HOW TO IDENTIFY INSIDERS AND INTRUDERS DISGUISING AS INVESTORS IN THE ASSIGNMENT OF INVESTMENTS

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Abstract The constant exchange of investment assets poses a risk of 'commoditisation' of investment treaty claims. Nevertheless, both traditional and modern investment treaties contain sufficient safeguards against attempts by host State 'insiders' and third State 'intruders' to create artificial access to arbitration. First, the definition of 'investment' can filter genuine investments from bare acquisition of assets (*ratione materiae*). Second, the textual linkage between 'investor' and 'investment' strongly implies that 'active contribution' in the investment is required from assignees to qualify for protection (*ratione personae*). Third, the doctrine of abuse of rights prevents treaty shopping and internationalisation of domestic disputes (*ratione temporis*).

Keywords: private international law, foreign investment, abuse of process, treaty shopping, *ratione materiae*, *ratione personae*, *ratione temporis*, treaty interpretation, jurisdiction, commoditisation of claim.

I. INTRODUCTION

The paradigm shift from inter-State diplomatic protection under customary law to investor–State arbitration under international investment agreements (IIA) aims to strengthen the protection of foreign investors.[1] Such depoliticisation would shepherd disputes from the 'realm of diplomacy' back to the 'realm of law'.[2] As observed by Judge Nervo in *Barcelona Traction*, diplomatic protection has had a chequered history, including abuses, unjust claims, and military aggression by imperialist States against weaker States.[3] As the chapter of colonisation drew to a close in the twentieth century, Judge Jessup remarked that the days of 'gun-boat diplomacy' were happily behind us.[4]

Yet friction between capital-exporting and capital-importing nations still lingers today. Whilst the identity of actors and choice of weapons may have

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[1] *Banro American Resources, Inc v Democratic Republic of the Congo*, ICSID Case No ARB/98/7, Award (excerpts) (1 September 2000) (Weil, Geach, Diagne) para 14.
[2] ICSID, CIRDI, CIADI, *History of the ICSID Convention*, vol II (ICSID 2009) 273.
[3] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 245–6 (Separate Opinion of Judge Nervo).
[4] ibid 164, para 10 (Separate Opinion of Judge Jessup).

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evolved, the potential for abuse remains. There is growing concern that the IIA regime has bred a new class of merchants and mercenaries thriving on debt collection—resulting in the 'commoditisation' of treaty claims.[5] This phenomenon is most recently exemplified by the *Westmoreland v Canada* arbitration in which Canada challenged the NAFTA tribunal's jurisdiction over a claim commenced by an American company formed by the secured creditors of an insolvent American company solely as a vehicle to acquire the latter's assets in four Canadian coal mines (inclusive of its NAFTA claim against Canada).[6]

Under their domestic law, many jurisdictions recognise the assignment of debts and choses in action, including common law (United States[7] and United Kingdom[8]) and civil law (Germany[9] and Switzerland[10]). However, to what extent is assignment of claims allowed under international law? On the one hand, host States are understandably irked by 'insiders' of their own nationality (or 'intruders' from third States) acquiring a matured investment for the preponderant purpose of forging artificial access to an IIA where none previously existed. On the other hand, limiting access to original investors unfairly results in their impecuniosity compunding their injury, or worse, incentivises host States to double-down on heavy-handed measures to drive foreign investments to the brink. The search for a middle way to bridge the divide has attracted recent scholarly discourse—notably Goh[11] and Wehland[12]—primarily from a teleological perspective. In contrast, to resolve this legal conundrum, it is preferable to fall back on the basics of treaty interpretation.

This analysis consists of three parts. The first explains why such a textual approach is grounded both in principle and pragmatism (Section II). Next, it reviews the *jurisprudence constante* of investment tribunals on jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis* (Section III). This aims to demonstrate how well treaty interpretation works in practice, rather than establishing definitive interpretations of particular IIAs. A diverse sample of case studies has been selected to cover transfers of investments

[5] *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Canada's Reply Memorial on Jurisdiction (9 April 2021) para 134 fn 266.

[6] *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Final Award (31 January 2022) (Blanch, Hosking, Douglas) paras 85–92. This article had been written, peer-reviewed, revised and approved for publication before the final award was made publicly available sometime in February 2022. Accordingly, our analysis is primarily focused on parties' submissions rather than the findings of the tribunal.

[7] *In Re UAL Corp*, 635 F. 3d 312 (7th Cir 2011) 316.

[8] AG Guest, *Guest on the Law of Assignment* (Sweet & Maxwell 2012) 4–22; M Smith and N Leslie, *The Law of Assignment* (2nd edn, Oxford University Press 2013) 53–61.

[9] German Civil Code, Division 5 <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf>.

[10] Swiss Civil Code (Part Five: The Code of Obligations) art 164 <https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en>.

[11] N Goh, 'The Assignment of Investment Treaty Claims: Mapping the Principles' (2019) 10 JIDS 23.

[12] H Wehland, 'The Transfer of Investments and Rights of Investors – Some Unresolved Issues' (2014) 30(3) ArbIntl 565.

ranging from assignments of assets (via arm's-length sale and purchase contracts) to acquisition of shares (via corporate restructuring between related companies). Third, it identifies emerging trends on the jurisdictional scope of modern IIAs (Section IV). Briefly, the preliminary conclusions are as follows:

- There is no general presumptive rule under international law which prohibits nor permits the assignment of investments due to the *sui generis* nature of IIAs.
- The validity of such assignments is ultimately dependent on the treaty text of IIAs, examined through the jurisdictional lenses of *ratione materiae*, *ratione personae* and *ratione temporis*.
- Any gap allowing for the possible abuse of the IIA regime is sufficiently plugged by the *jurisprudence constante* of arbitral tribunals, and the more sophisticated textual architecture of modern IIAs.

II. THE TEXTUAL APPROACH

Since the 1980s, the proliferation of IIAs has displaced traditional diplomatic protection mechanisms as the principal means of resolving disputes between investors and host States.[13] Naturally, the starting point for ascertaining the scope of rights enjoyed by investors to directly institute arbitration against host States arising from IIAs lies in the customary rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[14] This holds true for jurisdictional and definitional clauses.[15] As opined by the *Yukos Universal v Russia* tribunal:

> The principles of international law … [do] not allow an arbitral tribunal to write new, additional requirements — which the drafters did not include — into a treaty, no matter how auspicious or appropriate they may appear.[16]

[13] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) (Salans, Veeder, van den Berg) para 198.

[14] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[15] *Plama* (n 13) paras 147, 158, 188; *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) (Weil (dissenting), Bernardini, Price) para 27; *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No ARB/08/13, Award (16 July 2012) (Park, Stern, Lalonde (dissenting)) para 333; *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) (Stern, Fernández-Armesto, Bucher) paras 75–76; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1 Award (22 August 2012) (Dupuy, Brower (dissenting), Janeiro) para 46; *Saluka Investments BV (The Netherlands) v The Czech Republic*, PCA Case No 2001-04, Partial Award (17 March 2006) (Watts, Behrens, Fortier) paras 296–300; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) (Stephen, Crawford, Schwebel) para 43; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000) (Vicuña, Buergenthal, Wolf) para 27.

[16] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No 2005-04/AA227, Interim Award on Jurisdiction and Admissibility (30 November 2009) (Fortier, Schwebel, Poncet) para 415.

Such deference to treaty law accords with jurisprudence of the International Court of Justice (ICJ). In *Barcelona Traction*, the ICJ examined Belgium's claim against Spain under the customary rule of diplomatic protection because of the absence of any treaty.[17] Later, in *ELSI*, the ICJ Chamber dismissed the United States' claim against Italy under the Treaty of Friendship, Commerce and Navigation without mentioning *Barcelona Traction*.[18] Such silence was later explained away by the ICJ in *Diallo* on the basis that the United States' claim had been grounded on treaty law, not custom.[19] Such a clear dichotomy between treaty and custom in the field of investor protection cuts both ways. Just as IIAs are unhelpful in identifying customary rules of diplomatic protection in jurisdictional matters, customary rules are unhelpful when interpreting IIAs due to their *sui generis* and *lex specialis* nature.[20]

Indeed, as vividly put by Paulsson, IIAs have created a unique form of 'arbitration without privity' which leaves investors 'standing on a broad highway' rather than navigating 'through the eye of [the] thinnest needle' on the 'road to arbitration'.[21] Jurisdictional requirements in investor–State arbitration (vis-à-vis ICSID) are less formalistic and stringent than State-to-State disputes (vis-à-vis the ICJ).[22] Most notably, the customary rule of exhaustion of local remedies[23] is displaced by Article 26 of the ICSID Convention.[24] Another example is the inapplicability of the 'real and effective nationality' test[25] under Article 25 of that convention.[26]

Here, the critical issue is whether a *subsequent* investor (assignee) which owns or controls an investment transferred from the *original* investor

[17] *Barcelona Traction* (n 3) paras 36, 90.

[18] *Elettronica Sicula SPA (ELSI) (United States of America v Italy)* (Merits) [1989] ICJ Rep 15.

[19] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, paras 89–90.

[20] *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award (17 October 2013) (Kaufmann-Kohler, Glick, Thomas) para 129 ('the wide consensus that emerges from case law according to which rules of customary international law applicable in the context of diplomatic protection do not apply where they have been varied by the *lex specialis* of an investment treaty'); *AES Corporation v The Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) (Dupuy, Böckstiegel, Janeiro) para 23(b)–(c) ('the rule according to which "*specialia generalibus derogant*", from which it derives that treaty obligations prevail over rules of customary international law under the condition that the latter are not of a peremptory character'); *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/18, Decision on Jurisdiction (17 July 2003) (Vicuña, Lalonde, Rezek) para 48.

[21] J Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Rev 232, 241.

[22] *Casinos Austria International v Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) (van Houtte, Schill, Bernárdez (dissenting)) paras 273–275.

[23] *Interhandel (Switzerland v United States of America)* [1959] ICJ Rep 6, 27; *ELSI* (n 18) paras 49–50.

[24] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

[25] *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Rep 4, 22.

[26] *The Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008) (Berman, Donovan, Lalonde) paras 92–93; *KT Asia* (n 20) paras 126–129.

