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Chapter 2: Investment and Investor

Investor-State arbitration offers protection to investors that make an investment in a State that has accepted to arbitrate disputes resulting from its acts or omissions affecting certain investments. A State may consent to arbitrate in a contract, in a national law on foreign investment or in investment treaties. An investor may consent to arbitrate by concluding a contract or by commencing arbitration based on a national law or an investment treaty.

In general, jurisdiction is normally acquired over the person (*ratione personae*) and over the matter (*ratione materiae*). This is also the case in investor-State arbitration. *Ratione personae* jurisdiction is acquired based on the nationality of the investor and jurisdiction *ratione materiae* is acquired based on the existence of an investment.

The expression 'investment' may have different meanings according to its context. Definitions of 'investment' in business, economy, finance or law will therefore vary. In investment arbitration, the notion of 'investment' is crucial because it triggers the application of an investment treaty or of a law on the protection of foreign investments, a pillar of the tribunal's jurisdiction.

The notion of 'investor' is another pillar of arbitral jurisdiction. An investor may be a natural or a legal person. An investor's right to arbitrate against the State is usually straightforward when this right has its basis on an investment contract with an arbitration agreement. Yet a State's offer to arbitrate contained in its national law on foreign investment or in its investment treaties is limited to certain predefined categories of 'investors'.

In addition to satisfying treaty requirements in relation to the notions of 'investment' and 'investor', a claimant in investment arbitration has to satisfy the standard rule on jurisdiction *ratione temporis*. This rule requires nationality on the date of injury (*dies a quo*) and on the date of submission of the claim for resolution (i.e., filing the request for
P 20 arbitration) (*dies ad quem*). The ICSID ● Convention requires specific critical dates depending on whether a natural or a legal person brings the investment claim.

Finally, an arbitral tribunal may deny jurisdiction *ratione temporis* when the investor's nationality results from acquiring nationality through fraudulent means or from material error by national authorities granting nationality. Moreover, in some cases tribunals may dismiss claims as inadmissible because of abuse of process.

§2.01 INTRODUCTION

The purpose of investor-State arbitration is to offer protection to investors that make an investment in a State that has accepted to have disputes resulting from its acts affecting certain investments to be submitted to arbitration. The acceptance of the State may be found in a contract, in a national law on foreign investments or in BIT or ann MIT.

The investor accepts to arbitrate against a State by concluding a contract with the State providing for investor-State arbitration or by commencing arbitration based on a national law on foreign investment or on an investment treaty. Because the investor is not a 'party' to the investment treaty, some scholars have referred to investment treaty arbitration as 'arbitration without privity'. (1)

In order for arbitrators to have jurisdiction, it is necessary that the dispute relates to an investment covered by the contract, the law or the treaty. The concept of 'investment' lacks a precise definition in international treaties and in the arbitration jurisprudence (§2.02). The protection of the 'investor' mainly depends on its nationality; nationality is a concept subject to various definitions (§2.03).

§2.02 THE CONCEPT OF INVESTMENT

The word 'investment' has several different meanings according to the context: business, tax, economy, finances, law, etc. Consequently, the recourse to common sense to recognize an investment is not of much help, contrary to the hope of some authors. (2) In the field of arbitration, the notion of investment is particularly important when it triggers the applicability of a treaty or of a law on the protection of foreign investments that, subsequently, will be the basis of the arbitrators' jurisdiction.

The notion of investment has been called the 'the cursed notion of the ICSID system'. (3) The regrettable confusion about the notion of investment increases when the discussion is no longer limited to ICSID arbitration and is extended to other procedures such as
P 21 UNCITRAL arbitration. Many authors are concerned that the very concept of ● investment arbitration be based on such an unstable notion. However, this supposed instability has not jeopardized the development of investment arbitration.

Although there is no uniformity on the definition of investment in the major applicable

legal texts, two main approaches result from the efforts of arbitral tribunals and scholars to propose a definition: the subjective approach and the objective approach.

[A] The Absence of a Uniform Definition of the Concept of 'Investment' in Legal Instruments

There is no definition of the concept of investment in the ICSID Convention. There is no uniformity in this regard in MITs and BITs that in most cases provide examples of investment rather than a proper definition. When there is an attempt to provide one, it is very broad and, consequently, not very useful in practice.

[1] The Absence of a Definition under Article 25 of the ICSID Convention

Article 25(1) of the ICSID Convention reads that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly 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.

Although is it clear that the existence of an investment is a mandatory requisite to ICSID jurisdiction, no definition of investment can be found in the ICSID Convention. This is not the result of an oversight. The *travaux préparatoires* reveal that the omission was intentional. Article 30(i) of the first draft defined the notion of investment as follows: '"investment" means any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years'. (4) However, no agreement was reached on that wording or on any other. The view of the majority was that investment was an evolving concept that could not be reduced to a frozen definition. Moreover, a definition was not felt necessary on the ground that the consent of the parties to ICSID intervention could be a sufficient confirmation that their dispute was originating from an investment. The negotiators' assumption was that the parties would agree to arbitration under the ICSID rules in a contract when the investment was made or after the occurrence of the dispute. They had not foreseen that in a near future many States would give a blind agreement to ICSID jurisdiction in-laws on the protection of
P 22 investments, bilateral or multilateral treaties. Neither had they foreseen ● the difficulties that the absence of a definition of investment would create in this context.

