

Chapter 1

Definition of Investor and Investment in International Investment Agreements*

The definition of investor and investment is key to the scope of application of rights and obligations of investment agreements and to the establishment of the jurisdiction of investment treaty-based arbitral tribunals. This factual survey of state practice and jurisprudence aims to clarify the requirements to be met by individuals and corporations in order to be entitled to the treatment and protection provided for under investment treaties. It further analyses the specific rules on the nationality of claims under the ICSID Convention. As far as the definition of investment is concerned, most investment agreements adopt an open-ended approach which favours a broad definition of investment. Nevertheless recent developments in bilateral model treaties provide explanatory notes with further qualifications and clarifications of the term investment. The survey further reviews the definition of investment under ICSID as well as non-ICSID case-law for jurisdictional purposes.

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Executive summary

The definition of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements.

There are two types of investors: natural and legal persons. For natural persons, investment agreements generally base nationality exclusively on the law of the state of claimed nationality. Some investment agreements also introduce alternative criteria, such as a requirement of residency or domicile. The issues related to the nationality of legal persons are more complicated. Companies today operate in ways that can make it very difficult to determine nationality. Tribunals have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person, unless the test of control is provided for in the agreement. Accordingly, it is the general practice in investment agreements to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for purposes of the agreement. When the objective criteria used may include investors to whom a Party would not wish to extend the treaty protection, some treaties include “denial of benefits” clauses allowing exclusion of investors in certain categories.

The ICSID Convention, the main instrument for the settlement of investor-state disputes, limits the jurisdiction of its Centre to disputes between one Contracting State and a national of another Contracting State. It provides specific rules on the nationality of claims. For natural persons, it requires nationality to be established on two important dates: the date of consent to arbitration and the date of registration, and does not cover dual nationals when one of the nationalities is the one of the other Contracting State party to one dispute. The ICSID jurisprudence as to the nationality of natural persons is so far limited to four cases brought by dual nationals. For legal persons, the ICSID Convention requires nationality to be established only on the date on which the parties consented to submit such dispute to arbitration and allows a departure from the principle of incorporation or seat, when the Parties agree to treat a legal entity with the nationality of the Contracting State as a national of another Contracting State because of foreign control. A related issue is the question of the extent to which shareholders can bring claims for injury sustained by the corporation. Recent jurisprudence has

decided in favour of the right of shareholders, to be accepted as claimants with respect to the portion of shares they own or control.

There is no single definition of what constitutes foreign investment. International investment agreements usually define investment in very broad terms. They refer to “every kind of asset” followed by an illustrative but usually non-exhaustive list of assets, recognising that investment forms are constantly evolving. The ICSID Convention does not define the term investment. It is, however, possible to identify certain typical characteristics of investment under the Convention which have been increasingly used by arbitral tribunals: i) duration of the project; ii) regularity of profit and return; iii) risk for both sides; iv) a substantial commitment; and v) the operation should be significant for the host state’s development.

Introduction

The definition of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements. An investment agreement applies only to investors and investments made by those investors who qualify for coverage under the relevant provisions. Only such investments and investors may benefit from the protection and be eligible to take a claim to dispute settlement.

Why is the definition of investor and investment so important? From the perspective of a capital exporting country, the definition identifies the group of investors whose foreign investment the country is seeking to protect through the agreement, including, in particular, its system for neutral and depoliticised dispute settlement. From the capital importing country perspective, it identifies the investors and the investments the country wishes to attract; from the investor’s perspective, it identifies the way in which the investment might be structured in order to benefit from the agreements’ protection.¹

This definition may also be central to the jurisdiction of the arbitral tribunals established pursuant to investment agreements since the scope of application *rationae personae* may depend directly on what “investor” means, i.e. being an investor of a state party to the treaty is a necessary condition of eligibility to bring a claim. In addition, the scope of application *rationae materiae* depends on the definition of investment and in particular with respect to the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), as it extends to “any dispute arising out of an investment”.

1. B. Legum “Defining Investment and Investor: Who is Entitled to Claim?” presentation at the Symposium “Making the Most of International Investment Agreements: A Common Agenda” co-organised by ICSID, OECD and UNCTAD, 12 December 2005, Paris.

The Investment Committee, in its discussions on the interpretations of provisions of investment agreements, identified the definition of investor and investment as among the core elements of these agreements. It requested the Secretariat to undertake legal research and analysis, looking at state practice and jurisprudence related to these issues, with a view to improving mutual understanding and outcomes of agreements. As a factual survey this paper does not necessarily reflect the views of the OECD or those of its member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under international investment agreements.

The issue is becoming of increased relevance in the current context where national security and other essential interest concerns are on the rise and the nationality and identity of an investor and the nature of an investment face growing scrutiny by regulators and policy makers in a number of OECD and non-member countries, taking into account their countries' rights and obligations under international investment agreements. The definition of investor and investment under these agreements is relevant in relation to such concerns, including protecting intellectual property and politically motivated corporate takeovers by foreign government-controlled investors or sovereign investment funds.

The present document responds to the Investment Committee's request. First, this paper addresses the definition of investor by examining the way in which natural persons qualify as investors under both international customary and treaty law with reference to the arbitral awards that address such qualification. It then looks at the criteria used by investment agreements to qualify a legal person as an investor and the way they have been interpreted by arbitral tribunals. Second, it examines the definition of investment as included in international investment agreements as well as the jurisprudence arising out of the interpretation of the term "investment" included in these agreements. In Annex 1.A1, it gives samples of a large number of investment agreement provisions defining investment.

Part I. Definition of "Investor"

I. Natural persons

It is a firmly established principle in international law that the nationality of the investor as a natural person is determined by the national law of the state whose nationality is claimed. However, some investment agreements introduce alternative criteria such as a requirement of residency or domicile.

The ICSID Convention requires nationality to be established on two important dates: the date of consent to arbitration and the date of registration. The Convention does not cover dual nationals when one of the nationalities is

the one of the Contracting State. The jurisprudence as to the nationality of natural persons is so far limited to four cases brought by dual nationals.

1. Customary international law

The right to grant and withdraw nationality of natural persons remains part of the sovereign domain. The question before tribunals has been whether and to what extent a state can refuse to recognise the nationality of a claimant. International law practice on questions of nationality has developed primarily in the context of diplomatic protection.

In the *Nottebohm* case,² the ICJ held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state and the national. The Court made the following statement:

“Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.”

However, in today’s circumstances of the modern world it would be very difficult to demonstrate effective nationality following the *Nottebohm* considerations, i.e. the person’s attachment to the state through tradition, interests, activities or family ties.³ The International Law Commission’s (ILC)

2. The *Nottebohm* case (*Liechtenstein v. Guatemala*), 2nd phase, Judgment of 6 April 1955, 1955 ICJ Reports 4, at 23. The case concerned Mr. Nottebohm, a German national who resided in Guatemala (since 1905). In 1939, he travelled to Liechtenstein to visit his brother and obtained Liechtenstein nationality “in exceptional circumstances of speed and accommodation” in order to gain the status of a neutral State instead of the one of a belligerent State. He returned to Guatemala in 1940 and remained there until his deportation to the US in 1943. He then tried to rely on his Liechtenstein nationality to seek diplomatic protection against Guatemala. In these circumstances, the Court said he could not assert his Liechtenstein nationality against Guatemala where he had settled for 34 years.
3. Amerasinghe comments that: “There is a distinction between diplomatic protection and jurisdiction for the purposes of the [ICSID] Convention ... [E]ven if the *Nottebohm* Case were to be used as an applicable precedent, it is arguable that an effective link is relevant to negating the existence of nationality only in the particular circumstances of that case, or at any rate, in very limited circumstances” in “The Jurisdiction of the International Centre for Settlement of Investment Disputes” (1979) 19 *Indian Journal of International Law* 166, 203.

Report on Diplomatic Protection recognised the limitations presented by the *Nottebohm* ruling in the context of modern economic relations:

“[...] it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalisation and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.”⁴

However, the *Nottebohm* principles are still useful in cases of dual or multiple nationality when the nationality of the claimant in order to be accepted has to be “predominant”.

In the case of dual nationality, Article 7 of the ILC Draft Articles on Diplomatic Protection states:

“A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and the date of the official presentation of the claim.”⁵

Under customary international law, a state may exercise diplomatic protection on behalf of one of its nationals with respect to a claim against another state, even if its national also possessed the nationality of the other state, provided that the dominant and effective nationality of the person was that of the state exercising diplomatic protection. In this respect, customary law has evolved from the earlier rule of non-responsibility under which diplomatic protection could not be exercised in those circumstances.⁶

4. ILC, “Report of the International Law Commission on the Work of its fifty-eighth Session” (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Chapter IV, 33.