(assignor) can invoke the IIA between the host State and the assignee's State. In arbitral practice, this question directly affects the host State's consent to arbitration, and consequently, goes to the root of the tribunal's jurisdiction.[27]

The cardinal rule is that a treaty shall be interpreted 'in good faith' based on the 'ordinary meaning' of the terms in 'their context and in the light of its object and purpose'.[28] Primary sources to determine a treaty's context include, amongst others, its preamble, annexes, accompanying agreements or instruments, and subsequent agreements or practices.[29] Recourse may be made to secondary sources, including the treaty's *travaux préparatoires*, either to confirm the meaning resulting from the general rule or to resolve any ambiguities or absurdities from such meaning.[30] Further, aside from such fundamental rules, a few guiding principles on interpreting jurisdictional clauses can be drawn from arbitral practice:

- The basic pre-requisite for arbitration is an arbitration agreement which must be expressed in clear and unequivocal terms.[31]
- An IIA's object and purpose may be examined in order to identify the common intention of the States Parties, but such examination must not be used as a pretext to embark on a teleological exercise (with a view to ascertaining the *subjective* intention of individual States Parties,[32] considering desirable policy considerations,[33] or achieving systemic integration with other international regimes[34]).

[27] *Ioan Micula v Romania (I)*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) (Lévy, Ehlermann, Alexandrov) para 64 ('when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection'); *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) (Lowe, Brower, Thomas) para 90.

[28] VCLT (n 14) art 31(1). [29] ibid art 31(2)–(3). [30] ibid art 32(a)–(b).

[31] *Plama* (n 13) para 198.

[32] ibid para 193; *Hrvatska Elektroprivreda DD v the Republic of Slovenia*, ICSID Case No ARB/05/24, Decision on the Treaty Interpretation Issue (12 June 2009) (Brower, Paulsson (dissenting), Williams) para 159; *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Award (13 March 2009) (Veeder, Audit, Berry) paras 388–390; *Tsa Yap Shum v Republic of Peru*, ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence (19 June 2009) (Fernandez-Armesto, Otero, Kessler) paras 181–182.

[33] *ICS Inspection and Control Services Limited v the Argentine Republic*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) (Dupuy, Bernárdez, Lalonde) paras 266–267; *RosInvestCo UK Ltd v The Russian Federation*, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007) (Böckstiegel, Steyn, Berman) para 42; *B-Mex, LLC v United Mexican States*, ICSID Case No ARB(AF)/16/3, Partial Award (19 July 2019) (Born, Vinuesa (partially dissenting), Verhoosel) para 123; *Renta 4 SVSA v The Russian Federation*, SCC No 24/2007, Award on Preliminary Objections (20 March 2009) (Paulsson, Brower, Landau) para 93; *Tsa Yap Shum* (n 32) paras 175–177.

[34] *AS PNB Banka v Republic of Latvia*, ICSID Case No ARB/17/47, Decision on the Intra-EU Objection (14 July 2021) (Spigelman, Tomka, Townsend) paras 500, 505, 526, 595; *Silver Ridge Power BV v Italian Republic*, ICSID Case No ARB/15/37, Award (26 February 2021) (Simma, Johnson (dissenting), Cremades) para 222; *Eco Oro Minerals Corp v the Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) (Blanch, Naón (partially dissenting), Sands (partially dissenting)) para 371.

- The interpretive exercise must be balanced and objective, without any presumption in favour of the host State or investor.[35]
- It is permissible to step beyond the 'four corners' of the IIA at hand to compare it with the treaty text of *other* IIAs entered into with third States.[36]

It is worth noting that scholars,[37] lawyers, or even arbitrators may be tempted to refer to the *jurisprudence constante* of past arbitral decisions in order to determine some general rule in international investment law. Two authorities spring to mind.

On the one hand, the tribunal in *Daimler v Argentina* opined:

> As the large and thriving global market for distressed debt attests, most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived. The reason is that such severability greatly facilitates and speeds the productive re-employment of assets in other ventures.[38]

On the other hand, the tribunal in *Mihaly v Sri Lanka* opined:

> A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit.[39]

Never mind that both authorities stand at diametrically opposite positions. Neither authority holds much legal sway. First, their factual bases are too peculiar, narrow, and dissimilar—particularly, as to the timing of the assignment—to allow the extrapolation of any wider principle of international law.[40] Second, their differing outcomes can be easily reconciled and rationalised from the perspective of *ratione temporis*.

This textual analysis primarily focuses on the *Energy Charter Treaty* (ECT).[41] Ratified by over 50 States in Europe and Central Asia,[42] the

[35] *Renta* (n 33) para 55; *Casinos Austria* (n 22) para 181; *RosInvest* (n 33) para 44; cf *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) (El-Kosheri, Crawford, Crivellaro) para 116.

[36] *Plama* (n 13) para 195; *Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No ARB/10/12, Award (2 November 2012) (Park, Legum, Pryles) paras 233–235 (*SCB*). However, reference to such external aids of interpretation must be exercised with caution as 'each BIT has its own identity' and 'striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts' (*AES Corporation* (n 20) paras 24–25).

[37] Goh (n 11) 28.

[38] *Daimler* (n 15) para 144.

[39] *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) (Sucharitkul, Rogers, Suratgar) para 24.

[40] The assignment in *Daimler* occurred *after* the commencement of arbitration, whilst the assignment in *Mihaly* occurred *before* arbitration commenced. The materiality of such distinction is explained in Section III(C).

[41] The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

[42] *Plama* (n 13) para 121.

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ECT has lived up to expectations as being the 'most ambitious multilateral treaty' and 'a quantum leap' in investment protection.[43] Since 2014, the ECT has overtaken NAFTA[44] as the most frequently invoked IIA both in terms of total numbers[45] and on an annual basis (2014–20).[46] Negotiations on treaty modernisation commenced in 2018.[47] With such expansive reach, the ECT arguably now sits at the centre of investor–State arbitration.

That said, reference to the ECT and other IIAs is for illustrative purposes only. Ultimately, treaties are autonomous creatures. Each IIA is to be interpreted without preconceived notions of what the States Parties intended. The quest to ascertain the jurisdictional scope of IIAs must begin with a clean slate.

III. THE JURISDICTIONAL TRIPLE-LAYER DEFENCE

It is the common practice of international courts and tribunals to examine jurisdictional challenges under three heads: *ratione materiae*, *ratione personae* and *ratione temporis*. This applies to all forms of manifestation of State consent to dispute settlement, whether by way of treaty (compromissory clauses[48]) or unilateral declarations (optional clause declarations accepting compulsory jurisdiction[49]).

[43] Paulsson (n 21) para 248.

[44] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

[45] UNCTAD, 'Recent Trends in IIAs and ISDS' (UNCTAD IIA Issues Note, 19 February 2015) 7 <https://unctad.org/system/files/official-document/webdiaepcb2015d1_en.pdf>.

[46] UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2015' (UNCTAD IIA Issues Note, 8 June 2016) 5 <https://unctad.org/system/files/official-document/webdiaepcb2016d4_en.pdf>; UNCTAD, 'Special Update on Investor–State Dispute Settlement: Facts and Figures' (UNCTAD IIA Issues Note, 7 November 2017) 3 <https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf>; UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2017' (UNCTAD IIA Issues Note, 1 June 2018) 3 <https://unctad.org/system/files/official-document/diaepcbinf2018d2_en.pdf>; UNCTAD, 'Fact Sheet on Investor–State Dispute Settlement Cases in 2018' (UNCTAD IIA Issues Note, 29 May 2019) 3 <https://unctad.org/system/files/official-document/diaepcbinf2019d4_en.pdf>; UNCTAD, 'Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019' (UNCTAD IIA Issues Note, 7 July 2020) 4 <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf>; UNCTAD, 'Investor–State Dispute Settlement Cases: Facts and Figures 2020' (UNCTAD IIA Issues Note, 2 September 2021) 3 <https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf>.

[47] Energy Charter Secretariat, 'Decision of the Energy Charter Conference on the Modernisation of the Energy Charter Treaty' (Brussels, 28 November 2017) CCDEC 2017 23 STR.

[48] *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595, paras 23, 26–27, 34.

[49] *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, paras 28–29; *Aerial Incident of 10 August 1999 (Pakistan v India)* (Jurisdiction of the Court) [2000] ICJ Rep 12, para 40; *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Rep 432, para 84.

All three heads are interrelated and overlapping. There is no strict hierarchy. Arbitral tribunals are free to consider jurisdictional objections in any particular order.[50] The ICJ typically examines whichever head 'is more direct and conclusive'[51] when considering jurisdictional challenges.

Although conspicuously absent from the treaty text of most IIAs, recognition of all three jurisdictional concepts is strongly implied in Article 25 of the ICSID Convention: jurisdiction *ratione materiae* ('investment'),[52] *ratione personae* ('national'),[53] and *ratione temporis* ('on the date on which the request was registered').[54] This is reinforced by Article 4(2) of the ICSID Additional Facility Rules stipulating that the ICSID Secretary-General shall only administer cases where parties have consented to ICSID's jurisdiction under Article 25 of the ICSID Convention 'in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met'.[55]

This provides a three-layered defence mechanism which filters claims falling outside the protective sphere of an IIA (and consequently the jurisdictional scope of its dispute settlement body). Whilst some parts of the analysis offered here may not fit squarely within established arbitral practice (especially as regards jurisdiction *ratione temporis*), that should not detract from the utility of this approach in assisting treaty interpreters to determine the extent of a host State's consent to investor–State arbitration under an IIA.

Ultimately, the test of whether a particular assignment of investment is protected by an IIA can be narrowed down to three simple questions: What did the claimant invest? How much did the claimant contribute to such investment? When did the claimant acquire such investment? Put simply, the test turns on the nature, purpose, and timing of the assignment.

A. Jurisdiction Ratione Materiae

The test of jurisdiction *ratione materiae* (subject matter jurisdiction) turns upon the varying definitions of 'investment' across different IIAs. The definitional

[50] *Transglobal Green Energy, LLC v Republic of Panama*, ICSID Case No ARB/13/28, Award (2 June 2016) (Sureda, Paulsson, Schreuer) para 100.

[51] *Legality of Use of Force* (n 49) para 46; *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, 25; *Aegean Sea Continental Shelf (Greece v Turkey)* (Jurisdiction of the Court) [1978] ICJ Rep 3, para 40; *Aerial Incident* (n 49) para 26.

[52] *Philip Morris Brands SARL v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) (Bernardini, Born, Crawford) para 193; *Ambiente Ufficio SPA v the Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (Simma, Böckstiegel, Bernárdez (dissenting)) para 433.

[53] *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Award (26 April 2017) (Malintoppi, Bermann, Söderlund) paras 152–153; *KT Asia* (n 20) paras 135–136.

