WHO IS THE ACTIVE INVESTOR?: TRIBUNALS' SEARCH FOR A TRUE INVESTOR

Maja Stanivukovic[*]

Abstract

*One of the fresh debates unfolding in the field of investment arbitration concerns the question whether "passive investors" enjoy protection of investment treaties. There are three awards that have been rendered during the last decade: Alapli Elektrik v. Turkey ["**Alapli Elektrik**"], Standard Chartered Bank v. Tanzania ["**Standard Chartered Bank**"] and Clorox Spain S.L. v. Venezuela ["**Clorox**"], where the tribunals have denied jurisdiction because shareholders, as purported investors, have not engaged in any investment activity. It could be argued that these awards have introduced a new requirement of an active investor that is being more and more often invoked by respondent States and discussed in practice. This article explores the origin of the requirement of an active investor, which may be traced to the views that there is an inherent meaning of investment, distinct from the ownership of property; its similarity with the requirement of an investor's contribution; and the reactions to this requirement in the subsequent arbitral practice.*

I. Introduction

One of the fresh debates unfolding in the field of investment arbitration concerns the question whether "*passive investors*" enjoy protection of investment treaties.[1]

Taking a stand on this debate presupposes a clear understanding of the meaning of "*passive investor*" and its necessary counterpart, the "*active investor*", in the context of the decisions that mention it.

As a starting point, it could be said that a "*passive investor*" is the one who holds a right defined as an investment in an investment treaty but has engaged in no activity to obtain such a right.

There are three awards that have been rendered during the last decade where the tribunals have denied jurisdiction because the claimants, as purported investors, had not engaged in any investment activity. These are *Alapli Elektrik* v. *Turkey*[2], *Standard Chartered Bank* v. *Tanzania*[3] and *Clorox Spain S.L.* v. *Venezuela*[4]. It could be argued that these awards have introduced a new requirement – the requirement of an active investor – that is being more and more often invoked by respondent States and discussed in practice.

---

[*] Prof. (Dr.) Maja Stanivukovic is a Professor of Law at the University of Novi Sad, Serbia, and, the President of the Belgrade Arbitration Center.

[1] Jarrod Hepburn & Lisa Bohmer, *Analysis: Recent Award Highlights Debate over Whether Investment Treaties Protect Passive Investments – But Tribunal Sidesteps Discussing That Jurisprudence in Great Detail*, INV. ARB. REP. (May 31, 2019), *available at* https://www.iareporter.com/articles/analysis-recent-victory-for-clorox-against-venezuela-highlights-debate-over-whether-investment-treaties-protect-passive-investments-but-tribunal-sidesteps-discussing-that-jurisprudence.

[2] Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13.

[3] Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12.

[4] Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. No. 2015-30.

This article will explore the origin of the requirement of an active investor, which may be traced to the views that there is an inherent meaning of investment, distinct from ownership of property; its similarity with the requirement of a contribution; and the reactions to this requirement in the subsequent arbitral practice.

It is our preliminary assumption that the tribunals that have introduced the requirement of "*active investor*", did so in order to prevent treaty shopping in cases where the true investor would not have been eligible for protection. This assumption finds support in a monograph on treaty shopping, which treats the requirement of an active investor as a "*fact-sensitive element that has the potential to detect a possible abuse of the arbitration system, without explicitly naming it as such*."[5] The true investor could be, for example, a domestic national of the respondent State ("*round-tripping*", "*U-turn*")[6] or a national of a State that did not have an investment treaty with the respondent State.[7] The same requirement could also be needed in a third situation that does not occur so often, but is plausible when the actual investor is another State hiding behind the domestically incorporated company that appears as the investor and claimant but conducts no investment activity. The interposition of the "*passive investor*" is often the result of corporate restructuring. The need to develop a new doctrine is based on the non-availability of a direct route to tackle these forms of treaty shopping.

II. The Conventional Approach: Investment Equals Assets

In order for an investment tribunal to have jurisdiction *ratione materiae* over a dispute, it is necessary that the dispute, as defined in the statement of claim, relate to the claimant's investment. But what is an investment and how do we know that it is the claimant's investment? The meaning of investment is intuitively known to everyone,[8] but is not easy to define.

The meaning of the term "*investment*", which appears in the title of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ["**ICSID Convention**"][9] and in all investment treaties, has become one of the most controversial issues as regards the determination of jurisdiction of not only ICSID tribunals, but also of other investment tribunals.[10] It has been subject to extensive debate and wide-ranging viewpoints.

---

5 JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW 158 (2016).

6 *See* M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 176 (2015). *See, e.g., Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, where the Ukrainian nationals channelled their investment through a Lithuanian shell company which initiated an ICSID arbitration against Ukraine pursuant to the Lithuania-Ukraine BIT, and *Phoenix Action Ltd.* v. *The Czech Republic,* ICSID Case No. ARB/06/5. where the original Czech investor sold its investment to an Israeli company, Phoenix Action, that was established and owned by him, to become capable of commencing an ICSID arbitration by relying on the Israel-Czech Republic BIT.

7 A well-known example is Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3.

8 *Memorandum of the Meeting of the Committee of the Whole*, *reprinted in II(2)* HISTORY OF THE ICSID CONVENTION 965, 972 (Feb. 16, 1995) (Aron Broches stated: "The large majority [of the Legal Committee preparing the draft ICSID Convention] had, […] agreed that while it might be difficult to define 'investment', an investment was in fact readily recognizable").

9 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

10 Emmanuel Gaillard, *Identify or define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 403 (Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich eds., 2009).

The controversy began when most bilateral and multilateral investment treaties defined investment broadly, as any kind of asset owned or controlled by the investor. This definition was usually followed by a non-exhaustive enumeration of property and contractual and intellectual property rights that were included in the category of assets.

For example, the Energy Charter Treaty ["**ECT**"] contains an all-encompassing definition of investment covering assets "*owned or controlled directly or indirectly*", by a national of a contracting state.[11] Ownership of assets is apparently all that is required under the ECT.[12] Also, the control over assets, even if it is indirect, suffices in the absence of ownership.

When arbitrators strictly apply these broad treaty definitions of investment, the purported investor is often not required to prove any activity of investing to obtain such status. Arbitral awards confirm that "*owning*", "*holding*", or "*acquiring*" an investment suffices for the purposes of protection under certain Bilateral Investment Treaties ["**BITs**"].[13]

The award rendered in *Fedax* v. *Venezuela*[14] ["**Fedax**"] was the first ICSID award that considered at length the State's objection to jurisdiction on the ground of lack of an investment.[15] Venezuela had objected to the jurisdiction of ICSID on the ground that Fedax could not have been considered to have made an investment for the purposes of the ICSID Convention. Relying on the broad asset-based definition contained in the Netherlands-Venezuela BIT, the Tribunal proclaimed that endorsement of six promissory notes issued by the Republic of Venezuela, as a financial transaction undertaken by a Venezuelan company in favour of the Dutch claimant, falls under the definition of (the Claimant's) investment in the sense of the applicable BIT and the ICSID Convention[16]. According to the Tribunal, with every endorsement, the identity of the investor would change.[17] The Tribunal rejected the Respondent's objection that Fedax did not qualify as an investor because it had not made any investment "*in the territory*" of Venezuela.[18] The *Fedax* decision was criticized by eminent writers and arbitrators, some of them calling it an isolated case, an outlier.[19] Still, it influenced the understanding of the term investment in the initial years of investment arbitration.[20]

---

11 Energy Charter Treaty, Apr. 16, 1998, 2080 U.N.T.S. 100, art. 1(6).

12 Similar wording was also used in pre-2004 U.S. BITs. *See* BORZU SABAHI, NOAH RUBINS, DON WALLACE, JR., INVESTOR-STATE ARBITRATION 340 (2d ed. 2019).

13 CSOB A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction ¶¶ 31-32 (May 24, 1999); Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, ¶¶ 205, 211 (Perm. Ct. Arb., Mar. 17, 2006) [*hereinafter* "Saluka Investments"].

14 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3.

15 MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW 134 (2017).

16 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶43.

17 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 39-40 (July 11, 1997).

18 *Id.* ¶ 41.

19 *See* Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Georges Abi-Saab, ¶ 105 (Oct. 28, 2011).

20 RUDOLF DOLZER & CHRISTOP SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 66 (2d ed. 2012).

In *Saluka* v. *Czech Republic*[21] ["**Saluka Investments**"], the Tribunal rejected the argument that the Dutch claimant (and its Japanese parent company) did not intend to make any "*real investment*" in Czech Republic's banking sector, and that the acquisition of shares in a local bank by the Dutch company was designed as a short-term holding of shares with the purpose of recovering a profit from selling assets controlled by the Czech bank, Investiční a poštovní banka ["**IPB**"]. The Tribunal determined that the ownership of shares in a local bank qualified as an investment under the terms of the Czech-Netherlands BIT, irrespective of the fact that the shares were purchased as a portfolio investment and were initially purchased by the parent company, which subsequently transferred them to Saluka.[22] The Tribunal rejected the argument that Saluka itself invested nothing in IPB, "*but was merely a conduit for the investment made by Nomura*" (Japanese parent company), and was not itself a true investor.[23] The Tribunal opined that this argument relied on the definition of investment as an economic process which involved making a substantial contribution to the local economy or to the local company. However, such additional meaning could not be imported into the broad definition of investment set forth in Article 2 of the Czech-Netherlands BIT. Although the *chapeau* of Article 2 referred to "*every kind of asset <u>invested</u>*" [emphasis in the original], the use of that verb did not require the Claimant to prove that it satisfied any further substantive conditions with regard to investment, other than those in which investment was defined in that Article..[24]

Very early, the question arose in investment treaty arbitration as to whether an investment by a shell company used as a special purpose vehicle by a domestic investor, could be an investment eligible for protection under an investment treaty. The majority opinion in *Tokios Tokelés* v. *Ukraine* deemed that the holding of an investment was sufficient for the purposes of jurisdiction in a BIT arbitration.[25] The Tribunal refused to impose the origin-of-capital requirement, and accepted as a Lithuanian investment, the establishment of a company in Ukraine by a Lithuanian company that was ninety-nine per cent owned by Ukrainian nationals, and that invested capital originating from Ukrainian sources.[26] The Tribunal referred to the definition of "*investment*" in the Ukraine-Lithuania BIT as "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party*", and concluded that the requirement of origin of capital is clearly absent from the treaty text.[27] The origin of the invested funds did not matter, as long as the investor (the Claimant shell company) legally owned the investment.

The asset-based approach is based on purported consent of the contracting parties to the BIT. It is based on the assumption that the States would have introduced specific limitations to their consent,

---

21 Saluka Investments B.V. v. The Czech Republic, PCA Case No. 2001-04.
22 Saluka Investments B.V. v. The Czech Republic, Partial Award, ¶ 209 (Perm. Ct. Arb., Mar. 17, 2006).
23 *Id.*, ¶ 210.
24 *Id.*, ¶ 211.
25 Vladislav Djanic, *Looking Back: In Tokios Tokeles Case, Majority Upholds Jurisdiction Over Claim Against Ukraine Brought by Lithuanian Corporation that was Owned by Ukrainian Nationals, Prompting Chairman to Resign*, INV. ARB. REP. (Dec. 9, 2017).
26 *See generally id.*; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 77 (Apr. 29, 2004) [*hereinafter* "Tokios Tokelés"].
27 Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 74, 77.

if they wished.[28] By not introducing such limitations in express terms, they have made a deliberate choice,[29] and consented to be sued by companies and individuals of the other contracting state, who meet the formal requirements set forth in the definitions of investors and investments, regardless of their actual role is in the relevant investment transaction.

In *Saba Fakes* v. *Turkey* ["**Saba Fakes**"], the Tribunal stated that:

> "*Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.*"[30]

This sentence strongly suggests that a bare legal title suffices for the protection under these legal instruments.[31] There are also some more recent awards holding the same view.

In these early awards, investment tribunals have, by majority, taken a rather formalistic and blindfolded approach to finding an investment based on broad definitions of investment contained in various bilateral and multilateral treaties which allow plenty of space for treaty shopping. These formalistic interpretations of treaty definitions by the early awards tied the hands of investment tribunals that saw it necessary to enter into a more realistic economic analysis.

