DO ARBITRAL AWARDS CONSTITUTE 'INVESTMENT'?

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Abstract

Can foreign investors invoke the protection of bilateral investment treaties against judicial interference with arbitral awards? This inquiry is occasioned at a unique intersection between commercial and investment treaty arbitration; it arises when a foreign investor holds an arbitral award against the host state. Judicial interference with such awards against the state i.e. failure to recognize and enforce or annulment, is not uncommon. From time to time, enterprising award creditor-investors have attempted to characterize such interference as expropriation or denial of justice, in violation of applicable investment protection treaties. For such a claim to be heard by an investment arbitration tribunal, it is necessary that the award be categorized as 'investment', to fulfil ratione materiae jurisdiction. While this inquiry has not figured prominently in academic debates, there is a developing, but divergent body of case law that addresses it. In this editorial, the authors offer a critical commentary on these divergent approaches and attempt to identify the future course of this development.

I. Introduction

The question of whether an award is an 'investment' has recently become the source of some debate.[1] In addressing the divergent perspectives of this debate, the authors must acknowledge the importance of this debate beyond that of a purely academic inquiry. At first, there is the question of the significance of a universal definition of 'investment' itself. The definition of 'investment' determines the scope of the disputes that can be subjected to arbitration under the terms of a Bilateral Investment Treaty ["**BIT**"]. Defining the contours of 'investment' becomes particularly relevant in the context of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[2] [the "**ICSID Convention**"], which does not contain any definition of the term. While there is some disagreement over the need for a universal objective definition,[3] the need to broadly outline the definition of 'investment', to introduce legal certainty for States and foreign investors, is irrefutable.[4]

The authors consider the question of whether an arbitral award can fit any version of the definition of 'investment'. This question would necessarily arise in cases where the host state has

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1 *See* Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007) [*hereinafter* "Saipem v. Bangladesh"]; ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010) [*hereinafter* "ATA v. Jordan"]; Frontier Petroleum Services Limited v. The Czech Republic, Permanent Court of Arbitration, Final Award (Nov. 12, 2010); GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (March 28, 2011) [*hereinafter* "GEA v. Ukraine"]; White Industries Australia Limited v. Republic of India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011) [*hereinafter* "White v. India"]; Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement,* 28(1) ICSID Rev. 64 (2013); Leonila Guglya, *International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (With Emphasis on the Developments within the International Investment Arbitration Setting)*, 2 Czech Y.B. Int'l. L. 93 (2011).

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"].

3 *See* Romak S.A. v. The Republic of Uzbekistan, Permanent Court of Arbitration, Case No. AA280, Award (Nov. 26, 2009), ¶ 205 [*hereinafter* "Romak v. Uzbekistan"].

4 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction (Jan. 27, 2012), ¶ 198.

interfered with an arbitral award held by a foreign investor, rather than with the underlying economic activity which constitutes the subject-matter of the award – for instance, non-enforcement or annulment of the award.[5] Tribunals may be compelled to consider this question when the violation of investment protection standards occurs due to interference with the award rather than any interference with the underlying economic activity. Another instance where this question may become relevant is where the investor's economic activity ceases to exist prior to the entry into force of the BIT and the arbitral award is the investor's only subsisting right.[6] This question may also become relevant where the award has been bought from the original award creditor-investor by a third party. The authors seek to examine the various approaches for answering this question.

In doing so, the authors begin by understanding the nature of 'investment' in Chapter II, by recourse to the landmark decision in *Salini Consturotti* v. *Morocco*[7] and the manner in which it has been interpreted in subsequent cases. This chapter sets out the criteria adopted to arrive at an objective definition of investment and their applicability to arbitral awards. Chapter III presents a critical analysis of the cases that have discussed the eligibility of arbitral awards to constitute investment. In Chapter IV, the authors deduce the existing position of law, in light of the cases discussed in the third chapter and identify some of the unresolved issues and unintended consequences presented by the phenomenon of categorization of arbitral awards as investment. The authors' concluding remarks constitute the fifth and final chapter.

II. Looking Through the Double-Keyhole of 'Investment'

A preliminary question that must be addressed is: *what is an investment?* The manner in which 'investment' is defined is determinative of the scope of disputes which may be submitted to investment treaty arbitration. Notably, Article 25 of the ICSID Convention provides:

[t]he jurisdiction of the Centre shall extend to any ***legal dispute arising directly out of an investment****, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State […]* (emphasis added)

Thus, an ICSID tribunal would only have jurisdiction where the dispute is legal in nature i.e. requires determination of rights and obligations; and where the dispute arises out of an investment.[8] However, the Convention, unlike BITs, does not define 'investment'. A possible reason behind this omission is to afford contracting state parties the autonomy to determine the

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5 *See* Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007); GEA v. Ukraine, ICSID Case No. ARB/08/16, Award (March 28, 2011).

6 *See* ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010); Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008) [*hereinafter* "Chevron v. Ecuador"].

7 Salini Consturotti S.p.A and Ilastrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 42 I.L.M. 609 (2003) (July 23, 2001) [*hereinafter* "Salini v. Morocco"].

8 *See* the 1965 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (March 18, 1965), ¶ 26; Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997), ¶¶ 20-23 (noting that the lack of a definition was due to failure to agree on any of the proposals) [*hereinafter* "Fedax v. Venezuela"].

scope of disputes that may be submitted to ICSID – through consent expressed vide BITs or through prior notification of classes of disputes under Article 25(4) of the Convention.[9]

The definition of investment is found, at a primary level, in the applicable investment protection treaty. These treaties tend to have varied definitions of investment, and often adopt a wide definition of the term.[10] For instance, the Energy Charter Treaty provides that 'investment' is "*every kind of asset, owned or controlled directly or indirectly by an investor*", followed by a non-exhaustive list of examples of investment.[11] Treaties may also adopt a tautological definition. The 1992 BIT between the United States and Bulgaria defines 'investment' as "*every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party*", followed by a non-exhaustive, illustrative list of investments.[12] At the same time, some treaties employ a characteristics-based definition. The 2009 Japan-Peru BIT, for example, defines 'investment' to include every asset "*which has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*".[13]

Clearly, the precision with which investment treaties define 'investment' varies greatly. The eligibility of arbitral awards to constitute investment is usually considered under the head of 'claims of money arising out of an investment'. Tribunals may vary in their approach to this head. In *Nova Scotia* v. *Venezuela*,[14] contractual rights under a coal supply contract were held to be insufficient to constitute investment under this head. However, a contrary view was taken in *Deutsche Bank* v. *Sri Lanka*[15] with respect to a hedging contract. Similarly, in *Malaysian Historical Salvors* v. *Malaysia*,[16] right to contractual payments was found to be sufficient to constitute investment under this head. Particularly in relation to arbitral awards, as discussed in Chapters III and IV below in greater detail, the tribunal in *Saipem* v. *Bangladesh* considered that an award falls squarely within the coverage of 'credits for sums of money' since "*the prevailing party undoubtedly has a credit for a sum of money in the amount of the award*".[17] However, it is relevant to note that the tribunal considered this claim to originate in the underlying contract and not the award.[18]

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9 Fedax v. Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997), ¶ 27.

10 *See generally* Catherine Yannaca-Small, *Definition of Investor and Investment in International Investment Agreements*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008).

11 Energy Charter Treaty, art. 1(6); s*ee also* Agreement between the Government of the Argentine Republic and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (Nov. 13 1996), art. 1(1).

12 Treaty between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment (Sep. 23, 1992), art. I(1)(a).

13 The Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberation of Investment (Dec. 1, 2009), art. 1(1). The EU-Vietnam Free Trade Agreement 2016 (in chapter 8) and the EU-Canada Comprehensive Economic and Trade Agreement 2016 (in chapter 8) also provide for similar definitions.