[54] *Compañiá de Aguas del Aconquija SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Jurisdiction (14 November 2005) (Kaufmann-Kohler, Bernal, Rowley) para 60.

[55] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (adopted 10 April 2006).

clauses embodied in the ECT are also to be found in a myriad of other modern IIAs, albeit with certain variations.[56]

These definitional terms can be loosely categorised into two types: (a) pro-assignment, and (b) anti-assignment. Although these terms are neither definitive nor exhaustive in determining whether a *specific* IIA protects a *specific* investment, they exemplify the main provisions that tribunals typically deem most relevant when determining the extent of their jurisdiction.

1. Pro-assignment

Article 1(6) of the ECT defines 'investment' as 'every kind of asset, owned or controlled directly or indirectly by an Investor' which is 'associated with an Economic Activity in the Energy Sector'. The words 'owned' and 'controlled' are disjunctive.[57] One of the enumerated examples of assets includes 'claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment'.[58] Arbitral tribunals have consistently recognised that 'claims to money' include financial and credit instruments. In *Petrobart v Kyrgyzstan*, the tribunal found a contract for the sale of gas condensate (and a court judgment enforcing a debt arising from said contract) constituted an investment under this limb of the ECT.[59] In *Fedax v Venezuela*, a promissory note acquired from a Venezuelan investor was deemed a foreign investment, despite the identity of the investor having changed with every endorsement, so long as 'credit is provided by a foreign holder of the notes'.[60]

Moreover, Article 1(6) of the ECT stipulates that any 'change in the form in which assets are invested does not affect their character as investments'. This proviso is wide enough to cover not only changes in the form of investment held by the original investor, but also any change in the ownership of an investment from the original investor to a subsequent investor. This was well illustrated in *African Holding v Congo* which concerned the assignment of contracts between two co-claimants creating a 'continuum' of an investment

[56] Agreement between Japan and the Kingdom of Morocco for the Promotion and Protection of Investment (adopted 8 January 2020) art 1(a); Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part (adopted 30 June 2019) art 12(h) (EU–Vietnam BIT); Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (2019) (adopted 5 April 2019) art 1(1)(a); Agreement between Ukraine and Japan for the Promotion and Protection of Investment (adopted 5 February 2015) art 1(1); Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (adopted 14 November 1991) art 1(1)(a).

[57] *Saluka* (n 15) para 203; *Yukos* (n 16) para 430.

[58] ECT (n 41) art 1(6)(c).

[59] *Petrobart Limited v The Kyrgyz Republic (II)*, SCC Arbitration No 126/2003, Award (29 March 2005) (Danelius, Smets, Bring) 71–2.

[60] *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) (Vicuña, Owen, Heth) paras 37–40. The definition of 'investment' under the Netherlands–Venezuela BIT includes 'titles to money'.

in which its 'nature and character are kept unchanged'.[61] In finding that only the assignee claimant (and not the original investor and assignor claimant) had standing to commence the claim against Congo,[62] the tribunal provided this colourful but apt analogy:

> Once money or claim leaves one pocket and goes into the other, only that other pocket can claim or collect it … The pockets may belong to the same pants, but they are still different pockets.[63]

Hence, it is well-settled that an assignment of a contract or debt can be regarded as an 'asset' under the ECT and analogous IIAs. However, this is only half the picture since not every 'asset' constitutes an 'investment'.

2. *Anti-assignment*

Only an 'investment associated with an Economic Activity in the Energy Sector' is protected under the ECT. This is a fundamental criterion. In *Amto v Ukraine*, the tribunal construed the term 'associated with' as requiring a 'factual rather than legal association'.[64] In other words, a 'functional relationship' with the energy sector was required, whilst a 'mere contractual relationship with an energy producer' was insufficient.[65]

A deep dive into *Energorynok v Moldova* illustrates how this criterion can be used to distinguish assignments of genuine investments from mere contractual debts.[66] The arbitration concerned an electricity supply agreement between Ukraine and Moldova (APO).[67] Due to an electrical overflow from Ukraine to Moldova, the Moldovan State enterprise was obliged to pay compensation.[68] The Ukrainian counterparty transferred the debt to another State enterprise (the claimant) which became the 'legal successor' over the APO rights.[69] The claimant commenced a civil suit in the Moldovan court and obtained judgment.[70] After repeated failures in enforcement, the claimant commenced arbitration against Moldova under the ECT.[71]

The tribunal had little hesitation in finding that the APO constituted a protected investment.[72] The critical issue, however, was whether the

[61] *African Holding Company of America, Inc v Congo*, ICSID Case No ARB/05/21, Decision on Jurisdiction and Admissibility (29 July 2008) (Vicuña, Wijnen, Grisay) paras 75–84 (citing *Fedax* (n 60) with approval at para 77).
[62] ibid para 73.
[63] ibid para 70 (unofficial translation). The assignment of an 'investment' between two co-claimants was also validated in *MNSS BV v Montenegro*, ICSID Case No ARB(AF)/12/8, Award (4 May 2016) (Sureda, Stern, Gaillard) para 203 ('The First Loan did not change its condition as an investment because of the assignment. The change of creditor changes the investor but not the substance of the investment.').
[64] *Limited Liability Company Amto v Ukraine*, SCC Arbitration No 080/2005, Final Award (26 March 2008) (Cremades, Söderlund, Runeland) para 42.
[65] ibid para 42.
[66] *State Enterprise Energorynok v the Republic of Moldova*, SCC Case No 2012/175, Final Award (29 January 2015) (Turck, Knieper, Tirado).
[67] ibid paras 15–19.
[68] ibid para 22.
[69] ibid para 5.
[70] ibid para 26.
[71] ibid paras 26–30.
[72] ibid paras 81–82.

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contractual debt assigned to the claimant was similarly protected.[73] The tribunal distinguished *Petrobart v Kyrgyzstan* on the basis that the case concerned an original investor claiming for payment of gas supplied by itself, and not another party.[74] In contrast, the claimant in the present case never had any role, control or influence in the transmission of electricity to Moldova.[75] The claimant's financial interest resided in the 'claim of money' itself (debt recovery), and not the economic activity (transmission of electricity).[76] Hence, the tribunal concluded that it lacked jurisdiction over the dispute because the claimant merely acquired a debt and this fell short of acquiring an investment protected under the ECT.[77]

A similar finding on closely analogous facts was reached in *Energoalians v Moldova*.[78] The Ukrainian claimant acquired two debts owed by the same Moldovan State enterprise as a result of defaulting on payments due under two contracts to supply electricity to power grids in Moldova.[79] The first debt arose from a tripartite contract requiring the claimant (supplier) to supply electricity to a Swiss company based in Ukraine (buyer) for onward use by the Moldovan State enterprise (recipient).[80] The recipient's debt to the buyer was assigned to the claimant supplier.[81] The second debt arose from a similar series of transactions with one singular but critical difference—the supplier was a third party, and not the claimant.[82] Under the ECT, the tribunal found that it only had jurisdiction *ratione materiae* over the first debt, where the claimant had participated in the contract for supply of electricity,[83] but not the second debt where the claimant had no participation whatsoever.[84] Once again, the factual link between the 'claim of money' and 'economic activity' was central to its reasoning.[85]

There is, however, another interesting twist to the tale. Under the Ukraine–Moldova BIT, the tribunal found that it lacked jurisdiction for *both* debts.[86] Unlike the ECT, the Ukraine–Moldova BIT defines 'investment' as 'every kind of asset invested *in connection with economic activities by an investor* of one Contracting Party in the territory of the other Contracting Party'.[87]

[73] ibid paras 80, 89. [74] ibid paras 86–87. [75] ibid paras 91–92.
[76] ibid paras 90, 95. [77] ibid paras 101, 103.
[78] *Energoalians LLC v Republic of Moldova*, UNCITRAL *ad hoc* arbitration, Award (23 October 2013) (Pellew, Volcinski, Savranski). This case has a long chequered history. Moldova applied to set aside the award at Paris, the arbitral seat, on the ground that the tribunal lacked jurisdiction *ratione materiae*. In 2016, the award was set aside by the Paris Court of Appeal. In 2018, the French Court of Cassation overturned the decision and remitted the matter back to the Paris Court of Appeal, which then referred the jurisdictional question to the Court of Justice of the European Union (CJEU). On 2 September 2021, the CJEU decided in favour of Moldova (Case C-741/19 *Republic of Moldova v Komstroy LLC* EU:C:2021:655).
[79] *Energoalians LLC v Republic of Moldova* (n 78) paras 69–80. [80] ibid paras 70–71.
[81] ibid paras 72–74. The buyer settled all payments due to the claimant supplier.
[82] ibid paras 77–79. [83] ibid paras 80, 250–251, 262. [84] ibid paras 80, 268–272.
[85] ibid paras 285–289. [86] ibid paras 282, 289.
[87] Agreement between the Republic of Moldova and Ukraine for the Promotion and Protection of Investments (adopted 29 August 1995) art 1 (emphasis added). The material difference between

According to the tribunal, these additional words imply that an 'investment' only arises when an investor carries out economic activity in the host State 'at the moment of the respective asset acquisition' (or alternatively, the 'acquisition of an asset should be necessarily followed by a commencement of new economic activity' by the investor).[88] Since the electricity was supplied only up to the Ukrainian–Moldovan border, neither the claimant nor the buyer had carried out any economic activity in the energy sector of Moldova.[89] Further, post-assignment, the debt recovery suits commenced in the Moldovan courts did not qualify as a new 'economic activity.[90]

Mention must also be made of the controversial *Salini* test that posits four additional elements to the definition of 'investment': (i) contribution of capital; (ii) duration; (iii) element of risk; and (iv) contribution to the host State's economy.[91] Even today, arbitral tribunals remain divided on this—it is embraced by some,[92] but rejected by others.[93]

There is no need to wade into this legal quagmire,[94] except to make three observations. First, the test only applies (if at all) to the extent consistent with the treaty text construed in accordance with the general rules of treaty interpretation, for the same reasons previously cited in support of the textual approach **(**Section II**).** Second, an assignment of investment will typically only have difficulty meeting the fourth limb—especially a bare assignment of

this additional qualifying term and the proviso in Article 1(6) of the ECT is that the latter lacks direct reference to the territory of the host State.

[88] *Energoalians* (n 78) para 285.

[89] ibid paras 71, 286–287. Both contracts were based on DAF terms (delivered at frontier). Incidentally, this singular fact was pivotal to the CJEU's reasoning that the contract did not constitute an 'investment' under Article 1(6) of the ECT (see *Komstroy* (n 78) paras 76–84).

