THE UNITY OF AN INVESTMENT

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INTRODUCTION

An investment is often a complex operation. It may consist of preparatory studies, licences, government permits, financing arrangements, real estate transactions, various contractual arrangements, and a variety of other legal dispositions. Each of these elements has its own legal existence but in economic terms they are united to serve a common purpose.

Investment tribunals have often treated the various assets and activities that make up an investment as a unity. In most cases they have not dissected investments into their individual legal components but have treated them as an integral whole. This holistic approach towards investments has shown itself in several contexts. When determining the existence of an investment, tribunals have looked at a combination of elements that collectively made up the investment. They have extended the protection of investments to activities incidental to the investment's core activity. This protection applied to some activities preparatory to the investment proper and to certain follow-up activities. At times, consent to arbitration contained in some investment-related documents was extended to legal relationships governed by other documents. The requirement of an investment in the host State was deemed fulfilled even if only some of the activities making up the investment had taken place in the host State's territory. In the eyes of investment tribunals, the illegality of one aspect of the investment tainted the entire operation.

The picture is less clear when tribunals dealt with the merits of investment claims. In some cases, tribunals have looked at the entire investment when determining whether an alleged expropriation amounted to a substantial deprivation. In other cases, tribunals have accepted the possibility of a partial expropriation.

I. THE IDENTIFICATION OF AN INVESTMENT

The unity of the investment may determine the very existence of an investment. In some cases, respondents argued that each of the claimants' assets on its own did not amount to an investment. Claimants argued that these assets, looked at in combination, did constitute an investment.

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The simplest example for this constellation is the existence of several interrelated contracts. In *Mytilineos* v. *Serbia and Montenegro*,[1] the Claimant had entered into a series of agreements with a "socially owned company" under the law of Yugoslavia. The Respondent argued that there was no investment since these were ordinary commercial contracts. The Tribunal found that, in combination, the contracts amounted to an investment. It said:

> Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, it seems clear that the combined effect of these agreements amounts to an investment . . . [T]he combined effect of the Agreements is clearly more than an ordinary commercial transaction.[2]

The Tribunal proceeded to apply the *Salini* criteria to the entire operation to identify an investment.[3]

The situation was similar in *ADC* v. *Hungary*.[4] The Claimant and a Hungarian State entity had entered into a Master Agreement and a series of more specific Project Agreements for the expansion of Budapest International Airport. The Respondent argued that this was not an investment but a series of ordinary commercial transactions. The Tribunal disagreed. It found that the entire operation had the characteristics of an investment. The Tribunal found that it was "necessary to have regard to the effect of all the Project Agreements".[5] It said:

> In considering whether the present dispute falls within those which "*arise directly out of an investment*" under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements.[6]

İçkale v. *Turkmenistan*[7] involved a set of 13 interrelated construction contracts. In determining the existence of a contribution, the risk involved and the duration of the entire operation for purposes of determining the existence of an investment, the Tribunal found that it had to look at the contracts in their totality. It said:

> In the circumstances, the Tribunal does not find it appropriate to consider each of the Contracts concluded by the Claimant individually when determining whether the Claimant has made an "investment" in Turkmenistan; they form part of a whole, which is the Claimant's business venture in Turkmenistan. In view of the scale, duration and number of the projects, and the commitment of capital by the Claimant in their performance, the Tribunal concludes that the Claimant must be considered to have made an "investment" in Turkmenistan within the meaning of both Article 25 of the ICSID Convention and Article I(2) of the [Turkey–Turkmenistan] BIT.[8]

[1] *Mytilineos Holdings SA* v. *The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) 16 ICSID Rep 572.
[2] Ibid. paras. 120 and 125. [3] Ibid. para. 124.
[4] *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *The Republic of Hungary*, Award of the Tribunal (2 October 2006) 15 ICSID Rep 539.
[5] Ibid. para. 325. [6] Ibid. para. 331 (italics original).
[7] *İçkale İnşaat Limited Şirketi* v. *Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016).
[8] Ibid. para. 293.

