



Registration and Approval Requirements in Investment Treaties

Best Practices Series - December 2012



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1.0 Introduction

Investment treaties typically have a very broad scope of application extending to all sectors of economic activity and covering a wide range of government measures and actions of the legislature, the executive and judiciary at the national and sub-national levels. The scope of application depends on various factors, including the definition of “investment” and “investor,” and on whether and how the treaty sets limits to its own scope of application. Typically, the definitions of investment and investor are very broad, covering any tangible and intangible asset directly or indirectly owned or controlled by investors. Increasingly, however, States are becoming more restrictive in defining “investment” in the treaties they negotiate. For example, some States prefer to use an exhaustive list of covered investments rather than covering any asset, and others explicitly exclude certain types of assets from the definition of investment. Another possibility is the requirement that investments meet certain conditions and characteristics to qualify as investments under the treaty, such as a commitment of capital, the assumption of risks, or a contribution to development. Often, treaties link the definition of investment to the requirement the investment is made in accordance with host State law, and sometimes they go further and tie the definition to a registration or approval requirement, which may or may not be independent of domestic law.

Similarly, States can set limits to the scope of application by explicitly stating that certain sectors or certain types of measures are excluded from treaty coverage. They can also limit the scope of the treaty to investments that have been registered or approved in writing for the purpose of the treaty. Such approval or registration requirements—whether connected to the definition of investment or integrated in a provision on application and scope—can be important because they will determine which investors can initiate international arbitration against host States under the investment treaty.

This paper will analyze registration and approval requirements for investments in investment treaties, and will examine the interpretation of such provisions by arbitral tribunals. Finally, the paper will provide concluding remarks and recommendations for States contemplating the use of approval or registration requirements to achieve chosen policy goals.



2.0 Limiting the Scope of Application to “Registered” or “Approved” Investments in Treaty Practice

A number of treaties, particularly (but not exclusively) in South East Asia, limit their scope of application to investments that have been registered or approved in writing. For example, in the 1970s, U.K. Bilateral Investment Treaties (BITs) with ASEAN member States, such as Singapore and Thailand, limited the scope of the treaties’ application to investments that had been specifically approved by the host government. For example, Article 12 of the U.K.–Singapore BIT signed on July 22, 1975, requires approval in writing:

The provisions of this Agreement shall only extend to investments, whether made before or after the coming into force of this Agreement, which are specifically approved in writing by the Contracting Party in whose territory the investments have been made or will be made.¹

Article 3 of the U.K.–Thailand BIT (dated 28 November 1978, in force on 11 August 1979), similarly states:

The benefits of this Agreement shall apply only in cases where the investment of capital by the nationals and companies of one Contracting Party in the territory of the other Contracting Party has been specifically approved in writing by the competent authority of the latter Contracting Party.

Nationals and companies of either Contracting Party shall be free to apply for such approval in respect of any investment of capital whether made before or after entry into force of this Agreement.

When granting approval in respect of any investment, the approving Contracting Party shall be free to lay down appropriate conditions.²

The qualification of each of these BITs’ application was a departure from the U.K.’s common practice at the time. The U.K.’s BITs with Egypt (1975)³ and Korea (1976)⁴, signed in the same time period, did not contain any such limitation on the coverage of the treaty.

The origins of the registration or approval of investments in investment treaties appear tied to the planned economic models used by many developing countries in the 1960s and 1970s. At the time, countries such as Malaysia, Thailand and Indonesia, among others, adopted a permit or register system for foreign investments. While these countries were not alone in adopting such a practice, they had the foresight of reflecting this approach in their BITs. The Belgium–Indonesia BIT of 1970 illustrates the typical approach taken when a Southeast Asian country negotiated with a European State:

¹ U.K.–Singapore BIT, July 22, 1975 (in force July 22, 1975), Article 12.

² U.K.–Thailand BIT, November 28, 1978 (in force August 11, 1979), Article 3.

³ U.K.–Egypt BIT, June 11, 1975 (in force February 24, 1976), available at http://www.fco.gov.uk/resources/en/pdf/3706546/3872894/fco_ref_tr_ippa_egypt.

⁴ U.K.– Republic of Korea BIT, March 4, 1976 (in force on March 4, 1976), available at http://www.fco.gov.uk/resources/en/pdf/3706546/3872894/fco_ref_tr_ippa_korea.



