The Investment Treaty Arbitration Review

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

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on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

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

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
Paris
June 2023

Chapter 1

COVERED INVESTMENT

Can Yeğinsu and Calum Mulderrig[1]

I INTRODUCTION

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

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

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

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

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

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

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

II DEVELOPMENT OF TREATY LANGUAGE

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

That said, not all earlier treaties adopted such wide language. Some define investment in a circular manner, referring to investment within the definition itself (i.e., 'investment means any kind of asset or right related to an investment'[5] or 'investment means every kind of investment').[6] Others embrace an exhaustive list. For example, until it was superseded by the United States–Mexico–Canada Agreement (USMCA),[7] the investment chapter in the original 1994 North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico had covered only interests in enterprises and property, other 'interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory' and 'contracts where remuneration depends substantially on the production, revenues or profits of an enterprise'.[8] The NAFTA list also referred to debt securities in, or loans to, a company (not state enterprises) but only if the maturity of the debt was at least three years and the enterprise was an affiliate of an investor. Certain claims to money were also expressly excluded from the definition. The bilateral investment treaty (BIT)

2 *Ambiente Ufficio SpA and others (Case formerly known as Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 (*Ambiente Ufficio and others v. Argentina*), Paragraph 438; *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007, Paragraph 55.

3 See Energy Charter Treaty (ECT), Article 1(6), covering every kind of asset owned or controlled by a defined investor followed by a non-exhaustive, generous list of covered assets. The ECT, however, faces an uncertain future, with three states (France, Germany and Poland) recently giving written notification of their intentions to withdraw from the Treaty (ECT, 'Written notifications of withdrawal from the Energy Charter Treaty', 22 March 2023, www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty (accessed 7 June 2023).

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

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

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

7 Signed on 30 November 2018, entered into force 1 July 2020. Under Article 1 of the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, the North American Free Trade Agreement (NAFTA) has been superseded by the United States–Mexico–Canada Agreement (USMCA), save for the 'provisions set forth in the USMCA' referring to NAFTA.

8 NAFTA, Article 1139.

between Hong Kong and Mexico similarly prescribes an exhaustive list of rights and assets that are to be considered as investments, while also providing expressly that debt securities and loans do not constitute investments under that treaty.[9]

The discrepancy between definitions has given rise to debate regarding whether most-favoured nation (MFN) treatment clauses in treaties with a narrow definition of investment could be deployed to import a broader definition from other treaties to which the defendant state is a party; however, consistent investment treaty jurisprudence has indicated that tribunals are not willing to widen the application of MFN clauses to import a more favourable definition of investment from other treaties, on the basis that the definition is a crucial element of a state's consent to arbitrate a particular dispute, which goes to the *ratione materiae* jurisdiction of an arbitral tribunal.[10]

More recently, investment treaties and investment chapters within multinational trade agreements have departed from a purely asset-based definition,[11] and additionally require the investment to display the 'characteristics of an investment'.[12]

For example, Article 14.1 of the USMCA defines investment as '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'. While providing a non-exhaustive list of assets, it also excludes certain claims to money, and orders and judgments entered in a judicial or administrative action from the definition of investment.[13] Similarly, Article 1.2(h) of Chapter I of the European Union–Vietnam Investment Protection Agreement (IPA) signed on 25 June 2019,[14] the investment chapter of the EU–Canada Comprehensive Economic

9 Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, which entered into force 16 June 2021, Article 1 (Definitions).

10 See *Krederi Ltd v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, Paragraph 295; *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (*Metal-Tech v. Uzbekistan*), Paragraphs 145–63; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, Paragraph 133.

11 For example, the 2015 India Model Bilateral Investment Treaty (BIT) defines investment as an 'enterprise', which the investor must have incorporated in the host state and that, together with its assets, must have 'the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made'. The Model BIT proceeds to list the assets that an enterprise may 'possess' to qualify as an 'investment'.

12 The characteristics vary as between treaties. For example, Article 3.3 of the Morocco Model BIT (adopted 1 June 2019) lists: (1) contribution to sustainable development to the host state; (2) a certain duration; (3) a commitment of capital or resources; (4) an expectation of profit; and (5) risk taking. A similar formulation is deployed in the Slovakia Model BIT (adopted 2019). By contrast, two more recent treaties have omitted the requirements that a covered investment be of a certain duration and contribute to the development of the host state: see Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People's Republic of China (entered into force 17 January 2020); and Agreement between the Government of Republic of Korea and the Government of Republic of Armenia for the Promotion and Reciprocal Protection of Investments (entered into force 3 October 2019).

