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## **Recent Developments in the Definition of Investment in International Investment Agreements**

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The **South Centre** ([www.southcentre.org](http://www.southcentre.org)) is an intergovernmental organization of developing countries established by the 1994 Intergovernmental Agreement to Establish the South Centre (deposited with the UN Secretary-General) which came into force on 31 July 1995. The South Centre currently has 50 developing country Member States. It has its headquarters in Geneva. The South Centre seeks to meet the need for analysis of development problems and experience, as well as to provide policy analysis and research support required by developing countries for collective and individual action, particularly in the international arena. The South Centre's primary objectives include the promotion of: developing country (South) solidarity and cooperation on development issues; South-wide collaboration in promoting common interests and coordinated participation by developing countries in international forums dealing with South-South and North-South matters, as well as with other global concerns; convergent views and approaches among countries of the South with respect to global economic, political and strategic issues related to evolving concepts of development, sovereignty and security; and better mutual understanding and cooperation between the South and the North on the basis of equity and justice. To meet its objectives, and within the limits of its capacity and mandate, the South Centre responds to requests for policy advice, and for technical and other support from collective entities of the South such as the Group of 77 and the Non-Aligned Movement. These functions are carried out by means of policy-oriented research and analysis, negotiations support and technical assistance, and capacity-building, and by publishing and disseminating widely the results of its work. The South Centre's main areas of policy expertise include trade, intellectual property, climate change, investment, finance, agriculture and services.

The **Department of Investment** has been in charge of promoting foreign investment in Morocco since 1996. Beyond its mandate to provide information on the country's potential, the Department creates and implements investment promotion strategies targeting specific sectors to promote the realization of projects. Its plan of action revolves around four main axes:

- Identifying different categories of investors and countries initiating foreign investment;
- Promoting priority sectors such as tourism, NTIC, electronic and automobile components, textiles, aeronautics and the agro-alimentary industry;
- Coordinating between national institutions and international organizations in the field of investment; and
- Locating projects according to the opportunities offered in the different regions of Morocco, in collaboration with the Regional Investment Centres.

In order to further the government's investment policy, while carrying out its mission, the Department of Investment is organized along two main poles, namely cross-sectional and sector-oriented:

- Two divisions cover investment promotion, communication and cooperation, research and regulations;
- Two other divisions are dedicated to activities in priority sectors, agriculture and industry on one hand, tourism and services on the other.

To maximize efficiency, these structures benefit from the support of offices in charge of human resources and general affairs. The Department of Investment, along with its initial mandate, also steers the Inter-Ministerial Investment Commission, an appeal and arbitration body presided by the Prime Minister. The Department of Investment plans to establish an independent agency dealing specifically with promotion in early 2009.

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### **Recent Developments in the Definition of Investment in International Investment**

#### **Agreements**

**Mahnaz Malik**

#### **1. Introduction**

The term “investment” features in our every day usage, which provides a sense of comfort with respect to its understanding. However, the scope of what constitutes an “investment” in the context of International Investment Agreements (IIAs) may contain surprises. The growing number of IIA awards have brought into focus the breadth of what constitutes an investment under these treaties, well beyond what is commonly understood by the term. Respondent states in investor-state arbitrations have often found that the definition of investment in IIAs is far broader than what is considered investment under their domestic laws and regulations.

The question of what constitutes an investment can be critical as it is a threshold jurisdictional question in IIA arbitration. Only the interests of investors falling within the scope of an “investment” defined in the particular IIA can form the basis of a

claim under that treaty. If the arbitration is under the ICSID Convention<sup>1</sup>, the investor will need to persuade the tribunal that the definition of investment is met under both the applicable IIA and Article 25 of the ICSID Convention. In fact, a number of arbitrations have turned on the issue of whether a particular interest is covered by the definition of investment in both these instruments. The answer to the question determines whether the tribunal has the jurisdiction to hear the “investment dispute”. The definition of investment under the ICSID Convention is discussed in detail below.