[2] The Definitions in Other Multilateral Treaties

[a] NAFTA

The NAFTA definition under its Article 1139 is enterprise-based. It refers to an 'enterprise' owned or controlled by an investor as a type of investment as well as to assets linked to the activities of an enterprise: equity and debt securities of an enterprise, a loan to an enterprise, any interest in an enterprise entitling the owner to a share of the income and/or profits of the enterprise, any interest in an enterprise entitling the owner to a share of the assets of the enterprise upon its dissolution, business real estate, and interests arising from the commitment of capital or other resources. Certain monetary claims are expressly excluded from the definition.

[b] The Energy Charter Treaty

Article 1(6) of the ECT defines 'investment' as follows:

> 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
> (d) Intellectual Property;
> (e) Returns;
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made

(hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat.

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Two points must be noted: (1) the given list of assets is not exhaustive but contains just examples and (2) the protection of the ECT is reserved to investments in the energy sector under precise conditions.

[3] The Various Definitions in Bilateral Treaties

Traditionally, BITs have defined 'investment' as an asset or an interest, providing as the ECT a non-exhaustive list such as movable and immovable property, shares, stocks and debentures of companies or interests in the property of such companies, loans and portfolio transactions, mortgages, liens and pledges, contractual rights, claims to money, intellectual property rights and goodwill, concessions conferred by law or by contract.

The China-Pakistan Free Trade Agreement (5) of 2006 is a good example. Its Article 46 provides the following definition:

> For the purpose of this Chapter,
>
> 1. The term 'investment' means every kind of asset invested by investors of one Party in accordance with the laws and regulations of the other Party in the territory of the latter, and particularly, though not exclusively, includes:
>
> (a) movable and immovable property and other property rights such as mortgages, pledges and similar rights;
>
> (b) shares, debentures, stock and any other kind of participation in companies;
>
> (c) claims to money or to any other performance having an economic value associated with an investment;
>
> (d) intellectual property rights, in particular copyrights, patents, trade-marks, trade-names, technical process, know-how and goodwill;
>
> (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Further to the non-exhaustiveness of the list, which is stressed in the text, the circularity of the definition is noteworthy: 'The term "investment" means every kind of asset invested by investors.' It is not specific to this treaty. Article 1(1) of the 1997 Italy-Pakistan BIT (6) reads that investment 'mean[s] any kind of property invested … by a natural or legal person …' and the 1994 Bolivia-Chile BIT does not hesitate to state in Article I(2) that 'investment refers to every kind of assets and rights in relation to an investment'. (7)

The difficulties of interpretation resulting from such broad and sweeping definitions of the concept of investment are described below. They have prompted a new generation of
P 24 treaties including definitions that are more restrictive. The 2012 US Model BIT provides a good example: it states that investment means every asset that has the characteristics of an investment; this is obviously a tautology, but such definition has the advantage to point out that the list it provides are just examples of the forms that an investment may take:

> 'investment' means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans; (8)
>
> (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; (9) , (10) and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledge.

The 2016 Free Trade Agreement between the EU and Vietnam refers to 'every kind of 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, the assumption of risk and for a certain duration'. (11) The CETA between the EU and Canada adopt the same definition in its Article 8(1). However, these new treaties do not provide for resolution of investment disputes by traditional arbitration but by a permanent Tribunal with an appellate procedure. (12)

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[B] The Investment in Arbitration Jurisprudence

Article 25 of the ICSID Convention limits the jurisdiction of ICSID arbitrators to disputes arising from an investment. This has led ICSID arbitrators to develop what is known as the 'double barrel' or 'double keyhole' approach: to retain jurisdiction, ICSID arbitrators should check first whether the dispute relates to an investment pursuant to the requirements of applicable treaty and, then, that it is 'arising of an investment' according to Article 25 of the ICSID Convention. However, this approach has not generated a uniform definition of the concept of investment and the proposed definitions have found little support outside of ICSID arbitration.

[1] The ICSID Jurisprudence

ICSID arbitrators appear to be divided into two main groups: those who believe in the existence of an objective concept of investment and apply with more or less flexibility the so-called *Salini test* (a)*;* and those who prefer a subjective case-by-case approach and rely mainly on the parties' agreement in the applicable BIT (b).

