

# COMMENTARY



# THE UNITY OF AN INVESTMENT

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## INTRODUCTION

An investment is often a complex operation. It may consist of preparatory studies, licences, government permits, financing arrangements, real estate transactions, various contractual arrangements, and a variety of other legal dispositions. Each of these elements has its own legal existence but in economic terms they are united to serve a common purpose.

Investment tribunals have often treated the various assets and activities that make up an investment as a unity. In most cases they have not dissected investments into their individual legal components but have treated them as an integral whole. This holistic approach towards investments has shown itself in several contexts. When determining the existence of an investment, tribunals have looked at a combination of elements that collectively made up the investment. They have extended the protection of investments to activities incidental to the investment's core activity. This protection applied to some activities preparatory to the investment proper and to certain follow-up activities. At times, consent to arbitration contained in some investment-related documents was extended to legal relationships governed by other documents. The requirement of an investment in the host State was deemed fulfilled even if only some of the activities making up the investment had taken place in the host State's territory. In the eyes of investment tribunals, the illegality of one aspect of the investment tainted the entire operation.

The picture is less clear when tribunals dealt with the merits of investment claims. In some cases, tribunals have looked at the entire investment when determining whether an alleged expropriation amounted to a substantial deprivation. In other cases, tribunals have accepted the possibility of a partial expropriation.

## I. THE IDENTIFICATION OF AN INVESTMENT

The unity of the investment may determine the very existence of an investment. In some cases, respondents argued that each of the claimants' assets on its own did not amount to an investment. Claimants argued that these assets, looked at in combination, did constitute an investment.

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The simplest example for this constellation is the existence of several inter-related contracts. In *Mytilineos v. Serbia and Montenegro*,<sup>1</sup> the Claimant had entered into a series of agreements with a “socially owned company” under the law of Yugoslavia. The Respondent argued that there was no investment since these were ordinary commercial contracts. The Tribunal found that, in combination, the contracts amounted to an investment. It said:

Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, it seems clear that the combined effect of these agreements amounts to an investment . . . [T]he combined effect of the Agreements is clearly more than an ordinary commercial transaction.<sup>2</sup>

The Tribunal proceeded to apply the *Salini* criteria to the entire operation to identify an investment.<sup>3</sup>

The situation was similar in *ADC v. Hungary*.<sup>4</sup> The Claimant and a Hungarian State entity had entered into a Master Agreement and a series of more specific Project Agreements for the expansion of Budapest International Airport. The Respondent argued that this was not an investment but a series of ordinary commercial transactions. The Tribunal disagreed. It found that the entire operation had the characteristics of an investment. The Tribunal found that it was “necessary to have regard to the effect of all the Project Agreements”.<sup>5</sup> It said:

In considering whether the present dispute falls within those which “*arise directly out of an investment*” under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements.<sup>6</sup>

*İçkale v. Turkmenistan*<sup>7</sup> involved a set of 13 interrelated construction contracts. In determining the existence of a contribution, the risk involved and the duration of the entire operation for purposes of determining the existence of an investment, the Tribunal found that it had to look at the contracts in their totality. It said:

In the circumstances, the Tribunal does not find it appropriate to consider each of the Contracts concluded by the Claimant individually when determining whether the Claimant has made an “investment” in Turkmenistan; they form part of a whole, which is the Claimant’s business venture in Turkmenistan. In view of the scale, duration and number of the projects, and the commitment of capital by the Claimant in their performance, the Tribunal concludes that the Claimant must be considered to have made an “investment” in Turkmenistan within the meaning of both Article 25 of the ICSID Convention and Article I(2) of the [Turkey–Turkmenistan] BIT.<sup>8</sup>

<sup>1</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) 16 ICSID Rep 572.

<sup>2</sup> *Ibid.* paras. 120 and 125. <sup>3</sup> *Ibid.* para. 124.

<sup>4</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award of the Tribunal (2 October 2006) 15 ICSID Rep 539.

<sup>5</sup> *Ibid.* para. 325.

<sup>6</sup> *Ibid.* para. 331 (italics original).

<sup>7</sup> *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016).

<sup>8</sup> *Ibid.* para. 293.

Other tribunals too found that several contracts had to be viewed in combination to establish the existence of an investment.<sup>9</sup>

Some cases involved a variety of assets and activities that combined to form an investment. For instance, *Saipem v. Bangladesh*<sup>10</sup> involved the construction of a pipeline governed by a contract, retention money, warranty bonds and an ICC Arbitration Award in the Claimant's favour that had been nullified by the Respondent's Supreme Court. The Tribunal looked at the entire operation to establish the existence of an investment:

... the Tribunal wishes to emphasize that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration.<sup>11</sup>

The Tribunal added that the ICC Award did not in itself constitute an investment but formed part of the overall investment for purposes of Article 25(1) of the ICSID Convention.<sup>12</sup>

In *White Industries v. India*,<sup>13</sup> the Claimant's assets consisted of a contract for the supply of equipment, a bank guarantee and an unpaid ICC Award. The Respondent contested the existence of an investment. The Tribunal rejected the proposition that the bank guarantee or the ICC Award constituted investments in their own right.<sup>14</sup> They did however form part of the overall investment:

It is thus clear from White's operation under the Contract as a whole that it has made an investment in India for the purposes of the *Salini* Test.<sup>15</sup>

Other tribunals have found similarly that "all the elements of the Claimant's operation must be considered for the purpose of determining whether there was an investment under Article 25 [of the ICSID Convention]";<sup>16</sup> that "in order to determine whether or not an investment had been made, the Tribunal should assess the Claimant's business in the Czech Republic as a whole";<sup>17</sup> that "[w]hilst individual parts of that overall operation, e.g. the two Guarantees, might not by themselves qualify as an 'investment', the Tribunal considers that overall, there

<sup>9</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) para. 92; *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) para. 367.

<sup>10</sup> *Saipem SpA v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures (21 March 2007) 17 ICSID Rep 352.

<sup>11</sup> *Ibid.* para. 110 (footnote omitted).

<sup>12</sup> *Ibid.* paras. 113–14. For a contrary view, see *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) paras. 162–4.

<sup>13</sup> *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011).

<sup>14</sup> *Ibid.* paras. 7.5.1 and 7.6.8–10. <sup>15</sup> *Ibid.* para. 7.4.19.

<sup>16</sup> *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para. 5.44.

