

International Framework of Investment Law

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Outline

- **Typical elements of an IIA**
- **Scope of Application**
 - Definition of Investor
 - Definition of Investment
 - Temporal Scope
 - Territorial Scope

IIAs: *Typical Elements*

- **Scope of Application**
 - Definition of covered “investments”
 - Definition of covered “investors”
 - Temporal scope
 - Territorial scope
- **Standards of Treatment**
 - Relative standards:
 - National Treatment (NT)
 - Most Favoured Nation Treatment (MFN)
 - Absolute standards:
 - International Minimum Standard of Treatment (IMS)
 - Fair and Equitable Treatment (FET)
 - Full Protection and Security (FPS)
- **Standards of Protection**
 - Protection against unlawful expropriation
 - Compensation in cases of strife
 - Transfer of funds
 - Subrogation
 - Umbrella Clause
- **Dispute Settlement**
 - State to State
 - Investor – State Arbitration (ISDS)

Two main
categories of
IIAs:

• Bilateral
Investment
Treaties (BITs)

• Investment
Chapters in
Preferential
Trade
Agreements
(PTAs)

SCOPE OF APPLICATION

The importance of definitions

- Definitions serve two important functions:
 - Determine whether the standards of protection apply
 - Since the terms are usually used in the arbitration clause, they determine whether an investor-state arbitral tribunal has jurisdiction to decide a dispute:
 - Investment: *ratione materiae* -- subject matter jurisdiction
 - Investor: *ratione personae* -- personal jurisdiction over the parties
 - Application in time: *ratione temporis*
 - Geographical application: *ratione loci*
- Similarities between IIAs, but important differences. Although there are general trends and common provisions, ultimately the text of the particular treaty governs

- Types of definition of investment:
 - Asset based, illustrative list approach
 - Typical European Model BIT (Dutch/Swiss BIT)
 - Asset invested by an investor a Party in the territory of the other Party
 - Closed list (NAFTA, Canada 2004 Model BIT)
 - Investment is only what is on the list
 - Characteristics of an investment approach (US Model)
 - Some IIAs limit the scope of the definition of “investment”:
 - Assets used for non-business purposes
 - Financial transactions that do not entail a real acquisition of interests
 - Public debt
 - Include characteristics of investment: commitment of resources, expectation for profit, assumption of risk
 - Other definitions:
 - Lasting economic relations (EFTA – Mexico)
 - Direct Investment (Australia-Thailand FTA)

Examples of “asset-based” definitions of “Investment”

- Dutch Model

the term “investments” means every kind of asset and more particularly, though not exclusively:

- (i) movable and immovable property as well as any other rights in rem in respect of every kind of asset;
- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- (iii) claims to money, to other assets or to any performance having an economic value;
- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
- (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

Examples of “closed list” definitions of “Investment”

Canada MODEL FIPA (BIT)

“Investment means:

- (I) an enterprise;
- (II) an equity security of an enterprise;
- (III) a debt security of an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
- (IV) a loan to an enterprise
 - (i) where the enterprise is an affiliate of the investor, or
 - (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
- (V) (i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and
- (ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment; (...)

Examples of limiting the scope of definitions of “Investment”

- US Model BIT (2012)

“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;¹
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights; (...)

Examples of limiting the scope of definitions of “Investment”

BIT between Belarus and the Czech Republic (1996)	BIT between Mauritius and Swaziland (2000)
<p style="text-align: center;">“Article 1 Definitions</p> <p>The term “investment” shall mean 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 in accordance with the laws and regulations of the latter ...” (emphasis added)</p>	<p style="text-align: center;">“Article 1 Definitions</p> <p>“Investment” means every kind of asset admissible under the relevant laws and regulations of the Contracting Party in whose territory the respective business undertaking is made, ...” (emphasis added)</p>

Article 45 of the European Free Trade Association (EFTA)-
Mexico FTA (2000)

*“For the purpose of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment **for the purpose of establishing lasting economic relations** with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.*”

Australia-Thailand FTA - Art. 901,903

“Article 901

Definitions

For the purposes of this Chapter:

“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter and which has been admitted by the latter Party in accordance with its laws, regulations and policies; (...)”

Article 903

Scope

“This Part applies to measures adopted or maintained by a Party relating to:

a. **direct investments** of investors of the other Party; and

b. investors of the other Party, (...)”