[a] The Objective Approach

The basic characteristics of an investment were enumerated in 2001 by the *Salini v. Morocco* (13) tribunal: (a) a contribution, (b) an assumption of risk, (c) a duration and (d) a contribution to the economic development of the host State of the investment. The idea was that these characteristics were requisites that should be objectively met as a condition for the jurisdiction of ICSID arbitrators. This became known as the *Salini test*. (14)

However, subsequent ICSID tribunals did not uniformly apply the *Salini test*. Some
P 26 considered that it had to be strictly applied. (15) Others reduced the number of
criteria to three, as the *LESI* tribunal in 2006, (16) which considered that the contribution to the economic development of the host State of the investment was difficult to prove and was implicitly covered by the three first criteria of *Salini*. However, these criteria were increased to six when in 2009, the *Phoenix* Tribunal (17) added as conditions, observance of the law of the host State and good faith in making the investment. This position, however, was not followed a year later by the *Saba Fakes* (18) tribunal, which retained only the first three criteria of the *Salini* test; it did not retain the contribution to the host State development because an investment, which is expected to be fruitful, might turn out to be an economic disaster while nevertheless remaining an investment. It also rejected the condition of good faith because it was not contemplated by the text of the ICSID Convention and that of legality of the investment because such condition should be included in a BIT. This approach was confirmed by the *Quiborax* tribunal in 2010:

> The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong Salini test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. (19)

Consequently, it seems that for the majority of those arbitrators which believe that a general concept of investment should be referred to in order to establish their jurisdiction pursuant to Article 25 of the ICSID Convention, only the three first criteria of the *Salini test* should be met:

(1) a contribution;

(2) an element of risk;

(3) a certain duration.

[b] The Subjective Approach

Other tribunals have rapidly concluded that the *Salini test* had no solid basis under the
P 27 ICSID Convention. In 2008, the *Biwater* tribunal pointed out that:

> In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five[(20)] Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention ...
>
> Further, the *Salini Test* itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are

> elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly. (21)

This position was confirmed by an ICSID annulment committee in 2009 in *Malaysian Historical Salvors v. Malaysia.* (22) The *Alpha Projecktholding* tribunal adopted a similar reasoning in 2010:

> The ICSID Convention does not define the term 'investment'. Given the absence of a definition, both parties refer to illustrative criteria developed in various arbitration awards, most notably the award in *Salini v. Morocco*. However, the elements of the so-called Salini test, which some tribunals have applied mandatorily and cumulatively (i.e., if one feature is missing, a claimed investment will be ruled out of ICSID jurisdiction), are not found in Article 25(1) of the ICSID Convention. In applying the criteria in this manner, these tribunals have sought to apply a universal definition of 'investment' under the ICSID Convention, despite the fact that the drafters and signatories of the Convention decided that it should not have one. This Tribunal will not follow that approach and will not impose additional requirements beyond those expressed on the face of Article 25(1) of the ICSID Convention and the UABIT.
>
> The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of 'investment', the criteria of resources, duration, and risk would seem fully to serve that objective. The Tribunal recognizes that elements discussed in the *Salini* test might be of some use if a tribunal were concerned that a BIT or contract definition of 'investment' was overreaching and captured transactions that manifestly were not investments under any acceptable definition. Indeed, a number of tribunals and *ad hoc* committees have treated the *Salini* elements as non binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention. However, in most ● cases –including, in the Tribunal's view, this one – it will be appropriate to defer to the States' definition of investment in a BIT or a contract. (23)

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The *Abaclat* tribunal showed the same preference for the definition of the BIT in 2011:

> Considering that these criteria [The Salini criteria] were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which neither the Convention itself nor the Contracting Parties to a specific BIT intended to create. (24)

The conclusion is that a significant number of ICSID tribunals appear to be reluctant to refer to an objective concept of 'investment' and prefer to rely on the definition to be found in the applicable BIT.

[2] The Jurisprudence of Non-ICSID Tribunals

Non-ICSID tribunals do not have to bother with the absence of a definition of the concept of investment in Article 25(1) of the ICSID Convention, which is not applicable. They consider only the definition of the applicable BIT and retain jurisdiction if they find the alleged investment on the list. This approach was perfectly explained by the *Mytilineos* tribunal constituted pursuant to the UNCITRAL Rules:

> It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an 'investment' under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention. This requirement is set out in Article 25(1) of the Convention, which confines the jurisdiction of ICSID arbitration tribunals to 'legal dispute[s] arising directly out of an investment' without defining 'investment'.
>
> ... However, this later *ratione materiae* test for the existence of an investment in the sense of Article of the 25 ICSID Convention is one specific to the ICSID Convention and does not apply in the context of *ad hoc* arbitration provided

for in BITs as an alternative to ICSID.

> In the present *ad hoc* arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer *ratione materiae* jurisdiction on this Tribunal are those under the BIT. (25)

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However, there are two notable exceptions. Two tribunals considered, as the 2012 US Model BIT does, that the fact that the lists of investments included in most BITs are not exhaustive is an evidence that they are just mere examples of what an investment could be provided it meet the characteristics of an objective concept of investment under international law. The *Romak* tribunal stressed:

> First, the approach advanced by Romak deprives the term 'investments' of any inherent meaning, which is contrary to the logic of Article 1(2) of the BIT. Indeed, as already mentioned, the categories of investments enumerated in Article 1(2) of the BIT are not exhaustive, and do not constitute an all encompassing definition of 'investment'. Both Parties agree that this is the case. Therefore, there may well exist categories different from those mentioned in the list which, nevertheless, could properly be considered investments protected under the BIT. Accordingly, there must be a benchmark against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an 'investment' within the meaning of Article 1(2). The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. (26)

The *Aps Finance and Trade* tribunal found that when the Contacting States make a list of what constitutes an investment in a BIT they 'explicitly or implicitly refer to an "objective" definition given by international law'. (27) It added that in a case where the Contracting States contemplated that disputes might be resolved alternatively under the ICSID Convention or the UNCITRAL Rules, the consequences is that they 'inevitably intended to refer to what constitutes "investment" under the ICSID Convention as concretely applied in the relevant case law'. (28)

Those are strong arguments that show that the definition of the concept of investment remains hotly disputed among arbitrators. This generates a lack of foreseeability that is difficult to explain to the parties because the same economic operation may be considered as protected or not protected by the same BIT, depending on whether the arbitrators define their jurisdiction *ratione materiae* by a mere reference to the list of investments provided in the treaty or rely on an objective concept of investment in the light of the *Salini test*.