[90] ibid paras 89–118, 288.

[91] *Salini Costruttori SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) (Briner, Fadlallah, Cremades Sanz-Pastor) para 52.

[92] *Romak SA v The Republic of* Uzbekistan, PCA Case No AA280, Award (26 November 2009) (Mantilla-Serrano, Molfessis, Rubins) para 188; *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction (6 August 2004) (Vicuña, Weeramantry, Craig) para 53; *Jan de Nul NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction (16 June 2006) (Kaufmann-Kohler, Stern, Mayer) para 91; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction (17 October 2006) (Derains, Dolzer, Lee) para 77; *Christian Doutremepuich v Republic of Mauritius*, PCA Case No 2018-37, Award on Jurisdiction (23 August 2019) (Scherer, Paulsson, Caprasse) para 117; *Isolux Infrastructure Netherlands BV v Kingdom of Spain*, SCC Case No V2013/153, Award (12 July 2016) (Derains, Tawil (dissenting), von Wobeser) paras 683–686.

[93] *Flemingo DutyFree Shop Private Limited v Republic of Poland*, PCA Case No 2014-11, Award (12 August 2016) (Houtte, Townsend, Kühn) para 298; *White Industries Australia Limited v The Republic of India*, UNCITRAL *ad hoc* arbitration, Final Award (30 November 2011) (Rowley, Brower, Lau) para 7.3.8; *A11Y Ltd. v Czech Republic*, ICSID Case No UNCT/15/1, Award (29 June 2018) (Fortier, Joubin-Bret, Alexandrov) para 138; *Ceskoslovenska Obchodni Banka, as v The Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) (Buergenthal, Bernardini, Bucher) paras 78, 90 (*CSOB*); *Fedax* (n 60) para 25; *African Holding* (n 61) para 75; *Energoalians* (n 78) paras 237, 241.

[94] A Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) Chicago Journal of International Law 287, 293; P-E Dupont, 'The Notion of ICSID Investment: Ongoing "Confusion" or "Emerging Synthesis"?' (2011) 12(2) The Journal of World Investment & Trade 245, 246.

a contractual debt where the investment has long matured and no longer contributes in any meaningful way to economic activity. Even tribunals receptive of the *Salini* test are generally inclined to exclude the requirement of the fourth limb (or presume its existence from the fulfilment of the other three limbs).[95] Indeed, only the first three limbs have been incorporated in modern IIAs incorporating the *Salini* test in the definition of 'investment'.[96] Third, the test as a whole (including the fourth limb) is a weak filter capable of catching only the most blatant forms of bare assignments.

Returning to the crux of this analysis, it can be seen that the words 'associated with' or 'in connection with' the 'investment' can narrow the scope of a tribunal's jurisdiction *ratione materiae* in relation to claims over investments acquired by a subsequent investor through assignment. In short, the relationship between the asset acquired and the original investment remains a key variable in the equation.

B. Jurisdiction Ratione Personae

The test of jurisdiction *ratione personae* (personal jurisdiction) primarily turns upon the definition of 'investor'. Article 1(7)(a)(ii) of the ECT defines a corporate 'investor' as 'a company or other organisation organised in accordance with the law applicable in that Contracting Party'. Another relevant provision is Article 17(1) of the ECT which embodies what is commonly known as a 'denial of benefit' clause:

> Each Contracting Party reserves the right to deny the advantages of this Part to … a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised.[97]

Further, Article 26 of the ECT sets out the procedure for dispute settlement by way of investor–State arbitration (paraphrased for brevity):[98]

- Disputes between a host State and an investor relating to an investment in the Area of the host State shall, if possible, be settled amicably.
- If such disputes cannot be settled, the investor may choose to submit the dispute for resolution through international arbitration by providing its consent in writing.

[95] *Phoenix Action* (n 15) paras 83–85; *Mr. Franz Sedelmayer v The Russian Federation*, SCC *ad hoc* arbitration, Arbitration Award (7 July 1998) (Magnusson, Zykin (dissenting), Wachler) para 224; *LESI SpA v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction (12 July 2006) (Tercier, Gaillard, Faurès) paras 72–73; *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) (van Houtte, Lévy, Gaillard) paras 110–111; *Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17, Award (excerpts) (2 July 2018) (Reinisch, Wirth, Griffith) para 237; *Quiborax SA, Non Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) (Kaufmann-Kohler, Lalonde, Stern) paras 220–225; *Isolux* (n 92) para 685.

[96] See Section IV.

[97] ECT (n 41) art 17.

[98] ibid art 26(2)–(5).

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- Each host State gives its unconditional consent to the submission of a dispute to international arbitration.
- The unconditional consent given by the host State together with the written consent of the investor shall satisfy the requirement for 'written consent' under the ICSID Convention or 'agreement in writing' under the New York Convention.[99]

This analysis of jurisdiction *ratione personae* under the ECT and analogous BITs will follow the twofold structure adopted in the previous section concerning jurisdiction *ratione materiae*.

1. *Pro-assignment*

It is evident that the ECT's definition of corporate investors adopts the incorporation test, and not the control test.[100] Company A(x) is entitled to claim against State Y under an IIA between State X and State Y, so long as Company A(x) is legally incorporated in State X. It is immaterial that Company A(x) is a shell company with no business operations in State X. Understandably, a common objection of State Y is the lack of any genuine link of nationality between Company A(x) and State X[101] and abuse of forum shopping.[102] Still, such concerns cannot override the express words of the treaty, as succinctly noted by the *Saluka* tribunal when interpreting the Czech–Netherlands BIT:[103]

> The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed … and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.[104]

Similar sentiments were expressed by the tribunal in *Tokios Tokelès v Ukraine* when interpreting the Ukraine–Lithuania BIT, reinforced by its object and purpose[105] and lack of a denial of benefits clause[106] (unlike the Ukraine–United States BIT[107] and the ECT). Does this mean that a denial of benefits clause would subsume the control test? Not exactly. In *Plama v Bulgaria*, the

[99] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art II(1)–(2).
[100] *Tokios* (n 15) para 30; *Plama* (n 13) para 124; *Saluka* (n 15) para 240; *Yukos* (n 16) para 416.
[101] *Nottebohm* (n 25) 22–3.
[102] *Saluka* (n 15) para 240.
[103] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (adopted 29 April 1991).
[104] *Saluka* (n 15) para 241.
[105] *Tokios* (n 15) paras 31–32.
[106] ibid paras 33–36 ('We regard the absence of such a provision as a deliberate choice of the Contracting Parties.').
[107] Treaty between Ukraine and the United States of America Concerning the Encouragement and Reciprocal Protection of Investments (adopted 4 March 1994) art 1(2) ('[E]ach Party reserves the right to deny to any company the advantages of this treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party … .').

tribunal construed Article 17 of the ECT as being applicable only to its substantive provisions under Part III,[108] and as vesting a right exercisable by the host State by giving express notice within a reasonable time *after* the investment is made.[109] In short, Article 17 does not operate as an absolute and automatic jurisdictional barrier against investor claims.

Generally, the incorporation test dispels any objection to the exercise of jurisdiction *ratione personae* over claimants having indirect ownership or control over an investment. Likewise, the test equally dispels objections to the assignment of an investment from Company C(z) of State Z to Company A(x) of State X. It is immaterial that the assignment is designed to take advantage of Company A(x)'s nationality in State X to gain access to the BIT between State X and State Y.[110]

Another possible objection to such an assignment revolves around the concept of consent and *intuitu personae*—that only an original investor can invoke the BIT against the host State. In other words, Company A(x), being the subsequent investor, cannot invoke the BIT against State Y (as such a right is only vested with Company C(z) as the original investor, who cannot invoke the IIA since State Z is a non-party). However, this objection fails on two counts.

First, under customary international law, there is no rule that prohibits the assignment of treaty claims. The doctrine of *intuitu personae* alluded to by scholars such as Schreuer[111] and Judge Crawford[112] is to be understood in the context of diplomatic protection. As explained by Judge Jessup in *Barcelona Traction*, the rationale 'for the rule on continuity of nationality of claims is the avoidance of assignments of claims by nationals of a small State to nationals of a powerful State'.[113] In contrast, an IIA is a hybrid platypus-like creature straddling public and private international law.[114] Douglas aptly characterises an IIA claim as a 'direct claim' (as opposed to a 'derivative claim' under diplomatic protection).[115]

Second, the plain text of an IIA cannot be overridden by additional requirements under the customary law of diplomatic protection.[116] An

[108] *Plama* (n 13) paras 146–151. Part III of the ECT contains the majority of the substantive provisions on investment protection (ie MFN, FET and expropriation). Dispute settlement (*vide* Article 26) is found in Part V.

[109] ibid paras 153–165.

[110] This is subject to considerations of *ratione temporis* in Section III(C).

[111] C Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 177–90.

[112] J Crawford and I Brownlie, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 704.

[113] *Barcelona Traction* (n 3) 189, para 48 (Separate Opinion of Judge Jessup).

[114] A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) AJIL 45, 45–6.

[115] Z Douglas, *The International Law of Investment Claims* (Cambridge University Press 2012) 161–84.

[116] *Waste Management, Inc v United Mexican States (II)*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Gómez) para 85.

investor's right to arbitration against the host State under an IIA is provided by its dispute settlement clause. Any recourse to investor–State arbitration rests on the fundamental notion that the host State has made an 'open offer to arbitrate' to all investors of other States Parties.[117] Their arbitration agreement is sealed (albeit counter-intuitively) when the investor submits a written notice of arbitration.[118] Since commencement constitutes acceptance, there is no further requirement of consent from the host State.[119] Such a unique arbitral mechanism is well entrenched in the ECT and the ICSID regime, as recognised by scholars[120] and arbitral tribunals.[121]

Hence, it is immaterial whether the host State is aware of the investor's existence or incorporation in the other State Party.[122] Nor is it relevant that the host State was initially aware of the investment made by the original investor in its territory, but unaware of its assignment to a subsequent investor of a different nationality. In short, a host State's consent to arbitration cannot be vitiated due to the absence of consent to (or even knowledge of) the assignment.