<sup>17</sup> *AIIY Ltd v. Czech Republic*, ICSID Case No. UNCT/15/1, Award (29 June 2018) para. 107.

was here a covered ‘investment’ within the meaning of Article 25(1) of the ICSID Convention’;<sup>18</sup> and that they should not examine a particular element of a complex operation in isolation but evaluate “the operation as a whole”.<sup>19</sup>

In some decisions, tribunals held that even though several of the claimant’s assets individually qualified as investments, they should still be examined in conjunction. In *Unión Fenosa v. Egypt*,<sup>20</sup> the Tribunal determined that a Sale and Purchase Agreement and Claimant’s shares in an Egyptian company were each by themselves investments for purposes of the BIT and Article 25(1) of the ICSID Convention.<sup>21</sup> Despite this finding the Tribunal added:

The Tribunal also decides that these investments are to be treated “holistically” as one overall investment made by the Claimant comprising the Damietta Project.<sup>22</sup>

In *Ambiente Ufficio v. Argentina*,<sup>23</sup> Italian banks held government bonds issued by the Respondent and had in turn issued “security entitlements” to individual investors. The Respondent argued that the individual Claimants lacked standing because they were only remotely connected with the underlying bonds.<sup>24</sup> The Tribunal relied on the general unity principle to conclude that the Claimants had standing irrespective of the indirect nature of their interest in the bonds. It found that “the bond issuing process, including the purchase of security entitlements on the secondary market, is to be seen as an economic unity embodying a single act of investment”.<sup>25</sup> It summarised the situation as follows:

... the Tribunal is convinced that the process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind “aris[e] directly out of an investment” and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina–Italy BIT.<sup>26</sup>

In some cases, tribunals paid lip service to the principle of the unity of the investment but did not, in fact, apply it. *Joy Mining v. Egypt*<sup>27</sup> concerned the supply and installation of mining equipment supported by a performance bond in the form of a bank guarantee. When Egypt refused to release the bond, the

<sup>18</sup> *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award (19 November 2007) para. 208.

<sup>19</sup> *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2015-12, Award on Jurisdiction (8 July 2019) para. 293.

<sup>20</sup> *Unión Fenosa Gas, SA v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018).

<sup>21</sup> *Ibid.* paras. 6.66–7.

<sup>22</sup> *Ibid.* para. 6.68.

<sup>23</sup> *Ambiente Ufficio SpA and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) 19 ICSID Rep 506.

<sup>24</sup> *Ibid.* para. 432.

<sup>25</sup> *Ibid.* para. 433.

<sup>26</sup> *Ibid.* para. 429. See also paras. 434 and 486.

<sup>27</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) 13 ICSID Rep 123.

Claimant started ICSID arbitration under the UK–Egypt BIT. The Tribunal accepted the unity of the investment, in principle, and said:

The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract as a whole in order to determine whether it could qualify as an investment under Article 25 of the [ICSID] Convention, although as explained the Tribunal is only called to determine the status and implications of the bank guarantees.<sup>28</sup>

Despite this avowed acceptance of the unity principle, the Tribunal’s examination of the existence of an investment focused on the bank guarantee. Its conclusion was that a bank guarantee is not an investment since it is a contingent liability.<sup>29</sup> This, and its finding that the transaction was no more than a normal sales contract, led the Tribunal to conclude that there was no investment and to dismiss the case for lack of jurisdiction.

*Mitchell v. Congo*<sup>30</sup> concerned the seizure by the Congolese authorities of a legal consulting firm and the incarceration of its employees. The Tribunal noted the movable assets, know-how, good will, money and services which in their totality amounted to an investment. It said:

In addition to movable property, Claimant transferred into the Congo money and other assets which constituted the foundations for his professional activities which came to an end the day of the seizure of his firm or soon thereafter. Together with the returns on the initial investments, which also qualify as investments [under the US–Zaire BIT], these activities and the economic value associated therewith qualify as an investment within the meaning of the BIT and the ICSID Convention.<sup>31</sup>

In proceedings for the Award’s annulment, the *ad hoc* Committee seemed to endorse the concept of the unity of the investment, in principle, when it said:

In the opinion of the *ad hoc* Committee, one should avoid confusing the economic operation or project – which, if it fulfills certain characteristics, becomes the investment within the meaning of the [ICSID] Convention and the Treaty, even if it is “smaller” and “of shorter duration and with more limited benefit to the host State’s economy” (...) – with all the rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another.<sup>32</sup>

Having made this broad statement, the *ad hoc* Committee immediately proceeded to zoom in on one aspect of the investment – the services provided by the law firm:

<sup>28</sup> *Ibid.* para. 54.

<sup>29</sup> *Ibid.* paras. 42, 44–5 and 47.

<sup>30</sup> *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award (9 February 2004) 19 ICSID Rep 85.

<sup>31</sup> *Ibid.* para. 55.

<sup>32</sup> *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) 19 ICSID Rep 85 para. 38.

In this case, by the nature of things, it is the services of the “Mitchell & Associates” firm that would or would not constitute the investment within the meaning of the Convention and the Treaty . . .<sup>33</sup>

In the view of the *ad hoc* Committee, these services did not contribute to the host State’s economic development. This, and the Award’s failure to state coherent reasons, led the Committee to annul the Award.<sup>34</sup>

## II. THE INCLUSION OF ANCILLARY OR RELATED ASSETS AND ACTIVITIES

In another group of cases, the existence of an investment as such was not in doubt. The question was whether certain aspects that were incidental to the core assets and activities partook of the investment’s status and protection.

A typical example for an activity ancillary to the investment is financing arrangements. In *Holiday Inns v. Morocco*,<sup>35</sup> the agreement for the establishment and operation of hotels had also provided for financing by the government. This was done by means of separate loan contracts. The contracts contained choice-of-forum clauses in favour of the Moroccan courts. This led the Respondent to object to the jurisdiction of ICSID over the claims connected with the loan contracts. The Tribunal emphasised “the general unity of an investment operation” to assert its jurisdiction also over the loan contracts. The Tribunal said:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.<sup>36</sup>

Other tribunals too have accepted that loan agreements were part of the overall investment they were designed to serve.<sup>37</sup> In *Tenaris and Talta*

<sup>33</sup> *Ibid.* para. 38.

<sup>34</sup> *Ibid.* paras. 39–41.

<sup>35</sup> *Holiday Inns SA and Others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction (12 May 1974) (not public). A detailed account can be found in Pierre Lalive, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems” (1980) 51 *British Yearbook of International Law* 123 (reproduced in 1 ICSID Rep 645).

<sup>36</sup> Lalive (n 35) 159.