5. Draft Articles on Diplomatic Protection, *ibidem*, 43.

6. Support for the rule of non-responsibility can be found in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. Article 4 provides that: “A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.” See also Art. 16(a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, (1929) 23 AJIL Special Supplement 133-139. See Art. 23(5) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reproduced in (1961) 55 AJIL 548; Article 4(a) of the resolution on “*Le caractère national d’une réclamation internationale présentée par un État en raison d’un dommage subi par un individu*” adopted by the Institute of International Law at its 1965 Warsaw Session.

The Iran-United States Claims Tribunal⁷ had recourse to the test of dominant and effective nationality in that it had to determine whether a claimant with dual US-Iranian nationality was to be regarded as predominantly American or Iranian for purposes of bringing a claim before the Tribunal. In **Esphahanian v. Bank Tejarat**,⁸ Chamber Two found that the claimant could claim before the Tribunal because his “*dominant and effective nationality at all relevant times [was] that of the United States and the funds at issue in the present case related primarily to his American nationality, not his Iranian nationality*”. Nevertheless, the Chamber distinguished the case as one in which the dual national, rather than the state, brought his own claim before the international tribunal against one of the states whose nationality he possessed.

2. Investment agreements

Some Bilateral Investment Treaties (BITs) include a single definition of “national” which applies to both parties. Other BITs offer two definitions, one relating to one Contracting Party and the other to the second Contracting Party. For example the **Finland-Egypt BIT**⁹ provides that the term “national” means:

- “a) In respect of Finland, an individual who is a citizen of Finland according to Finnish law.
- b) In respect of Egypt, an individual who is a citizen of Egypt according to Egyptian Law.”

The **US-Uruguay BIT**¹⁰ defines national to mean:

- “a) For the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act.
- b) For Uruguay, a natural person possessing the citizenship of Uruguay, in accordance with its laws.”

Some investment agreements require some link beyond nationality. For example, the **Germany-Israel BIT**¹¹ provides in its Article (1)(3)(b), that the term “nationals” means with respect to Israel, “Israeli nationals being permanent residents of the State of Israel”.

7. The Algiers Accords resolved the hostage crisis between Iran and the United States. Pursuant to these Accords the Iran-US Claims Tribunal was established in 1981 in order to adjudicate claims by nationals of each country following the Iranian revolution.
8. *Esphahanian v. Bank Tejarat* (Case No. 157), Award No. 31-157-2 (29 March 1983), reprinted in 2 IRAN-US C.T.R. 157 (1983). See also Case No. A/18, 5 IRAN-US C.T.R. 251 (1984).
9. Finland-Egypt BIT, entered into force on 5 February 2005.
10. US-Uruguay BIT, entered into force on 1 November 2006.
11. Germany-Israel BIT, signed on 24 June 1974, not entered into force yet.

The criterion of permanent residence is sometimes used as an alternative to citizenship or nationality. For instance in the **Canada-Argentina BIT**¹² the term “investor” means “i) any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws”.

Natural persons that are covered by the **Energy Charter Treaty (ECT)**¹³ are similarly defined by reference to each state’s domestic laws determining citizenship or nationality but also extends coverage to permanent residents: “Investor” means: “a) with respect to a Contracting Party: i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law”.

Article 201 of **NAFTA** equally provides in part that: “National means a natural person who is a citizen or permanent resident of a Party.”

The new **Canada Model FIPA** which replaces the 2004 Model FIPA covers citizens as well as permanent residents of Canada, but it expressly provides that a natural person who is a national of both contracting parties shall be deemed to be exclusively a national of the party of his or her dominant or effective nationality. Not many investment agreements address the issue of dual nationality.¹⁴ Nevertheless **Dolzer and Stevens**¹⁵ say that in the absence of treaty regulation, general principles of international law would apply, according to which the “effective” nationality of the individual would govern.¹⁶

3. ICSID Convention

Article 25(1) of the ICSID Convention provides that: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State [...] and a national of another Contracting State [...]”. With respect to natural persons, Article 25(2) of the Convention defines “National of another Contracting State” to mean:

“a) Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties

12. Canada-Argentina BIT, entered into force on 29 April 1993.

13. Energy Charter Treaty, entered into force in April 1998.

14. See also the 2005 United States-Uruguay BIT, Art. 1: Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.

15. R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1995).

16. *Ibidem*, at 34. See the 1991 BIT between Israel and Romania which in its Protocol provides that: “With respect to physical persons – an individual who possesses both Israeli and Romanian citizenship who invests in Israel shall be considered as Romanian investors, under Israeli law in force, for the purposes of this Agreement.”

consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contacting State party to the dispute.”

The ICSID Convention requires claimants to establish that they had the nationality of a Contracting State on two different dates: the date at which the parties consented to ICSID’s jurisdiction and the date of the registration of the request for arbitration.

An extension of treaty rights to permanent residents cannot extend ICSID’s jurisdiction beyond nationals of Contracting States to the ICSID Convention.¹⁷

With respect to dual nationality, the ICSID Convention excludes dual nationals, if one of the nationalities is that of the host state.¹⁸

In practice, investment treaty jurisprudence under the ICSID Convention as to the nationality of natural persons is limited to four cases brought by dual nationals.

The first case is **Eudoro A. Olguín v. Republic of Paraguay**.¹⁹ Mr. Olguín, a dual national of Peru and the United States, brought a claim against the Republic of Paraguay under the Peru-Paraguay BIT, for the treatment allegedly received from the Paraguayan authorities, in relation to his investment in a company for the manufacture and distribution of food products in Paraguay. The arbitral tribunal rejected Paraguay’s objection to jurisdiction based on the claimant’s dual nationality by relying on the fact that Mr. Olguín’s Peruvian nationality was effective, which was deemed enough for purposes of the ICSID Convention and the BIT.

In **Soufraki v. United Arab Emirates**,²⁰ the claim was related to a port concession in Dubai. When a dispute arose, Mr. Soufraki, a dual Italian and Canadian national, invoked the Italy-United Arab Emirates BIT to bring a claim based on his Italian nationality. The Tribunal investigated his claim of Italian nationality and found that he had lost it when he acquired Canadian citizenship.

17. Schreuer refers to the Report of the Executive Directors which explains the provision of dual nationality as follows: “It should be noted that under clause a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent” in “ICSID Convention: A Commentary” (CUP, Cambridge 2000).

18. *Amerasinghe* (n. 3) at 205.

19. *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001.

20. *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004.

The fact that he could present certificates of nationality only provided *prima facie* evidence of his Italian nationality.²¹ The tribunal therefore held that he was not entitled to bring a claim under the Italy-U.A.E. BIT as an Italian national.²²

The Tribunal recognised the difference between the ease with which an investor may incorporate an investment in a favourable jurisdiction in order to have the most advantageous BIT coverage and the many difficulties faced by Mr. Soufraki as a natural person in proving that he had Italian nationality, when he had previously lost it:

“... *had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the Tribunal can only take the facts as they are and as it has found them to be.*”²³

On 4 November 2004, Mr. Soufraki submitted a request for annulment of the Arbitral Award issued on 7 July 2004 because of a manifest excess of power by the Tribunal and its failure to state reasons. The core issue was whether the Tribunal could make an independent determination of the nationality of the claimant or whether it was bound by the determination made by the Italian authorities relying on passports and certificates of nationality issued to the claimant. The *ad hoc* Committee found that the arbitral tribunal correctly stated that certificates issued by consular authorities are not binding on the tribunal’s determination of the claimant’s nationality in order to ascertain its own jurisdiction. The presumption in favor of the existence of the Italian nationality was not corroborated by further evidence showing that Mr. Soufraki had reacquired his lost Italian nationality.

In the case **Champion Trading v. Egypt**,²⁴ US nationals who were also found to be Egyptian nationals were denied the right to bring a claim against Egypt (based on the US-Egypt BIT) because of the rule in Article 25(2)a) excluding nationals having the nationality of the Contracting State Party to the dispute. The tribunal dismissed three claims brought by these individual shareholders in the National Cotton Company (NCC), a firm involved in cotton processing and trading, although it affirmed jurisdiction over two related

21. Soufraki, para. 63.

22. An interesting argument was raised by the defendant but was not elaborated by the Tribunal: had Mr. Soufraki qualified as an Italian national, would he still need to meet a further test of “effective” or “dominant” nationality under international law? Such a test might have required that, as a dual passport-holder, he demonstrate that he had closer or more “effective” ties with the “home” State under whose BIT he sought to bring a claim (i.e. Italy).

