an investment within the USA itself.[86]

Energy Charter Treaty

6.52 The ECT definition of 'investment' follows the familiar form of providing for 'every kind of asset' and then setting out a comprehensive list of specific asset types. At one of its broadest points it includes 'returns', which are defined as 'the amounts derived from or associated with

[83] *Nova Scotia Power Inc v Venezuela* (Award) ICSID Case No ARB(AF)/11/1, IIC 654 (2014, van Houtte P, Vinuesa & Williams) para 80.

[84] *Postova Banka AS v Greece* (Award) ICSID Case No ARB 13/8, IIC 679 (2015, Zuleta P, Stern & Townsend) para 293–349.

[85] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 107 Stat 2057 CTS 1994 No 2 ('NAFTA') (Appendix 1 below) art 1139.

[86] *Apotex Inc v United States of America* (Award on Jurisdiction and Admissibility) IIC 598 (UNCITRAL, 2013, Landau P, Smith & Davidson) paras 151–241.

an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payment in kind'.[87]

'Investment' is also stated to refer to any investment associated with 'an Economic Activity in the Energy Sector'. This phrase is itself widely defined in art 1(5) as 'an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises'.[88] **6.53**

ASEAN Comprehensive Investment Agreement

The definition of 'investment' in art 4 of the ASEAN Comprehensive Investment Agreement[89] contains the usual long list of types of investment. However, footnote 2 of the definition makes it dependent upon possessing the 'characteristics of an investment'. These are stated to 'include the commitment of capital, the expectation of gain or profit, or the assumption of risk'. Footnote 3 excludes from the definition claims for money arising solely from the commercial contracts for the sale of goods or services or any related extension of credit. **6.54**

Pursuant to the definition of 'covered investment' in art 4, applicable investments need to be approved in writing by the competent authority of a Member State. The structure within which this approval is to be sought appears at Annex 1.[90] **6.55**

Trans Pacific Partnership Agreement

The TPPA definition of 'investment' is based upon that found in the US model BIT with its descriptive preamble and footnotes. **6.56**

C. Specific Issues

In this section various issues addressed by investment treaty tribunals relating to the definition of 'investment' are considered. A number of awards have looked at these issues. For the purposes of this section they are grouped into the following categories: **6.57**

(1) Timing issues—when is an investment made?
(2) Pre-contract investment
(3) Territorial issues—where must the investment be made?
(4) The role played by the law of the host State in determining the nature of the investor's property rights
(5) Requirements for investments to be specifically approved
(6) Individual corporate identity and direct/indirect investment.

[87] art 1(9).
[88] art 1(5).
[89] ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2013) Appendix 3 below.
[90] See discussion of *Yaung Chi Oo* at paras 6.159–6.162 below.

Timing issues—when is an investment made?

Timing issues before a treaty comes into force

6.58 It is not usually necessary for an investment to be made after the BIT has come into force in order to be protected. Many investment treaties contain a 'scope of application' provision, which expressly states that the treaties apply to investments made both prior and subsequent to the coming into force of the treaty.[91] One of the jurisdictional challenges raised by the respondent State in *Nykomb v Latvia*[92] was that the ECT did not cover contracts entered into before the treaty came into force. The Tribunal disposed of this objection in a single paragraph, pointing to the fact that: 'Both the changes in the law and the breach of contract occurred after the entry into force of the treaty. There is therefore no question of retroactive effects of the treaty in this situation.'[93] The Tribunal did not even refer to the specific provision of the ECT which, by specifying that the treaty covers investments existing at the time the treaty enters into force,[94] would have provided a complete answer.

6.59 In considering the temporal definition of an investment, the first matter to consider would always be the wording of the instrument upon which the dispute is based. In *Tradex v Albania* the Tribunal relied upon the wording of the foreign investment law under which the claim was brought. The foreign investment law came into force on 1 January 1994 and the underlying claim related to a business that had been liquidated on 16 December 1993. However, the Tribunal held that the investor was protected, not least because the foreign investment law specifically stated that it covered investments made after 31 July 1990.[95]

6.60 *Kardassopoulos v Georgia*[96] is an example of a tribunal rejecting a case because the actions about which a complaint was raised took place before the treaty came into force. The Tribunal did take jurisdiction over a part of the claim where a separate dispute had arisen once the treaty was in force.[97]

6.61 In *RosInvest v Russia*[98] the timing issue did not relate to the date of the investment or of the treaty coming into force but to the date of the investor taking over the investment. The Tribunal was prepared to consider acts perpetrated before the investment was made by the current investor in order to inform its decision on whether the respondent had breached the treaty. However, the timing of the share purchase would have an effect on the allowable quantum of the claim.[99] In *Levy v Peru* the Tribunal declared that an investor must acquire its interest before the alleged breach occurs.[100]

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[91] Netherlands model BIT (Appendix 8 below) art 10; NAFTA (Appendix 1 below) note 39; *Mondev International Ltd v United States of America* (Award) ICSID Case No ARB(AF)/99/2, 6 ICSID Rep 191, IIC 173 (NAFTA/ICSID (AF), 2002, Stephen P, Crawford & Schwebel).

[92] *Nykomb Synergetics Technology Holding AB v Latvia* (Award) SCC Case 118/2001, IIC 182 (SCC, 2003, Haug C, Gernandt & Schütze).

[93] ibid para 4.3.3(a).

[94] ECT, art 1(6)(f).

[95] *Tradex Hellas SA v Albania* (Decision on Jurisdiction) ICSID Case No ARB/94/2, 5 ICISD Rep 47, IIC 262 (1996, Böckstiegel P, Fielding & Giardina).

[96] *Kardassopoulos v Georgia* (Decision on Jurisdiction) ICSID Case No ARB/05/18, IIC 295 (2007, Fortier P, Orrego Vicuña & Watts).

[97] ibid paras 241 and 248–9.

[98] *RosInvestCo UK Ltd v Russia* (Award) SCC Case No V079/2005, IIC 471 (SCC, 2010, Böckstiegel C, Steyn & Berman).

[99] ibid paras 407 and 409.

[100] *Levy and Gremcital SA v Peru* (Award) ICSID Case No ARB/11/17, IIC 671 (2015, Kaufmann-Kohler P, Vinuesa & Zuleta) para 146.

In the case of continuous acts, which commence before a treaty comes into force and continue after it has done so, there is consistent authority that tribunals will have jurisdiction.[101] **6.62**

Disputes arising before a treaty takes effect

Another issue of timing is the question of whether a dispute has arisen before the treaty took effect. This is not strictly a question of the definition of 'investment' under a treaty, but since it is also a matter of jurisdiction *ratione temporis*, it is appropriate to consider the matter here. **6.63**

A number of BITs contain provisions which specifically provide that their protections do not apply to disputes arising before their entry into force. For example, art II(2) of the Argentina–Spain BIT provides: 'This agreement shall not, however, apply to disputes or claims arising before its entry into force'.[102] **6.64**

This provision was considered in *Maffezini v Spain*.[103] The Argentina–Spain BIT came into force in September 1992 but the claimant was relying on acts that took place 'as early as 1989 and throughout 1990, 1991 and the first part of 1992'.[104] The Tribunal considered the issue by seeking to clarify what constituted a 'dispute' within the meaning of the BIT. It referred to jurisprudence of the International Court (ICJ) to the effect that 'it is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties" '.[105] **6.65**

Other frequently cited ICJ dicta in this regard are that a dispute is a 'situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance' of a legal obligation[106] or when 'the claim of one party is positively opposed by the other'.[107] **6.66**

The *Maffezini* Tribunal upheld jurisdiction. While it recognised that the criteria of a 'dispute' should not be as formal as those of a 'claim', it held that art II(2) would not bite until 'the conflict of legal views and interests came to be clearly established'.[108] This only happened at the point of the dispute spectrum when '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'.[109] **6.67**

[101] See *Railroad Development Corp v Guatemala* (Decision on Jurisdiction No 2) ICSID Case No ARB/07/23, IIC 432 (2008, Rigo Sureda P, Crawford & Eizenstat) para 124; *Mondev International Ltd v USA* para 56; *Técnicas Medioambientales Tecmed v Mexico* (Award) ICSID Case No ARB (AF)/00/2, 10 ICSID Rep 130, IIC 247 (2003, Grigera Naón P, Bernal Verea & Fernández Rosas) para 63; and *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction) ICSID Case No ARB/02/6, 8 ICSID Rep 515, IIC 224 (2004, El-Kosheri P, Crawford & Crivellaro (dissenting)) para 167.

[102] Acuerdo para la Promoción y la Protección Recíprocas de Inversiones ('Agreement on the Reciprocal Promotion and Protection of Investments') (Argentina-Spain) (signed 3 October 1991, entered into force 28 September 1992) 1699 UNTS 187.

[103] *Maffezini v Spain* (Decision on Jurisdiction) ICSID Case No ARB/97/7, 5 ICSID Rep 396, IIC 85 (2000, Orrego Vicuña P, Buergenthal & Wolf).

[104] ibid para 92.

[105] ibid para 94, quoting *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 99 para 22.

[106] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65, 74.

[107] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 328.

[108] *Maffezini v Spain* para 98.

[109] ibid para 96.

6.68 In *Lao Holdings v Lao*, the Tribunal refused to dismiss a claim on *ratione temporis* grounds. Having analysed the facts, it concluded that the fact that the claimant had been in negotiations with the government prior to the critical date did not mean that a dispute had arisen because the claimant believed, based upon 'objective facts,' that the negotiations would lead to a renewal of his agreement on mutually satisfactory terms.[110]

6.69 While the *Maffezini* Tribunal upheld jurisdiction, another BIT tribunal used a similar provision to deny jurisdiction. In *Lucchetti v Peru*,[111] a dispute arising under the Chile–Peru BIT, the Tribunal distinguished *Maffezini* on the basis that the dispute in the *Lucchetti* case had 'crystallized'[112] before the treaty came into force as a result of the investor (who was the second claimant) having commenced proceedings to have certain administrative steps annulled before the local court. The Tribunal rejected the argument that the treaty reference to 'disputes' in its provisions dealing with the scope of its coverage should relate only to proceedings between the foreign investor and the State over treaty questions. It found that the meaning of 'disputes' should be ascertained by reference to the subject-matter rather than the parties or the cause of action upon which the litigation is based.[113] The *Lucchetti* Tribunal's consideration of the phrase 'disputes' runs counter to the finding of tribunals considering the meaning of 'dispute' in other provisions in BITs. For example, in considering the impact of so-called 'fork in the road' provisions, tribunals have focused typically on the parties and the cause of action rather than the subject-matter.[114] The decision is thus open to criticism on the ground that the word 'dispute' should be given the same meaning whether in a scope of application provision or in any other provision of a BIT. Nonetheless, *Luchetti* was followed in *ATA v Jordan,* where the Tribunal was persuaded by an analysis that two disputes comprising the same subject matter and having the same origin should be considered legally equivalent.[115]

6.70 In contrast, the Tribunal in *Railroad Corp v Guatemala*[116] considered the previous investment arbitration and ICJ authorities in depth before settling upon the *Maffezini* definition. It also rejected the *Luchetti* approach, upholding the distinction between a dispute based upon the domestic law and one based upon a treaty, although it did give a warning that the mere allegation of a BIT claim cannot be used to deprive a *ratione temporis* restriction of any effect.[117]

6.71 NAFTA does not contain a provision specifically excluding pre-existing disputes. Nonetheless, the Tribunal in *Feldman v Mexico*[118] decided it did not have jurisdiction to

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[110] *Lao Holdings NV v Lao People's Democratic Republic* (Decision on Jurisdiction) ICSID Case No ARB(AF)/12/6, IIC 633 (2014, Binnie P, Hanotiau & Stern) para 156. See also *Tidewater Investment v Venezuela* (Decision on Jurisdiction), ICSID Case No ARB/10/5, IIC 573 (2013, McLachlan P, Rigo Sureda & Stern) paras 190–2.

[111] *Empresas Lucchetti SA v Peru* (Decision on Jurisdiction) ICSID Case No ARB/03/4, IIC 88 (2005, Buergenthal P, Cremades & Paulsson).

[112] ibid para 39.

[113] ibid para 50.

[114] See 4.101 *et seq* above.

[115] *ATA Construction, Industrial and Trading Co v Jordan* (Award) ICSID Case No ARB/08/2, IIC 430 (2010, Fortier P, El-Kosheri & Reisman) para 102.