<sup>37</sup> *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010) paras. 272–3: “The Tribunal concludes that it is the character of the project *in toto* which determines the nature of the commercial arrangements and not the individual agreements in isolation. The project involved more than a series of loan agreements and construction contracts . . . The Tribunal notes that large infrastructure undertakings regularly involve loans that are part and parcel of a greater endeavor”; *Tulip Real Estate and Development BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) para. 202: “the Tribunal accepts that the Claimant’s overall investment included various infusions of capital into the Ispartakule III Project through loans”; *MNSS BV and Recupero Credito Acciaio NV v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) 19 ICSID Rep 749 paras. 201–2: “Arbitral tribunals have recognized ‘the general unity of an investment operation’ since the first ICSID



v. *Venezuela*,<sup>38</sup> the Tribunal accepted that a loan granted by the Claimant in the course of its acquisition of shares in Venezuela's steel industry was part of the investment. The Tribunal said:

In the opinion of the Tribunal, the Talta Loan qualifies as an "investment" in its own right under the terms of Articles 1(2) of the Luxembourg and Portuguese Treaties. But even if that were wrong, the Tribunal is satisfied that it was an essential element of Claimants' "investment" in Matesi.<sup>39</sup>

Paradoxically, the outlier in this line of cases is *CSOB v. Slovakia*,<sup>40</sup> which is commonly celebrated as the paradigmatic authority for the unity of investments. The Claimant had granted a loan to a Slovak Collection Company that was secured by a guarantee of the Slovak Ministry of Finance.<sup>41</sup> A Consolidation Agreement between the Claimant and the Ministry of the Slovak Republic dealt with the issue of non-performing receivables. It referred to a projected BIT, which the Tribunal accepted as incorporating the BIT's ICSID clause into the Consolidation Agreement. When the Slovak Collection Company defaulted in its payment, CSOB instituted ICSID proceedings against Slovakia. Slovakia argued that the claims against it did not arise directly out of the loan and were, therefore, outside the Tribunal's jurisdiction. The Tribunal found that the loan to the Collection Company was closely related to, and could not be disassociated from, the other transactions and that the Slovak Republic's undertaking and the loan formed an integrated whole.<sup>42</sup> It adopted the doctrine of the unity of the investment operation and said in an often-quoted passage:

An investment is frequently a rather complex operation, composed of various inter-related transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.<sup>43</sup>

case, *Holiday Inns v. Morocco* ... [T]he acquisition of ZN's shares, together with the loans to ZN, qualify as an investment under the [ICSID] Convention and the BIT."

<sup>38</sup> *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2018).

<sup>39</sup> *Ibid.* para. 289. Somewhat incongruously, at para. 291, the Tribunal found that an off-take agreement was not part of the investment: "The Tribunal accepts Venezuela's submission that the Off-Take Agreement is not an 'investment' in its own right. Nor does it consider that the Off-Take Agreement would constitute an investment, if an holistic approach were adopted: despite the context in which it was concluded, it remains, in essence, a commercial agreement in respect of the purchase and delivery of product at a known price."

<sup>40</sup> *Československá Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) 5 ICSID Rep 335.

<sup>41</sup> *Ibid.* paras. 1–3.

<sup>42</sup> *Ibid.* paras. 80 and 82.

<sup>43</sup> *Ibid.* para. 72.

A few months later, the Tribunal issued another decision on jurisdiction.<sup>44</sup> In that decision the Tribunal found that it did not have jurisdiction with respect to the Loan Agreements. The unity of the investment operation did not mean that the Tribunal automatically acquired jurisdiction over each agreement concluded to implement the investment operation. The agreement to arbitrate in the Consolidation Agreement did not necessarily mean that the interpretation of the consent of the parties under Article 25(1) of the ICSID Convention must in each case be deemed to extend to any and all agreements comprising the entire transaction.<sup>45</sup>

This result was based in part on the somewhat indirect incorporation by reference of the consent to ICSID arbitration contained in the projected but abortive BIT. It was also based on the fact that the respective agreements were between different parties. Therefore, the Tribunal's competence was confined to the Consolidation Agreement.<sup>46</sup>

Tribunals have embraced the doctrine of the unity of the investment also with respect to other activities incidental to the investment. In *SOABI v. Senegal*,<sup>47</sup> a claim for reimbursement of architects' fees was found to be part of an investment involving the construction of housing units.<sup>48</sup> A Share Transfer Agreement entered into in the context of the privatisation of a gas transportation company was part of the investment.<sup>49</sup> An option to buy, incidental to a Management and Operation Contract, was part of the investment.<sup>50</sup> A lease contract in connection with the construction of an oil container terminal was part of the investment.<sup>51</sup> A gas purchase and sale agreement ancillary to the development and operation of a gas field was part of the overall investment.<sup>52</sup>

<sup>44</sup> *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction (1 December 2000) 5 ICSID Rep 358.

<sup>45</sup> *Ibid.* para. 28.

<sup>46</sup> *Ibid.* paras. 26–32.

<sup>47</sup> *Société Ouest Africaine des Bétons Industriels [SOABI] v. State of Senegal*, ICSID Case No. ARB/82/1, Award (25 February 1988) 2 ICSID Rep 190.

<sup>48</sup> *Ibid.* paras. 8.01–23.

<sup>49</sup> *Enron Corporation and Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) 11 ICSID Rep 273 para. 70: "an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment".

<sup>50</sup> *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, the Tribunal's Decision on Respondent's Objections to Jurisdiction (5 June 2012) para. 42: "for purposes of determining whether there is an investment, the Tribunal must look at the contractual arrangements as a whole and not just at certain aspects of these arrangements. The Tribunal considers that in practice, an investment may be composed of several contracts, and different types of assets, which together form the 'venture' that constitutes the investment."

<sup>51</sup> *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015) para. 288: "The Tribunal does not have to decide whether one of the items, such as the lease contract, looked at in isolation qualifies as an investment. It is a part of a unity that the Tribunal must appraise in its totality."

<sup>52</sup> *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction (19 August 2013) paras. 361 and 371: "Investments of any complexity often consist of a variety of different components. These components may be regulated in a single legal

### III. THE EXTENSION OF ARBITRATION CLAUSES TO ASSOCIATED DOCUMENTS

A related question is the extension of clauses providing for consent to arbitration, contained in some documents governing the investment, to incidental activities that are not formally covered by these documents. This was part of the discussion in *Holiday Inns* and *CSOB*, described above, where the basic agreement governing the investment contained an ICSID clause, but the loan agreements did not.

In *Duke Energy v. Peru*,<sup>53</sup> the investor and Peru had entered into a series of contracts called Legal Stability Agreements (LSAs). Only one of these, the DEI Bermuda LSA, contained an ICSID clause.<sup>54</sup> The Tribunal found that the capital contribution through the DEI Bermuda LSA was not an isolated transaction, but was one of many transactions;<sup>55</sup> and that it was made in connection with Duke Energy's overall investment and as part of a single concerted effort.<sup>56</sup> The Tribunal embraced the principle of the unity of the investment and analysed the decisions in *Holiday Inns*, *CSOB* and *SOABI*.<sup>57</sup> It said:

The reality of the overall investment, which is clear from the record, overcomes Respondent's objection that it could never have consented to arbitration of a dispute related to the broader investment . . .<sup>58</sup>

But the Tribunal immediately pointed out that this finding did not extend to the merits phase:

. . . Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any of the other LSAs . . . While the Tribunal's lack of jurisdiction over the other LSAs will not prevent it from taking them into consideration for the purposes of the interpretation and application of the DEI Bermuda LSA . . . , it will not be in a position to "give effect" to the protections in those LSAs. In other words, in the peculiar circumstances of this case (successive agreements *for the protection* of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.<sup>59</sup>

In *Cambodia Power v. Cambodia*,<sup>60</sup> the parties had signed three agreements, each of which contained an ICSID clause. Therefore, the question was not the extension of the arbitration clause from one contract to related contracts. Rather, the issue was whether the claims were to be heard in one unified proceeding or, as

instrument or in separate contracts . . . [T]he sale of the gas produced by the Joint Venture Partners is a necessary component of the investment."