23. Soufraki, para. 83.

24. *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction 21 February 2003.

claims brought by US corporate entities, Champion Trading Company and Ameritrade International Inc., which each held larger stakes in the NCC.

The individual claimants argued that the tribunal should employ the international law test of “real or effective nationality”, which they contended would show that they “have not effectively acquired Egyptian nationality”. In the end, the tribunal did not wholly rule out the applicability of such a test in the ICSID context, where it would be manifestly absurd or unreasonable for a person to be classified as a dual national, perhaps where a third or fourth generation individual “has no ties whatsoever with the country of its forefathers” – and where a test of real or effective nationality might be appropriate to use in ICSID. However, the tribunal was convinced that there could be little doubt that the claimants in this case had sufficient ties to Egypt and that they were therefore clearly excluded from ICSID arbitration. It was relevant that their Egyptian nationality had been used for the registration of their business. After dismissing jurisdiction for the individual claims, the tribunal upheld jurisdiction for the claims brought by the two corporate entities observing that there was no bar to ICSID claims by companies whose shares were held by dual nationals of the two parties engaged in the arbitration.

In the case *Siag and Vecchi v. Egypt*,²⁵ Mr. Siag and his mother Ms. Vecchi, former Egyptian nationals submitted a claim under the Italy-Egypt BIT as Italian nationals. Because the ICSID Convention does not allow persons to initiate arbitration against their own state, the tribunal examined extensively the Egyptian law in order to determine whether they had ceased to be Egyptian nationals. Although all three arbitrators held that Ms. Vecchi had lost her Egyptian nationality on the date she re-acquired her Italian nationality, one tribunal member,²⁶ in a partial dissenting opinion disagreed that this was the case with Mr. Waguïh Siag. Two of the three arbitrators held that Mr. Waguïh Siag had lost his Egyptian nationality by virtue of his failure to take formal steps to retain it.

II. Legal persons

The issues related to the nationality of legal persons can be even more complicated than for natural persons. Companies today operate in ways that can make it very difficult to determine nationality. Layers of shareholders, both natural and legal persons themselves, operating from and in different countries make the traditional picture of a company established under the

25. *Waguïh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007. Mr. Siag and his mother Ms. Vecchi claimed that Egypt confiscated a property which had been purchased by their Egyptian company and slated for development into a resort property.

26. See F.O. Vicuña’s Dissenting Opinion in the Decision cited above.

laws of a particular country and having its centre of operations in the same country, more of a rarity than a common situation. It is quite common that a company can be established under the laws of country A, have its centre of control in country B and do its main business in country C. Tribunals have usually refrained from engaging in substantive investigations of a company's control and they have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.²⁷

Accordingly, it is the general practice in investment treaties to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for purposes of the agreements, rather than to simply rely on the term "nationality" and international law. Since the objective criteria used may include investors to whom a Party would not wish to extend the treaty protection, some treaties themselves include "denial of benefit clauses" allowing exclusion of investors in certain categories.

OECD governments are often confronted with requests by their investors to advocate on their behalf in their relations with the host state, before any arbitral claims are presented. It seems that in such situations government determinations on the nationality of an investor are not based exclusively on BITs provisions, but often use different, more flexible tests. The ICSID Convention which limits the jurisdiction of the Centre to disputes between one contracting state and a national of another contracting state, provides specific rules on the nationality of claims in its Article 25 and investment treaties specify any other or additional requirements that the contracting states wish to see apply to determine the standing of claimants.

A related issue is the question of the extent to which shareholders can bring claims for injury sustained by the corporation, an issue that has evolved significantly since the ICJ decision of *Barcelona Traction*.

1. Investment agreements

There is no single test used by all investment treaties to define the link required between a legal person seeking protection under the treaty and the contracting state under whose treaty the investor asks for protection.²⁸ Bilateral investment treaties have essentially relied on the following tests²⁹ for

27. Schreuer (n. 17) Article 25, para. 465.

28. Judge Jessup, in his Separate Opinion in *Barcelona Traction* said: "[t]here are two standard tests of the 'nationality' of a corporation. The place of incorporation is the test generally favoured in the legal systems of the common law, while the siege social is more generally accepted in the civil law systems."

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determining the nationality of legal persons: i) the place of constitution in accordance with the law in force in the country; ii) the place of incorporation or where the registered office is; iii) the country of the seat, i.e. where the place of administration is; and iv) less frequently, the country of control. Most investment treaties use a combination of the tests³⁰ for nationality of legal persons so that a company must satisfy two or more of them in order to be covered. The most common approach is a combination of the place of incorporation or constitution and seat, although the combination of incorporation or constitution and control and also of all three tests is also found.

Place of constitution in accordance with the law. In order to determine the nationality of a legal person, some bilateral investment treaties have adopted the test of the place of constitution in accordance with the law in force in the country. By so doing, the contracting parties simply make reference to national law provisions of each contracting party in order to establish the legal persons entitled to protection. A legal person constituted in accordance with the laws of a contracting party will be considered an investor of that state. Since states are free to choose the criteria for the attribution of nationality to legal persons, such criteria – be they incorporation, seat or control, etc. – may vary in accordance with the specific provisions of the applicable laws of each contracting party. Investment treaties concluded by Greece have often followed this pattern in order for legal persons to qualify as investors under investment agreements. Article 1 of the **Greece-Cuba BIT**³¹ defines as investors:

“with regard to either Contracting Party, legal persons constituted in accordance with the laws of that Contracting Parties.”

The **US-Uruguay BIT**³² for instance provides that:

“Enterprise of a Party’ means an enterprise constituted or organised under the law of a Party and a branch located in the territory of a Party and carrying out business activities there.”³³

30. A. Sinclair notes that, “cultural, economic and political factors will influence which test a particular State will prefer to apply [...] No question arises as to the validity of the choices, nor is it appropriate to identify a general rule in the abstract because different States legitimately take different approaches to qualification for protection” in “The Substance of Nationality Requirements in Investment Treaty Arbitration” (2005) 20(2) ICSID Review – *Foreign Investment Law Journal*.

31. Greece-Cuba BIT, entered into force on 18 October 1997.

32. US-Uruguay BIT, entered into force on 1 November 2006.

33. In the US Model BIT, “enterprise” is further defined as “any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of an enterprise.”

The most recent definitions section of the **Canada Model FIPA**³⁴ reads:

“**enterprise** means: i) Any entity constituted or organised under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.”

The **Energy Charter Treaty (ECT)** in its article 1(7)(a)(ii) defines “investor” with respect to a contracting Party to include a “company or other organisation organised in accordance with the law applicable in that Contracting Party”. This broad definition is somewhat qualified by Article 17 of the ECT which calls for an inquiry into a company’s substantive connection with the state in which it is incorporated³⁵ (see below, denial of benefits clause).

The **draft MAI** defined as investor: “A legal person or any other entity constituted or organised under the applicable law of a Contracting Party [...]”, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.

Place of incorporation. In other treaties the place of constitution in accordance with the laws is often found in combination with the incorporation test. Because of its potential opening for treaty shopping, it may be accompanied by a “denial of benefits” clause which allows the state party concerned to deny treaty protection to a company, under certain circumstances, which is controlled by nationals of a non-party. The UK is one of the countries which, in the majority of their BITs, use the place of incorporation or constitution as the sole test. The **UK-El Salvador**³⁶ and the **UK-Yugoslavia BIT**³⁷ for instance, define an investor as:

“i) in respect of the United Kingdom: [...] corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended [...]”

The two cases that follow show how arguments related to the economic reality have not succeeded in preventing tribunals from applying the test that the contracting parties have agreed upon and included in their treaties.

34. See Article 1, Definitions. The 2004 Canada Model FIPA has been recently revised.

35. These companies are usually called “mailbox” or “brass-plate” companies. They are typically favoured for tax and regulatory reasons and also for treaty protection available to the investors.