Article 9: The protection accorded to investors by the provisions of the present Agreement shall apply:

(a) in the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to the stipulations contained in the Foreign Investment law No. 1 of 1967 or other relevant laws and regulations of the Republic of Indonesia;

(b) in the territory of the Kingdom of Belgium only to investments which have been made consistent with the relevant laws and regulations of the Kingdom of Belgium.⁵

By comparison, the Indonesia–Denmark BIT was more unusual because the developed country partner, Denmark, also opted to restrict the scope of the treaty to certain types of approved, or otherwise declared as covered, investments, unlike Belgium in the example above. In the Indonesia–Denmark BIT of 1968, Denmark required that investments must be “declared by the Danish Ministry of Foreign Affairs to be covered by the present Agreement”:

Article II

The protection accorded to investors by the provisions of this Agreement shall apply:

a) in the territory of the Republic of Indonesia only to investments which have been approved by the Indonesian Government in accordance with the foreign investment legislation currently in force (Law No. 1 of the year 1967);

b) in the territory of Denmark only to investments which have been made consistent with the Danish exchange regulations currently in force (Order No. 199 of June 20th, 1961) and declared by the Danish Ministry of Foreign Affairs to be covered by the present Agreement.⁶

For a number of States the practice to integrate such requirements in investment treaties has continued until today. Moreover, they are not exclusive to treaties between developing and developed countries.⁷

The approach taken by some of the countries in Southeast Asia in their bilateral treaties was also reflected in at the regional level in the 1987 ASEAN Agreement on the Promotion and Protection of Investments (commonly known as the ASEAN Investment Guarantee Agreement, or “1987 ASEAN IGA”). That agreement limited the scope of the treaty to those investments that “are specifically approved in writing and registered by the host country” as follows:

⁵ Belgium–Indonesia BIT, January 15, 1970 (in force June 17, 1972), Article 9.

⁶ Indonesia–Denmark BIT, January 30, 1968 (in force July 2, 1968), Article 2.

⁷ See, for example, the 1991 BIT between Vietnam and Indonesia, Article 3.



Article II

APPLICABILITY OR SCOPE

This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party *and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement* [emphasis added].

This Agreement shall not affect the, rights and obligations of the Contracting Parties with respect to investments which, under the provisions of paragraph 1 of this Article, do not fall within the scope of the Agreement.

This Agreement shall also apply to investments made prior to its entry into force, *provided such investments are specifically approved in writing and registered by the host country and upon such-conditions* [sic] *as it deems fit for purpose of this Agreement subsequent in its entry into force* [emphasis added].⁸

The above-cited provision was at issue in *Yaung Chi Oo v. Myanmar*, which is discussed further below. Although Myanmar prevailed in this case, the reasoning of the tribunal indicates that the lack of a reference to a concrete registration process could be problematic. The case, which was decided in 2003, may have influenced the more nuanced approach taken in the new ASEAN Comprehensive Investment Agreement of 2009 (commonly referred to as the “2009 ACIA”).⁹

Unlike Article II of the 1987 ASEAN IGA, approval requirements under the 2009 ACIA are not tied to the provision on “Scope of Application.” Instead, they are tied to the definition of “covered investment” in Article 4(a) in relation to Annex I (Approval in Writing).

Article 4(a) of the new 2009 ACIA provides:

Article 4 – Definitions

For the purpose of this Agreement:

(a) “covered investment” means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, *and where applicable, specifically approved in writing (FN1) by the competent authority of a Member State* [emphasis added];

FN1: For the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing).

⁸ The 1987 Agreement on Promotion and Protection of Investment in ASEAN [IGA], available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=234900.

⁹ The 2009 ASEAN Comprehensive Investment Agreement [ACIA], 14th ASEAN Summit in Cha-am, Thailand, February 26, 2009 (in force on March 29, 2012, available at <http://www.unescap.org/tid/projects/tisiln-investagreement.pdf>) terminates the 1987 ASEAN IGA, though for investments falling within the ambit of the previous agreements, investors have the choice of applying the provisions of any of the agreements, but only in their entirety, for a period of three years after March 29, 2012 (Article 47(3), 2009 ACIA).