13 USMCA, Article 14.1.

14 The EU–Vietnam Investment Protection Agreement (IPA) provides for an investment court system, through a permanent and independent tribunal to be established by the treaty committee, with an appeal tribunal. EU–Vietnam IPA, Chapter I, Article 1.2(h) and Chapter III, Articles 3.38, 3.39 and 3.40. The IPA will enter into force when it is ratified by all EU Member States. As at the time of writing, 12 EU Member States have ratified the IPA.

and Trade Agreement (CETA)[15] and the European Union–Singapore IPA, signed on 19 October 2018,[16] all make reference to assets that have the characteristics of an investment, including 'the commitment of capital or other resources, the expectation of gain or profit', 'the assumption of risk' and 'a certain duration'.

The investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11), which entered into force on 30 December 2018, adopts a similar construction, save for the reference to 'a certain duration'.[17] Before the political developments of 2016, it was expected that the investment chapter of the European Union–United States Transatlantic Trade and Investment Partnership (TTIP) agreement under negotiation would follow this trend; however, the negotiations were suspended following the Trump administration's voiced scepticism towards multilateral trading blocs and, on 15 April 2019, the European Council issued a decision confirming that the negotiating directives for TTIP were obsolete and no longer relevant.[18] In any event, we know the United States prefers a formulation similar to those in the recent multilateral trade agreements, as reflected in the 2012 US Model BIT.[19] It is clear that these new generation investment definitions seek to limit or clarify the scope of covered investments, in contrast with the broad, open-ended definitions found in earlier treaties encompassing 'every kind of asset'.[20]

This recent trend may be explained by states' desire expressly to exclude one-off commercial transactions for the sale of goods or services, or purely contractual claims, from the scope of investments afforded treaty protections. These types of claims have previously been found by some tribunals to fall within a traditional definition of investment encompassing 'claims to money and performance under a contract having an economic value'. Unfortunately, there is significant inconsistency in the jurisprudence on this issue, which is difficult to rationalise by reference to the wording of the treaties.

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15 Signed on 30 October 2016. See, in particular, EU–Canada Comprehensive Economic and Trade Agreement (CETA), Chapter 8, Section A, Article 8.1.

16 EU–Singapore IPA, Chapter 1.

17 See investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11). The TPP11 incorporates, by reference, the majority of the provisions of the Trans-Pacific Partnership (TPP) as signed by ministers on 4 February 2016 in Auckland, New Zealand. The TPP never entered into force as a result of the formal withdrawal of the United States, per guidance from President Trump in January 2017. See, also, TPP Chapter 9, Section A, Article 9.1.

18 Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the United States of America on the elimination of tariffs for industrial goods, Document No. 52019PC0016, 9 April 2019.

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

20 *Seo v. South Korea*, an UNCITRAL case, is also of note here. The tribunal interpreted the definition of investment in the South Korea–United States of America Free Trade Agreement (FTA) as incorporating 'characteristics of investment'. The definition of a covered investment in the FTA was such that it covered 'every asset that an investor owns, 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'. Yet, focusing on the definition's connection of those characteristics with 'or', the tribunal concluded that the three listed characteristics are mere examples but none of them is 'indispensable'. See *Jin Hae Seo v. The Government of the Republic of Korea*, HKIAC, No. 18117 (UNCITRAL), Final Decision, 24 September 2019.

For example, *Joy Mining v. Egypt* involved the non-performance of a contractual obligation by an Egyptian state entity as the counterparty under a contract for the provision of mining systems and supporting equipment. The definition of investment in the relevant United Kingdom–Egypt BIT includes the formulations 'every kind of asset' and 'claims to money or to any other performance under contract having a financial value'. However, the tribunal refused to assume jurisdiction over the claim on the basis that it was necessary to draw a fundamental distinction between 'ordinary sales contracts, even if complex, and an investment', as otherwise 'any sales or procurement contract involving a State agency would qualify as an investment'.[21] The tribunal in *Nova Scotia Power v. Venezuela*, a case involving contractual rights under a coal supply agreement, reached a similar conclusion under the investment definition in the Canada–Venezuela BIT, which includes 'money, claims to money, and claims to performance under contract having a financial value'.[22] The tribunal commented that '[n]either the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute'.[23]

In contrast, in *Deutsche Bank v. Sri Lanka*, the tribunal found that a hedging agreement (under which the Sri Lankan national petroleum corporation contractually failed to make a required payment to the claimant) fell within the investment definition in the Germany–Sri Lanka BIT, which covers 'claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment'.[24] Similarly, the annulment committee in *MHS v. Malaysia* found that non-payment under a contract to find and salvage a shipwreck for the Malaysian Malaysia constituted an investment under the United Kingdom–Malaysia BIT's definition of investment, even though the definition only included 'claims to money or to any other performance under contract having a financial value'.[25]

Several tribunals have recognised that a politically motivated decision carried out by a state in its sovereign capacity has the potential to elevate what is ostensibly a contractual breach into in a claim for breach of an investment treaty. To this effect, the tribunal in *Vigotop v. Hungary* explained that:

> *the key question [is] whether to put it in the words of Prof. Schrijver – Respondent 'stepped out of the contractual shoes' and, in fact, acted in its sovereign capacity when it terminated the Concession Contract. Accordingly, the Tribunal will first examine whether . . . Respondent had 'a hidden political agenda,' which was the true reason for its termination of the Concession Contract, meaning that Respondent in fact took this decision in order to give effect to a change in government policy, and thus in its sovereign capacity.*[26]

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

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

23 ibid., Paragraph 82.

