

## **Is There a “Nationality” of Investment? Origin of Funds and Territorial Link to the Host State**

*Margaret Clare Ryan* \*

### **INTRODUCTION**

Protection under international investment agreements is subject to a number of conditions, the key conditions being qualification as a protected “investor” with a protected “investment,” and being within the temporal scope of the treaty’s protection. While questions surrounding the nationality of an individual and corporate investor have been extensively debated in the arbitral case law, the question whether an investment should have a particular “nationality” to meet the requirements of jurisdiction *ratione materiae* has received relatively little attention. The present contribution will analyse whether a protected investment is subject to any “nationality” requirements by reference to two separate issues: first, whether the funds used to make an investment should originate from a particular source or in a particular jurisdiction, and second, whether an investment should have a specific territorial nexus to the host State.

---

\* Senior Associate, International Arbitration and Public International Law groups, Shearman & Sterling LLP.

## **I. IS THE ORIGIN OF FUNDS RELEVANT TO THE EXISTENCE OF AN INVESTMENT?**

To define what is a protected “investment,” most investment treaties adopt a broad definition in the form of a reference to “every kind of asset” followed by a non-exhaustive list of examples. However, treaties are silent on where funds used to make a protected investment should originate. Respondent States have raised two related objections to jurisdiction based on the origin of the capital invested: first, that the investor did not fund its investment using its own resources, and second, that the investment is “domestic,” rather than “foreign,” because the funds used to make the investment originated in the host State. Arbitral tribunals have unanimously rejected these objections, with one recent exception.

### ***A. No Requirement that an Investment Be Funded with an Investor’s Own Capital***

Arbitral case law consistently confirms that an investor is not required to capitalize an investment through its own resources in order to meet the requirements of jurisdiction *ratione materiae*. This conclusion is reflected in early cases where tribunals affirmed that a protected investment may be funded from a variety of sources, including from an investor’s affiliates which do not qualify as protected investors under the treaty.

*Tradex v. Albania* was the first case to have considered the origin of invested capital. The Claimant, a Greek company, alleged that Albania had expropriated its joint venture in violation of the 1993 Albanian Law on Foreign Investments (the “1993 Law”).<sup>1</sup> Albania argued that the Claimant’s investment did not

---

<sup>1</sup> During the first phase of the arbitration, Albania objected to the jurisdiction of the Tribunal on grounds that the Claimant had failed to show that

qualify as a “foreign investment” under the 1993 Law. A full account of this argument is not included in the Tribunal’s 1999 Award, and it would appear that the objection was less concerned with the alleged “nationality” of the invested funds and more with the fact that those funds did not come directly from the Claimant. Albania argued that the investment was funded by an “offshore company of unspecified identity and nationality, or by Greek State banks and the European Community.” The Tribunal rejected the argument, noting that the 1993 Law defined “foreign investment” as “every kind of investment in the Republic of Albania owned directly or indirectly by a foreign investor,” and contained no requirement that the “foreign investor finance his investment from his own resources.” The Tribunal concluded that “the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law as long as an investment is proved.”<sup>2</sup>

A similar objection was raised in *Wena Hotels v. Egypt*. Egypt objected that a significant part of the Claimant’s investment in a local hotel venture had been funded by the Claimant’s affiliate companies, which were not qualifying UK investors under the relevant bilateral investment treaty (“BIT”). The Tribunal rejected the objection, and held that “whether the investments were made by Wena or by one of its affiliates, as long as those investments

---

the State’s conduct amounted to an expropriation for the purposes of Article 8(2) of the 1993 Law, which provided for the submission to ICSID of “a dispute arising out of or relating to ‘expropriation’.” The *Tradex* Tribunal joined this issue to the merits phase, during which Albania’s origin of funds objection was decided. *See Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2), Decision on Jurisdiction (K.H. Böckstiegel, President, F.F. Fielding, A. Giardina), 24 Dec. 1996, 14 ICSID REV. 161, 196 (1999); itlaw website.

<sup>2</sup> *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2), Award (K.H. Böckstiegel, President, F.F. Fielding, A. Giardina), 29 Apr. 1999, ¶¶ 108, 111, 14 ICSID REV. 197 (1999); itlaw website.

went into the Egyptian hotel venture, they should be recognized as appropriate investments.” The Tribunal was persuaded that it was “a widely established practice for hotel enterprises to adopt allocation measures, which spread the profits from the group operations into various jurisdictions where there are tax advantages to the group as a whole.”<sup>3</sup> An *ad hoc* Committee constituted to hear Egypt’s request for annulment of the Award later held that the Tribunal had not manifestly exceeded its powers in making this finding. For the Committee, the relevant issue was that “only Wena was found by the Tribunal to be entitled to damages.”<sup>4</sup>

In *Saipem v. Bangladesh*, the Tribunal examined the significance of the origin of funds in a dispute arising out of a construction contract between the Claimant, an Italian company, and Petrobangla, a Bengali State-owned company. Based on the facts reported in the Award, the Claimant’s investment was sponsored by the World Bank and “financed to a large extent” by the International Development Association.<sup>5</sup> Petrobangla had also made contractual progress payments to the Claimant during the course of the pipeline’s construction.<sup>6</sup> Bangladesh argued that the Claimant had not made an investment within the meaning of the

---

<sup>3</sup> Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Award (M. Leigh, President, I. Fadlallah, D. Wallace, Jr.), 8 Dec. 2000, ¶ 126, italaw website.

<sup>4</sup> Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000 (K.D. Kerameus, President, A. Bucher, F. Orrego Vicuña), 28 Jan. 2002, ¶ 54, italaw website.

<sup>5</sup> Saipem S.p.A. v. People’s Republic of Bangladesh (ICSID Case No. ARB/05/07), Award (G. Kaufmann-Kohler, President, C. Schreuer, P. Otton), 30 June 2009, ¶ 7, italaw website.