- Key points on scope of investment:
 - Although meaning of investment is a question of international law, host State law (lex situs of asset/property) determines the rights associated with an asset.
 - There is no international law of property
 - Asset based definition very broad – its outer limits are not known
 - Many BITS includes portfolio, indirect investment and minority shareholders
 - There is no monetary threshold

Definitions of “Investment”: key issues discussed in case law

- What is an asset and thus an investment?
 - *Pope & Talbot vs. Canada*: is market share an investment?
 - *Fedax vs. Venezuela*: investment goes beyond that just FDI

- Objective vs. Subjective definitions of investment
 - Discussion started in context of determining jurisdiction in ICSID cases: the “doubled-barrelled” test...
 - *Salini vs. Morocco* (“*Salini test*”)
 - Certain duration
 - Regularity of profit and return
 - Element of risk
 - Substantial commitment
 - Significant contribution to host State’s development
 - But has lead to a broader discussion: how free are the parties to define the term “investment”?
 - Subjective vs. Objective tests (intent of the parties or textual interpretation of the text?)
 - *Joy Mining v. Egypt*

- Arguably no requirement that the capital/contribution for the investment come from the home state of the investor: “the Treaty contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement.” (*Mobil v. Venezuela*, 2010)

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- Legality of the investments: what happens when an investment has been made not in accordance with the domestic laws of the host country?
 - Some IIAs define the term “investment” as investment made in accordance with the laws of the host country...
 - Other IIAs make it clear that investments shall be admitted in accordance with host country’s laws and regulations...

Chile – New Zealand BIT

ARTICLE 1

Definitions

For the purposes of this Agreement:

(...)

"investment" means any kind of asset or rights related to it ***provided that the investment has been made in accordance with the laws and regulations of the Contracting Party receiving it***, including, though not exclusively, any: movable and immovable property and any other property rights such as mortgages, usufructs, liens or pledges: shares, stocks, debentures and similar interests in companies; titles or claims to money, including loans, or to any performance under contract having a financial value; intellectual property rights such as copyrights, patents for inventions, trademarks, industrial designs, know-how, technical processes, trade names and goodwill; business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources

Lebanon-Malaysia BIT

“ 1. For the purpose of this Agreement:

(a) "investments" means every kind of asset and in particular, though not exclusively...

2. (a) The term "investments" referred to in paragraph 1(a) shall only refer to all investments that **are made in accordance with the laws and regulations of the Contracting Parties.**”

China-Mexico BIT

“Each Contracting Party shall admit the entry of investments made by investors of the other Contracting Party **pursuant to its applicable laws and regulations.**”

The “legality of investments”

- Is that a jurisdictional issue or an issue of admissibility of the claim?
- Some tribunals (*Salini vs. Morocco, Tokios Tokéles vs. Ukraine, Plama vs. Bulgaria*)
 - Reference to host State’s domestic laws concerns not the definition of “investment” but just refers to the validity of the investment, it seeks to prevent the BIT from protecting investments that should not be protected.
- Other tribunals have denied jurisdiction
 - *Inceysa Vallisoletane v. El Salvador, Fraport vs. the Philippines, Alistair Anderson vs. Costa Rica*
 - Even without a specific language included in BIT assets should be invested in good faith. E.g. *Phoenix Action vs. the Czech Republic*
- So far discussion of “legality” has tended to focus on situations of compliance with domestic laws and regulations...
- Issue likely to be raised in the future: the actual breadth of the admission clause.

Definitions of “Investor”

- ...the term “nationals” shall comprise with regard to either Contracting Party:
 - (i) natural persons having the nationality of that Contracting Party; (Dutch Model)
- The term “investor” refers with regard to either Contracting Party to:
 - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals; (Swiss Model)
- Natural persons:
 - Citizens
 - Permanent residents
- Case law:
 - *Nottebohm case*
 - request for a “effective link” (tradition, interests, activities or family ties) between home State and national
 - *Champion Trading vs. Egypt, Soufraki vs. UAE*
 - Examine domestic law of the home State and all other relevant facts
 - Although defining who is a national is within the sovereign power of the state, the arbitral tribunal is bound to make that determination
 - Investment arbitral tribunals have not always applied an “effectiveness” or “genuine link” test to determine nationality (the test in customary international law); the mere legal fact of being a national is sufficient (Fakes v. Turkey)