24 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 (*Deutsche Bank v. Sri Lanka*), Paragraphs 284–86.

25 *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 (*MHS v. Malaysia*), Paragraphs 61, 73–74 and 80.

26 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, Paragraph 328; *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-3, Award, 27 June 2016, Paragraph 252.

Perhaps in response to the inconsistency of these decisions, and the potentially widening ambit of state liability, the new generation free trade agreements (FTAs) and BITs tend to adopt more specific wording, indicating expressly when a sale of goods or a purely contractual claim is not included in the definition of investment. For example, CETA, USMCA and several recently adopted Model BITs[27] categorically exclude sale of goods claims, clarifying that such transactions would not constitute a 'claim to money' referred to in the investment definition.[28] The 2012 US Model BIT and the TPP11 text provide that 'claims to payment that are immediately due and result from the sale of goods or services are less likely to have [the characteristics of an investment]'[29] without completely disqualifying them. By contrast, treaties such as the 2015 Australia–China and 2008 New Zealand–China (2022 Upgrade) FTAs adopt the wider ECT formula that merely requires any 'claims to money or claims to any contractual performance' to be 'associated with an investment'.[30]

III COVERED INVESTMENT IN ICSID JURISPRUDENCE

Although consent of the parties to resolve their investment disputes before an ICSID tribunal 'is an essential prerequisite for the jurisdiction of the Centre',[31] Article 25 of the ICSID Convention limits the Centre's jurisdiction to disputes arising 'directly out of an investment':

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

27 Morocco Model BIT, adopted 1 June 2019; the Belgium–Luxembourg Economic Union Model BIT, adopted 18 March 2019; the Netherlands Model BIT, adopted 22 March 2019; the Slovakia Model BIT, adopted in 2019; the India Model BIT, adopted 28 December 2015.

28 CETA, Chapter 8, Section A, Article 8.1: 'For greater certainty, claims to money does not include: (i) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party; (ii) the domestic financing of such contracts; or (iii) any order, judgment, or arbitral award related to sub-subparagraph (i) or (ii)'; USMCA, Article 14.1: 'investment does not mean . . . claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party'; and Netherlands Model Investment Agreement, Article 1: '"Claims to money" within the meaning of sub (iii) does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or legal in the territory of a Contracting Party to a natural or legal person in the territory of the other Contracting Party, the domestic financing of such contracts, or any related order, judgment, or arbitral award.'

29 TPP, Chapter 9, Section A, Article 9.1, note 2.

30 2015 China–Australia FTA, Chapter 9, Section A, Article 9.1(d); 2008 New Zealand–China FTA (and the FTA Upgrade 2022) , Chapter 11, Section 1, Article 135.

31 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, Paragraph 25.

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

> *No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*[32]

Suggestions to include a contribution or a duration requirement or an emphasis on host state development in the Article 25 notion of investment were rejected by the negotiating states.[33] There is also no *de minimis* investment amount that can bestow ICSID jurisdiction. It was agreed that the precise limitation on jurisdiction of an ICSID tribunal should be determined by the consent of the parties expressed by means of investment agreements, national legislation or investment treaties. This freedom, however, does not mean that parties can submit any dispute for resolution by the Centre. There are 'outer limits' to the jurisdiction of an ICSID tribunal, and arbitral tribunals interpreting the Article 25 reference to investment have developed various criteria to define and maintain those limits. It is fair to say that the task of defining those limits has proved to be complex.

With the intention of distinguishing treaty claims from ordinary commercial disputes, the idea that a covered investment must also constitute an investment under the ICSID Convention (independent of the definition of 'investment' in the treaty at issue) was first proposed by the *Fedax v. Venezuela* tribunal.[34] This approach was embraced by the *Salini v. Morocco* tribunal, which devised the following criteria as the typical characteristics of an investment – later known as the *Salini* test: (1) a contribution of money or other assets of economic value; (2) an assumption of risk by the investor; (3) a certain duration; and (4) a contribution to the economic development of the host state.[35]

Subsequent ICSID tribunals have had differing opinions on the applicability and suitability of these criteria. Some have adopted them fully and applied the test rigidly as a jurisdictional requirement,[36] whereas others have taken a more flexible approach and

32 ibid., Paragraph 27.