Annex 1 of the 2009 ACIA sets out the procedures to be followed in the event that an approval process is employed by an ASEAN member State:

ANNEX 1

APPROVAL IN WRITING

Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

- (a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
- (b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
- (c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
- (d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.¹⁰

The 2009 ACIA appears to depart from the approach taken in the 1987 ASEAN IGA. The 1987 ASEAN IGA provides for a system where registration, can be—but is not necessarily—linked to the existence of a domestic registration requirement. The 2009 ACIA, on the other hand, seems to come into play only where an ASEAN member State requires registration in its domestic law. The main goal of the ASEAN approach seems to be to allow member States to use registration systems in their domestic law and to align their international obligations under the 2009 ACIA to these domestic law requirements, while providing clarity for the investor by setting out clear processes and clarifying the role of responsible institutions. This way, the government retains control over treaty coverage via its domestic law, as long as it follows the prescribed process laid out.

In Africa, another regional investment treaty, the COMESA Investment Agreement, has taken a different approach to linking treaty coverage to a registration requirement. Unlike the 2009 ACIA, the COMESA Investment Agreement sets up a system that is specifically crafted for the purpose of the COMESA Investment Agreement, and is independent from domestic law requirements. Article 12 of the COMESA Investment Agreement limits its “coverage” to investments “specifically registered” pursuant to the Agreement with a pre-determined Member State authority. It requires all investments to be specifically registered pursuant to the treaty with the relevant authority of the member State. It provides:

¹⁰ The 2009 ACIA, Annex 1 (Approval in Writing).



ARTICLE 12

Coverage

1. This Agreement shall only apply to investments of COMESA investors that have been specifically registered pursuant to this Agreement with the relevant authority of the Member State in which the investment is made as set out in Annex B.
2. Subject to paragraph 1 of this Article, this Agreement shall cover investments of COMESA investors made in the territory of Member States in accordance with their laws and regulations prior to or after entry into force of this Agreement.
3. Subject to paragraph 1 of this Article, this Agreement shall not be applicable to claims arising out of disputes which occurred prior to entry into force of the Agreement.¹¹

ANNEX B, referred to in Article 12, paragraph 1, is meant to contain a list of national authority contact points for Member States for the purpose of registering an investment under Article 12 of the COMESA Investment Agreement. Contact points for registering investments are the national investment promotion agencies for 18 member states.¹²

¹¹ Investment Agreement for the COMESA Common Investment Area [COMESA Investment Agreement], Article 12, available at <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf>.

¹² According to a senior COMESA Secretariat official, the list will ideally be made public with contact names, address and telephone numbers. One open question will be to know what criteria the identified authority should apply to decide whether or not to register an investment pursuant to the treaty. Unlike the ACIA, where the criteria are linked to national law requirements, and minimum procedural requirements are set out in the ACIA itself, the COMESA Investment Agreement, at this point in time, does not provide for either. In order for Article 12 to become effective, COMESA States will have to provide additional guidance.



3.0 The Arbitral Awards Interpreting Registration and Approval Provisions in Investment Treaties

Registration or approval of investment clauses has been tested in at least three public arbitral decisions to date. While two tribunals, in *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*¹³ and *Philippe Gruslin v. Malaysia*,¹⁴ gave deference to the host States arguing for the limited scope of the applicable investment treaties, the tribunal in the more recent *Desert Line Projects LLC v. The Republic of Yemen* case ruled in favour of the investor, indicating that the effectiveness of the approval requirements will depend on the clarity of the language used in the treaty and the circumstances of the relationship between the investor and the State. Although the decisions of investment treaty tribunals are in no way binding on future arbitrators, they demonstrate, first, that approval requirements in investment treaties are legitimate policy tools and, second, that properly crafted approval or registration requirements can shield a country from arbitration in some instances.

The tribunal in the *Desert Line* case stated unequivocally that approval requirements in investment treaties are legitimate policy. In its decision, it noted that a treaty requiring “that investors wishing to be protected must identify themselves” and “that only specifically approved investments will give rise to benefits under the relevant treaty” has a “legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a qualitative control.”¹⁵

The *Yaung Chi Oo* and the *Gruslin* tribunals additionally attest that if the approval requirements integrated in an investment treaty are not met, a claim may be denied on jurisdictional grounds. In the *Yaung Chi Oo* arbitration, the tribunal found that the lack of written approval, which was required under the 1987 ASEAN IGA, prevented the investment’s protection under the agreement.¹⁶ It found that the investment had not been specifically approved and registered in writing after the 1987 ASEAN IGA entered into force for Myanmar in 1997. As a consequence, the tribunal concluded that it did not qualify as an investment covered under the Agreement. It reasoned that even though the investment had been approved pursuant to domestic law before 1997 as required under Article II(3) of the 1987 ASEAN IGA, an express subsequent act amounting to written approval and registration after the Agreement’s entry into force was required to gain protection under the Agreement.