Individuals as investors

- What about dual nationals?
 - Varies according to the forum and applicable IIA
 - Beware of ICSID Art.25 requirements. Under ICSID, dual nationals cannot make an arbitral claim
- A claimant with a dual nationality (i.e. Dutch and Swiss) can arguably make a claim under both Dutch and Swiss BITs, even though the person has lived in Switzerland all his or her life and has no effective links to The Netherlands
- But most investment treaties do not address the question of dual nationality
- International Law Commission's Draft Articles on Diplomatic Protection, Article 7 ("Multiple nationality and claim against a State of nationality")
 - "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim".*

Individuals as investors

- **Permanent residents:**

- The criterion of permanent residence is sometimes used as an alternative to citizenship or nationality. For instance in the Canada-Argentina BIT the term “investor” means “i) any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws”.
- Natural persons that are covered by the Energy Charter Treaty (ECT) are similarly defined by reference to each state’s domestic laws determining citizenship or nationality but also extends coverage to permanent residents: “Investor” means: “a) with respect to a Contracting Party: i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law”.
- Article 201 of NAFTA equally provides in part that: “National means a natural person who is a citizen or permanent resident of a Party

- **Certain investment agreements require some link beyond nationality.** For example, the Germany-Israel BIT provides in its Article (1)(3)(b), that the term “nationals” means with respect to Israel, “Israeli nationals being permanent residents of the State of Israel”.

Examples of definitions of “Investor”: Legal Entities

BIT between Sierra Leone and the United Kingdom (2000)	BIT between Belgium - Luxembourg and Pakistan (1998)
<p>“Article 1</p> <p>[...]</p> <p>(d) companies” means:</p> <p>(i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;</p> <p>(ii) in respect of the Republic of Sierra Leone: corporations, firms and associations incorporated or constituted under the law in force in any part of the Republic of Sierra Leone; (emphasis added)</p>	<p>“Article I.</p> <p>[...]</p> <p>1. The term “Investor” means: [...]</p> <p>b) any legal entity, including companies, association of companies, trading corporate entities and other organizations which is incorporated or, in any event is properly organized under the law of the Islamic Republic of Pakistan, the Kingdom of Belgium or the Grand-Duchy of Luxembourg.” (emphasis added)</p>

Examples of definitions of “Investor”: Legal Entities

BIT between France and Uganda (2002)	BIT between Argentina and Thailand (2000)	BIT between Chile and Turkey (1998)
<p>“Article 1</p> <p>[...]</p> <p>3. The term “company” means any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party and having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party or by legal persons having their head office in the territory of one contracting Party and constituted in accordance with the legislation of that Party.” (emphasis added)</p>	<p>“Article 1</p> <p>1. The term “investor” shall mean: ...</p> <p>(b) any juridical person incorporated or constituted under the law in force in the territory of either Contracting Party whether or not with limited liability and whether or not for pecuniary profit and having its seat in the territory of that Contracting Party.” (emphasis added)</p>	<p>“Article 1</p> <p>1. The term “investor” means the following subjects who invest in the territory of the other Contracting Party in accordance with this Agreement: [...]</p> <p>(b) any legal person including companies, corporations, or business associations incorporated or constituted under the law in force of either of the Contracting Parties and having their headquarters together with effective economic activities in the territory of that Contracting Party.” (emphasis added)</p>

Examples of definitions of “Investor”: Legal Entities

Place of constitution/organization

“(b) the term “nationals” shall comprise with regard to either Contracting Party:

- (i) natural persons having the nationality of that Contracting Party;
- (ii) legal persons *constituted under the law of that Contracting Party*;
- (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).”

(Dutch Model)

“enterprise” means any entity *constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled*, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

“investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

(US Model)

Examples of definitions of “Investor”: Legal Entities

Seat of the business (*siège social*) - the place of central administration or effective seat of management of the business

“(1)The term “investor” refers with regard to either Contracting Party to:

(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party **and have their seat, together with real economic activities**, in the territory of that same Contracting Party;

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party”

(Swiss Model)

- Legal entities:
 - Place of incorporation
 - Real seat or principal place of business (effective management)
 - Nationality of ownership or controlDifferent IIAs use one or more of these requirements
- Case law: When does a company is a covered investor?
 - *Common criteria in IIAs: nationality by incorporation*
 - Companies constituted abroad but owned or controlled by nationals of the host State:
 - *Autopista Concesionada vs. Venezuela* (Company incorporated in the U.S. controlled by Mexicans)
 - *Tokios Tokelés vs. Ukraine* (Company incorporated in Lithuania controlled by Ukrainians)
 - *Rompetrol vs. Romania* (Dutch company controlled by Romanian nationals)
- Are State enterprises covered?
 - Depends on applicable IIA
 - Debate on whether these entities behave in the same manner as private ones.