36. UK-El Salvador BIT, 1 December 2001.

37. UK-Yugoslavia BIT, not yet in force, presented to the UK Parliament in February 2007.

In *Tokios Tokelés v. Ukraine*,³⁸ the Tribunal held that a company incorporated in Lithuania was entitled to bring a claim against the Ukraine under the Lithuania-Ukraine BIT although it was controlled and 99 per cent owned by Ukrainian nationals. Tokios Tokelés, the claimant company, was qualified as a Lithuanian investor under the Lithuania-Ukraine BIT that defined corporate nationality by incorporation.³⁹

*“According to the ordinary meaning of the terms of the Treaty, the Claimant is an ‘investor’ of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an ‘investor’ of Lithuania.”*⁴⁰

Ukraine argued, however, that the tribunal should deny jurisdiction on the ground that the Ukrainian owners had incorporated the company in Lithuania for the sole purpose of availing themselves of the protection of the Lithuania-Ukraine BIT. Although the Tribunal acknowledged that a number of investment agreements provide for the denial of benefits to entities controlled by the host state’s own nationals, it noted that the Ukraine-Lithuania BIT did not do so: it is not for Tribunals to impose limits on the scope of BITs not found in the text.⁴¹ The tribunal held that, consistent with the ICJ’s ruling in the *Barcelona Traction*,⁴² the clear treaty language could only be avoided and the corporate veil doctrine applied if there was a showing of “abuse” or “fraud”.⁴³ The tribunal

38. *Tokios Tokelés v. Ukraine*, Case No. ARB/02/18, 29 April 2004.

39. The language in the BIT was: “Any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.”

40. *Tokios Tokelés v. Ukraine*, para. 28.

41. *Idem*, para. 36.

42. In *Barcelona Traction*, the ICJ had to consider an application by Belgium espousing a claim of Belgian nationals who were the majority shareholders in a Canadian incorporated company whose assets included Spanish subsidiaries. The Court held that Belgium was unable to pursue claims against Spain for damage done to the company.

43. In *Barcelona Traction*, the ICJ indicated that “the wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations”. *Barcelona Traction, Light and Power Co. Ltd. (Belgium. v. Spain)*, 1970 I.C.J., Reports 3, para. 58.

found that there was no such abuse or fraud as the founding of Tokios Tokelés predated the Lithuania-Ukraine BIT.⁴⁴

In **Saluka v. The Czech Republic**,⁴⁵ an arbitral tribunal arrived at similar conclusions as to the validity of the place of incorporation. The arbitration arose out of the reorganisation and privatisation of the Czech bank system. Saluka Investments BV, a Dutch Company, which had acquired shares of the Czech state-owned bank IPB, claimed a violation of Article 5 (deprivation of investment) and Article 3 (fair and equitable treatment) of the BIT between the Netherlands and the Czech Republic. According to the Czech Republic, the real investor was not Saluka but an English-registered company, Nomura Europe (a subsidiary of the Japanese Investment Bank). It asserted that Saluka was merely a shell company with no real economic interest in the IPB shares and therefore it failed to meet the definition of an investor under the BIT, because as an agent for the parent corporation Nomura could not benefit from the BIT.

The tribunal rejected these arguments and decided based on the language of the treaty which defined the investor as “legal persons constituted under the law of one of the Contracting Parties”. The tribunal considered the disadvantages of the formalistic test, in particular the risk for “treaty shopping”, but respected the contracting parties’ choice of definition of investor.⁴⁶

Company seat. Possibly with the intention of preventing “treaty shopping” by acquiring or establishing a shell company in a jurisdiction where a relevant BIT applies, some states require that in order to qualify as an investor, a legal person should not only be constituted or incorporated in the host country but also have its seat and/or effective management there. The rationale is different with respect to BITs of EU member states (e.g. Germany-China BIT). Such BITs extend their benefits to companies which transfer their seat to another member state without giving up the original form of incorporation.

An example of a treaty using the company seat as the basis for attributing nationality is the 2003 **Germany-China BIT**.⁴⁷ The treaty defines company to

44. This decision of the Tribunal was taken by majority of the arbitrators. The President of the Tribunal, Professor P. Weil, issued a strong dissenting opinion on this part of the decision. He felt that the ICSID mechanism and remedy were not meant for investments made in the State by its own citizens with domestic capital through the channel of a foreign entity. He Stated: “When it comes to mechanisms and procedures involving States and implying therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much that the application of the basic principles rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economies and juridical players”, Tokios Tokelés, para. 24.

45. *Saluka Investments B.V. v. The Czech Republic*, under UNCITRAL Rules, Partial Award 17 March 2006.

46. *Saluka*, paras. 240-1.

47. Germany-China BIT, entered into force on 11 November 2005.

include in respect of Germany “any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany [...]”.

Other BITs make the location of the investor’s seat or “*siège social*” one of the necessary conditions. Examples include:

The **France-Singapore BIT**⁴⁸ in its article 1(3)(a) restricts its coverage in the case of French “bodies corporate”, to “legal persons constituted in France conforming to the French law and having a Head Office in France”.

The **Italy-Libya BIT**⁴⁹ in its article 1(3) also applies to juridical persons organised under the law of the contracting state and having in that territory its *siège social* or main headquarters.

The **ASEAN Agreement for the Promotion and Protection of Investments** also uses a combination of the tests of the place of constitution or incorporation and the company seat. It provides that “the term ‘company’ of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the *place of effective management* is situated” [*emphasis added*].

In the first case under the ASEAN Agreement, **Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar**,⁵⁰ the tribunal observed that this effective management requirement was primarily included in the ASEAN Treaty to avoid what has been referred to as protection shopping, i.e. the adoption of a local corporate form without any real economic connection in order to bring a foreign entity or investment within the scope of treaty protection. It finally held that the claimant was a Company of a Contracting State other than Myanmar. It noted that unless some indication of improper protection shopping exists, the company would be a company of the state of incorporation when the legal requirements of that state on this issue are satisfied and there are some other indicia of management in that state.⁵¹ The Tribunal decided that the requirements were satisfied: i) the claimant had a resident director in Singapore; and ii) the claimant also conducted certain business activities (procurement) from Singapore. According to the Tribunal,

48. France-Singapore BIT, entered into force on 18 October 1976.

49. Italy-Libya BIT, entered into force on 20 October 2004.

50. *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ICSID Additional Facility Rules Case No. ARB/01/1 (31 March 2003), 42 ILM 540 (2003). Yaung Chi Oo Trading Pte Ltd., a Singapore-incorporated company maintained a brewery investment in Myanmar which, it claimed, had been expropriated in violation of the ASEAN Agreement. The fact that the Claimant’s management spent considerable time in Myanmar attending to its investment prompted Myanmar to claim that the claimant’s place of “effective management” had shifted to Myanmar.

51. *Idem*, paras. 49 and 62.

with these conditions satisfied, the nationality of the company's shareholders was irrelevant, as was the source of the capital.

The **UK-Philippines BIT**⁵² in its article 1(4) stipulates that: "A 'Company' of a Contracting Party must be incorporated or constituted and *actually doing business* under the laws in force in any part of the territory of that Contracting Party *where a place of effective management is situated*" [*emphasis added*].

The **Belgian-Luxembourg-Croatia BIT**⁵³ in its article 2(b), provides that an investor's "seat" must be in its home state, and that the investor must "engage in local activities in the home State territory".

Control. It is not an easy task to determine what control means. The **Draft 4th Edition of the OECD Benchmark Definition of Foreign Investment**⁵⁴ emphasises the percentage of ownership or voting power in a company as the measure of control, constituting the quantitative approach:

*"To classify an enterprise within a country on the basis of the presence or absence of effective **foreign control** [emphasis in original text], the criterion recommended for use is whether or not a majority of ordinary shares or voting power (more than 50% of the capital) is held by a single foreign direct investor or by a group of associated investors acting in concert [...]. Application of this criterion avoids the use of subjective concepts or case by case review [...]."*

The Tribunal in the NAFTA case **Thunderbird v. Mexico**⁵⁵ gave the following interpretation of what might constitute control:

*"Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know-how and authoritative reputation."*⁵⁶

The **Convention establishing the Multilateral Investment Guarantee Agency** combines the tests of the place of incorporation with the company seat but also allows the use of the place of ownership or control as an alternative. Article 13a)ii) provides that a legal entity is an eligible investor under the Agency's insurance program provided that "such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases".

52. UK-Philippines BIT, entered into force on 2 January 1981.

53. Belgium/Luxembourg-Croatia BIT, entered into force on 19 December 2003.

54. OECD Benchmark Definition of Foreign Investment (Draft) – 4th Edition, DAF/INV/STAT(2006)2/REV. 3, 2007.

55. *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 26 January 2006.

56. *Thunderbird*, para. 180.

The test of control is often combined with other formal criteria such as incorporation and seat to justify coverage of an investor under the treaty. This element can be found in the **French model BIT** and some other **BITs** concluded by **Sweden, Switzerland, Belgium-Luxembourg and the Netherlands**.