14 Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Award (April 30, 2014).

15 Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award (Oct. 31, 2012).

16 Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007).

17 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007), ¶ 126.

18 *Id.* ¶ 127.

Similarly, in *Chevron* v. *Ecuador*,[19] it was held that lawsuits fall within the 1993 US-Ecuador BIT's definition of investment as 'claims to money' or 'rights conferred by law or contract' since they represent the subsisting rights in the original investment. This head of the definition of 'investment' has also been relied on to attempt extension of the temporal application of BITs to economic activates pre-dating the BIT.[20] Further, the right to arbitrate has been found to be a right 'having financial value related to an investment' and been classified as investment.[21] The presence of transformation clauses, which state that a change in the form in which assets are held does not lead to a change in the assets' characterization as 'investment',[22] can also affect a tribunal's decision as to whether arbitral awards can constitute investment under a particular BIT.

Beyond the question of the scope of the BIT, tribunals constituted under the ICSID Convention must also determine whether the subject-matter of the dispute falls within a generally accepted definition of investment under Article 25(1) of the Convention.[23] This is known as the 'double-barrel test'[24] or the 'double-keyhole approach'.[25]

In the context of the ICSID Convention, the question of jurisdiction based on the definition of 'investment' (jurisdiction *ratione materiae*) first came up in *Fedax* v. *Venezuela*.[26] This case, however, did not discuss the ingredients of such a definition in detail; it merely listed them as follows: commitment of capital, a certain duration, regularity of profit, assumption of risk, and contribution to the host State's development.[27] These ingredients were further defined in the 2003 decision in *Salini*, which continues to be considered the contemporary standard for defining 'investment'.[28] The *Salini* tribunal considered the ingredients individually even though it acknowledged that they were interdependent and must be assessed globally.[29] Adopting a similar approach, the authors discuss below each of these ingredients individually to assess their scope, as understood in *Salini* and thereafter.

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19 Chevron v. Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008), ¶¶ 212-213.

20 *See* ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010) (In this case, the tribunal denied temporal jurisdiction when the 'claim to money' in the form of an award came into being post-BIT but the original investment was made prior to the entry into force of the BIT).

21 *Id.*

22 Energy Charter Treaty, art. 1(6) ("A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty"); Agreement between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment (July 31, 2008), art. 1 ("A change in the form in which the assets are invested does not affect their character as investments").

23 *See generally* Fedax v. Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997); Salini v. Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 42 I.L.M. 609 (July 23, 2001).

24 Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Award (May 17, 2007), ¶ 55.

25 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 17 (2d ed., 2009).

26 Fedax v. Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 2008), ¶ 25 (noting that previous ICSID decisions discussed this issue even though it was not raised as an objection to jurisdiction, and further that certain ad hoc committees had discussed the issue briefly).

27 *Id.* ¶ 43; Christoph Schreuer, *Commentary on the ICSID Convention*, 11(1) ICSID Rev. 316, 372 (2000).

28 *See generally* Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, 15(1) Chicago J. Int'l. L. 287; Aniruddha Rajput, *Defining "Investment" – A Developmental Perspective*, 2(1) Indian J. Arb. L. 12 (2013).

29 Salini v. Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 42 I.L.M. 609 (July 23, 2001), ¶ 52.

Commitment of capital was found by the *Salini* tribunal in the form of contributions in money as well as in kind through provision of know-how, equipment and qualified personnel made by the investor under a highway construction contract.[30]

Duration was considered to be present because the construction contract exceeded the minimum duration, which as per the tribunal, was 2-5 years.[31] Duration has been considered a paramount factor that differentiates investments from ordinary commercial transactions.[32] However, the tribunal in *Bayindir* v. *Pakistan* warned against placing too high a bar on this requirement.[33] For instance, in *L.E.S.I.* v. *Algeria*, the nature of the claimant's contract was such that it required repeated short-term extensions, but was still classified as investment.[34]

Risks were considered to be inherent in the highway construction contract and were identified to include the state's contractual right to prematurely terminate the contract, the risk of potential increase in the cost of labour in case of modification of Moroccan law, risk of accident or damage during the performance of the works, etc.[35] The tribunal stated that it was irrelevant that the risk was freely undertaken by the investor, and further noted that there was a link between the duration of the contract and an inherent risk attached thereto.[36] The requirement of *expectation of regular of profits and returns* was also considered a part of the element of risk by the tribunal.[37]

Contribution to the host state's economic development was inferred in *Salini* due to the highway construction's contribution to Morocco's infrastructure.[38] However, *L.E.S.I.* v. *Algeria* held that contribution to economic development was implicit wherever there was: an expenditure by the investor in pursuance of an economic objective, an element of risk and a minimal duration.[39] Contribution to host state's economic development has been considered difficult to prove as well as implicit in the other three ingredients.[40]

The double-keyhole approach, as laid down in *Salini*, has been widely accepted. Even in non-ICSID cases, tribunals often resort to the *Salini* test to accord meaning to 'investment' in relation to treaties without a clear and exhaustive definition of the term, or out of abundant caution.[41] However, there has been some disagreement. On occasions, the very idea of an objective definition of 'investment' has been brought into question – some tribunals have observed that

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30 *Id.*; *see also* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶ 53 [*hereinafter* "Bayindir v. Pakistan"].

31 Salini v. Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 42 I.L.M. 609 (July 23, 2001), ¶ 54.

32 Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, (Aug. 6, 2004).

33 Bayindir v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶ 133.

34 Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Award (Jan. 10, 2005), ¶ 14(ii) [*hereinafter* "LESI-Dipenta v. Algeria"].

35 Salini v. Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 42 I.L.M. 609 (July 23, 2001), ¶ 55.

36 *Id.* ¶ 56.

37 *Id.*

38 *Id.* ¶ 57.

39 LESI-Dipenta v. Algeria, ICSID Case No. ARB/03/8, Award (Jan. 10, 2005), ¶ 13(iv).

40 *Id.*; L.E.S.I., S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Award on Jurisdiction (July 12, 2006), ¶ 72(iv); Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 232.

41 *See, e.g.,* White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011), ¶ 7.4.10.

the definition of 'investment' must be entirely subject to the consent of the States, as expressed in the terms of the BIT.[42] In this relation, the tribunal in *Romak* v. *Uzbekistan* observed:[43]

Contracting States can even go as far as stipulating that a 'pure' one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term 'investment'. However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term 'investment' an extraordinary and counterintuitive meaning.

In any case, as aforementioned, an objective definition of 'investment' remains relevant because of the need for legal certainty in international investment law. The *Salini* test and the double-keyhole approach continue to be applied while determining the eligibility of arbitral awards to constitute investment, as will be highlighted in the following chapters.

III. Sidesteps and Missteps: Prevailing Approaches for Categorization of Arbitral Awards as 'Investment'

In contrast to the relative abundance of literature related to the in-principle inquiry of what may constitute 'investment', jurisprudence pertaining to classification of arbitral awards as 'investment' is limited. As of date, only a handful of published investment-treaty decisions have addressed this issue. The first such decision, *Saipem* v. *Bangladesh*,[44] was an ICSID award under the 1990 Italy-Bangladesh BIT.[45] Since then, this issue has been addressed by five other investment treaty tribunals (two ICSID, three non-ICSID). In this chapter, the authors identify, compare and critique the various approaches adopted by these tribunals.