Any lingering doubt was laid to rest in *Vannessa Ventures v Venezuela*.[123] The investment concerned a joint venture between a governmental agency and original investor to extract gold and copper at the Las Cristinas mine.[124] Their shareholders' agreement prohibited assignment without the counterparty's consent.[125] As works stalled, the original investor unilaterally sold its shares in the joint venture to the claimant.[126] Upon discovering the sale, the agency terminated the mining contract.[127] Venezuela raised a jurisdictional objection that the joint development of Las Cristinas was *intuitu personae* in nature and the assignment violated Venezuelan contract law on non-assignment.[128] In dismissing the objection, the tribunal opined:

> Nonetheless, the *intuitu personae* character of the contracts does not itself put Claimant's ownership of shares in PDV outside the scope of the Canada-Venezuela BIT … The Tribunal's view that the participation of [the original investor], rather than any other company, was an essential part of the contractual arrangements in respect of Las Cristinas does not, therefore, preclude Claimant's ownership of shares in PDV from satisfying the BIT's definition of 'investment.'[129]

[117] *Amto* (n 64) para 45. [118] ibid para 46. [119] ibid.
[120] C Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) 218; CF Amersinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes' (1979) 19 Indian Journal of International Law 166, 224.
[121] *SGS* (n 35) para 31; Tokios (n 15) para 98.
[122] The domestic law of some States may require registration of foreign investments (see *Beijing Urban Construction Group Co Ltd v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) (Binnie, Douglas, Townsend) paras 45–47).
[123] *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/04/6, Award (16 January 2013) (Lowe, Stern, Brower). [124] ibid paras 56–61. [125] ibid para 65.
[126] ibid paras 84–85. [127] ibid paras 93, 98. [128] ibid paras 138–140.
[129] ibid para 154.

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Hence, there is no doctrine of *intuitu personae* which precludes a subsequent investor from invoking an IIA claim against the host State from the aspect of jurisdiction *ratione personae*.[130]

2. *Anti-assignment*

Nonetheless, it is plausible for the express terms of an IIA to preclude a subsequent investor from invoking its dispute settlement mechanism. One technique has already been touched upon—a denial of benefits clause. To draw a contrast with the ECT, the tribunal in *Plama v Bulgaria* provided the ASEAN Framework Agreement on Services[131] as a counter-example:

> The benefits of this Framework Agreement shall be denied to a service supplier … not engaged in substantive business operations in the territory of Member States(s).[132]

In *Pac Rim v El Salvador*, the tribunal found that Article 10.12.2 of CAFTA[133] was worded more broadly than the ECT and encompassed both the substantive section on investment protection and the procedural section on investor–State dispute settlement:

> [A] Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party … .[134]

The extent to which a host State may 'nullify' its 'consent to arbitration' under a denial of benefits clause differs from treaty to treaty.[135] At any rate, even an expansive clause is only capable of precluding assignments of investments to a shell company.[136] Assignment between investors of different nationalities is still permissible, so long as the claimant investor maintains a commercial footprint in a State Party of the IIA. This is not difficult to establish, especially for multinational conglomerates and financial institutions with multiple subsidiaries spread out over multiple jurisdictions. Arbitral tribunals

[130] The converse is also true—the validity of an IIA is unaffected by any change of political regime of a host State: *Sanum Investments Limited v Lao People's Democratic Republic*, PCA Case No 2013-13, Award on Jurisdiction (13 December 2013) (Hanotiau, Stern, Sureda) para 246 ('it would be excessive to say that all bilateral treaties are *so* personal, *so* related to *intuitu personae* questions that they cannot survive a State's succession' (emphasis in original text)).

[131] *Plama* (n 13) para 156.

[132] ASEAN Framework Agreement on Services (adopted 15 December 1995, entered into force 30 December 1998) art V.

[133] Dominican Republic-Central America-United States Free Trade Agreement (entered into force 1 March 2006).

[134] *Pac Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objection (1 June 2012) (Tawil, Stern, Veeder) paras 4.1–4.4.

[135] *Luxtona Limited v The Russian Federation*, PCA Case No 2014-09, Interim Award on Respondent's Objections to the Jurisdiction of the Tribunal (22 March 2017) (Oreamuno, Radicati, Crook) paras 279–281.

[136] *Gran Colombia Gold Corp v Republic of Colombia*, ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue (23 November 2020) (Kalicki, Hanotiau, Stern) para 141.

have construed the test of 'substantial' as one of 'materiality' rather than one of 'magnitude'.[137] In short, a denial of benefits clause does not fully plug the 'jurisdictional loophole' that allows forum shopping by passive investors.[138]

A more effective approach is to draw a link between the 'investment' and 'economic activity' within the host State. A few examples have been alluded to previously (eg Article 1 of the Ukraine–Moldova BIT and, to a lesser degree, the proviso to Article 1 of the ECT). A restrictive definition of 'investment' is marginally better than a denial of benefit clause. The former requires a closer factual and temporal link between the investor and the host State, whilst the latter merely requires a link between the investor and its home State.

Perhaps the best approach is to draw a direct link between the investor and the investment (straddling over both jurisdiction *ratione materiae* and *ratione personae*). Ironically, this technique does not require any complex draftsmanship, and can be found hidden in plain sight within the most basic of IIAs. This was exemplified in *SCB v Tanzania*.[139] The claimant, a UK bank, wholly owned a Hong Kong subsidiary through direct and indirect shareholding.[140] The Hong Kong subsidiary purchased a loan issued by a consortium of Malaysian banks to a Tanzanian borrower.[141] The dispute primarily revolved around the non-payment of loans utilised to fund a Tanzanian power plant.[142]

The principal provision under the spotlight was the jurisdictional clause in Article 8(1) of the UK–Tanzania BIT (which closely mirrors Article 26 of the ECT).[143] The question was whether the dispute concerned 'an investment of [a UK company] in the territory of [Tanzania]'.[144] Another provision that attracted much scrutiny was Article 11 governing the applicable law which used the words 'investments by investors'.[145] The crux of Tanzania's jurisdictional objection essentially turned on the prepositions 'of' and 'by' that connected the words 'investor' and 'investment'.[146] The tribunal began by examining the word 'of' with meticulous linguistic rigour:

> [W]ith respect to the preposition 'of' different meanings can be adduced. Some uses indicate a contributory relationship (as in the 'the plays of Shakespeare' or 'the paintings of Rembrandt'), while others define ownership (as in 'the house of Shakespeare' or 'the hat of Rembrandt').

[137] ibid paras 137–138; *Amto* (n 64) para 69; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) (Beechey, Born, Stern) para 253; *Littop Enterprises Limited, Bridgemont Ventures Limited v Ukraine*, SCC Case No V 2015/092, Final Award (4 February 2021) (Lew, Fortier, Oreamuno) paras 616, 624.

[138] J Ho, 'Passive Investments' (2020) 35(3) ICSID Rev 523, 529.

[139] *SCB* (n 36).

[140] ibid paras 196, 252.

[141] ibid para 196.

[142] ibid paras 23–29, 55–58.

[143] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments (adopted 7 January 1994, entered into force 2 August 1994) UKTS 90 (1996), Cm 3453, art 8(1) ('any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former').

[144] *SCB* (n 36) paras 205, 208.

[145] ibid para 219.

[146] ibid para 213.

> The phrase 'an investment of the latter' (Article 8 of the BIT) remains more equivocal. Neither the possessive nor the contributory connotation presents itself with the same degree of obviousness as in the examples suggested above.[147]

After noting the UK–Tanzania BIT's interchangeable use of the terms 'investments by investors', 'investment by nationals and companies' and 'investments by a national or company',[148] the tribunal proceeded to examine the word 'by':

> The preposition 'by' can indicate the relationship between subject and object when an active sentence is converted into a passive form … 'She made a contribution' becomes 'A contribution was made by her.' In this formulation, the associated verb sheds useful light on the contemplated relationship between object and subject.[149]

Since the verb 'made' was sprinkled throughout the treaty's preamble, the definition of 'investment', and provisions on its temporal application, the tribunal found that the verb 'implies some action in bringing about the investment, rather than purely passive ownership'.[150] After cross-checking with other secondary sources (ie the treaty's object and purpose,[151] other IIAs between Tanzania and third States,[152] and past arbitral decisions[153]), the tribunal concluded that the claimant's lack of active participation in the Tanzanian loans did not justify a finding of jurisdiction.[154] This was underscored by a restrictive interpretation of the jurisdictional clause:

> To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner …
>
> [F]or an investment to be 'of' an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.[155]

Three months earlier, in *Alapli v Turkey*, Arbitrator Park adopted a similar approach when interpreting the word 'of' in Article 26(1) of the ECT concerning dispute settlement ('Investment of the latter in the Area of the former') and Article 3(1) of the Netherlands–Turkey BIT concerning FET protection ('investments of investors of the other Contracting Party'):[156]

[147] ibid paras 216–217. [148] ibid paras 218–219. [149] ibid para 220.
[150] ibid paras 221–222. [151] ibid paras 226–229. [152] ibid paras 241–244.
[153] ibid paras 245–256. [154] ibid paras 257–266. [155] ibid paras 230–232.
[156] *Alapli* (n 15) paras 355–361. Turkey's jurisdictional objection was allowed by majority vote (Lalonde dissenting). However, both majority arbitrators gave separate concurring opinions on their preferred grounds (Park relied on *ratione personae*, whilst Stern on *ratione temporis*). Incidentally, Park also sat in the panel of *SCB* (n 36).

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> In each instance, the investor is assumed to be an entity which has engaged in the activity of investing, in the form of having made a contribution. An alleged investor must have made some contribution to the host state permitting characterization of that contribution as an investment 'of' the investor …
>
> Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing.[157]

Unlike *SCB v Tanzania*, Arbitrator Park did not embark on an elaborate exercise of linguistic gymnastics. Indeed, one may wonder whether such an exercise is even necessary. After all, to most laypeople, the term 'investment of investors' should be sufficiently self-explanatory and mean that an investor is one who actually makes an investment.[158] Is the term free from ambiguity? Perhaps not. However, treaty interpretation is not a matter of legal perfection. IIAs should be construed through the eyes of an objective interpreter.[159] Neither sophisticated textual interpretation[160] nor further teleological interpretation[161] is required when the ordinary meaning is self-evident.

C. Jurisdiction Ratione Temporis

The concept of jurisdiction *ratione temporis* (temporal jurisdiction) can manifest itself in many ways. It is best to first dispense with those irrelevant to the present analysis, before concentrating on the ones that matter. First, the general rule of non-retroactivity precludes a treaty from binding a State in relation to acts occurring and ceasing before its entry into force for that State.[162] Here, the critical date refers to the date when the IIA comes into force between the States Parties.[163] Second, the general rule in arbitral practice is that only acts or omissions by the host State occurring after the investor's purported investment can engage its responsibility.[164] Here, the critical date refers to the date of the investment by the original investor

[157] ibid paras 358, 360.