<sup>6</sup> Saipem S.p.A. v. People’s Republic of Bangladesh (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures (G. Kaufmann-Kohler, President, C.H. Schreuer, P. Otton), 21 Mar. 2007, ¶ 104, italaw website.

relevant BIT or the ICSID Convention because it had never been “a net creditor vis-à-vis Petrobangla in respect of the Pipeline Contract having actually put its own money into the project.” Rejecting the objection, the Tribunal held that “the host State may impose a requirement [in a relevant BIT] that an amount of capital in foreign currency be imported into the country,” but in the absence of such requirement, it was irrelevant whether or not the invested funds originated from the investor’s own resources.<sup>7</sup> The Tribunal further referred to discussions during the negotiation of the ICSID Convention, where a proposal that the jurisdiction of the Centre be premised on the requirement of nationality of the investment was rejected and thereafter “the idea of looking to the origin of funds was abandoned.”<sup>8</sup>

Similar conclusions were reached in two more recent cases brought under the Energy Charter Treaty (“ECT”). The first case, *Eiser and Energía Solar v. Spain*, concerned claims by a UK private equity fund and a Luxembourg-incorporated company who had invested three concentrated solar panel plants in Spain.<sup>9</sup> Spain

---

<sup>7</sup> *Id.* ¶¶ 104, 106. “[I]t is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant. This results from the drafting history of the ICSID Convention and is confirmed by several arbitral decisions relating to BITs.”

<sup>8</sup> *Id.* ¶ 107. “During the elaboration of the Convention, an argument was made that the nationality of the investment was more important than the one of the investor. The Chairman, Dr. Broches, answered that he did not see how the Convention could make a distinction based on the origin of funds . . . . As a consequence, the idea of looking to the origin of funds was abandoned.” *See also* HISTORY OF THE ICSID CONVENTION, Vol. II-1, at 23.

<sup>9</sup> *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Award (J. Crook, President, S. Alexandrov, C. McLachlan), 4 May 2014, [italaw website](http://italaw.com).

objected to the Tribunal’s jurisdiction, including on grounds that the Claimants had not contributed their own funds to the investments and had not incurred any risk, and instead that the funds for the investments were provided, and the risk incurred, by pension funds from various countries who were not claimants in the arbitration, and many of whose identities were undisclosed. The Tribunal rejected the objection, holding that “the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction.”<sup>10</sup> In a second ECT claim arising out of Spain’s reforms to the energy sector, *RREEF v. Spain*, Spain alleged that the funds for the investment at issue were not contributed by the Claimants, but rather by limited partners to a partnership in which the first Claimant was the general partner, and the second Claimant had an indirect ownership and control. Spain further argued that the limited partners, rather than the Claimants, had assumed the risk of the investment.<sup>11</sup> In its Decision on Jurisdiction, the Tribunal rejected this objection, noting that “the criteria identified by the Respondent are additional to the language of Article 25 of the ICSID Convention” and that “there is no textual basis for adding them.”<sup>12</sup>

***B. No Requirement that an Investment Be Funded Using Capital from Outside the Host State***

In other cases, Respondent States have raised a related objection that the funds used to make an investment originated in the host State, rather than in the investor’s home State or in another jurisdiction. This objection at times overlaps with the objection

---

<sup>10</sup> *Id.* ¶ 228.

<sup>11</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Jurisdiction (A. Pellet, President, P. Nikken, R. Volterra), 6 June 2016, italaw website.

<sup>12</sup> *Id.* ¶ 158.

that the investment is not funded with an investor's own resources. It raises additional issues that an investment is allegedly sourced from "domestic," rather than "foreign," capital.

Early cases involving investments by juridical entities alleged to be owned and controlled by host State nationals expressly held that the alleged domestic "origin" of the invested funds is irrelevant to jurisdiction *ratione materiae*. In *Tokios Tokelès v. Ukraine*, for instance, the Claimant was a Lithuanian company indisputably owned and controlled by nationals of Ukraine, the host State. Ukraine argued that the Claimant's investment in a Ukrainian subsidiary was funded with capital originating in Ukraine and was therefore not a qualifying investment under the relevant BIT or the ICSID Convention.<sup>13</sup> The Tribunal rejected the objection, noting that the definition of investment in the BIT was silent on where the invested funds should originate. According to the Tribunal, "the context in which the term 'investment' is defined, namely, 'every kind of asset invested by an investor'" confirmed that it could place no additional conditions on the requirements for jurisdiction *ratione materiae*. The Tribunal further held that the requirements for jurisdiction under the BIT were consistent with those under the ICSID Convention. In the Tribunal's view, the ICSID Convention did not require that an investment have "an international character in which the origin of the capital is decisive."<sup>14</sup>

---

<sup>13</sup> *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction (P. Weil, President, D. Price, P. Bernardini), 29 Apr. 2004, ¶ 72, [italaw website](#).

<sup>14</sup> *Id.* ¶ 82. "In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive. Although the Convention contemplates disputes of an international character, we believe that such character is defined by the terms of the Convention, and in turn, the terms of the BIT. Were we to accept the origin of capital as transcending the textual definition of the nationality of the Claimant and the scope of covered investment

Prosper Weil, the President of the Tribunal, famously dissented. In his view, the majority should have first analyzed whether the requirements for jurisdiction under Article 25 of the ICSID Convention were met before considering the jurisdictional requirements of the relevant BIT.<sup>15</sup> Professor Weil considered that the reports leading up to the adoption of the Convention, as well as the Convention’s Preamble, confirmed the Convention’s object and purpose to settle disputes between a State and foreign nationals, and that “[i]t is only the *international* investment that the Convention governs, that is to say, an investment implying a transborder flux of capital.” He continued:

when it comes to ascertaining the *international* character of an investment, the origin of the capital *is* relevant, and even decisive . . . . Given the indisputable and undisputed Ukrainian character of the investment the Tribunal does not, in my view, give effect to the letter and spirit, as well as the object and purpose, of the ICSID institution.<sup>16</sup>

Professor Weil’s approach has generally not been followed in subsequent cases raising similar issues. Instead, tribunals have followed the wording of the relevant investment treaty and have found that it contains no origin of funds requirement.

---

in the Ukraine-Lithuania BIT, we would override the explicit choice of the Contracting Parties as to how to define these terms. Ukraine, Lithuania and other Contracting Parties chose their methods of defining corporate nationality and the scope of covered investment in BITs with confidence that ICSID arbitrators would give effect to those definitions. That confidence is premised on the ICSID Convention itself, which leaves to the reasonable discretion of the parties the task of defining key terms. We should be loathe [*sic*] to undermine it.”

<sup>15</sup> Tokios Tokelės v. Ukraine (ICSID Case No. ARB/02/18), Decision on Jurisdiction (P. Weil, President, D. Price, P. Bernardini), Dissenting Opinion of Prosper Weil, 29 Apr. 2004, ¶ 14, italaw website.

<sup>16</sup> *Id.* ¶ 20.