[116] *Railroad Development Corp v Guatemala* (Second Decision on Objections to Jurisdiction) ICSID Case No ARB/07/23, IIC 432 (2008, Rigo Sureda P, Eizenstat & Crawford).

[117] ibid paras 124–9 and 134–6.

[118] *Feldman v Mexico* (Decision on Jurisdiction) ICSID Case No ARB(AF)/99/1, 7 ICSID Rep 318, IIC156 (NAFTA/ICSID (AF), 2000, Kerameus P, Covarrubias Bravo & Gantz).

adjudicate upon measures adopted by Mexico before NAFTA came into force. Its reason for so finding was that: 'Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*.'[119]

6.72 However, the Tribunal did accept jurisdiction to consider measures adopted after the date NAFTA came into force even though they formed part of a permanent cause of action commencing before that date.

6.73 In the BIT context, the claimant in *Paushok v Mongolia*[120] argued that the treaty should cover disputes arising before its coming into force because (1) it expressly covered investments made before that date and (2) it did not expressly exclude such disputes. The Tribunal conducted a thorough review of the pre-existing public international law and investment treaty cases before concluding that its ordinary meaning considered under art 31 of the Vienna Convention would exclude giving the treaty such retroactive force.[121] It cited with approval[122] the statement made by the tribunal in *MCI Power Group v Ecuador*[123] saying:

> ... because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified ... Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.[124]

Timing issues once the investment has come to an end

6.74 An investment will not cease to be covered under a treaty merely because it has ceased to exist. In the NAFTA case of *Mondev v USA* the respondent State sought to exclude the Tribunal's jurisdiction on the basis that the failure of the investment project meant that there was no underlying investment which could be the subject of a dispute. Not surprisingly, the Tribunal rejected this assertion, as it would have undermined the whole principle of investment treaty arbitration:

> ... once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed ... a person remains an investor for the purposes of [NAFTA] Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an 'investor' as someone who 'seeks to make, is making or has made an investment.' Even if an investment is expropriated, it remains true that the investor 'has made' the investment.[125]

6.75 The point was also addressed by a BIT tribunal in *Jan de Nul v Egypt*.[126] The investment consisted of a contract that had come to an end long before the claimant commenced treaty arbitration proceedings. The respondent State argued that at the time the dispute arose the

[119] ibid para 62.
[120] *Paushok v Mongolia* (Award) IIC 490 (UNCITRAL, 2011, Lalonde P, Grigera Naón & Stern).
[121] ibid para 468.
[122] ibid para 460.
[123] *MCI Power Group LC v Ecuador* (Award) ICSID Case No ARB/03/6, IIC 296 (2007, Vinuesa P, Irarrázabal & Greenberg) paras 59 and 66.
[124] See also *ST-AD GmbH v Bulgaria* (Award on Jurisdiction) PCA Case No 2011–06 (UNCITRAL, 2013, Stern P, Klein & Thomas) paras 298–333.
[125] *Mondev International Ltd v United States of America* (Award) ICSID Case No ARB(AF)/99/2, 6 ICSID Rep 191, IIC 173 (NAFTA/ICSID (AF), 2002, Stephen P, Crawford & Schwebel) para 80.
[126] *Jan de Nul NV v Egypt* (Decision on Jurisdiction) ICSID Case No ARB/04/13, IIC 144 (2006, Kaufmann-Kohler P, Mayer & Stern).

investment no longer existed. Both the BIT and the ICSID Convention would prevent an investment claim being brought in such circumstances. The Tribunal rejected this argument, recognising that accepting it would defeat the entire logic of investment protection treaties. It quoted from an expert report made by Schreuer which had been submitted by the claimant:

> Providing an effective remedy is part of the duties of fair and equitable treatment and of continuous protection and security for investments. A violation of that duty after the investment has come to an end does not change its nature. The duty to provide redress for a violation of rights persists even if the rights as such have come to an end. Otherwise an expropriating State might argue that it owes no compensation since the investment no longer belongs to the previous owner.[127]

6.76 These principles were also considered, in slightly different circumstances, in *National Grid v Argentina*.[128] The claimant had commenced the arbitration in April 2003. In August 2004 it sold the shares that constituted its investment. It asserted that this share sale was done by way of mitigation. The alternative would have been 'to continue pumping money into a ruinous enterprise'.[129] One of the bases upon which Argentina challenged jurisdiction was that the claimant was no longer an investor under the BIT. Argentina sought to distinguish *Mondev* and similar authorities on the basis that none covered cases where assets had been relinquished voluntarily. Yet the Tribunal supported the claimant, stating that the key factor under *Mondev* 'is to have been an investor and to have suffered a wrong before the sale or disposition of [the] assets, without the need to remain an investor for [the] purposes of the arbitration proceedings'.[130]

6.77 The issue of duration has also arisen in a number of cases where the central complaint has revolved around the treatment of an arbitration claim or domestic court case rather than the original form of the investment. The issue arose in *Saipem v Bangladesh*[131] where the Tribunal held that the award was a continuation of the original investment. In *White Industries v India*[132] the claim arose out of the inordinate delay the claimant faced in seeking to enforce an arbitral award in the Indian courts. The Tribunal accepted jurisdiction describing:

> ... developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment.[133]

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[127] *Jan de Nul* para 135. See also *Bogdanov v Moldova* (Award) SCC Arbitration No V (114/2009) IIC 495 (SCC, 2010, Nilsson (sole)) paras 67-68.

[128] *National Grid plc v Argentina* (Decision on Jurisdiction) IIC 178 (UNCITRAL, 2006, Rigo Sureda P, Debevoise & Garro).

[129] ibid para 110.

[130] ibid para 120.

[131] *Saipem SpA v Bangladesh* (Decision on Jurisdiction) ICSID Case No ARB/05/07 (2007, Kaufmann-Kohler P, Otton & Schreuer) para 127.

[132] *White Industries Australia Ltd v India* (Award) (UNCITRAL, 2011, Rowley P, Brower & Lau).

[133] ibid para 7.6.8; see also *Chevron Corp v Ecuador* (Third Interim Award on Jurisdiction and Admissibility) PCA Case No 2009-23, IIC 524 (UNCITRAL, 2012, Veeder P, Grigera Naón & Lowe) para 4.21 makes reference to 'the overall life-span of an investment'; *ATA Construction v Jordan* para 96; *GEA Group Aktiengesellschaft v Ukraine* (Award) ICSID Case No ARB/08/16, IIC 487 (2011, van den Berg P, Landau & Stern) is an exception to this 'developing jurisprudence' as the Tribunal sought to distinguish an arbitration as merely ruling upon the rights and obligations arising out of an investment, but not constituting an investment itself (para 162).

In *ATA v Jordan*[134] the dispute that culminated in an unfavourable Court of Cassation decision was determined to have arisen prior to entry into force of the Turkey–Jordan BIT. However, the Tribunal did have jurisdiction to hear a claim arising out of the annulment of a right to arbitrate as this right was an autonomous legal right due to the doctrine of separability.[135] **6.78**

Pre-contract investment

Tribunals addressing the question of pre-contract expenditure have consistently developed the idea that, in the absence of the specific consent of the State, such costs are not covered. **6.79**

The earliest case addressing the issue is *Mihaly International Corp v Sri Lanka.*[136] This was an ICSID arbitration brought under the US–Sri Lanka BIT.[137] The claimant was seeking reimbursement of expenses incurred pursuing a proposed power project in Sri Lanka that never happened. The Tribunal found that no investment, under the terms of art 25 of the ICSID Convention, had taken place. Its main reason for so finding was that: 'The Respondent clearly signalled, in the various documents which are relied upon by the Claimant, that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made.'[138] **6.80**

Mihaly was closely considered in *PSEG v Turkey.*[139] In this ICSID arbitration, brought under the US–Turkey BIT, the Turkish Government had cancelled a concession contract before any works commenced. At the time of its cancellation, the concession contract still had a number of incomplete clauses and Turkey argued that no investment had been made because the project had not 'moved off the drawing board'.[140] Yet the Tribunal distinguished *Mihaly* on the basis that the contract in this case had become effective. The contract was valid as the remaining gaps to be negotiated would not have prevented the claimant executing it.[141] Thus a distinction can be drawn between disputes arising out of situations where expenses have been incurred before a contract has become effective and those arising after the contract has come into existence. **6.81**

The *PSEG* Tribunal also discussed the (at the time) unpublished award in *Zhinvali Development Ltd v Georgia,*[142] another case where a pre-investment expenditure claim was rejected on jurisdictional grounds. The award had been made available to the *PSEG* Tribunal.[143] It arose out of the Georgian Investment Law No 473–1S of 12 November 1996 which contains a general offer of ICSID arbitration. Zhinvali was excluded from a project **6.82**

[134] *ATA Construction v Jordan.*
[135] ibid paras 117–19.
[136] *Mihaly International Corp v Sri Lanka* (Award) ICSID Case No ARB/00/2, 6 ICSID Rep 310, IIC 170 (2002, Sucharitkul P, Rogers & Suratgar).
[137] Treaty Concerning the Encouragement and Reciprocal Protection of Investment (US-Sri Lanka) (signed 20 September 1991, entered into force 1 May 1993) Senate Treaty Doc 102-25.
[138] *Mihaly* para 51.
[139] *PSEG Global Inc v Turkey* (Decision on Jurisdiction) ICSID Case No. ARB/02/5, 11 ICSID Rep 431, IIC 197 (2004, Orrego Vicuña P, Fortier & Kaufmann-Kohler)
[140] ibid para 54.
[141] ibid paras 79–105.
[142] *Zhinvali Development Ltd v Georgia* (Award) ICSID Case No ARB/00/1, 10 ICSID Rep 3 (2003, Robinson P, Jacovides & Rubin).
[143] *PSEG* para 478 fn 12.

to rehabilitate a hydro-electricity plant after three years of negotiations.[144] The Tribunal denied jurisdiction on the ground that the pre-investment expenditure did not qualify as an investment under the 1996 Georgian Investment Law.[145] The *PSEG* Tribunal describes *Zhinvali* as a case where the parties expressly acknowledged that the claimant did not have an investment.[146]

6.83 The claim in *Petrobart v Kyrgyz Republic*[147] comprised two elements. The first was a contract for delivery of 200,000 tons of gas concentrate over twelve months and the second was an agreement to agree additional supplies at a later stage. The Tribunal upheld the first part of the claim as constituting an investment but rejected the second on the grounds that 'whatever discussions may have taken place between the parties about further business relations, they did not result in any binding undertakings in the Contract'.[148]

6.84 While the awards of tribunals dealing with this issue are consistent with each other, the point has generated some controversy among those commenting on the awards. The *Mihaly* award features a separate concurring opinion on the grounds that: 'Expenditure[s] incurred by successful bidders do indeed produce "economic value" ... and the protection mechanism developed under the aegis of the World Bank in the form of the ICSID Convention should be available to those who are encouraged to embark on such expensive exercises'.[149]

6.85 This observation has some persuasive value, in particular given the recognition in other awards that investment treaty claims arise out of abusive governmental acts and are not related to claims existing under domestic law contracts.[150] It is thus somewhat inconsistent for the existence of a contract to be the central question in circumstances where investments, in an economic sense, have been made. In addition, the absence of a contract may not have been an issue had Mihaly incorporated a specific company in Sri Lanka through which it pursued the project, a point specifically not considered by the Tribunal.[151]

6.86 Ben Hamida points out that the result in *Mihaly* may well have been different had the investor relied to a greater extent on the detailed definition of investment contained in the BIT.[152] There is little doubt that if *Mihaly* was being argued today, its counsel would follow the practice adopted by claimants in many of the cases considered in this chapter, of focusing in detail upon the BIT definition. Nonetheless, it must be recalled that the *Mihaly* Tribunal not

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[144] See also Ben Hamida, 'The *Mihaly v. Sri Lanka* case: Some Thoughts Relating to the Status of Pre-Investment Expenditures' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005).

[145] ibid 68.

[146] *PSEG* para 479.

[147] *Petrobart Ltd v Kyrgyz Republic* (Award) SCC Case 126/2003, IIC 184 (SCC, 2005, Danelius C, Bring & Smets).

[148] ibid 69.

[149] *Mihaly* (Award, Concurring Opinion of Suratgar) para 10.

[150] See *Compañía de Aguas del Aconquija and Vivendi Universal v Argentina* (Decision on Annulment) ICSID Case No ARB/97/3, 6 ICSID Rep 327, IIC 70 (2002, Fortier P, Crawford & Fernández Rozas) *('Vivendi I')*, discussed at 4.90 above.