Whatever the applicable arbitration rules, it seems that there is at least an agreement to exclude from the concept of investment commercial transactions. The *Joy Mining Machinery* tribunal in 2004 was explicit in this regard:

> The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the
P 30 governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration? (29)

However, there is also a degree of inconsistency in this respect. In 2012, the *Deutsche Bank v. Sri Lanka* (30) ICSID tribunal found that a hedging agreement was an investment under the Germany-Sri Lanka BIT. (31)

§2.03 THE PROTECTED INVESTOR

The investor may be a natural or a legal person. The right of investors to arbitrate against the State is not seriously disputable when it concluded with the State an investment contract that includes an arbitration clause. The issue is more complicated when the investor intends to rely on the offer to arbitrate that the State has made to foreign investors in its national investment law or to certain categories of foreign investors in BITs or MITs to which this State is a party. In the first case, the investor must meet the definition of a foreigner under national investment law. In the second case, the investor must meet the conditions laid down by the definition of 'investor' in the particular BIT of MIT:

> The fundamental issue is that of the nationality of the investor, although some BITs and MITs contain definition of the investor which also includes permanent residents of the contracting parties. (32) With regard to investment laws, the investor must not be a national of the host State since the very purpose of the law is to foster foreign investment by granting a special protection to foreign investors. Concerning BITs or MITs, the investor must also be a national of a country which is a party to a treaty binding on the host State. Although the nationality of natural persons has given rise to controversies, it is essentially the nationality of corporations which is at the origin of the more serious difficulties. The date at which the nationality must be taken into consideration is also an important factor.

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[A] Natural Persons

Arbitral tribunals tend to determine whether a person is a national of a particular country by application of the law of the country whose nationality is claimed. (33) In case such nationality is disputed the tribunal will not hesitate to determine it. As stressed in the *Soufraki* award:

> It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality … But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass [judgement] upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself, whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue. (34)

However, the situation of dual nationals, i.e., persons who have the nationality of the host State, in addition to the nationality of the State on whose basis he or she claims protection, creates a specific problem in ICSID arbitration. Dual nationals are expressly excluded under Article 25(2)(a) of the ICSID Convention which reads that:

> 2) 'National of another Contracting State' means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;

The application of the rule raises difficulty when a dual national investor claims that his or her effective nationality is not that of the host State. According to the prevailing definition of nationality in international law, such as expressed in the *Nottebohm* (35) case when the International Court of Justice (ICJ) found that nationality is a 'legal bond
P 32 having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with reciprocal rights and duties'. On the basis of Article 25(2)(a) of the ICSID Convention, arbitral tribunals refuse to rely on the effective nationality and do not consider that a dual national is entitled to protection. (36)

In ICSID arbitration, the solution should be the same *mutatis mutandi*, when a BIT or MIT contains a definition of 'investor' that includes not only nationals but also natural persons who are permanent residents under the applicable domestic law, if that resident is not a national of a country party to the ICSID Convention, since Article 25(2)(a) of the Convention requires the investor to be a national of a Contracting State.

With regard to non-ICSID investor-State arbitration, the situation of dual nationals depends only on the text of the relevant applicable treaty or investment law. For example, Article 1 of the US Model BIT addresses the dual nationality issue in its definition of 'investor of a Party': 'a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'. Failing such definition, the tribunal in the *García Armas v. Venezuela* case held that in the absence of express limitation excluding dual nationals or requiring dominant and effective nationality it was not possible to devoid of effect the nationality granted freely by a State and accepted as valid by the other. (37) This solution was upheld by the Paris Court of Appeal on 25 April 2017 (38) in setting aside proceedings.

[B] Legal or Juridical Persons

A legal person's nationality is that of the State of its seat or its place of incorporation or

formation. Consequently, a legal person must have its seat or must have been incorporated in another State to rely on the investment law of a State protecting foreign investors. However, it will be insufficient when the investment law also requires that the investor be under foreign control. (39)

Although most BITs protect legal persons that are legally constituted or incorporated in a contracting party, granting protection to investors by the mere fact of incorporation,
P 33 some of them provide protection to legal entities incorporated in a ● non-contracting party controlled by natural or legal persons holding the nationality of the other contracting party. (40) Failing such a specific requisite, the huge majority of arbitral tribunals is of the view that control is irrelevant and that a treaty's silence with respect to control means that incorporation in another contracting party is sufficient.