[158] ibid para 350. Park referred to the dictionary meaning of 'investor' in the Oxford English Dictionary ('one who invests money or makes an investment') and Webster's ('one that invests; one that seeks to commit funds for long-term profit with a minimum of risk').

[159] *Casinos Austria* (n 22) para 181; *RosInvest* (n 33) para 44.

[160] *Phoenix Action* (n 15) para 79.

[161] *RSM Production* (n 32) para 390.

[162] VCLT (n 14) art 28.

[163] *MCI Power Group, LC v Republic of Ecuador*, ICSID Case No ARB/03/6, Award (31 July 2007) (Vinuesa, Irarrázabal, Greenberg) para 61; *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) (Paulsson, Salpius, Voss) para 11.2; *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award (18 May 2010) (Fortier, Reisman, El-Kosheri) para 98; *Astrida Benita Carrizosa v Republic of Colombia*, ICSID Case No ARB/18/5, Award (19 April 2021) (Kaufmann-Kohler, Fernández Arroyo, Söderlund) para 124.

[164] *Phoenix Action* (n 15) para 68; *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, PCA Case No 2012-17, Award (25 March 2016) (Kauffman-Kohler, Brower (concurring and dissenting), Landau) paras 325–326, 332–333; *Vito G Gallo v Government of Canada*, UNCITRAL, PCA Case No 55798, Award (redacted) (15 September 2011) (Fernández-

(rather than the date of acquisition of the investment by a subsequent investor). Both of these critical dates are irrelevant because the present analysis presupposes that the preliminary events proceed in regular chronological order: the IIA entering into force, the making of the investment and the alleged breach by the host State (this being the key point in time).

Hence, what merits consideration are three other rules and their corresponding critical dates. First, under customary international law, a State can only exercise the right of diplomatic protection over a person possessing its nationality at the time of injury (the date of breach).[165] Second, based on investment arbitral practice, the doctrine of abuse of rights takes into account the timings of the purported investment, the claim, and most pertinently, the claimant's acquisition of the investment (the date of assignment).[166] Third, based on general judicial practice, any jurisdictional challenge is to be assessed at the date of institution of proceedings (the date of commencement of arbitration).[167]

Ultimately, whether there is jurisdiction *ratione temporis* turns upon the timing of assignment.[168] Broadly, there are three possible periods: (a) pre-breach; (b) post-breach and pre-claim; and (c) post-claim. An assignment is most contentious when made within the second period. In addition, the determination of whether there is jurisdiction *ratione temporis* is primarily factual, rather than textual.

1. *Pre-breach*

This is a safe zone in which investments can change hands between investors without legal complication. Imagine that Company C(z) of State Z furnishes a loan to build a power plant in State Y in 2010. The loan is subsequently assigned to Company A(x) of State X in 2013. Company A(x) continues to fund the

Armesto, Castel, Levy) paras 325–326; *Renée Rose Levy v Republic of Peru*, ICSID Case No ARB/11/17, Award (9 January 2015) (Kauffman-Kohler, Zuleta, Vinuesa) para 182.

[165] *The Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* (Merits) [1939] PCIJ Rep Series A/B No 76, 16–17; *Barcelona Traction* (n 3) 202–4, paras 73–77 (Separate Opinion of Judge Jessup); 99–102, paras 61–63 (Separate Opinion of Judge Fitzmaurice). There is some uncertainty whether the rule of continuity also requires the nationality to remain unchanged until the claim is made.

[166] *Transglobal* (n 50) para 50; *Phoenix Action* (n 15) paras 136–138.

[167] *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Objection to the Jurisdiction of the Court) [1924] PCIJ Rep Series A No 2, 34; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, para 26; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, para 162; *Legality of Use of Force* (n 49) paras 79, 91; *CSOB* (n 93) para 31; *Daimler* (n 15) para 141.

[168] *African Holding* (n 61) paras 109, 114–116, 120–122 (the tribunal lacked jurisdiction *ratione temporis* under the United States–Congo BIT because the claimant was acquired by American owners from a Belgian company *after* the dispute arose). Arbitral tribunals typically address the doctrine of abuse of rights as a distinct issue separate from *ratione temporis* (see *Phoenix Action* (n 15) paras 68–71 and 135–144; *Levy* (n 164) para 182; *Pac Rim* (n 134) paras 2.101–2.104; *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) (Böckstiegel, Kaufmann-Kohler, McRae) para 527).

power plant's operation through loan tranches until 2015. Changes to State Y's regulatory policies in 2017 render the power plant commercially unviable. The power plant owner defaults on the loan and becomes insolvent. Company A(x) commences arbitration against State Y under the IIA between State X and State Y in 2020 (no IIA exists between State Y and State Z).

Is there a compelling reason for State Y to object to Company A(x)'s claim? Not really. Although not the original investor, Company A(x) made an active contribution to the power plant, thus fulfilling the tests of jurisdiction *ratione materiae* and *ratione personae*.[169] State Y received economic benefits from the power plant regardless of whether Company A(x) initiated or acquired the loan. There is nothing unexpected or unfair in Company A(x) gaining access to the IIA (despite Company C(z)'s inability to do so) by piggy-backing on a pre-existing foreign investment because State Y's ratification of the IIA constitutes an 'open offer' to all nationals of State X to invest in its territory at any time.

In short, the earlier the assignment takes place, the less objectionable it becomes. A host State may justifiably be aggrieved, however, where the assignment is made closer to the date of purported breach and further away from the date of the original investment made by the assignor.

2. *Post-breach and pre-claim*

This is a danger zone in which abuses of the IIA regime are prone to materialise. On the one hand, it is not unusual for an investor to operate in a State which provides the most beneficial regulatory and legal environment, including for purposes of taxation or investment treaty protection.[170] An upstream modification of investment to take into account the possibility of future disputes is perfectly legitimate.[171] On the other hand, any incorporation made with the primary purpose of gaining access to an IIA constitutes 'an abusive manipulation of the system of international investment protection'.[172] Such downstream modification made after a pre-existing dispute has already arisen (or is about to arise) is impermissible.[173] As aptly put by Paulsson, the

[169] See Section III(A) and (B). It is plausible for State X and State Y to have only intended for their IIA to protect *fresh* capital flowing between their territories. If so, such intention would have been made expressly clear by narrowing the definition of 'investment' to only encompass 'establishing new Investments' (in contrast with Article 1(8) of the ECT which defines 'Making of Investments' as including both 'establishing new Investments' and 'acquiring all or part of existing Investments').

[170] *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) (Caron, Alberro-Semerena (dissenting), Alvarez) para 330.

[171] *Phoenix Action* (n 15) para 94; *Levy* (n 164) para 184; *Pac Rim* (n 134) para 2.51; *Mobil Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) (Guillaume, Kaufmann-Kohler, El-Kosheri) para 204.

[172] *Phoenix Action* (n 15) para 144.

[173] ibid para 95; *Levy* (n 164) para 185; *Pac Rim* (n 134) para 2.51; *Mobil* (n 171) para 205.

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rationale for 'placing temporal limitations' on the latter scenario is 'that the door should be shut on nationals pretending to be foreigners'.[174]

Where is the dividing line to be drawn? This was succinctly answered by the *Pac Rim v El Salvador* tribunal:

> [T]he dividing-line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy … [B]efore that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances … [A]s a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.[175]

There are two situations in which an assignment of an investment becomes abusive: internationalisation of a domestic dispute, and treaty shopping. The first situation is exemplified in a plethora of arbitral decisions.[176] In *Phoenix Action v Czech Republic*, an Israeli company (fully owned by a Czech citizen with dual Israeli nationality) bought two Czech companies 'already burdened with the civil litigation'.[177] Since the transaction was 'not for the purpose of engaging in economic activity' but rather with the sole purpose to 'transform a pre-existing domestic dispute into an international dispute', the tribunal held that it was 'not a bona fide transaction and cannot be a protected investment under the ICSID system'.[178]

In *Transglobal v Panama*, a Panamanian company owned by a Panamanian national was awarded a concession to design, build, and operate a hydroelectric power plant in Panama.[179] Due to construction delays exceeding the contractual deadline, the government agency terminated the concession.[180] The concessionaire filed for administrative review in the Panamanian courts, and successfully obtained a judgment which kept the concession alive.[181] The concessionaire then executed a partnership and transfer agreement with the first claimant, an American company (which formed the second claimant, a Panamanian subsidiary, a month after) to facilitate the execution of the judgment.[182] Since the timing of the transaction evinced an attempt 'to create artificial international jurisdiction over a pre-existing domestic dispute', the tribunal upheld Panama's jurisdictional objection on the ground of abuse.[183]

[174] *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Legal Opinion of Jan Paulsson relating to the Issue of Jurisdiction *Ratione Temporis* (26 February 2021) paras 17–18.
[175] *Pac Rim* (n 134) para 2.99.
[176] *Levy* (n 164) paras 188–195; *Gallo* (n 164) paras 331–336; *Philip Morris* (n 168) paras 585–588; *Cementownia 'Nowa Huta' SA v Republic of Turkey*, ICSID Case No ARB(AF)/06/2, Award (17 September 2009) (Tercier, Lalonde, Thomas) paras 116–117, 136, 146–147, 156–159.
[177] *Phoenix Action* (n 15) paras 136–137.
[178] ibid para 142.
[179] *Transglobal* (n 50) para 50.
[180] ibid paras 51–52.
[181] ibid paras 54–58.
[182] ibid paras 63–64, 108–109.
[183] ibid paras 117–118.