[151] *Mihaly* (Award) para 54.

[152] Ben Hamida, 'The *Mihaly v. Sri Lanka* case', 64–7. A similar point is made by C Chatterjee, 'When Pre-Investment or Development Costs May or May Not be Regarded as Part of "Investment" under Article 25(1) of the ICSID Convention; The *Mihaly* Case' (2003) 4 JWIT 918, 923. Chatterjee states that had it not been for the Government of Sri Lanka explicitly exempting its liability, the claim would have been admissible under the BIT (924).

only found that Mihaly's expenditure did not amount to an investment under the BIT, but also under the ICSID Convention itself.

6.87 The Tribunal's decision in *Mihaly* is defended strongly by Hornick.[153] Hornick points out that any pre-investment process would involve a large number of bidders, only one of whom can be successful.[154] If treaty claims could be brought in respect of pre-investment disputes, a wide category of claimants would be created. In addition, the issues which may be covered by such claims, namely bribery and corruption, would be more appropriately reviewed by a national court applying domestic criminal law than by an arbitral tribunal applying principles of public international law. These contentions would of course have no relevance if jurisdiction could be found to exist under the wording of a BIT.

Place of investment

6.88 Most investment treaties contain provisions explicitly limiting their application to investments territorially made within a host State. For example, art 2 (1) of the Swiss–Pakistan BIT provides that: 'Le présent Accord est applicable aux investissements effectués sur le territoire d'une Partie Contractante par des investisseurs de l'autre Partie Contractante'.[155]

6.89 As with other investment treaties, the Swiss–Pakistan BIT contains many other references to the territory of the host State.

6.90 The question of which investments are to be considered as being made on the territory of the host State was considered in the jurisdiction awards in *SGS v Pakistan*[156] and *SGS v Philippines*.[157] Both cases concern agreements by which SGS was to provide pre-shipment customs inspection services. These services would be carried out outside the host State. Following an inspection, SGS would provide an inspection certificate to the customs authorities in Pakistan and the Philippines respectively. In both cases the respondent States contested jurisdiction by arguing that the large majority of SGS's expense, and thus its investment, took place outside the host State in the many places where the inspections physically took place.

6.91 Both Tribunals rejected this narrow contention. The reasoning of the *SGS v Philippines* Tribunal is fuller. It relied on the fact that the focal point of SGS's services was the provision of a reliable inspection certificate in the host State itself. It also took into account that a proportion of SGS's expenditure took place in the Philippines. Ultimately the Tribunal considered the matter 'as a whole',[158] adopting the approach taken by the tribunals in *Fedax v Venezuela* and *CSOB v Slovakia* to the question whether an investment had been made at all (see paras 6.08 to 6.14 above). The important aspect was ' "the entire process" of economic activity, even though particular aspects of it were not locally performed'.[159] The *SGS*

[153] RN Hornick, 'The *Mihaly* Arbitration Pre-Investment Expenditure as a Basis for ICSID Jurisdiction' (2003) 20 J Int'l Arb 189.

[154] ibid 191.

[155] Accord Concernant la Promotion et la Protection Réciproques des Investissements ('Agreement Concerning the Promotion and Reciprocal Protection of Investments') (Switzerland–Pakistan) (signed 11 July 1995, entered into force 6 May 1996) RO 1998 2601.

[156] *SGS Société Générale de Surveillance SA v Pakistan* (Decision on Jurisdiction) ICSID Case No ARB/01/13, 8 ICSID Rep 383, IIC 223 (2003, Feliciano P, Faurès & Thomas).

[157] *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction) ICSID Case No ARB/02/6, 8 ICSID Rep 515, IIC 224 (2004, El-Kosheri P, Crawford & Crivellaro (dissenting)).

[158] *SGS v Philippines* para 112.

[159] ibid para 110.

v Philippines Tribunal also agreed with the reasoning applied by the *SGS v Pakistan* Tribunal which had characterised the transaction as involving 'the injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement.'[160]

6.92 The claimants in *Inmaris v Ukraine*[161] relied on the fact that the Germany–Ukraine BIT did not contain a specific territorial requirement to argue that the respondent could not raise questions of territoriality as a jurisdictional objection. The Tribunal rejected this position, both by requiring a territorial connection 'as an overarching jurisdictional limit' and by using the specific territorial references in the substantive treaty positions as indicating a territorial requirement.[162] The investment in question was a contract to repair and renovate a historical sailing vessel to be used for the training of Ukrainian cadets and for tourism. The Tribunal found the territorial requirement to be met by considering the benefits of the claimant's investments considered as an integrated whole, rather than by considering more narrow and formalistic matters such as the place where payments of money transfers were actually made.[163] A similar conclusion was reached in *Alpha v Ukraine*,[164] where the investment was the renovation of a hotel. The construction and the ultimate benefit all took place in Ukraine and the Tribunal refused to elevate form over substance. It rejected Ukraine's objection which had been based on the fact that the payments to the construction company had been made in Cyprus.[165]

6.93 A territorial requirement was used to deny jurisdiction in the NAFTA case of *Bayview v Mexico*.[166] The claim was brought by certain Texan agricultural interests against Mexico, complaining that Mexico's management of the Rio Grande River was harming their businesses in Texas. In order to qualify as an 'investor' under NAFTA art 1101(a) the Tribunal considered that an enterprise must make an investment in another NAFTA State, and not in its own.[167] The claimants failed this test because their investments were wholly confined to their own national States. To qualify under NAFTA, an investment would have to be primarily regulated by the law of a State other than the State of the investor's nationality. In the absence of this fact, there could be no foreign investment.[168]

6.94 A more borderline case is *Abaclat v Argentina*.[169] The investments in this case were sovereign bonds issued by Argentina, which had been acquired by the claimants in secondary securities

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[160] *SGS v Philippines* paras 96 and 111 cited *SGS v Pakistan* para 136. The approach of the two *SGS* tribunals was followed in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay* (Decision on Jurisdiction) ICSID Case No ARB/07/9, IIC 428 (2009, Knieper P, Fortier & Sands) para 103 and by the majority in *Abaclat v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5, IIC 504 (2011, Tercier P, van den Berg & Abi-Saab (dissenting)) para 374, fn 147.

[161] *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/08/8, IIC 431 (2010, Alexandrov P, Cremades & Rubins).

[162] ibid paras 118–21.

[163] ibid paras 123–5.

[164] *Alpha Projektholding GmbH v Ukraine* (Award) ICSID Case No ARB/07/16, IIC 464 (2010, Robinson P, Alexandrov & Turbowicz).

[165] See also *Romak SA v Uzbekistan* (Award) PCA Case No AA280, IIC 400 (UNCITRAL, 2009, Mantilla-Serrano P, Molfessis & Rubins) where the Tribunal had regard to where the contribution duration and risk occurred, not just the physical delivery of a product (para 237).

[166] *Bayview Irrigation District v Mexico* (Award) ICSID Case No ARB(AF)/05/1, IIC 290 (2007, Lowe P, Gómez-Palacio & Meese).

[167] ibid para 101.

[168] ibid para 98.

[169] *Abaclat v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5, IIC 504 (2011, Tercier P, van den Berg & Abi-Saab (dissenting)).

markets outside Argentina. As a result, Argentina raised a jurisdictional objection on the basis that the claimants had not made an investment in Argentina. It would have been possible to distinguish a previous decision concerning traded financial instruments, *Fedax v Venezuela*,[170] because the bonds in question in *Fedax* were issued to support a specific project in Venezuela. The funds raised by the *Abaclat* bonds were not specified for any particular project. Nonetheless, the Tribunal did not find this distinction to be relevant:

> With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is where the invested funds ultimately made available to the Host State and did they support the latter's economic development?[171]

This decision can be supported on policy grounds because sovereign nations issue bonds in order to advance their development and the ability to trade these bonds on secondary markets is an integral part of the attractiveness of the investment. The dissenting opinion focuses narrowly on specific features of the bonds but does not take into account the overall effect the bonds would have had on the Argentinian economy. However, it does correctly point out the special features of the particular case given that the bonds were not 'issued in support of a public project or a commercial undertaking ... In other words, they have no specific economic anchorage in Argentina'.[172]

6.95 As noted above at paragraph 6.49 the *Postova Bank* award reaches the opposite conclusion to the cases involving Argentinian sovereign debt.[173]

6.96 The question of treaty coverage of indirect investments is considered at paragraphs 6.117 *et seq* below. In *Guaracachi v Bolivia*, the Tribunal considered whether an investment made indirectly could be considered to be made in the territory of a contracting State. It concluded that the territorial requirement was not designed to exclude such investment as long as the ultimate investment that had been expropriated had been located in the territory of a contracting State.[174]

The role played by the law of the host State in defining 'investment'

Investment according to law

6.97 In many investment treaties the definition of 'investment' includes a requirement that the categories of assets admitted as 'investments' must be made 'in accordance with the laws and

[170] *Fedax NV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/96/3, 5 ICSID Rep 183, IIC 101 (1997, Orrego Vicuña P, Heth & Owen).

[171] *Abaclat v Argentina* para 374. See also *Deutsche Bank AG v Sri Lanka* (Award) ICSID Case No ARB/09/02, IIC 578 (2012, Hanotiau P, Khan & Williams) para 292 and *Ambiente Ufficio SpA v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/08/9, IIC 576 (2013, Simma P, Böckstiegel & Torres Bernárdez (dissenting)) para 502. In both awards, the Tribunals supported the proposition that the territorial requirement would apply differently in the case of financial instruments.

[172] *Abaclat v Argentina* (Dissenting Opinion, Abi-Saab) para 108.

[173] *Postova Banka AS v Greece* (Award) ICSID Case No ARB 13/8, IIC 679 (2015, Zuleta P, Stern & Townsend) paras 293–349. See Waibel, 'Opening Pandora's Box: Sovereign Debt in International Arbitration' (2007) 101 AJIL 711.

[174] *Guaracachi America Inc v Bolivia* (Award) PCA Case No 2011–17, IIC 628 (UNCITRAL, 2014, Miguel Júdice P, Conthe & Vinuesa) para 358.

regulations of the said party'.[175] The plain meaning of this phrase is that investments which would be illegal upon the territory of the host State are disqualified from the protection of the BIT. Attempts by respondent States to broaden the matters encompassed by this phrase have failed.

6.98 In *Salini*[176] Morocco argued that the Tribunal lacked jurisdiction as the transaction in question would be regarded by Moroccan law as a business contract rather than investment. As a result, an investment had not taken place 'in accordance with the laws and regulations' of Morocco as required by art 1(1) of the Italy–Morocco BIT. The Tribunal rejected this argument, confirming that the phrase should be maintained within its proper scope: 'In envisaging "the categories of invested assets … in accordance with the laws and regulations of the said party", the provision in question refers to the legality of the investment and not to its definition. It aims in particular to ensure that the bilateral Agreement does not protect investments which it should not, generally because they are illegal.'[177]

6.99 The role played by the phrase was also restricted by the Tribunal in *Tokios Tokelės v Ukraine*.[178] Ukraine attempted to deny the Tribunal's jurisdiction because of various technical defects in the manner in which the investment had been registered under Ukrainian law. The Tribunal was, however, unwilling to withdraw the protection of the BIT on the basis of such defects saying that 'to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty'.[179] Similarly, in *Quiborax v Bolivia*, the Tribunal held that trivial breaches of Bolivian law would not amount to a breach of the Chile–Bolivia BIT's legality requirement.[180]

6.100 In *Achmea v Slovakia*, the claimant had acquired a portfolio of health insurance clients. Slovakia sought to rely on the Netherlands–Slovakia BIT's legality requirement to contest jurisdiction. It pointed to a number of improper and illegal practices that the claimant had carried out in order to obtain its client portfolio. The Tribunal refused to interpret a provision obliging the State parties to admit investments in accordance with its provisions of law as constituting a requirement, found in other treaties, demanding that investments be made in accordance with the laws and regulations of the host State. Further, it stated that not all violations of a State's laws should bear the same consequences. Where, as in this case, the domestic regulations had already imposed penalties falling short of terminating the investor's license to operate, the Tribunal did not believe that a good faith application of the BIT's legality standard would require exclusion of the investment from the scope of the treaty's protection.[181]

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[175] Tra sulla Promozione e Protezione Degli Investimenti ('Treaty for the Promotion and Protection of Investments') (Italy–Morocco) (signed 18 July 1990, entered into force 26 April 2000) art 1(1).