Other tribunals too found that several contracts had to be viewed in combination to establish the existence of an investment.[9]

Some cases involved a variety of assets and activities that combined to form an investment. For instance, *Saipem* v. *Bangladesh*[10] involved the construction of a pipeline governed by a contract, retention money, warranty bonds and an ICC Arbitration Award in the Claimant's favour that had been nullified by the Respondent's Supreme Court. The Tribunal looked at the entire operation to establish the existence of an investment:

> . . . the Tribunal wishes to emphasize that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration.[11]

The Tribunal added that the ICC Award did not in itself constitute an investment but formed part of the overall investment for purposes of Article 25(1) of the ICSID Convention.[12]

In *White Industries* v. *India*,[13] the Claimant's assets consisted of a contract for the supply of equipment, a bank guarantee and an unpaid ICC Award. The Respondent contested the existence of an investment. The Tribunal rejected the proposition that the bank guarantee or the ICC Award constituted investments in their own right.[14] They did however form part of the overall investment:

> It is thus clear from White's operation under the Contract as a whole that it has made an investment in India for the purposes of the *Salini* Test.[15]

Other tribunals have found similarly that "all the elements of the Claimant's operation must be considered for the purpose of determining whether there was an investment under Article 25 [of the ICSID Convention]";[16] that "in order to determine whether or not an investment had been made, the Tribunal should assess the Claimant's business in the Czech Republic as a whole";[17] that "[w]hilst individual parts of that overall operation, *e.g.* the two Guarantees, might not by themselves qualify as an 'investment', the Tribunal considers that overall, there

[9] *Inmaris Perestroika Sailing Maritime Services GmbH and Others* v. *Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) para. 92; *Arif* v. *Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) para. 367.
[10] *Saipem SpA* v. *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures (21 March 2007) 17 ICSID Rep 352.
[11] Ibid. para. 110 (footnote omitted).
[12] Ibid. paras. 113–14. For a contrary view, see *GEA Group Aktiengesellschaft* v. *Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) paras. 162–4.
[13] *White Industries Australia Limited* v. *The Republic of India*, UNCITRAL, Final Award (30 November 2011).
[14] Ibid. paras. 7.5.1 and 7.6.8–10. [15] Ibid. para. 7.4.19.
[16] *Electrabel SA* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para. 5.44.
[17] *A11Y Ltd* v. *Czech Republic*, ICSID Case No. UNCT/15/1, Award (29 June 2018) para. 107.

was here a covered 'investment' within the meaning of Article 25(1) of the ICSID Convention";[18] and that they should not examine a particular element of a complex operation in isolation but evaluate "the operation as a whole".[19]

In some decisions, tribunals held that even though several of the claimant's assets individually qualified as investments, they should still be examined in conjunction. In *Unión Fenosa* v. *Egypt*,[20] the Tribunal determined that a Sale and Purchase Agreement and Claimant's shares in an Egyptian company were each by themselves investments for purposes of the BIT and Article 25(1) of the ICSID Convention.[21] Despite this finding the Tribunal added:

> The Tribunal also decides that these investments are to be treated "holistically" as one overall investment made by the Claimant comprising the Damietta Project.[22]

In *Ambiente Ufficio* v. *Argentina*,[23] Italian banks held government bonds issued by the Respondent and had in turn issued "security entitlements" to individual investors. The Respondent argued that the individual Claimants lacked standing because they were only remotely connected with the underlying bonds.[24] The Tribunal relied on the general unity principle to conclude that the Claimants had standing irrespective of the indirect nature of their interest in the bonds. It found that "the bond issuing process, including the purchase of security entitlements on the secondary market, is to be seen as an economic unity embodying a single act of investment".[25] It summarised the situation as follows:

> . . . the Tribunal is convinced that the process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind "aris[e] directly out of an investment" and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina–Italy BIT.[26]

In some cases, tribunals paid lip service to the principle of the unity of the investment but did not, in fact, apply it. *Joy Mining* v. *Egypt*[27] concerned the supply and installation of mining equipment supported by a performance bond in the form of a bank guarantee. When Egypt refused to release the bond, the