A. Saipem S.p.A. v. The People's Republic of Bangladesh

Saipem and Petrobangla (a Bangladeshi state-owned entity) had entered into a contract to build a gas pipeline [the "**Pipeline Contract**"].[46] Upon Petrobangla's failure to pay certain monies due under the contract, Saipem filed a request for arbitration before the ICC Court of Arbitration, in accordance with the dispute resolution provision of the Pipeline Contract.[47] During the pendency of the arbitral proceedings, Petrobangla obtained an order from the Supreme Court of Bangladesh for revocation of the ICC tribunal's authority to adjudicate the matter.[48] However, the ICC tribunal refused to recognize this order on the ground that, under the extant ICC Rules of Arbitration, a challenge to the tribunal's authority could only be brought before the ICC Court of Arbitration.[49] Thus, the tribunal continued the arbitral proceedings and rendered its final award in favour of Saipem.[50] Petrobangla again approached the Supreme Court of

42 Romak v. Uzbekistan, PCA Case No. AA280, Award (Nov. 26, 2009), ¶ 205; ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 111.

43 *Id.* ¶ 205.

44 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007).

45 Agreement Between the Republic of Italy and the People's Republic of Bangladesh on the Promotion and Protection of Investments (March 20, 1990).

46 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007), ¶ 7.

47 *Id.* ¶¶ 17-18.

48 *Id.* ¶¶ 26-29.

49 *Id.* ¶ 31.

50 *Id.* ¶ 34.

Bangladesh, this time seeking setting aside of the award.[51] The Court held that, in light of the tribunal's disregard of the Supreme Court's order, the award was a nullity in the eyes of law and could neither be set aside nor enforced.[52]

Saipem invoked Article 9 of the Italy-Bangladesh BIT and filed a claim before ICSID.[53] Saipem contended that it had made an investment in Bangladesh and the actions of the state courts amounted to expropriation of:

1. its right to arbitrate under the Pipeline Contract;
2. its right to payment under the Pipeline Contract as ascertained in the ICC award; and
3. its rights under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad.[54]

Since Saipem's claims were occasioned by annulment of the ICC award, the tribunal had to establish whether the ICC award constituted 'investment' eligible for protection under the Italy-Bangladesh BIT. Further, as the dispute was subject to the ICSID Convention, the tribunal also had to determine whether an 'investment' in terms of Article 25(1) of the Convention had been made by Saipem and whether the same had been affected by the actions of the Bangladeshi courts.

In its affirmative finding on jurisdiction, the tribunal held that Saipem had satisfied the *ratione materiae* requirements under both the Italy-Bangladesh BIT and Article 25(1). Following the double-keyhole approach, the tribunal first analysed whether Saipem's investment satisfied the *Salini* test for the purpose of Article 25(1). Relying on the decisions in *Holiday Inns* v. *Morocco*[55] and *CSOB* v. *The Slovak Republic*,[56] the tribunal held that a finding under Article 25(1) must consider "*the entire operation*" of the investor.[57] First, the tribunal concluded that the Pipeline Contract satisfied the four prongs of the *Salini* test, dismissing Bangladesh's objections regarding risk and holding that commercial risk was inherent in the long-term nature of the contract.[58] Then, the tribunal held that the entire or overall operation in the present case included the Pipeline Contract as well as the related ICC award.[59] Since the Pipeline Contract met the *Salini* criteria, Saipem's overall operation, including the award, was characterized as investment by the tribunal.[60] At the same time, the tribunal agreed with Bangladesh that the ICC award *itself* could not constitute investment under Article 25(1);[61] the jurisdictional requirement under Article 25(1)

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51 *Id.* ¶ 35.
52 *Id.* ¶ 36.
53 *Id.* ¶ 42.
54 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Award (June 30, 2009), ¶ 102.
55 Holiday Inns v. Morocco, Decision of Jurisdiction of 12 May 1974, *reported in* Pierre Lalive, The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, British Y.B. Int'l. L. 159 (1980).
56 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic (ICSID Case No. ARB/97/4): Introductory Note*, 14(1) ICSID Rev. 250, 275 (1999).
57 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007), ¶ 110.
58 *See id.* ¶¶ 98-109.
59 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007), ¶ 110.
60 *Id.*
61 *Id.* ¶ 113.

was fulfilled by the award only by virtue of the fact that it formed part of an overall operation which satisfied the notion of investment under the ICSID Convention.[62]

The tribunal then analysed whether Saipem had made an investment in terms of the Italy-Bangladesh BIT. Saipem had contended that the Pipeline Contract as well as the rights accruing from the ICC award fell within the definition of 'investment' provided in Article 1(1) of the BIT.[63] Article 1(1) provides:

The term 'investment' shall be construed to mean any kind of property […]. Without limiting the generality of the foregoing, the term 'investment' comprises:
[…]
c) credit for sums of money or any right for pledges or services having an economic value connected with investments,
[…]

At the outset, the tribunal noted that "*[i]n their ordinary meaning, the words 'credit for sums of money' also cover rights under an award ordering a party to pay an amount of money*".[64] However, in-keeping with the approach adopted for the inquiry under Article 25(1), it was held that the rights embodied in the ICC award were not created by the award; rather, the award was a crystallisation of Saipem's rights under the Pipeline Contract.[65] Thus, in the tribunal's opinion, it could be left open whether the award *itself* qualifies as an investment under the Italy-Bangladesh BIT, since the contractual rights which were crystallized by the ICC award constituted an investment under Article 1(1)(c) of the BIT.[66]

In sum, while the tribunal extended the BIT's protection to the ICC award by deeming it part of an overall scheme of investment, it refused to accept the view that an arbitral award, in and of itself, can possibly constitute 'investment' under Article 25(1).[67] Surprisingly, the tribunal did not deem it necessary to set out any reasons for its categorical rejection of this possibility. Nonetheless, the tribunal's unprecedented decision of extending BIT protection to an arbitral award, even indirectly under an 'overall operation' theory, was unquestionably a ground-breaking development. It provided an additional remedy against judicial interference with arbitral awards held by foreign investors. Naturally, the decision in *Saipem* has been discussed in subsequent cases on this issue. However, in light of the *Saipem* tribunal's blanket refusal to entertaining the possibility of arbitral awards constituting 'investment' under Article 25(1), on a standalone basis, these subsequent decisions have also avoided addressing this possibility, instead relying on the 'overall operation' theory.

The tribunal's reluctance in classifying the award as 'investment' under the Italy-Bangladesh BIT is also baffling. As noted by the tribunal itself, an arbitral award clearly constitutes a claim for money and Article 1(1)(c) expressly covers such claims within the BIT's definition of 'investment'. Subsequent decisions, as discussed below, have overcome this hesitance and have

62 *Id.* ¶ 114.
63 *Id.* ¶ 125.
64 *Id.* ¶ 126.
65 *Id.* ¶ 127.
66 *Id.* ¶ 127.
67 *Id.* ¶ 113.

expressly classified arbitral awards, on a standalone basis, as investment under BITs with similarly broadly worded definition of investment.

B. Chevron Corporation and Anr. v. The Republic of Ecuador[68]

In this non-ICSID case under the 1993 BIT between USA and Ecuador,[69] the tribunal was faced with the question of whether lawsuits could constitute investment. The case involved a denial of justice claim, based on inordinate delay by Ecuadorian courts in deciding breach-of-contract lawsuits filed by the claimants against the state.[70] The claimants had originally entered into an oil exploration contract with Ecuador.[71] However, by the time the USA-Ecuador BIT came into effect, the claimants had liquidated all of their interest in the said contracts.[72] The tribunal had to decide whether the lawsuits, which were the only remnants of the contracts, could constitute investment and be eligible for protection under the USA-Ecuador BIT.