[176] *Salini Costruttori SpA v Morocco* (Decision on Jurisdiction) ICSID Case No ARB/00/4, 6 ICSID Rep 398 (2001, Briner P, Cremades & Fadlallah).

[177] ibid para 46. See also *Consortium RFCC v Morocco* (Award) ICSID Case No ARB/00/6, IIC 75 (2003, Briner P, Cremades & Fadlallah); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (Decision on Jurisdiction) ICSID Case No ARB/03/29, IIC 27 (2005, Kaufmann-Kohler P, Berman & Böckstiegel) para 109.

[178] *Tokios Tokelės v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, IIC 258 (2004, Weil P (dissenting), Bernardini & Price).

[179] ibid para 86.

[180] *Quiborax SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/06/2, IIC 563 (2012, Kaufmann-Kohler P, Lalonde & Stern) paras 265 and 280.

[181] *Achmea BV v Slovakia* (Award) PCA Case No 2008–13, IIC 649 (UNCITRAL, 2012, Lowe P, van den Berg & Veeder) paras 162–80.

6.101 The dispute in *Desert Line v Yemen*[182] arose under the Oman–Yemen BIT. Article 1.1 of this treaty provides:

> The term 'Investment' shall mean every kind of assets owned and invested by an investor of one Contracting Party, in the territory of the other Contracting Party, and that is accepted by the host party, as an investment according to its laws and regulations, and for which an investment certificate is issued.[183]

6.102 Yemen objected to the Tribunal's jurisdiction on the basis that the investment had never been 'accepted' pursuant to art 1.1 and that no investment certificate had ever been issued. The Tribunal found that Yemeni legislation did not call for any particular form in which an investment was to be 'accepted' and also concluded that the art 1.1 requirements should correspond to a material objective rather than 'mere formalism'.[184] The Tribunal quoted this passage from the first edition of this work with approval in support of its conclusion.[185]

6.103 In *Saba Fakes v Turkey*[186] the respondent State contended that the investment had not been made in accordance with law because the claimant investor had taken a problematic assignment of the asset from a high profile Turkish business family who were seeking to avoid problems arising for them in Turkey due to investigations and related matters such as asset freezing. The Tribunal rejected this position, distinguishing between breaches of the law relating to the admission of investments in the host State and illegality arising in the course of operating the business:

> As to the nature of the rules contemplated in Article 2(2) of the Netherlands–Turkey BIT, it is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to '*investments … established in accordance with the laws and regulations …*" The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws but are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation.[187]

6.104 In a number of cases tribunals have employed the concept of estoppel to defeat the jurisdictional objections of a respondent State seeking to rely upon its domestic investment registration processes as a basis for arguing that a non-registered investment had not been made according to the law. For example, the *Desert Line* Tribunal approvingly cited dicta of the Tribunal in *Fraport v Philippines* who addressed the issue in the following terms:

> Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and

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[182] *Desert Line Projects LLC v Yemen* (Award) ICSID Case No ARB/05/17, IIC 319 (2008, Tercier P, El-Kosheri & Paulsson).

[183] The original text is in Arabic. This quotation is taken from the English translation on which both parties relied for the purposes of the arbitration.

[184] *Desert Line Projects* (Award) para 106.

[185] See also *Mytilineos Holdings SA v Serbia and Montenegro* (Partial Award on Jurisdiction) IIC 345 (UNCITRAL, 2006, Reinisch P, Koussoulis & Mitrović) para 146 where the Tribunal held that investment did not need to be registered in order to be invested 'in accordance with law' even though the law required registration; and *Alpha v Ukraine* para 297 where the Tribunal concluded that trivial errors would not vitiate an investment's status as such according to the law under the terms of the Austria–Ukraine BIT.

[186] *Saba Fakes v Turkey* (Award) ICSID Case No ARB/07/20, IIC 439 (2010, Gaillard P, Lévy & van Houtte).

[187] ibid para 119.

> endorsed an investment which was not in compliance with its law.' This comment applies *a fortiori* when the alleged problem is not violation of law, but merely—as here—the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself.[188]

6.105 The tribunal in *Arif v Moldova* was also impressed by the fact that the legality of the investment had been acted upon in good faith by both parties over a period of time. It stated that:

> This is not a case of a concealed illegality, or a class of assets prohibited to foreign investors … The investment was not made fraudulently or on the basis of corruption. In cases like the present one, the passage of time and the actions of the parties on the mutual assumption of legality cannot be ignored in the determination of jurisdiction.[189]

Use of illegality to deny jurisdiction

6.106 An example of a successful jurisdictional objection on the basis of the claimant's failure to comply with law is *Fraport v Philippines*.[190] Although this award was annulled, the annulment was on the basis of the procedure followed by the Tribunal. The case arose from the expropriation of an airport concession. The Philippines argued that the investment had not been carried out according to law because it violated provisions of Philippines law requiring such investments to be majority owned by Philippines nationals. The Tribunal found that Fraport had consciously, intentionally and covertly structured arrangements in a way that it knew to be a violation of the law.[191] The Tribunal found that:

> Fraport knowingly and intentionally circumvented the [relevant law] by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment 'in accordance with law'. Nor can it claim that high officials of the Respondent subsequently waived the legal requirements and validated Fraport's investment, for the Respondent's officials could not have known of the violations. Because there is no 'investment in accordance with law', the Tribunal lacks jurisdictional *ratione materiae*.[192]

6.107 In reaching its conclusion, the Tribunal had regard to domestic law, notwithstanding the BIT's status as an international legal instrument. It stated that the relevant BIT provisions

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[188] *Desert Line Projects* (Award) para 120 quoting from *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (Award) ICSID Case No ARB/03/25, IIC 299 (2007, Fortier P, Cremades & Reisman) para 346. Other examples of the use of estoppel in this context are *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/08/8, IIC 431 (2010, Alexandrov P, Cremades & Rubins) para 140, and *H&H Enterprises Investments Inc v Egypt* (Decision on Jurisdiction) ICSID Case No ARB 09/15, IIC 542 (2012, Cremades P, Gharavi & Heiskanen) paras 52–4. See also *Railroad Development Corp v Guatemala* (Decision on Jurisdiction No 2) paras 144–7 when the Tribunal concluded that the Respondent's failure to raise any objection based on illegality for a number of years prevented it from doing so in the arbitration.

[189] *Arif v Moldova* (Award) ICSID Case No ARB/11/23, IIC 585 (2013, Cremades P, Hanotiau & Knieper) para 376.

[190] *Fraport AG v Philippines* (Award) ICSID Case No ARB/03/25, IIC 299 (2007, Fortier P, Cremades & Reisman). The second award delivered after the first proceedings had been annulled also contains a strong endorsement of the need to comply with the law of the host State as a condition for jurisdiction: *Fraport AG v Philippines* (Award) ICSID Case No ARB/11/12, IIC 731 (2014, Bernadini P, Alexandrov & van den Berg).

[191] ibid para 323.

[192] ibid para 401. See also *Inceysa Vallisoletana SL v El Salvador* (Award) ICSID Case No ARB/03/26, IIC 134 (2006, Oreamuno Blanco P, Landy & von Wobeser). The Tribunal constituted following the annulment of the first *Fraport* award reached a similar conclusion on this issue: *Fraport* (Award, 2014) para 467–8.

effected a *renvoi* to domestic law. As a consequence, a 'failure to comply with the national law to which a treaty refers will have an international legal effect.'[193]

6.108 *Anderson v Costa Rica*[194] was a claim brought by a number of investors against Costa Rica alleging that its failure to provide proper vigilance over its banking system had caused them significant losses following their investments in a fraudulent investment scheme. The investors had not committed any crime by their activities in Costa Rica, but their investment in the scheme was not in accordance with the laws of Costa Rica. The Tribunal denied jurisdiction asserting that:

> The Tribunal's interpretation of the words 'owned in accordance with the laws' of Costa Rica reflects both sound public policy and sound investment practice. Costa Rica, indeed any country, has a fundamental interest in securing respect for its law. It clearly sought to secure that interest by requiring investments under the BIT to be owned and controlled according to law. At the same time, prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica.[195]

6.109 In *Metal-Tech v Uzbekistan*, the Tribunal found as a fact that the investor had committed acts of bribery and corruption in making his investment. It read Uzbekistan's consent to arbitrating disputes as being limited to disputes concerning an 'investment'. In turn, the definition of 'investment' contained in the Israel–Uzbekistan BIT was limited to those made in accordance with domestic law. It thus denied jurisdiction.[196]

Effect of illegality upon 'investment': a summary

6.110 In summary, an investment that is made in breach of the laws of the host State will not qualify as an investment under an investment treaty. This will be the case even where the applicable treaty does not contain an express requirement of compliance with the laws of the host State. An alternative approach would be to concede that the tribunal has jurisdiction over the investment but to refuse the investor the benefits of the substantive protections of the investment treaty.[197]

6.111 An investor cannot lose jurisdiction because of an allegation of illegality in the performance of the investment. The rationale for the distinction between illegality in the making of an investment and illegality in the performance of an investment is that, in the latter case, a State has its usual judicial and regulatory functions available to sanction the performance of illegal acts.[198] In *Mamidoil v Albania* the Tribunal put the 'decisive moments' for the analysis of substantive illegality as being the time when the investment was planned and made.[199]

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[193] *Fraport* (Award, 2007) para 394.

[194] *Anderson v Costa Rica* (Award) ICSID Case No ARB(AF)/07/3, IIC 437 (2010, Morelli Rico P, Salacuse & Vinuesa).

[195] ibid para 58.

[196] *Metal-Tech Ltd v Uzbekistan* (Award) ICSID Case No ARB/10/3, IIC 619 (2013, Kaufmann-Kohler P, Townsend & von Wobeser) paras 372–3.

[197] *Yukos Universal Ltd v Russia* (Final Award) PCA Case No AA 227, IIC 652 (UNCITRAL, 2014, Fortier C, Poncet & Schwebel) paras 1349–53.

[198] *Yukos* paras 1354–5.

[199] *Mamidoil Jetoil Greek Petroleum Products Soc SA v Albania* (Award) ICSID Case No ARB/11/24, IIC 682 (2015, Knieper P, Banifatemi & Hammond) para 375.

6.112 In *Yukos*, the respondent State invoked a general doctrine of 'unclean hands' in support of its jurisdictional objection based upon illegality. The Tribunal reviewed certain ICJ authorities but noted that there were no investor–State awards where the 'unclean hands' doctrine had been applied to bar jurisdiction over a claim.[200]

The role played by the law of the host State in determining the nature of the investor's property rights

6.113 The municipal law of the host State plays an important role in determining whether an investment has taken place. The typical definition of an investment found in a BIT requires that the status of the asset claimed to be an investment must be considered under the host State's domestic property law. At the same time, of course, international law must prevent a State from using its own laws wrongfully to deny the investment's status as an investment. The respective roles of international law and domestic law are set out in a statement taken from a decision of the American–Mexican Claims Commission:

> When questions are raised before an international tribunal … with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent government is determined solely by international law …[201]

6.114 Douglas defines the different roles to be played by domestic and international law in the following terms:

> At the first stage, the treaty tribunal must decide, if it is a matter of contention, whether particular rights *in rem* constituting the alleged investment exist, the scope of those rights, and in whom they vest. [Douglas states that this is a question of municipal law.] At the first stage of the analysis, the treaty tribunal must also determine whether or not the rights *in rem* that have been identified in accordance with the municipal law of the host state constitute an investment as defined by the investment treaty itself. This is a question of treaty interpretation that is ultimately governed by principles of international law.[202]

6.115 An example of this two-headed approach being adopted in practice is *Generation Ukraine Inc v Ukraine*.[203] In this claim, brought under the US–Ukraine BIT, the claimant asserted claims both under the treaty and under Ukrainian law. The Tribunal was only willing to hear the treaty claims[204] and thus took pains to ensure that the disputes it was asked to adjudicate related to 'investments' as defined under the BIT.[205] The Tribunal carried out this exercise by considering in detail the content of various rights, permits, protocols, and agreements existing under Ukrainian law. Once it had used domestic law to determine the precise nature

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[200] *Yukos* paras 1357–63.

[201] *Cook (United States of America) v Mexico* (1927) IV RIAA 213, 215. The passage is quoted by Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151, 190 where he points out that this statement was made by one Commissioner and the other members of the Commission did not endorse these remarks.

[202] Doulgas 'The Hybrid Foundations of Investment Treaty Arbitration' 211.