The **French model BIT** defines the term investor as follows:

“... b) Toute personne morale constituée sur le territoire de l’une des Parties contractantes, conformément à la législation de celle-ci et y possédant son siège social, ou contrôlée directement ou indirectement par des nationaux de l’une des Parties contractantes, ou par des personnes morales possédant leur siège social sur le territoire de l’une des Parties contractantes et constituées conformément à la législation de celle-ci.”

Article 1 of the **Swedish-India BIT**⁵⁷ uses as well a combination of incorporation/ownership/control tests and provides that:

“... d) ‘companies’ mean any corporations, firms and associations incorporated or constituted under the law in force in the territory of either Contracting Party, or in a third country if at least 51 per cent of the equity interest is owned by investors of that Contracting Party, or in which investors of that Contracting Party control at least 51 per cent of the voting rights in respect of shares owned by them.”

The **Belgium/Luxembourg-Philippines BIT**⁵⁸ does the same:

“‘Investor’ shall mean [...] the ‘companies’, i.e. with respect to both Contracting Parties, a legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party”.

The **Switzerland-Ethiopia BIT**⁵⁹ uses different language to describe control:

“Le terme « investisseur » désigne, en ce qui concerne chaque Partie contractante :

[...]

b. toute personne morale qui est constituée ou autrement organisée conformément à la législation de cette Partie contractante et qui exerce d’importantes activités économiques sur le territoire de cette même Partie contractante ;

57. Sweden-India BIT entered into force on 1 April 2001.

58. Belgium/Luxembourg-Philippines BIT entered into force on 19 December 2003.

59. Switzerland-Ethiopia BIT entered into force on 7 September 1998.

c. toute personne morale qui n'est pas établie conformément à la législation de cette Partie contractante :

- i) lorsque plus de 50 % de son capital social appartient à des personnes de cette Partie contractante ;
- ii) lorsque des personnes de cette Partie contractante ont la capacité de nommer une majorité de ses administrateurs ou sont autrement habilitées en droit à diriger ses opérations.”

The **Netherlands-Bulgaria BIT**⁶⁰ covers:

“Legal persons constituted under the law of one of the Contracting Parties [...] Legal persons not constituted under the law of that Contracting Party but controlled directly, or indirectly by natural persons as defined in a) or by legal persons as defined in b).”

The **Netherlands-Bolivia BIT**⁶¹ includes the following additional language:

“[...] legal persons constituted in accordance with the law of that Contracting Party [...] Legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.”

This latter BIT was the basis for the case **Aguas de Tunari, S.A. v. Republic of Bolivia**.⁶² Aguas del Tunari (“AdT”) initiated ICSID arbitration proceedings alleging that several acts of Bolivia amounted to an expropriation of its investment in violation of the Netherlands-Bolivia BIT. The majority of the Tribunal dismissed Bolivia’s objections to jurisdiction.

When Bechtel informed the Bolivian water and electricity authorities of proposed changes in AdT’s ownership, transferring International Water Ltd.’s shares to a Dutch company, the Bolivian water authorities gave their approval. However, Bolivia disputed both the content and the legal effect of such approval.

At the core of Bolivia’s objections was the argument that Bolivia could not have consented to an arrangement by which a company registered in Bolivia

60. Netherlands Bulgaria BIT, entered into force on 1 March 2001.

61. Netherlands-Bolivia BIT, entered into force on 1 November 1994.

62. *Aguas de Tunari v. Bolivia*, ICSID case No. ARB/02/03, Decision on Jurisdiction, 21 October 2005. The background of the dispute concerns Bolivia’s international tender process to privatise water, sewage services and an electricity generation license in 1998. Aguas de Tunari (AdT) is the locally incorporated Bolivian entity for a consortium led by International Water, Ltd., incorporated in the Cayman Islands, and 100% owned by Bechtel Enterprise Holding, a US company. A concession agreement between the Bolivian government and AdT took effect in 1999, and provided for a 40-year relationship between AdT and the Bolivian water and electricity authorities. The concession agreement resulted in significant public controversy in Bolivia, especially among labor organisations and civil society groups.

such as AdT could, at any time, restructure itself as a Dutch company in 1999 in a *post facto* attempt to claim the benefit of the Netherlands-Bolivia BIT. It argued that the claimant was “controlled” by the US-based Bechtel Corporation, and that the Netherlands shareholders were merely “shell” companies which did not exert any real “control”.

The Tribunal examined the question of whether AdT was a national of the Netherlands in accordance with Article 1b) of the treaty which includes “legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party”. The Tribunal, after a lengthy analysis of the meaning of the phrase “controlled directly or indirectly” in the treaty, concluded that Bolivia’s interpretation would frustrate the treaty’s purpose. It concluded “that the phrase ‘controlled directly or indirectly’ means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity”.⁶³

*“[I]t is not uncommon in practice and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”*⁶⁴

*“Although titled ‘bilateral’ investment treaties, this case makes clear that which has been clear to negotiating States for some time, namely, that through the definition of ‘national’ or ‘investors’, such treaties serve in many cases more broadly as portals through which investments are structured, organised, and, most importantly, encouraged through the availability of a neutral forum.”*⁶⁵

Sedelmayer v. Russia⁶⁶ is the first case in which an arbitral tribunal has interpreted the notion of investor in a way that allowed the protection of an investment made by the intermediary of a company incorporated in a third state.⁶⁷ In this case, Sedelmayer, a German national, was the sole owner and CEO of SGC International incorporated in Missouri, USA. The latter made an investment in Russia in the area of enforcement equipment. When a dispute arose from this activity, Mr. Sedelmayer initiated an arbitration procedure under the German-Russia BIT (since the US-Russia BIT was not in force).

63. One of the arbitrators, José Luis Alberro-Semerana, issued a declaration of dissent in which he maintained that Bolivia could not have consented to face arbitration from an unlimited “universe of beneficiaries” and that the tribunal should have undertaken further inquiry as to the “motivations and the timing” of Bechtel’s decision to restructure the corporate ownership of the claimant company.

64. *Idem*, para. 330(d).

65. *Idem*, para 332.

66. *Franz Sedelmayer v. The Russian Federation*, SCC Award, 7 July 1998.

67. See the analysis of the case by W. Ben Hamida “La notion d’investisseur”, *La Gazette du Palais*, December 2005.

The Tribunal held that SGC international was a simple vehicle by which Mr. Sedelmayer has transferred his capital to Russia and that he was a *de facto* investor. Although the language of the Treaty did not mention the element of control but only the elements of incorporation and *siège social*, the Tribunal accepted jurisdiction and noted that:

“The question then arises whether an individual who makes his investments through a company might be regarded as an investor – a de facto – investor under the treaty. This question concerns the general issue to what extent the ‘theory of control’ may be applied. [...] during recent years, there has been a growing support of the control theory [...] In the Tribunal’s opinion, the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer cannot be regarded as a de facto investor”[emphasis in the original].⁶⁸

Denial of benefits. As investors try to build their legal structure in their favour, states may also seek in advance to avoid claims from certain entities to which they did not intend to offer treaty protection. Therefore, some treaties include a denial of benefits clause by which the state party to the Treaty is entitled to deny the treaty protection to investors incorporated in one of the states party to the treaty but under control of investors of a third country not party to the treaty or when they do not have any substantial activity in the country of incorporation. This provision gives the host state the authority effectively to carve out from the definition of “investor” shell companies owned by nationals of a third-country or the host state and companies owned by certain third-country aliens.⁶⁹

The **Austria-Libya**⁷⁰ and **Austria-Lebanon**⁷¹ BITs also include a denial of benefits clause:

“A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organised.”

68. One of the arbitrators, Professor S. Zykin, issued a very forceful dissenting opinion based in particular on the lack of the criterion of control in the BIT. He concluded that: “The claimant could have made investments personally or through a German company, but instead he preferred to act [...] for tax reasons through a company of a third State. It seems unlikely that the purpose of the 1989 Treaty between Russia and Germany was to encourage such kind of investment and to offer them protection [...].” Dissenting opinion, paras. 1-4.

69. See B. Legum (n. 1).

70. Austria-Libya BIT, entered into force on 1 January 2004.

71. Austria-Lebanon BIT, entered into force on 20 September 2002.

The **draft MAI** provided for a choice of clauses for denial of benefits.⁷²

“a. [Subject to prior notification to and consultation with the Contracting Party of the investor] a Contracting Party may deny the benefits of the Agreement to an investor [as defined in 1ii)] and to its investments if investors of a non-Party own or control the first mentioned investor and that investor has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised, or

b. [Subject to prior notification and consultation in accordance with Articles XXX (Transparency) and XXX (Consultations),] a Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a non-Contracting Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised.”