This position was clearly expressed in the *Tokios Tokelès v. Ukraine* case. The Lithuanian Tokios had created a Ukrainian subsidiary that brought a claim against Ukraine under Lithuania-Ukraine BIT. Tokios Tokelès itself was 99%-owned by Ukrainian nationals. According to Lithuanian law, applicable under the BIT, the place of incorporation was enough to determine the nationality of a legal person, and there was no control requirement in the BIT. The majority of the arbitrators (41) decided that Tokios could rely on the BIT because:

> Article 1(2)(b) of the Ukraine-Lithuania BIT defines the term 'investor', with respect to Lithuania, as 'any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations... The Treaty contains no additional requirements for an entity to qualify as an 'investor' of Lithuania. (42)

In ICSID arbitration, the control of a legal person by nationals of a Contracting State is taken into consideration only when the investor is a legal person of the same nationality as the host State, provided it has been contemplated by the Contracting Parties. Article
P 34 25(2)(b) of the Washington Convention reads: ●

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

In the 2016 World Investment Report, the United Nations Conference on Trade and Development (UNCTAD) noted on the basis of the available information that since 2010, about one-third of ISDS claims had been filed by claimant entities that were ultimately owned by a parent in a third country not party to the treaty on which the claim was based. (43)

Finally, some investment treaties contain denial-of-benefits clauses excluding nationals of third States that, through shell or mailbox companies, claim treaty protection. For instance, the Canada-Mongolia BIT (44) provides in Article 18(2) that a contracting party may deny BIT benefits to investments of an investor that is an enterprise of the other contracting party 'if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized'.

[C] Date of Nationality

[1] Jurisdiction Ratione Temporis

On comity grounds, States have historically required 'continuous nationality' under international law and, particularly, in diplomatic protection. Espousing a claim and thus interfering with how another State handled internal affairs required 'continuous nationality' until the date of dispute resolution (*dies ad quem*). But when States empowered individuals to pursue their claims directly against other States, the requirement that nationality exist on the date of dispute resolution was relaxed. (45)

In investor-State arbitration, the standard rule on jurisdiction *ratione temporis* requires nationality on the date of injury (*dies a quo*) and on the date of submission of the claim for resolution (i.e., filing the request for arbitration) (*dies ad quem*). For example, in *García Armas v. Venezuela* the majority of the tribunal held that jurisdiction required that the investor possess the nationality of the relevant State: (a) on the date of injury (unless the treaty provides otherwise) and (b) on the date of the request for arbitration pursuant to terms of the BIT. (46) The *Pey Casado v. Chile* tribunal upheld the same nationality critical dates. (47)

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In ICSID arbitration, Article 25(2)(a) of the ICSID Convention requires that a natural person possess the nationality of a Contracting State that is not a party to the dispute on two dates: on the date when he or she consents to arbitrate, and on the date when the

Secretary General registers the request for arbitration. In investment treaty arbitrations, the date of consent is the date of the request for arbitration, which often does not coincide with the date when the Secretary General registers the request under Article 28(3) (48) of the ICSID Convention. For instance, the *Kim et al. v. Uzbekistan* tribunal applied the investment treaty and the ICSID Convention requirements on nationality of natural persons, finding that the critical dates applying to the claimants were: (a) 'the date of the alleged breach', (b) 'the date the claim was submitted to ICSID' and (c) 'the date the claim was registered by ICSID'. (49)

The three critical dates in relation to nationality in *Kim et al. v. Uzbekistan* above should be understood in the context of natural persons. Article 25(2)(b) of the ICSID Convention does not require nationality on the registration date for legal persons. Rather, a legal person shall possess the nationality of a Contracting State other than the State party to the arbitration 'on the date on which the parties consented to submit such dispute' to arbitration. ICSID tribunals also consider other nationality date requirements such as those provided under the relevant investment treaty or investment legislation. Except for the ICSID Convention critical dates, non-ICSID tribunals will also consider these other nationality date requirements.

The ICJ held in the *Arrest Warrant* case that 'jurisdiction must be determined at the time that the act instituting proceedings were filed'. (50) This means that jurisdiction persists regardless of later events. Arbitral tribunals have therefore rejected, for instance, allegations that investors were no longer interested parties. (51)

In *El Paso v. Argentina*, the arbitral tribunal rejected Argentina's allegation that subsequent events such as El Paso's sale of its shares in the Argentine invested companies led to the tribunal's lack of jurisdiction over El Paso. According to the tribunal,
P 36 the text of the ICSID Convention and the US-Argentina BIT (52) do not require ● 'continuous ownership of the investment'. (53) Otherwise, expropriation by the host State could easily defeat these treaties' purpose. The tribunal rejected that the investment's sale in October 2003 after the critical dates of consent to arbitrate (submission of request for arbitration) and arbitration registration in June 2003 could affect jurisdiction, unless the right to claim compensation had been included in the sale. (54)

Tribunals have exceptionally required 'continuous nationality' from the date of injury until the date of dispute resolution (*dies ad quem*). (55) In the ICSID Additional Facility *Loewen* arbitration, the US raised, among other things, jurisdictional objections against Loewen Group after the 2001 merits hearing. Loewen Group had filed a voluntary application under the US Bankruptcy Code leading to a reorganization plan. Pursuant to the reorganization of its business operations Loewen Group ceased to exist as a Canadian company, reorganized as a US corporation. Before ceasing to exist Loewen Group 'assigned all of its right, title and interest to the NAFTA claim to a newly created corporation (discreetly called Nafcanco – a play on the words NAFTA and Canada)'. (56)