[203] *Generation Ukraine Inc v Ukraine* (Award) ICSID Case No ARB/00/9, IIC 116 (2003, Paulsson P, Salpius & Voss).

[204] ibid para 17.1.

[205] ibid para 8.5–8.14.

of these rights, it considered whether they fell within the definition of 'investment' set out in the BIT.

6.116 This analysis was also used by the tribunal in *Bayview v Mexico*.[206] The claimants had agricultural interests in Texas and based their claim on the manner in which water was being handled by Mexican authorities in Mexico. They asserted that Mexico's conduct had infringed their rights under NAFTA. The Tribunal addressed the question as to whether the Texan property owners had made foreign investments in Mexico and did so by considering their right to the waters of the Rio Grande under Mexican law. They considered the question under the Mexican constitution, the Mexican Law of National Waters, and Mexico's General Law of National Assets to conclude that water concessions in Mexico do not create ownership rights but rather a right of use and exploitation. In a similar manner, the Tribunals in *Saba Fakes v Turkey*[207] had regard to Turkish law in considering whether share certificates were void. In *Inmaris v Ukraine*[208] the tribunal had regard to the English governing law of a contract to consider whether that contract had legal effect.[209]

Indirect investment

Introduction—claiming for losses suffered by a direct subsidiary

6.117 Investments are often made through subsidiary companies incorporated under the law of the host State. There are different reasons for this—sometimes States require a participant in a local industry to be a locally incorporated entity. Alternatively, the investor may find it more convenient to trade through a local company. If the State commits a breach, the wrong will be done to the local subsidiary or investment vehicle. Without a specific agreement to the contrary,[210] the subsidiary will not be able to bring a treaty claim as any dispute it may have with the government will be a domestic dispute. The shareholder investor may be able to qualify as a claimant under an investment treaty but it will need to show that it has standing to recover damages for a wrong committed to a separate corporate entity. The question is thus whether investment treaty jurisprudence allows an investor to look through the corporate structure (or pierce the corporate veil) to claim losses suffered by a separate juridical entity.

6.118 Prior to the development of investment treaty arbitration, the classic statement of public international law in this scenario was to be found in the judgment of the ICJ in *Barcelona Traction*.[211] The case concerned bonds issued by a Canadian company operating in Spain. The company was majority owned by Belgian nationals. It became bankrupt as a result of actions taken by the Spanish Government. The Court denied standing to Belgium to

[206] *Bayview Irrigation District v Mexico* (Award) ICSID Case No ARB(AF)/05/1, IIC 290 (2007, Lowe P, Gómez-Palacio & Meese).

[207] *Saba Fakes v Turkey* (Award) ICSID Case No ARB/07/20, IIC 439 (2010, Gaillard P, Lévy & van Houtte).

[208] *Inmaris v Ukraine* para 69.

[209] See also *Alps Finance and Trade AG v Slovakia* (Award) IIC 489 (UNCITRAL, 2011, Crivellaro P, Klein & Stuber) paras 197–9; *Nagel v Czech Republic* (Award) SCC Case No 049/2002, IIC 176 (SCC, 2003, Danelius P, Hunter & Kronke) para 152; *BG Group plc v Argentina* (Award) IIC 321 (UNCITRAL, 2007, Álvarez P, Miguel Garro & van den Berg) paras 116–27; *Emmis International Holding BV v Hungary* (Award) ICSID Case No ARB/12/2, IIC 722 (2014, McLachlan P, Lalonde & Thomas) paras 166, 221 and 255, and *Accession Mezzanine Capital LP v Hungary* (Award) ICSID Case No ARB/12/3 (2015, Rovine P, Douglas & Lalonde).

[210] ICSID Convention, art 25(2)(b) (Appendix 12 below); Schreuer 296–337.

[211] *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (New Application: 1962)* [1970] ICJ Rep 3.

assert a claim on behalf of the shareholders against Spain stating that 'where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim'.[212]

6.119 The Court thus established that public international law would not in general allow the veil of separate corporate identity to be pierced. The shareholders (or their government) could not establish a right to bring an action in their own name.[213]

6.120 The decision remains in good standing in customary international law and has been codified in art 11 of the International Law Commission's Draft Articles on Diplomatic Protection.[214]

6.121 The ICJ's restrictive ruling in *Barcelona Traction* has never been followed in treaty arbitrations. The issue arose in the first BIT arbitration, *Asian Agricultural Products Ltd v Sri Lanka*.[215] In this claim, brought under the UK–Sri Lanka BIT, a Hong Kong corporation held 48 per cent of the shares in a Sri Lankan company that had suffered the loss. It is not clear from the award whether Sri Lanka sought to argue that the claimant was precluded from seeking recovery in circumstances where the loss had been suffered by a subsidiary. However, the tribunal had no difficulties with allowing the claimant to recover. It stated that: 'The undisputed "investments" effected since 1985 by AAPL in Sri Lanka are in the form of acquiring shares in Serendib Company, which has been incorporated in Sri Lanka under the domestic Companies Law … The scope of the international law protection granted to the foreign investor in the present case is limited to a single item: the value of his share-holding in the joint-venture entity (Serendib Company).'[216]

6.122 In another early case, *AMT v Zaire*,[217] the Tribunal considered the definition of investment provided by the USA–Zaire BIT. This provided, in art 1(c), that the term 'investment' included 'every kind of investment, owned or controlled directly or indirectly, including equity' as well as 'a company or shares of stock or other interests in a company or interests in the assets thereof'.[218] When Zaire contested the claimant's right to recover for

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[212] ibid 47 para 88.

[213] For an interesting summary of the development of international law since *Barcelona Traction* see FA Mann, 'The Protection of Shareholders' Interests in the Light of the *Barcelona Traction* Case' (1973) 67 AJIL 259; I Laird, 'A community of destiny—the *Barcelona Traction case* and the development of shareholder rights to bring investment claims' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005). For a discussion of the principle and its exceptions see 5.28 above.

[214] ILC 'Diplomatic Protection: Draft Articles with Commentaries' (Dugard, Special Rapporteur) [2006] 2(2) YB ILC 22. See also *Diallo (Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, (Merits) [2010] ICJ Rep 639, where the ICJ confirmed this strict position in a way that was fatal to Guinea's claim for loss to Diallo's property interest in the DRC. They were held by a Congolese company and customary international law would not permit a claim on the basis of indirect damage to the shareholder.

[215] *Asian Agricultural Products Ltd v Sri Lanka* (Award) ICSID Case No ARB/87/3, 4 ICSID Rep 245, IIC 18 (1990, El-Kosheri P, Goldman & Asante (dissenting)) (*'AAPL v Sri Lanka'*).

[216] ibid para 95.

[217] *American Manufacturing & Trading Inc v Zaire* (Award) ICSID Case No ARB/93/1, 5 ICSID Rep 11, IIC 14 (1997, Sucharitkul P, Golsong & Mbaye) (*'AMT v Zaire'*).

[218] Treaty Concerning the Reciprocal Encouragement and Protection of Investment (US–Democratic Republic of Congo (Kinshasa) formerly Zaire) (signed 3 August 1984, entered into force 28 July 1989) Senate Treaty Doc 99-17, art 1(c).

losses suffered by a local subsidiary, the Tribunal concluded that the point was 'perfectly clear'.[219]

6.123 Neither the *AAPL* nor the *AMT* tribunals made reference to *Barcelona Traction*. It is of course possible that the point was not raised before them, but it is also possible that they believed that, as the claims arose out of BITs, they were dealing with a *lex specialis* rather than customary international law. Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value. Tribunals have been so consistent in applying the *lex specialis* in this regard that it is arguable that the special rule has become the general rule. This was the conclusion of the tribunal in *CMS Gas Transmission Co v Argentina,*[220] where the Tribunal permitted a claim by the US shareholder company on the basis that:

> ... *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters. To the extent that customary international law or generally the traditional law of international claims might have followed a different approach—a proposition that is open to debate—then that approach can be considered the exception.[221]

6.124 For the purposes of investment treaty jurisprudence, it is not necessary to find that *Barcelona Traction* has been wrongly decided. It suffices to limit its effect to the field of diplomatic protection and to posit a different rule for treaty claims. Such an approach would be consistent with the ICJ's decision in *ELSI*[222] and the numerous arbitration awards considered in this section.

Alternative approaches to justify indirect claims

6.125 The simplest approach to justify indirect claims is that taken by the tribunals in the cases cited above, based upon the wording of the treaty. For example, in *Mobil v Venezuela*[223] the US Corporation had restructured its holdings so that it owned a Dutch company, which in turn owned a US company, which in turn held a Bahamas company holding an interest in the project in Venezuela. Venezuela objected that the indirect nature of the Dutch holding company's interest in the project meant that it could not rely upon the provisions of the Netherlands–Venezuela BIT. However, the Tribunal concluded that:

> Venezuela Holdings (Netherlands) owns 100% of its US and Bahamian subsidiaries. Those subsidiaries are thus controlled directly or indirectly by a 'legal person constituted under the law' of the Netherlands. Accordingly they must be deemed to be Dutch nationals under article 1(b)(iii) of the BIT.[224]

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[219] *AMT v Zaire* para 25. Almost all of the jurisdiction decisions in the Argentine cases came to the same conclusion on this point.

[220] *CMS Gas Transmission Co v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/8, 7 ICSID Rep 492, IIC 64 (2003, Orrego Vicuña P, Lalonde & Rezek).

[221] ibid para 48. See also eg *GAMI Investments Inc v Mexico* (Award) 13 ICSID Rep 147, IIC 109 (NAFTA/UNCITRAL, 2004, Paulsson P, Muró & Reisman); *BG Group plc v Argentina* (Award) IIC 321 (UNCITRAL, 2007, Álvarez P, Miguel Garro & van den Berg) para 202; and *El Paso Energy International Co v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/15, IIC 83 (2006, Caflisch P, Bernardini & Stern) paras 206–10.

[222] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15.

[223] *Mobil Corp Venezuela Holdings BV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/07/27, IIC 435 (2010, Guillaume P, Kaufmann-Kohler & El-Kosheri).

[224] ibid para 153.

6.126 Similarly, the Tribunal in *Cemex v Venezuela*[225] allowed a Dutch holding company interposed in the middle of a corporate chain to assert a claim. It quoted the conclusion of the *Siemens v Argentina*[226] Tribunal at para 137 that:

> The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[227]

6.127 The *Cemex* Tribunal also noted that when the BIT mentioned investments 'of' nationals of the other Contracting Party 'it means that those investments must belong to such nationals in order to be covered by the Treaty but this does not imply that they must be "directly" owned by those nationals.'[228] However, a subsequent Tribunal in *Standard Chartered Bank v Tanzania*[229] was persuaded that the Treaty's use of the words 'of' meant that the investor had to do something as party of the investing process, 'either directly or through an agent or entity under the investor's direction.' In the absence of any such action it denied jurisdiction to an indirect investor finding that 'an indirect chain of ownership linking a British company to debt by a Tanzanian creditor does not in itself confer the status of investor under the UK–Tanzania BIT.'[230]

6.128 At present the *Standard Chartered Bank* award is the only award in which jurisdiction was denied to indirect investors.

6.129 In addition to analysing the literal wording of a treaty, other tribunals have adopted different approaches to grant shareholders standing to assert a claim.[231] In the NAFTA case of *SD Myers Inc v Canada* the claimant was a US company bringing a claim in respect of harm suffered by a Canadian subsidiary, SD Myers (Canada), Inc.[232] The claimant and the subsidiary were part of the same family group but the claimant did not directly own shares in the subsidiary. Rather, the same four members of the Myers family owned all the shares in both companies. The Tribunal was not concerned with the niceties of corporate ownership. It stated that:

> ... the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs ... there are a number of other bases on which SDMI could

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[225] *CEMEX Caracas Investments BV v Venezuela* (Decision on Jurisdiction) ICSID Case No ARB/08/15, IIC 470 (2010, Guillaume P, Abi-Saab & von Mehren).

[226] *Siemens AG v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/02/8, 12 ICSID Rep 174, IIC 226 (2004, Sureda P, Bello Janeiro & Brower).