33 Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd edn., Cambridge University Press, pp. 114–17, Paragraphs 113–22; *MHS v. Malaysia*, Paragraphs 63–71.

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

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

36 See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, Paragraphs 130–38; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, Paragraphs 91–92; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision on Jurisdiction, 17 October 2006, Paragraph 77; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, Paragraphs 27, 30 and 33.

preferred to apply only some elements of the test, finding that requirements on duration and a contribution to economic development of the host state are too subjective to be consistently endorsed.[37] A number of other tribunals have chosen to view the *Salini* criteria as guidance rather than strict jurisdictional requirements capable of depriving a tribunal of its jurisdiction if they are not fully satisfied.[38] Some tribunals have even refused to apply the test altogether on the basis that, notwithstanding the reference to investment in Article 25 of the ICSID Convention, it is the investment treaty definition that should prevail as the ultimate expression of contracting parties' consent.[39]

The majority in *Abaclat v. Argentina* highlighted the controversy of endorsing a definition of investment in accordance with the *Salini* criteria, which have never been included in the ICSID Convention, nor in the operative treaty relevant to those proceedings. To that end, the tribunal noted that the *Salini* criteria 'should not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create'.[40] At the other end of the spectrum, one tribunal has added two further criteria to the *Salini* test, namely that assets be invested in good faith and in accordance with host state law[41] – an expansion criticised by subsequent tribunals.[42]

The *Salini* test has found more limited support outside the ICSID framework. Two notable exceptions are *Romak v. Uzbekistan* and *Alps Finance v. Ukraine*, in which tribunals constituted under the UNCITRAL Arbitration Rules applied the elements of the *Salini* test as the 'objective characteristics of an investment', declining jurisdiction on both occasions;[43]

37 See, e.g., *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, Paragraphs 36, 43; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (*Saba Fakes v. Turkey*), Paragraphs 110–12; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (*Quiborax v. Bolivia*), Paragraphs 220, 223 and 235.

38 See, e.g., *Ambiente Ufficio and others v. Argentina*, Paragraphs 479 and 481; *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, Paragraph 165.

39 See, e.g., *MHS v. Malaysia*, Paragraphs 73–79; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (*Inmaris Perestroika v. Ukraine*), Paragraph 129; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (*Alpha Projektholding v. Ukraine*), Paragraphs 311–12; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, Paragraphs 204–06; *Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, Paragraphs 197–99; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (*SGS v. Paraguay*), Paragraph 93.

40 *Abaclat and others (Case formerly known as Giovanna A Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (*Abaclat and others v. Argentina*), Paragraph 364.

41 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (*Phoenix Action v. Czech Republic*), Paragraph 114.

42 *Saba Fakes v. Turkey*, Paragraph 112.

43 *Romak SA (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL Rules, Award, 26 November 2009 (*Romak v. Uzbekistan*), Paragraphs 205–07; *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011 (*Alps Finance v. Slovakia*), Paragraphs 240–41. In another case under the UNCITRAL Rules, *Gramercy v. Peru*, the majority of the tribunal concluded that the first three *Salini* criteria (which were mirrored in the definition of investment in the Peru–United States Trade Promotion Agreement) were fulfilled and further found that the fourth *Salini* criterion was applicable in light of the treaty's preamble wording (that one purpose of the treaty was to promote 'broad-based economic

however, the approach of these tribunals has been attributed to the specific facts of these cases,[44] since *Romak v. Uzbekistan* involved a mere sale of wheat as the alleged investment, and *Alps Finance v. Ukraine* an assignment of receivables. The definition of investment in both BITs referred only to 'claims to money or to any other performance having an economic value' without linking those claims to an overarching economic activity; and a literal interpretation was found insufficient to determine the existence of a protected investment.[45] In both tribunals' conclusions, the perceived need to exclude one-off commercial transactions from the protection of a BIT was pivotal, while disregarding the four corners of the BITs in question.

IV EXTENT OF PROTECTION

Apart from traditional types of investments involving interests in infrastructure and public projects, tribunals have extended protection to different types of economic activities, including financial instruments (e.g., promissory notes,[46] hedging agreements[47] and sovereign bonds[48]), contracts for the provision of services[49] and arbitral awards crystallising a party's rights and obligations.[50] Some tribunals have preferred to look at the totality of the investment activity rather than individual elements of it to decide whether the entire

development to reduce poverty'). This criterion was found by the majority to have been fulfilled. See *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award, 6 December 2022 (*Gramercy v. Peru*).

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

45 *Romak v. Uzbekistan*, Paragraphs 182, 185; *Alps Finance v. Slovakia*, Paragraphs 230 and 232.

46 *Fedax v. Venezuela*.