First, the tribunal noted that it was undisputed that the oil exploration contracts would fall within the definition of 'investment' stipulated in the USA-Ecuador BIT.[73] Further, agreeing with the claimants, the tribunal held that the lawsuits continued the claimants' original investment, i.e. the exploration contracts, merely in a different form and thus constituted 'investment'.[74] Despite reaching this conclusion, the tribunal unfortunately did not undertake an in-principle analysis to determine whether lawsuits, on a standalone basis, could constitute 'investment' under the USA-Ecuador BIT. Article I(1)(a) of the BIT defines 'investment' as:

every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes […](iii) a claim to money or a claim to performance having economic value, and associated with an investment; […]

Given the tautological definition clause, the tribunal held that the definition refers to "*the plain meaning of the word 'investment'*" and provides a basis to supplement the non-exclusive list of covered investments provided in Article I(1)(a).[75] Holding the pending lawsuits as a part of the original investment, the tribunal effectively applied the *Saipem* tribunal's 'overall operation' theory to lawsuits, as opposed to arbitral awards. However, as discussed below, the *Chevron* decision has been relied upon as an authority to support eligibility of arbitral awards to constitute investment.[76]

By assuming jurisdiction over the pending lawsuits, the *Chevron* decision marked another step towards protecting foreign investors against delays and inaction on part of the host state's courts. But, much like the *Saipem* tribunal, the *Chevron* tribunal chose not to examine whether lawsuits,

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68 Chevron v. Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008).

69 Treaty between the United States of America and Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (Aug. 27, 1993).

70 Chevron v. Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008), ¶ 2.

71 *Id.* ¶ 2.

72 *Id.*

73 *Id.* ¶ 180.

74 *Id.* ¶¶ 184 and 189.

75 *Id.* ¶ 192.

76 *See* White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011), ¶ 7.6.5 ("Similar reasoning was employed by the tribunals in Mondev, Chevron, and Frontier Petroleum Services. In those decisions, the tribunals characterised arbitral awards as 'continuing' an investment under a contract.").

on a standalone basis, could be classified as investment and applied the 'overall operation' theory instead. If the tribunal had analysed whether the pending lawsuits could fall within the "*plain meaning of the word investment*", such analysis could have furthered the present inquiry – whether arbitral awards can constitute investment.

C. ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan[77]

In 1998, ATA was engaged by Arab Potash Co. ["**APC**"] (a Jordanian state-owned entity) for construction of a dike over the Dead Sea [the "**Dike Contract**"]. The dike eventually collapsed and APC initiated arbitration proceedings against ATA, as provided in the Dike Contract.[78] The resultant award absolved ATA of all liability and also partially allowed ATA's counterclaims.[79] APC challenged this arbitral award before the local courts of Jordan.[80] On January 24, 2006, the Amman Court of Appeal annulled the award and, on appeal, this decision was confirmed by the Court of Cassation in 2007.[81] The Court of Cassation also ruled that pursuant to Article 51 of the 2001 Jordanian Arbitration Law, the arbitration agreement contained in the Dike Contract stood extinguished as a result of the annulment.[82]

ATA commenced ICSID proceedings pursuant to the Turkey-Jordan BIT,[83] which, although entered into in 1993, only came into force on January 23, 2006.[84] ATA alleged that the actions of the Jordanian courts amounted to denial of justice as well as expropriation of its claims to money under the arbitral award.[85] The tribunal declined temporal jurisdiction over the denial of justice claim, holding the claim as equivalent to the contractual dispute (under the Dike Contract) which was initiated on September 6, 2000.[86] Despite ATA's protestations that the denial of justice claim, while connected to the initial contractual dispute, was legally distinct and could have only arisen once the Jordanian courts had annulled the arbitral award, the tribunal maintained that this claim was part of the initial contractual dispute which commenced before the BIT came into force. As obiter, relying on the *Saipem* decision, the tribunal did accept that an arbitral award can be part of an 'investment' as per the 'overall operation' theory.[87] However, it was held that the eligibility of the award to be classified as part of an investment does not affect the tribunal's lack of temporal jurisdiction since "*the first legal confrontation between the parties over the [f]inal [a]ward occurred prior to the entry into force of the Turkey-Jordan BIT*".[88]

The tribunal rejected the possibility that the cause of action in a denial of justice claim could be distinct from the cause behind the underlying litigation, holding: "*[c]laimant attempts to present a*

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77 ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010).
78 *Id.* ¶¶ 32-33.
79 *Id.* ¶ 33.
80 *Id.* ¶ 35.
81 *Id.* ¶¶ 46 and 52.
82 *Id.* ¶ 54.
83 Agreement Between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (Dec. 6, 1993) [*hereinafter* "Turkey-Jordan BIT"].
84 ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 37.
85 *Id.* ¶¶ 71, 78 and 81.
86 *Id.* ¶ 95.
87 *Id.* ¶¶ 113-115.
88 *Id.* ¶ 115.

denial of justice as an independent violation of the BIT and to invite the [t]ribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT. But the attempt must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT".[89] The tribunal ignored ATA's argument that the annulment of the award by the Jordanian Court of Cassation gave rise to a cause of action under the BIT – a denial of justice/ expropriation claim, which is completely distinct from the original contractual dispute. As discussed in this chapter, ATA's position is supported by the decisions in *Saipem*, *Chevron* and *White Industries* v. *India*,[90] where denial of justice/ expropriation claims against actions of the state courts have been treated distinct from the underlying contractual disputes. Quite simply, ATA's denial of justice/ expropriation claim did not even exist until the annulment of the arbitral award. The tribunal erroneously relied on the *Saipem* decision to hold that, as per the 'overall operation' theory, even the claim for denial of justice, which came into being after the BIT had come into effect,[91] was to be treated as part of the original contractual dispute.

Because of the tribunal's flawed understanding of the *Saipem* decision and the 'overall operation' theory, Article IX of the Turkey-Jordan BIT (which made the treaty retrospectively applicable to existing investments)[92] was rendered otiose. The tribunal held that "*Article IX(1) […] does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. Under the plain meaning of Article IX(1), the Tribunal may only exercise jurisdiction ratione temporis over the [c]laimant's claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006*.[93] It is surprising that the tribunal interpreted Article IX in this manner. This is contrary to what was held in *Chevron*[94] and, it has been argued, is an incorrect interpretation.[95]

Interestingly, the tribunal did retain jurisdiction over ATA's second claim, which was that the annulment of the award had resulted in expropriation of its right to arbitrate under the Dike Contract.[96] Under Article 51 of the 2001 Jordanian Arbitration Law, annulment of an award automatically results in extinguishment of the underlying arbitration agreement. ATA had cited this extinguishment as an additional ground for its ICSID claim.[97] The tribunal observed that the 'right to arbitrate' is a distinct 'investment' within the meaning of the BIT as Article I(2)(a)(ii) defines an investment to *inter alia* include "*claims to money or any other rights to legitimate performance having financial value related to an investment*" and thus "*[t]he right to arbitration could hardly be considered as*

89 *Id.* ¶ 108.

90 White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011).

91 The Turkey-Jordan BIT came into force on January 23, 2006 and the Court of Appeal and Court of Cassation Cassation decisions were rendered on January 24, 2006 and January 16, 2007 respectively.

92 Turkey-Jordan BIT, *supra* note 83, art. IX ("Entering into Force - 1. This Agreement shall enter into force on the date on which the exchange of instruments of ratification has been completed. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.")

93 ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 98.