[227] *CEMEX* para 152. See also *Kardassopoulos v Georgia* (Decision on Jurisdiction) ICSID Case No ARB/05/18, IIC 295 (2007, Fortier P, Orrego Vicuña & Watts) paras 123–4; *Tza Yap Shum v Peru* (Decision on Jurisdiction) ICSID Case No ARB/07/6, IIC 382 (2009, Kessler P, Fernández-Armesto & Otero) paras 106–11; *Waste Management Inc v Mexico* (Award) ICSID Case No ARB(AF)/00/3, IIC 270 (NAFTA/ICSID(AF), 2004, Crawford P, Civiletti & Magallón Gómez) ('*Waste Management II*')paras 80 and 84–5; and *Lemire v Ukraine* (Decision on Jurisdiction and Liability) ICSID Case No ARB/06/18, IIC 424 (2010, Fernández-Armesto P, Paulsson & Voss) paras 54–5.

[228] *CEMEX* para 157.

[229] *Standard Chartered Bank v Tanzania* (Award) ICSID Case No ARB/10/12, IIC 581 (2012, Park P, Legum & Pryles).

[230] ibid para 200.

[231] *Pope & Talbot Inc v Canada* (Award on Damages) 7 ICSID Rep 148, IIC 195 (NAFTA/UNCITRAL, 2002, Dervaird P, Belman & Greenberg).

[232] *SD Myers Inc v Canada* (First Partial Award on the Merits) 8 ICSID Rep 3, IIC 249 (NAFTA/UNCITRAL, 2000, Hunter P, Chiasson & Schwartz).

contend that it has standing to maintain its claim including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) it had made a loan to Myers Canada, and (d) its market share in Canada constituted an investment.[233]

6.130 The Tribunal in *Azurix Corp v Argentina*[234] based its analysis not only on the US–Argentina BIT's inclusion of 'shares of stock' in the definition of investment, but also on the contractual rights held by the subsidiary. Contractual rights were also specifically protected under the BIT. The US Company, Azurix, had obtained a concession to provide water and waste water services to an Argentinean province. In order to implement the investment it had been required to establish a locally registered company. The Tribunal held that:

> Provided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT
>
> ...
>
> (a) Azurix indirectly owns 90% of the shareholding in [the local subsidiary], (b) Azurix indirectly controls [the local subsidiary], and (c) [the local subsidiary] is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.[235]

6.131 In addition, its conclusion was based on the fact that the treaty defined 'investment' in a wide, non-exhaustive manner, with the only condition being that the investment be directly or indirectly owned or controlled by a national of the investing State.

Minority shareholders' rights

6.132 In the passage quoted above, the *Azurix* Tribunal expressly included, as a step in its reasoning, the fact that the US parent company indirectly controlled the local subsidiary. However, tribunals have consistently stated that the presence of such control is not required to bring an interest in a subsidiary within a BIT's definition of 'investment'. It is noteworthy that the first BIT case, *AAPL*, not only dealt with losses suffered by a subsidiary, but that the claimant's stake in that subsidiary was a minority stake.[236] Investment tribunals have consistently held that minority shareholdings are included in the definition of investment. For example, the claimant in *CMS v Argentina*[237] was a US company with a 29.42 per cent share in an Argentinian company with a licence to transport gas. The measures taken by Argentina were directed at the gas transportation licence which was owned by the Argentinian company, not by the US claimant. The Tribunal held that notwithstanding the minority shareholding there would be a direct right of action for shareholders, whether under the BIT or the ICSID Convention:

> Precisely because the [ICSID] Convention does not define 'investment', it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction. There is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares ... The reference that [ICSID Convention] Article 25(2)(b) makes to foreign control in terms of

[233] ibid paras 229 and 232.

[234] *Azurix Corp v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/12, 10 ICSID Rep 412, IIC 23 (2003, Rigo Sureda P, Lauterpacht & Martins).

[235] ibid paras 63 and 65.

[236] *AAPL v Sri Lanka* paras 96–8.

[237] *CMS Gas Transmission Co v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/8, 7 ICSID Rep 492, IIC 64 (2003, Orrego Vicuña P, Lalonde & Rezek).

> treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment. The same result can be achieved by means of the provisions of the BIT, where the consent may include non-controlling or minority shareholders.[238]

6.133 This statement was quoted with approval in *Azurix Corp v Argentina*.[239] A similar conclusion was reached in *Lanco International Inc v Argentina*,[240] *Enron Corp and Ponderosa Assets LP v Argentina*,[241] the NAFTA case *GAMI Investments Inc v Mexico*[242] as well as many other cases.

6.134 Extending the right of action to minority shareholders will create problems for respondent States. Argentina relied on four such difficulties in contesting jurisdiction in *CMS v Argentina*.[243] These were:

(1) the local subsidiary could negotiate a settlement with the government but at the same time an ICSID tribunal could grant a remedy to foreign shareholders with minority interests in that local subsidiary;
(2) allowing a foreign investor to bring a treaty claim would lead to discrimination between domestic and foreign investors as only foreign investors would have access to arbitration;
(3) allowing all minority shareholders to bring claims could lead to the multiplication of international claims by investors of different nationalities and under separate treaties; and
(4) it cannot be assumed that a minority shareholder should be entitled to claim compensation in proportion to its minority stake. This is because, if the local company owning the asset were to be compensated, there is no guarantee that the benefit would flow through to its shareholders.

6.135 These objections are all well-founded and could result in substantial prejudice for respondent States. However, as long as tribunals proceed upon an interpretation of the wording of BITs, without regard to potential wider consequences, they will not be able to find any legal reasons for denying jurisdiction to minority shareholders. As the *CMS* Tribunal recognised: 'The Tribunal notes in this respect that [ICSID] has made every effort possible to avoid a multiplicity of tribunals and jurisdictions, but that it is not possible to foreclose rights that different investors might have under different arrangements. The Tribunal also notes that, while it might be desirable to recognize similar rights to domestic and foreign investors, this is seldom possible in the present state of international law in this field.'[244] The difficulties raised by parallel proceedings are considered in Chapter 4.

6.136 In *GAMI Investments Inc v Mexico* the Tribunal considered the issues that could arise by granting a minority shareholder standing to pursue its NAFTA claim.[245] In this case, a US shareholder was bringing a claim to recover for losses allegedly caused to his minority

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[238] *CMS* para 51.
[239] *Azurix Corp v Argentina* para 64.
[240] *Lanco International Inc v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/97/6, 5 ICSID Rep 367, IIC 148 (1998, Cremades P, Álvarez & Baptista).
[241] *Enron Corp v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/3, 11 ICSID Rep 268, IIC 92 (2004, Orrego Vicuña P, Gros Espiell & Tschanz).
[242] *GAMI Investments Inc v Mexico* (Award) 13 ICSID Rep 147, IIC 109 (NAFTA/UNCITRAL, 2004, Paulsson P, Muró & Reisman).
[243] *CMS* para 83.
[244] *CMS* para 86.
[245] *GAMI Investments Inc v Mexico* paras 37–42.

shareholding in a Mexican company. While the Tribunal ruled liberally on jurisdiction, in considering the merits of the claim it took a very strict stance in defining the substantive rights a minority shareholder could assert. Despite the fact that the minority shareholder had US nationality, the Tribunal refused to consider acts taken towards the Mexican subsidiary company as discriminatory because, by definition, they were acts taken against a Mexican company.[246] A similar approach was adopted in *BG v Argentina,*[247] where the Tribunal accepted that BG's ownership rights in the local company were an investment under the UK–Argentina BIT, but only permitted it to make a claim based on the diminution in value of its shares. It could not bring contractual claims owned by the subsidiary, a distinct legal entity.[248]

6.137 If a Tribunal can only limit injustice to respondent States by a restrictive analysis of the claimant's substantive rights, any problems potentially thrown up by allowing minority shareholders to bring claims can only be resolved on a case-by-case basis.

Claims brought by holding companies

6.138 Similar problems to those raised by minority shareholders can be raised by the fact that holding companies may also bring treaty claims. In this respect, a holding company can be any participant in a corporate ownership chain save for the ultimate beneficiary and the company directly affected. The potential for disruption created by allowing claims to be brought at various levels of the corporate chain was illustrated by the TV Nova saga. TV Nova was a very successful Czech television station which was set up by the American investor Ronald S Lauder. Upon losing control of the station, Mr Lauder brought two arbitrations. One, *Ronald S Lauder v Czech Republic*[249] was brought by Mr Lauder in his personal capacity under the US–Czech Republic BIT. Mr Lauder was the ultimate beneficiary in the corporate chain. The other was brought by a Dutch holding company in *CME Czech Republic v Czech Republic.*[250] Both claims arose out of same set of facts. One Tribunal (*CME Czech Republic v Czech Republic*) found that there had been an expropriation and awarded substantial damages while the other Tribunal (*Lauder v Czech Republic*) rejected the claim. This was a clear demonstration of the possibility of 'a multiplicity of tribunals and jurisdictions', as noted by the *CMS v Argentina* Tribunal.[251]

6.139 The ability of a holding company to assert a claim was taken to an extreme in *Tokios Tokelės v Ukraine.*[252] In this arbitration, brought under the Lithuania–Ukraine BIT, the

[246] ibid para 115.

[247] *BG Group plc v Argentina* (Award) IIC 321 (UNCITRAL, 2007, Álvarez P, Miguel Garro & van den Berg).

[248] ibid paras 202–14. See also *El Paso Energy International Co v Argentina* (Award) ICSID Case No ARB/03/15, IIC 519 (2011, Caflisch P, Bernardini & Stern) paras 185–9; *ST-AD GmbH v Bulgaria* (Award on Jurisdiction), PCA Case No 201–06 (UNCITRAL, 2013, Stern P, Klein & Thomas) para 282; and *Enkev Beheer BV v Poland* (First Partial Award) PCA Case No 2013-01 (UNCITRAL, 2014, Veeder P, Sachs & van den Berg).

[249] *Lauder v Czech Republic* (Final Award) 9 ICSID Rep 62, IIC 205 (UNCITRAL, 2001, Briner C, Cutler & Klein).

[250] *CME Czech Republic BV v Czech Republic* (Partial Award) 9 ICSID Rep 121, IIC 61 (UNCITRAL, 2001, Kühn C, Schwebel and Hándl (dissenting)).

[251] *CMS Gas Transmission Co v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/8, 7 ICSID Rep 492, IIC 64 (2003, Orrego Vicuña P, Lalonde & Rezek) para 86.

[252] *Tokios Tokelės v Ukraine* (Decision on Jurisdiction) ICSID Case No ARB/02/18, IIC 258 (2004, Weil P (dissenting), Bernardini & Price).

Lithuanian claimant was owned and controlled by Ukrainian nationals. As a matter of economic substance, therefore, the claim was a domestic Ukrainian dispute. Nonetheless the majority of the Tribunal pointed out that the parties to the BIT could have included a 'denial of benefits' provision. Such a provision is regularly included by State parties to investment treaties to prevent holding or shell companies from asserting treaty rights. For example, the ECT allows State parties to deny the benefits of the treaty to 'a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized'.[253]

6.140 In the absence of such a provision, however, the Tribunal refused to read one into the BIT.

6.141 The Tribunal in *Yukos v Russia*[254] accepted jurisdiction over a claim brought by an Isle of Man company that was ultimately owned by Russian investors against Russia. The claimant was asserting its claim arising out of its nominal ownership of shares in Yukos Oil Company OJSC, a Russian joint stock company. The Tribunal found that the ECT did not include any requirements with regard to the origin of capital or the necessity of an injection of foreign capital.[255]

6.142 On the basis of the awards rendered thus far, in the absence of specific treaty provisions denying benefits to companies lacking substantial economic activities in the investor's home State, tribunals have not denied jurisdiction over the claims of holding or shell companies under BITs available in their States of incorporation. The Tribunal in *Soufraki v UAE*[256] recognised that the unsuccessful claimant in that case could have overcome the disadvantages of his dual nationality merely by incorporating an Italian corporate vehicle, rather than by investing in his personal capacity. Tribunals can only deny jurisdiction in such circumstances if they are willing to read policy considerations into the BIT, something which they have not been willing to do in considering questions of indirect investment.

Corporate restructuring to gain the advantage of investment treaties

6.143 Allowing wide latitude for holding companies to bring claims is consistent with the idea that investors do not need to fund investments with their own resources,[257] and encourages claimants to structure their investments through a variety of jurisdictions to ensure maximum treaty coverage. There appears to be nothing wrong in principle with claimants taking such steps. Moreover, it may be that certain States will be encouraged to develop a wide network of bilateral treaty relationships in order to encourage investors to route

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[253] art 17(1) (Appendix 2 below).

[254] *Yukos Universal Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 227, IIC 416 (UNCITRAL, 2009, Fortier C, Poncet & Schwebel).