In the cases brought under the ECT by the majority shareholders of former Yukos Oil Company (“Yukos”) against the Russian Federation (collectively, the “*Yukos* ECT arbitrations”),<sup>17</sup> the latter argued that the Claimants’ shareholding in Yukos were investments in fact made by Russian nationals using funds originating in Russia which involved no “injection of foreign capital” into its territory, and therefore did not qualify as investments under the ECT. This allegation – namely, that the funds originated from Russia – was distinct from the Russian Federation’s separate allegation that the Russian nationality of the ultimate beneficiaries of the trusts establishing the Claimants made this a domestic dispute. On the latter allegation, the Tribunal considered the question of the investors’ control under the denial of benefits clause contained at Article 17 of the ECT.<sup>18</sup> On the former allegation, the Tribunal considered that it was “bound to interpret the terms of the ECT not as they might have been written so as exclusively to apply to foreign investment but as they were actually written.” The Tribunal held that the unambiguous and clear terms of Article 1(6) of the ECT, which provides that “[i]nvestment’ means every kind of asset, owned and controlled directly by an investor,” was devoid of any origin of funds requirement and that the Tribunal was therefore “not entitled” to impose an “additional requirement with regard to the origin of

---

<sup>17</sup> *Hulley Enterprises Limited v. Russian Federation* (PCA Case No. AA226), Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009, ¶ 27, *italaw* website; *Yukos Universal Limited v. Russian Federation* (PCA Case No. AA227), Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009, ¶ 27, *italaw* website; *Veteran Petroleum Limited v. Russian Federation* (PCA Case No. AA228), Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009, ¶ 27, *italaw* website. For the purposes of the present discussion, the Tribunals constituted in each of the *Yukos* arbitrations are considered to be a single Tribunal (L.Y. Fortier, President, C. Poncet, S.M. Schwebel).

<sup>18</sup> On denial of benefits, see the contribution by Yas Banifatemi, *Taking into Account Control Under Denial of Benefits Clauses*, *infra* at 223.

capital or the necessity of an injection of foreign capital.”<sup>19</sup> On this basis, the Tribunal concluded that the “investment” owned by the Claimants was protected by the ECT.

The decisions in the *Tokios Tokelès* and the *Yukos* ECT arbitrations highlight a number of points relevant to the origin of capital used to make an investment. First, as with the cases discussed in the previous section, the arbitral tribunals refused to override the explicit choice of the State Parties to an investment treaty when defining the scope of a protected investment in order to imply an origin of funds requirement that is absent in the treaty text. Nor will tribunals imply such a requirement for jurisdiction under the ICSID Convention, which is equally silent on the origin of capital for a protected investment. Second, the refusal to impose any origin of funds requirement in these decisions reflects that it is an outdated notion that funds used to make an investment could be considered to have any particular national origin. While this reasoning did not figure in the *Tokios Tokelès* or *Yukos* ECT arbitrations, some authors and arbitrators have commented that the increased mobility and cross-border circulation of capital in recent years makes it nonsensical to speak of capital belonging to or originating in any particular jurisdiction.<sup>20</sup>

The *Tokios Tokelès* and *Yukos* ECT arbitrations also illustrate that, in the view of treaty drafters and the tribunals who interpret investment treaties, the “domestic” as opposed to “foreign” nature of a claim is captured through the prism of the protected “investor” rather than the protected “investment” or, in

---

<sup>19</sup> *Hulley*, *supra* note 17, ¶ 431; *Yukos Universal*, *supra* note 17, ¶ 432; *Veteran*, *supra* note 17, ¶ 488.

<sup>20</sup> See Robert Wisner and Nick Gallus, *Nationality Requirements in Investor–State Arbitration*, 5 J. WORLD INV. & TRADE 927, 944 (2004). See also *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon* (ICSID Case No. ARB/15/8), Award (P. Tercier, President, A. Mourre, A. Pellet), Dissenting Opinion of Alexis Mourre, 22 June 2017, [italaw website](http://italaw.com).

other words, through the scope of jurisdiction *ratione personae* rather than through that of jurisdiction *ratione materiae*. There are two principal means for controlling the “domestic” nature of the claim: by providing that companies owned or controlled by host State nationals do not qualify as “investors,” and/or by including a provision in an investment treaty that would allow the State parties to deny the benefits of a treaty to investors owned and/or controlled by host State nationals. In *Tokios Tokelès*, the relevant BIT contained neither type of restriction. Despite being owned and controlled by Ukrainian nationals, the Claimant in that case met the treaty’s definition of a Lithuanian “investor,” which was defined as “any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.” As the Tribunal noted, the BIT imposed no further requirement with regards to the nationality of a Lithuanian investor’s controlling shareholders, nor did it contain a provision that would allow Ukraine to deny the benefits of the BIT to investors controlled by Ukrainian nationals.<sup>21</sup> In the *Yukos* ECT arbitrations, where the Russian Federation alleged that the Claimants were owned and controlled by Russian nationals, the Tribunal similarly affirmed that the ECT’s definition of investor “contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party.” It held that the proper context to examine the Russian Federation’s allegations of ownership and control by host State nationals was in relation to the application of the denial of benefits clause at Article 17 of the ECT.<sup>22</sup> The Tribunal ultimately held that the Russian Federation had not validly exercised its right to deny benefits

---

<sup>21</sup> *Tokios Tokelès*, *supra* note 13, ¶¶ 30, 36.

<sup>22</sup> *Hulley*, *supra* note 17, ¶¶ 411–12; *Yukos Universal*, *supra* note 17, ¶¶ 411–12; *Veteran*, *supra* note 17, ¶¶ 412–13.

pursuant to that provision,<sup>23</sup> and that in any event each of the Claimants was owned and controlled by UK nationals within the meaning of the ECT and did not fall within the scope of the denial of benefits provision.<sup>24</sup>

In the recent award *Capital Financial Holdings Ltd v. Cameroon*, the Tribunal analysed the origin of funds as part of its inquiry into whether the investments at issue involved a substantial contribution and an element of risk, which it considered to be among the objective requirements for an investment under the ICSID Convention.<sup>25</sup> Although the Tribunal dismissed jurisdiction on other grounds, namely that the Claimant (CFHL) was not a Luxembourg national under the BIT, it also considered whether CFHL had made any investment in Cameroon.<sup>26</sup> In that case, Cameroon argued that CFHL’s alleged investments, namely a 46.57% shareholding in a local bank and certain loans made by CFHL to the local bank, were all funded by the same group of companies owned and controlled by a Cameroonian national, Yves-Michel Fotso, and that CFHL could not at once detach itself from this group of companies while purporting to have Luxembourg nationality for the purposes of the BIT. Citing the *Tokios Tokelès* decision, the Tribunal noted that the origin of funds for an investment was not determinative to jurisdiction. It considered, however, that the issue could not be “completely ignored” in cases where the funds used to make the investment originated either directly or indirectly from nationals of the host

---

<sup>23</sup> *Hulley*, *supra* note 17, ¶¶ 445–46, 456–57; *Yukos Universal*, *supra* note 17, ¶¶ 446–47, 457–58; *Veteran*, *supra* note 17, ¶¶ 502–03, 513–14. *See also* Banifatemi, *supra* note 18.