The **NAFTA** in its Article 1132(2),⁷³ the new **US**⁷⁴ and **Canada**⁷⁵ **Model BITs**, the **US FTAs** with **Chile**,⁷⁶ **US-CAFTA-Dominican Republic**,⁷⁷ **Australia**,⁷⁸ **Colombia**,⁷⁹

72. Views differed on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital flows, and avoids diverting investment flows from developing countries. The Group considered four cases: a) investment by an investor established in another MAI Party, but owned or controlled by a non-MAI investor (example: an investment in Austria by a Belgian subsidiary of a non-MAI parent); b) investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor (example: an investment in Canada by a non-MAI subsidiary of a Danish parent); c) investment by an investor established in another MAI Party, but owned or controlled by an investor of a third MAI Party (example: an investment in France by a German subsidiary of a Hungarian parent); and d) investment in a MAI Party by an investment there covered by the MAI (example: an investment in Italy by an Italian subsidiary of a Japanese parent). There was a broadly shared view that case a) investments should be covered by the MAI. Most delegations favoured providing for certain exclusions in a denial of benefits clause which would permit, but not require, exclusion. Some delegations were concerned about possible abuse of this provision. It was suggested that the condition for exclusion would be where the MAI investor lacked substantial business activity in the MAI Contracting Party. One delegation suggested limiting this to cases in which the investor was constituted “for no other purpose than obtaining MAI benefits” (exact wording not finalised). There was wide support for covering case b) investments; however, whether to do so was considered a policy issue to be considered by the Negotiating Group. There was consensus that case c) and case d) investments would be covered by the MAI.

73. NAFTA Article 1113(2).

74. US Model BIT, Article 17.

75. Canada FIPA, Article 18.

76. Article 10.11, US-Chile FTA.

Morocco,⁸⁰ **Panama**,⁸¹ **Peru**⁸² and the **Canada-Chile FTA**⁸³ contain similar language with some variation. Article 17 of the **US Model BIT** provides as follows:

“1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

- a) does not maintain diplomatic relations with the non-Party; or
- b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.”

This clause is also found in Part III, Article 17, of the **Energy Charter Treaty** which stipulates:

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

- 1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised.”

The two qualifications of i) substantial business connection and ii) ownership or control residing in the territory of an ECT Contracting Party are cumulative.

The **Plama v. Bulgaria**⁸⁴ decision on jurisdiction rendered by an ICSID tribunal under the Energy Charter Treaty provides guidance for the interpretation of the meaning of the denial of benefits clauses with regard both to its conditions of exercise and substantial requirements. Unlike most investment treaties, the denial of benefits clause provided for under the ECT, Article 17(1) does not operate as a denial of all benefits to a covered investor

77. Article 10.12(2), US-CAFTA-Dominican Republic.

78. Article 11.12, US-Australia FTA.

79. Article 10.12, US-Colombia FTA.

80. Article 10.11, US-Morocco.

81. Article 10.12, US-Panama FTA (under negotiation text as of January 2007).

82. Article 10.12, US-Peru FTA.

83. Article G-13, Canada-Chile FTA.

84. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, reprinted in 20 ICSID Rev.-FILJ 262 (2005).

under the treaty but is expressly limited to a denial of the advantages related to the substantial protection under Part III of the ECT.⁸⁵ Taken into account the specific language of the ECT, the Tribunal ruled against Bulgaria submissions and held that Art. 17(1) is related to the merits of the dispute and cannot be invoked to support a complaint to the jurisdiction of the tribunal. By contrast, the right to deny provision provided for in many other BITs can result in a filter on the admissibility of claims.⁸⁶

The Tribunal addressed the question of the conditions under which the right to deny the benefits under the treaty may be exercised. The issue at stake was whether the denial of benefits under Article 17(1) operates automatically and requires no further action from the host state as argued by the respondent, or whether it requires the right to deny to be exercised through positive action taken by the host state as argued by the claimant.

In this case, Bulgaria, after it had received the request for arbitration, sent to ICSID a letter by which, in accordance with Article 17(1) of the ECT, it denied ECT protection to the claimant on the grounds that the claimant was “a ‘mailbox’ company with no substantial business activities in the Republic of Cyprus”⁸⁷ and it was not owned or controlled by a national of an ECT state. Bulgaria further argued that the ECT’s drafters intended to confer on a host state a direct and unconditional right of denial, which may be exercised at any time and in any manner.

The tribunal clarified that “the existence of a ‘right’ is distinct from the exercise of that right...”.⁸⁸ It further held that:

“The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State’s official gazette could suffice; or a statutory provision in a Contracting State’s investment or other laws; or even an exchange of letters with a particular investor or class of investors.”

By way of comparison, the tribunal contrasted Art. 17(1) with the different language of Article VI of the 1995 **ASEAN Framework Agreement on**

85. See E. Gaillard, “Energy Charter Treaty: International Centre for Settlement Decision”, (2005) 233(66) *New York Law Journal*; Id., “Investment and Investors Covered by the Energy Charter Treaty” in C. Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* (Juris Net LLC, 2006) 67-73 and S. Jagusch and A. Sinclair “The Limits of Protection for Investments and Investors under the Energy Charter Treaty”, *ibidem*, 89-103. See also Sinclair (n. 30); and Ben Hamida (n. 67).

86. See the Sweden-Bulgaria BIT (1994) at Art. 1(c), cited by Gaillard, “Investment and Investors Covered by the Energy Charter Treaty”, *op. cit.*, p. 71. See also *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award 16 September 2003, paras. 15.7 and 15.9.

87. *Plama Consortium Limited v. Republic of Bulgaria*, para. 31.

88. *Ibidem*, paras. 155-165.

Services to clarify in which case no exercise or other action by a contracting state to deny a covered investor the benefits of the treaty would be required. Article VI stipulates that:

“The benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-member State or a juridical person owned or controlled by persons of a non-member State constituted under the laws of a member State, but not engaged in substantive business operations in the territory of member States.”

On the substantial business requirement, the tribunal held that the lack of substantial business activity “cannot be made good with business activities undertaken by an associated but different legal entity”, even where the latter owns or controls the claimant. The requirement of ownership and control by a third party is also difficult to determine and may prove highly controversial. In the tribunal’s view, “ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body”. The burden of proof to establish the lack of substantial business activity falls with the respondent state.

This was also confirmed by the **Generation Ukraine v. Ukraine**⁸⁹ case. In this case, the claimant was a company registered in the US which had established a subsidiary in Ukraine. Ukraine invoked Article 1(2) of the **US-Ukraine BIT** to deny the claimant the advantages of the BIT because the claimant had no substantial business in the US and was in fact controlled by Canadians. Article 1(2) provides: “Each Party reserves the right to deny to any company the advantages of this treaty, if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”

However, Ukraine failed to produce evidence to support the assertion and therefore the objection was not retained. The Tribunal concluded that “this [the denial of benefits clause] is not, as the Respondent [Ukraine] appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead, it is a potential filter on the admissibility of claims which can be invoked by the respondent State”.⁹⁰

Finally the tribunal found that denial of Part III investment Protection benefits under Article 17(1) could only be prospective and that it had

89. *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003.

90. *Generation Ukraine*, para. 15.7.

jurisdiction under Part V to hear the merits of these claims, which arose prior to the time the investor was notified of the denial of benefits.

In anticipation of potential disputes, a number of investment treaties provide for consultations when the lack of meaningful links between a company and contracting party is at issue. The US BIT practice has provided for examples of prior recourse to consultations to seek a mutually satisfactory resolution to the matter.⁹¹ Though in different terms, NAFTA Article 1113(2) also provides for a form of prior notification and consultation. Since recent US and Germany model BITs no longer offer this possibility, the interpretation of requirements to be met for the exercise of the right to deny will be increasingly submitted to judicial scrutiny.

2. ICSID Convention

If a dispute is submitted to ICSID, it must qualify for coverage not only under the investment treaty but also under the ICSID Convention. That means that each Party must be either an ICSID Convention Contracting State or a national of another Contracting State, and that their dispute must be a legal dispute arising directly out of an investment under both the ICSID Convention and the investment treaty in question.