47 *Deutsche Bank v. Sri Lanka*.

48 See the trio of Argentine government bond cases: *Abaclat and others v. Argentina*; *Ambiente Ufficio and others v. Argentina*; *Giovanni Alemanni and others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014. The tribunal in the *Poštová banka and Istrokapital v. Greece*, concerning the Greek sovereign bonds, refused to assume jurisdiction because 'sovereign debt, as indebtedness of a sovereign State, has special features and characteristics' and 'cannot, thus, be equated to private indebtedness or corporate debt', so it ruled that the definition of investment referring to 'loans, claims to money or to any performance under contract having a financial value' in the relevant BIT could not be extended to sovereign debt. In contrast, the ICSID tribunal in *Adamakopoulos and others v. Cyprus* found jurisdiction for a mass bond claim under the Cyprus–Greece BIT. See *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020.

49 See, e.g., *SGS v. Paraguay*, where a contract for the pre-shipment inspection services with respect to goods to be exported from the host state were accorded protection; see also *MHS v. Malaysia*, in which the annulment committee held that a contract for the salvage of a shipwreck would qualify as a covered investment under the BIT, criticising the original tribunal in limiting itself to the analysis of the *Salini* criteria when rejecting jurisdiction.

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

operation constitutes an investment.[51] To date, the majority of tribunals have been reluctant to consider pre-investment activities and expenditures, which do not ultimately come to fruition, as covered investments.[52]

V IRRELEVANCE OF ORIGIN OF CAPITAL

Unlike some treaties – such as the 1987 Association of Southeast Asian Nations Comprehensive Investment Agreement, which requires that investments be brought into, or derived from investments brought into, the host state territory[53] – most treaties are silent on the origin of capital for the covered investment. In the absence of an express requirement in the treaty, investments made by foreign investors from local funds raised in the host state are treated in the same manner as investments funded with imported capital.[54] Arbitral jurisprudence is settled: the origin of capital is irrelevant for the purposes of finding a covered investment, and it is not a requirement that a foreign investor finance the investment from its own resources or that the assets or funds be imported from abroad.[55]

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51 See, e.g., *Saipem SpA. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (*Saipem v. Bangladesh*), Paragraph 110, which considered that the entire operation, including the underlying contract, the construction itself, the retention money, the warranty and the related ICC arbitration was an investment under Article 25 of the ICSID Convention; *White Industries v. India*, Paragraph 7.6.8, where the tribunal regarded the rights under an ICC award as 'a continuation or transformation of the original investment' after India inordinately delayed the enforcement of the arbitral award in India; *Chevron Corp & Texaco Petroleum Co v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, Paragraphs 4.35–4.36; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, Paragraphs 285–288; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, Paragraphs 6.57–6.67

52 See *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, Paragraphs 48–51, where after extensive negotiations the parties never signed a contract for the construction and operation of a power plant. See, also, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, Paragraphs 18.8–18.9. By contrast, see *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, in which the tribunal found jurisdiction because a concession contract was actually signed for a power plant and was valid and legally binding even though the project was never carried out.

53 See *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN ID Case No. ARB/01/1, Award, 31 March 2003, applying the relevant wording in Article II of the treaty providing: '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.'

54 See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (*Tokios Tokelés v. Ukraine*), Decision on Jurisdiction, 29 April 2004. The approach of the majority in *Tokios Tokelés v. Ukraine* was followed by the tribunal in *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, Paragraphs 111–139.

55 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, Paragraph 56; *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, Paragraph 418; *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, Paragraphs 81–2; *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, Paragraphs 100,

In his well-known dissenting opinion in *Tokios Tokelés*,[56] Professor Prosper Weil differed sharply from his co-arbitrators by taking the view that economic reality should prevail over formal legal structure when interpreting both the ICSID Convention and the specific provisions of BITs for the purposes of ascertaining an international investment. In his view, the ICSID system dictates a 'transborder flux of capital'; for that reason, he disagreed with the majority in *Tokios Tokelés*, who permitted claims against Ukraine by a Lithuanian entity wholly owned by Ukrainian nationals, while concluding that the origin of capital is irrelevant. Professor Weil's opinion advocating the imposition of a jurisdictional requirement without a textual foundation in respect of the origin of capital is yet to find support in arbitral jurisprudence.