<sup>24</sup> *Hulley*, *supra* note 17, ¶¶ 535–36; *Yukos Universal*, *supra* note 17, ¶¶ 536–37; *Veteran*, *supra* note 17, ¶¶ 547–48.

<sup>25</sup> *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon* (ICSID Case No. ARB/15/18), Award (P. Tercier, President, A. Mourre, A. Pellet), 22 June 2017, ¶ 423, *italaw* website.

<sup>26</sup> *Id.* ¶ 369.

State and were invested through transactions that were “artificial” and “circular.”<sup>27</sup> The Tribunal found that CFHL had in fact purchased the shares from its ultimate owner Mr. Fotso, and that there was no evidence that CFHL had paid anything for certain portions of the shareholding. The Tribunal further found that CFHL’s loans to the local bank were funded by a loan from FHL, a Cypriot company owned by Mr. Fotso, and that there was no evidence that the loan had been or was intended to be repayable. The Tribunal concluded that these elements, considered together, demonstrated that CFHL had made no substantial contribution and had incurred no risk, and therefore its investments did not meet the requirements of the ICSID Convention.<sup>28</sup>

The Claimant’s nominated arbitrator, Alexis Mourre, took issue with the majority’s conclusion on jurisdiction *ratione materiae* in a dissenting opinion. Mr. Mourre questioned the majority’s finding that the CFHL’s loan to the local bank entailed no risk, noting that there was no evidence that CFHL would not eventually repay its loan to FGH or that FGH would not demand

---

<sup>27</sup> *Id.* ¶ 426. “The investor may have procured the funds for the investment from third parties. The true question however remains whether the Claimant made the investment himself and bears the risks associated with it and, in that regard at least, the origin of the allegedly invested funds cannot be completely disregarded. It is notably the case when, through an artificial circular movement, those amounts directly or indirectly originate from funds used by persons targeted by the measures in the State against which the proceedings are brought.” (“L’investisseur peut s’être procuré le montant de l’investissement auprès de tiers. Il n’en demeure pas moins que la vraie question reste celle de savoir si celui qui agit a fait lui-même l’investissement et en supporte les risques et, à cet égard au moins, l’origine des fonds prétendument investis ne peut être complètement négligée. C’est notamment le cas si, par un mouvement circulaire artificiel, ces montants proviennent directement ou indirectement de fonds utilisés par des personnes visées par les mesures dans l’État contre lequel la procédure est ouverte.”).

<sup>28</sup> *Id.*

repayment in the future.<sup>29</sup> Mr. Mourre further criticized the majority for not taking into account that CFHL, the Luxembourg-based Claimant, had a legal personality distinct from that of its Cypriot shareholder FGH. As he aptly noted, this led the majority to make an erroneous inquiry into the origin of funds for the investment, an approach at odds with the express provisions of the BIT:

The view adopted by the majority ultimately boils down to ignoring the respective legal personalities of CFHL (Luxembourg company) and FGH (Cypriot company) to consider that we would, in reality, be faced with a Cameroonian investment in Cameroon (that is to say, made by the ultimate shareholder Mr. Fotso), and not entitled to benefit as such from the protection of the Treaty. Such reasoning would lead the arbitrators to systematically look for the ultimate origin of the funds used to finance the investment, which would generate legal uncertainty. In the present case, it does not appear, in my opinion, to be consistent with the bilateral treaty for the reasons set forth above.<sup>30</sup>

A series of awards involving claims by natural persons have more consistently followed the decision in *Tokios Tokelès* and have affirmed that whether or not the capital used to make an investment allegedly originates in the host State is irrelevant to

---

<sup>29</sup> *Id.*, Dissenting Opinion of Alexis Mourre, *supra* note 20, ¶ 41.

<sup>30</sup> *Id.* ¶ 45. (“L’approche retenue par la majorité revient, en définitive, à ignorer les personnalités juridiques respectives de CFHL (société luxembourgeoise) et de FGH (société chypriote) pour considérer que nous serions en réalité en présence d’un investissement camerounais au Cameroun (c’est-à-dire réalisé par l’actionnaire ultime Mr Fotso), ne pouvant à ce titre bénéficier de la protection du Traité. Un tel raisonnement devrait conduire les arbitres à rechercher systématiquement l’origine ultime des fonds ayant servi à financer l’investissement, ce qui serait une source d’incertitude juridique. Dans le cas d’espèce, il ne me paraît pas conforme au traité bilatéral pour les raisons qui viennent d’être exposées.”).

jurisdiction *ratione materiae*. In *Siag v. Egypt*, for instance, Egypt argued that the Claimants’ investment “was devoid of any foreign element from its inception” because “the corporate vehicles used for the purposes of the investment . . . were local entities established under applicable Egyptian law.”<sup>31</sup> Referring to the decision in *Tokios Tokelès*, the Tribunal considered that “[t]he [ICSID] Convention requires an ‘investment’ but does not limit the term in any manner” and noted that the relevant BIT broadly defined the term. In the Tribunal’s view, “the fact [that the] Claimants managed their investment through the medium of companies incorporated under Egyptian law does not exclude the [Claimants’ investment] from falling within the definition of ‘investment’ of the BIT.”<sup>32</sup>

In another claim brought by a natural person, *Joseph Lemire v. Ukraine*, Ukraine objected that the Claimant, a U.S. national, had “failed to prove the transfer of his invested funds into Ukraine from abroad” when he purchased shares in a Ukrainian company. Rejecting the argument, the Tribunal held that the relevant BIT and the ICSID Convention placed no conditions on the origin of invested funds, and that such conditions could not be inferred from the purpose of either treaty. The Tribunal further noted that reinvested assets were included in the illustrative list contained in the BIT’s definition of investment, and that “these earnings by definition originate within the host country.”<sup>33</sup>

---

<sup>31</sup> Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt (ICSID Case No. ARB/05/15), Decision on Jurisdiction (D.A.R. Williams, President, M. Pryles, F. Orrego Vicuña), 11 Apr. 2007, ¶ 207, [italaw website](#).