## **2. Investment under IIAs**

Virtually all IIAs define investment. Nearly all of them follow a typical formula in defining investment, which was propagated in Bilateral Investment Treaties (BITs). This formula typically consists of a wide, open ended phrase, stating that investment means “*every kind of asset*” or “*any kind of asset*”, and is followed by an illustrative list of approximately five or six categories of assets, interest and rights. For example,

Article 1 of the German Model Treaty<sup>2</sup> contains such a typical formation:

*“Investment shall comprise every kind of asset, in particular*

*(I) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;*

*(II) Shares of companies and other kinds of interest in companies;*

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<sup>1</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965), entered into force 14 October 1966 (“the ICSID Convention”)

<sup>2</sup> German Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment issued by the Federal Ministry of Economics and Labour in 2005 (“the German Model Treaty”)

*(III) Claims to money which has been used to create an economic value or claims to any performance having an economic value;*

*(IV) Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;*

*(V) Business concessions under public law, including concessions to search for, extract and exploit natural resources.”*

The fact that the definition of investment in the German Model Treaty is virtually identical to the one in the German-Malaysia BIT (1960) shows how little the formulation has changed over nearly half a century. Similar formulations are found in other European models, such as those of the United Kingdom, France and the Netherlands.

This typically broad formulation has been the discussed in a number investment treaty awards in recent years. A few countries have responded by including greater detail in their definition of investment to provide guidance to tribunals with respect to its interpretation. One such example is the recently concluded US-Rwanda BIT (2008)<sup>3</sup>, based on the US Model BIT<sup>4</sup> (2004), which adopts the more detailed approach in comparison to the traditional European models:

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<sup>3</sup> Signed on 19 February 2008, [www.ustr.gov](http://www.ustr.gov)

<sup>4</sup> The US Model BIT contains provisions developed by the US Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S BITs. The US Model BIT is substantively similar to the investment chapters of the free trade agreements the United States has concluded since the 2002 Act. Source: [www.ustr.gov](http://www.ustr.gov)

*"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;<sup>1</sup>*

*(b) shares, stock, and other forms of equity participation in an enterprise;*

*(c) bonds, debentures, other debt instruments, and loans;<sup>2</sup>*

*(d) futures, options, and other derivatives;*

*(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*

*(f) intellectual property rights;*

*(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;<sup>3</sup> <sup>4</sup> and*

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

*1 For greater certainty, where an enterprise does not have the characteristics of an investment, that enterprise is not an investment regardless of the form it may take.*

*2 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.*

*3 Whether a particular type of license, authorization, 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 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.*

4 *The term "investment" does not include an order or judgment entered in a judicial or administrative action."*

The US-Rwanda BIT also includes an important qualification that the “*investment*” should have “*the characteristics of an investment*”, which is absent in most BITs. The approach in the US-Rwanda BIT, which provides that investment should have the characteristics of an investment is a limiting phrase in the BIT itself, and is in keeping with the general US approach to draft treaty provisions with greater detail than found in traditional BITs. As the requirement of the asset to have the characteristics of an investment is in the BIT itself, this test would need to be satisfied even before a non-ICSID arbitration forum.

Article 2 of the draft Norwegian Model<sup>5</sup> contains a similar qualification at the end of its investment definition:

1. *"Investment" means:*

*Every kind of asset owned or controlled, directly or indirectly, by an investor of a Party, including, but not limited to:*

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<sup>5</sup> The Norwegian Ministry of Trade and Industry (“the Ministry”) circulated the draft Norwegian Model Agreement for the Promotion and Protection of Investments (“the Model”) for comments earlier this year.

- i. *any entity established in accordance with, and recognised as a legal person by the law of a Party, whether or not their activities are directed at profit;*
- ii. *shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;*
- iii. *bonds, debentures, loans and other forms of debt, and rights derived therefrom;*
- iv. *rights under contracts, including turnkey, construction, management, production or revenue-sharing;*
- v. *contracts;*
- vi. *claims to money and claims to performance;*
- vii. *intellectual property rights;*
- viii. *rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;*
- ix. *any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges*

*In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” (Emphasis added)*

The fact that investment in most BITs is defined to mean “*every kind of asset*” or “*any kind of asset*” with the illustrative categories serving as a non-exhaustive list of examples makes the expanse of the BIT protection very vast. However, most

investment treaty awards show that tribunals often choose to rely on the detailed categories in the definition of investment, rather than to base their decisions on the broad phrase “*every kind of asset*”<sup>6</sup>. Still, the tribunal in the recent arbitration of *Saipem S.p.A. v. Bangladesh*<sup>7</sup> boldly relied on the general phrase “*any kind of property*”, stating that: “*Article 1(1) of the BIT gives a general definition of investment as ‘any kind of property’. On its face this general definition is very broad. In the light of the conclusion reached above according to which Saipem made an investment within the meaning of Article 25 of the ICSID Convention, the Tribunal fails to see how the operation at issue could not be considered as a ‘kind of property’ protected by the BIT.*”

The broad, general definition of investment found usually in BITs was developed by capital exporting states to ensure that a wide variety of their investors’ assets were protected in the territories of their capital importing treaty partners. However, from the perspective of the host state, the expanse of the types of assets covered under an IIA can be problematic, particularly as it makes it difficult for governments to predict which investments would be affected by its measures.