VI TERRITORIAL LIMITATIONS ON COVERED INVESTMENT

Most treaties place a territorial limit requiring that a covered investment be 'made in the territory of the host state'.[57] Some do not expressly refer to such territorial limits in the definition of investment but instead refer to 'investments in the territory of a Contracting Party' within the context of the substantive obligations and protections under the treaty. Either way, arbitral tribunals examine the territorial nexus of an investment to the host state at the jurisdictional stage regardless of where this requirement is postulated.[58]

Two examples from NAFTA cases illustrate the relevance of territorial connection. *Bayview v. Mexico*[59] was a claim brought by a US claimant in relation to its investment in farm and irrigation facilities in the United States, involving alleged deleterious effects of Mexico's use of the waters of the Rio Grande, on which the claimant's enterprise was dependent. The NAFTA tribunal did not allow the claim under Article 1101 of NAFTA on the basis that the investment in question was wholly confined to the territory of the United States. A similar issue arose in *Canadian Cattlemen for Fair Trade v. United States*, in which a group of Canadian cattle producers challenged a US prohibition on live-cattle imports from Canada after an outbreak of mad cow disease. The cattle businesses of the claimants were located entirely in Canada and, therefore, the tribunal dismissed the claim for lack of investment in the territory of the United States.[60]

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101 and 110; *Saipem v. Bangladesh*, Paragraph 106; *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Paragraph 126 and Annulment Proceeding, 5 February 2002, Paragraph 54; *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, Paragraphs 147 and 170.

56 *Tokios Tokelés v. Ukraine*, Dissenting Opinion of Prosper Weil, 29 April 2004, Paragraphs 19 and 20.

57 See, e.g., Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, 11 July 1995 (entered into force 6 May 1996), Article 2(1): 'The present Agreement shall apply to any investments in the territory of one Contracting Party by investors of the other Contracting Party.'

58 See, e.g., *Inmaris Perestroika v. Ukraine*, Paragraphs 113–21; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 27 November 2000, Paragraphs 13.9–13.12.

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

60 *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, Paragraphs 126 and 127.

The tribunals in *SGS v. Pakistan*[61] and *SGS v. Philippines*[62] had to consider whether pre-shipment inspection services, carried out by SGS outside the respective host states, complied with the territorial limitation in Article 2(1) of the Switzerland–Pakistan BIT[63] and Article II of the Philippines–Switzerland BIT.[64] Both tribunals rejected the host states' narrow contention that the majority of SGS's investment took place outside Pakistan and the Philippines, respectively, and that, as a result, those investments were not protected under the BIT. The tribunal in *SGS v. Philippines* considered that the 'focal point of SGS's services was the provision, in the Philippines, of a reliable inspection certificate . . . SGS's inspections abroad were not carried out for their own sake but in order to enable it to provide, in the Philippines, an inspection certificate'.[65] The tribunal in *SGS v. Philippines* also endorsed the reasoning of the tribunal in *SGS v. Pakistan* that the investment was within host state territory because there had been an 'injection of funds into the territory . . . for the carrying out of SGS's engagements under' the relevant agreements.[66]

Contrary to traditional investments, such as acquisition of interests in immovable property or companies, tribunals draw a distinction for territorial nexus when it comes to investments of a financial nature. It is well established that, with regard to investments of a purely financial nature, the territorial determination should focus on where, or for the benefit of whom, the funds are ultimately used, and not the place where the funds were paid out or transferred; therefore, the relevant question is whether the benefit is enjoyed in the host state.[67]

At times, respondent states have questioned whether a portfolio investment bought and paid for outside the host state with no flow of direct funds into the host state can be deemed to be invested 'in the territory' of the host state. For example, a trio of cases against Argentina involving bondholders who purchased Argentinian sovereign bonds in the secondary market turned on this question. Argentina argued that these transactions outside Argentina did not involve a direct flow of funds into the territory of Argentina and, therefore, the claims in relation to these bonds were not claims in relation to a covered investment. The dissenting opinion by Professor Georges Abi-Saab in *Abaclat v. Argentina* found that submission to be persuasive, stating that 'such financial products with high velocity of circulation . . . traded

61 *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13 (*SGS v. Pakistan*), Decision on Jurisdiction, 6 August 2003, Paragraph 136.

62 *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6 (*SGS v. Philippines*), Decision on Jurisdiction, 29 January 2004, Paragraphs 101 and 110–12.

63 Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, 11 July 1995 (entered into force 6 May 1996), Article 2(1): 'The present Agreement shall apply to any investments in the territory of one Contracting Party by investors of the other Contracting Party.'

64 Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 31 March 1997 (entered into force 23 April 1999), Article II: "The present Agreement shall apply to any investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party.'

65 *SGS v. Philippines*, Paragraph 101.

66 ibid., Paragraph 111, directly endorsing *SGS v. Pakistan*, Paragraph 136.

67 *Fedax v. Venezuela*, Paragraphs 41–43; *Abaclat and others v. Argentina*, Paragraph 374; *Ambiente Ufficio and others v. Argentina*, Paragraphs 498–99, 508–10; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, Paragraphs 206 and 207.

within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State', lacked the necessary territorial link to the host state.[68]

However, most tribunals considering financial investments (such as the Argentinian sovereign bonds in *Abaclat v. Argentina* or the hedging agreements in *Deutsche Bank v. Sri Lanka*) have not followed the approach of Professor Abi-Saab;[69] rather, they have been satisfied that a sufficient territorial nexus exists as long as funds were made available to host states and served to finance their economy or needs. Those tribunals have all given weight to the fact that it was the state itself that ultimately benefited from the disbursement of funds even if the funds never entered its territory directly from the transaction entered into by the purported investor.