<sup>53</sup> *Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006) 15 ICSID Rep 108.

<sup>54</sup> *Ibid.* paras. 80–2 and 89–90. <sup>55</sup> *Ibid.* para. 92(2). <sup>56</sup> *Ibid.* paras. 100 and 102.

<sup>57</sup> *Ibid.* paras. 119–31. <sup>58</sup> *Ibid.* para. 131.

<sup>59</sup> *Ibid.* paras. 132–3 (footnotes omitted; italics original).

<sup>60</sup> *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011).

the Respondent demanded, in separate proceedings. The Tribunal entertained no doubt that it could hear claims under the three agreements in one proceeding:

The agreements in this case all regulate aspects of a single project, and there exists a clear connectivity and interdependence between them. Any dispute arising out of the project would almost inevitably touch upon, and give rise to claims under, each agreement, and the Tribunal finds that the Parties' intention must have been to have such claims heard together, wherever possible.<sup>61</sup>

#### IV. THE TEMPORAL DIMENSION OF AN INVESTMENT

Tribunals have employed the concept of the unity of an investment also to gauge the outer limits of an investment before and after the core activity.

##### A. *Pre-investment*

The time of the inception of an investment is important, especially in cases where preparatory steps never matured into the investment's intended activity.<sup>62</sup> Since the ICSID Convention and the treaties providing for consent to arbitration require the existence of an investment, the exact starting point of the investment can be decisive for jurisdiction.

Investment tribunals have decided that mere negotiations, that are ultimately unsuccessful and do not lead to a contract or to any actual investment activity, do not amount to an investment.<sup>63</sup> This applies even if, through the negotiations or other acts preparatory to the investment, the investor has incurred expenses. An investment does, however, exist if an agreement materialises, even if it does not ultimately lead to actual economic activity. The decisive criterion for the existence of such an agreement is that it contains binding commitments and has financial value.<sup>64</sup> An investment also exists if the relevant activity has actually commenced

<sup>61</sup> *Ibid.* para. 141.

<sup>62</sup> See Christoph Schreuer, "Pre-Investment Activities" in Christoph Benicke and Stefan Huber (eds.), *National, International, Transnational: Harmonischer Dreiklang im Recht, Festschrift für Herbert Kronke* (Gieseking Verlag 2020).

<sup>63</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002) 6 ICSID Rep 310 paras. 47 and 61; *Zhinvali Development Limited v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) 10 ICSID Rep 3 paras. 377, 388, 410, 415 and 417; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) 10 ICSID Rep 240 para. 18.9; *Nagel v. Czech Republic (Ministry of Transportation and Telecommunications)*, SCC Case No. 49/2002, Final Award (9 September 2003) 13 ICSID Rep 33 paras. 320 and 328–9; *F-W Oil Interests v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006) 16 ICSID Rep 398 paras. 125, 142 and 183; *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction (18 July 2013) para. 273; *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award (3 May 2018) paras. 133–245.

<sup>64</sup> *PSEG Global Inc. and Others v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 June 2004) 11 ICSID Rep 434 paras. 66–73 and 79–104; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) paras. 113–14; *Bosca v. Lithuania*, UNCITRAL, Award (17 May 2013) paras. 164, 166 and 168; *CC/Devas (Mauritius)*

in the form of economically significant steps, pending the conclusion of a final legal instrument.<sup>65</sup> In some cases, tribunals used the unity of the investment doctrine to underpin the inclusion of pre-investment activities in their concept of investment.

In *RSM Production v. Grenada*,<sup>66</sup> the parties had entered into an Agreement that foresaw an Exploration Licence for oil and gas and a possible subsequent Development Licence. When RSM applied for the Exploration Licence, Grenada refused and subsequently terminated the Agreement. Before the Tribunal, the Respondent argued that the Agreement was only preliminary or preparatory and not susceptible by itself of constituting an investment for ICSID jurisdictional purposes.<sup>67</sup> The Tribunal held that the provisions in the Agreement relating to the grant of the Exploration Licence were a fundamental part of the overall project.<sup>68</sup> It quoted the famous passage from *CSOB* and said:

In the present case, the first phase resulting from the organization of the project under the Agreement can hardly be dissociated from the rest of the transaction. In fact, one does not find in the Agreement any formal separation between the terms relating respectively to the pre-exploration period, the exploration period and the development period: they all form a single and overall agreement.<sup>69</sup>

In *Arif v. Moldova*,<sup>70</sup> following a tender, the parties had entered into a contract for the opening of a network of duty-free stores supported by several lease agreements. After the cancellation of the contracts, the Claimant initiated ICSID arbitration proceedings. The Respondent contested the existence of an investment. The Claimant relied on the various rights resulting from the contracts, invoking the unity of the investment doctrine.<sup>71</sup> The Tribunal stated that it was sufficient that the contracts and their performance as a whole satisfied the definition of an investment.<sup>72</sup> The Tribunal pointed out that the events preparatory to the investment satisfied the definition of investment. It said:

The Tribunal can consider events preceding these agreements, such as the Tender, and the steps taken by Claimant in execution of the rights they conferred without needing to individually consider whether preliminary or subsequent steps satisfy the definition of investment. These agreements constituted an investment within the meaning of Article 1 of the [France–Moldova] BIT. This is sufficient to confer jurisdiction on this

*Ltd, Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, Award on Jurisdiction and Merits (25 July 2016) 18 ICSID Rep 487 paras. 199, 201, 208 and 210.

<sup>65</sup> *Nordzucker v. Republic of Poland*, UNCITRAL, Partial Award (10 December 2008) paras. 147, 152, 201, 208, 212 and 216–17; *Lemire v. Ukraine*, ICSID Case No. 06/18, Decision on Jurisdiction and Liability (14 January 2010) paras. 86 and 89–90; *Blusun SA, Lecorcier and Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award (27 December 2016) para. 269.

<sup>66</sup> *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award (13 March 2009).

<sup>67</sup> *Ibid.* para. 253.

<sup>68</sup> *Ibid.* para. 255.

<sup>69</sup> *Ibid.* para. 256. See also para. 264.

<sup>70</sup> *Arif v. Moldova* (n 9).

<sup>71</sup> *Ibid.* para. 365.

<sup>72</sup> *Ibid.* paras. 367–9.