<sup>32</sup> *Id.*

<sup>33</sup> Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability (J. Fernández-Armesto, President, J. Paulsson, J. Voss), 14 Jan. 2010, ¶¶ 56–57, [italaw website](#).

In *Arif v. Moldova*, the Tribunal similarly rejected Moldova’s argument that the Claimant, a French national, had failed to transfer any capital from France to Moldova when making his investment, which he argued was a “key objective” of the relevant BIT. The Tribunal noted that the BIT’s definition of investment “makes no mention of such requirement,” and that the requirement could not be read into its Preamble, which set out the BIT’s objective to “stimulate the transfer of technology and capital between the two States.”<sup>34</sup>

The Tribunal in *von Pezold v. Zimbabwe* dismissed Zimbabwe’s argument that the Claimants, German and Swiss nationals, had funded their investments using capital originating in the host State. The Tribunal held that the relevant BITs and the ICSID Convention placed no conditions on the origin of invested funds and that in any case, it was clear from the evidence that the Claimants, in addition to reinvesting locally-generated profits, had funded their investment using capital originating outside of Zimbabwe.<sup>35</sup>

## **II. IS A TERRITORIAL LINK REQUIRED BETWEEN AN INVESTMENT AND THE HOST STATE?**

A second aspect of whether the protection of an investment should be premised on its “nationality” concerns whether an investment should have a territorial nexus to the host State. While the ICSID Convention is silent on the territorial aspect of investments, investment treaties systematically refer to the

---

<sup>34</sup> Franck Charles Arif v. Republic of Moldova (ICSID Case No. ARB/11/23), Award (B.M. Cremades, President, B. Hanotiau, R. Knieper), 8 Apr. 2013, ¶¶ 382–83, [italaw website](#).

<sup>35</sup> Bernard von Pezold and Others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Award (L.Y. Fortier, President, D.A.R. Williams, A.P. Mutharika), 28 July 2015, ¶ 288, [italaw website](#).



“territory” of the State Parties, either in the definition of “investment”<sup>36</sup> or in provisions on the treaty’s scope of application.<sup>37</sup> The substantive protections of some investment treaties also refer to the territories of the State Parties.<sup>38</sup> Here the issue is not whether the investment is a “domestic” or “foreign” investment, but rather whether the investment as executed is too remote from the host State in order to fall within the scope of jurisdiction *ratione materiae*. Arbitral tribunals have interpreted the requirement for the territorial nexus of investments depending on the type of investment at issue.

The requirements of NAFTA Article 1101(1), which provides that the Treaty’s investment chapter applies to “measures adopted or maintained by a Party relating to . . . investments of investors or another Party in the territory of the Party,” were interpreted in two relatively early cases. In *Bayview v. Mexico*, the Claimants brought claims in relation to Mexico’s alleged seizure and diversion of irrigation water located in the Rio Grande. The Tribunal held that it lacked jurisdiction over the claims because the

---

<sup>36</sup> See, e.g., the definition of “investment” in the Austrian Model BIT 2008, Art. 1(2); Canadian Model FIPA, Art. 1; China Model BIT, Art. 1(1); Colombian 2009 Model IIA, Art. 1(2); German Model BIT 2009, Art. 1(1); Italian Model BIT 2003, Art. 1(1); Republic of Korea Model BIT 2001, Art. 1(1); Latvia Model BIT, Art. 1(1); The Netherlands Model BIT, Art. 1; Russian Model BIT, Art. 1(b); Singapore De Facto Model IGA, Art. 1(1); Switzerland-China BIT, Art. 1(1); United Kingdom Model IPPA 2008, Art. 1(a).

<sup>37</sup> See e.g., Article 26 of the Energy Charter Treaty, which provides that “[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former” can be submitted to international arbitration.

<sup>38</sup> See e.g., Philippines-Switzerland BIT, Art. IV, which states: “Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or investments or returns of investors of any third State, whichever is more favourable to the investor concerned.”

investments at issue (namely the Claimants’ farm and irrigation facilities in Texas and concession rights to extract water granted by the state of Texas) were located entirely in Texas. The Tribunal considered that “it was quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their national States, in circumstances where those investments may be affected by measures taken by another NAFTA State party.”<sup>39</sup> The Tribunal in *Canadian Cattlemen v. United States* similarly declined jurisdiction over claims by a group of Canadian cattle producers that a U.S. prohibition on live-cattle imports from Canada unfairly discriminated against them in the U.S. market. Following a careful textual analysis of the relevant NAFTA provisions, as well as the Treaty’s object and purpose, the Tribunal held that Chapter 11 of NAFTA should apply “only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party” and that the Claimants’ activities, which were carried out in Canada, did not meet this threshold.<sup>40</sup> Both cases highlight how NAFTA Article 1101(1) allows for the exclusion of trade-related disputes from NAFTA’s investment chapter where the investor does not carry out any manufacturing or production activity in the importing country.

The territorial nexus for investments based on contractual rights was considered by the tribunals in *SGS v. Pakistan*, *SGS v. Philippines* and *SGS v. Paraguay*. In each of these cases, the Swiss Claimant alleged non-payment of invoices for the inspection and certification of goods imported by the host State from certain countries. The relevant BIT in each case limited its scope of

---

<sup>39</sup> Bayview Irrigation District et al. v. United Mexican States (ICSID Case No. ARB(AF)/05/1), Award (V. Lowe, President, E. Meese III, I. Gomez-Palacio), 19 June 2007, ¶ 104, italaw website.

<sup>40</sup> Canadian Cattlemen for Fair Trade v. United States of America (UNCITRAL), Award on Jurisdiction (K.H. Böckstiegel, President, J. Bacchus, L.A. Low), 28 Jan. 2008, ¶ 127, italaw website.

application to “investments in the territory of one Contracting Party.” In *SGS v. Pakistan*, Pakistan argued that the Claimant had not made a protected investment because the essential part of its activities consisted in providing services in the ports of origin of the imported goods, rather than in Pakistan.<sup>41</sup> In *SGS v. Philippines*, the Philippines similarly argued that all of the services referenced in the Claimant’s request for arbitration that were carried out in the Philippines were “peripheral or negligible in comparison to the main obligation, which consisted in pre-shipment inspections made outside the Philippines.”<sup>42</sup> Paraguay raised the same objections in *SGS v. Paraguay*.<sup>43</sup>

The Tribunal in *SGS v. Pakistan* rejected Pakistan’s objection in a single paragraph of its Award. It noted that the Claimant’s expenditures in Pakistan were “relatively small” but nonetheless involved an “injection of funds” into Pakistan, and thus the Claimant had made an investment in its territory within the meaning of the BIT.<sup>44</sup> The *SGS v. Philippines* Tribunal examined the issue in more detail. It held that the Claimant’s pre-shipment inspection services outside of the Philippines enabled the entry of goods into the country, and that the Claimant’s office in Manila played a central role in its activities. The Tribunal considered that these two elements were together “sufficient to

---

<sup>41</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction (F.P. Feliciano, President, A. Faurès, C. Thomas), 6 Aug. 2003, ¶ 77, italaw website.