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In *Alapli v Turkey*, Arbitrator Stern preferred to ground her dismissal of the claim on the basis of a lack of jurisdiction on grounds of 'timing and *bona fides*'.[184] A Turkish national, 'seeing a dispute looming with his own government', established a Dutch company (the claimant).[185] American backers provided all the financing and technological know-how, and absorbed all risk of loss flowing from a power plant project awarded to the Turkish company under a concessionary contract.[186] The concession was assigned to a second Turkish company owned by the Dutch claimant.[187] Arbitrator Stern opined that 'it would be unfair to allow Claimant to change its nationality in the grey period of the Parties' relationship between good relations and a full-fledged dispute, when disagreement and acrimony have already arisen'.[188] Such a change was abusive because its main purpose was to gain access to international arbitration under the ECT and Netherlands–Turkey BIT—a recourse 'which did not exist for the Turkish nationals and the Turkish company'.[189]

The second situation of 'treaty shopping' arises when the investment possesses an international character. What the investor lacks—and seeks to establish—is a link of nationality with the host State. This was illustrated in *Mihaly v Sri Lanka* which concerned an assignment between two related companies. Mihaly (US) filed an ICSID claim against Sri Lanka arising from rights assigned by Mihaly (Canada) over a proposed power project in Sri Lanka.[190] Mihaly (Canada) could not directly invoke the ICSID Convention, since Canada was not a State Party at the material time.[191] The claim was deemed inadmissible.[192] The tribunal reasoned that the assignment could not improve Mihaly (Canada)'s procedural rights against Sri Lanka (or rather, the lack thereof) on the ground that 'no one could transfer a better title than what he really has' ('*nemo dat quod non habet*').[193] To allow the assignment to cure such a procedural defect 'would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-Parties'.[194]

In sum, arbitral tribunals take a dim view of assignments of investments made with the predominant purpose of manufacturing artificial access to an IIA. This is especially so when the assignment is timed shortly after the purported breach occurred or a potential dispute is already looming on the horizon.

3. *Post-claim*

This is yet another safe zone for assignments. Since the critical date for determining jurisdiction is the date of institution of proceedings, jurisdiction

[184] *Alapli* (n 15) para 315. [185] ibid para 311. [186] ibid para 311.
[187] ibid paras 339–341, 390. [188] ibid para 403. [189] ibid para 393.
[190] *Mihaly* (n 39) para 11. [191] ibid para 23.
[192] ibid para 24. The tribunal considered this point under jurisdiction *ratione personae*.
[193] ibid. [194] ibid.

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once established cannot be defeated or affected by subsequent events.[195] Concomitantly, tribunals look kindly upon changes in ownership of investment during arbitral proceedings.[196] And rightly so, for investor–State arbitrations are notorious for lasting many years, due to legal complexities and voluminous documentary evidence. As opined by the tribunal in *CSOB v Slovakia*:

> It is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted. Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the tribunal has jurisdiction to hear their case regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.[197]

In *El Paso v Argentina*, the tribunal rejected the applicability of any rule of continuous ownership since IIA claims are typically premised upon loss of ownership and control (ie expropriation), and imposing such a requirement would defeat the entire purpose of investor–State dispute resolution mechanisms.[198] Any profits received by the claimant from the disposal of the investment might be relevant in the quantum of compensation.[199]

It is rather odd that the tribunal in *Daimler v Argentina* felt compelled to opine that IIAs 'accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment'.[200] The rationale given was the following:

> The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments … Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.[201]

Such a *dictum* is deeply troubling. The tribunal appears to draw an analogy with the doctrine of separability under private international law. First, it is doubtful

[195] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1993] ICJ Rep 9, para 38; *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142; *Arrest Warrant* (n 167) para 26; *Aguas* (n 54) paras 60–63. According to a more nuanced view, subsequent events may be admissible in a 'subordinate capacity' to 'corroborate and explain' events occurring preceding the critical date (LFE Goldie, 'The Critical Date' (1953) 12(4) ICLQ 1251, 1254).

[196] *Mondev* (n 15) para 91.

[197] *CSOB* (n 93) para 31.

[198] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) (Caflisch, Stern, Bernardini) para 135.

[199] *Daimler* (n 15) para 154; *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, Award (3 February 2006) (Crawford, Naón, Thomas) para 131.

[200] *Daimler* (n 15) para 144.

[201] ibid para 145 (emphasis in original text).

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whether the doctrine is applicable to IIAs. As previously seen, consent in investor–State arbitration is asymmetrical in nature—the arbitration agreement crystallises upon an investor's acceptance of a host State's 'open offer to arbitrate' by the very act of commencing arbitration.[202] Due to the peculiarity of States 'expressing their consent in the absence of privity' with unknown prospective investors, any analogy drawn with contract-based arbitration 'must be treated with caution'.[203]

Second, the dictum overstates the legal effect of the doctrine, taking it beyond its intended purpose (ie that an arbitration agreement survives the termination, rescission, discharge or invalidity of the main contract).[204] Indeed, it is generally accepted that the assignment of a contract automatically includes the arbitration agreement 'without the need for any separate or additional assignment'.[205]

Third, and most disconcertingly, severability would imply that the right to invoke an IIA's dispute settlement mechanism over an investment vests exclusively with the original investor. What, then, would make the transfer of such right effective? Surely it cannot require the consent of the host State, as this goes against the 'open offer to arbitrate' system of IIAs.[206] An unnecessary artificial legal fiction is created if—recalling the analogy of *African Holding v Congo*—money moving from one pocket to another still leaves some small change in the original pocket.

It is conceivable that the tribunal in *Daimler v Argentina* may have envisaged a 'qualifying investor' as being broad enough to cover a subsequent acquirer of the investment who continues to actively contribute to the investment (as opposed to a passive investor). Such an interpretation is reinforced by fixing the critical date at the date of breach (akin to the 'dividing line' test). If so, the test of active contribution (*ratione personae*) and doctrine of abuse of rights (*ratione temporis*) already cover this. There is no need to muddy the waters by anchoring its normative basis in separability.

Hence, the better view is to relegate such *dictum* to the sidelines. The general rule is simple—any assignment of investments after the commencement of arbitration is relevant only to the issue of reparation, not jurisdiction.

[202] See Section III(B)(1).

[203] *Casinos Austria* (n 22) paras 272–273. The doctrine of separability, however, may be relevant to draw a distinction between substantive standards on investor protection and procedural rules on dispute settlement in the context of invocation of 'most-favoured-nation' clauses to import provisions from third State IIAs (see *Plama* (n 13) para 212).

[204] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, para 41 (Lord Hamblen and Lord Leggatt) (Lord Kerr concurring).

[205] ibid paras 61–62 (Lord Hamblen and Lord Leggatt) (Lord Kerr concurring). This view was unanimously shared by Lord Burrows and Lord Sales in their dissent (at paras 232–233).

[206] See Section III(B)(1).

IV. TRENDS IN MODERN INVESTMENT TREATIES

The last decade has witnessed a new wave of IIAs coming into force.[207] Notable examples include the *United States–Mexico–Canada Agreement*[208] (USMCA) replacing the NAFTA regime in 2020, and the agreement between the European Union (EU) and Canada[209] (CETA). Presently, the EU is spearheading negotiations to modernise the ECT,[210] and has submitted a proposed draft text.[211] It is noteworthy that these new IIAs and proposed revisions to existing IIAs lean towards restricting the scope of investors and investments in step with the trajectory of arbitral decisions concerning jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis*.

First, 'investment' refers to an asset having 'the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk'.[212] This essentially incorporates the three limbs of the *Salini* test (with the notable exception of the controversial fourth limb of 'contribution to the host State's economy'). The more interesting revision, however, is the new proviso to 'claims to money'. For instance, Article 8.1 of CETA stipulates:

> For greater certainty, claims to money does not include:
> (a) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party;
> (b) the domestic financing of such contracts; or
> (c) any order, judgment, or arbitral award related to sub-subparagraph (a) or (b).[213]

[207] Z Douglas *et al.*, *The Foundations of International Investment Law – Bringing Theory Into Practice* (Oxford University Press 2014) 17, 18; UNCTAD, *World Investment Report 2020 – International Production Beyond the Pandemic* (UN Publications 2020) 106.

[208] Agreement between the United States of America, the United Mexican States, and Canada (adopted 30 November 2018).

[209] Comprehensive Economic and Trade Agreement between Canada and the European Union (adopted 30 October 2016).

[210] European Commission, 'Fifth Negotiation Round to Modernise Energy Charter Treaty' (*EC Trade*, 4 June 2021) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2273>.

[211] European Commission, 'EU Text Proposal for the Modernisation of the Energy Charter Treaty (ECT)' (EU ECT Modernisation Proposal) <https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf>.

[212] CETA (n 209) art 8.1; USMCA (n 208) art 14.1; Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part (adopted 19 October 2018) art 1.2(2) (EU–Singapore BIT); Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (adopted 12 November 2017) art 1(e) (HK–ASEAN BIT); Agreement between the Government of the Republic of Turkey and the Government of the Republic of Burundi concerning the Reciprocal Promotion and Protection of Investments (adopted 14 June 2017) art 1(1) (Turkey–Burundi BIT); EU–Vietnam BIT (n 56) art 1.2(h).

[213] See also USMCA (n 208) art 14.1; Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (adopted 29 January 2021) art 1(a); Brazil–India Investment Cooperation and Facilitation Agreement (adopted 25 January 2020) art.

This echoes the tribunal findings in *Energorynok v Moldova* and *Energoalians v Moldova*. The opening words 'for greater certainty' make it clear that the exceptions are intended to explain, rather than add to, the current understanding of the term 'claims to money'. It is likely that these words were deliberately crafted to avoid *a contrario* interpretation of the term found in existing IIAs from being raised in disputes. In short, the proviso merely confirms what is already strongly implied in the treaty texts of traditional IIAs.[214] Second, 'investor' refers to a natural person or enterprise that seeks 'to make, is making or has made an investment in the territory of the other Party'.[215] The word 'make' strongly implies the requirement of a nexus connecting 'investor' and 'investment', based on the test of *active contribution* alluded to by the tribunal in *SCB v Tanzania* and Arbitrator Park in *Alapli v Turkey*.[216]

Further, aside from incorporation, the CETA requires an 'enterprise' to have 'substantial business activities' in its home State in order to qualify as an 'investor'.[217] Under the USMCA, a host State has the option of denying investment protection to any enterprise falling short of the same requirement by invoking its denial of benefits clause.[218] This provides yet another (albeit weaker) safeguard precluding assignments of investments to shell companies.

Third, and undoubtedly inspired by the doctrine of abuse of rights,[219] the EU recommends adding an expedited procedure to the ECT which would allow arbitral tribunals to dismiss 'frivolous claims':

> For greater certainty, the tribunal shall decline jurisdiction if the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject

2.4.1; EU–Vietnam BIT (n 56) art 1.2(h)(v); Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (adopted 16 June 2019) art 1(d); Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana (adopted 13 December 2018) art 1.3; Treaty between the Republic of Belarus and the Republic of India on Investments (adopted 24 September 2018) art 1.4 (Belarus–India BIT); Agreement between the Belgium–Luxembourg Economic Union, on the One Hand and … on the Other Hand, on the Reciprocal Promotion and Protection of Investments (adopted 28 March 2019) art 2(3) (Model BIT); Agreement on Reciprocal Promotion and Protection of Investments between … and the Kingdom of the Netherlands (adopted 22 March 2019) art 1(a) (Model BIT); EU ECT Modernisation Proposal (n 211) 2, art 1(6).