One of the recent endorsements of the sufficiency of the asset-based definitions was given in the annulment proceedings of the controversial *Yukos Universal Limited* v. *The Russian Federation*[32] ["**Yukos**"] awards. The Hague Court of Appeals has interpreted Article 1(6) of the ECT as not requiring the foreign investor to make an economic contribution to the host state. According to the Court of Appeals:

> "*The drafters of Article 1(6) ECT could have defined the term 'investment' more narrowly than they did, for example by requiring capital to flow from one contracting state to another, or requiring the foreign investor to make an economic contribution to the host state. It is clear from the wording of the Treaty, however, that only an 'asset based' definition, i.e. a non-exhaustive list of assets, will determine whether an investment within the meaning of the ECT is involved.*"[33]

---

28 Relja Radović, *Demystifying Consent, The Jurisdictional Framework of Investment Treaty Arbitration Revisited, dissertation*, UNIVERSITÉ DU LUXEMBOURG, PHD-FDEF-2019-03, 40-42 (May 29, 2019).
29 *See* Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 36 (Apr. 29, 2004).
30 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 134 (July 14, 2010). *See also* Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No. 2005-05/AA228, Interim Award on Jurisdiction and Admissibility, ¶ 477 (Perm. Ct. Arb., Nov. 30, 2009); RosInvestCo UK Ltd v. The Russian Federation, SCC Case No. V079/2005, Final Award, ¶¶ 381, 388 (Stockholm Chamber of Comm., Sept. 12, 2010), Yukos Universal Limited v. The Russian Federation, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, ¶ 430 (Perm. Ct. Arb., Nov. 30, 2009); Alpha Projectholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶¶ 343-45 (Nov. 8, 2010).
31 However, in *Saba Fakes*, the Tribunal concluded that the Claimant did not hold a legal title over the share certificates in the Turkish telecommunications company, and thus did not have an investment in Turkey. *See* Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 135 (July 14, 2010).
32 Yukos Universal Limited v. The Russian Federation, PCA Case No. 2005-04/AA227.
33 Yukos Universal Limited (Isle of Man) v. The Russian Federation, Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227, Judgment of The Hague Court of Appeal (Unofficial English Translation), ¶ 5.1.9.5 (Perm. Ct. Arb., Feb. 18, 2020).

According to the Dutch court, the Russian Federation failed to demonstrate that an objective notion of investment, involving contribution, duration, and risk, applies to an investment within the meaning of Article 1(6) of the ECT.[34]

III. The Modern Approach: Investment implies something more than just property

The terms investment and assets (property) often appear together in the same treaty. An investment is often defined as any or every kind of asset, representing various forms of property. In a number of investment treaty cases, as discussed earlier in Part II, ownership of property in the host State was considered sufficient to prove the status of an investor and the existence of an investment. The tribunals did not inquire into the way the claimant had acquired its asset, nor whether it had an active role in the investment. But there is something more to an investment than just property.

Historically, international law was concerned with the protection of foreign property, or the property of aliens, as it was often termed in older texts. The focus of documents such as the 1959 Abs-Shawcross Draft Convention on Investment Abroad, the 1961 Harvard Draft Convention on International Responsibility of States for Injuries to Aliens, and the 1967 Organisation for Economic Co-operation and Development ["**OECD**"] Draft Convention on the Protection of Foreign Property was on the protection of property owned by foreigners, and not on the protection of investments.[35]

The ICSID Convention and the first BITs, on the other hand, focused on the protection of investments. This term conveyed a more proactive, development-oriented activity than mere holding of assets in another country.[36]

This replacement of property with investment as the subject of protection indicates that States party to those instruments were willing to accord special rights to foreigners, such as the right of foreign individuals and companies to initiate an arbitration against them, only if they were bringing into their territory (i.e., contributing) something of value for those States, for instance, commitment of productive capital or know-how, important for their development. This quid pro quo of investment treaty arbitration was noted by Douglas in his Rule 23:[37]

> "*The notion of a quid pro quo between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration. In exchange for contributing to the flow of capital into the economy of the host contracting state, the nationals of the other contracting state […] are given the right to bring international arbitration proceedings against the host contracting state and to invoke the international minimum standards of treatment contained in the applicable investment treaty. The conferral of this right reduces the sovereign risk attaching to the investment in the host state and hence investment treaties in this way can positively influence the*

---

[34] *Id.* ¶ 5.1.9.4.

[35] MONIQUE SASSON, *supra* note 15, at 126.

[36] For the explanation of the main reasons for the replacement of "protection of alien property" with "investment protection". *See* Thomas W. Wälde, *Specific Nature of Investment Arbitration, the Introduction: The Reports of the Directors of Studies*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 74-75 (Philippe Kahn & Thomas W. Wälde eds., 2004).

[37] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 161 (2009) [*hereinafter* "DOUGLAS"].

decision making process for investments. This quid pro quo is implicit in the preamble of most investment treaties;"[38]

There are, therefore, two aspects which the concept of investment covers: (1) the contribution by the investor that constitutes the investment, and (2) the rights and the value that derive from that contribution and that belong to the investor.[39]

The verb "*invest*" and the derived noun "*investment*" imply an economic activity being carried out by the investor in the host State,[40] while assets (property) acquired in the host State, although also called "*investments*" are the result of that activity.

Therefore, while definitions in investment treaties are focused on the rights and the value that contributions from investors may generate, those definitions are premised on the existence of a contribution.[41]

Some modern international treaties acknowledge the distinction that exists between the terms asset and investment. For example, the following definition of investment appears under Article 8.1 of the 2016 Comprehensive and Economic Trade Agreement ["**CETA**"] and under Article 9.1 of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership ["**CPTPP**"]:[42]

"*[I]nvestment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment*"

(emphasis supplied)

Clearly, this provision implies that ownership or control of property is not enough, by itself, to qualify that property for treaty protection, but it must be established, in addition, that such property has the characteristics of an investment.

Also, some international arbitrators question whether the asset-based definitions of investment are definitions at all:

"*115. [...] the Respondent submits that France-Mauritius BIT does not contain a substantive definition of protected investments and that Article 1(1) merely lists possible forms that investments may take. The relevant test, according to the Respondent, is therefore not whether assets fall in a category of the list in Article 1(1), but rather whether they meet an inherent definition of investment under the Treaty.[...]*

117. The Tribunal is satisfied that this interpretation of Article 1(1) of the Treaty is correct. Looking at the plain wording of Article 1(1), it does not contain a definition of investments. Indeed, the term "definition" does

38 *Id.*
39 Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶ 352 (June 5, 2012) *citing* Abaclat et al.*,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 346-47 (Aug. 4, 2011).
40 MONIQUE SASSON, *supra* note 15, at 101.
41 Abaclat et al., ICSID Case No. ARB/07/5,Decision on Jurisdiction and Admissibility, ¶ 347 (Aug. 4, 2011).
42 Comprehensive Economic and Trade Agreement (CETA), Jan. 14, 2017, L 11/23, art. 8.1.

not even appear in Article 1(1). Rather, Article 1(1) only provides that the term "investments" - however to be defined - encompasses ("comprend") all types of assets ("toutes les catégories de biens"). Such a provision cannot play the gatekeeping role of establishing when a situation qualifies as an investment and when it does not. Nor can the non-exhaustive list of assets contained in Article 1(1) play such a role since, by its own terms, it only provides possible examples. The question of how to define investment therefore cannot be found in Article 1(1) or the Treaty. It has to be found in the objective and ordinary meaning of the term "investments"."[43]

(references omitted, emphasis added)

Consequently, the modern approach demands that while deciding whether there is an investment, the tribunal should not simply look into illustrative list of assets provided in the BIT and mechanically check whether the claimant holds/owns any such asset/property, but should also engage in a more subtle analysis of whether the acquired property rights result from a "*commitment of resources to the economy of the host state by the claimant entailing the assumption of risk in expectation of a commercial return*."[44] As rightly pointed out by one author: "*If, for example, a BIT lists bonds and loans as property rights, this does not necessarily make every loan or bond a protected asset, since a bond or loan will still have to qualify as an investment under the treaty*."[45] Accordingly, the tribunal should check how the claimant acquired the assets to ascertain whether it holds a qualifying investment in the host state.

IV. Approaching the Objective Test: Investment has an Inherent Meaning

Efforts of arbitrators to define the meaning of the term investment have been originally undertaken to concretize the jurisdictional hurdle of "*arising directly out of an investment*" under Article 25(1) of the ICSID Convention. In contrast to the investment protection treaties, the ICSID Convention did not include a specific definition of the term investment.

In *Fedax,* the Tribunal enumerated the basic features of an investment, citing the leading commentary by Professor Christoph Schreuer as legal authority:

"*The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development*."[46]

Another influential decision on jurisdiction was soon to follow. In *Salini* v. *Morocco* ["**Salini**"], the investment requirement was treated as an objective condition of the jurisdiction of ICSID.[47] The Tribunal complained that it would be easier to define an investment pursuant to the Convention, "*if*

[43] Christian Doutremepuich and Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, ¶¶ 115, 117 (Perm. Ct. Arb., Aug. 23, 2019).
[44] This is the definition of investment that is proposed by Zachary Douglas in his Rule 23. *See* DOUGLAS, *supra* note 37, at 189.
[45] MONIQUE SASSON, *supra* note 15, at 103.
[46] Fedax, Decision on Jurisdiction, ¶ 43 (July 11, 1997), *citing* Christoph Schreuer, *Commentary of the ICSID Convention*, 11(2) ICSID REV. – FOREIGN INV. L. J. 372 (1996).
[47] Salini Costruttori S.P.A. & Italstrade S.P.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 52 (July 31, 2001).

there were awards denying [ICSID's] jurisdiction on the basis of the transaction giving rise to the dispute".[48] However, as the Tribunal noted, the awards "*only very rarely turned on the notion of investment*". Then, citing another influential commentary by Emmanuel Gaillard, the Tribunal stated that:

> "*[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risk of the transaction (...). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition*."[49]

According to Gaillard and Banifantemi, "*the Salini test is ultimately based on nothing more than the economic definition of an investment or, in other terms, the ordinary meaning of the word*."[50]

In *Pantechniki* v. *Albania*, the sole arbitrator noted that "*the term 'investment' carries an 'inherent common meaning*'" that should be adopted to avoid unintended conflicts among treaties, and to make some useful and proper distinctions.[51]

Eventually, these efforts of the ICSID arbitrators impacted the area of non-ICSID investment arbitrations. The view that an investment has an inherent meaning has been vigorously espoused by the tribunal in *Romak* v. *Uzbekistan*[52] ["**Romak**"], an arbitration conducted under the United Nations Commission on International Trade Law ["**UNCITRAL**"] Rules.

In *Romak*, the Tribunal did not accept the Claimant's position that in order to establish that there is an investment, the Tribunal should simply confirm that Romak's assets fall within one of the categories listed in Article 1(2) of the Switzerland-Uzbekistan BIT. This Article was worded as follows:

> "*For the purpose of this Agreement:*
>
> *(2) The term 'investments' shall include every kind of assets and particularly:*
>
> *[…] (c) claims to money or to any performance having an economic value;*"[53]

Romak argued that its supply agreement with certain State-owned Uzbek companies for the supply of wheat and a Grain and Feed Trade Association (GAFTA) arbitral award rendered in pursuance of a dispute arising from the supply agreement, were investments within the meaning of Article 1(2), sufficient for the purposes of determining jurisdiction. The Tribunal disagreed with this approach and

---

48 *Ibid.*

49 *Id. citing* Emmanuel Gaillard, *Chronique des Sentences Arbitrales*, JOURNAL DU DROIT INTERNATIONAL 292 (1999) [*hereinafter* "Emmanuel Gaillard"].

50 Emmanuel Gaillard & Yas Banifantemi, *The Long March towards a Jurisprudence Constante on the Notion of Investment: Salini v Morocco*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 109 (2015).

51 Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, ¶¶ 46-47 (July 30, 2009). This inherent common meaning of investment, the sole arbitrator suggests, could be the one proposed by Zachary Douglas in his Rule 23. *See* ZACHARY DOUGLAS, *supra* note 28, at 189.

52 Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280,

53 Agreement between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments, Nov. 5, 1993, art. 1(2)(c).

dismissed the case for want of jurisdiction due to the fact that Romak had not made a protected investment in Uzbekistan.[54]

The Tribunal considered that "*[t]he term "investment" has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT*,"[55] [emphasis added] and observed as follows:

> "*[T]he term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk [...] By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'*.[56]

The importance of this holding lies in the emphasis it places on the distinction between the terms "*assets*" and "*investments*". Both terms are used in BIT definitions of investments, but they are not identical, and should not be treated as synonymous. Although investment usually results in acquisition of assets, an acquired asset is not necessarily acquired by investing. The *Romak* tribunal has explained "*the ordinary meaning*" of these terms in the following manner:

> "*The 'ordinary meaning' of the term 'investments' is the commitment of funds or other assets with the purpose to receive a profit, or 'return', from that commitment of capital. The term 'asset' means property of any kind*."[57]

(references omitted)

As explained by the Tribunal in *Abaclat* v. *Argentina* ["**Abaclat**"]:

> "*[…] a contribution that extends over a certain period of time and that involves some risk has been understood as "an objective meaning" of the term investment*."[58]

(emphasis in original)

> "*[…] once such contributions are made, it is about protecting the fruits and value generated by these contributions*."[59]"*[…] A certain value may only be protected if generated by a specific contribution, and – vice versa – contributions may only be protected to the extent they generate a certain value, which the investor may be deprived of*."[60]

---

[54] Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280, Award, ¶¶ 242, 243 (Perm. Ct. Arb., Nov. 26, 2009).
[55] *Id* .¶ 180.
[56] *Id.* ¶ 207.
[57] *Id.* ¶ 177. To define these terms, the Tribunal referred to the Black's Law Dictionary.
[58] Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 370 (Aug. 4, 2011).
[59] Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 349 (Aug. 4, 2011).
[60] Abaclat et al., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 350 (Aug. 4, 2011).