94 Chevron v. Ecuador, PCA Case No. 34877, Interim Award (Dec. 1, 2008), ¶¶ 187-189 (the tribunal claimed jurisdiction over a contractual investment which was made before the BIT entered into force and was then the subject of a denial of justice claim which arose when lawsuits remained pending after the BIT came into force).

95 Joanna Dingwall & Hussein Haeri, *Jordan: ICSID Tribunal finds Jordan in Violation of its Investment Treaty Obligations*, 4 Int'l. Arb. L. Rev. N-33, N-34 (2010).

96 ATA v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010), ¶ 95.

97 *Id.* ¶ 116.

something other than a 'right […] to legitimate performance having financial value related to an investment'".[98] However, despite this being an ICSID case, the tribunal did not make any attempt to classify the 'right to arbitrate' as investment under Article 25(1), instead adopting the stand that "*[t]he ICSID Convention leaves the definition of the term investment open to the parties, allowing them to determine its scope and application pursuant to mutual agreement in the relevant BIT*".[99] Since the new Jordanian Arbitration Law came into effect after the Dike Contract had been entered into in 1998, the tribunal held that the Court of Cassation should have exempted ATA from the operation of this new law.[100] It was held that "*this part of* ***the decision of the Court of Cassation, occurring, as it does, after the entry into force of the BIT and distinct from the underlying investment****, is not barred ratione temporis and falls within the Tribunal's jurisdiction because* ***the right to arbitrate was never in contention until the annulment*** *whereupon the Court of Cassation extinguished that right.*" (emphasis added)

While the intention behind extending the BIT's protection to the right to arbitrate is commendable, it is difficult to reconcile the tribunal's assumption of jurisdiction over this claim with its dismissal of the denial of justice and expropriation claims related to the annulment. The tribunal found the extinguishment of the arbitration agreement to be a direct result of the Court of Cassation decision and distinct from the contractual dispute. Whereas, the award and its annulment were termed a part of the contractual dispute. The authors submit that, much like the right to arbitrate, the rights against expropriation and denial of justice were also never in contention until the annulment of the award. The annulment concurrently gave rise to expropriation claims in relation to both the arbitral award and the right to arbitrate. Furthermore, if the tribunal deemed the 'right to arbitrate' to be an investment, it is difficult to understand how the award arising out of this right was not categorized as so. This is especially striking since Article 2(a)(ii) of the Jordan-Turkey BIT explicitly includes "*[…] claims to money or any other rights to legitimate performance having financial value related to an investment*" within the definition of investment.

To make matters worse for ATA, the tribunal, ultimately finding Jordan guilty of expropriating ATA's right to arbitrate, ordered ATA to commence fresh arbitration proceedings pursuant to the arbitration clause of the Dike Contract.[101] This remedy is far from ideal. Since the tribunal has created an artificial distinction between right against expropriation of the arbitral award and the right to arbitrate, it is likely that the second set of arbitration proceedings will prove fruitless. Even if ATA, once again, succeeds in procuring an award in its favour, it is possible that the Jordanian courts will annul this award. Initiating ICSID proceedings for expropriation of the arbitral award/ denial of justice would normally have been the last resort available to the foreign investor. However, in this case, ICSID proceedings are likely to be infructuous since even the second arbitral award cannot be completely divorced of a connection with the initial contractual dispute. Thus, if the reasoning adopted by the original *ATA* tribunal is followed, once again the ICSID tribunal will be found to be lacking temporal jurisdiction.

98 *Id.* ¶ 117.
99 *Id.* ¶ 111.
100 *Id.* ¶ 118.
101 *Id.* ¶ 133.

In conclusion, the *ATA* tribunal agreed with the *Saipem* decision and the 'overall operation' theory, even though its application of the same is questionable. In a progressive development, the tribunal recognized the 'right to arbitrate' as an 'investment' under the Turkey-Jordan BIT. Despite being an ICSID tribunal, the tribunal did not undertake any analysis to determine whether this right could constitute investment in terms of Article 25(1) of the Convention. However, it is likely that the *ATA* decision may be relied upon as a precedent in the future to contend that the 'right to arbitrate' satisfies the *ratione materiae* requirements under Article 25(1). Overall, the *ATA* decision is a mixed bag as it adopts a progressive stand by extending the BIT's protection to the right to arbitrate but misapplies the *Saipem* and *Chevron* decisions to erroneously reject temporal jurisdiction over claims arising from annulment of an arbitral award.

D. Frontier Petroleum Services Limited v. The Czech Republic[102]

Frontier had entered into a joint venture agreement with Moravan-Aeroplanes and advanced loans to the same for manufacturing of aircrafts in the Czech Republic.[103] Upon alleged breaches of the said agreement by Moravan-Aeroplanes, Frontier initiated arbitration in Stockholm, as provided in the joint venture agreement, and successfully obtained an interim and a final award in its favour.[104] However, the Czech courts failed to recognize and enforce these awards for a prolonged period of time.[105] Aggrieved, Frontier initiated arbitration proceedings under Article IX of the 1990 Canada-Czech Republic BIT,[106] claiming that the Czech Republic, owing to actions of the state courts, had failed to accord fair and equitable treatment and full protection and security to its investment.[107] Although Frontier's claims were ultimately dismissed, the tribunal's findings on jurisdiction are relevant to the present inquiry.

It was undisputed between the parties that the loans advanced by Frontier constituted 'investment' under the Canada-Czech Republic BIT.[108] However, the Czech Republic had objected, although without much force or any supporting arguments, to categorization of the final arbitral award held by Frontier as investment. The tribunal held that Frontier's original investment (in the form of the loans advanced), was "*transformed into an entitlement under the final arbitral award*".[109] Further, noting that Article 1(a) of the BIT provides that "*[a]ny change in the form of an investment does not affect its character as an investment*", the tribunal held that the final award was "*what remained of [Frontier's] original investment*" and the same was protected under the BIT.[110] Since the Czech Republic had not put up any strong opposition on this ground, the tribunal assumed jurisdiction after very brief and cursory analysis, without referring to any of the other decisions on this issue. In light of Article 1(a) of the BIT, the tribunal simply held that the original investment had changed its form to an arbitral award and did not delve into any further analysis

102 Frontier Petroleum Services Limited v. The Czech Republic, Permanent Court of Arbitration, Final Award (Nov. 12, 2010).
103 *Id.* ¶ 26.
104 *Id.* ¶ 27.
105 *Id.*
106 The Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments (Nov. 15, 1990).
107 Frontier Petroleum Services Limited v. The Czech Republic, Permanent Court of Arbitration, Final Award (Nov. 12, 2010), ¶ 28.
108 *Id.* ¶¶ 215 and 218.
109 *Id.* ¶ 231.
110 *Id.*

or felt the need to refer to any of the existing jurisprudence on this issue. Interestingly, while the *Saipem* tribunal had hesitated from classifying an arbitral award as investment, despite the express inclusion of "claims for money" in the BIT definition of 'investment', the tribunal in *Frontier* showed no such hesitation. Further, while the *Frontier* tribunal did not expressly refer to the *Saipem* decision or the 'overall operation' theory, extending BIT protection to the arbitral award by classifying it as a transformation of the original investment is largely in line with the developing body of jurisprudence on this subject.

E. GEA Group Aktiengesellschaft v. Ukraine

Decided by an ICSID tribunal constituted under the 1993 Germany-Ukraine BIT,[111] this case adopted a radically different approach. A subsidiary of GEA had entered into an agreement with Oriana, a Ukrainian state-owned entity, for supply of naphtha fuel [the "**Fuel Agreement**"].[112] Upon arising of disputes, the parties signed a settlement agreement and subsequently a repayment agreement whereby Oriana agreed to pay a sum of "*at least USD 27.6 million*" to GEA [the "**Settlement Agreements**"].[113] Both of these agreements contained arbitration clauses.[114] Upon non-payment, GEA commenced arbitration against Oriana under the Settlement Agreements and successfully obtained an award in its favour.[115] However, the Ukrainian courts refused to enforce this award.[116] In this backdrop, GEA initiated ICSID proceedings, alleging expropriation of its investment made in the form of (i) the Fuel Agreement, (ii) the Settlement Agreements and the (iii) arbitral award.