With the evolving legal order, however, the rule of nationality has lost some of its importance. As **A. Broches**, one of the main drafters of the ICSID Convention noted:

*“... The significance of nationality in traditional instances of espousal of a national’s claim should be distinguished from its relatively unimportant role within the framework of the Convention. In the former case, the issue of nationality is of substantive importance as being crucial in determining the right of State to bring an international claim, while under the Convention it is only relevant as regards the capacity of the investor to bring a dispute before the Centre.”*⁹²

Article 25(1) of the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) provides that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,

91. Dolzer and Stevens, (n. 15) at 42. See the reference made to the text of the US and Morocco BIT (1985), at Art. I(2).

92. A. Broches, Chairman’s Report on the Preliminary Draft of the Convention, 9 July 1964, doc. Z11, reprinted in ICSID, *Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Vol. II, (1968) at 557, 579-582.

which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

With respect to legal persons, a national of a Contracting State is defined in Article 25(2) as:

“Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

The Convention in its Article 25(2)(a) requires the claimants to establish that they had the nationality of a Contracting State on the date on which the parties consented to ICSID’s jurisdiction.

Article 25(2)(b) allows a foreign investor and the host State to agree that the local company, established in the host state by the foreign investor in order to make the investment, may be considered as a national of another Contracting State in order that the local subsidiary may have recourse to available ICSID arbitration.⁹³ These narrowly circumscribed conditions of Article 25(2)(b) allow a departure from the principle of incorporation or *siege social* in favour of foreign control.

As explained by **A. Broches**, the purpose of the control test in the second part of Article 25(2)(b) is to expand the jurisdiction of ICSID.⁹⁴

The **Energy Charter Treaty**, although using place of incorporation as a criterion for its application to investors, specifically provides the agreement

93. Several cases dealt with this question: *Holiday Inns v. Morocco*; *Klöckner v. Cameroon*; *Amco Asia v. Indonesia*; *Vacuon Salt v. Ghana*; *Aucoven v. Venezuela*; *Soabi v. Senegal*.

94. “There was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organised under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national in the host country, it becomes readily apparent that there is need for an exception to the general principle that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention” A. Broches, “The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States” (1972) 136, *Recueil des Cours de l’Académie de Droit International*, 331 at 358-9 and 361.

required for the application of Article 25(2)(b) of the ICSID Convention. In its Article 26(7) it states that:

“An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of Article 25(2)(b) of the ICSID Convention be treated as a ‘national of another Contracting State’ [...]”

A similar approach was taken in the **draft MAI** which included a blanket consent to the controlled enterprise having standing to bring a claim directly on its own behalf, whether in ICSID or under other MAI dispute settlement options.⁹⁵ A somewhat different approach was taken in **NAFTA**.⁹⁶

The question of the judicial person’s nationality could be clarified through an agreement between the host state and the investor. Such an agreement cannot however create a nationality that does not exist. An agreement on nationality was very useful in the case **MINE v. Guinea**.⁹⁷ An agreement between the parties providing for the settlement of their dispute by ICSID arbitration stated that the parties specified that the investor was Swiss

95. “*Standing of the Investment*: An enterprise constituted or organised under the law of a Contracting Party but which, from the time of the events giving rise to the dispute until its submission for resolution under paragraph 2.c. was an investment of an investor of another Contracting Party, shall, for purposes of disputes concerning that investment, be considered ‘an investor of another Contracting Party’ under this article and a ‘national of another Contracting State’ for purposes of Article 25(2)(b) of the ICSID Convention regarding a dispute not submitted for resolution by the investor which owns or controls it”. The MAI negotiators inserted this provision because they were concerned to provide a more efficient and economically rational remedy for the many cases in which the investment was not wholly owned by the foreign investor.

96. NAFTA parties, two of which (Canada and Mexico) were not parties to the ICSID Convention, included Article 1117, *Claim by an Investor of a Party on Behalf of an Enterprise*, which provides in part: “1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: ... Section A [Investment Protection] ... and ... the enterprise has incurred loss or damage by reason of, or arising out of, that breach [...]” Similar language can be found in Article 24(b) of the 2004 US Model BIT, “Submission of a Claim to Arbitration”.

97. *MINE v. Guinea*, as discussed in *Schreuer* (n. 17).

(incorporated in Lichtenstein, a non ICSID Party but under Swiss control).⁹⁸ Definitions of corporate nationality in treaties providing for ICSID jurisdiction will be important for the determination of whether the nationality requirements of Article 25(2)(b) have been met.

A question that arises is how closely tribunals should examine foreign control and the nationality of such control.

Amco v. Indonesia,⁹⁹ **Klöckner v. Cameroon**¹⁰⁰ and **AMT v. Zaire**¹⁰¹ involved a local subsidiary incorporated in the host state. The protection was granted to the foreign investor for investments made through a local company in the host state.¹⁰² In *Amco v. Indonesia* for instance, the Tribunal looked at the first instance of control¹⁰³ and held that: “*The concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control [...].*”¹⁰⁴

In **Banro v. Democratic Republic of Congo**¹⁰⁵ Banro Resource Corporation was the Canadian parent company that signed a concession agreement with the Congolese state. The concession agreement contained an ICSID arbitration agreement, though it was not effective for Banro since Canada was not Party to the ICSID Convention. No BIT existed between Congo and Canada. Banro Resource Corporation subsequently transferred its rights under the concession agreement to Banro American Resource, a wholly owned US subsidiary. A BIT existed between Congo and the US. The tribunal found that Banro American could not avail itself of its Canadian parent’s consent to

98. According to C. Schreuer, “An agreement on the investor’s nationality need not be made in the form of an express stipulation. Consent to ICSID’s jurisdiction expressed in a direct agreement between the parties implies an understanding that the investor fulfils the Convention’s nationality requirements. This would hold true only if two conditions are fulfilled: the host State must have expressed its consent specifically with respect to the particular investor [...] and the parties must have been fully aware of the circumstances surrounding the investor’s nationality”, Schreuer (n. 17).

99. *Amco Asia Corporation, Pan American Development Ltd. and P.t. Amco Indonesia v. The Republic of Indonesia*, Decision on Jurisdiction, ICSID case No. ARB/81/1, 25 September, 1 ICSID reports.

100. *Klöckner v. Cameroon*, Award, ICSID case No. ARB/81/2, 21 October 1983, 2 ICSID Reports.

101. *American Manufacturing & Trading (AMT) v. Zaire*, Award, ICSID Case No. ARB/93/1, 21 February 1997.

102. For a detailed analysis of these decisions and commentaries see E. Gaillard, *La jurisprudence du CIRDI* (Pédone, Paris, 2004); Schreuer (n. 17).

103. C. Schreuer points out that there was no need to go further since the determination of the controlling nationality was of no relevance since all the parties involved were Contracting States.

104. *Amco*, p. 396.

105. *Banro v. Democratic Republic of Congo*, Award, 1 September 2000, (2003)17 ICSID Rev-FILJ 382.

ICSID arbitration under the concession agreement, as that consent was invalid and could not be transferred due to the fact that Banro Resource did not have the requisite nationality at the time the concession agreement was entered into and therefore could not transfer any valid consent to Banro American. It therefore found that the requirements of the Article 25(2)(b) of the ICSID Convention were not fulfilled. The Tribunal indicated that:

*“In view of the approach adopted by the jurisprudence of ICSID tribunals concerning relationships between companies of the same group, [it] could have addressed the issue of jus standi of Banro American in a flexible manner if the issue raised by the present case were limited to the jus standi of a subsidiary in the presence of an arbitration clause which concerns the parent company only. But this is not the case.”*¹⁰⁶

A different decision was reached by the Tribunal in the case **Aucoven v. Venezuela**.¹⁰⁷ Venezuela objected to the Tribunal's jurisdiction by pointing out that Aucoven¹⁰⁸ was in fact controlled by ICA Holding, a company incorporated under the laws of Mexico, and therefore it could not initiate an ICSID arbitration proceeding, since Mexico was not a Contracting State of the ICSID Convention. Venezuela claimed that the transfer of 75% of Aucoven's shares from ICA Holding to ICATECH (a US company) did not diminish the Holding's control over Aucoven's operations in Venezuela. It further stated that even if the parties had agreed on majority shareholding as constituting control, the pervasive control by Mexican nationals over, and involvement in the affairs of Aucoven should lead the Tribunal to decline jurisdiction. On 27 September 2001, the Tribunal upheld jurisdiction on the basis that the tests

106. *Idem*, para. 10. See further paras. 11-12, in which the tribunal added that “[...] in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved. [...] It is for this reason that [they] are more willing to work their way from the subsidiary to the parent company rather than the other way around. Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an ‘instrumentality.’ The extension of consent to subsidiaries that are not designated or not yet created, even following a transfer of shares, is less readily accepted”.