Cases emphasizing that an investment presupposes a contribution, such as *Romak*[61] and *Abaclat*, may be considered a predecessor of the requirement of an active investor, or a spark that has set it off.

V. Developing the Objective Test: Investment Requires a Sufficient Contribution by the Investor

Although the view expressed in *Saba Fakes* (discussed in Part II)[62] dominated the practice of investment arbitration for a while, there were more and more tribunals which, following the holding in *Romak*, ventured to look beyond the enumeration of assets contained in the BIT. More and more tribunals started to inquire into the existence of a sufficient contribution from which the holding of assets results, specifying that:

> "*BIT protection is not granted simply to any formally held asset, but to an asset which is the result of [the] flow of [private] capital. Thus, even though the BIT definition of "investment" does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied.*"[63]

These tribunals expressly or implicitly distinguish between property and investment. A foreign-owned asset that is expropriated enjoys protection as a property right, but it attracts the protection of a BIT only if it also constitutes an investment, as defined in the BIT.[64]

Soon after the seminal decision in *Abaclat,* where the issue of a qualifying contribution had been in the centre stage, a line of cases followed where the tribunals insisted upon the requirement of consideration (payment) by the purported investor for acquiring the assets in the host country as a condition for the existence of an investment.[65] Three of them will be mentioned here in chronological order: *Caratube* v. *Kazakhstan*[66] ["**Caratube**"], *Quiborax* v. *Bolivia*[67] ["**Quiborax**"], and *KT Asia* v. *Kazakhstan*[68] ["**KT Asia**"].

It is important to emphasize that the "*contribution requirement*" discussed in those cases should not be confused with the *Salini* criterion of "*contribution to the host State's development*", as has been done by some

---

[61] A recent decision following the reasoning of the *Romak* tribunal on the objective and ordinary meaning of investment even outside the ICSID framework is Christian Doutremepuich and Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, ¶¶ 117-20 (Perm. Ct. Arb., Aug. 23, 2019).
[62] *See supra* Part II.
[63] Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 351 (June 5, 2012).
[64] MONIQUE SASSON, *supra* note 8, at 101.
[65] JORUN BAUMGARTNER, *supra* note 2, at 150–55.
[66] Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12.
[67] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2.
[68] KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8.

authors,[69] and some courts.[70] The confusion comes from the fact that the *Salini* award mentioned four criteria, of which the first and fourth were termed contribution:

> "*[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risk of the transaction (...) one may add the contribution to the economic development of the host State of the investment as an additional condition*."[71]
>
> (emphasis added)

The contribution, as understood in the awards that follow means "*a contribution of money or assets (that is, a commitment of resources*)",[72] and it is referred to in *Salini* as the first criterion.[73]

The sufficiency of contribution has been the object of some debate. In the first edition of his Commentary of the ICSID Convention, Christoph Schreuer outlined five characteristics that most investments would share.[74] One of them was that the commitment was substantial. This statement was then relied on in *Fedax*, which mentioned "*a substantial commitment*".[75] The commentators said that "*[o]f all of Schreuer's factors, this one seems the least convincing*" because the epithet "*substantial*" is highly subjective.[76] Some awards have rejected this feature as a criterion.[77] Nevertheless, as it will be seen, tribunals have gradually started to inquire into the monetary magnitude of a contribution. Schreuer mentioned *substantial commitment*, whereas tribunals today speak of a *substantial contribution* (combining *Fedax* and *Salini* language).

A. Caratube v. Kazakhstan

The term "*investment*" was analyzed in *Caratube* to determine whether the purported Claimant was a "*national of another Contracting State*" (here, the United States) despite formally being a company registered in Kazakhstan.[78] Pursuant to the U.S.-Kazakhstan BIT, in order to prove this, the Claimant

---

69 *See*, *for e.g.*, JORUN BAUMGARTNER, *supra* note 2, at 149, who cites KT Asia Investment Group BV v. Republic of Kazakhstan as one of the awards that has rejected the requirement of contribution in ¶ 171, whereas it is only the Salini criterion of contribution to the development of the host State that has been rejected in that paragraph.

70 *See* Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227, ¶¶ 5.1.9.3. *et seq.* (Perm. Ct. Arb., Feb. 18, 2020).

71 Salini Costruttori S.P.A. & Italstrade S.P.A, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), *citing* Emmanuel Gaillard, *supra* note 38, at 292.

72 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 219. Baumgartner in his treatise on Treaty Shopping in International Investment Law (2016) uses the term "*commitment of capital and other resources*". JORUN BAUMGARTNER, *supra* note 2, at 264.

73 On the origin of the first and second criterion of "contribution" in the Salini test, *see* Gaillard & Banifntemi, *supra* note 39, at 116.

74 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 140 (2001).

75 *See* Fedax, Decision on Jurisdiction, ¶ 43 (July 11, 1997).

76 Noah Rubins, *The Notion of 'Investment' in International Investment Arbitration*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 298-99 (Horn & Kroll eds., 2004).

77 Mihaly International Corporation v. Social Democratic Republic of Sri Lanka, ICSID case no. ARB/00/2, Award ¶ 51 (March 15, 2002); Pantechniki v. Albania, ICSID Case No. ARB/07/21, Award, ¶ 45 (July 30, 2009). For a more recent assessment, *see* Christian Doutremepuich & Antoine Doutremepuich v. The Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction ¶¶ 126, 132 (Aug. 23, 2019).

78 Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award, ¶¶ 312, 359 (June 5, 2012).

needed to establish that it was itself an investment of its owner, Devincci Hourani, an American citizen.[79] Kazakhstan argued that

> "*[…] to satisfy the requirement of a contribution, the putative investor should show that it contributed a substantial financial resource or transfer of know-how, equipment and personnel. The price paid and a guarantee put up need to be substantial enough relative to the entire project to be considered an investment. Similarly, a nominal price paid for assets that purportedly amount to an investment raises doubts as to the existence of an investment and requires in-depth inquiry into the circumstances of the transaction*."[80]

Already, in *Saba Fakes,* it was noted that a nominal price of only a few thousand U.S. dollars could not be reconciled with the significance of the underlying business, as expressed in the Claimant's valuation of the alleged investment.[81] This holding was echoed by the *Caratube* tribunal:

> "*[P]ayment of only a nominal price [for acquisition of the shares] and lack of any other contribution by the purported [American] investor must be seen as an indication that the investment [...] is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT*"[82]

> "*A putative transaction to pay US$ 6,500 for 92% for an enterprise into which over USD 10 million have been invested and for which later a relief of over USD 1 billion is sought calls for explanation and justification*."[83]

Devincci Hourani was found to be the owner of 92% of Caratube's shareholding.[84] However, the requirement that he made a substantial contribution was not satisfied.[85] As a result, the Tribunal found that Caratube failed to prove that it was an investment of a U.S. national.

According to Kazakhstan, Devincci Hourani provided a front for the real parties in interest, a Lebanese company JOR Investments Inc. and its shareholders, including Hourani's brother Issam Hourani, a Kazakh national. Neither JOR, nor Issam Hourani possessed a nationality that could grant them access to ICSID arbitration.[86]

In the *Caratube* decision, the Tribunal agreed with the Claimant that the origin of capital used to make an investment is immaterial for jurisdictional purposes, subject to express provisions to the contrary.[87] However, the Tribunal added that:

---

79 This condition was provided in Article VI (8) of the Kazakhstan-U.S. BIT (1992) ("any company legally constituted under the applicable laws and regulations of a Party, ...that at the time immediately before the events which gave rise to the dispute was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party […]").

80 Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 411 (June 5, 2012).

81 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 139 (July 4, 2010).

82 Caratube International Oil Company LLP, ICSID Case No. ARB/08/12, Award, ¶ 435 (June 5, 2012).

83 *Id.* ¶ 437.

84 *Id.* ¶ 395.

85 *Id.* ¶ 495.

86 *Id.* ¶ 413.

87 *Id.* ¶ 355.

> "*[T]here still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor*."[88]

B. Quiborax v. Bolivia

The Tribunal in *Quiborax* declined jurisdiction for the claim of one of the Claimants, an individual who had acquired his single share in the Bolivian company for free i.e. without making any payment in exchange for that share. The Tribunal found that there was no evidence that he personally made an original or any subsequent contribution to exploit the mining concessions that were granted to the company.[89] The fact that he received dividends demonstrated that he benefited from the investment, not that he had made a contribution.[90] As the Tribunal stressed, "*a distinction should be made between the objects of an investment, 'such as shares or concessions […] and the action of investing'*."[91] The holding of this tribunal was that shares do not suffice if acquired gratuitously.

C. KT Asia v. Kazakhstan

Jurisdiction was denied in *KT Asia* because the Claimant, a Dutch company, had acquired the investment (shares) in BTA Bank, a Kazakh company, at no cost, through a loan obtained from the seller which was never repaid. The Tribunal opined that:

> "*[A] payment of a nominal price for a shareholding is but one aspect out of a number of factors that may assist in ascertaining the existence of an investment. However, in the factual reality of this case, the Claimant agreed to pay a fraction of their value to buy the BTA shares and ultimately paid nothing at all for their acquisition: the consideration was covered by a loan of which neither the capital nor the interest was ever paid*."[92]

In this case, both the purchaser (the Claimant) as well as the sellers of the shares (incorporated in the British Virgin Islands) were companies beneficially owned by a Kazakh national, Mr. Ablyazov. The Tribunal concluded that the Claimant was seeking credit for Mr. Ablyazov's initial contribution. In its view, the Claimant "*had made no contribution with respect to its alleged investment, nor was there any evidence on record that it had the intention or the ability to do so in the future*."[93] As a result, the Tribunal considered that the Claimant had not demonstrated the existence of an investment under the ICSID Convention or under the BIT.[94]

VI. Innovative Approach: Investment Requires an Active Investor

Mere holding of an investment made by someone else does not warrant protection in the opinion of some tribunals. It should be emphasized that tribunals are interpreting different texts and applying

---

88 *Ibid.*

89 Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 232 (Sept. 27, 2012).

90 *Ibid.*

91 *Id.* 233.

92 KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Award, ¶ 203 (Oct. 17, 2013).

93 *Id.* ¶¶ 205-06.

94 KT Asia v. Kazakhstan was relied on by the Tribunal in Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, ¶ 246 (Feb. 7, 2019), – which is another case where the Claimant could not prove that it has paid any consideration for the purported acquisition of shares in the host state company.

them to different facts. The differences in treaty language and the circumstances of each case cause different decisions on the existence of an investment. In one BIT, an investment may be defined as an asset owned or controlled by an investor, whereas in the other, the definition of investment may imply an activity. It may require the making of an investment, for example.

There are several cases in which the tribunals took a view, based on the text of the relevant treaties, that the claimant must prove its own active involvement in making the investment. The claimant must show that it had made an active contribution. Otherwise, the tribunal has no jurisdiction to decide upon the breaches of the BIT. Those arbitrators focused on the treaty language that required investment "*of an investor*" or "*made by an investor*" which, in their opinion, excluded passive investments. Already, in *Toto* v. *Lebanon*, the Tribunal observed that the concept of an investment "*implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time*."[95]

The requirement of active investment is similar to the requirement of sufficient contribution, but it is formulated in slightly different terms. It also starts from the assumption that ownership of assets is not enough in itself, but focuses on the *activity* of the owner, which is a broader term than contributing/committing capital. The owner of an asset in the territory of the respondent State is required to have been the active subject in the process of investing.[96]

The cases where investor activity was sought as a requirement will be discussed first, followed by an overview of awards where the distinction between active and passive investors was commented upon.

The invention of the requirement of "*active investment*" may be attributed to William (Rusty) Park, professor of law at Boston University and a distinguished and highly experienced arbitrator. Professor Park was appointed by the Chairman of the Administrative Council of ICSID to act as president of the Tribunal in the case of *Alapli Elektrik* initiated in 2008. Professor Park also presided over the arbitration initiated by Standard Chartered Bank against Tanzania in 2010 ["**Standard Chartered Bank**"].[97] In 2012, awards in both cases were dispatched to the parties; both of them denying jurisdiction based on the requirement of an active investor. However, in *Alapli Elektrik*, Professor Park remained alone in his conviction that the absence of active contribution was the reason why jurisdiction should be denied. His co-arbitrators were of different views. Professor Brigitte Stern agreed with him that there was no jurisdiction, but for different reasons,[98] while Marc Lalonde dissented. The split in majority views later led to a request for annulment of the *Alapli Elektrik* award. In *Standard Chartered Bank*, Professor Park achieved unanimity with Barton Legum and Professor Michael Pryles, both of whom shared his ideas on the need for an investor's active contribution.

---

95 Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 84 (Sept. 11, 2009). The award was relied on in Alapli v. Turkey, together with Salini v. Morocco. *See* Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 382, 384 (July 16, 2012).

96 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 802 (Perm. Ct. Arb., May 20, 2019).

97 Standard Chartered Bank v. The United Republic of Tanzania*,* ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).

98 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 312-313 (July 16, 2012).