There appears to be a growing recognition that the definition of investment should be drafted with greater precision, both among developed states as noted above, and also by developing countries, albeit to suit their respective agendas. An interesting development is seen in the Investment Agreement for the COMESA Common

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<sup>6</sup> For example, *Petrobart v. Kyrgyz Republic*, Award, DCC Case 126/2003 (SCC, 2005, Danelius c, Bright & Smets) and *Jan De Nul N.V. v Arab Republic of Egypt (Jurisdiction)* ICSID Case No. ARB/04/13 (ICSID 2006, Kaufmann-Kohler P, Mayer & Stern)

<sup>7</sup> Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, available on-line at: [www.investmentclaims.com](http://www.investmentclaims.com)

Investment Area (CCIA)<sup>8</sup>, as it attempts to limit the expansive coverage of assets ordinarily found in the definition of investment in BITs. The CCIA defines investment as: “*assets admitted or admissible in accordance with the relevant laws and regulations of the COMESA Member State in whose territory the investment is made*” with a list of the types of assets that are to be included such as “*(a) moveable and immovable property and other related property rights such as mortgages, liens and pledges; (b) claims to money, goods, services or other performance having economic value; (c) stocks, shares and debentures of companies and interest in the property of such companies; (d) intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the COMESA Member States in which the investment is made; (e) business concessions conferred by law or under contract; and (f) such other activities that may be declared by the Council as Investments*”.

The CCIA definition of investment creates an important limitation on the coverage of intellectual property rights (IPR) by requiring that these be associated with a business operating in the host state territory. Nearly all BITs cover IPRs *per se*, though this may be subject to the caveat in some that they must have the characteristics of an investment, without any additional requirement that the IPRs be associated with some other form of investment. Although an investor-state arbitration has not been launched as yet in reliance solely on an IPR right, commentators believe that such an occurrence is a matter of time. Thus, providing coverage to IPRs *per se* can give coverage to a potentially very broad range of investments under the treaty.

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<sup>8</sup> The twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, on 22nd and 23rd May 2007, adopted the (CCIA).

The CCIA investment definition also contains an important list of what is expressly excluded from the definition of investment, i.e. : *“goodwill market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing”*.

### **3. Investment under the ICSID Convention**

The vast majority of known investment treaty arbitrations are filed at ICSID. Last year, 27 of the 35 known investor-state arbitrations were administered at ICSID. Article 25 of the ICSID Convention limits the Centre’s jurisdiction to legal disputes arising “directly out of an investment”. As the term ‘investment’ has not been defined in the ICSID Convention, the matter has been left for tribunals to interpret. The recent rise of investor-state arbitration has revealed a diverse range of assets that have satisfied the test of being an ‘investment’ under the appropriate treaties as well as the ICSID Convention.

While ad hoc arbitrations under some rules, such as those of UNCITRAL, grant practically total discretion to the parties to the dispute to agree on the kind of investment disputes that may be subject to investor-state procedures, Article 25 of the ICSID Convention provides for certain objective requirements which must be met for an ICSID tribunal to have jurisdiction to hear a particular case. The scope of the term

investment under the ICSID Convention, and its relationship, with the definition of investment in BITs has been the subject of a number of investment treaty awards. Due to the paucity of information about non-ICSID investment treaty awards, it is difficult to ascertain the types of interests that tribunals are interpreting to qualify as investments under the broad definition of IIAs, where it is not essential for the interest to meet the threshold of investment under the ICSID Convention.