<sup>42</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction (A.S. El Koshi, President, A. Crivellaro, J. Crawford), 29 Jan. 2004, ¶ 57, italaw website.

<sup>43</sup> *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Jurisdiction (S. Alexandrov, President, D. Donovan, R. Mexía), 12 Feb. 2010, ¶ 111, italaw website.

<sup>44</sup> *SGS v. Pakistan*, *supra* note 41, ¶ 136.

qualify the service as one provided in the Philippines.” In the Tribunal’s words, “[t]he fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that [the Claimant] was paid in Switzerland.”<sup>45</sup> The Tribunal in *SGS v. Paraguay* equally rejected that services provided by the Claimant abroad could be severed from services provided in Paraguay, and indeed considered that the former “were indispensable operations for the issues of the final certifications in Paraguay.”<sup>46</sup>

In cases concerning investments in financial instruments, tribunals have dispensed with any requirement that an investor’s activities be performed in the territory of the host State or involve any injection of funds into the host State. *Fedax v. Venezuela* – the first ICSID case in which a Respondent State objected to the Tribunal’s jurisdiction *ratione materiae* – laid the groundwork for this increasingly liberal interpretation of the territorial nexus for investments. Venezuela argued that the Claimant, a beneficiary by endorsement of debt instruments issued by Venezuela, had not made an “investment” under the BIT or the ICSID Convention because the instruments did not involve “a long term transfer of financial resources – capital flow – from one country to another. . . which normally entails certain risks to the potential investor.” Venezuela further argued that the Claimant had not made an investment “in the territory” of Venezuela.<sup>47</sup>

Rejecting Venezuela’s argument, the *Fedax* Tribunal considered that in the absence of a definition of “investment” in the ICSID Convention, it should assess the existence of an

---

<sup>45</sup> *SGS v. Philippines*, *supra* note 42, ¶¶ 103, 106.

<sup>46</sup> *SGS v. Uruguay*, *supra* note 43, ¶ 113.

<sup>47</sup> *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction (F. Orrego Vicuña, President, M. Heth, R.B. Owen), 11 July 1997, ¶¶ 19, 41, *italaw* website.

investment solely by reference to the definition in the relevant BIT, which sets forth a “very broad meaning for the term ‘investment’” including “titles to money [which] are not in any way restricted to forms of direct foreign investment or portfolio investment.” The Tribunal held that financial transactions can qualify as investments without involving any injection of funds into the host State:

While it is true that in some kinds of investments. . . such as the acquisition of interests in immoveable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities.<sup>48</sup>

For the *Fedax* Tribunal, the “important question” for determining whether a financial transaction amounts to an ordinary commercial transaction or an investment falling within the scope of the BIT was “whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs.” There was no dispute that Venezuela had used the debt instruments to finance its budget under a law on public credit, and the Tribunal thus concluded that the Claimant’s investment met the BIT’s requirements of jurisdiction *ratione materiae*.<sup>49</sup>

The reasoning in *Fedax* has been followed in subsequent cases involving investments in financial instruments. The Tribunal

---

<sup>48</sup> *Id.* ¶ 41.

<sup>49</sup> *Id.*

in *CSOB v. Slovak Republic*, for instance, rejected an objection that a loan made by the Claimant to the Slovak Collection Company and guaranteed by the Slovak Ministry of Finance did not qualify as an investment because the Claimant had not caused any funds to be moved or transferred into its territory. Referring to the decision in *Fedax*, the Tribunal held that “a transaction can qualify as an investment even in the absence of a physical transfer of funds” into the host State.<sup>50</sup> The Tribunal nonetheless emphasized that the loan “was closely related to and cannot be disassociated from” the privatization of a large Slovakian financial institution.<sup>51</sup>

The tribunals hearing mass claims concerning Argentina’s suspension of payment on sovereign bonds have further diluted the territorial requirement for investments in financial instruments.<sup>52</sup>

---

<sup>50</sup> *Českoslovenka Obchodní Banka, A.S. (CSOB) v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction (T. Buergenthal, President, A. Bucher, P. Bernardini), 24 May 1999, ¶ 78, *italaw website*.

<sup>51</sup> *Id.* ¶ 75. The reasoning in *Fedex* and *CSOB* was followed in *Inmaris v. Ukraine*, where the Tribunal rejected an objection that alleged claims to performance by a group of German investors based on an agreement signed with a Ukrainian State entity for the upkeep of a vessel fell outside the scope of the Germany-Ukraine BIT. Ukraine relied on the fact that the services and works performed under the agreement were not carried out in the Ukraine and involved no injection of funds into the Ukraine. The Tribunal considered that Ukraine’s “characterization of the territorial requirement is unduly narrow and formalistic” and held that “an injection of funds is by no means the only way that an investment may be made in the territory of a host State.” The Tribunal noted that Ukraine had not contested that it lacked the financial resources to carry out the restoration of the vessel. It held that the funds expended by the Claimants in the restoration of the Ukrainian vessel “created value in Ukraine, on the basis of contractual relationships with a Ukrainian state entity” and should therefore be considered to have been made in the territory of the Ukraine. *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Decision on Jurisdiction (S. Alexandrov, B. Cremades, N. Rubins), 8 Mar. 2010, ¶¶ 122–25, *italaw website*.