The tribunal, after applying the *Salini* test, held that the Fuel Agreement constituted investment under Article 25(1)[117] and further classified it as investment under Article 1(1)(e) of the BIT which defines 'investment' to include "*rights to the exercise of an economic activity*".[118] However, it was held that the Settlement Agreements could not "*in and of themselves – constitute 'investments' under Article 1 of the BIT or (if needed) Article 25 of the ICSID Convention*" as they merely record and provide a mode of payment of the debt owed by Oriana to GEA.[119] Finally, the tribunal held that "*the arbitral award – in and of itself – whether tested against the criteria of Article 1 of the BIT or Article 25 of the ICSID Convention – cannot constitute an 'investment'*" as it merely provided for disposition of rights under the Settlement Agreements, which the tribunal had already held not to be investment.[120]

The tribunal further pronounced that the award *itself* could never constitute investment under the BIT or Article 25(1), even if, *arguendo*, it arose out of an investment (i.e., if it arose out of the Fuel Agreement, or if the Settlement Agreements constituted investment).[121] The tribunal rejected the 'overall operation' theory by stating that "*the fact that the [a]ward rules upon rights and obligations arising*

111 Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments (Feb. 15, 1993) [*hereinafter* "Germany-Ukraine BIT"].
112 GEA v. Ukraine, ICSID Case No. ARB/08/16, Award (March 28, 2011), ¶ 44.
113 *Id.* ¶¶ 51-52.
114 *Id.* ¶ 53.
115 *Id.* ¶ 62.
116 *Id.* ¶¶ 63-67.
117 *Id.* ¶¶ 151-152.
118 *Id.* ¶¶ 146-150.
119 *Id.* ¶ 157.
120 *Id.* ¶ 161.
121 *Id.* ¶ 162.

out of an investment does not equate the [a]ward with the investment itself".[122] In the tribunal's opinion, the arbitral award and the underlying investment remain "*analytically distinct and the award itself involves no contribution to or relevant economic activity within Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention*".[123] The tribunal did not elaborate any further as to what this 'analytical distinction' was. This was done despite the fact that GEA had brought prior awards, which did not make this distinction, to the tribunal's attention. It is also surprising that the tribunal did not consider the application of the transformation clause contained in Article 1(1) of the Germany-Ukraine BIT, and whether the same protected analytically distinct manifestations of an investment.[124]

Interestingly, while deciding whether the award could constitute investment, the tribunal refused to consider any of GEA's arguments which relied on the *Saipem* decision as, in the tribunal's opinion, the *Saipem* decision was marred by internal contradictions:[125]

in the Decision on Jurisdiction in Saipem S.p.A. v. *The People's Republic of Bangladesh (a case heavily relied upon by the Claimant), the Tribunal made statements that are difficult to reconcile, i.e., that* ***the ICC arbitration is part of the investment*** *(under the heading: 'Has Saipem made an investment under Article 25 of the ICSID Convention?')* [referring to paragraph 110 of the *Saipem* decision]*; that* ***the ICC award is not part of the investment*** *(under the heading 'Does the dispute arise directly out of the Investment?')* [referring to paragraph 113 of the *Saipem* decision]*; and that* ***it is unnecessary to decide whether the ICC award is part of the investment*** *(under the heading 'Jurisdictional objections under the BIT').* [referring to paragraph 127 of the *Saipem* decision] (emphasis added)

However, the authors believe that the tribunal's reading of the *Saipem* decision is manifestly incorrect. While the tribunal has correctly identified that the *Saipem* decision held an award to be part of an overall investment, the other two statements cited as instances of contradictions are misunderstood at best, and misleading at worst. At no stage does the *Saipem* tribunal hold that the ICC award is not part of the investment. As discussed above, paragraph 113 of the *Saipem* decision holds that an arbitral award *itself* could not constitute investment under Article 25(1), but that the ICC award in that case was part of an investment under the 'overall operation' theory. Further, the *Saipem* tribunal did not state that it was unnecessary to decide whether the ICC award was part of the investment under the BIT. In fact, the tribunal expressly held that the award was part of an overall investment under the BIT.[126] Rather, the tribunal found it unnecessary to decide whether the award *itself* was an investment, since it had already held that the award was part of an overall operation which constituted investment under the Italy-Bangladesh BIT.

While the *GEA* tribunal was in agreement with the *Saipem* decision so far as it holds that the arbitral award *itself* cannot constitute investment, it does not put forward any reasons for

122 *Id.*

123 *Id.*

124 Germany-Ukraine BIT, *supra* note 111, art. 1(1) ("the term 'investments' means assets of any kind […]. Any change to the form in which assets are invested shall not affect their nature as investments.").

125 GEA v. Ukraine, ICSID Case No. ARB/08/16, Award (March 28, 2011), ¶ 163.

126 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (March 21, 2007), ¶¶ 110-114 and 127.

discarding the 'overall operation' theory relied on by GEA and utilized in the *Saipem* decision. Nevertheless, there has been some support for the *GEA* decision.[127] It has been argued that the decision furthers the orthodox understanding that "*whether an arbitral award constitutes an 'investment' will largely depend on a case-by-case analysis of the definition of 'investment' contained within the relevant BIT*".[128] However, given that the Fuel Agreement was held to constitute investment, the authors believe that correct application of the *Saipem* decision and the 'overall operation' theory would have led the tribunal to conclude that the arbitral award also constituted part of GEA's investment. The *GEA* decision is a considerable departure from the 'overall operation' theory and the gradually developing body of jurisprudence on the topic. The authors maintain that this departure is an aberration and has been rightly criticized by the tribunal in *White Industries* v. *India*,[129] as discussed below.

F. White Industries Australia Limited v. Republic of India

White Industries had entered into a contract with Coal India (a state-owned entity) for supply of equipment to a coal mine [the "**Coal Contract**"].[130] White Industries initiated ICC arbitration, as provided under the Coal Contract, due to disputes relating to payment by Coal India.[131] In May 2002, the ICC tribunal decided in White Industries' favour.[132] Later in 2002, White Industries applied to the High Court of New Delhi seeking enforcement whereas Coal India applied to Calcutta High Court seeking setting aside of the award.[133] Upon receiving notice of the Calcutta High Court proceedings, White Industries requested transfer of both the proceedings to the Supreme Court of India.[134] The Supreme Court dismissed the transfer request and, after going through multiple levels of appeal, both the cases remained pending till 2009.[135] White Industries initiated arbitration proceedings pursuant to Article 12 of the 1999 Australia-India BIT,[136] contending that the judicial delay amounted to denial of justice.[137] For this purpose, it claimed that the Coal Contract as well as the arbitral award constituted investment under Article 1(c) of the BIT.[138] White Industries did not contend that the award *itself* constituted investment. Rather,

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127 *See* Sumeet Kachwaha, The White Industries Australia Limited – India BIT Award: A Critical Assessment, 29(2) Arb. Int'l. 275, 282-283 (2013), *available at* http://www.kaplegal.com/upload/pdf/Kachwaha-article.pdf.

128 *See* Robert Volterra, *Is an Arbitral Award an "Investment"?*, VOLTERRA FIETTA (2011) *available at* http://www.volterrafietta.com/is-an-arbitral-award-an-investment.