Tribunal over a dispute relating to Respondent's treatment of such agreements and the steps taken by Claimant on the basis thereof.<sup>73</sup>

It followed that the agreements were investments in the sense of the BIT and of the ICSID Convention.<sup>74</sup>

In *Bear Creek Mining v. Peru*,<sup>75</sup> the Claimant had obtained an authorisation to acquire and possess concessions and mining rights as well as seven mining concessions.<sup>76</sup> After protests by local communities, these rights were revoked. In the ensuing arbitration, the Respondent argued that the Claimant's rights and activities had never matured into an investment since the necessary permits were still missing.<sup>77</sup> The Claimant pointed to its various steps and activities and invoked the unity of the investment.<sup>78</sup> The Tribunal followed the Claimant's approach and said:

Indeed, it is uncontroversial that an investment typically consists of several inter-related economic activities which, step by step, finally lead to the implementation of a project such as mining activity. As Claimant points out, the steps already obtained and completed were (1) the finding of public necessity that expressly authorized Claimant to acquire mining rights in the border region, (2) Claimant's acquisition of mining concessions comprising the Santa Ana Project and the Corani Project, (3) the years Claimant engaged in expensive exploration and development efforts in Respondent State, and that these efforts (4) apparently resulted in the discovery of significant economic silver mineralization in the area.<sup>79</sup>

It followed that there had been an investment for purposes of the free trade agreement (FTA) between Canada and Peru.<sup>80</sup>

### B. *Post-investment*

In a similar manner, tribunals have employed the concept of the unity of the investment to include activities that took place after the termination of the investment proper.

In *Chevron and Texaco v. Ecuador*,<sup>81</sup> TexPet, a subsidiary of Texaco, had operated under an oil Concession Agreement of 1973 until 1992. After performing environmental remediation work, in 1995 TexPet and the Respondent entered into a Settlement Agreement discharging TexPet from further environmental obligations. Private litigants, however, pursued class actions for environmental damage.

The Claimants initiated arbitration proceedings against Ecuador on the ground that it was improperly seeking to shift its environmental obligations onto the

<sup>73</sup> *Ibid.* para. 370.      <sup>74</sup> *Ibid.* para. 384.

<sup>75</sup> *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017).

<sup>76</sup> *Ibid.* para. 283.      <sup>77</sup> *Ibid.* paras. 286–8.      <sup>78</sup> *Ibid.* paras. 289–94.      <sup>79</sup> *Ibid.* para. 296.

<sup>80</sup> *Ibid.* paras. 297–8.

<sup>81</sup> *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012).

Claimants after having released them through the Settlement Agreement. The Respondent contested the Tribunal's jurisdiction, arguing that the investment had terminated with the expiry of the Concession Agreement. In Respondent's view, the Settlement Agreement was a stand-alone agreement that did not qualify as an investment.<sup>82</sup> The Claimants argued that their obligations under the Settlement Agreement were components of a larger integrated investment.<sup>83</sup> The Tribunal followed the Claimants' position and said:

TexPet began its investment in Ecuador in 1964 and continued its investments under the 1973 Concession Agreement. In the Tribunal's view, that investment did not terminate in 1992 (upon that Concession Agreement's ending) because there is a close and inextricable link between TexPet's 1973 Concession Agreement and the 1995 Settlement Agreement. Without the former, the latter would not have come into existence . . . [I]t is necessary to treat the 1995 Settlement Agreement as a continuation of the earlier concession agreements, so that it forms part of the overall investment invoked by TexPet.<sup>84</sup>

In *ATA Construction v. Jordan*,<sup>85</sup> there was a dispute over the annulment, by the Respondent's courts, of a FIDIC<sup>86</sup> arbitral award in the investor's favour. In addition, legislation passed by Jordan provided that the right to arbitrate was extinguished once an award is annulled. The Turkey–Jordan BIT had entered into force after the investment's completion and after the FIDIC award had granted compensation to the Claimant but before the judicial decisions setting aside the award. The BIT applied to investments made before its entry into force but only to disputes that arose after that date.<sup>87</sup>

The Tribunal rejected the Claimant's contention that the judgment of the Court of Cassation, which had confirmed the award's annulment, had given rise to a new dispute. The Tribunal found that the set-aside decisions were inextricably linked to the dispute that had arisen already before the BIT's entry into force. It followed that the Tribunal lacked jurisdiction *ratione temporis* over this dispute.<sup>88</sup>

The situation was different with respect to the Claimant's right to arbitrate which, pursuant to legislation, had been extinguished by the decision of the Jordanian Court of Cassation, after the BIT's entry into force. The Tribunal made a general statement on the unity of the investment:

[A]n investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.<sup>89</sup>

<sup>82</sup> *Ibid.* paras. 3.57, 3.72 and 3.167.      <sup>83</sup> *Ibid.* paras. 3.90, 3.114, 3.117, 3.201 and 3.218–19.

<sup>84</sup> *Ibid.* paras. 4.15–16. See also paras. 4.33 and 4.36.

<sup>85</sup> *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010).

<sup>86</sup> Fédération Internationale des Ingénieurs Conseils (International Federation of Consulting Engineers).

<sup>87</sup> *Ibid.* para. 98.      <sup>88</sup> *Ibid.* paras. 98–103 and 115.      <sup>89</sup> *Ibid.* para. 96.



In the Tribunal's view, the right to arbitrate had survived as a distinct investment that had been extinguished by the Court of Cassation only after the BIT's entry into force.<sup>90</sup> The Tribunal said:

Given that the right to arbitration is considered a distinct investment, it follows that the decision of the Jordanian Court of Cassation extinguishing the Arbitration Agreement between the Claimant and APC, occurring as it did after the entry into force of the BIT, is not barred from the Tribunal's jurisdiction *ratione temporis* and the Tribunal so finds.<sup>91</sup>

## V. THE TERRITORIAL DIMENSION OF AN INVESTMENT

Many treaties providing for investment arbitration refer to investments in the host State's territory.<sup>92</sup> Some types of investments, however, are difficult to pin to a particular territory.<sup>93</sup> The issue of a territorial nexus has arisen in connection with financial transactions such as loans, bonds, deposit receipts or payments.<sup>94</sup> Other cases concerned pre-shipment inspections.<sup>95</sup> Tribunal practice indicates that the performance of the relevant activity need not take place in the territory of the host

<sup>90</sup> *Ibid.* para. 118. <sup>91</sup> *Ibid.* para. 120.

<sup>92</sup> BITs and FTAs often refer to the territory of the Parties in their definitions of "investment" or "investor". Similarly, Article 1101(1) of the NAFTA speaks of "investments in the territory" of a Party. Article 14.1 of the Agreement between the United States of America, the United Mexican States and Canada (adopted 10 December 2019, entered into force 1 July 2020) (USMCA) speaks of "an investment in its territory". Article 26(1) of the Energy Charter Treaty refers to investments "in the Area" of a Party, with an Area defined under Article 1(10)(a) as "the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea".

<sup>93</sup> See Christina Knahr, "Investment 'In the Territory' of the Host State" in Christina Binder, Ursula Kriebbaum, August Reinisch and Stephan Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009); Christina Knahr, "The Territorial Nexus between an Investment and the Host State" in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds.), *International Investment Law: A Handbook* (Nomos 2015).