A. Alapli Elektrik v. Turkey

Alapli Elektrik was an ICSID case initiated by a Dutch company on the basis of the Netherlands-Turkey BIT and the ECT. Jurisdiction was declined because the Claimant had "*no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology*."[99] The case was described by the Tribunal as follows:

> "*A Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant. The entirety of the financial contribution and technological know-how came from American backers, the GE Group, which advanced monies to realize an opportunity to provide equipment and services, taking all risk of loss if the Project never came to fruition. The Concession Contract, by which the host country agreed in principle to the Project's terms, was awarded to a Turkish company, Atam Elektrik*."[100]

Arbitrator Park concluded that the Dutch company failed to contribute to the project.[101] All contributions to the project came from someone other than the Claimant. The capital and technology came from the American backers. Negotiations were conducted by the Turkish sponsors. The Concession Contract was obtained by a Turkish company. The requirement of an active investor was conceptualized in this award in the following terms:

> "*To be an investor a person must actually make an investment, in the sense of an active contribution. Status as a national of the other contracting state is not in itself enough. The Dutch entity […] has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey. To the extent that contributions were made, they came from nationals or companies of the United States and Turkey*."[102]

(emphasis added)

For Professor Park, the Claimant "*simply lacked the status of an investor, for want of any contribution to the Alapli Project*".[103] Professor Park referred to Oxford, Webster, and *Le grand* Robert dictionaries for the definition of investor, but also asserted that the foundational concept of active contribution was set forth in both, the Netherlands-Turkey BIT (1986) and the ECT. He found support for the concept in the words "*the flow of capital and technology*" (which must run as between the Contracting Parties) written in the preamble of the Netherlands-Turkey BIT and in the verb "*make*" that was used in Article 10(1) of the ECT.[104] Further support was found in the wording of both treaties that included the term "*of*" (i.e. investment "*of*" an investor).[105] According to Professor Park, on the basis of this word, "*the investor is assumed to be an entity which has engaged in the activity of investing in the form of making a contribution*" to the

99 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 389 (July 16, 2012).
100 *Id.* ¶ 311. *See also* Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 162 (July 10, 2014), where the names of Turkish and American companies have been disclosed.
101 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 337 *et seq.* (July 16, 2012).
102 *Id.* ¶ 350.
103 *Id.* ¶ 315.
104 *Id.* ¶¶ 352-54.
105 *Id.* ¶¶ 355-60.

host state, "*permitting characterization of that contribution as an investment 'of' the investor*".[106] This activity of investing is juxtaposed with "*the abstract existence of some piece of property, whether stock or otherwise*."[107] Consequently, Atam Alapli (the Second Project Company) was not an investment "*of*" the Claimant because the Claimant did not engage in any activity of investing , it did not make any significant contribution to the Project.[108]

In the opinion of Professor Brigitte Stern, the fact that a Dutch company owned the shares of a Turkish company, was sufficient to consider that there was an investment, if not for the fact that this company was introduced into the investment chain at the time when important disagreements between the Turkish company and the Turkish authorities had already occurred. The introduction of the Dutch company at that particular time represented an abuse of the system of international investment protection.[109] According to Professor Stern, the Claimant had acquired the investment "*for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with Turkey were already known to the Sponsors of the Project*."[110]

The third, dissenting arbitrator was convinced that the Claimant had made a qualifying investment in Turkey. The Claimant had equity capital of U.S. $60,800, which it invested to acquire 50% equity in a Turkish company that detained valuable rights in the form of a concession contract. In the opinion of the dissenting arbitrator, the origin of the capital invested by the Claimant did not matter: "*whether Claimant has obtained its equity money through a bank loan, a lottery win, a gift from a benevolent friend or found it on the street, is totally irrelevant*."[111]

The Claimant submitted a request for annulment of the *Alapli Elektrik* award, which was rejected in 2014.[112] Bernard Hanotiau was presiding over the Ad Hoc Committee. Perhaps the views of Professor Park had influenced him, as he was to take a stand that the Claimant was not an active investor in the *Clorox* case, initiated in 2015, where he was one of the co-arbitrators.

B. Standard Chartered Bank v. Tanzania

Jurisdiction was also denied in *Standard Chartered Bank* because the Claimant was unable to demonstrate its active participation in the investing process.[113] The case involved loans that had initially been granted by a consortium of Malaysian banks to a Tanzanian borrower, but were purchased in 2005 by a Hong Kong company, Standard Chartered Bank (Hong Kong) Limited ["**SCB HK**"].[114] The

---

106 *Id.* ¶358.
107 *Id.* ¶ 360.
108 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶ 250 (July 10, 2014), citing Alapli v. Turkey, ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 338-349, 362-380 (July 16, 2012).
109 *Id.* ¶390.
110 *Id.* ¶416.
111 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Dissenting Opinion of Marc Lalonde, ¶¶ 12-13 (July 12, 2012), *citing* Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 106 (Jan. 19, 2007).
112 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment (July 10, 2014).
113 Standard Chartered Bank v. The United Republic of Tanzania*,* ICSID Case No. ARB/10/12, Award (Nov. 2, 2012).
114 *Id.* ¶ 196.

Claimant, Standard Chartered Bank ["**SCB**"], was a United Kingdom-based company that owned and controlled the purchaser, SCB HK. The Tribunal had to determine whether "*the loans were investments 'of' [the] Claimant"* within the meaning of the U.K.-Tanzania BIT (1994)."[115] It should be remembered that it was established in the previous ICSID practice that loans could be qualified as investments.[116]

The U.K.-Tanzania BIT in Article 8(1) granted the tribunal jurisdiction over a dispute "*arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.*"[117] The Claimant's argument was that the phrase "*investment of*" in Article 8(1) should be broadly interpreted to cover both directly and indirectly held investment.[118] The Claimant argued that it indirectly held/owned the loans provided to the Tanzanian company by virtue of its ownership and control over an intermediate company, SCB HK.[119]

The Respondent State argued that the expression "*investment of*" must be interpreted to require "*something more than indirect ownership*" and "*more than passive ownership*". According to the Respondent, the term "*investment*" implied some "*contribution, flow of funds or 'involvement.*'"[120]

In the section of the Award entitled "*Requirement of Investor's Active Contribution*"[121], the Tribunal noted that the U.K.-Tanzania BIT used two principal prepositions to connect investor and investment: "*of*" and "*by*" but no verb was associated with these prepositions that would allow to interpret a necessity of active relationship between the investor and the investment.[122]

Other provisions of the treaty, however, used the verb "*made*" (e.g. Article 1(a) referred to "*territory of the Contracting State in which the investment is made*").[123] According to the Tribunal, "*made*" was a verb that denoted an action and not just passive ownership.[124] A U.K.-based company did not obtain the status of an investor under the U.K.-Tanzania BIT simply by acquiring shares of a Hong Kong company that held a debt by a Tanzanian debtor. [125] The U.K.-Tanzania BIT did not define investment with the verbs "*own*" or "*hold*" but with the verb "made".[126] Also, Article 2 of the BIT contained the verb "*to invest*", which reinforced the interpretation that "*an active relationship between investor and investment.*" was required[127] The Tribunal interpreted the BIT:

---

115 *Id.* ¶ 197.

116 *See* Fedax, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 22, 29 (July 11, 1997). CSOB v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 91 (May 24, 1999).

117 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, Aug. 2, 1996, art. 8(1).

118 Standard Chartered Bank v. The United Republic of Tanzania*,* ICSID Case No. ARB/10/12, Award, ¶ 139 (Nov. 2, 2012).

119 Id. ¶ 209.

120 *Id.* ¶¶ 210-11.

121 *Id.* ¶¶ 206–256.

122 *Id.* ¶ 221.

123 *Id.* ¶ 222.

124 *Id.*

125 *Id.* ¶ 200.

126 *Id.* ¶ 223.

127 *Id.* ¶ 229.

> "*230 […] to require an active relationship between the investor and the investment. To benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner. Passive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.*
>
> *231. The Tribunal is not persuaded that an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.*
>
> *232. Rather, for an investment to be "of" an investor […], some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other".*

Thus, the Tribunal *"concluded that protection of the UK-Tanzania BIT requires an investment made by, not simply held by, an investor. To be considered to have made an investment, SCB must have contributed actively to the investment.*"[128]

Applying the BIT to facts of the case, the Tribunal found no action by the Claimant contributing to the loans or to the power facility that was at the origin of the arbitration. The activity of purchasing the loans, which qualified as a relevant investment, was done by SCB HK alone, absent of any direction or control by the Claimant.[129] It was established that the Claimant had no involvement in the purchasing of the loans.[130]

The Tribunal stressed the importance of the reciprocal nature of the treaty. It "*would be unreasonable to interpret the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities.*"[131]

C. Clorox Spain S.L. v. Venezuela

The latest in line of cases requiring some action from the Claimant is *Clorox*,[132] a Spain-Venezuela BIT case over the closing of manufacturing facilities of Clorox Venezuela in 2014, allegedly as a result of government measures, including price freezes on its products that accounted for 74% of its sales.[133] A U.S. entity in the Clorox group had established the Venezuelan subsidiary in the 1990s. In 2011, the shares in the Venezuelan subsidiary were transferred to Clorox Spain by its parent company as part of a corporate restructuring.[134]

---

[128] *Id.* ¶ 257.
[129] *Id.* ¶¶ 200, 260.
[130] *Id.* ¶¶ 261. *See also* ¶ 197 ("No evidence presented in this arbitration demonstrates that Claimant took actions concerning the Tanzanian Loans that would confer the status of investor pursuant to the UK-Tanzania BIT.").
[131] *Id.* ¶ 270.
[132] Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award (Perm. Ct. Arb., May 20, 2019). The language of the case was Spanish, and the arbitration was administered by the PCA. The award was published in Spanish only. The description of the case by the author is based on English and French reports of the case.
[133] Sebastian Perry, *Clorox revives Claim against Venezuela*, GLOBAL ARB. REV., (May 29, 2020), *available at* https://globalarbitrationreview.com/article/1227355/clorox-revives-claim-against-venezuela.
[134] *Id.* The date on which the transfer occurred was disputed between the parties.

The Respondent objected to jurisdiction on two grounds: on the one hand, the Respondent denied that Clorox Spain shareholding in Clorox Venezuela qualified as a protected investment (objection *ratione materiae*); on the other hand, it denied Clorox Spain had the status of an investor (objection *ratione personae*).[135] The Tribunal noted that those two objections were interdependent; they were "*two sides of the same coin*."[136]

The Spain-Venezuela BIT defined investments in the following manner in Article I(2):

> "*"Investments" means all types of assets, invested by investors of one Contracting Party in the territory of the other contracting party, and in particular, although not exclusively, the following:*
> (a) *shares securities, bonds and any other form of participation in companies*."

The Respondent argued that the phrase "*invested by investors of a Contracting Party*" suggested that a Spanish investor had to undertake an action of investing in Venezuelan territory.[137] Mere holding of assets or shares in a local company by a natural or legal entity of the contracting party was excluded from the scope of this definition if the action of investing had not been carried out by that entity.[138] Clorox Spain had made no contribution, and it had done "*nothing more than swap shares issued by it against shares in Clorox Venezuela S.A.*"[139] It was a shell company that had no other activity than holding shares in Clorox Venezuela.[140]

The Claimant, in turn, stressed that the BIT definition of an investor did not require an active contribution, and that in any case, Clorox Spain was involved in the management of Clorox Venezuela.[141] The Claimant also insisted on the fact that it had acquired 100% of the shares of Clorox Venezuela and had thereby met the definition of a protected investor.[142]

In May 2019, the Tribunal dismissed the case for lack of jurisdiction since the Claimant, Clorox Spain, had not made any action of investing. The Tribunal accepted that Clorox Spain was the owner of an investment in Venezuela and was thus prima facie eligible for protection under the BIT.[143] However, the Spain-Venezuela BIT limits protection to assets "*invested by investors*."[144] The Tribunal believed that this required an action of investing by the Spanish investor.[145]

---

135 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 786 (Perm. Ct. Arb., May 20, 2019).
136 *Id.* ¶ 787.
137 *Id.* ¶ 788.
138 *Id.* ¶ 789.
139 *Id.* ¶ 790.
140 *Id.* ¶ 791.
141 *Id.* ¶ 792.
142 *Id.* ¶¶ 793-94.
143 *Id.* ¶¶ 794, 800.
144 *Id.* ¶800.
145 *Id.* ¶802.