129 White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011). For a detailed analysis of the award, *see generally* S. K. Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries V. Coal India Award*, 2(1) Indian J. Arb. L. 4 (2013).

130 White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011), ¶ 3.2.13.

131 *Id.* ¶ 3.2.29.

132 *Id.* ¶ 3.2.33.

133 *Id.* ¶¶ 3.2.35-3.2.36.

134 *Id.* ¶ 3.2.40.

135 *Id.* ¶¶ 3.2.63-3.2.64.

136 Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (Feb. 26, 1999) [*hereinafter* "Australia – India BIT"].

137 White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011), ¶¶ 4.3.3-4.3.17.

138 *Id.* ¶¶ 4.1.8 and 4.1.24; Australia – India BIT, *supra* note 136, art. 1(c) ("'investment' means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes: (i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges; (ii) shares, stocks, bonds and debentures and any other form of participation in a company; (iii) **right to money or to any performance having a financial value, contractual or otherwise**; (iv) business concessions and any other **rights required to conduct economic activity and having economic value** conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals; (v) activities

it relied on the *Saipem* decision to argue that the award was part of the original investment (i.e. the Coal Contract).[139] On the other hand, India relied on the *GEA* decision to argue that the ICC award was analytically distinct from the Coal Contract and thus could not be considered a part of the original investment.[140]

First, the tribunal held that the Coal Contract constituted investment under Article 1(c)(iii) ('right to money or to any performance having a financial value') as well as Article 1(c)(iv) ('right to conduct economic activity') under the Australia-India BIT.[141] As to the eligibility of the arbitral award for protection under the BIT, the tribunal agreed with the *Saipem* decision and held that the award was a crystallization of the original investment made in the form of the Coal Contract.[142] The tribunal rejected India's reliance on the *GEA* decision and ultimately termed the decision in *GEA* as a deviation from the developing jurisprudence on this issue. The tribunal also noted that the *GEA* tribunal's observation that an award cannot be part of investment even under the 'overall operation' theory, was merely obiter as the award in *GEA* arose from the Settlement Agreements which did not constitute investment under the applicable BIT.[143] In addition, the tribunal held that "*the conclusion expressed by the GEA [t]ribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment.*"[144]

The *White Industries* decision, as emphasized by the tribunal itself, continues along the developing line of interpretation on this issue. However, major flaw in the decision also lies with the tribunal's zeal to fall in line with the existing body of jurisprudence. The tribunal relied on cases cited by White Industries almost as if they were binding precedents. The tribunal omitted to juxtapose the clauses of the Australia-India BIT and the corresponding clauses of the BITs underlying the cited cases. Given the scope of variation in the language of BITs (as highlighted in Chapter II) and the tribunal's mandate to restrict its award to interpretation of the Australia-India BIT, this omission is startling. The tribunal's overreliance on other cases without sufficient attention to the niceties of the Australia-India BIT is epitomized in the tribunal reaching its conclusion without even establishing which clause of the Australia-India BIT's definition of 'investment' covered (directly or as part of an overall investment) the arbitral award. While the authors maintain that closer analysis of the Australia-India BIT would have ultimately led the tribunal to the same conclusion, the tribunal's omission to do so deserves scrutiny.[145]

IV. Awards as Investment: Tracing the Trail and Charting the Course for Future

Broadly, the existing approaches to categorization of arbitral awards as investment can be summarized as below:

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associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights") (emphasis added).

139 White v. India, Permanent Court of Arbitration, Final Award (Nov. 30, 2011), ¶ 4.1.25.

140 *Id.* ¶ 5.1.19.

141 *Id.* ¶ 7.4.19.

142 *Id.* ¶ 7.6.10.

143 *Id.* ¶ 7.6.7

144 *Id.* ¶ 7.6.8.

145 *See* Kachwaha, *supra* note 127, at 282-283.

1. the award can form part of an 'overall operation', and such operation and its parts, including the arbitral award, can be characterized as investment (both under Article 25(1) and BIT-specific definitions of 'investment' discussed above);
2. if the award arises from an economic right/ activity that qualifies as an investment, the award will also be categorized as an investment as a remnant/ crystallization/ transformation of the economic right/ activity (both under Article 25(1) and BIT-specific definitions of 'investment' discussed above);
3. without prejudice to the above approaches, the award, *in and of itself*, cannot constitute investment under Article 25(1); and
4. in contrast to the above, the last approach provides that the award is *analytically distinct* from the economic right/ activity it arises from and thus, even if such activity constitutes investment, the award cannot be categorized as investment, or a part/ form of investment.

The common thread among all of the above approaches is that none of them propose that an award, on a standalone basis, can constitute investment.[146] While some tribunals expressly rejected such a possibility, others have avoided addressing this question. However, none of the tribunals have felt it necessary to dwell on the reasons why this possibility is so unpalatable. The authors believe that this is founded in the inability of arbitral awards to showcase some of the typical characteristics of investment. While, as discussed earlier, there has been considerable debate around the definition of 'investment', there is largely a consensus that the term denotes assets with certain typical characteristics, regardless of whether these characteristics come from the plain meaning of the word, or the *Salini* test, or the wording of the specific BIT. Admittedly, most tribunals do not insist on the presence of all such characteristics in each case. As discussed in Chapter II, tribunals have considered these characteristics to be inter-dependent. The requirement of 'a certain duration' has not been strictly construed and the requirement of contribution to host state's economic development has been found to be implicit in the other characteristics.

However, the wide application of criteria such as the *Salini* test, even in non-ICSID cases, shows that tribunals tend to satisfy themselves, if only out of abundant caution, that the assets in question possess the typical and most commonly expected characteristics of investment. Along these lines, if the *Salini* test is applied to an arbitral award (as a standalone instrument), it is difficult to identify any contribution to the host state's economy by the award itself. Even if the controversial 'contribution to economic development' prong of the *Salini* test is discarded, it is equally difficult to associate the presence of a commercial risk with arbitral awards. Although, where risk is understood broadly, the authors acknowledge that the risk of enforcement in a foreign jurisdiction – or even the risk of an unfavourable arbitral award, perhaps – are possible arguments. But even if an element of risk is identified, seeking to associate a commitment of capital or expectation of regular profits with arbitral awards is a tall ask. It is highly desirable that,

146 While the tribunal in Frontier Petroleum v. The Czech Republic had categorized an arbitral award, in and of itself, as investment, this was owing to the (i) specific language of the 1990 Canada-Czech Republic BIT and (ii) lack of any substantial opposition to jurisdiction by the Czech Reupblic (*see* Chapter III.D above).

unlike the cases decided as of date, future tribunals conduct an analysis along similar lines before reaching the conclusion that awards – *in and of themselves* – cannot constitute investment.

Given the difficulty in establishing arbitral awards as investment, on a standalone basis, the most prominent approach for extending BIT protection to arbitral awards is to characterize the award as either an embodiment or a part of an underlying investment. Apart from the *GEA* decision, all the decisions discussed above adopt this approach. While it may be too soon to term this approach as the standard, a trend can certainly be observed. If an arbitral award arises from any economic right/ activity of the investor which could be categorized as investment, it is likely that a tribunal will consider the award to be part such investment. However, this generalization will not hold true in each and every case; language of the definition clause of the underlying BIT will play a crucial and determinative role in this respect. For example, in a non-ICSID case where the definition of 'investment' in the underlying BIT expressly includes 'claims to money', the tribunal should not show any hesitation in extending the protection of the BIT to arbitral awards. At the same time, a BIT may expressly exclude certain instruments from its scope of protection. In fact, India's 2016 Model BIT expressly excludes "an order or judgment sought or entered in any judicial, administrative or arbitral proceeding" from the scope of its definition of 'investment'.[147] Further, the presence or absence of a transformation clause may also play a part in the tribunal's decision regarding eligibility of an arbitral award to constitute investment. The 'overall operation' theory is likely to be particularly effective and persuasive in cases where the BIT contains a transformation clause.