[214] See Section III(A)(2).

[215] CETA (n 209) art 8.1; USMCA (n 208) art 14.1; NAFTA (n 44) art 1139. Some treaties are worded more restrictively to only cover an investor 'who has made an investment' (see EU–Singapore BIT (n 212) art 1.2(3); EU–Vietnam BIT (n 56) art 1.2(i); Hong Kong–ASEAN BIT (n 212) art 1(f)).

[216] See Section III(B)(2).

[217] CETA (n 209) art 8.1; See also Brazil–India Investment Cooperation and Facilitation Agreement (adopted 25 January 2020) art 2.5; Turkey–Burundi BIT (n 212) art 2(b); EU–Singapore BIT (n 212) art 1.2(6); Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (adopted 1 November 2017) art 1(1); Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (2019) (adopted 26 March 2019) art 1; Belarus–India BIT (n 213) art 1.6; EU ECT Modernisation Proposal (n 211) 3, art 1(7).

[218] USMCA (n 208) art 14.14.

[219] See Section III(C)(2).

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> to the dispute and the tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting a claim … .[220]

In sum, the textual architecture of modern IIAs converges with the *jurisprudence constante* of arbitral tribunals on the scope of 'investment' and 'investor' in traditional IIAs (jurisdiction *ratione materiae* and *ratione personae*). There are also promising signs that States are committed to preventing forum shopping by way of sham assignments (jurisdiction *ratione temporis*).

V. CONCLUSION

There is no hard and fast rule as to whether an assignee of an investment can invoke an IIA claim against the host State. It is surely a bridge too far to prohibit assignments of IIA claims on the basis that the claimant must be an investor when the alleged breach occurred (as argued by Canada in *Westmoreland v Canada*).[221] Aside from extinguishing claims resulting from inheritance or succession (eg due to the investor's death or incapacity),[222] such an extreme position would unfairly entail an investor's 'impecuniosity compound[ing] its injury'.[223] Even more worrying is the skewed incentive accorded to heavy-handed host States, as emphatically elucidated by Paulsson:

> [C]onsideration should be given to the example that would be set if respondents were rewarded for accentuating the severity of the consequences of their breach, *e.g.*, to drive investors into insolvency with the possible 'prize' to the respondent of forcing their dissolution and losing their standing, if not indeed to use local processes to expropriate their 'investment' out of existence.[224]

IIAs are legal regimes reflecting the consent of States. It is axiomatic that treaty interpretation must be based, above all, upon treaty text.[225] As aptly put by the majority in *Alapli v Turkey*, on one hand 'a conscientious arbitrator will not set jurisdictional barriers at unreasonable levels which deny investors' legitimate expectations', and on the other, '[n]either, however, should a tribunal facilitate use of treaties by persons not intended to receive their benefits'.[226]

The triple-layered system provides an effective method for examining all types of jurisdictional objections, including assignments. However, it does not function as a rigid checklist. Rather, the layers are complementary lines

[220] EU ECT Modernisation Proposal (n 211) 16–17.
[221] *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Canada's Memorial on Jurisdiction (18 December 2020) paras 47, 55.
[222] *Westmoreland Coal Company v Government of Canada*, ICSID Case No UNCT/20/3, Claimant's Counter-Memorial on Jurisdiction (26 February 2021) para 41; *Alapli* (n 15) para 351 (Park).
[223] *Westmoreland (Legal Opinion of Jan Paulsson)* (n 174) para 49.
[224] ibid para 50.
[225] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, para 41; *Legality of Use of Force* (n 49) para 100; *RSM Production* (n 32) para 390.
[226] *Alapli* (n 15) para 334.

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of defence—like three vigilant guards on joint patrol. The *jurisprudence constante* of investor–State arbitrations provide ample examples of how these safeguards are fool-proof enough to catch and repel mischievous insiders or intruders masquerading as investors.

The tests of jurisdiction *ratione materiae* and *ratione personae* are closely intertwined. The language employed in many IIAs implies a factual link between investments and investors. This is evinced by the prepositions 'of' and 'by' to connect both terms, as well as the verb 'make' embodied in the object and purpose clause ('encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area').[227] The same factual patterns can trigger two or more jurisdictional red flags. In *Alapli v Turkey*, the claimant's last-ditch attempt to incorporate a Dutch entity to indirectly own a Turkish power plant failed to meet the 'active contribution' threshold (*ratione personae*) and improperly sought to internationalise an impending domestic dispute (*ratione temporis*).[228]

The ECT cases of *Energorynok v Moldova* and *Energoalians v Moldova* illustrate how no amount of mischievous manoeuvres can permit the claim to slip through the cracks.[229] By treating the contractual debt as an 'asset', the claimants may find it easy to establish the link between 'investor' and 'investment' (*ratione personae*—pass). However, the debt itself did not constitute an 'investment' due to the lack of any economic activity in Moldova (*ratione materiae*—fail). And even if it did, the claimants would be incapable of surmounting the hurdle of timing, since the debt was assigned *after* the breach occurred and the dispute had arisen in the Moldovan courts (abuse of process). Indeed, it is arguable that the *ratione temporis* test in the narrow, traditional sense is also not met. This is because the timing of the purported investment made by the claimants also matches the timing of the assignment—the date that the contractual debt was acquired.[230] In other

[227] ECT (n 41) art 10(1); Agreement between Japan and the Kingdom of Morocco for the Promotion and Protection of Investment (adopted 8 January 2020) Preamble; Agreement Between the Republic of San Marino and Bosnia and Herzegovina on the Promotion and Reciprocal Protection of Investments (adopted 2 August 2011) art 2(1); Agreement Between the Government of the Republic of Malta and the Council of Ministers of the Republic of Albania for the Reciprocal Promotion and Protection of Investments (adopted 27 January 2011) art 2(1); Agreement on Investment between the Republic of Korea and the Republic of Iceland, the Principality of Liechtenstein and the Swiss Confederation (adopted 15 December 2005) art 3(1); Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments (adopted 21 July 2005) art 2(1).

[228] See Section III(B)(2) and III(C)(2).

[229] See Section III(A)(2).

[230] *Phoenix Action* (n 15) paras 67–71 ('[T]he Tribunal has no jurisdiction ratione temporis to consider Phoenix's claims arising prior to … the date of Phoenix's alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix "invested" in the Czech Republic.'). To backdate the critical date of investment to the time when electricity was supplied by the *original* investor would wrongly conflate the *original* investment with the *actual* investment made by the claimants.

words, there was no investment by the claimants in Moldova *before* the alleged breach (*ratione temporis*—fail).

Hypothetically, what if the claims were premised on the electricity supply contract itself being the 'asset'? Such an 'asset' evidently constitutes 'investment'. However, this would not change the timing of the assignment. Further, the claimants' status as 'investors' is highly questionable as they did not 'make' any 'investment' but merely owned a contractual debt after the 'investment' had long matured and ceased to contribute any economic activity in Moldova. Hence, such an alternative plea is still futile. Ultimately, the triple-layer defence links together a simple yet strong chain of reasoning grounded in logic.

Further, the *jurisprudence constante* of arbitral tribunals is gradually being reinforced by modern IIAs narrowing the scope of 'investment' and 'investor'. The language has improved, so as to leave no room for doubt and misinterpretation. It is critical, however, to understand such a trend as confirming—rather than departing from—the meaning of such terms in traditional IIAs, which were already crystal clear. And if an IIA is inadequate, then it is for the States Parties to fix it through renegotiation. Arbitrators should resist the temptation of importing words to a treaty as 'Band-Aid' solutions to patch over perceived injustices. After all, the task of an international judicial body is to interpret treaties, and not to revise or reconstruct them.[231]

There is, however, an elephant in the room that has been glossed over so far—nationality. Is a last-ditch assignment still abusive if both assignor and assignee share the same nationality? The answer is no. This is because intra-State assignments do not create a jurisdictional link where none previously existed. As long as the investment keeps flowing from State X to State Y, it is immaterial that the claimant is a subsequent investor acquiring the investment from the original investor.[232] Both being incorporated in State X the entities have equal access to arbitration under the IIA.

Seen in this light, there is nothing objectionable *in principle* with the assignment of the NAFTA claim from one American company (the original investor) to another American company (incorporated by the creditor of the original investor after the alleged breach) in *Westmoreland v Canada*. There is no break in the chain of investment flow from the United States to Canada, nor any jurisdictional advantage gained by the newly formed company stepping into the shoes of the original investor of the same nationality.[233] Or to use the

[231] *Interpretation of Peace Treaties* (Second Phase) (Advisory Opinion) [1950] ICJ Rep 221, 229; *Acquisition of Polish Nationality* (Advisory Opinion) [1923] PCIJ Rep Series B No 7, 20.

[232] *Alapli* (n 15) paras 352–353.

[233] See *Westmoreland* (n 6) paras 209–215. However, the tribunal unanimously dismissed the claim because 'only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim' based on the textual construction of arts 1101(1), 1116(1) and 1117(1) of NAFTA. The tribunal was particularly swayed by the latter two

colourful analogy from *African Holding v Congo*—money has moved from the right pocket to the left pocket of the same pants.[234] And both pockets (assignor and assignee) still belong to the same person (State X).

Thus the analysis comes full circle, back to the fundamental nature of IIAs as creatures of consent. As Arbitrator Park rightly observed in *Alapli v Turkey*, IIAs protect investments from 'designated nationals' and 'are not intended as treaties with the world'.[235] Only an investment that changes hands between investors of different nationalities threatens to break this sacred bond forged between two States. Such a bond is only broken when changes of ownership or control over an investment overstep the boundaries carved out in the treaty text. For as much as the purpose of IIAs is to protect private investors, their mandate flows from the will of States. And nothing speaks louder in expressing the will of States than the words they choose to use in treaties.

provisions requiring that the investor (or enterprise that an investor owns or controls directly or indirectly) 'has incurred loss or damage by reason of, or arising out of, that breach' as a precondition for an investor to submit a claim to arbitration.

[234] *African Holding* (n 61) para 70; *Koch Minerals Sàrl v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/19, Award (30 October 2017) (Veeder, Lalonde, Douglas) paras 6.30, 6.70 (the tribunal implicitly accepted the claimant's contention that international investment law permits assignment between related companies 'so long as there is an unbroken continuum of nationality').

[235] *Alapli* (n 15) para 353.

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