[18] *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc* v. *The Republic of Estonia*, ICSID Case No. ARB/04/6, Award (19 November 2007) para. 208.
[19] *ICS Inspection and Control Services Limited* v. *Argentine Republic*, PCA Case No. 2015-12, Award on Jurisdiction (8 July 2019) para. 293.
[20] *Unión Fenosa Gas, SA* v. *Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018).
[21] Ibid. paras. 6.66–7. [22] Ibid. para. 6.68.
[23] *Ambiente Ufficio SpA and Others* v. *Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) 19 ICSID Rep 506.
[24] Ibid. para. 432. [25] Ibid. para. 433.
[26] Ibid. para. 429. See also paras. 434 and 486.
[27] *Joy Mining Machinery Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) 13 ICSID Rep 123.

Claimant started ICSID arbitration under the UK–Egypt BIT. The Tribunal accepted the unity of the investment, in principle, and said:

> The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract as a whole in order to determine whether it could qualify as an investment under Article 25 of the [ICSID] Convention, although as explained the Tribunal is only called to determine the status and implications of the bank guarantees.[28]

Despite this avowed acceptance of the unity principle, the Tribunal's examination of the existence of an investment focused on the bank guarantee. Its conclusion was that a bank guarantee is not an investment since it is a contingent liability.[29] This, and its finding that the transaction was no more than a normal sales contract, led the Tribunal to conclude that there was no investment and to dismiss the case for lack of jurisdiction.

Mitchell v. *Congo*[30] concerned the seizure by the Congolese authorities of a legal consulting firm and the incarceration of its employees. The Tribunal noted the movable assets, know-how, good will, money and services which in their totality amounted to an investment. It said:

> In addition to movable property, Claimant transferred into the Congo money and other assets which constituted the foundations for his professional activities which came to an end the day of the seizure of his firm or soon thereafter. Together with the returns on the initial investments, which also qualify as investments [under the US–Zaïre BIT], these activities and the economic value associated therewith qualify as an investment within the meaning of the BIT and the ICSID Convention.[31]

In proceedings for the Award's annulment, the *ad hoc* Committee seemed to endorse the concept of the unity of the investment, in principle, when it said:

> In the opinion of the *ad hoc* Committee, one should avoid confusing the economic operation or project – which, if it fulfills certain characteristics, becomes the investment within the meaning of the [ICSID] Convention and the Treaty, even if it is "smaller" and "of shorter duration and with more limited benefit to the host State's economy" (. . .) – with all the rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another.[32]

Having made this broad statement, the *ad hoc* Committee immediately proceeded to zoom in on one aspect of the investment – the services provided by the law firm:

[28] Ibid. para. 54.
[29] Ibid. paras. 42, 44–5 and 47.
[30] *Mitchell* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award (9 February 2004) 19 ICSID Rep 85.
[31] Ibid. para. 55.
[32] *Mitchell* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 November 2006) 19 ICSID Rep 85 para. 38.

> In this case, by the nature of things, it is the services of the "Mitchell & Associates" firm that would or would not constitute the investment within the meaning of the Convention and the Treaty . . .[33]

In the view of the *ad hoc* Committee, these services did not contribute to the host State's economic development. This, and the Award's failure to state coherent reasons, led the Committee to annul the Award.[34]

II. THE INCLUSION OF ANCILLARY OR RELATED ASSETS AND ACTIVITIES

In another group of cases, the existence of an investment as such was not in doubt. The question was whether certain aspects that were incidental to the core assets and activities partook of the investment's status and protection.