<sup>52</sup> These cases are: *Abaclat and Others* (Case formerly known as *Giovanna A Beccara and Others*) v. Argentine Republic (ICSID Case

The *Abaclat* and *Ambiente* claims were both brought under the Argentina-Italy BIT, whose definition of “investment” includes “any conferment or asset invested or reinvested . . . in the territory of the other Contracting Party.”<sup>53</sup> The Claimant bondholders – in both cases various Italian nationals and legal entities – had purchased security entitlements to Argentinian sovereign bonds issued in different currencies and listed on various international exchanges outside of Argentina. In both cases, Argentina objected that the security entitlements were not made “in the territory” of Argentina as required by the BIT, as they were located outside the scope of Argentina’s territorial jurisdiction and did not involve any injection of capital into the country.<sup>54</sup>

The tribunals in *Abaclat* and *Ambiente* held that the security entitlements qualified as protected investments under the BIT and the ICSID Convention. In *Abaclat*, the Tribunal considered that it would be “contrary to the BIT’s wording and aim to attach a further condition to the protection of financial instruments” that an investment be linked to a specific economic enterprise or operation taking place in the host State.<sup>55</sup> For the Tribunal, the “relevant

---

No. ARB/07/5), Decision on Jurisdiction and Admissibility (P. Tercier, President, A.J. van den Berg, G. Abi-Saab), 4 Aug. 2011, italaw website; *Ambiente Ufficio S.P.A. and Others (Case formerly known as Giordano Alpi and Others v. Argentine Republic) v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility (B. Simma, President, K.H. Böckstiegel, S. Torres Bernárdez), 8 Feb. 2013, italaw website; *Giovanni Alemanni and Others v. Argentine Republic* (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility (F. Berman, President, K.H. Böckstiegel, C. Thomas), 17 Nov. 2014, italaw website. The issue of the territorial aspect of investments was postponed to the merits phase of the *Alemanni* case. The case was discontinued on 14 December 2015, before an award on the merits was rendered.

<sup>53</sup> *Abaclat*, *supra* note 52, ¶ 336 (unofficial translation submitted by Claimants to the arbitration).

<sup>54</sup> *Abaclat*, *supra* note 52, ¶ 307; *Ambiente*, *supra* note 52, ¶ 327.

<sup>55</sup> *Abaclat*, *supra* note 52, ¶ 375.

question” for determining whether the Claimants’ investments met the BIT’s territorial requirement was whether “the invested funds [were] ultimately made available to the Host State and [whether] they support[ed] the latter’s economic development.”<sup>56</sup> It continued:

There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina’s economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina’s economic development and thus to have been made in Argentina.<sup>57</sup>

The Tribunal in *Ambiente* followed the same reasoning, holding that “in order to identify in which State’s territory an investment was made, one has to determine which State benefits from this investment.”<sup>58</sup>

The test applied by the tribunals in *Abaclat* and *Ambiente* is even less stringent than the test retained in *Fedax*. First, as noted above, the *Abaclat* and *Ambiente* tribunals rejected that an investment in a financial instrument should be linked to any specific economic project in the host State. In the *Fedax* case, this issue did not arise, as the Claimant’s debt instruments were initially given in exchange for the provision of specific services in Venezuela. Second, in contrast to the facts in *Fedax*, where Venezuela indisputably allocated the Claimants’ debt instruments to its budget, Argentina received no direct proceeds from the

---

<sup>56</sup> *Id.* ¶ 374.

<sup>57</sup> *Id.* ¶ 378.

<sup>58</sup> *Ambiente*, *supra* note 52, ¶ 499.



Claimants' purchase of security entitlements on the secondary market. As the *Abaclat* Tribunal stated, it would suffice that the funds were "ultimately made available to Argentina, and served to finance Argentina's economic development."<sup>59</sup>

This interpretation of the BIT's "in the territory" requirement was sharply criticized by dissenting opinions in both cases. In *Abaclat*, Professor Abi-Saab argued that the approach taken by the majority would unduly expand the scope of an ICSID tribunal's jurisdiction to "virtually all capital market transactions."<sup>60</sup> Criticising the majority's reliance on the *Fedax* award, he considered that the security entitlements at issue would in any event not meet the test applied by the Tribunal in that case, as they did "not form part of an economic project, operation or activity in Argentina," nor were they "issued in support of a public project or a commercial undertaking there."<sup>61</sup> Professor Abi-Saab suggested an alternative approach for determining the *situs* of the transactions at issue, namely by reference to principles of private international law. Noting that this approach found support in academic commentary,<sup>62</sup> Professor Abi-Saab proposed that the governing law of the debt, the chosen forum for the resolution of

---

<sup>59</sup> *Abaclat*, *supra* note 52, ¶ 378.

<sup>60</sup> *Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) v. Argentine Republic (ICSID Case No. ARB/07/5)*, Decision on Jurisdiction and Admissibility (P. Tercier, President, A.J. van den Berg, G. Abi-Saab), Dissenting Opinion of Professor Georges Abi-Saab, 28 Oct. 2011, ¶ 268, [italaw website](http://italaw.com).

<sup>61</sup> *Id.* ¶ 108.

<sup>62</sup> See ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 171 (Cambridge University Press, 2009); MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 239 (Cambridge University Press, 2011). For a more recent study of the relevance of private international law rules to the territorial nexus for investments, see Christopher R. Zheng, *The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism*, 34 SINGAPORE L. REV. 139 (2016).

disputes under the instrument, as well as the currency and place of payment and the residence of the intermediaries could all be taken into account in determining its *situs*, but “[o]n any of these criteria, the transactions at issue here were deliberately structured so as to have their *situs* outside Argentina.”<sup>63</sup> In *Ambiente*, Santiago Torrez Bernárdez argued that the majority had adopted an “alternative criterion susceptible of bypassing the territoriality of the BIT.” For Mr. Torrez Bernárdez, the Claimants’ security entitlements were “too remote. . . to satisfy the element of a positive effect on the economic development of Argentina” and “there was no proof either that the Claimants intended or actually did support the economic development of the Argentine Republic through the purchase of ‘security entitlements’ in Italy.”<sup>64</sup>

Subsequent cases have followed the broad test adopted by the tribunals in *Abaclat* and *Ambiente*. In *Deutsche Bank v. Sri Lanka*, the Tribunal held that an oil price hedging agreement which had originated in the Claimant’s London office and was not signed by its Colombo office nonetheless met the territorial requirement in the relevant BIT. The Tribunal concluded that the territorial nexus was satisfied, as “the funds paid by Deutsche Bank in execution of the Hedging Agreement were made available to Sri Lanka. . . and served to finance its economy.” It further noted:

The reality of today’s banking business is that major banks operate all over the world. The fact that one particular subsidiary or branch does the paperwork does not mean that the financial instrument is located in the country concerned.

---

<sup>63</sup> *Supra* note 60, ¶ 82.

<sup>64</sup> *Ambiente Ufficio S.p.A. and Others (Case formerly known as Giordano Alpi and Others v. Argentine Republic) v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, 8 Feb. 2013, ¶ 331, *italaw* website.