Nafcanco's only asset was the NAFTA claim, and its only business was the pursuit of this claim. The arbitral tribunal noted that NAFTA expressly required nationality on the submission date (*dies a quo*) in Articles 1116 and 1117 but was silent on 'whether nationality must continue to the time of resolution of the claim'. (57) Applying international law, the tribunal explained that the requirement of continuous nationality until resolution of the dispute (*dies ad quem*) was expressly relaxed in certain treaties but not in NAFTA:

> When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called 'BITs', contain specific modifications of the requirement. But such specific provisions
> P 37 in ● other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision. (58)

Therefore, the *Loewen* tribunal found that '[s]uch a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national' in the arbitration. (59) Yet subsequent investment awards have not endorsed the *Loewen* strict standard on 'continuous nationality' until the date of dispute resolution.

[2] Changes in Investor Nationality

An arbitral tribunal may deny jurisdiction *ratione temporis* when an investor's nationality change results from fraudulent acquisition of nationality or from material error by national authorities granting nationality. However, if the change in nationality is not

fraudulent and does not result from a material error, it may nevertheless constitute, in certain cases, abuse of process. For example, tribunals have discussed abuse of process when ruling on corporate restructuring of an investment seeking to obtain treaty protection otherwise unavailable. When found, the abuse of process objection in investment arbitration leads to non-admissibility of claims.

On the distinction between jurisdictional and admissibility objections, Professor Jan Paulsson explains that a jurisdictional objection is when a claim cannot be brought to the forum seized, whereas an admissibility objection is when a claim cannot 'be heard at all (or at least not yet)'. (60) The *Philip Morris v. Australia* tribunal distinguished between the *ratione temporis* jurisdictional objection and abuse of process as an admissibility objection in relation to corporate restructuring.

According to the *Philip Morris* tribunal, the critical date as the date of the alleged breach is essential for jurisdiction *ratione temporis* based on a treaty breach. (61) Therefore, when a treaty breach and thus an investment dispute exist, corporate restructuring after the date of breach leads to lack of jurisdiction *ratione temporis*. (62) In turn, an abuse of process objection can succeed when 'an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute'. (63) The threshold for an abuse of process finding is high, subject to an objective test not requiring bad faith evidence. (64) The tribunal went on to define the 'foreseeability' test in abuse of process as 'reasonable prospect' that a measure giving rise to treaty claims will materialize, as
P 38 follows: ●

> [F]oreseeability rests between the two extremes posited by the tribunal in *Pac Rim v. El Salvador* – 'a very high probability and not merely a possible controversy'. On this basis, the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise. (65)

The tribunal went on to find that Philip Morris had failed to prove that the alleged tax and business reasons 'were determinative for the restructuring'. (66) Thus, the tribunal concluded that its claims were inadmissible because 'the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong'. (67)

New developments in treaty making also seek to deal with abuse in corporate restructuring. Article 16(3) of the 2018 Draft Model BIT of the Netherlands entitles the host State to deny the benefits of treaty protection in some restructuring cases, as follows:

> The responding Contracting Party may deny the benefits of this Section to an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state. (68)

Moreover, the *Micula et al. v. Romania* award provides a good example of fraud allegations in relation to a natural person's acquisition of nationality. On the jurisdictional objection about treaty-required nationality of one of the claimants, Mr Viorel Micula, the tribunal dismissed Romania's allegations that he had not fulfilled the five-year residence requirement in Sweden. It pointed out that the Swedish decision granting nationality was unrelated to the arbitration and that it would be deferential to the Swedish authorities. In its view, 'the Tribunal would only be inclined to disregard the decision of the Swedish authorities if there was convincing and decisive evidence that Viorel Micula's acquisition of Swedish nationality was fraudulent or at least resulted from a material error'. (69)

In *Arif v. Moldova*, Moldova argued that the decree granting French nationality to Mr Arif was invalid. The tribunal relied on 'strong and convincing evidence that Mr Arif acquired French nationality in accordance with French law'. (70) It went on to find that Moldova
P 39 had failed to show that Mr Arif's nationality 'was obtained fraudulently or ● resulted from a material error of the French authorities'. (71) Thus, the tribunal refused to exercise control over the French authorities' decision granting Mr Arif French nationality.

§2.04 CONCLUSION

While a State may consent to arbitrate in a contract, in a national law on foreign investment or in investment treaties, an investor may consent to arbitrate by concluding a contract or by commencing arbitration based on a national law or an investment treaty.

In investment arbitration, the notion of 'investment' is one of the pillars of arbitral jurisdiction, because it triggers the application of an investment treaty or of a law on the protection of foreign investments. The notion of 'investor' as a natural or legal person is another pillar of arbitral jurisdiction.

Having satisfied investment treaty requirements on the categories of protected 'investments' and 'investors', a claimant in investment arbitration may confront jurisdiction *ratione temporis* issues. With some variations depending on the applicable law, the standard rule on jurisdiction *ratione temporis* requires nationality on the date of injury (*dies a quo*) and on the date of submission of the claim for resolution (i.e., filing the request for arbitration) (*dies ad quem*).