The first publicly known award to consider the meaning of investment in a detailed manner was *Fedax NV v Republic of Venezuela*<sup>9</sup>. The investor, Fedex was the beneficiary, by way of endorsement, of debt instruments issued by Venezuela. The respondent state, Venezuela, argued that Fedax had not made a direct investment into its territory involving a long term transfer of financial resources. The tribunal rejected this argument and adopted an approach based upon an article written by *Schreuer*<sup>10</sup> to the effect, that “*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*”. The tribunal noted in particular the significant relationship between the transaction and the host state’s development. Another important finding by the tribunal was the rejection of Venezuela’s contention that the dispute did not arise directly out of an investment because the disputed transaction was not a direct foreign investment. The tribunal stated that the term “*directly*” in Article 25 of the ICSID Convention related to the fact that the dispute should arise directly out of the investment, not to the investment itself. Accordingly, the tribunal in *Fedax* held that jurisdiction could exist even in

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<sup>9</sup> *Fedax NV v Republic of Venezuela (Jurisdiction)* 5 ICSID Rep 183 (ICSID, 1997, Orrego Vicuna P, Heath & Owen)

<sup>10</sup> C.Schreuer, *The ICSID Convention: A Commentary* (2001)

respect of investments that are not made directly into the host state's economy as long as the dispute arises directly from the investment in question.

Although there is no concept of binding precedent in international investment law, the *Fedax* approach has been followed by a number of awards since, for example in *Consortium RFCC v Kingdom of Morocco*<sup>11</sup> and *Salini Costruttori SPA v Kingdom of Morocco*<sup>12</sup>.

In *Salini v Morocco*, the tribunal while recognising that the parties could, in principle, agree on the kind of disputes that could be submitted to the Centre, it went a step further than in *Fedax* and explicitly recognised the existence of objective criteria that have to be met if a particular asset is to be considered an "*investment*" for the purposes of the ICSID Convention. The tribunal considered that its jurisdiction depended upon the existence of an "*investment*" within the meaning of the applicable IIA, in this case the BIT between Italy and Morocco (1990), but also on the basis of the ICSID Convention, in accordance with case law.

The tribunal in *Joy Mining v Egypt*<sup>13</sup> further developed the *Fedax* and *Salini* approaches to find that the investor's interests, in this case bank guarantees, had failed to satisfy the test of what constituted an investment under the ICSID Convention. The tribunal was clear in holding that: "*The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention*". Thus,

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<sup>11</sup> Consortium RFCC v Kingdom of Morocco (Award) 20 ICSID Rev FILJ 391 (ICSID, 2003, Briner P, Cremades & Fadlallah)

<sup>12</sup> Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction) 6 ICSID Rep 398 (ICSID, 2001, Briner P, Cremades & Fadlallah)

<sup>13</sup> Joy Mining Machinery Ltd. v. Egypt, Award, ICSID Case No. ARB/03 /11 (Aug. 6, 2004),

according to this ruling the parties' definition of an investment under the BIT must also meet the objective criteria of a definition under the ICSID Convention.

It is therefore possible for a particular asset to constitute an investment under an investment treaty but not under Article 25 of the ICSID Convention. While in an ICSID arbitration, the definitional threshold must be met under both the IIA and the ICSID Convention, non-ICSID arbitrations only require the test in the IIA to be completed. For example, in *Petrobart v Kyrgyz Republic*<sup>14</sup>, a Stockholm Chamber of Commerce arbitration arising out of the Energy Charter Treaty (ECT), found an investment to exist which would not have qualified under the ICSID Convention had the tribunal applied the *Fedax* criteria. The dispute in *Petrobart* arose out of a contract to sell 200,000 tons of gas condensate over a period of a year. While the tribunal made reference to *Fedax* to support the proposition that investment can have a wide meaning, it did not consider the criteria for defining an investment as laid out in *Fedax* and subsequent awards following that line of reasoning. The *Petrobart* tribunal based its reasoning on the fact that investment existed pursuant to the broad definition provided for in the ECT<sup>15</sup>.

Last year, a number of decisions determined whether the investment had been made within the definition of Article 25 of the ICSID Convention. In *Saipem S.p.A. v. Bangladesh*, the tribunal applied the so-called "Salini test" in order to hold that the

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<sup>14</sup> *Petrobart Limited v. The Kyrgyz Republic*. Arbitration No. 126/2003 (Arbitral Award). Arbitral Award rendered in Stockholm on 29 March 2005

<sup>15</sup> The ECT's broad definition of investment includes "Economic Activity in the Energy Sector" which in turn refers to a further 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 were explicitly covered by the ECT's definition of investment with no exclusion based upon concepts such as duration or importance for the host state economy.

investor had made an investment within the meaning of Article 25 of the ICSID Convention.