The *Clorox* tribunal phrased the issue it needed to resolve in the following manner:

> "*The only issue that needs to be discussed in order to resolve the Respondent's objection is whether [Clorox Spain] made the investment it owns*." [146]

Therefore, the Tribunal centred on the relationship between the Spanish Claimant and the object of the alleged investment, the shares in Clorox Venezuela.[147] Without expressly referring to *Romak v. Uzbekistan*, the *Clorox* tribunal reiterated that "*an asset or right that is listed in a treaty does not necessarily constitute an investment protected by the Treaty by the mere fact that it is listed therein*."[148] Citing *Quiborax v. Argentina* (sic!), the Tribunal acknowledged the distinction between objects of an investment and the action of investing.[149] The holding of shares must result from an action of investing by the Claimant.[150]

In the present case, the Claimant was a subsidiary of the original investor. "[*T*]*he source of the capital, and know-how invested in Venezuela was Clorox Company and/or the Clorox International Company, two U.S. companies not protected by the Treaty*."[151] According to the Tribunal, the shares of Clorox Venezuela had been transferred to the Claimant (Clorox Spain) for no consideration (i.e. without payment) through a share swap.[152] The Tribunal did not accept the Claimant's argument that the counter-performance it provided for acquiring the shares was the delivery of its own shares to its parent company.[153] The acquisition of the shares by the Claimant must have been the result of a transfer of value, which was missing in this case.[154] But there was also a possibility that *Clorox Spain* invested in shares of Clorox Venezuela subsequent to the transfer of shares.[155] After examining that possibility, the Tribunal concluded that the Claimant had not invested in Clorox Venezuela:[156]

> "*While it has asserted that Clorox Venezuela had facilities, employees and activity, it has not proven that Clorox Spain contributed to or invested in such assets of Clorox Venezuela…*"[157]

Consequently, the Claimant did not *have* an investment protected by the BIT.[158] Emphasis is added on the word "*have*" used by the Tribunal in the cited paragraph, which usually denotes ownership. After establishing that the Claimant had not invested in Clorox Venezuela, the Tribunal concluded that the Claimant did not have (own) a protected investment.

---

146 *Id.* ¶ 794.
147 *Id.* ¶ 798.
148 *Id.* ¶ 807.
149 *Id.* ¶ 808.
150 *Id.* ¶ 815.
151 *Id.* ¶ 817.
152 Sebastian Perry, *supra* note 104.
153 Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 830-831 (Perm. Ct. Arb., May 20, 2019).
154 *Id.* ¶¶ 824, 830.
155 *Id.* ¶ 818.
156 *Id.* ¶ 834.
157 *Ibid.*
158 *Id.* ¶ 835.

VII. Reception of the Requirement

The respondent States seem to have seized the opportunity to use the "*active investor*" requirement as new ammunition in their defences against the jurisdiction of investment tribunals. However, this argument mostly missed the mark. The commentators have already identified some cases where the "*active investor*" requirement was rejected.[159]

Thus, active role of the claimant as a requirement from *Standard Chartered Bank* was rejected in *Flemingo v. Poland*[160] on the basis of the wording of the India-Poland BIT (1996). The treaty provided for protection not only of investments that were "*established*", but also of investments "*acquired*" by the investor.[161] The majority in this case concluded that the indirect acquisition of shares in an existing company through a transaction operated outside of Poland constituted a protected investment under the BIT.[162] The majority cited *Saluka Investments* in support of the holding that it is not necessary for the claimant to actively operate the investment.[163]

In the *Garanti Koza* v. *Turkmenistan* award,[164] the Respondent's argument – based on *Standard Chartered Bank* – was rejected once again. The Respondent argued that to meet the definition of investment in the UK-Kazakhstan BIT, an investment must have been "*actually made*"[165] and "*actively made*" by the Claimant;[166] rather than being a situation of "*simple passive ownership*".[167] The Tribunal found that there was nothing in the BIT that would lead it to read in such a requirement.[168] Nevertheless, the Tribunal went through the exercise of verifying that Garanti Koza's investment was actively made and not merely held by a passive investor. The Tribunal established that Garanti Koza's did engage in investment activity in Turkmenistan. It negotiated a contract to build bridges in Turkmenistan, transferred resources required for performance of its contractual obligations into the country, and actually designed and built a number of highway bridges.[169] "*[I]t was not a mere passive investor*."[170]

In the same vein, the Tribunal in *Ampal-American Israel* v. *Egypt* refused "*to read into the Treaty restrictions such as those advanced by the Respondent to the effect that 'passive, indirect and very small' holdings cannot enjoy any protection under the Egypt-US BIT*."[171]

---

159 Jarrod Hepburn & Lisa Bohmer, *supra* note 1.
160 Flemingo DutyFree Shop Private Limited v. Republic of Poland, Award (Perm. Ct. Arb., Aug. 12, 2016).
161 *Id.* ¶¶ 306, 322, 324.
162 *Id.* ¶ 308. Jarrod Hepburn and Lisa Bohmer, *supra* note 1, at 2.
163 Flemingo DutyFree Shop Private Limited v. Republic of Poland, Award, ¶ 340 (Perm. Ct. Arb., Aug. 12, 2016).
164 Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award (Dec. 19, 2016).
165 *Id.* ¶ 169.
166 *Id.* ¶¶ 169, 171.
167 *Id.* ¶ 231.
168 *Id.* ¶¶ 229-31.
169 *Id.* ¶ 232.
170 *Id.* ¶ 233.
171 Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on jurisdiction, ¶ 343 (Feb. 1, 2016).

Likewise, in *Kim* v. *Uzbekistan*, the Tribunal found that the BIT in question did not contain a distinction between active and passive investors, and did not require investors to be active.[172] Even if there was such a requirement, the Tribunal confirmed that the Claimants had an active role in the investment. The Tribunal distinguished *Standard Chartered Bank* on the basis that the claimants in *Kim* v. *Uzbekistan* had undertaken not just to hold financial interests in the local plants, but also to manage and develop those plants. It also distinguished *Alapli Elektrik* on the basis of the timing of the acquisition of shares.[173] Respondent's argument that investment arrangements depended on credit facilities for their financing and were not "*investments*" was also rejected.[174]

In *Eiser* v. *Spain*,[175] the Respondent objected that the funds that were invested in the solar plants were derived from the Claimant's limited partners in the investment fund, and were not the Claimant's own funds. This objection was rejected by the Tribunal on the basis that the origins of capital invested by an investor in an investment are not relevant for the purposes of determining jurisdiction.[176]

In *South American Silver* v. *Bolivia*, the Tribunal was split over this issue. While the majority considered that the indirect shareholding by the Claimant company was an investment protected by the treaty,[177] the dissenting arbitrator opined that an active involvement of the investor in the investment was needed, referring to *Caratube* and *Standard Chartered Bank* as authorities.[178] The majority distinguished the latter case on the basis of treaty language – the UK-Bolivia treaty in question did not contain the term "*made*" – and on the basis of control. As regards control, the Tribunal noted that the Claimant in *Standard Chartered Bank* did not acquire the controlling interest in the Tanzanian company, whereas South American Silver was the 100% owner of the shares of the three companies incorporated in the Bahamas, which were the owners of the company in Bolivia, the holder of the mining concessions.[179] The majority did not find that the word "*of*" figuring in Article 8(1) of the U.K.-Bolivia BIT implies direct property or excludes indirect investments.[180]

The Respondent asserted that if indirect investments were protected, the Tribunal had to consider that the Claimant's parent company was the investor. The Canadian parent company was the one who provided the funds, resources, and technologies for the mining operations, made the strategic decisions, and concluded the consulting contracts.[181] In other words, the Canadian company was the

---

172 Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 312 (March 8, 2017).
173 *Id.* ¶ 313.
174 *Id.* ¶¶ 334-35.
175 Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award (May 4, 2017).
176 *Id.* ¶ 228, *citing* Tokios Tokelés, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 77, 80 (April 29, 2004). *See also* Jarrod Hepburn and Lisa Bohmer, *supra* note 1.
177 South American Silver Limited v. Bolivia*,* PCA Case No. 2013-15, Award, ¶¶ 309-310 (Perm Ct. Arb. Aug. 30, 2018).
178 South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia, PCA Case No. 2013-15, Dissenting Opinion of Osvaldo Cesar Guglielmino, ¶ 86 *et seq.* (Nov. 22, 2018).
179 *Id.* ¶ 331.
180 *Id.* ¶ 306.
181 *Id.* ¶ 313-14.

actual investor. The majority rejected this argument stating that jurisdiction did not depend on the origin of the capital:[182]

> "*Bolivia is asking the Tribunal to disregard the protected investment - SAS' indirect ownership of CMMK's shares and CMMK's ownership of the Mining Concessions - by analyzing who contributed the resources to the Project, an economic test that is not provided for anywhere in the Treaty*."[183]

In a dissenting opinion, Mr Osvaldo Cesar Guglielmino concluded that the Claimant, "*a shell company with negligible capital and a nominal and passive shareholding*", was not a protected investor under the treaty because, among other reasons, all it did was accept the shareholding in certain companies, which, in turn, had the shares of the Bolivian company holding the mining concessions; The Claimant had no active involvement in making the investment.[184] Its parent company, a Canadian company, which was not a party to the arbitration, had performed all of the relevant management and control activities with regard to the purported investment;[185] and the terms of the treaty did not afford protection to a purported investor who had a passive, nominal relationship with the purported investment, but only to an investor who was actively involved in the making of the investment.[186] He found that the rules of interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"] lead to the conclusion that the the U.K.-Bolivia BIT does not afford protection to investments made by companies of third-party countries even if those investments are made through special purpose vehicles that are incorporated in one of the contracting parties.[187]

In *Theodoros Adamakopoulos* v. *Cyprus*, the dissenting arbitrator observed in the passing that the Cyprus-Greece BIT referred to investments "*made*" by investors of the other party, not simply "*held*" by them.[188] The sentence resembles the one from *Standard Chartered Bank*, although there was no citation to that case or to the "*active investor*" requirement. The observation was made in the context of opposing the majority's recognition of indirect investments.[189]

Several cases initiated by investors in solar power plants in the Czech Republic decided by the same arbitral tribunal in awards issued on the same date, acknowledged the interpretation of the verb "*made*" in *Standard Chartered Bank*, but distinguished Article 1(6) of the ECT from Article I(a) of the U.K.-Tanzania BIT on the basis that it does not contain the verb "*made*" and expressly provides for indirect

---

182 *Id.* ¶ 322.
183 *Id.* ¶ 334.
184 *Id.* 117.
185 *Id.* 74.
186 *Id.* ¶¶, 85.
187 *Id.* ¶¶ 148.
188 Theodoros Adamakopoulos v. Republic of Cyprus, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, ¶ 74 (Feb. 3, 2020).
189 *See also* Sergei Viktorovich Pugachev v. the Russian Federation, Award on Jurisdiction, ¶¶413-418 (18 June 2020), where the Tribunal held that the terms "made" and "held" do not have the same meaning, that the investment must be made by way of transfer of capital or the exchange of leading-edge technologies between the two States, and that the investment is made when the investor acquires any of the assets and rights listed in Article 1 of the BIT and a transfer of capital takes place.

control. The Tribunal also added a remark regarding the irrelevance of the origin of capital for assessing the degree of the investor's involvement:

> "*In any case, if a requirement as to the degree of involvement of the investor in the making of an investment were applicable, such requirement would not have any bearing upon the origin of the funds applied by the investors.*"[190]

The Russian Federation unsuccessfully invoked the requirement of "*active investor*" before The Hague Court of Appeal in the annulment action of the *Yukos* investment awards:

> "*5.1.9.1. The Russian Federation is of the opinion that it follows from various ECT provisions that a foreign investor must actively make an investment within the territory of a Contracting State. It refers, inter alia, to words 'the investor making an investment' and 'the investment is made'. It follows from this that there is only an investment within the meaning of the ECT if an investor contributes funds of foreign origin to the territory of a contracting state, or at least makes an economic contribution to the host state.*"[191]

(emphasis in the original, references omitted)

The latest blow to the requirement of an active investor came from the judicial bench. On March 25, 2020, the Swiss Federal Tribunal in Lausanne set aside the UNCITRAL award that had declined jurisdiction in *Clorox*, assessing that the Tribunal had applied conditions not contained in the BIT, when it found that the Claimant had not made an "*active act of investment*" in Venezuela. According to the Swiss Federal Tribunal, it was sufficient under the BIT that an investor from one contracting State possessed assets in the territory of the other contracting State.[192]

The Swiss Federal Tribunal remanded the case to the arbitral Tribunal to address whether the transfer of the investment to the U.S. group's Spanish subsidiary (Clorox Spain) amounted to an abuse of rights, because Clorox U.S. had allegedly restructured the investment when the dispute was already foreseeable, with the purpose of bringing a claim under the BIT.[193]

In contrast, the concept of an active investor was accepted by the English High Court in the judgment deciding an application of Venezuela to set aside an order enforcing the award in *Gold Reserve* v. *Bolivarian Republic of Venezuela* ["**Gold Reserve**"].[194] The Court interpreted the wording of the Canada-

---

[190] WA Investments-Europa Nova Limited v. Czech Republic, PCA Case No. 2014-19, Award, ¶ 269 (May 15, 2019). I.C.W. Europe Investments Limited v. Czech Republic, PCA Case No. 2014-22, Award, ¶ 214 (May 15, 2019); Voltaic Network GmbH v. Czech Republic, PCA Case No. 2014-20, Award, ¶ 206 (May 15, 2019).

[191] Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227), Judgment of the Hague Court of Appeal (Unofficial English Translation), ¶ 5.1.9.1 (Perm. Ct. Arb., Feb. 18, 2020).

[192] Tribunal Fédéral 4a_306/2019, Ruling of Mar. 25, 2020, ¶ 3.4.2.7.

[193] *Id.* ¶ 3.4.2.8. *See* Sebastian Perry, *supra* note 104, at 4.