Fraudulent acquisition of nationality or material error by national authorities granting nationality may lead to lack of jurisdiction *ratione temporis*. In addition, in some cases tribunals may dismiss claims as inadmissible because of abuse of process in corporate restructuring.

Questions

(1) What is arbitration without privity?

(2) What is the difference between the objective and the subjective tests on the definition of 'investment'?

(3) Please discuss the application of the *Salini test* versus the application of the 'investment' definition under an investment treaty.

(4) What law applies to the investor's nationality?

(5) Could entities without legal personality qualify as an 'investor' under the ICSID Convention

(6) What is the relevance of 'effective nationality' for jurisdiction *ratione personae*?

(7) Please discuss *Loewen*'s 'continuous nationality' requirement.

(8) Please discuss different types of denial clauses in investment treaties.

(9) What is the difference between lack of jurisdiction *ratione temporis* and non-admissibility for abuse of process?

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(10) What factors have arbitral tribunals considered when ruling on allegations of abuse of process in relation to changes of nationality?

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References

1) *See*, for example, Jan Paulsson, *Arbitration Without Privity*, 10(2) ICSID Rev. (1995).
2) *See* Eduardo Silva Romero, *Por un regreso al sentido ordinario de la palabra 'inversión'*, 10 Revista Peruana de Arbitraje 25 (2010).
3) Walid Ben Hamida, *La notion d'investissement: la notion maudite du système CIRDI* ?, 4 Les cahiers de l'arbitrage 33 (2007).
4) *Convention on the Settlement of Investment Disputes between States and Nationals of Others States, Documents Concerning the Origin and the Formulation of the Convention* vol. I (ICSID 1970), p. 116.
5) Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China (24 Nov. 2006).
6) 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 Jul. 1997).
7) Agreement between the Republic of Bolivia and the Republic of Chile on the Reciprocal Promotion and Protection of Investments (22 Sep. 1994) (original in Spanish, free translation).
8) 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.
9) 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.
10) The term 'investment' does not include an order or judgment entered in a judicial or administrative action.

11) EU-Vietnam Free Trade Agreement (2016), Trade in Services, Investment and E-Commerce, Chapter I on 'General Provisions', Art. 4(p).
12) *See*, for example, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one Part, and the European Union and its Member States, of the Other Part (2016), Art. 8.27 and Art. 8.28.
13) *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 Jul. 2001), 42 ILM 609, 622 (2003), para. 52: 'The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction … In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.'
14) In fact, the *Salini* case was not the first to introduce a definition of investment in addition to that of the treaty. In *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 Jul. 1997), 37 ILM 1378, 1387 (1998), the tribunal indicated that an investment is characterized by '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'.
15) *See,* among other decisions, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), paras 130 et seq.; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006), para. 91.
16) *LESI, SpA and Astaldi, SpA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 Jul. 2006), para. 72(iv).
17) *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), para. 100.
18) *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 Jul. 2010), paras 110–111.
19) *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sep. 2012), para. 220.
20) The *Biwater* tribunal saw five and not four criteria as in *Salini*, as follows: (a) duration, (b) regularity of profit, (c) assumption of risk, (d) substantial commitment, and (e) contribution to the development of the host State.
21) *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 Jul. 2008), paras 312, 314.
22) *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision of the Application for Annulment (16 Apr. 2009), para. 79.
23) *Alpha Projecktholding mgbh v. Ukrain Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 Nov. 2010), paras 311–312.
24) *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility (4 Aug. 2011), para. 364. *See also Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Decision on Jurisdiction (2 Jul. 2013), para. 187.
25) *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction (UNCITRAL) (8 Sep. 2006), paras 112, 117–118.
26) *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 Nov. 2009), para. 180.
27) *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 Mar. 2011), para. 239.
28) *Ibid.*
29) *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004), para. 58.
30) *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 Oct. 2012), para. 312(iii).
31) This award was subject to annulment proceedings, which were discontinued on 9 Sep. 2016.
32) For instance, the Argentina-Canada BIT defines the investor as follows: 'The term "investor" includes any natural person who makes the investment possessing the citizenship or permanently residing in a Contracting Party in accordance with its laws.' Article 201 of NAFTA contains a similar definition of 'national', whereby permanent residents are considered as nationals. Likewise, Art. 1(7) of the ECT refers not only to nationals but also to individuals who are 'permanently residing' in a contracting party.

33) Pursuant to Art. 1 of the 2012 US Model BIT, '"national" means for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act'. Article 201 of NAFTA reads that 'national means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1'. In turn, Annex 201.1 provides that 'national also includes: (a) with respect to Mexico, a national or a citizen according to Arts 30 and 34, respectively, of the Mexican Constitution; and (b) with respect to the United States, "national of the United States" as defined in the existing provisions of the Immigration and Nationality Act'.

34) *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (7 Jul. 2004), para. 55.

35) *Nottebohm Case (Liechtenstein v. Guatemala), Second Phase*, ICJ Judgment (6 Apr. 1955), 1955 ICJ Reports 4, 23.