Here, the preliminary engagement took place in Sri Lanka and it is there too that the investment had its impact.<sup>65</sup>

In *British Caribbean Bank v. Belize*, the Tribunal equally held that the Claimant’s interests in certain loan and security agreements satisfied the territorial nexus stipulated in the UK-Belize BIT.<sup>66</sup> The loan and security agreements in that case had granted the Claimant’s predecessor company a security interest in the shares and assets of local telecoms company Belize Telemedia, which Belize subsequently nationalized. Belize objected to the Tribunal’s jurisdiction, including on the ground that there was no investment made in its territory. While it accepted the test adopted by the Tribunal in *Abaclat* that the location of a financial investment depends upon “where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid or transferred,” Belize submitted that it did not ultimately benefit from the agreements, which instead benefitted the shareholders of Telemedia who received the shares in the form of dividends.<sup>67</sup> Rejecting Belize’s objection, the Tribunal noted that each of the loan and security agreements at issue were concluded with and were for the benefit of companies incorporated in Belize. Though the Tribunal considered that “it need look no further down the chain of how those funds were deployed,” it

---

<sup>65</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award (B. Hanotiau, President, D.A.R. Williams, M. Ali Khan), 31 Oct. 2012, ¶ 291.

<sup>66</sup> *British Caribbean Bank Limited v. Government of Belize* (UNCITRAL (PCA Case No. 2010-18)), Award (A.J. van den Berg, President, J. Beechey, R. Oreamuno), 19 Dec. 2014, italaw website. The applicable UK-Belize BIT did not include an “in the territory” requirement in the definition of investment, but such requirement was found in the Treaty’s substantive obligations of Promotion and Protection of Investment (Art. 2), National Treatment and Most-favoured-nation Treatment (Art. 5) and Expropriation (Art. 5). The Tribunal assessed the issue of whether the investment was “made in Belize” as one of jurisdiction.

<sup>67</sup> *Id.* ¶ 202.

noted “for completeness” that the funds acquired under the agreements were either loaned to, or used to acquire interests in, other locally incorporated companies.<sup>68</sup>

Arbitral tribunals have equally held that the territorial nexus for investments is satisfied where a claimant acquires an indirect interest in a local company. In *Gold Reserve v. Venezuela*, Venezuela challenged the territorial nexus of the Claimant’s investments by reference to the phrasing of the definition of “investor” at Article 1(g)(ii) of the Canada-Venezuela BIT as one who, among other requirements, “makes the investment in the territory of Venezuela.”<sup>69</sup> As a result of a corporate reorganization in the Gold Reserve Group, the Claimant Canadian company had become the indirect owner of a locally-incorporated company that held certain mining concessions in Venezuela. The Tribunal rejected Venezuela’s objection that the investment was made outside of its territory, holding that “the ordinary meaning of the words, ‘making an investment in the territory of Venezuela’ does not require that there must be a movement of capital or other values across Venezuelan borders.” The Tribunal reasoned that:

If such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business. Clearly, this was not the intention of the parties to the BIT and nor does it reflect the ordinary meaning of the definition. Whether Claimant made an investment when it acquired the shares in

---

<sup>68</sup> *Id.* ¶¶ 208–11.

<sup>69</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award (P. Bernardini, President, D.A.R. Williams, P.M. Dupuy), 22 Sept. 2014, [italaw website](http://italaw.com).

Gold Reserve Corp., is not affected by the fact that the acquisition took place through a share-to-share swap outside Venezuela.<sup>70</sup>

The Tribunal followed similar reasoning in *Orascom v. Algeria*, an ICSID award issued pursuant to the BIT between Algeria and the Belgium-Luxembourg Economic Union. In that case, the Claimant had acquired shares in an Italian entity that indirectly owned shares in a local telecommunications company. The Claimant acquired the shares in the context of a corporate restructuring with a view to taking over another Italian company.<sup>71</sup> Algeria raised a number of objections to the Tribunal’s jurisdiction *ratione materiae*, including that the Claimant’s indirect shareholding in the local company fell outside the territorial scope of the BIT because it did not amount to an investment in its territory. Rejecting this argument, the Tribunal noted that the “investment” in that case – namely the local telecoms company – was located in the territory of Algeria. Citing the finding in *Gold Reserve* with approval, the Tribunal held that “requiring a flow of funds directly into the host state would preclude a foreign investor from purchasing an existing investment from another foreign investor, because the purchase price would necessarily be paid to the foreign seller of the investment.”<sup>72</sup>

### III. CONCLUSION

The case law that has developed in recent years confirms that there is no requirement for the “nationality” of investments

---

<sup>70</sup> *Id.* ¶ 262.

<sup>71</sup> *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Final Award (G. Kaufmann-Kohler, President, A.J. van den Berg, B. Stern), 31 May 2017, italaw website.

<sup>72</sup> *Id.* ¶ 382. The *Orascom* Tribunal ultimately declared the Claimant’s claims inadmissible on separate grounds. *Id.* ¶ 547.

such that the funds used to make an investment should originate in any particular source or jurisdiction. To impose any origin of funds requirement for jurisdiction *ratione materiae* would disregard the economic reality of contemporary investments, which are financed from a variety of sources, and would uphold an outdated notion that capital used to make an investment could be considered to originate in one particular jurisdiction. As cogently argued by the dissenting arbitrator in the *Capital Financing Holdings Ltd.* case,<sup>73</sup> requiring arbitrators to systematically inquire into the alleged origin of the capital used to make an investment would lead to legal uncertainty, in particular given the absence of any express requirement in investment treaties to this effect. Whether an investment is a “foreign,” rather than “domestic,” investment subject to treaty protection should instead be controlled through the scope of jurisdiction *ratione personae*.

Likewise, there is no requirement for the “nationality” of investments such that the same territorial nexus between an investment and the host State should apply in all cases. Instead, the interpretation and application of the territorial nexus for investment varies according to the type of transaction at issue. In cases involving physical investments, arbitral tribunals have required some physical nexus between the investment and the host State to meet the requirements of jurisdiction *ratione materiae*. By contrast, in more recent cases, arbitral tribunals have adopted a broad interpretation of the “in the territory” requirement to accommodate the particular features of investments in contracts and financial instruments, and have inquired whether the host State ultimately used and benefited from the funds invested. The limits of this inquiry will likely continue to be tested in future cases involving increasingly complex investment structures as well as new types of transactions alleged to be subject to treaty protection.

---

<sup>73</sup> *Supra* note 20.