<sup>94</sup> *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997) 5 ICSID Rep 186 para. 41; *CSOB v. Slovakia* (n 40) paras. 77–8; *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valores SICAV SA, Orgor de Valores SICAV SA and GBI 9000 SICAV SA v. Russian Federation*, Award on Preliminary Objections (20 March 2009) 19 ICSID Rep 205 para. 144; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) 19 ICSID Rep 364 para. 374. But see *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab (4 August 2011) 19 ICSID Rep 364 paras. 73–119; *Ambiente Ufficio v. Argentina* (n 23) paras. 328, 374–7, 404–9 and 496–510; *Alpha Projektholding v. Ukraine* (n 37) paras. 275–85; *Inmaris Perestroika v. Ukraine* (n 9) paras. 113–25; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012) 19 ICSID Rep 446 paras. 136–43, 221–9 and 287–92.

<sup>95</sup> *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) 8 ICSID Rep 406 para. 136; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, Decision on Objections to Jurisdiction (29 January 2004) 8 ICSID Rep 518 paras. 99–112; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) paras. 97–104; *SGS Société Générale de Surveillance SA v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) paras. 109–17.



State, at least not in its entirety. Neither is a physical transfer of assets into the host State's territory necessary. What matters is that the economic effect of the investment is felt in the host State's territory.

In some cases, tribunals relied on the doctrine of the unity of the investment to substantiate the nexus between the investment and the host State's territory. In *Ambiente Ufficio v. Argentina*,<sup>96</sup> the Respondent had argued that the investment in government bonds had not taken place on Argentinian soil. The Tribunal pointed out that Argentina was the beneficiary of the investment and that it had "to conceive of the investment in question as a unified economic operation".<sup>97</sup> It said:

In sum, the Tribunal is convinced that, looking at the investment operation at stake as a whole and in terms of its economic realities, it is hard to imagine the investment's *situs* to be elsewhere than in Argentina. While the Respondent is right to point out that a number of "connecting factors" (...) do not point to Argentina, the Tribunal cannot join the Respondent's conclusion that the investment was not made in the Respondent's territory since the decisive elements, notably the fact that the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose, qualify the investments pertinent to the present case as having been made in Argentina.<sup>98</sup>

A series of cases concerned pre-shipment inspections of cargoes destined for the respondent States. These inspections take place in the ports of origin and hence outside the territory of the country for whose benefit they are undertaken. The respondents argued that the services were performed principally outside their territory. The claimants pointed out that some activities had taken place in the territory of the respondents and that even the activities outside their territories were to their benefit.

In *SGS v. Philippines*,<sup>99</sup> the Tribunal followed the Claimant's arguments. In doing so it relied, *inter alia*, on the unity of the investment and said:

A substantial and non-severable aspect of the overall service was provided in the Philippines . . . SGS made an investment "in the territory of" the Philippines under the CISS Agreement, considered as a whole . . . There was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment "in the territory of" the Philippines.<sup>100</sup>

The Tribunal in *BIVAC v. Paraguay*,<sup>101</sup> dealing with the same arguments, said with respect to the unity of the investment:

Activities cannot be subdivided in a way as to distinguish between claims for non-payment of services abroad and claims for services in Paraguay: in practice the services were treated as inseparable . . . Activities that were internal and external to the territory of Paraguay formed a whole for which a single *ad valorem* fee was paid.<sup>102</sup>

<sup>96</sup> *Ambiente Ufficio v. Argentina* (n 23).

<sup>97</sup> *Ibid.* para. 500.

<sup>98</sup> *Ibid.* para. 508.

<sup>99</sup> *SGS v. Philippines* (n 95).

<sup>100</sup> *Ibid.* paras. 102 and 112.

<sup>101</sup> *BIVAC v. Paraguay* (n 95).

<sup>102</sup> *Ibid.* para. 103.

In *SGS v. Paraguay*,<sup>103</sup> the Tribunal was even clearer in its deployment of the doctrine of the unity of the investment. It said:

In the Tribunal's view, Respondent's approach rests on a parsing of SGS's investments and its activities under the Contract that is not sustainable. Like the tribunal in *SGS v. Philippines*, this Tribunal does not consider it consistent with the facts presented to subdivide Claimant's activities into services provided abroad and services provided in Paraguay, and to then attribute Claimant's claims solely to the former category. SGS's inspections abroad were not carried out for separate purposes, but rather in order to enable it to provide, in Paraguay, a final Inspection Certificate . . .<sup>104</sup>

The Tribunal continued:

And because the Claimant's investment is not divisible in the way Paraguay contends, the suggestion also fails that this dispute does not arise directly out of an investment in the territory of Paraguay. The services provided by SGS in Paraguay were not severable or ancillary; they were part and parcel of the services for which SGS expected to be paid under the Contract . . .<sup>105</sup>

*Inmaris Perestroika v. Ukraine*<sup>106</sup> concerned a series of contracts for the renovation and operation of a sailing ship owned by Ukraine. The Respondent contested the Tribunal's jurisdiction, arguing that the alleged investments were not undertaken in the territory of Ukraine since neither were services performed in Ukraine nor were funds injected into Ukraine.<sup>107</sup> The Tribunal rejected this objection and said:

In the Tribunal's view, an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself. Here, the benefits of Claimants' investments, considered as an integrated whole, were received by Respondent.<sup>108</sup>

The Tribunal rejected the Respondent's contention that each claimed investment had to be separately examined to determine whether it was undertaken in the territory of Ukraine. Territoriality had to be established in respect of the investment as a whole. The Tribunal said:

. . . the investment as a whole was ultimately undertaken in relation to property belonging to the Ukrainian state, and thus sufficiently in the territory of Ukraine. It is not necessary to parse the territorial nexus of each and every component of the Claimants' investment; it is the investment as a whole that has that nexus.<sup>109</sup>

<sup>103</sup> *SGS v. Paraguay* (n 95).

<sup>104</sup> *Ibid.* para. 113 (footnote omitted).

<sup>106</sup> *Inmaris Perestroika v. Ukraine* (n 9).

<sup>107</sup> *Ibid.* paras. 113 and 122.

<sup>109</sup> *Ibid.* para. 125.

<sup>105</sup> *Ibid.* para. 115.

<sup>108</sup> *Ibid.* para. 124.

## VI. THE LEGALITY OF AN INVESTMENT

Treaties providing for the protection of investments often require that the investments must have been made in accordance with host State law.<sup>110</sup> An investment made in violation of the law will not enjoy the treaty's protection and will hence not be under the jurisdiction of a tribunal.<sup>111</sup> Tribunals have found that, even in the absence of a treaty clause to this effect, investments that are contrary to host State law will not enjoy protection.<sup>112</sup> Whether this sanction applies in a particular case depends on the severity of the violation.<sup>113</sup> Tribunals have held in numerous cases that the legality requirement refers to the making of the investment but not to its conduct and management.<sup>114</sup>

In some cases, tribunals have used the concept of the unity of the investment to extend the consequences of an illegality to the entire investment. An illegality that tainted one aspect of the investment's formation had the consequence of withdrawing protection from the entire investment. This included the negation of jurisdiction over the investment.