[255] ibid paras 430–2. See also *Veteran Petroleum Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 228, IIC 417 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel) paras 489–91; and *Hulley Enterprises Ltd v Russia* (Interim Award on Jurisdiction and Admissibility) PCA Case No AA 226, IIC 415 (UNCITRAL, 2009, Fortier P, Poncet & Schwebel) paras 429–31. The origin of capital requirement was also addressed in *Lemire v Ukraine* (Decision on Jurisdiction and Liability) ICSID Case No ARB/06/18, IIC 424 (2010, Fernández-Armesto P, Paulsson & Voss) para 56.

[256] *Soufraki v United Arab Emirates* (Award) ICSID Case No ARB/02/7, IIC 131 (2004, Fortier P, El-Kholy & Schwebel) para 83.

[257] *Tokios Tokelès*. This is an aspect of tribunals rejecting the idea that an investment needs to be made 'directly'. See further 6.12 above.

investments through their legal and fiscal frameworks. This point arose in *Aguas del Tunari SA v Bolivia*[258] where the respondent State contended that it had carefully structured the concession contract to preclude ICSID jurisdiction. At the time of entering into the concession contract the claimant company was controlled through the Cayman Islands but, by the time a dispute arose, the control structure had been altered and a Dutch holding company had been inserted into the corporate chain. The Tribunal held that it had jurisdiction under the Netherlands–Bolivia BIT[259] as the changes to the corporate structure did not affect any of the undertakings given in the concession agreement.[260]

6.144 In *Mobil v Venezuela*[261] the respondent framed its objection to a corporate restructuring designed to create treaty protection where none had existed previously on the basis of an abuse of right. On a factual basis, the Tribunal accepted that the main purpose of the restructuring was to gain access to ICSID arbitration through the Netherlands–Venezuela BIT.[262] However, the Tribunal considered that this was a 'perfectly legitimate goal as far as it concerned future disputes.'[263] Nonetheless, such re-structuring would be abusive if they were carried out with an eye to create jurisdiction for pre-existing disputes.[264] A similar conclusion was reached in *Millicom v Senegal*[265] where the Tribunal concluded that a restructuring to give an investment the benefit of investment treaty protection would be acceptable for future disputes unless the choice was made unknown to the other party under artificial conditions.[266]

6.145 An example of a corporate restructuring which did not succeed in creating ICSID jurisdiction was that attempted in *Phoenix v Czech Republic*.[267] The claimant was controlled by a former Czech national who had incorporated it under Israeli law and arranged for it to acquire an interest in two Czech companies owned by his family members. Disputes had arisen with the Czech authorities arising out of those companies before the acquisition. The Tribunal denied jurisdiction on the basis that 'what was really at stake were indeed the pre-investment violations and damages ... [T]he whole operation was not an economic investment, based on the actual or future value of the companies, but indeed, simply a re-arrangement of assets within a family, to gain access to ICSID jurisdiction ...'.[268]

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[258] *Aguas del Tunari SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/02/3, IIC 8 (2005, Caron P, Álvarez & Alberro-Semerena (dissenting)).

[259] Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands–Bolivia) (signed 10 March 1992, entered into force 1 November 1994) Tractatenblad 1992, 081.

[260] *Aguas del Tunari* paras 160–180.

[261] *Mobil v Venezuela* (Decision on Jurisdiction) .

[262] ibid para 190.

[263] ibid para 204; *OI European Group v Venezuela* (Award) ICSID Case No ARB/11/25, IIC 678 (2015, Fernandez-Armesto P, Mourre & Orrego Vicuña) paras 193–4.

[264] *Mobil v Venezuela* para 205.

[265] *Millicom International Operations BV v Senegal* (Decision on Jurisdiction) ICSID Case No ARB/08/20, IIC 450 (2010, Tercier P, Abraham & Hobér).

[266] ibid para 84.

[267] *Phoenix Action Ltd v Czech Republic* (Award) ICSID Case No ARB/06/5, IIC 367 (2009, Stern P, Bucher & Fernández-Armesto). See also *KT Asia Investment Group BV v Kazakhstan* (Award) ICSID Case No ARB/09/8, IIC 615 (2013, Kaufmann-Kohler P, Glick & Thomas).

[268] *Phoenix v Czech Republic* paras 138 and 140.

6.146 *Philip Morris v Australia* is a prominent example of a claim being dismissed on these grounds. The Tribunal held that a restructuring to try and bring a pre-existing dispute within the framework of an investment treaty was inadmissible as an abuse of process.[269]

6.147 In *Malicorp v Egypt*[270] a company with share capital of $1,000 won a contract to build an airport. Egypt cancelled the contract saying that it had expected the claimant's share capital to be $100 million. Egypt said that Malicorp had won the contract due to forgery and as a result lacked the good faith necessary to assert that it had made an investment. The Tribunal accepted that the question could be addressed as one of jurisdiction, but preferred to treat it as going to the merits on the basis that an investment had to be valid in order to enjoy substantive protection. By addressing the question at the merits stage, the Tribunal would be acting consistently with best practice in international arbitration whereby matters that undermined a substantive legal relationship did not automatically terminate an arbitration agreement. As a practical matter, the Tribunal would be better placed to undertake a detailed factual investigation at the merits stage.[271]

6.148 In *Levy de Levi v Peru*, an investor was permitted to advance a claim despite having paid nothing to acquire the investment by way of assignment. Here, the Tribunal based its decision on the fact that it was a transfer between close family members and that it had taken place long before the decision to resort to ICSID arbitration.[272] In contrast, one of the claimants in *Quiborax v Bolivia* did not pay for his share and was thus excluded from the Tribunal's jurisdiction.[273]

Claims brought by ultimate beneficiaries

6.149 The relaxed attitude to piercing the corporate veil demonstrated by investment tribunals also extends to allowing claims to be asserted by the ultimate beneficial owner in a corporate structure. An example of this is *Sedelmayer v Russia*.[274] Mr Sedelmayer, a German citizen, brought a claim against Russia under the Germany–Russia BIT.[275] His investment had been made through a US corporation, Sedelmayer Group of Companies International Inc ('SGC International'). The policy reason for denying the benefit of investment treaties to beneficial owners of a corporate structure is that allowing them treaty protection gives them a double advantage. The first advantage is that while making their investment they can hide behind the shield of limited corporate liability. The second advantage is that, in the event of a dispute, they can cast away the separate corporate personality through which they invested and bring a claim in their own right. However, the *Sedelmayer* Tribunal had no difficulty in accepting the claimant's standing as an investor under the treaty because the treaty's definition of 'investment' clearly covered a beneficial

[269] *Philip Morris Asia Ltd v Australia* (Award on Jurisdiction and Admissibility) PCA Case No 2012-12, IIC 777 (UNCITRAL, 2016, Bockstiegel P, Kaufmann-Kohler & McRae) paras 538–54.

[270] *Malicorp Ltd v Egypt* (Award) ICSID Case No ARB/08/18, IIC 476 (2011, Tercier P, Olavo Baptista & Tschanz).

[271] ibid paras 117–9. See also A Cohen Smutny and P Polášek, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' in *A Liber Amicorum: Thomas Wälde* (2012).

[272] *Levy de Levi v Peru* (Award) ICSID Case No ARB/10/17, IIC 728 (2014, Oreamuno P, Hanotiau & Morales Godoy) para 154.

[273] *Quiborax SA v Bolivia* (Decision on Jurisdiction) ICSID Case No ARB/06/2, IIC 563 (2012, Kaufmann-Kohler P, Lalonde & Stern) paras 232–3.

[274] *Sedelmayer v Russia* (Award) SCC Case No 106/1998, IIC 106 (SCC, 1998, Magnusson C, Wachler & Zykin).

[275] Germany–Russia BIT.

owner bringing a claim in his own name. In addition, the Tribunal's analysis went further than the wording of the treaty alone. It referred to the 'control theory' of international law. As the Tribunal explained:

> This theory is based on the idea that the decisive factor is who de facto controls the entity which has, for example, made investments in a foreign country. Consequently, the control theory leads to the piercing of SGC International's corporate veil and to putting the de facto investor—i.e. the Claimant—in the focus.
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> ...
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> Mr. Sedelmayer shall, thus, be regarded as an investor under the Treaty, even with respect to investments formally made by SGC International or the other companies.[276]

6.150 In relying upon the 'control theory' in international law, the *Sedelmayer* Tribunal looked to the International Court's decision in *ELSI*.[277] In the *ELSI* case a Chamber of the International Court was prepared to allow the United States to bring a claim on behalf of two US corporations which owned shares in an Italian corporation in respect of actions taken by the Italian Government. The *ELSI* judgment is thus an example of a tribunal in a State-to-State case taking the same approach to the admissibility of indirect claims as the investment arbitration tribunals that are the subject of this section.

6.151 In *ELSI* the International Court was considering claims arising under the Treaty of Friendship, Commerce and Navigation between the US and Italy of 1948. The International Court did not refer to *Barcelona Traction* in its main decision. However, Schwebel's Dissenting Opinion specifically noted that the Chamber had not accepted arguments that would have denied the right of the United States to bring a claim on behalf of its nationals owning shares in an Italian company.[278]

6.152 One commentator has noted that the decision of the majority in *Tokios Tokelės v Ukraine* is one example of a tribunal not applying a control test to determine a corporation's nationality.[279]

6.153 Another example of an ultimate beneficiary bringing a claim is *Waste Management Inc v Mexico*.[280] Here the claim was brought by a US corporation which owned a Mexican company which was party to a waste disposal concession in Mexico. The Mexican subsidiary was owned through two Cayman Island corporations. As in so many of the other awards dealing with indirect claims, the Tribunal based its decision upon the simple text of the particular instrument, in this case NAFTA. The Tribunal spelt out clearly its reasons for taking such an approach:

> Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality

[276] *Sedelmayer* 27 and 59.
[277] *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15.
[278] *ELSI* (Dissenting Opinion) 94/83.
[279] E Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in Muchlinski ch 2, 49. See further paras 5.111 *et seq* above.
[280] *Waste Management II* (Award).

> of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, [the Mexican subsidiary] was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim.[281]

6.154 Another robust defence of an ultimate shareholder's right to assert a claim can be found in *Bogdanov v Moldova*[282] where the Tribunal stated that the protections offered by investment treaties 'would become rather illusory' if shareholders in local companies could not bring claims.[283]

Portfolio investment

6.155 A significant potential difficulty which could be thrown up by the wide interpretation of 'investment' in indirect investment cases is posed by the portfolio investor. The facts underlying many of the claims against Argentina, where the breach Argentina is alleged to have committed consists of an economic measure affecting all Argentinian companies, could potentially give rise to claims brought by investors whose only interest in a company's shares is as an investment, rather than holding a stake for management purposes. This is often referred to as 'portfolio investment'. Investment treaty tribunals have yet to rule on the question of whether portfolio investors are covered.[284]

6.156 The issue arose between the parties in *Gruslin v Malaysia,*[285] but ultimately the Tribunal was not asked to rule on the issue. Mr Gruslin claimed he had made an investment in securities listed on the Kuala Lumpur stock exchange through an emerging Asian markets mutual fund based in Luxembourg. The issue was also considered in *Enron v Argentina,*[286] where the Tribunal admitted that, while investors could claim in their own right under the treaty, there existed a need to establish a cut-off point beyond which claims would not be permissible.[287] Such a cut-off point could be established by reference to the extent of the consent to arbitration of the host State. However, it is not clear that a tribunal would be able to deny jurisdiction over a claim brought by a portfolio investor by reference only to the remoteness of the connection to the affected company. Previous tribunals have taken a strict approach to the literal wording of treaties and if this approach is followed, remoteness per se would not be a sufficient ground on which to deny jurisdiction when such jurisdiction could be demonstrated to exist within the wide definition terms of the BIT.

6.157 In *Renta v Russia* the claimants were portfolio investors in the Yukos companies who sought to rely upon the same acts complained of by the companies themselves to assert a claim

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[281] ibid para 85.

[282] *Bogdanov v Moldova* (Award) SCC Arbitration No V (114/2009) IIC 495 (SCC, 2010, Nilsson (sole)).

[283] ibid para 67. See also *Paushok v Mongolia* (Award on Jurisdiction and Liability) IIC 490 (UNCITRAL, 2011, Lalonde P, Grigera Naón & Stern) para 206; and *Lauder v Czech Republic* (Award) 9 ICSID Rep 62, IIC 205 (UNCITRAL, 2001, Briner C, Cutler & Klein) where the Czech Republic ultimately did not seek to contest that Mr Lauder had standing to bring a claim in his own name.