In *M.C.I. Power Group L.C. v. Ecuador*, the tribunal noted that the elements “must be considered as mere examples and not necessarily as elements that are required for” the existence of an "investment" for purposes of Article 25 of the ICSID Convention. However, despite the different approaches both tribunals concluded that the dispute at hand indeed arose out of an “investment” as defined by Article 25 of the ICSID Convention. The tribunal held: *“From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term “investments”. The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term “investments” because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID...The BIT indicates in its Article 1 which investments are to be protected under it. Thus, the BIT complements Article 25 of the ICSID Convention, for purposes of defining the Competence of the Tribunal with respect to any legal dispute arising directly out of an investment. “*

In *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*<sup>16</sup>, the tribunal emphasised the apparent divergence in the arbitral practice with regard to the definition of “investment” for purposes of ICSID jurisdiction. However, it tried to suggest a compromising approach by adopting a “fact-specific and holistic assessment”. The tribunal concluded that the underwater salvaging project in Malaysia failed the definitional test of "investment" under Article 25 of the ICSID Convention. Having

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<sup>16</sup> Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award, May 17 2007

noted that “*the question of contribution to the host State’s economic development assumes significant importance because the other typical hallmarks of ‘investment’ are either not decisive or appear only to be superficially satisfied*”, the tribunal found that the project “*did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant.*”

The above-mentioned findings of tribunals raise concerns for states defining investment in their treaties when opting for arbitration under the ICSID Convention as much is left to the tribunals to determine if the covered investment under the BIT also meets the test of an investment under Article 25. The fact that the ICSID Convention does not define the term “*investment*” leaves tribunals with considerable discretion in determining if the particular asset or interest satisfies the criteria of an investment under both instruments, in order to determine their jurisdiction.

#### **4. Recent Decisions on Issues Relating to the Definition of Investment**

The rise of investor-state arbitration has resulted in jurisprudence on the definition of investments in IIAs by investment treaty tribunals. A number of issues have emerged, and the developments in a selection of these<sup>17</sup> are considered below:

##### **A. Investment according to law**

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<sup>17</sup> Constraints of time do not allow every major issue to be considered, in particular those related to pre-contract expenditure, place of investment

The definition of investment in a large number of IIAs includes a requirement that the investment must be made in accordance with the laws and the regulations of the host state. This phrase prevents investments that would be illegal under the host state law from receiving protection under the treaty. A growing number of tribunals have reflected on this provision, and the limits to its scope have also emerged. In particular, tribunals have rejected host state arguments that the assets claiming to be an investment under the treaty should be considered an investment according to local laws and regulations.

In *Salini v Morocco*, Morocco argued that the tribunal lacked jurisdiction as the transaction under Moroccan law would be regarded as a business contract rather than an investment. As a result, investment had not taken place in accordance with the laws and regulations of Morocco under the Italy-Morocco BIT. The tribunal held that the phrase requiring the investment to be in accordance with the laws and regulations of the host state referred to the legality of the investment not to its definition.

In the recent case of *Saipem Spa v Bangladesh*, the tribunal also rejected the respondent state's arguments, that the provision should be interpreted with reference to Bangladeshi law. The tribunal noted *"that the phrase 'in conformity with the laws and regulations [of the host State]' following the 'investment' in Article 1(1) does not limit the definition of investment under the BIT to investment within the laws and regulations of Bangladesh. Indeed, as convincingly held by the tribunal in Salini v Morocco, such a 'provision [i.e., the requirement of conformity with local laws] refers to the validity of the investment and not to its definition."*

The tribunal in *Tokios Tokeles v Ukraine*<sup>18</sup> refused the respondent state's arguments that the technical defects in the registration of the investment under Ukrainian law denied the investment protection of the treaty. The tribunal held that “*to exclude an investment on the basis of such minor errors would be inconsistent with the objects and purpose of the Treaty*”. This implies that tribunals will be looking for substantial transgressions of the law, not merely technical irregularities.