[194] *See* Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm) (Eng.). However, in subsequent decisions, the English High Court distanced itself from the concept of active investor. First, in PAO Tatneft v. Ukraine, [2018] EWHC 1797 (Comm), ¶¶67-81 the Court rejected the argument that there must be an active relationship between the investor and the investment. The Court distinguished the holding from Gold Reserve on the grounds that it was dealing with the definition of "investor" rather than "investment", and that the wording of the Canada-Venezuela BIT was different than the wording of the Russia-Ukraine BIT. Nevertheless, the Court observed that even if there had to be an active relationship of this kind, Tatneft would have satisfied the requirement because it expended significant sums to acquire the shareholding in the US and Swiss companies which controlled the Ukrainian oil company. The same court

Venezuela BIT, which defined "*the investor*" as "*any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela*."[195] The arbitration concerned mining concessions and mining rights in Venezuela (the Brisas project) granted in 1988 to a Venezuelan company, which became a subsidiary of an American company in 1992.[196] Subsequently, the American company established Gold Reserve Inc. ["**GRI**'], a Canadian company, which the Respondent characterised as a "*shell company*".[197] GRI became the indirect owner of assets in Venezuela through corporate restructuring, which took place in 1998 through a share swap between the shareholders of the American parent and the shareholders of the Canadian subsidiary, with no capital expenditure. The corporate restructuring transaction was completed outside Venezuela and involved no transfer of capital into its territory.[198] The Canada-Venezuela BIT (1996) expressly recognized that an "*investment*" may be "*owned or controlled by an investor of one Contracting Party either directly or indirectly*".[199] However, relying on the definition of an investor from the BIT, Venezuela argued in the rejoinder that the making of an investment requires a "*contribution in economic terms*", and at the hearing that "*the ordinary meaning of the phrase 'who makes the investment in the territory' would appear to be one who positively and personally acts and effects the movement of capital or some other economic contribution - know-how, for example - into the territory of Venezuela*."[200] The Tribunal brushed off this argument, which was made rather late in the proceedings, stating that:

> "*Even if this were so, Respondent has previously acknowledged[…]that post-1999 the majority of funding came from Claimant. [...] Respondent had attempted to belittle this contribution as amounting to no more than a 'fund-raiser', and yet provision of funds (or 'capital') seems to be the crux of its definition of making an investment. [...] Claimant has stated that one of the reasons for incorporating the Canadian entity was to raise funds in Canada for its mining activities in Venezuela and most of the US$ 300 million invested in the so-called Brisas Project came through Canadian investors*."[201]

It is not stated in the *Gold Reserve* award whether the Respondent relied on *Alapli Elektrik* or *Standard Chartered Bank* in the arbitration.[202] However, in the annulment proceedings before the English High Court, Venezuela developed this argument and relied on both awards (as well as *KT Asia*).[203] The English High Court's interpretation of the words "*who makes the investment in the territory of Venezuela*" was receptive to the active investor argument, although the Court ultimately accepted the reasoning of the Tribunal regarding the Claimant's contribution. The Court noted that the term "*investment*" had

further rejected the *Romak* reasoning relied on by Korea as unpersuasive in the Republic of Korea v. Mohammad Reza Dayyani et alt. [2019] EWHC 3580 (Comm), ¶¶ 57-62, stating that the phrase "invested by" from Article 1 of the Korea-Iran BIT could not be interpreted to require an active commitment of resources by the investor.

195 Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, June 25, 1982, Art. 1, cited in: *Id.*, ¶ 15.

196 Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 3,11.

197 *Id.* ¶251.

198 Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 256 (Sept. 22, 2014).

199 Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Jan. 28, 1998, art. I(f).

200 *Id.* ¶ 271.

201 *Ibid.*

202 Clorox Spain S.L. v. Venezuela was initiated only after Gold Reserve v. Venezuela had been decided.

203 Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm), ¶ 29.

two distinct meanings in ordinary language –one was "*the contribution of resources to acquire an asset*", and the other "*the asset which was acquired by the act of investing*."[204] Article 1 of the BIT relied on the second meaning and defined the "*investment*" as an asset.[205] However, the Courtcontinued, incorporating this definition into the definition of the "*investor*" contained in the same Article, i.e. defining an investor as the person "*who makes assets*" did not make sense. This could not have have been the intention of the parties.[206] The term "*makes the investment*" had to be construed in accordance with its ordinary meaning, which, according to the Court, includes "*the exchange of resources, usually capital resources, in return for an interest in an asset*."[207] But, the Court remarked, "*the fact that a person has acquired an asset does not necessarily indicate that he has made an investment in that asset*."[208] The Court then referred to *Standard Chartered Bank*:

> "*The present relevance of the case is the light it casts on what is required in order for a person to make an investment. Mere passive ownership of an asset is insufficient. What is required is an active relationship between the investor and the investment. I agree that in the context of the BIT in this case a person can only be one who "makes the investment" if there is some action on his part. Passive holding of an asset by itself would not amount to making the investment. That is so, it seems to me, as a matter of the ordinary use of language*."[209]

The Court was not persuaded that the share swap satisfied the test of "*making the investment*":

> "*Whilst GRI undoubtedly became the indirect owner or controller of the shares in CAB and of the Brisas Project I must conclude it did not at that time make an investment in the assets in respect of which the protection of the BIT was sought*."[210]

However, the fact that GRI subsequently provided nearly U.S$300 million to fund the Brisas project was sufficient, and in the Court's judgment, GRI thereby made an investment in protected assets.[211] Although those assets were a non-protected investment prior to such expenditure (as they were originally made by a Venezuelan company and acquired by the Claimant without payment), the act of making the expenditure transformed them into a protected investment.[212]

This is what, according to the Court, distinguished the position of GRI from the position of SCB (U.K.) in *Standard Chartered Bank*. In contrast to SCB, who did nothing concerning the investment and had no control over SCB HK, GRI raised finance and provided funds for developing the Brisas Project. It also exercised control as it retained consultants and experts and concluded contracts in its own name in connection with that project.[213]

---

204 *Id.* ¶ 32
205 *Ibid.*
206 *Id.* ¶ 33.
207 *Id.* ¶ 35.
208 *Id.*
209 *Id.* ¶ 37.
210 *Id.* ¶44.
211 *Id.* ¶ 46.
212 *Id.* ¶ 48.
213 *Id.* ¶ 47.

Capital Financial Holdings Luxembourg SA v. *Republique du Cameroun*,[214] also seems to support the requirement of an active investor. In this case, the Tribunal cited *KT Asia* as authority to deny jurisdiction *ratione materiae* regarding an investment of a Luxembourg company in Cameroon. The Claimant was indirectly owned by a Cameroonian national. The Tribunal took the view that the term investment in the sense used by the ICSID Convention had an objective meaning, the definition of which was not left to the discretion of the parties.[215] Out of the four criteria mentioned by *Salini*, the Tribunal accepted that it is necessary to establish only two: that the party that requests protection made a *substantial* economic contribution and that they accepted to take a risk of economic nature.[216] The Tribunal added that the first criterion is closely related to the second one, as "*in the absence of substantial contribution, the investor runs no risk in connection with the operation*".[217] The substantial contribution (adjective "*substantial*" was added to the *Salini* formula) meant that the investor must bring in contributions of certain value into the host country, which did not necessarily have to be of a financial nature, but could also consist in other performances, such as furnishing of raw materials, work, or services, provided that they had an economic value.[218] The Tribunal referred to several earlier awards to support the view that the contribution could not be substantial if the investment was acquired for a nominal price, manifestly below the market price.[219]

Talking about the risk, the Tribunal opined that the investor had to make the contribution himself i.e. he had to *actively* finance a transaction; otherwise, he objectively bore no risk for the operation.[220] The investor could obtain the amount of the investment from third parties. However, the true question remained whether the person who acted had made the investment himself and bore the accompanying risks. At least in that respect, the origin of funds could not be completely ignored.[221] Finally, the Tribunal observed that the delimitation between the question of origin of the funds invested and the person that had made the investment was especially sensitive when the operation concerned several companies controlled by the same person or persons.[222] In that respect, the Tribunal found large similarity between the factual matrix of the case it had to decide and the one in *KT Asia*.[223] The Tribunal established that the acquisition of shares in the Commercial Bank Cameroon, a local Cameroonian bank, by the Claimant and two shareholder loans it granted to that bank, were transactions between companies in the same group controlled by the same person, who was, additionally, a national of Cameroon.[224] The amounts of loans granted by the Claimant to the bank were identical to the amounts of loans granted to the Claimant by its own shareholders.[225] These loans

[214] Capital Financial Holdings S.A. v. Republique du Cameroun, Affaire CIRDI ARB/15/18, Award of the Tribunal (June 22, 2017).
[215] *Id.* ¶ 416.
[216] *Id.* ¶ 423.
[217] *Id.* ¶425.
[218] *Id.* ¶ 424.
[219] *Id.* ¶ 427.
[220] *Id.* ¶425.
[221] *Id.* ¶ 426.
[222] *Id.* ¶428.
[223] *Id.*
[224] *Id.* 455.
[225] *Id.* ¶ 445.

were never reimbursed by the Claimant.[226] Also, the Claimant submitted no evidence that it had purportedly paid almost EUR 9 million for the acquisition of the bank's shares.[227] For those reasons, the Tribunal considered that the Claimant had made no substantial contribution, and did not bear any risk related to those transactions, and consequently did not make an investment within the meaning of the ICSID Convention.[228] Noting that the BIT contained a typical broad definition of investments which included, *inter alia*, shares issued by companies, claims and rights to any kind of performance having an economic value, the Tribunal stated that the transactions in question could not automatically be qualified as investments, solely on the basis of the fact that they fell under the categories of investments mentioned in the relevant provision.[229] The definition of investments contained in the BIT had to be interpreted bearing in mind the purpose of the BIT, which was to encourage foreign investments to Cameroon.[230] The bare acquisition of shares, without any contribution and without taking any risk by the Claimant, did not correspond to such an interpretation of investment.[231]

The Czech Republic also argued that the Germany-Czech Republic BIT (1990) applicable in the *A.M.F. Aircraft Leasing* v. *Czech Republic* case ["**A.M.F. Aircraft Leasing**"] required protected investors to "*engage in the act of investing*" or to "*actively invest*."[232] In this case, the Tribunal accepted that the ordinary meaning of the terms used in the BIT, such as "*to make an investment*", "*investments by investors*", and "*investments made by investors*" indicated that the investor had to act and effectively engage in the action of making the investment.[233] However, the Tribunal distinguished this case from *Standard Chartered Bank* and *Alapli Elektrik* on the basis of the factual matrix. According to the Tribunal, the factual matrix in the *A.M.F. Aircraft Leasing* case indicated that the Claimant directly made and owned its investment.[234] After applying the tests established by the *Standard Chartered Bank* and the *Alapli Elektrik* tribunals to the facts of the case, the Tribunal concluded that the claimant had actively invested in the Czech Republic.[235]

VIII. Who is "the active investor"?

The reason why tribunals sometimes reject jurisdiction, although the claimant owns property (usually a shareholding) in the territory of the respondent State, is that the tribunals in those cases become aware, after establishing the facts, that the claimant was not the real investor, and that the real investor or the real party in interest was someone who should not be protected under the relevant treaty. In

---

226 *Id.* ¶ 452.
227 *Id.* ¶ 449.
228 *Id.* ¶¶ 457, 459.
229 *Id.* ¶ 461.
230 *Id.* ¶¶ 461-462.
231 *Id.* ¶ 462.
232 A.M.F. Aircraft Leasing Meier & Fischer GmbH & Co. v. The Czech Republic, PCA Case No. 2015-15, Final Award, ¶¶ 421-428, 448-458 (Perm. Ct. Arb., May 11, 2020).
233 *Id.* ¶ 450.
234 *Id.* ¶¶453-54.
235 The Claimant, a German company, itself purchased the aircraft from Fischer Air by transferring the purchase price to the Czech company's account and it was the claimant that made the decision to buy the Aircraft and to lease them to Fischer air. *Id.* ¶¶ 455-58.

other words, the idea behind the active investor requirement is to prevent treaty shopping, without expressly naming it as such.[236]

Conscious of the prevailing formalistic interpretations of the treaty definitions of investment, which do not give them much leeway, the tribunals search for the terms in the treaty which may be interpreted so that the purported investor's assets, although enumerated in the BIT as examples of eligible investments, can nevertheless be denied the status of an investment.