Ownership and Control

- Typical formulation: Art. 1 BIT Austria-UAE
*“Investment by an investor of a Contracting Party means every kind of asset in the territory of one Contracting Party **owned or controlled directly or indirectly** by an investor of the other Contracting Party...”*
- Very few IIAs define the concepts of “ownership” and “control”. But:
 - Definition of ownership tends to be **quantitative** (a juridical person is “owned” if more than 50 percent of the equity interest is owned).
 - Definition of control tends to be **qualitative** (a juridical person is “controlled” if there is the power to appoint a majority of the board of directors or otherwise to legally direct its actions)
- “Direct and indirect” ownership or control
 - Rationale: to protect investments or nationals or companies of a contracting party, no matter how many corporate layers exist between the company and the investment.

Ownership and control: Relevant case law

- *Aguas del Tunari (AdT) vs. Bolivia:*
 - Claim under Bolivia-Netherlands BIT
 - AdT was local Bolivian entity for a consortium led by International Water Ltd. Incorporated in Cayman Islands, and 100% owned by Bechtel Co. (a U.S. company), but with a subsidiary in the Netherlands.
- *Sedelmayer vs. Russia (ICC)*
 - German national sole owner of SGC Intnal. (U.S. company).
 - SGC Intnal. Invests in Russia
 - Sedelmayer submits claim under Russia-Germany BIT
 - BIT did not mentioned elements of control, just place of incorporation and siège social. Tribunal nevertheless upheld jurisdiction:
 - “... during recent years, there has been a growing support of the control theory...the mere fact that the Treaty is silent on the point...should not be interpreted so that Mr. Sedelmayer cannot be regarded as a de facto investor”
- *Saluka vs. Czech Republic (UNCITRAL)*
 - Tribunal honoured the validity of the place of incorporation under the BIT.
 - Saluka (Dutch Company) had shares of the Czech State-owned bank IPB, claimed violations of the BIT. Czech Government argued that Nomura Europe (a U.K. subsidiary of a Japanese investment bank) controlled Saluka.
 - Tribunal considered the disadvantages of the formalistic test, and the risk of treaty shopping, but opted to “respect” the terms of the text of the BIT.
- *Société Générale vs. Dominican Republic (UNCITRAL, LCIA)*
 - DR argued that tribunal should consider a cut-off point after which claims by indirect investors are too tenuous or remote in terms of the connection to the affected company at issue.
 - Tribunal held that France-DR BIT does cover indirect and minority forms of equity interest, so there may be several layers of intermediate companies intervening between the claimant and the investment.

- Investors can structure their investments in myriad ways to obtain investment protection
- Investors with indirect minority shareholding are covered under some BITs
- Further, investment is typically defined to include shares in a company (“rights derived from shares, bonds and other kinds of interests in companies and joint ventures (Dutch Model))
- “Treaty shopping”: Can we avoid it?
 - A requirement that an investor have substantial/real economic activities/connections to the home state.
 - Denial of benefits clauses:

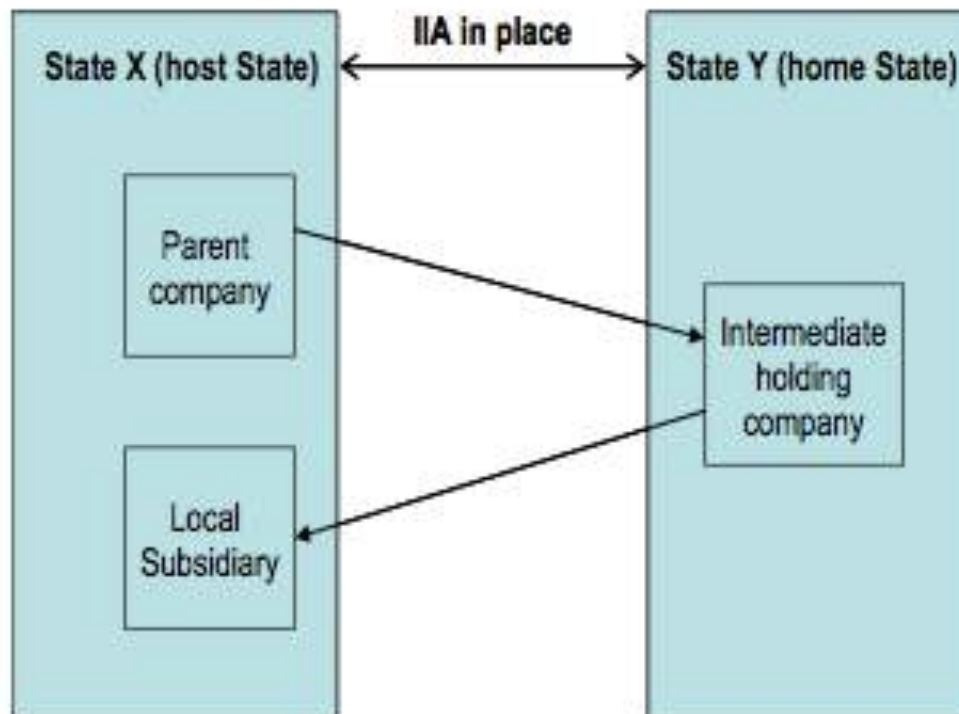
Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) 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 organized; (Energy Charter Treaty)
- Case law has different approaches: Plama and Pac Rim tribunals.

“In short, as regards business activities in the territory of the USA, the Tribunal concludes that the Claimant was and is not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.” (Pac Rim v. El Salvador, 2012)

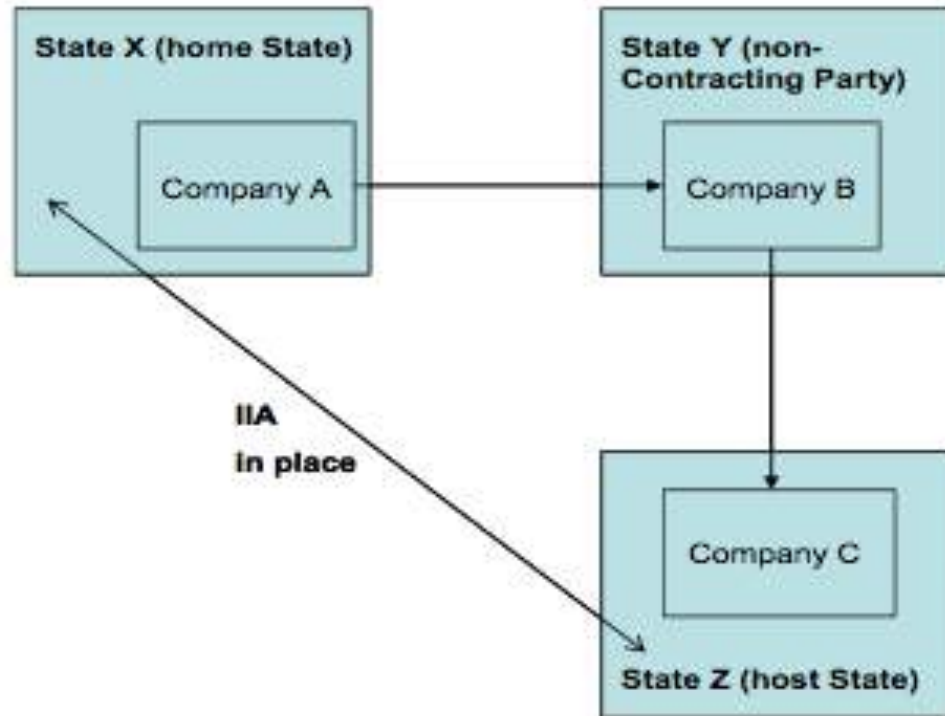
1. Round Tripping

Figure 1. Indirect investment with the parent company originating from the host State



2. Investing through a third State indirectly

Figure 2. Indirect investment structured through a third State which does not have an IIA with the host State



3. Indirect with a host State company

Figure 3. Example of an indirect investment (group structure)