While investment treaty tribunals' assumption of jurisdiction over and extension of BIT protection to arbitral awards is a positive trend, some concerns remain unaddressed. One of the objections to granting BIT protection to arbitral awards is that such a practice permits the investor to seek indirect enforcement of an annulled award, while circumventing the legitimate supervisory jurisdiction of the courts of the seat. In the cases discussed above, investors invariably requested the tribunal to grant payment of compensation as provided for in the initial award, although with varying degree of success in each case. If the tribunal grants such a relief, it effectively permits the investor to indirectly enforce an award which had been annulled by the courts of the seat. This concern was first raised by Bangladesh before the *Saipem* tribunal:[148]

Saipem is asking the ICSID tribunal to rubberstamp the ICC award, thereby converting it into an ICSID award, in order to bypass the correct method of enforcement of an ICC award. Saipem is thereby trying to take advantage of:

(1) the more favourable means of enforcement of an ICSID award;
(2) trying to have a second attempt at enforcing the ICC award;
(3) trying to mutate the Dhaka-ICC arbitration mechanism into a delocalised one to avoid any potential domestic Bangladesh annulment proceedings.

However, the tribunal summarily rejected Bangladesh's argument by stating:[149]

147 Model Text for the Indian Bilateral Investment Treaty, art. 1.4(vii) (2016).
148 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Award (June 30, 2009), ¶ 109.
149 *Id.* ¶ 110.

[t]he fact that the reparation claimed in this arbitration is by and large equivalent to the amounts awarded in the ICC Arbitration, does not in and of itself mean that this Tribunal would "enforce" the ICC Award in the event of a treaty breach.

The authors believe that the *Saipem* tribunal overemphasised the fact that granting the reliefs sought by Saipem would not amount to 'enforcement' of the ICC award, in the strictest legal sense of the word. Effectively, if the investor-state arbitral tribunal grants the same reliefs that were provided in the original arbitral award, the investor will have obtained indirect enforcement of the original award, even though the same may have already been annulled by the courts of the seat. This is particularly true in the context of ICSID cases, where, by virtue of Article 54 of the Convention, ICSID awards are equated to final court decisions in each and every ICSID contracting state.[150] Thus, in effect, once an investor successfully obtains an ICSID award which grants reliefs along the lines of the original arbitral award, enforcement becomes automatic and beyond the scope of any challenge. While a detailed discussion about the enforceability of annulled awards is beyond the scope of this editorial, this form of enforcement of awards by another arbitral tribunal could not have been envisaged by the New York Convention.[151] Article V of the New York Convention allows courts to refuse enforcement of foreign arbitral awards on seven different grounds.[152] Particularly, enforcement may be refused if an award has been annulled by a competent authority of the country in which, or under the law of which, that award was made.[153] However, by securing indirect enforcement of an award through the ICSID route, an award creditor-investor may successfully evade the application of the Article V standards for review and obtain automatic enforcement under Article 54 of the ICSID Convention.

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150 ICSID Convention, *supra* note 2, art. 54 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

151 *See generally* Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29(2) ICSID Rev. 1 (2014); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, (1998) 9(1) ICC Int'l. Ct. Arb. Bull. 14.

152 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V (June 10, 1958), 330 U.N.T.S. 38 ("1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.").

153 *Id.* art. V(1)(e).

Let us take the example of a fictional state Z, which is a contracting party to both the New York Convention and the ICSID Convention. This state, like many others, recognizes annulment at the seat of arbitration as an absolute ground for refusal of enforcement.[154] Investor X holds an arbitral award in its favour against State Y, which resulted from arbitration proceedings seated in Y. However, this award has been annulled by the state courts of Y. Y is a contracting party to the ICSID Convention and has signed BITs with multiple states, including the national state of X. Aggrieved by the annulment of its award, X, a foreign investor in Y, initiates ICSID proceedings against Y. As the outcome of these proceedings, X's award is held to constitute part of an investment, its annulment is found to be violative of the provisions of the applicable BIT, and Y is ordered to pay compensation to X as per the original arbitral award, alongwith interest and legal costs of the ICSID proceedings. Thereafter, X, on the strength of Article 54 of the ICSID Convention, seeks enforcement of the ICSID award in Z. By virtue of Article 54, the state courts of Z are bound to enforce the ICSID award. As a result, the courts of Z will have to (i) indirectly recognize the annulment decision of the courts of Y as invalid and (ii) contradict their own New York Convention jurisprudence by indirectly recognizing the validity of the underlying award (which has been annulled by the courts of Y, which is seen as an absolute ground for non-enforcement in Z) while enforcing the ICSID award.

The above example illustrates a conundrum that is yet to be addressed by any of the tribunals that have extended BIT protection to arbitral awards. While the authors favour the developing trend of extending international investment law protection to arbitral awards, there are concerns that are yet to be overcome by this development.

V. Conclusion

The discussion above shows that a trend, although not entirely devoid of occasional aberrations, is steadily emerging. Overall, the current position can be summarized as favouring classification of awards as investment, not on a standalone basis, but as a part/ form of an economic right/ activity which constitutes investment. It must be noted, however, that mere satisfaction of *ratione materiae* jurisdiction is not sufficient to conclude that a foreign investor, unlike any other award creditor, is permitted an additional bite of the apple. Even if an investment treaty tribunal assumes jurisdiction over judicial interference against an arbitral award, the mere fact of interference is not sufficient to warrant international investment law sanctions against the host state.[155] The courts of the seat of arbitration have legitimate supervisory jurisdiction over arbitral awards. Mere non-enforcement or annulment of the award is not sufficient, as is evidenced from the fact that even after assuming jurisdiction, the tribunals in many of the cases discussed above eventually dismissed the claims. If the decision of the national courts is tenable (or simply arguable) and there is no evidence of discriminatory treatment, arbitrariness, abuse of rights or bad faith, then there is no scope for introduction of investment treaty protection.[156] Thus, normally, investment treaty arbitration will not allow the investor another shot at enforcement. However, it may provide a remedy if the judicial interference with the award falls short of the investment protection standards prescribed by the relevant BIT. As noted by Prof. Loukas

154 *See generally* Albert Jan van den Berg, *supra* note 151; GARY B. BORN, INTERNATIONAL COMERCIAL ARBITRATION 3624-3640 (2d ed., 2014).

155 Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Award (June 30, 2009), ¶ 133.

156 Mistelis, *supra* note 1, at 86.

Mistelis, "*linking the destiny of commercial arbitration outcomes with foreign investment protection and investment treaty arbitration is an intriguing proposition with consequences which are not yet easy to ascertain fully*".[157] Given the significant risk and costs involved, it is unlikely that every frustrated award creditor-investor will initiate investment arbitration proceedings. Thus, the number of cases where investors seek BIT protection for arbitral awards is unlikely to grow exponentially. But, as discussed above, the cases that have discussed the question of arbitral awards as investment leave many issues unaddressed. In the backdrop of increasing backlash against the legitimacy of investment treaty arbitration, increased certainty and predictability are highly desirable; especially in relation to eligibility of arbitral awards to constitute investment, a question which is at a unique intersection of commercial and investment treaty arbitration.

[157] *Id.* at 87.