A typical example for an activity ancillary to the investment is financing arrangements. In *Holiday Inns* v. *Morocco*,[35] the agreement for the establishment and operation of hotels had also provided for financing by the government. This was done by means of separate loan contracts. The contracts contained choice-of-forum clauses in favour of the Moroccan courts. This led the Respondent to object to the jurisdiction of ICSID over the claims connected with the loan contracts. The Tribunal emphasised "the general unity of an investment operation" to assert its jurisdiction also over the loan contracts. The Tribunal said:

> It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.[36]

Other tribunals too have accepted that loan agreements were part of the overall investment they were designed to serve.[37] In *Tenaris and Talta*

[33] Ibid. para. 38. [34] Ibid. paras. 39–41.
[35] *Holiday Inns SA and Others* v. *Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction (12 May 1974) (not public). A detailed account can be found in Pierre Lalive, "The First 'World Bank' Arbitration (*Holiday Inns* v. *Morocco*) – Some Legal Problems" (1980) 51 British Yearbook of International Law 123 (reproduced in 1 ICSID Rep 645).
[36] Lalive (n 35) 159.
[37] *Alpha Projektholding* v. *Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010) paras. 272–3: "The Tribunal concludes that it is the character of the project *in toto* which determines the nature of the commercial arrangements and not the individual agreements in isolation. The project involved more than a series of loan agreements and construction contracts . . . The Tribunal notes that large infrastructure undertakings regularly involve loans that are part and parcel of a greater endeavor"; *Tulip Real Estate and Development BV* v. *Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) para. 202: "the Tribunal accepts that the Claimant's overall investment included various infusions of capital into the Ispartakule III Project through loans"; *MNSS BV and Recupero Credito Acciaio NV* v. *Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) 19 ICSID Rep 749 paras. 201–2: "Arbitral tribunals have recognized 'the general unity of an investment operation' since the first ICSID

v. *Venezuela*,[38] the Tribunal accepted that a loan granted by the Claimant in the course of its acquisition of shares in Venezuela's steel industry was part of the investment. The Tribunal said:

> In the opinion of the Tribunal, the Talta Loan qualifies as an "investment" in its own right under the terms of Articles 1(2) of the Luxembourg and Portuguese Treaties. But even if that were wrong, the Tribunal is satisfied that it was an essential element of Claimants' "investment" in Matesi.[39]

Paradoxically, the outlier in this line of cases is *CSOB* v. *Slovakia*,[40] which is commonly celebrated as the paradigmatic authority for the unity of investments. The Claimant had granted a loan to a Slovak Collection Company that was secured by a guarantee of the Slovak Ministry of Finance.[41] A Consolidation Agreement between the Claimant and the Ministry of the Slovak Republic dealt with the issue of non-performing receivables. It referred to a projected BIT, which the Tribunal accepted as incorporating the BIT's ICSID clause into the Consolidation Agreement. When the Slovak Collection Company defaulted in its payment, CSOB instituted ICSID proceedings against Slovakia. Slovakia argued that the claims against it did not arise directly out of the loan and were, therefore, outside the Tribunal's jurisdiction. The Tribunal found that the loan to the Collection Company was closely related to, and could not be disassociated from, the other transactions and that the Slovak Republic's undertaking and the loan formed an integrated whole.[42] It adopted the doctrine of the unity of the investment operation and said in an often-quoted passage:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[43]

case, *Holiday Inns* v. *Morocco* . . . [T]he acquisition of ZN's shares, together with the loans to ZN, qualify as an investment under the [ICSID] Convention and the BIT."

[38] *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 January 2018).

[39] Ibid. para. 289. Somewhat incongruously, at para. 291, the Tribunal found that an off-take agreement was not part of the investment: "The Tribunal accepts Venezuela's submission that the Off-Take Agreement is not an 'investment' in its own right. Nor does it consider that the Off-Take Agreement would constitute an investment, if an holistic approach were adopted: despite the context in which it was concluded, it remains, in essence, a commercial agreement in respect of the purchase and delivery of product at a known price."

[40] *Československá Obchodní Banka A.S.* v. *Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) 5 ICSID Rep 335.

[41] Ibid. paras. 1–3.

[42] Ibid. paras. 80 and 82.

[43] Ibid. para. 72.