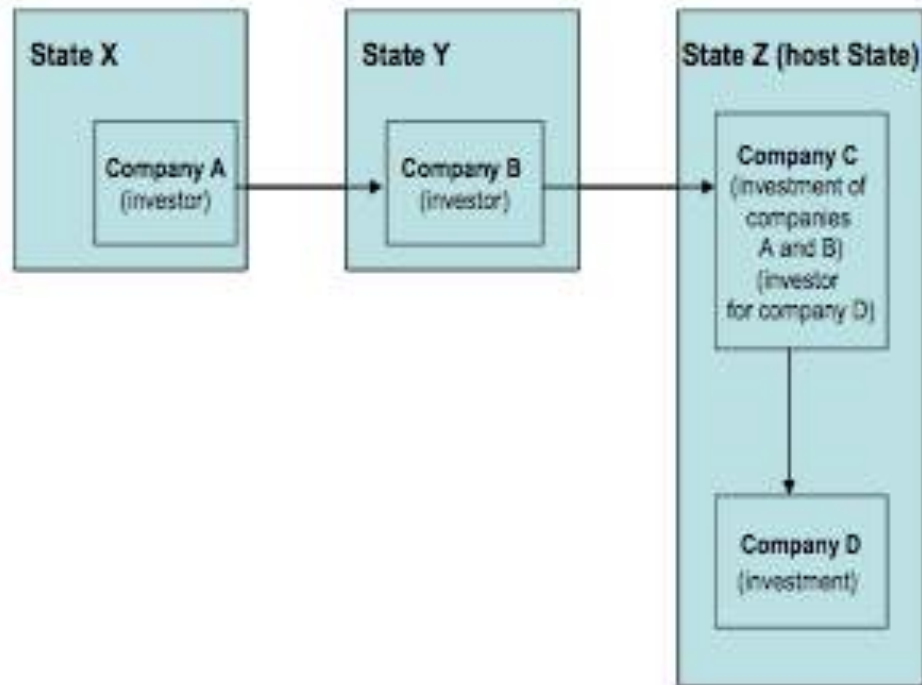
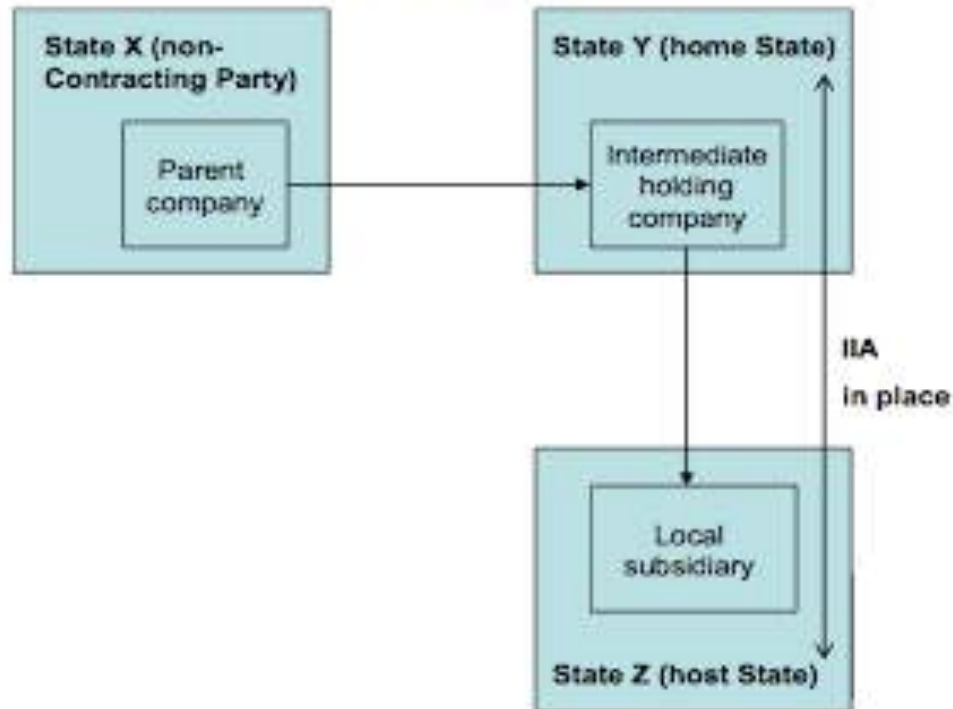


Figure 4. Investment by an investor from a non-Contracting Party through an intermediate company established in the Contracting Party