The *Gruslin* arbitration¹⁷ examined an approval requirement in the investment treaty between Malaysia and the Belgo-Luxembourg Economic Union. That treaty links the definition of investment to the requirement that the protected assets under the treaty be “invested in a project classified as an ‘approved project’ by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon.”

¹³ *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, Award (ASEAN ID Case No. ARB/01/1), March 31, 2003.

¹⁴ *Philippe Gruslin v. Malaysia*, Award (ICSID Case No. ARB/99/3), November 27, 2000.

¹⁵ *Desert Line Projects LLC v. The Republic of Yemen*, Award (ICSID Case No. ARB/05/17), February 6, 2008, Para. 108: “Some States sign BITs without any regard to the *ex ante* identification of investors who may be covered by the treaty in question. This option ensures broader coverage and may be thought to maximize the stimulation of investment flows between the two countries. Others require that investors wishing to be protected must identify themselves, on the footing that only specifically approved investments will give rise to benefits under the relevant treaty. This is a different approach, but it too has a legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a qualitative control on the types of investments which are indeed to be promoted and protected.

¹⁶ *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, Award (ASEAN ID Case No. ARB/01/1), March 31, 2003.

¹⁷ *Philippe Gruslin v. Malaysia*, Award (ICSID Case No. ARB/99/3), November 27, 2000.



The registration requirement is therefore intrinsically linked to domestic law. In *Gruslin*, the claimant had made an investment in securities listed on the Kuala Lumpur Stock Exchange (KLSE) through a portfolio-management firm in Luxembourg. Allegedly, the imposition by the Malaysian Government of exchange controls in respect of the trading of its currency had resulted in the loss of Gruslin's investment. Malaysia, among other things, contended that the Claimant's investment was not an "approved project" in accordance with the investment treaty between Malaysia and the Belgo-Luxembourg Economic Union. That treaty defined the term investment as follows:

Article 1 – Definitions

(3) The term "investment" shall comprise every kind of assets and more particularly, though not exclusively:

- (a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens, pledges, usufructs and similar rights;
- (b) shares and other types of holding;
- (c) titles to money or to any performance having an economic value;
- (d) copyrights, industrial property rights (such as patents for inventions, trademarks, industrial designs), know-how, trade names and goodwill; and
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources.

provided that such assets when invested:

- (i) in Malaysia, are invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon;
- (ii) in the Belgo-Luxemburg Economic Union, are invested under the relevant laws and regulations.

Any alteration of the form in which assets are invested shall not affect their classification as investment, provided that such alteration is not contrary to the approval, if any granted in respect of the assets originally invested.

The tribunal agreed with Malaysia, and rejected the investor's argument that the approval obtained from the Kuala Lumpur Stock Exchange (KLSE) was sufficient, the arbitral tribunal in *Gruslin* explained:

What is required is something constituting regulatory approval of a project as such, and not merely the approval at some time of the general business activities of a corporation.¹⁸

As a consequence, the tribunal declined to consider Gruslin's investment in KLSE-listed securities as a protected investment under the investment treaty at issue.

¹⁸ *Philippe Gruslin v. Malaysia*, Award (ICSID Case No. ARB/99/3), November 27, 2000, para. 25.5.



The tribunal in the *Desert Line* case¹⁹ took a somewhat different approach. It considered the requirement that a certificate be issued in Article 1(1) of the Yemen–Oman BIT, which reads as follows:

The term “Investment” shall mean every kind of assets owned and invested by an investor of one Contracting Party, in the territory of the other Contracting Party, and that is accepted, by the host Party, as an investment according to its laws and regulations, *and for which an investment certificate is issued* [emphasis added].

Yemen argued that the ICSID tribunal lacked jurisdiction because no investment certificate had been issued as required in Article 1(1). The tribunal disagreed. It first considered as the “threshold inquiry” the issue of “whether Article 1(1) corresponds to mere formalism or to some material objective.” The tribunal found that Article 1(1) constituted the latter because “a purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide”. In this case, the tribunal found that *Desert Line*, notwithstanding the absence of a formal certificate, would have been given an investment certificate had it asked for one, particularly given the general endorsement of the investment at the highest level of the Yemeni state, including endorsement of the project by the President of Yemen himself.²⁰

Moreover, the tribunal reasoned that the reference to “certificate” did not indicate that the treaty parties Yemen and Oman “had in mind some specific or indispensable formality.” It continued:

. . . The Arbitral Tribunal cannot accept that it has a “plain and ordinary meaning” in the sense of Article 31(1) of the Vienna Convention as urged by the Respondent here. . . . Indeed, if an imperative formality were intended to be required, it would have been appropriate, if not indispensable, to identify the type of document required in each of the two countries and to identify the issuing department, or at least direct the attention of readers of the Treaty—prospective investors—to the proposition that the precise nature of the required certificates is to be determined by “specific regulations in force from time to time.”²¹

The reasoning of the tribunal in *Desert Line* indicates, on the one hand, that it will not always show deference to formal registration requirements in investment treaties. On the other hand, it also shows the importance of being precise when crafting the requirement. The mere reference to “certificate” without a specification of what is meant by the term, and without specifying an applicable law or certification process, was perceived as absolutely insufficient.

The *Desert Line* tribunal specifically compared the situations in *Desert Line* and *Gruslin v. Malaysia*. It found that Mr. Gruslin’s investment in a mutual fund in Luxemburg which in turn purchased shares on the KLSE was drastically different from the investment at issue in *Desert Line*. It held:

The BIT in that case covered only investments that had been classified as “approved projects” by the “appropriate Ministry.” Quite clearly the fact that a Belgian individual makes a purchase of securities in Luxemburg which in turn reflects a portfolio partially acquired on the KLSE will not be such an “approved project”—indeed the event will be entirely unknown to any Malaysian official. This is evidently very different from the position of the Claimant in this case (paragraph 112).

¹⁹ *Desert Line Projects LLC v. The Republic of Yemen*, Award (ICSID Case No. ARB/05/17), February 6, 2008.

²⁰ In *Desert Lines v. Yemen* the tribunal also recognised the doctrine of waiver and estoppel, holding that the state, through its conduct, was seen to have waived any requirement for registration. An investor could therefore rely on estoppel if a state makes certain representations on acceptance or approval even though the formal approval process set out in the treaty has not been strictly adhered to.

²¹ *Desert Line Projects LLC v. The Republic of Yemen*, Award (ICSID Case No. ARB/05/17), February 6, 2008, para. 109.



4.0 Recommendations and Conclusions

Countries can have a variety of reasons to include registration or approval requirements in their treaties. As was the case in earlier treaties, some countries may simply wish to include approval or registration requirements in their treaties to reflect the domestic law approval or registration requirements and processes at the international level, ensuring that treaties are consistent with domestic law. Other countries may desire to have an overview and know in advance which investments are covered by the investment treaty, thereby increasing clarity and predictability. For example, some of the jurisdictional questions will become obsolete in case of a dispute, as was the case in *Gruslin*, where it was sufficient for the tribunal to determine whether or not the “investment” was an approved project. Finally, as the *Desert Line* tribunal noted, registration or approval requirements can serve to ensure quality control. Overall, registration and approval requirements will have the additional effect of limiting exposure of States to arbitration. Whether this reason alone would be sufficient for a tribunal to reject jurisdiction is not clear. At least the *Desert Line* case indicates that the requirement should be more than a mere formality or “trap.”

No matter what the intent of the State why to include registration or approval requirements, the clauses will have to be clearly drafted to that effect. A mere reference to some kind of approval or certification without any further specification would likely be insufficient. With this in mind, States wishing to pursue certain policy objectives through registration or approval requirements should, in particular:

- **Explicitly state in the treaty language that approval or registration is a precondition for treaty coverage.** This can be done in at least two ways. One option is to include in the treaty a separate provision on the scope of application. Article 12 of the COMESA Investment Agreement, cited earlier, provides a good example of a clause in this respect. Another option is to link the definition of investment in the treaty to a registration or approval requirement. Article 1 of the investment treaty between Malaysia and the Belgo-Luxembourg Economic Union at issue in the *Gruslin* case, and cited above, is an example of this approach.
- **Ensure that the registration or notification processes are specifically set out in a clear, transparent and burden-free fashion in the treaty.** This can be done by linking the process to domestic law procedures and institutions (as is the case in some Asian bilateral treaties and the 2009 ACIA) or by setting up independent, new contact points and/or procedures, specifically for treaty implementation. For example, the COMESA Investment Agreement uses an Annex to identify competent national authorities. The COMESA approach could be complemented by a process along the lines set out in the 2009 ACIA, which sets out some disciplines regarding the approvals and registration process. In the event that the process is entirely delinked from a national law system, the need for precision and detail will be greater.

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