WHO AND WHAT DOES INTERNATIONAL INVESTMENT LAW APPLY TO? DEFINING FOREIGN INVESTORS AND FOREIGN INVESTMENTS

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Key points:
- Investment treaties are concluded between states, but may grant rights to foreign investors to bring claims.
- Claims can only be brought by foreign investors in relation to foreign investments. A tribunal will not have jurisdiction over a claim unless both of these conditions are met.
Investment treaties are generally concluded between two or more states, both of which will be bound by obligations under the treaty. In addition to the states parties, investment treaties may also give foreign investors that are nationals of one of the treaty parties (the investor’s ‘home state’) the right to bring claims in relation to investments they have made in other treaty parties (the ‘host state’). A host state can challenge the jurisdiction of a tribunal on the ground that the claim is not being brought by a foreign investor of the relevant nationality, or that it does not relate to a foreign investment.

Who is a foreign investor? Line Item 1
Investment treaties define who is an investor for the purpose of protection under the treaty. This can be either a natural person or a corporation/company. In relation to companies, treaties will normally define this to include one or more of the following: that a company is constituted or incorporated in accordance with the laws of a treaty party; that the company's administration or management is located in the treaty party; and/or that the company is controlled by nationals of the treaty party.

What is a foreign investment? Line Item 2
Obligations under investment treaties apply to ‘investments’. The definition of an investment depends on the wording of each individual treaty. An investment treaty may define the concept of investment exhaustively, by reference to illustrative categories, or by reference to rights recognized under the domestic laws of the host state (such as contractual and other legal rights granted under domestic law). Or, it may leave the interpretation of the term to the tribunals hearing a dispute. The term ‘investment’ is generally defined as (or understood to) include both direct and portfolio investment, including intellectual property rights and shares.

However, some treaties restrict the definition of investment to direct investment.

If a claim is brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), an investor must, in addition to establishing that its claim relates to an investment in terms of the relevant investment treaty, establish that its claim relates to an ‘investment’ under the Convention. The Convention does not define the term. Although tribunals have generally deferred to any definitions adopted by the parties to the dispute in the relevant treaty,
Company v The Hashemite Kingdom of Jordan, ICSID Case No ARB/08/2, 18 May 2010 para 111; Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No ARB/08/8, Decision on Jurisdiction, 8 March 2010, para 130.\[\^\]*\[\[tooltip\] some tribunals have adopted a more restrictive approach that requires regularity of profit and return, an economic operation for a certain duration, the existence of a risk assumed by the investor, and a contribution to the economic development of the host state so as to amount to an investment.\[\] However, other tribunals have held that these criteria are illustrative rather than mandatory.\[\] In the *Philip Morris v Uruguay case*, Uruguay argued that the impact of tobacco consumption on the health and life of its population demonstrated that the activities of Philip Morris had negative effects on Uruguay’s economic development through increased health care costs and loss of life and therefore did not constitute an investment. However, the tribunal *held* that it was not mandatory for the claimant to establish that its economic activities had contributed to the economic development of the state.

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- *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No ARB/08/8, *Decision on Jurisdiction*, 8 March 2010
- *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, *Award*, 24 July 2008

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