Application in time

- Treaties only apply once they are in force
- There is a general presumption against retroactivity: Article 28, Vienna Convention on the Law of Treaties, Non-retroactivity of treaties
 - Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.
- Most BITs provide that they apply to all investments whether made before or after the coming into force of the treaty but not to disputes that arose prior to the coming into force of the treaty
 - Jurisdictional temporal issue is when did the “dispute” arise when there are a series of government measures over a long time that have affected the investment

Application in time

BIT between Argentina and New Zealand (1999)	BIT between Finland and the Philippines (1998)	BIT between the Democratic People's Republic of Korea and Thailand (2002)
<p style="text-align: center;">“Article 14 Final provisions</p> <p>(1) The Contracting Parties shall notify each other in writing when the constitutional requirements for the entry into force of this Agreement have been fulfilled. This Agreement shall enter into force on the thirtieth (30th) day from the date of the later notification.</p> <p>(2) This Agreement shall remain in force for a period of ten years. It shall remain in force thereafter until one of the Contracting Parties gives one year's written notice of termination through diplomatic channels of its intention to terminate.</p> <p>(3) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 13 shall remain in force for a further period of fifteen years from that date.” (emphasis added)</p>	<p style="text-align: center;">“Article 12 Final clauses</p> <p>1) The Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day after the latter notification.</p> <p>2) This Agreement shall remain in force fifteen years. Thereafter, it shall remain in force until one of the Contracting Parties gives one year's prior written notice of termination through diplomatic channels.” (emphasis added)</p>	<p style="text-align: center;">“Article 14 Entry into force, duration and termination</p> <p>1. Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications for an initial period of ten years.</p> <p>2. Thereafter, this Agreement shall remain in force indefinitely unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments made prior to the date when the termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for a period of fifteen years.” (emphasis added)</p>

Geographic application

- BITs apply to investments of foreign investors located in the territory of the host state
 - As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (1) provides otherwise. (*Dutch Model*)
- An investor cannot claim for injury to its investment in its home state as a result of a border measure (trade ban) by the “host” state. (*Canadian Cattlemen v. United States*)
- Where are intangible assets (such as financial instruments) located?
 - In *Abaclat v. Argentina*, the tribunal found that security entitlements held by Italians in Argentinean bonds were investments within the territory of Argentina: “With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. **Thus, the relevant question is where the invested funds ultimately made available to the Host State and did they support the latter’s economic development?**”

Geographic application (Australia – India BIT)

“Article 1

[...]

f) “territory” means:

- (i) in respect of India the territory of the Republic of India including its territorial waters and the airspace above it and other maritime zones including Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights or jurisdiction in accordance with its laws in force and international law, including the 1982 United Nations Convention on the Law of the Sea;*
- (ii) in respect of Australia the territory of Australia includes the territorial sea, maritime zone, Exclusive Economic Zone or continental shelf where Australia exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law;“ (emphasis added)*

Right of Establishment: Entry of foreign investment

- Admission and Establishment
 - Most BITs do not provide admission rights, therefore investment protection standards only apply post-establishment/post-entry
 - Establishment rights are never absolute. Where granted, states often exclude certain sectors and existing and future non-conforming measures from the national treatment obligation (negative listing approach)
 - Establishment rights in BITs often simply lock-in existing liberalization (a stand-still), rather expanding them.
 - In contrast, IIAs that provide establishment rights apply pre-establishment/pre-entry. This means an investor can make a claim if it is prevented from making an investment but home state nationals are allowed to make investment
- Approaches in IIAs:
 - Admission model: entry in accordance with laws and regulations of the host country. Legal framework regarding entry remains unbound (typical European BIT)
 - Pre-establishment model: provide national treatment and/or most favoured nation treatment regarding the right of establishment (US model)
 - Lists of exceptions: all countries have closed sectors under both models.

Right of Establishment: Entry of foreign investment

- **Admission:**

- Under customary international law, state has sovereign right to exclude foreign investors and investment
- Admission clauses in BITs tend to be weak – BITs are generally instruments of investment protection, not investment liberalisation
 - Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations. (Swiss Model)
- No right to admission—subject to host state laws, which might place severe limits on the admission of investment.
- No obligation on home states to promote outward foreign investments by its nationals

- **Establishment:**

- While admission allows the investor entry into the State, establishment is used to denote a right to establish a more permanent economic presence.
- Only a minority of BITs (American, Canadian, Japanese) provide for establishment rights; they do so by according national treatment to investors with respect establishment and acquisition

Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. (NAFTA)

Questions?

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