The tribunal in *Inceysa Vallisoletana v El Salvador*<sup>19</sup> was reported to have interpreted the phrase in “accordance with law” contained in the Spain-El Salvador BIT to deny jurisdiction in circumstances where the investor was found to have misled Salvadoran officials and to have made misrepresentations at the initial tender stage. The tribunal also noted that it would run counter to the general principle that a party should be able to benefit from its own wrong doing. The tribunal accepted that El Salvador's consent to ICSID jurisdiction embodied in the BIT between El Salvador and Spain (1995) did not extend to investments that were made fraudulently, and therefore not in accordance with the law.

This was followed recently by the tribunal in *Fraport v. the Philippines*<sup>20</sup>, which declined its jurisdiction based on the BIT between Germany and the Philippines (1997) after having established that the claimant had not made an investment “*in accordance with the laws of the Philippines*”. The tribunal in *Fraport* noted that

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<sup>18</sup> *Tokios Tokeles v Ukraine* (Jurisdiction) (2005) 20 ICSID Rev-FILJ 205 (ICSID, 2004, Weil P, Benardini & Price)

<sup>19</sup> *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No. ARB /03/26 (Summary of Decision on Jurisdiction by Counsel for El Salvador), on [www.ita.law.uvic.ca](http://www.ita.law.uvic.ca), accessed 20 September 2006

<sup>20</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25 (Germany/Philippines BIT) [Award, 16 August 2007](http://www.ita.law.uvic.ca/chronological_list_of_content.htm). ([http://ita.law.uvic.ca/chronological\\_list\\_of\\_content.htm](http://ita.law.uvic.ca/chronological_list_of_content.htm))(<http://www.investmentclaim.com/>)

Fraport was fully aware that it was in breach of domestic law. Fraport's investment in the local Phillipines' company was in violation of the Phillipines' foreign ownership and control laws<sup>21</sup>. This decision is important because it illustrates the fact that bad faith non-compliance with local laws at the moment when an investment is concluded is likely to prevent a dispute proceeding past the jurisdictional phase. The tribunal also noted that an investor should be given the benefit of the doubt where the transgression of a host state law is a good faith error, since this could easily result from lack of understanding of the foreign law.

It remains to be seen how future tribunals will develop the interpretation in *Fraport*, which places serious limits on an investor's ability to bring a claim under a BIT if the investment has not complied with domestic laws.

## **B. Indirect Investment**

Foreign investors often make their investments through subsidiary companies incorporated under the laws of the host state. Without a specific agreement to the contrary, a locally incorporated subsidiary will not be able to bring a treaty claim against the host state. However, the shareholder foreign investor can bring a claim under an applicable treaty for damages with respect to its shareholdings. Most treaties

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<sup>21</sup> The dispute concerned an investment made by Fraport, in a Philippine company, PIATCO, which had secured the rights for the construction and operation of the new Terminal 3 at Manila's Ninoy Aquino International Airport. Fraport directly and indirectly acquired 61.44% of PIATCO. The claim arose from a decision of the Philippine Supreme Court which found that the concession was null and void and therefore of no effect. Fraport argued that this decision amounted to expropriation under the German/Philippine Bilateral Investment Treaty (BIT), and therefore a breach of that treaty

explicitly include in the definition of investments, shares, stocks or any interest in a company.<sup>22</sup> It should be noted here that it is not essential that the claimant's stake in the subsidiary be controlling stake, in fact even a minority stake would qualify. This was recently asserted in *CMS Gas Transmission Co. v Argentina*<sup>23</sup>, in which the ICSID Annulment Committee noted that the definition in the Argentina-US BIT which provided for “*ever kind of investment...owned or controlled directly or indirectly...such as equity, debt...*” was “*very broad*”, and confirmed that investments made by minority shareholders are covered by the actual language of the definition as is also recognised by ICSID arbitral tribunals in comparable cases. The Committee upheld the tribunal's finding that CMS had a direct right of action as a shareholder under the BIT.

The broad definition of investment in indirect investment cases may also have wider consequences than perhaps originally envisaged by the treaty negotiators particularly with respect to the portfolio investor. Government measures, particularly those taken to cope with a crisis such as in the Argentinean case or that may occur as a result of the current global financial crisis, 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 to yet to rule on the question of whether portfolio investment is covered. The issue did arise in *Philippe Gruslin v Malaysia* but the tribunal did not have to make a determination on the matter.