In *Fraport v. The Philippines*,<sup>115</sup> the investment had involved secret shareholder agreements that were contrary to Philippine law. The Tribunal found that, as a consequence, the dispute was not within its jurisdiction.<sup>116</sup> In proceedings for the Award's annulment, Fraport argued that the secret shareholder agreements were only part of its investment and that the Tribunal should not have declined jurisdiction. The *ad hoc* Committee did not accept the suggestion that the Tribunal should have examined the legality of the investment's several components separately. It said:

<sup>110</sup> See e.g. *TSA Spectrum de Argentina SA v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 December 2008) paras. 163–76; *Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/07/3, Award (19 May 2010) paras. 51–61. See generally Christina Knahr, "Investments 'in Accordance with Host State Law'" in August Reinisch and Christina Knahr (eds.), *International Investment Law in Context* (Eleven International 2007) 27; Bernardo M. Cremades, "Investment Protection and Compliance with Local Legislation" (2009) 24 ICSID Rev 557; Gabriel Bottini, "Legality of Investments under ICSID Jurisprudence" in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); Ursula Kriebbaum, "Illegal Investments" in Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser and Gerold Zeiler (eds.), *Austrian Yearbook on International Arbitration 2010* (Stämpfli Verlag 2010); Stephan W. Schill, "Illegal Investments in Investment Treaty Arbitration" (2012) 11 *The Law and Practice of International Courts and Tribunals* 281.

<sup>111</sup> See e.g. *Anderson v. Costa Rica* (n 110) para. 59; *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) 17 ICSID Rep 105 paras. 239 and 244.

<sup>112</sup> See e.g. *Spentex Netherlands, BV v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (27 December 2016) para. 834; *Blusun v. Italy* (n 65) para. 264.

<sup>113</sup> See e.g. *Mamidoil v. Albania* (n 51) paras. 479–83; *Kim and Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017) paras. 390 and 394.

<sup>114</sup> See e.g. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014) 18 ICSID Rep 331 paras. 1354–5; *von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) 18 ICSID Rep 360 para. 420; *MNSS v. Montenegro* (n 37) paras. 214–15.

<sup>115</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007).

<sup>116</sup> *Ibid.* paras. 396–404.

The Committee is of the view that the Tribunal was entitled to treat Fraport's investment participation in the Terminal 3 Project as a unity pursuing the same objective. The Tribunal by applying its analysis to the investments of Fraport as a whole has not manifestly exceeded its powers.<sup>117</sup>

*Mamidoil v. Albania*<sup>118</sup> involved shareholding in a local subsidiary and the construction and operation of oil storage facilities supported by a lease agreement. The Tribunal refused to examine the legality of the investment's components in isolation. It found that the illegality of the construction and operation of the oil storage tanks affected the entire investment since the elements of the investment formed a unity.<sup>119</sup> The Tribunal said:

In sum, the Tribunal finds that the components of the investment form an inseparable whole and that the determination of the legality of the construction and/or operation of the tank farm would affect its totality.<sup>120</sup>

## VII. UNITY OF INVESTMENT AND THE MERITS OF AN INVESTMENT CASE

As set out above, the doctrine of the unity of an investment has found widespread acceptance in several jurisdictional contexts. The situation is less clear when one reaches the merits of a case. Although tribunals have also applied the unity doctrine to the merits, the practice is not homogeneous.

### A. Expropriation

This point is best illustrated by looking at cases dealing with expropriation. It is widely accepted that, to amount to an expropriation, a deprivation must be substantial. It must affect the investment "in whole or in significant part".<sup>121</sup> This means the expropriating measure must have led to the destruction of the investment's capacity to be economically viable.<sup>122</sup>

The requirement that a deprivation must be total or near-total to amount to an expropriation would support the concept of the unity of the investment. Whether an expropriation has occurred can only be determined by examining the fate of the investment as a whole and not by looking separately at its component parts. This would exclude the notion of a partial expropriation of an investment.

<sup>117</sup> *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010) para. 113.

<sup>118</sup> *Mamidoil v. Albania* (n 51). <sup>119</sup> *Ibid.* paras. 366–7. <sup>120</sup> *Ibid.* para. 369.

<sup>121</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) 5 ICSID Rep 212 para. 103.

<sup>122</sup> For an overview of practice on the severity of an interference amounting to an expropriation, see August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge University Press 2020) 112–35.

Practice is, however, divided on this point. Some tribunals have indeed established the existence of an expropriation by looking at what happened to the investment as a whole. In doing so, they sometimes relied on the investment's unity.

*Telenor v. Hungary*<sup>123</sup> concerned regulatory interferences that had affected the investor's telecommunication services. The Claimant, in support of its expropriation claim, pointed to several elements of its investment.<sup>124</sup> The Tribunal accepted that "these elements together constitute the investment".<sup>125</sup> It found that "the conduct complained of must be such as to have a major adverse impact on the economic value of the investment".<sup>126</sup> In order to establish that impact the investment had to be looked at as a whole:

The Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.<sup>127</sup>

The *Telenor* Tribunal rejected the expropriation claim because the effect of the measures, of which the Claimant had complained, fell short of a substantial economic deprivation of its investment.<sup>128</sup>

In *Burlington v. Ecuador*,<sup>129</sup> the Claimant's assets consisted of shares, the infrastructure and equipment employed to exploit oil reserves, other tangible property related to the project, and the monetary and asset contributions made to carry out its operations. The Tribunal found that "the focus of the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment".<sup>130</sup> The Tribunal applied the unity of the investment to the question of whether there had been an expropriation by examining whether the measures had deprived the entire investment of its economic viability. It said:

Most tribunals apply the test of expropriation, however it is phrased, to the investment as a whole. Applied to the investment as a whole, the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.<sup>131</sup>

Although the forcible seizure had only affected the Claimant's physical assets, it followed that the seizure of the Claimant's physical property amounted to an expropriation of the entire investment since the remaining assets, shares and contractual rights had no value without possession of the oil fields and access to the oil.<sup>132</sup>

<sup>123</sup> *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) 17 ICSID Rep 173.

<sup>124</sup> *Ibid.* para. 61. <sup>125</sup> *Ibid.* para. 62. <sup>126</sup> *Ibid.* para. 65. <sup>127</sup> *Ibid.* para. 67.

<sup>128</sup> *Ibid.* para. 79.

<sup>129</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012).

<sup>130</sup> *Ibid.* para. 257. See also para. 260. <sup>131</sup> *Ibid.* para. 398.

<sup>132</sup> *Ibid.* para. 530. See also para. 470.

Other tribunals too have examined the impact of expropriatory measures on the investment as a whole and not upon its component parts.<sup>133</sup>

On the other hand, some tribunals have recognised the possibility of partial expropriations.<sup>134</sup> They have looked at individual elements of investments to determine whether they had been expropriated.