36) *See Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (formerly *Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*), Decision on Jurisdiction (21 Oct. 2003), pp. 16–17.

37) *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction (15 Dec. 2014), para. 200.

38) Paris Court of Appeal, pôle 1, 1re ch., *République bolivarienne du Venezuela v. Monsieur Serafín García Armas and Mme Karina García Gruber*, Judgment (25 Apr. 2017). *See* comments by Walid Ben Hamida, *L'investisseur protégé: Paris le paradis arbitral des binationaux et des investisseurs souverains*, 4 Les Cahiers de l'Arbitrage 674 (2017).

39) *See*, for example, the Venezuelan law on promotion and protection of investments (Decree No. 356 of 3 Oct. 1999) which, after indicating that an 'international investment' must be owned or effectively controlled by foreign natural or legal persons, defines 'international investor' in its Art. 3(4), as follows: 'The owner of an international investment or whom effectively controls it.' (Free translation of Spanish original: 'El propietario de una inversión internacional, o quien efectivamente la controle.')The application of this law is discussed in the *Venoklim* award; *see Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award (3 Apr. 2015), paras 141 et seq.

40) *See,* for example, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (20 Oct. 1992), Art. 1(b): 'the term "investor" shall comprise with regard to either Contracting Party: ... ii. without prejudice to the provisions of paragraph (iii) hereafter, legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party in which a place of effective management is situated; and iii. legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party'. The Protocol to this Agreement seeks to define 'control' within the meaning of Art. 1(b)(iii), as follows: 'B. With reference to Article 1, paragraph b) (iii) the Contracting Party in the territory of which the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party. The following facts, *inter alia*, shall be accepted as evidence of the control: i. being an affiliate of a legal person of the other Contracting Party; ii. having a direct or indirect participation in the capital of a company higher than 49% or the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs.' Adopting a slightly different test on legal persons, combining the 'control' requirement with the 'incorporation' and 'seat' requirements, *see* Agreement Between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments (25 Jun. 2003), Art. 1(3): 'The term "company" means any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party and having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party.'

41) Interestingly, the president of the tribunal, Professor Prosper Weil, expressed a minority view, considering that a legal person controlled by nationals of the host State could not enjoy the protection of the BIT.

42) *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004), para. 28. *See also Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), in which a similar decision was based on Art. 1(b) of the Czech-Republic-Netherlands BIT, which reads that: 'the term "investors" shall comprise: (i) natural persons having the nationality of one of the Contracting Parties in accordance with its law; (ii) legal persons constituted under the law of one of the Contracting Parties'. (paras 222 et seq.).

43) UNCTAD, *2016 World Investment Report, Investor Nationality: Policy Challenges* (United Nations 2016), p. 171.

44) Agreement between Canada and Mongolia for the Promotion and Protection of Investments (8 Sep. 2016).

45) *See Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), para. 230.

46) *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction (15 Dec. 2014), paras 215–217. It is noteworthy that the Paris Court of Appeal set aside the Decision on the ground that this tribunal's majority had also found that the date when the investment was made was irrelevant for jurisdiction purposes, reading in the applicable treaty the requirement that the date of the investment be taken into consideration: Paris Court of Appeal, pôle 1, 1re ch., *République bolivarienne du Venezuela v. Monsieur Serafín García Armas and Mme Karina García Gruber*, Judgement (25 Apr. 2017).
47) *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008), para. 414.
48) ICSID Convention, Art. 28(3): 'The Secretary-General shall register the request unless he finds, on the basis of the *information* contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.'
49) *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 Mar. 2017), paras 190–191.
50) *Case Concerning the Arrest Warrant (Democratic Republic of the Congo v. Belgium)*, Judgment (14 Feb. 2002), 2002 ICJ Reports 3, 13, p. 26.
51) Christoph H. Schreuer et al., *The ICSID Convention: A Commentary*, 92 (2nd ed., Cambridge University Press 2014).
52) Treaty between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment (14 Nov. 1991).
53) *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 Apr. 2006), para. 135.
54) *Ibid.*, paras 135–136.
55) *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003).
56) *Ibid.*, para. 220.
57) *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), para. 226. *See also*, NAFTA, Arts 1116 and 1117: 'Article 1116: Claim by an Investor of a Party on Its Own Behalf 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: … Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: …'
58) *Loewen Group, Inc. ibid.*, para. 229.
59) *Ibid.*, para. 237.
60) Jan Paulsson, *Jurisdiction and Admissibility,* in *Liber Amicorum in honour of Robert Briner*, 601, 617 (ICC Publishing 2005).
61) *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 Dec. 2015), para. 529.
62) *Ibid.*, para. 539.
63) *Ibid.*
64) *Ibid.*
65) *Ibid.*, paras 529, 539, 554.
66) *Ibid.*, para. 584.
67) *Ibid.*, paras 584, 588.
68) Netherlands Draft Model BIT of 2018.
69) *Ioan Micula and others v. Romania, ICSID Case No. ARB/05/20*, Decision on Jurisdiction and Admissibility (24 Sep. 2008), para. 95.
70) *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), para. 356.
71) *Ibid.*, para. 357.