VII COMPLIANCE WITH HOST STATE LAW

Some treaties expressly require that an investment be made in accordance with host state law, while others are silent on the point.[70] The intention behind such a requirement is that investments that would be illegal in the territory of the host state cannot be protected investments under the relevant BIT. For treaties that require conformity of some sort with host state law as part of the covered investment definition, tribunals have accepted that any illegality or breach of local law in the making of the investment would act as a jurisdictional bar.[71] Where the treaty is silent on the issue, however, tribunals have reached different conclusions when addressing questions of non-conformity with local laws.

A number of tribunals have suggested that conformity with host state law is an implied requirement for an investment to be a protected investment under an investment treaty and Article 25 of the ICSID Convention, even if the definition of investment in the treaty is silent on this issue.[72] These tribunals have concluded that a state cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of its own law.[73]

68 Dissenting Opinion of Abi-Saab in *Abaclat and others v. Argentina*, Paragraphs 56 and 57, 78 and 105. Argentina's appointee in the sister case, *Ambiente v. Argentina*, Professor Santiago Torres Bernardez, held a similar opinion to Professor Abi-Saab; see Dissenting Opinion of Bernardez in *Ambiente Ufficio and others v. Argentina*, Paragraphs 262 and 263.

69 *Deutsche Bank v. Sri Lanka*, Paragraphs 288 and 292; see also *Ambiente and Others v. Argentina*.

70 Some treaties have a specific provision clarifying that the host state shall admit investments made in accordance with its laws from which tribunals have also inferred the same requirement. See, e.g., *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Paragraph 204. An example of such a treaty provision is Article 1(1) of the Italy–Morocco BIT, 18 July 1990 (entered into force 7 April 2000).

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

72 *Phoenix Action v. Czech Republic*, Paragraph 101. The tribunal cited *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (*Plama v. Bulgaria*), which held that the conformity requirement is implicit even when it is not expressly cited in the BIT (*Plama v. Bulgaria*, Paragraphs 138–43).

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

Other tribunals, however, have disagreed with this rationale, suggesting that states are at liberty (or not) to condition their consent to arbitrate, as well as the protections they offer, on compliance with host state law. If they have not done so, conformity with host state law cannot be part of the objective definition of 'investment' or relied on to deprive the tribunal of its jurisdiction. It may give rise to an admissibility defence or a defence on the merits as recourse to treaty arbitration and substantive treaty protections, in certain circumstances, may breach the prohibition of abuse of rights that is an emanation of the principle of good faith. That does not, however, mean that these elements are part of the definition of 'investment'. An illegal or bad-faith investment remains an investment.[74]

Tribunals have not always sought to draw a clear distinction between the different types of non-conformity with local law. In the face of an investor's non-conformity, some tribunals have only penalised the investor for a breach of domestic regulation relating to the investment activity or admission of the investment.[75] Other tribunals have interpreted non-conformity to condemn a wider illegality or iniquity in the investor's behaviour;[76] some have even extended the analysis of non-conformity beyond domestic law to encompass breaches of general principles of international law and international public policy.[77]

Where arbitral tribunals have resorted to general principles of law or international public policy, they have mostly framed this as an emanation of the 'clean hands' doctrine, on the basis that protection should be denied to investments that are made by way of fraud, corruption or deceitful conduct, and that denial is required to prevent the misuse of the international investment protection system by those who come with unclean hands.[78] That means, regardless of whether the treaty includes an express requirement for compliance with domestic or international law, there is the possibility that a tribunal may deny treaty protection to a clearly abusive claim based on general principles of law on its own accord.

Unlawfulness is a difficult issue and one that is potentially open to abuse by states that have been complicit in the alleged wrongdoing on which they rely as a defence to an arbitration

74 See, e.g., *Quiborax v. Bolivia*, Paragraph 226; *Metal-Tech v. Uzbekistan*, Paragraph 127; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, Paragraph 187; *Saba Fakes v. Turkey*, Paragraphs 114 and 119.

75 See, e.g., *Fraport v. Philippines*, Paragraph 398; *Anderson v. Costa Rica*, Paragraph 55; *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, Paragraphs 289–344.

76 See, e.g., *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (*Hamester v. Ghana*), Paragraph 123; *Phoenix Action v. Czech Republic*, Paragraph 101; *Inceysa v. El Salvador*, Paragraphs 208–09 and 229–47; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (*Desert Line v. Yemen*), Paragraphs 104 –05.