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<sup>22</sup> For example, *American Manufacturing and Trading Inc (AMT) v. the Republic of Zaire (USA-Zaire BIT)* 5 ICSID Rep 11 (ICSID, 1997, Sucharitkul P, Golsong & Mbaye)

<sup>23</sup> *CMS Gas Transmission Co. v Argentina* ICSID Case no. ARB/01/08 (Decision on Annulment, September 25, 2007)

It is probable that this issue will arise for determination before long. As tribunals have often taken a strict approach to a literal wording of the treaties, it is likely that strong arguments will be available in many cases. Some treaties are now responding to this. Notably, the CCIA (discussed above) has explicitly excluded portfolio investment from its definition of investment.

### **C. Investment Approval**

A number of treaties, particularly those concluded by centrally planned economies, contain a requirement that the investment must be registered and approved in writing to qualify for protection under the treaty.

In *Yuang Chi Oo Trading Pte Lts v Government of the Union of Myanmar*<sup>24</sup> the tribunal found that the lack of a written approval, which was required under the ASEAN agreement, prevented the investment to be protected under the agreement.

*Philippe Gruslin v. Malaysia* is another example of an investment being denied protection for failure to comply with a registration requirement. In this case the treaty required the investment had to be in an approved project by the appropriate Ministry in Malaysia in accordance with the legislation. The tribunal found that “*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.*”

The investor had unsuccessfully argued that the approval obtained from the Stock Exchange should be sufficient.

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<sup>24</sup> *Yuang Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* (Award) 8 ICSID Rep 452 (ASEAN, 2003, Sucharitkul P, Crawford & Delon)

As economies have grown more liberal, the requirements to register investments or obtain formal approval have waned in popularity in recent BITs. However, such a provision appears to have seen a recent revival in the CCIA, whose “*coverage of the agreement*” clause, restricts the benefit of the agreement only to those future investments that are duly registered under the agreement:

*“This Agreement shall only apply to investments of COMESA investors that have been specifically registered pursuant to this Agreement with the relevant authority of the Member State in which the investment is made as set out in Annex B.”*

The CCIA approach appears aimed at creating a mechanism that assists host states in identifying the investments that are affected by their measures, rather than to reflect the requirement of approvals or registrations in the economies of the signatory states, most of which are liberal economies. As the above examples of investor-state arbitrations show, the failure to obtain the requisite registration can be fatal to the investors claim, and therefore, this provision can play a critical role in determining the jurisdiction of the tribunal.

## **5. Conclusion**

The interpretation of the typically broad definition of investments found in BITs have led a number of states, both developed and developing, to define investment with greater clarity and detail in their IIAs. However, in the context of ICSID arbitrations, the requirement that the investment meet the criteria of investment under the ICSID

Convention as well as in the IIA leaves states unclear as to whether the categories of assets they have agreed to in their IIA will actually meet the ICSID test. The fact that the ICSID Convention does not define the term investment, and tribunals appear to adopt different interpretations, leaves matters unclear.

A growing number of investment treaty awards have also interpreted some of the common terms found in IIAs such as the requirement that the investment be made in accordance with host state laws and regulations. Tribunals have interpreted this notion to deny investments that have committed serious or willful breaches of the host state laws. Investment treaty awards have also confirmed the expanse of the assets that are covered under the definition of investment in typical IIAs, such as the interests of minority shareholders and portfolio investment.

The awareness of the impact of the broad definitions of investment in IIAs has led some states, such as in the case of the CCIA, to restrict the scope of covered investments. The CCIA has also revived the requirement to register investments.

Greater clarity and precision in the drafting of the definition of investment in IIAs by states will limit to a great extent the element of surprise with respect to the expanse of assets covered by the treaty prevalent under the broad formulation of investment in typical BITs.

## ANNEX A: CCIA

“investment” means assets admitted or admissible in accordance with the relevant laws and regulations of the COMESA Member State in whose territory the investment is made, and includes:

(a) moveable and immovable property and other related property rights

such as mortgages, liens and pledges;

(b) claims to money, goods, services or other performance having economic value;

(c) stocks, shares and debentures of companies and interest in the property of such companies;

(d) intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the COMESA Member States in which the investment is made;

(e) business concessions conferred by law or under contract, including:

(i) build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure;

(ii) concessions to search for, cultivate, extract or exploit natural resources; and

(f) such other activities that may be declared by the Council as investments;

but excludes: goodwill market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory

of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.

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