[284] In this section, the term 'portfolio investment' is taken to refer to circumstances when an investor owns shares in an investment. Thus *Fedax NV v Venezuela* (Award) ICSID Case No ARB/96/3, 5 ICSID Rep 200, IIC 102 (1998, Orrego Vicuña P, Heth & Owen) when the investor held promissory notes, allowing it to take a financial interest without management control, is not included.

[285] *Gruslin v Malaysia* (Award) ICSID Case No ARB/99/3, IIC 129 (2000, Griffith (sole)).

[286] *Enron Corp v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/3, 11 ICSID Rep 268, IIC 92 (2004, Orrego Vicuña P, Gros Espiell & Tschanz).

[287] See also *El Paso Energy International Co v Argentina* (Award) ICSID Case No ARB/03/15, IIC 519 (2011, Caflisch P, Bernardini & Stern) para 211.

against Russia. The claim was financed by a third party investor as a test case to establish whether portfolio investors in Yukos could rely on BITs to assert claims. The Tribunal held that they could, seeing nothing abusive in the attempt. It presumably had regard to the literal wording of the Spain-USSR BIT in concluding that there was no reason in principle preventing portfolio investors from asserting a claim.[288]

Investment approval

6.158 A number of investment treaties contain a provision that goes beyond the general requirement that for a foreign investment to enjoy protection it must be lawful under the law of the host State. These provisions, which are particularly prevalent in centrally planned economies, contain an express requirement for approval in writing and registration of a foreign investment. For example, art II(1) and (3) of the 15 December 1987 ASEAN Agreement provides that:

> 1. 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.
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> ...
>
> 3. This Agreement shall also apply to investments made prior to its entry into force, provided such investments are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for [the] purpose of this Agreement subsequent in its entry into force.[289]

6.159 These provisions, which are similar in nature to other approval of investments provisions, were considered in detail by the tribunal in the first ASEAN arbitration, *Yaung Chi Oo Trading Pte Ltd v Myanmar*.[290] The arbitration was brought by a Singaporean company whose investment had been made prior to Myanmar's accession to the ASEAN Treaty. At the time of making the investment, the investor had fulfilled the detailed and demanding procedure necessary to obtain the required permit under the Union of Myanmar's Foreign Investment Law and Procedures. Myanmar challenged the Tribunal's jurisdiction saying that the investment did not qualify for protection under the ASEAN Treaty as approval under the Myanmar Foreign Investment Law did not constitute approval 'for the purposes of this Agreement' as required by art II(1) of the ASEAN Treaty. It also argued that the claimant had failed to obtain specific approval in writing subsequent to the ASEAN Treaty coming into force in Myanmar as required by art II(3).

6.160 The Tribunal rejected Myanmar's first argument. It said that registration pursuant to an internal foreign investment law would amount to approval under the ASEAN Agreement:

> No doubt a Party to the 1987 ASEAN Agreement could establish a separate register of protected investments for the purposes of that Agreement, in addition to or in lieu of approval

[288] *Quasar de Valores SICA SA v Russia* (Award) SCC Case No 24/2007, IIC 557 (SCC, 2012, Paulsson C, Brower & Landau) para 33.

[289] Note that this Agreement is now superseded by the ACIA (Appendix 3 below), which does not contain identical language on this point. The 1987 text is retained here in view of its relevance to the analysis in the awards discussed below.

[290] *Yaung Chi Oo Trading Pte Ltd v Myanmar* (Award) ASEAN Case No ARB/01/1, IIC 278 (2003, Sucharitkul P, Crawford & Delon).

> under its internal law. But if Myanmar had wished to draw a distinction between approval for the purposes of the 1987 ASEAN Agreement and approval for the purposes of its internal law, it should have made it clear to potential investors that both procedures co-exist and, further, how an application for treaty protection could be made. At the least it would be appropriate to notify the ASEAN Secretariat of any special procedure. None of these things was done. In the Tribunal's view, if a State Party to the 1987 ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for the purposes of the Agreement.[291]

6.161 The Tribunal did, however, accept Myanmar's second contention. It felt compelled to give effect to the actual language of art II(3). As this called for 'an express subsequent act amounting at least to a written approval',[292] the Tribunal could not consider the investment to be protected without such a subsequent act.

6.162 As set out in paras 6.54–6.55 above, the registration requirements for the ASEAN Comprehensive Investment Agreement, the successor to the 1987 ASEAN Agreement, have been developed. States which require written approval as a pre-condition to qualifying for investment protection need to put in place specific procedures as set out in Annex 1 to the Agreement.

6.163 *Gruslin v Malaysia* is another example of an investment being denied protection for failure to comply with a registration requirement. The requirement in this case was contained in an Inter-Governmental Agreement (IGA) between the Belgo–Luxembourg Economic Union and Malaysia.[293] It provided, in art I(3)(e)(i), that assets invested in Malaysia had to be 'invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon'. The investment consisted of an interest in shares traded on the Kuala Lumpur Stock Exchange. The investor argued that the approval obtained from the Stock Exchange's Capital Issues Committee would be sufficient for the purposes of the IGA. The Tribunal rejected this contention: 'The answer to this proposition is that proviso (i) [of the IGA] and the [Stock Exchange] requirements concern different subject matters ... What is required is something constituting regulatory approval of a 'project', as such, and not merely the approval at some time of the general business activities of a corporation.'[294]

6.164 The registration requirement was read restrictively, in the claimant's favour, by the Tribunal in *Middle East Cement v Egypt*.[295] Egypt's Investment Law No 43 of 1974 required foreign interests to be registered to qualify as an investment. However, the claim was brought under the Greece–Egypt BIT which, while not requiring registration, stated that investments are admitted by the host State 'in accordance with its legislation'.[296] The Tribunal proceeded on the basis that as the BIT did not require a specific registration, one could not be read in from the investment law.

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[291] ibid para 59.

[292] ibid para 60.

[293] Agreement on the Encouragement and Reciprocal Protection of Investments (Belgo-Luxembourg Economic Union–Malaysia) (signed 22 November 1979, entered into force 8 February 1982) 1284 UNTS 121.

[294] *Gruslin v Malaysia* para 25.5.

[295] *Middle East Cement Shipping and Handling Co SA v Egypt* (Award) ICSID Case No ARB/99/6, IIC 169 (2002, Böckstiegel P, Bernardini & Wallace).

[296] Agreement for the Promotion and Reciprocal Protection of Investments (Greece—Egypt) (signed 16 July 1993, entered into force 6 April 1995) 1895 UNTS 173, art 2(1).

In *Metalpar v Argentina*[297] the respondent State sought to rely upon the claimant's failure to make necessary registrations as a ground to deny jurisdiction. In this case the requirement to register arose under Argentinian law, rather than under the treaty. The Tribunal rejected Argentina's submission on the basis that Argentinian law prescribed its own sanctions for a failure to register. It stated that it would be disproportionate to punish a failure to register with a denial of the ability to seek investment protection before an ICSID tribunal.[298] **6.165**

Two recent awards have dealt with the registration requirement found in many Indonesian BITs. In *Rizvi v Indonesia*, the Tribunal rejected jurisdiction based upon the claimant's failure to obtain specific registration for the investment. The claimant had been granted admission, but the registration requirement went beyond a general requirement of legality and the claimant had not obtained the specific registration approval required by the 1967 Foreign Investment Law.[299] In contrast, the Tribunal in *Churchill Mining v Indonesia* found jurisdiction. The claimant had obtained registration from the competent authority when the investment was first made, as well as obtaining approval for a subsequent charge in shareholding.[300] It also found that the registration requirement is not a continuing one, rather it is restricted to the time the investment is initiated. **6.166**

In examining challenges to jurisdiction brought by respondent States in reliance upon their domestic registration requirements, it is important to bear in mind the correct choice of law, as described above. In principle, the question as to whether registration has been properly obtained will be considered under the domestic law of the State whose approval is required. However, these requirements must be exercised subject to the overriding concerns of good faith contained in international law. This was emphasised by the Tribunal in *Southern Pacific Properties (Middle East) Ltd v Egypt*.[301] Here the project had been registered under Egypt's Investment Law No 43 but the approval was subsequently withdrawn. The Tribunal applied general principles of law to conclude that Egypt would not be permitted to repeal the approval or the investment law in a manner that would allow it to escape international arbitration. Cancellation of the approval would not alter the fact that an investment had been made under the investment law.[302] **6.167**

D. Conclusions

In conclusion, it is possible to suggest the following: **6.168**

Definition of investment under ICSID. ICSID Convention art 25 refers to disputes arising out of an 'investment' but contains no definition of an investment. Subsequent tribunals have laboured hard to provide a definition, and the debate is unlikely to be concluded soon. Most **6.169**

[297] *Metalpar SA v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/5, IIC 164 (2006, Oreamuno Blanco P, Cameron & Chabaneix).

[298] ibid paras 83–4.

[299] *Rizvi v Indonesia* (Award) ICSID Case No ARB/11/13 (2013, Griffith P, Donohue & Sornarajah) paras 54–199.

[300] *Churchill Mining plc v Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/12/14 and 12/40, IIC 635 (2014, Kaufmann-Kohler P, Hwang & van den Berg) paras 295–316.

[301] *Southern Pacific Properties (Middle East) Ltd v Egypt* (Decision on Jurisdiction No 1) ICSID Case No ARB/84/3 (1985, Jiménez de Aréchaga P, El Mahdi & Pietrowski).

[302] ibid para 66.

attempts at definition require a certain duration, a contribution to the economic development of the host State and some assumption of risk.

6.170 *Definition of investment under investment treaties.* In contrast to the ICSID Convention, most BITs do contain an express definition of investment that is focused on enumerating the kinds of property interests owned by a claimant that come within the scope of the treaty *ratione materiae*. In an ICSID case, this requirement must be satisfied in addition to that set out in art 25 ICSID Convention. In a non-ICSID case, the notion of 'investment' in a BIT still has two aspects: (a) *a legal aspect*—the asset belonging to the claimant, being an asset of the type listed in the BIT; and (b) *an economic aspect*—'a commitment of resources' or 'contributions that have created such … assets'.[303] Both elements must be present to constitute an investment. Each of these elements entails a different type of enquiry:

(a) The legal materialisation of the investment is to be determined according to the law applicable to the asset in question, which requires a *renvoi* to municipal law.[304]
(b) The economic materialisation of an investment is concerned with an essentially factual question, namely whether the investor has in fact made a 'commitment of resources' in an economic venture in the host State.

6.171 *Timing issues.* subject to the wording of specific treaties, any breaches that occur after the treaty has come into force will be covered even though the investment had been made before that date. However, save for continuous breaches, disputes that crystallise before the treaty comes into force will not fall within its ambit of protection.

6.172 *Pre-contract expenditure.* absent specific treaty wording, investment treaties will only cover investments actually made, not expenses incurred in anticipation of making an investment.

6.173 *Geographical scope.* while treaties commonly require investments to be made within the host State, it is appropriate to take a broad approach to this question. Accordingly, activity outside the host State that leads to an economic effect within the territory will be covered. This is why most tribunals have asserted jurisdiction over claims arising out of sovereign debt raised or arranged outside the host territory.

6.174 *Legality.* many treaties have provisions requiring investments to be made in accordance with the law. This does not allow domestic law a controlling say in what constitutes an investment, nor require that trivial formalities must be met to ensure treaty coverage. This is particularly the case if any non-compliance was known to the State party and did not form any basis of objection when the arrangement was made. However, investments made in breach of domestic laws which reflect sound public policy and sound investment practice will not be protected, particularly where the investor has set out to mislead domestic authorities. Once an investment has been made according to the law, it will not become illegal for the purposes of treaty protection just because the investor has breached some domestic laws in performing the investment. The host State may deal with breaches of the law within its own domestic system.

6.175 *Indirect investments.* there is no rule or practice in investment treaty arbitration preventing a parent company pursuing losses arising out of measures targeted at a subsidiary incorporated

[303] *KT Asia* para 167 citing *Malicorp* para 110. See also Douglas, Rules 22 & 23.
[304] See above para 6.107.

either in the host State or in a third jurisdiction. The claimant company does not need to be at the top of the corporate chain nor be the direct holding company of the affected entity. Minority shareholder rights are also protected. These conclusions are all subject to specific treaty wording and only constitute a basis upon which tribunals may assert jurisdiction. Different considerations often come into play when tribunals assess questions of quantum. A corporate restructuring carried out after a dispute has arisen will be seen as an abuse of right.