77 See *Inceysa v. El Salvador*, Paragraphs 224–27 and *Plama v. Bulgaria*, Paragraphs 144–146, where both tribunals directed themselves back to international law based on the reference to international law in the applicable substantive law.

78 See, e.g., *Plama v. Bulgaria*, Paragraphs 141 and 143–44; *Hamester v. Ghana*, Paragraphs 123–24 ('an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention[;] or . . . if it is made in violation of the host State's law . . . These are general principles that exist independently of specific language to this effect in the Treaty.'); *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, Paragraphs 488–508. See, also, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, Paragraphs 137–57, in which the question arose under an investment agreement governed by English law as opposed to a treaty under international law.

claim. There is also the question of degree; tribunals are reluctant to refuse a claim where the contravention of law in question is one of a technical or *de minimis* nature,[79] although it is uncertain where the line between fundamental and trivial breaches should be drawn. Even where the contravention is more serious, there remains the issue of whether a state is released from an investment treaty claim if the state itself has required the investor to contravene the laws when making the investment. In several cases, tribunals have concluded that the doctrine of estoppel should be employed to prevent a state from advancing jurisdictional objections based on violations of its domestic laws by an investor, where that state knowingly overlooked those breaches and endorsed the investment.[80]

VIII CONCLUSION

The definition of a covered investment remains one of the most controversial topics in investment law, and it is impossible to identify one agreed definition; the wording of international treaties is inconsistent and the arbitral jurisprudence is, in places, contradictory. The preponderance of generic definitions of investment within treaties means that a substantial degree of subjectivity cannot be excluded in their application to the specific facts of each case.

The conflicting ways in which arbitral tribunals have construed similar wording do not make the task any more straightforward. Critics of investor-state arbitration find encouragement from the perceived lack of consistency and coherence in arbitral awards. For example, the paucity of tribunal agreement on the precise scope and application of the *Salini* criteria to the definition of investment within the ICSID framework (let alone in general) is cited as one of the principal reasons for questioning the legitimacy of the system and its participants.

That said, there does appear to be a trend emerging in the new generation FTAs and BITs in favour of an objective definition of 'investment', whereby states expressly import chosen aspects of the *Salini* criteria directly into their definitions. It remains to be seen how tribunals interpreting these instruments will contribute to the current debate.[81] Certainly, if

79 See, e.g., the minor defect in company paperwork at issue in *Alpha Projektholding v. Ukraine*, Paragraph 297, did not prevent the tribunal from assuming jurisdiction. Similarly, in *Peter A Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, Paragraphs 92–94, the tribunal characterised non-compliance with exchange control legislation by the claimant as 'inadvertent and technical' and noted that there was nothing offensive to public policy or tainted with criminality. It further concluded that in the absence of the breach of fundamental legal principles of Barbados, there is no reason to deny jurisdiction. See, also, *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, Paragraph 86, in which the tribunal rejected Ukraine's attempt to deny jurisdiction where there had been minor technical defects in the registration of the investor's investment under Ukrainian law.

80 See, e.g., *Desert Line v. Yemen*, Paragraph 120, endorsing *Fraport v. Philippines*, Paragraph 346: '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 endorsed an investment which was not in compliance with its law.'

81 For example, the UNCITRAL claim filed in June 2016 by US hedge funds, Gramercy Funds Management LLC and Gramercy Peru Holdings LLC, against Peru under the US–Peru Trade Promotion Agreement 2009 (TPA) is of interest: *Gramercy v. Peru*, Paragraphs 165-272. Similar to the new generation FTAs discussed in this chapter, the definition of investment in the TPA incorporates 'characteristics of investment' into the definition, including 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. In *Gramercy*, Peru relied on the *Salini* criteria (i.e., that the

states choose to make the *Salini*, or any other, criteria part of the 'investment' definition in the text of a treaty, tribunals would be expected to give weight to such express wording when interpreting the treaty's terms 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' as required under Article 31 of the Vienna Convention on the Law of Treaties.

investment definition should include contribution, duration, risk and economic development of the host state) to argue that the tribunal lacked jurisdiction. The first three criteria mirrored the investment definition in the TPA and the majority of the tribunal (Juan Fernández-Armesto and Stephen L Drymer) found these to be satisfied. Regarding the fourth criterion, since the TPA stated that one of its purposes was to promote 'broad-based economic development in order to reduce poverty', it too was found to be a necessary element of the investment definition. The majority of the tribunal found that this fourth criterion had also been satisfied by virtue of the claimants paying US$33 million to Peruvian bondholders, advancing the economic development of Peru; however, note the strong dissenting opinion of Professor Brigitte Stern, in which she reached the conclusion that the tribunal lacked jurisdiction.