A few months later, the Tribunal issued another decision on jurisdiction.[44] In that decision the Tribunal found that it did not have jurisdiction with respect to the Loan Agreements. The unity of the investment operation did not mean that the Tribunal automatically acquired jurisdiction over each agreement concluded to implement the investment operation. The agreement to arbitrate in the Consolidation Agreement did not necessarily mean that the interpretation of the consent of the parties under Article 25(1) of the ICSID Convention must in each case be deemed to extend to any and all agreements comprising the entire transaction.[45]

This result was based in part on the somewhat indirect incorporation by reference of the consent to ICSID arbitration contained in the projected but abortive BIT. It was also based on the fact that the respective agreements were between different parties. Therefore, the Tribunal's competence was confined to the Consolidation Agreement.[46]

Tribunals have embraced the doctrine of the unity of the investment also with respect to other activities incidental to the investment. In *SOABI* v. *Senegal*,[47] a claim for reimbursement of architects' fees was found to be part of an investment involving the construction of housing units.[48] A Share Transfer Agreement entered into in the context of the privatisation of a gas transportation company was part of the investment.[49] An option to buy, incidental to a Management and Operation Contract, was part of the investment.[50] A lease contract in connection with the construction of an oil container terminal was part of the investment.[51] A gas purchase and sale agreement ancillary to the development and operation of a gas field was part of the overall investment.[52]

[44] *Československá Obchodní Banka, A.S.* v. *Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction (1 December 2000) 5 ICSID Rep 358.
[45] Ibid. para. 28.
[46] Ibid. paras. 26–32.
[47] *Société Ouest Africaine des Bétons Industriels [SOABI]* v. *State of Senegal*, ICSID Case No. ARB/82/1, Award (25 February 1988) 2 ICSID Rep 190.
[48] Ibid. paras. 8.01–23.
[49] *Enron Corporation and Ponderosa Assets LP* v. *Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) 11 ICSID Rep 273 para. 70: "an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment".
[50] *H&H Enterprises Investments, Inc.* v. *Arab Republic of Egypt*, ICSID Case No. ARB 09/15, the Tribunal's Decision on Respondent's Objections to Jurisdiction (5 June 2012) para. 42: "for purposes of determining whether there is an investment, the Tribunal must look at the contractual arrangements as a whole and not just at certain aspects of these arrangements. The Tribunal considers that in practice, an investment may be composed of several contracts, and different types of assets, which together form the 'venture' that constitutes the investment."
[51] *Mamidoil Jetoil Greek Petroleum Products Societe SA* v. *Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015) para. 288: "The Tribunal does not have to decide whether one of the items, such as the lease contract, looked at in isolation qualifies as an investment. It is a part of a unity that the Tribunal must appraise in its totality."
[52] *Niko Resources (Bangladesh) Ltd* v. *People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction (19 August 2013) paras. 361 and 371: "Investments of any complexity often consist of a variety of different components. These components may be regulated in a single legal

III. THE EXTENSION OF ARBITRATION CLAUSES TO ASSOCIATED DOCUMENTS

A related question is the extension of clauses providing for consent to arbitration, contained in some documents governing the investment, to incidental activities that are not formally covered by these documents. This was part of the discussion in *Holiday Inns* and *CSOB*, described above, where the basic agreement governing the investment contained an ICSID clause, but the loan agreements did not.

In *Duke Energy* v. *Peru*,[53] the investor and Peru had entered into a series of contracts called Legal Stability Agreements (LSAs). Only one of these, the DEI Bermuda LSA, contained an ICSID clause.[54] The Tribunal found that the capital contribution through the DEI Bermuda LSA was not an isolated transaction, but was one of many transactions;[55] and that it was made in connection with Duke Energy's overall investment and as part of a single concerted effort.[56] The Tribunal embraced the principle of the unity of the investment and analysed the decisions in *Holiday Inns*, *CSOB* and *SOABI*.[57] It said:

> The reality of the overall investment, which is clear from the record, overcomes Respondent's objection that it could never have consented to arbitration of a dispute related to the broader investment . . .[58]

But the Tribunal immediately pointed out that this finding did not extend to the merits phase:

> . . . Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any of the other LSAs . . . While the Tribunal's lack of jurisdiction over the other LSAs will not prevent it from taking them into consideration for the purposes of the interpretation and application of the DEI Bermuda LSA . . . , it will not be in a position to "give effect" to the protections in those LSAs. In other words, in the peculiar circumstances of this case (successive agreements *for the protection* of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.[59]

In *Cambodia Power* v. *Cambodia*,[60] the parties had signed three agreements, each of which contained an ICSID clause. Therefore, the question was not the extension of the arbitration clause from one contract to related contracts. Rather, the issue was whether the claims were to be heard in one unified proceeding or, as

instrument or in separate contracts . . . [T]he sale of the gas produced by the Joint Venture Partners is a necessary component of the investment."