In some instances, the result of this search is the wording of the treaty that uses "*active*" verbs, such as "*make*" and "*invest*". These words, according to the *Standard Chartered Bank,* imply some action in bringing about the investment, rather than purely passive ownership.[237]

The verbs used in the treaty are the centre piece of the analysis in *Clorox*. According to the Tribunal, it results from the wording of the treaty that its protection is limited to those assets that were invested by an investor of one contracting party in the territory of the other.[238] The following "*active*" verbs are used in the Spain-Venezuela BIT (1995): "*investments made [efectuadas] in its territory by investors of the other Contracting Party"* and *"investments carried out [realizadas] by investors of the other Contracting Party*".[239]

Of course, these verbs have been repeatedly used in BITs, but no one previously attributed a special meaning to them. The Swiss Federal Tribunal, deciding on the challenge of the *Clorox* award, was not convinced by this interpretation, and thought that there is no basis for deducing the requirement of an active investment from the phrase "*invested by investors*" that appears in the Spain-Venezuela BIT.[240] The Federal Tribunal opined that the BIT does not contain any requirements that go beyond the holding of assets by an investor of a contracting party in the territory of the other contracting party.[241] But the very basis for deducing such a requirement comes from the text of the Spain-Venezuela BIT, which defines investments as follows:

> "*'Investments' means any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party and in particular, although not exclusively, the following assets:*
>
> *(a) shares, securities, bonds and any other form of participation in companies*."[242]

If the enumerated assets are inserted into this definition (e.g., "*investments*" means shares invested by investors), the sentence would still not be synonymous with "*shares held by investors*". Therefore, as

---

[236] JORUN BAUMGARTNER, *supra* note 2, at 158. On the conditions to find corporate or investment structuring and restructuring to amount to the abuse of process *see* Sanja Đajić, *Good Faith in International Investment Law and Policy*, *in* J. Chaisse et al. (eds.), HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY, Springer Nature Singapore Pte. Ltd. 2020, pp. 1-34.

[237] Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶¶ 221-25 (Nov. 2, 2012).

[238] Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, ¶ 801 (Perm. Ct. Arb., May 20, 2019).

[239] Clorox Spain S.L., PCA Case No. 2015-30, Award, ¶ 801 (Perm. Ct. Arb., May 20, 2019).

[240] Decision of the Swiss Federal Tribunal, 4A_306/2019, Mar 25, 2020, ¶ 3.4.2.7.

[241] *Ibid.*

[242] Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, Sept 10, 1997, art. I(2).

confirmed by the English Court in the *Gold Reserve* case, the verb "*invested*" must have some other meaning, different from just holding assets.[243] It must have an objective ordinary meaning, which the Swiss Federal Tribunal failed to acknowledge.

Therefore, the interpretation of the words "*invested by investors*" as requiring action of some kind by the purported investor, remains persuasive. The annulled award in this case was fully consistent with the already established practice that requires contribution of some value, and does not content itself with the formal ownership of shares. In any case, Clorox Spain certainly did not invest any shares in Venezuela, as the ordinary meaning of these words would require. Nor did it "*invest*" any other type of assets in Venezuela.

Whether one agrees with it or not, the reach of the interpretation based on the use of "*active*" verbs is limited because there are many investment treaties that define investments by means of verbs "*own*", "*control*" or "*hold*". For example, in *Alapli Elektrik*, Professor Park considered it important that the word "*make*" is used in Article 10(1) of the ECT,[244] failing to notice or forgetting to mention that the same treaty also uses the verb "*own*" in its enumeration of assets that are deemed investments.[245] In some subsequent ECT cases, the "*active investor*" interpretation was rejected due to the use of the "*passive verbs*" in the ECT definition of investments.[246]

Another part of this interpretation relies on the preposition "*of*" connecting investment to a specific investor. According to Professor Park in the *Alapli Elektrik* case, reference to the investment "*of*" an investor connotes active contribution of some sort, "*an action of transferring something of value (money, know-how, contracts or expertise) from one treaty-country to another*".[247] The same definition is repeated in *Standard Chartered Bank*: for an investment to be "*of*" an investor, "*some activity of investing is needed, which implicates the claimant's control over the investment or an action of transferring something of value (money, know how, contacts or expertise) from one treaty-country to another*".[248] However, in *Standard Chartered Bank,* the Tribunal conceded that, with respect to the preposition "*of*", different meanings could be adduced. The phrase "*of*" could

243 Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm) (Eng.), ¶ 35.
244 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶354 (July 10, 2014).
245 ECT, Article 1(6): "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor […]."
246 WA Investments-Europa Nova Limited, PCA Case No. 2014-19, Award, ¶ 269 (May 15, 2019); I.C.W. Europe Investments Limited, PCA Case No. 2014-22, Award, ¶ 214 (May 15, 2019); Voltaic Network GmbH, PCA Case No. 2014-20, Award, ¶ 206 (May 15, 2019). However, in Sunreserve Luxoco Holdings, S.À.R.L. (Luxembourg) et alt. v. Italy, SCC Arbitration V (2016/32) Final award, ¶752 (25 March 2020), the Tribunal based its interpretation of the term "Making of Investments" under Article 1(8) of the ECT on the active/passive distinction: "the ECT envisions the making of an investment as an active mode of doing as opposed to a passive method of being granted acquisition over assets. In other words, making an investment refers to the active conduct of establishing or acquiring investments."
247 Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 359-60 (July16, 2012).
248 Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶ 232 (Nov. 2, 2012). This interpretation of the preposition "of" is misunderstood in Kim v. Uzbekistan*,* para. 313 ("In Standard Chartered Bank, the respondent state argued that the claimants' investment was limited [sic] the holding of loans, securities and other financial claims. The tribunal accepted that these were investments 'of' the claimants and not investments 'by' the claimants." - references omitted), while the English High Court 's explanation is illuminating: "in order for the investment to be 'of' SCB (UK) it had to be made by and not simply held by investor."

either connote a contributory relationship ("*the plays of Shakespeare*"), or ownership ("*the house of Shakespeare*").[249]

According to the relevant awards, the purported investor must engage in some activity related to the investment. It is interesting to analyze how this activity is defined by the tribunals and to compare it to the line of cases requiring sufficient contribution. Professor Park in *Alapli Elektrik* qualifies making of an investment as an "*active contribution*"[250] and also as "*a meaningful contribution to Turkey*".[251] He finds that the Claimant "*never made a contribution to the Alapli Project sufficient to create for itself the status of an investor under either the ECT or the Netherlands-Turkey BIT*".[252] His reasoning seemingly relies on the lack of sufficient contribution. Examples of such a contribution are providing capital and technology, conducting negotiations, and obtaining a contract.[253]

However, in contrast to cases where the claimants paid a nominal price to acquire the shares in the local subsidiaries, or acquired them gratuitously, such as *Caratube* and *Quiborax,* Alapli Elektrik did make some transfers from its bank account in the Netherlands to its Turkish subsidiary.[254] Those transfers were not accepted by Professor Park as a transfer of value made by the Claimant to Turkey because the funds were not really the Claimant's funds, they originated from someone else.[255] Professor Park stated that:

> "*No general test is suggested with permissible funding sources. Rather, [...] the compelling point is simply that, on the unique facts of this case, Claimant made no relevant contribution to the Project. This was because [t]o the extent that contributions were made, they came from nationals or companies of the United States and Turkey.*"[256]

In the annulment proceedings, the ad hoc committee understood that Professor Park based his decision on the finding that the Claimant had made no "*personal*" contribution, and had taken no risk in connection with the Alapli Project.[257] The hard and fast evidence of how the capital was transferred from Turkey to the Netherlands and then back to Turkey had shown that the Claimant was not the true investor; it was not investing its own capital, and that the capital did not originate from the Netherlands.

Professor Park attributed special importance to the origin of the capital, challenging the dogma of *Tokios Tokelés* v. *Ukraine*. He noted that the Claimant "*served as a mere conduit*" through which the American backers transmitted funds to the Turkish company, which held the project concession.[258] The American backers, rather than the Claimant, funded all capital for the shares held by the Claimant

---

[249] *Id.* ¶ 216.
[250] Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶ 350, 352, 359 (July 16, 2012)).
[251] *Id.* ¶ 350.
[252] *Id.* ¶ 337. *See also* Gold Reserve Inc. v. The Bolivarian Republic of Venezuela, [2016] EWHC 153 (Comm), ¶ 36 (Feb. 2, 2016).
[253] *Id.* ¶ 338.
[254] *Id.* ¶ 374.
[255] *Id.* ¶¶ 338, 347.
[256] *Id.* ¶ 349.
[257] Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Decision on Annulment, ¶¶ 159, 188, 217, 220 (July 10, 2014).
[258] *Id.* 218.

as investment under the relevant treaties.[259] Through multiple bank transfers, American backers reimbursed each of the Claimant's asserted contributions to the Turkish company's statutory capital.[260] The Claimant "*never had any meaningful control over use of the funds, which were simply passed through its bank accounts*" and had no duty to reimburse them.[261] For this reason, the arbitrator concluded that the Claimant neither made any contribution, nor took any risk. However, Professor Park noted that his conclusion might have been different had the statutory capital of the Turkish company been derived from a loan made to the Claimant by the American backers.[262]

Alapli Elektrik was invoked in the *Yukos* annulment action as a case confirming (or inaugurating) the principle that investment treaties do not (or should not) protect U-turn constructs. However, considering the division of the majority arbitrators, The Hague Court of Appeal opined that this award was insufficient to prove the existence of such a principle.[263]

Consequently, Professor Park's opinion in *Alapli Elektrik* rests on the origin of capital rationale as much as it does on the lack of sufficient contribution. But the origin of capital is here taken as evidence of inactivity of the shell company. Being just an instrument in the hands of the true investor, a conduit through which the funds were transmitted, the shell company in this case simply could not prove that it was an active investor. Therefore, *Alapli Elektrik* follows *Caratube* in the assumption that the ownership of the invested capital is not totally irrelevant because "*there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor*."[264]

Confirmation of the assumption that the active investor theory in *Alapli Elektrik* was concerned with prevention of treaty shopping by the Turkish and American investors may be found in the comments made about "*legitimate*" passive investments. *Obiter dictum*, Professor Park mentioned a case where the acquisition of an investment "*without contribution*" would be legitimate. That would be the case where the original investor was also eligible for protection under the treaty:

> "*Nor does this case present the situation of one person stepping into the shoes of another which had already made a qualifying contribution, as might be the case for a child who inherits from a parent that has made the contribution prior to death. To the extent that the inheritance analogy has any impact in this case, Claimant would be stepping into the shoes of a Turkish national*."[265]

---

[259] Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶¶339-40 (July 16, 2012).
[260] *Id.* ¶¶ 341, 372-78. The First Project Company (Atam Elektrik), a Turkish company, first made payments to the claimant, and the claimant then made payments to the Second Project Company (Atam Alapli), whose shares were the purported investments. American backers (GE Group) immediately reimbursed the capital payments to the First Project Company.
[261] *Id.* ¶¶ 345-46.
[262] *Id.* ¶ 342.
[263] Yukos Universal Limited (Isle of Man), Hague Ct. of Appeals Case No. 200.197.079/01, PCA Case No. 2005-04/AA227), ¶ 5.1.8.9 (Perm. Ct. Arb., Feb. 18, 2020). The Court of Appeals did not refer to Venoklim Holding BV v. Bolivarian Republic of Venezuela, ICSID Case No ARB/12/22 Award (Spanish) (April 3, 2015), where the tribunal declined jurisdiction of a claim brought under the Netherlands-Venezuela BIT by a Dutch company on the grounds that the claimant was not a foreign investor because it was effectively controlled by Venezuelan nationals and companies.
[264] Caratube, ICSID Case No. ARB/13/13, Award, ¶ 355 (June 5, 2012).
[265] Alapli Elektrik B.V, ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 351 (July 16, 2012).

Therefore, *Alapli Elektrik* could be understood as holding that acquiring assets without contribution of the claimant's own capital is not legitimate if the original investor was not eligible for treaty protection.[266]

The *Standard Chartered Bank* tribunal defines the activity of investment as the claimant "*doing something as part of the investing process, either directly or through an agent or entity under the investor's direction*"[267] and "*deciding to make the investment, funding the investment, or controlling or managing the investment after it was made*." [268] To benefit from the BIT's protection, "*a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner*."[269] On the particular facts of the case, the investment activity would have been the purchasing of the loans by the Claimant, or directing its subsidiary to purchase the loans, or exercising control over the acquired loans.[270]

It is evident that the definition of active involvement in *Standard Chartered Bank* is broader than in the *Alapli Elektrik*. While in *Alapli Elektrik* the want of the Claimant's own contribution was cited as the principal reason for declining jurisdiction, the *Standard Chartered Bank* award shows that some other form of participation in the investment process would suffice for an investment to be "*of*" the claimant.[271] The Tribunal in this case was faced not only with the lack of contribution of the Claimant's own capital, but also with the lack of any controlling or directional activity on the Claimant's part, connected to the acquisition or management of the investment. The Tribunal described it as the lack of "*an active relationship between the investor and the investment*."[272] The sole link that the Claimant relied on to prove the status of an investor was its indirect ownership of the assets.

Nevertheless, there is no inconsistency. If the *Standard Chartered Bank* definition of investment activities was applied in the *Alapli Elektrik* case, the conclusion would have been undoubtedly that *Alapli Elektrik*, as a subsidiary of the true investor, made no decisions, did not fund the investment, did not control, and did not manage the investment after it was made. Therefore, it was not an active investor. On the other hand, if the *Alapli Elektrik* definition of investment activity was applied in the *Standard Chartered Bank* case, the entity that made a meaningful contribution of its own capital to acquire the assets in Tanzania, the active investor, would have been SCB HK, and not its parent company.