In *Middle East Cement v. Egypt*,<sup>135</sup> the investment consisted, *inter alia*, of a free zone licence, a ship and a letter of guarantee. The Tribunal treated these as discrete investments and examined separately whether they had been expropriated. It found that Egypt had indeed expropriated the licence<sup>136</sup> and the ship.<sup>137</sup> On the other hand, it found that there had not been an expropriation of the letter of guarantee.<sup>138</sup>

*Waste Management v. Mexico*<sup>139</sup> involved the failure of the City of Acapulco to make payments under a concession contract. The Tribunal accepted the possibility not only of an expropriation of the investment as a whole, but also of a partial expropriation. It said with respect to an expropriation under Article 1110 of the NAFTA:

It is open to the Tribunal to find a breach of Article 1110 in a case where certain facts are relied on to show the wholesale expropriation of an enterprise but the facts establish the expropriation of certain assets only. Accordingly the Tribunal will consider first the standard set by Article 1110, in particular for conduct tantamount to an expropriation, then whether the enterprise as a whole was subjected to conduct in breach of Article 1110, and finally whether (even if there was no wholesale expropriation of the enterprise as such) the facts establish a partial expropriation.<sup>140</sup>

In the end, the Tribunal determined that the failure to pay the sums due constituted a mere breach of contract and not an expropriation.<sup>141</sup>

In *Eureko v. Poland*,<sup>142</sup> the investor had acquired a minority participation in an insurance company. A separate agreement entitled the Claimant to acquire additional shares which would have given it control of the company. Poland withdrew its consent to the acquisition of the additional shares but left the original share purchase intact. The Tribunal found that the investor had not been deprived of its original shareholding but had been deprived of “assets” with respect to its right to acquire additional shares.<sup>143</sup>

<sup>133</sup> *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) 7 ICSID Rep 341 para. 152; *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) para. 144; *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award (12 January 2011) paras. 154–5; *Electrabel v. Hungary* (n 16) para. 6.58; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) 18 ICSID Rep 450 para. 283.

<sup>134</sup> See Ursula Kriebaum, “Partial Expropriation” (2007) 8 *Journal of World Investment and Trade* 69.

<sup>135</sup> *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002) 7 ICSID Rep 178.

<sup>136</sup> *Ibid.* paras. 107 and 127. <sup>137</sup> *Ibid.* paras. 138 and 144. <sup>138</sup> *Ibid.* paras. 163 and 165.

<sup>139</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award (30 April 2004) 11 ICSID Rep 361.

<sup>140</sup> *Ibid.* para. 141. <sup>141</sup> *Ibid.* para. 175.

<sup>142</sup> *Eureko BV v. Republic of Poland*, Partial Award (19 August 2005) 12 ICSID Rep 335.

<sup>143</sup> *Ibid.* paras. 239–41.

Other tribunals too have envisaged the possibility of a partial expropriation.<sup>144</sup>

Therefore, some tribunals have adopted an approach that views an overall investment operation as composed of several discrete investments. Under this approach, the requirement of a substantial deprivation would apply to each of these investments separately. This would mean that the existence of an expropriation does not require that the entire business operation belonging to an investor has been taken.<sup>145</sup>

### B. *Other standards of protection*

The unity of an investment may well be relevant also in other contexts of the merits of an investment case. The application of the fair and equitable treatment standard may depend on whether a measure has affected the entire investment or only parts of it. Especially for the tests of reasonableness and proportionality it may be relevant whether the State's measures affected only certain aspects of the investment or its entirety.<sup>146</sup>

On the other hand, unfair or inequitable treatment by the host State, leading to compensable damage, may well affect only certain elements of the investment. Similar considerations apply to other standards of protection such as full protection and security, non-discrimination, and the prohibition of arbitrary or discriminatory treatment. The violation of an umbrella clause may affect a contract that is part of the investment. It is not realistic to require that these violations always extend to the entire investment, although violations affecting parts of the investment are likely to have an overall economic effect on the entire investment.

### C. *Quantum*

At the quantum stage, the calculation of damages will normally look at the value of the entire investment and not just at the value of its separate components.

In *Khan Resources v. Mongolia*,<sup>147</sup> the Tribunal addressed the issue of the investment's unity for the purpose of determining liability and damages. The Claimants had obtained a mining licence and an exploration licence covering adjacent areas. They pursued a claim for damages after the licences had been withdrawn. The Claimants argued that, although each of the two licences was an investment in its own right, they were economically interrelated and should be treated as one unified investment.<sup>148</sup> The Tribunal observed that if the two licences were to be viewed as one investment, damages would have to be assessed on the

<sup>144</sup> *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) 13 ICSID Rep 147 paras. 126–7; *EnCana Corporation v. Republic of Ecuador*, LCIA Case UN3481, Award (3 February 2006) 12 ICSID Rep 427 para. 183; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (29 February 2008) para. 583.

<sup>145</sup> Kriebaum, "Partial Expropriation" (n 134). <sup>146</sup> See Reinisch and Schreuer (n 122) 441–53.

<sup>147</sup> *Khan Resources Inc., Khan Resources BV and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits (2 March 2015).

<sup>148</sup> *Ibid.* paras. 130–6.

basis of the value of a single project comprising both licences.<sup>149</sup> It noted that the two licences had never been merged and refused to treat the two licences as part of a unified investment. It said:

In the Tribunal's view, the Mining and Exploration Licenses must be treated separately . . . Although, as the Claimants' assert, Khan may have intended to merge the two licenses and informal discussions regarding a potential merger may have taken place, the Tribunal must take the situation as it was at the time of the Respondents' allegedly wrongful acts, which is that the Mining and Exploration Licenses were not in fact merged . . . Having found that there was no "unity of investment," the Tribunal must consider separately whether the Respondents breached their obligations toward (i) Khan Canada and CAUC Holding in relation to the Mining License, and (ii) Khan Netherlands in relation to the Exploration License. In the event of a finding of liability, the Tribunal will also have to assess the value of the Claimants' investments in Mongolia as they stood as at the Valuation Date.<sup>150</sup>

Therefore, the Tribunal gave priority to the separate legal existence of the two licences over their economic unity.

## CONCLUSION

The concept of the unity of the investment is widely used by tribunals when examining their jurisdiction. It gives precedence to economic realism over legal formalism. It accords with the object and purpose of treaties for the protection of investment by looking at integrated economic operations rather than individual legal transactions.

The unity principle helps to coordinate investment disputes by concentrating jurisdiction in the hands of tribunals. It avoids claim-splitting and parallel proceedings.

At the same time, the significance of the unity principle should not be overestimated. Although widely used, it has not been applied uniformly. Very few tribunals have rejected it outright but some have embraced it, in principle, only to abandon it when it came to its concrete application.

At the merits stage, the situation is more complex. Practice on the possibility of partial expropriation is divided. Also, with respect to the violation of other standards of protection, tribunals may discard the unity of the investment and look at segments of the investment *seriatim*.

The principle of unity cannot serve as a definitional element for the concept of an investment. Although many investments combine various assets and activities with a common economic purpose, some investments are unidimensional and consist of a single transaction.

<sup>149</sup> *Ibid.* para. 289.

<sup>150</sup> *Ibid.* paras. 291–2 (footnotes omitted).