[53] *Duke Energy International Peru Investments No. 1 Ltd* v. *Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006) 15 ICSID Rep 108.

[54] Ibid. paras. 80–2 and 89–90. [55] Ibid. para. 92(2). [56] Ibid. paras. 100 and 102.

[57] Ibid. paras. 119–31. [58] Ibid. para. 131.

[59] Ibid. paras. 132–3 (footnotes omitted; italics original).

[60] *Cambodia Power Company* v. *Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction (22 March 2011).

the Respondent demanded, in separate proceedings. The Tribunal entertained no doubt that it could hear claims under the three agreements in one proceeding:

> The agreements in this case all regulate aspects of a single project, and there exists a clear connectivity and interdependence between them. Any dispute arising out of the project would almost inevitably touch upon, and give rise to claims under, each agreement, and the Tribunal finds that the Parties' intention must have been to have such claims heard together, wherever possible.[61]

IV. THE TEMPORAL DIMENSION OF AN INVESTMENT

Tribunals have employed the concept of the unity of an investment also to gauge the outer limits of an investment before and after the core activity.

A. *Pre-investment*

The time of the inception of an investment is important, especially in cases where preparatory steps never matured into the investment's intended activity.[62] Since the ICSID Convention and the treaties providing for consent to arbitration require the existence of an investment, the exact starting point of the investment can be decisive for jurisdiction.

Investment tribunals have decided that mere negotiations, that are ultimately unsuccessful and do not lead to a contract or to any actual investment activity, do not amount to an investment.[63] This applies even if, through the negotiations or other acts preparatory to the investment, the investor has incurred expenses. An investment does, however, exist if an agreement materialises, even if it does not ultimately lead to actual economic activity. The decisive criterion for the existence of such an agreement is that it contains binding commitments and has financial value.[64] An investment also exists if the relevant activity has actually commenced

[61] Ibid. para. 141.
[62] See Christoph Schreuer, "Pre-Investment Activities" in Christoph Benicke and Stefan Huber (eds.), *National, International, Transnational: Harmonischer Dreiklang im Recht, Festschrift für Herbert Kronke* (Gieseking Verlag 2020).
[63] *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002) 6 ICSID Rep 310 paras. 47 and 61; *Zhinvali Development Limited* v. *Republic of Georgia*, ICSID Case No. ARB/00/1, Award (24 January 2003) 10 ICSID Rep 3 paras. 377, 388, 410, 415 and 417; *Generation Ukraine Inc.* v. *Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) 10 ICSID Rep 240 para. 18.9; *Nagel* v. *Czech Republic (Ministry of Transportation and Telecommunications)*, SCC Case No. 49/2002, Final Award (9 September 2003) 13 ICSID Rep 33 paras. 320 and 328–9; *F-W Oil Interests* v. *The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006) 16 ICSID Rep 398 paras. 125, 142 and 183; *ST-AD GmbH* v. *Republic of Bulgaria*, Award on Jurisdiction (18 July 2013) para. 273; *ACP Axos Capital GmbH* v. *Republic of Kosovo*, ICSID Case No. ARB/15/22, Award (3 May 2018) paras. 133–245.
[64] *PSEG Global Inc. and Others* v. *Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 June 2004) 11 ICSID Rep 434 paras. 66–73 and 79–104; *Malicorp Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) paras. 113–14; *Bosca* v. *Lithuania*, UNCITRAL, Award (17 May 2013) paras. 164, 166 and 168; *CC/Devas (Mauritius)*