The *Clorox* tribunal confirms that an investor's action is required, but this action does not necessarily have to be the action of creating something that did not exist before. It might as well be investing in

---

[266] In Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014), the claimant had acquired her shareholding in the Peruvian Bank BNM by assignment from her father. Both the claimant and her father were French nationals and the investment was protected by the France-Peru BIT from the outset. Since it was obviously not the purpose of the assignment to obtain access to BIT protection, the fact that the shares were acquired for free did not matter, and the claimant's holding was recognized as an investment. *See* JORUN BAUMGARNER, *supra* note 2, at 154.

[267] Standard Chartered Bank, ICSID Case No. ARB/10/12, Award, ¶ 198 (Nov. 2, 2012).

[268] *Id.* ¶ 228.

[269] *Id.* ¶ 230.

[270] *Id.* ¶¶ 260, 264-265.

[271] *Id.* ¶ 232.

[272] *Id.* ¶ 230.

an existing investment already made by a third party.[273] For instance, if subsequent to the transfer of the shares of Clorox Venezuela, Clorox Spain had granted a loan to that company, or injected certain funds into its modernization, this would have been recognized as an investment.[274]

It was an undisputed fact that Clorox Venezuela had facilities, employees, and manufactured products that were sold to Venezuelan companies and consumers. This demonstrated, according to the Tribunal, that there was an investment in Venezuela, but it did not demonstrate that there was an investment by the Spanish Claimant.[275] The investment created by American investors who did not enjoy the protection of a BIT was simply transferred to Clorox Spain by internal company restructuring without payment. This operation could not be described as an investment by Clorox Spain within the meaning of the BIT. But if Clorox Spain had paid "*a valuable and also real consideration*" for the acquisition of shares, or made some further transfer of value to its Venezuelan subsidiary, apparently, the existence of an investment would have been recognized.[276]

In this respect, *Clorox* is similar to other cases, such as *Quiborax* and *KT Asia,* where shares were acquired for free or for a nominal price and jurisdiction was denied for the lack of a sufficient contribution. However, the Tribunal distinguished *Quiborax*, stating that the Spain-Venezuela BIT did not impose a restrictive meaning of investment that would require a contribution in money, or in kind, to materialize at the time of obtaining the title to the invested assets. It was sufficient, but necessary, according to the Tribunal, that the acquisition of the asset by the alleged investor had been the result of a transfer of value "*that generally occurs at the time of obtaining the asset but could, depending on the circumstances of the case, be deferred over time*."[277]

If, hypothetically, a further investment was made subsequent to restructuring, the holdings in these two awards may clash. The funds that the subsidiary, Clorox Spain, would invest into the newly acquired company might very well come from its mother-company in the U.S., and would, in that case, not be regarded as contribution by the Claimant according to the *Alapli Elektrik* standards. Conversely, in *Alapli Elektrik*, Professor Park distinguished *Mobil* v. *Venezuela*[278] on the basis of the fact that the Claimants in that case (the Dutch Mobil Holding company – an entity that was interposed into the chain of ownership by actual investors subsequent to the initial investment) "*contributed their*

---

273 Clorox Spain S.L, PCA Case No. 2015-30, Award, ¶ 803 (Perm. Ct. Arb., May 20, 2019).
274 *Id.* ¶ 832-33.
275 *Id.* ¶ 814.
276 *Id.* ¶ 832-33, *citing* Gold Reserve Inc., ICSID Case No. ARB(AF)/09/1, Judgment of the English High Court of Justice on Enforcement, ¶ 262 (Feb. 2, 2016).
277 *Id.* ¶ 823.
278 *Id.* ¶¶ 385-86. In Mobil, the tribunal found jurisdiction under the BIT despite the respondent's contention that the Dutch claimant was a "corporation of convenience". The claimants had been enabled to bring the claim following a transfer of shares, since they "contributed their part" to the investments of the local subsidiary whose shares were acquired. *See* Venezuela Holdings B.V., et al. (formerly known as Mobil Corporation, Venezuela Holdings, B.V.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, ¶¶ 193-97, *cited in* KT Asia, ICSID Case No. ARB/09/8. Award, ¶ 198 (Oct. 17, 2013).

part to [the] investments".[279] However, the origin of the contributions by Dutch Mobil was not further examined in *Mobil* v. *Venezuela*.

Notwithstanding these differences, *Clorox* had several things in common with *Alapli Elektrik*. First, the fact that the true investor was not eligible for protection. What must have led the Tribunal to deny jurisdiction in *Clorox* was not so much the absence of consideration when acquiring the shares, as the fact that the investment was made by American investors who continued to own and control Clorox Venezuela through their 100% ownership of Clorox Spain: "*the source of the capital and know-how invested in Venezuela [are two United States companies] not protected by the Treaty*".[280]

The fact that the shares were acquired without payment, and that Clorox Spain remained passive in this operation showed that the true investors continued to be US companies.

Second, like *Alapli Elektrik*, *Clorox* involved corporate restructuring. The corporate restructuring that took place as a result of the transfer of shares was insufficient to transform Clorox Spain into an eligible investor. The protection was denied to Clorox Spain because it had not contributed to or invested its own funds in the assets of Clorox Venezuela. The Swiss Federal Tribunal found fault in this because the Spain-Venezuela BIT did not contain a denial of benefits clause.[281] However, it does not seem realistic to expect that the States should foresee every kind of treaty shopping that ingenious companies may devise. Moreover, it is well known that the denial of benefits clauses have been interpreted in ways that makes them extremely ineffective.[282] Structuring an investment so that it attracts the protection of a particular BIT from the outset seems less problematic than restructuring it subsequently so that the protection of the relevant BIT is to be captured post-factum, after the investment has already been made by an unprotected entity. In such circumstances, the arbitrators felt compelled to scrutinize the active or passive role of the claimant in implementing the investment.

One less persuasive layer of the active investor jurisprudence is that "*indirect*" investors are not necessarily excluded by this requirement. Although it seems from the *Alapli Elektrik* award that the investment must be the personal activity of the investor, the other two awards leave open the possibility that the relevant activity may be conducted by someone else on the investor's behalf.

In *Standard Chartered Bank,* the Claimant argued that mere indirect ownership was sufficient for the purpose of jurisdiction in an ICSID case, but the tribunal was not persuaded.[283] The Tribunal distinguished between the adjective "*indirect*" describing ownership, and implying that there are

---

[279] Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 386 (July 16, 2012).
[280] *Id.* ¶ 817.
[281] Decision of the Swiss Federal Tribunal, ¶ 3.4.2.4.
[282] *See* Petar Đundić, *Procesne pretpostavke za primenu klauzule o uskraćivanju pogodnosti u investicionoj arbitraži: zašto je teško reći ne? (Procedural Requirements for the Application of the Denial of Benefits Clause in Investment Arbitration: Why is it Hard to Say No?)*, 53(3) ZBORNIK RADOVA PRAVNOG FAKULTETA U NOVOM SADU, 933-54 (2019). JORUN BAUMGARTNER, *supra* note 2, at 116-19.
[283] *Standard Chartered Bank*, ICSID Case No. ARB/10/12, Award, ¶¶ 247–48 (Nov. 2, 2012).

intermediate entities separating an asset from its ultimate owner, and the adverb "*indirectly*" which describes an action of making an investment, and implies that one person invests through another .[284]

The Tribunal admitted that an investment could be made indirectly through an entity that serves as a special purpose vehicle. [285] Such indirectly made investments, however, would still have to involve investing activity by a claimant, possibly performing direction or control. The Tribunal expressly reserved the position on whether jurisdiction would have existed, had the Claimant in that case actually engaged in the process of making the investment by funnelling funds through an intermediary, such as a special purpose vehicle.[286]

According to the *Clorox* tribunal, the link between an investor and an investment does not disappear as a result of indirect ownership of the investment. An investor can be the source of the capital invested in a territory and at the same time hold its investment through affiliated companies.[287] However, such a link does not exist without an action of investing by the alleged investor.[288] In this case, as the Tribunal observed, Clorox Spain was the subsidiary of the original investor.[289] What remains unanswered in these two awards is whether in a case like *Alapli Elektrik,* where the funds of the controlling investor were funnelled through an intermediary, that intermediary could (also) claim the status of an active investor on the basis of the mere transfer of the controlling investor's funds.

A common element of the three cases, as already stated, is the BIT wording requiring that the investment be made or invested "*in the territory*" by investors of one contracting party in the territory of the other contracting party. This is a territorial requirement that narrows the scope of application of the treaty.

However, the interpretation of the territorial requirement in the *Clorox* award could be criticized as less than persuasive. Considering the holding in *Clorox*, which relies, like the two preceding awards, on the absence of transfer of value,[290] one would expect that an active investor needed to transfer some value to the territory of Venezuela.[291] However, the *Clorox* tribunal expressly rejected this argument raised by Venezuela. The Tribunal cited Gold Reserve*,* where it was found that "*the ordinary meaning of the words 'making an investment in the territory of Venezuela' does not require that there must be a movement of capital or other values across Venezuelan borders*."[292] It seems that, in the Tribunal's view, the territorial requirement would be satisfied even if an existing investment in Venezuela was acquired by the

---

284 *Id.* ¶ 237.

285 *Id.* ¶ 198 ("[T]o constitute Claimant's status as treaty investor, so that the Loans may be considered investments 'of' Claimant, implicates doing something as part of the investing process, either directly or through an agent or entity under the investor's direction. No such actions were performed").

286 *Id.* ¶ 266.

287 *Clorox Spain S.L., PCA Case No. 2015-30, Award*, ¶ 804 (Perm. Ct. Arb., May 20, 2019).

288 *Id.* ¶¶ 804, 816.

289 *Id.* ¶ 817.

290 *Id.* ¶ 830.

291 Jarrod Hepburn and Lisa Bohmer, *supra* note 1, at 2-3.

292 Clorox Spain S.L., PCA Case No. 2015-30, Award, ¶¶ 824, fn. 380 (Perm. Ct. Arb., May 20, 2019); Gold Reserve Inc., ICSID Case No. ARB (AF)/09/1, Judgment of the English High Court of Justice on Enforcement, ¶ 260 (Feb. 2, 2016), which was cited for the same proposition in Flemingo, Award, ¶ 315 (Perm. Ct. Arb. Aug. 12, 2016).

Claimant by a transfer of value occurring outside of the host state i.e. if Clorox Spain had paid for the acquisition of shares by transfer of money to the U.S., for example.

In contrast, the presiding arbitrator in *Alapli Elektrik* emphasized the territorial requirement.[293] He said that the "*flow of capital and technology*" must "*run from the Netherlands to Turkey, not from the United States or some other third country*." The transfer of value must be from one treaty-country to another.[294] Emphasizing the need for reciprocity, he expressed his opinion that "*investment treaties are not intended as treaties with the world*", contradicting the view of arbitrators from *Aguas del Tunari* v. *Bolivia* that investment treaties: "*serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum*."[295]

Ultimately, all three "*active investor*" cases have one feature in common: they do not accept that ownership of assets is enough to prove the status of an investor and reject the formal asset-based approach in answering the question whether the claimant made an investment. By requiring the investor to be active, they actually require that the claimant prove that it was the real investor, whether it is holding the assets resulting from investment, or not.

IX. Conclusion

The question whether "*passive investors*" enjoy protection of investment treaties has arisen in the practice of investment tribunals in the preceding decade as a result of intensified efforts of investors to restructure their investments so that they are covered by treaty protection on the one hand, and as a way to circumvent rather formalistic asset-based interpretations of the term "*investment*", on the other hand. The constellation in which this question arises can involve an entity that is established and directed by the true investor to implement the investment (the so-called "*special purpose vehicle*" or "*shell company*"), that conducts no activity of its own. It can also involve an entity that owns the actual investor, the so-called "*indirect investor*", that holds an indirect ownership interest but has conducted no activity regarding the relevant investment. The "*inactive*" entity eventually appears as a claimant in an investment arbitration, triggering the question whether it has made an investment in the sense of the relevant treaty. Faced with such factual constellations that they had to resolve, the tribunals in *Alapli Elektrik, Standard Chartered* Bank and *Clorox* adopted the view that the investor must make an active contribution to qualify the assets it owns as investments.

The requirement of an "*active investor*" is of limited utility to lawyers who are trying to defend States from the rapidly expounding number of treaty shoppers. First, it is highly dependent on the wording of the particular treaty: the definition of investment in the particular treaty should rest upon the verbs of activity rather than verbs of ownership; second, it clashes with some established precedents on the status of shell companies and on the origin of capital; and third, it has already been rejected by several tribunals and has now caused an annulment of an award before a Swiss court.

---

[293] Alapli Elektrik B.V., ICSID Case No. ARB/08/13, Excerpts of Award, ¶ 350-53 (July 10, 2014).

[294] *Id.*, ¶ 360.

[295] Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, Oct. 21, 2005, ¶ 332.

Despite these limitations, the tribunals and arbitrators that introduced this requirement deserve credit for refreshing the analysis of what "*investing*" and "*investment*" really mean. They build upon the distinction between investment and property, between action and result, a distinction that needs to be preserved and contemplated on, so that the original purpose of the investment treaties remains uncompromised. The prospects for the wider acceptance of this requirement depend on which view will prevail in the long run: should the tribunals endeavour to prevent conspicuous treaty shopping using all available means, including the doctrine of "*active investor*", or should they rather stick to the conventional wisdom and accept any kind of foreign property as a foreign investment.