107. *Autopista Concesionada de Venezuela [Aucoven] v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 27 September 2001, published in (2001)16 ICSID Review 469.

108. The arbitration was brought under the ICSID arbitration clause contained in a concession agreement with Venezuela for the construction and maintenance of two major highways linking Caracas to La Guaira. The claimant is a company incorporated under the laws of Venezuela and owned by ICATECH Corporation, a US company. On 24 January 1996, ICA and Baninsa consortium incorporated the Autopista Concesionada de Venezuela, Aucoven C.A., a Venezuelan corporation, to serve as concessionaire. On 23 December 1996, the claimant entered into the concession agreement with Venezuela.

chosen by the parties to define foreign control were reasonable. The Tribunal held that “an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purpose of the [ICSID] Convention.”¹⁰⁹

It added that: *The Convention does not contain any definition of the objective requirements such as foreign control.* It cited A. Broches who had stated that: the purpose of Article 25(2)(b) being to indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre, the parties should be given ‘the widest possible latitude’ to agree on the meaning of nationality. Any definition of nationality based on a ‘reasonable criterion’ should be accepted.¹¹⁰

As a result, the Tribunal “must respect the parties’ autonomy and may not discard the criterion of direct shareholding, unless it proves unreasonable. Direct shareholding confers voting right, and, therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define ‘foreign control’, direct shareholding is certainly a reasonable test for control.”¹¹¹

3. Nature of the investor

Private or public entity? The ICSID definition is not explicit as to whether eligibility is limited to investors who are private entities or whether they could be state-controlled.¹¹² ICSID was confronted with this question of the access to the Centre of an investor with legal personality but controlled by a state in the case *CSOB v. Slovak Republic*¹¹³ (the state retained 65% of the capital). The tribunal noted that the term “investor” in the Convention, did not exclusively concern the companies with private capital but also companies partially or entirely controlled by a state.¹¹⁴ It therefore decided that a legal person could have access as an investor to proceedings under ICSID unless it acts as a state agent or undertakes a governmental function.¹¹⁵

109. See discussion on the case by E. Gaillard (n. 102); E. Teynier “Notion d’investisseur : sentences commentées” in (2003) 2 Gazette du Palais, Les Cahiers de l’Arbitrage, 2^e partie.

110. Broches (n. 94) at 361.

111. *Aucoven*, paras. 120-1.

112. On this issue see the discussion by S. Manciaux: *Investissements étrangers et arbitrage entre États et ressortissants d’autres États : trente années d’activité du CIRDI* (Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux, Paris, Litec, 2004).

113. *Ceskoslovenska Ochozni Banka (CSOB) v. Slovak Republic*, ICSID case ARB/97/4, Decision on Jurisdiction, 24 May 1999.

114. *CSOB v. Slovak Republic*, para. 16.

115. *Idem*, paras. 17, 20-25.

Some investment agreements make it clear that state entities are included. For instance, the **2004 US Model BIT** and **Canada Model FIPA** cover governmentally owned or controlled entities. According to Article 1, Definitions, enterprise means any entity constituted or organised under applicable law, whether or not for profit, and *whether privately or governmentally owned or controlled [...]* [emphasis added].

Similarly, Article 13(a)(iii) of the **Convention establishing the Multilateral Investment Agency**, defines eligible investors to include a juridical person “*whether or not is privately owned [...]*” [emphasis added].

Some investment agreements include in addition to state entities, the government itself. For instance, in the 1996 **Czech Republic-Kuwait BIT** and in the 2001 **Belgium-Saudi Arabia BIT**, the Government qualifies as an investor.¹¹⁶

Different legal forms. Some BITs include language indicating that all legal entities, regardless of form may be considered investors. The **US and Canada Model BITs** for instance, provide that investors may consist of legal entities including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation; and a branch of any such enterprise.

The **Swiss Model BIT** also provides that the term investor refers to “legal entities including companies, corporations, business associations and other organisations”.

The **German Model BIT**, in addition to the above forms of companies, includes also non-profit entities in the definition of “investor”. In its Article 1.2a), it defines “companies” to include “any juridical person as well as any commercial or other company or association with or without legal personality [...] *irrespective of whether or not its activities are directed at profit*” [emphasis added].

In the case **Impregilo v. Pakistan**,¹¹⁷ based on the Italy-Pakistan BIT, the tribunal found that it did not have jurisdiction *rationae personae* because Impregilo was only one of the companies of a joint venture and could not bring a claim on behalf of the others.¹¹⁸ Pakistan argued *inter alia* that Impregilo, which claimed to be “entitled to claim the entirety of the

116. A number of governments expressed some concern about the insistence of their counterparts in BIT negotiations to include the Government itself as an investor, in particular with respect to national security issues.

117. *Impregilo S.p.A. v. Pakistan*, ICSID case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

118. GBC (Ghazi-Barotha Contractors), a joint venture (“JV”) established under the laws of Switzerland, concluded two contracts (“the Contracts”) in 1995 with the Pakistan Water and Power Development Authority (“WAPDA”). The Contracts called for the construction of a barrage downstream and the construction of a channel respectively. Impregilo, an Italian company, was one of the five joint venture participants. The JV was established between an Italian, German, French, and two Pakistani companies, and Impregilo was selected to act as “leader” of the JV.

damages suffered by GBC because of its role in the JV with the partners”, lacked *locus standi* due to the fact that GBC itself had no legal personality. Moreover, the respondent continued, the claimant could not have the right to bring claims on behalf of the other parties of the JV, as the BIT was only concluded to confer privileges to Italian investors. The tribunal, citing a treatise on the drafting history of the ICSID Convention, indicated that “*legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify*”. As a result, the tribunal found that Impregilo was not able to bring claims on behalf of the JV. The tribunal then examined whether Impregilo could make claims on behalf of the other participants in the JV. The tribunal reiterated that “*consent of the parties is the cornerstone of the jurisdiction of the Centre*”. Due to the fact that the other investors did not fall within the ambit of the BIT, Impregilo could not make claims on their behalf.

4. Rights of Shareholders to bring claims

Investment protection treaties in their definitions of investments very often include shares or participation in companies as forms of investment. The **US-Argentina BIT**¹¹⁹ for instance which is the basis of numerous concluded and pending cases, includes in its definition of “investment”: “A company or shares of stock or other interests in a company or interests in the assets thereof.”

An investment may therefore include shareholders that may be controlling or non-controlling; they may be majority or minority and they may be direct or indirect through another company.

Barcelona Traction¹²⁰ recognised the central role of shareholders as investors. In this case, the ICJ held that the state of nationality of the majority shareholders (Belgium) of a company incorporated in Canada was not entitled to pursue claims against Spain for damage done to the company.¹²¹ The ICJ Chamber held:

“Notwithstanding the separate corporate personality, a wrong done to the company frequently causes a prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled

119. US-Argentina BIT, entered into force on 20 October 1994.

120. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 5 February 1970 (1970) I.C.J. Reports 3 at 35-36, 9 I.L.M. 227.

121. For a discussion on the Barcelona Traction case see I. Laird “A Community of Destiny – The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims” in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron, May 2005); R. Higgins, “Aspects of the Case Concerning the Barcelona Traction Company” (1971) 11 *Virginia J. Int. Law*.

to claim compensation [...]. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered the same wrong, it is only one entity whose rights have been infringed."¹²²

The Court suggested however that international law may provide for three narrow exceptions in which shareholders' claims may be brought in particular where: i) the rights of shareholders are directly affected; ii) the company has ceased to exist in the country of incorporation; or iii) the state of incorporation lacks capacity to take action.

It is interesting to note that the ICJ was well aware of the new trends in respect of the protection of foreign investors under the growing web of bilateral investment treaties.¹²³ On this point it held that:

*"Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations [...] and considering the way in which economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane [...]. Thus, in the present State of the law the protection of shareholders requires that recourse be to treaty stipulations or special agreements directly concluded between the private investors and the State in which the investment is placed."*¹²⁴

122. (1970) I.C.J. Reports 3, at 35.

123. Judge Jessup in his separate opinion stated the following: "The International Court of Justice in the instant case is not bound by formal conceptions of corporate law. We must look at the economic reality of the relevant transactions and identify the overwhelmingly dominant feature." The overwhelmingly dominant feature in the affairs of Barcelona Traction was "control which may constitute the essential link". At n. 1.

124. *Ibid.*, at 46-47. The Court identified these BITs and other agreements as a *lex specialis* – thus allowing the conclusion that customary international law had not yet developed and that recourse of shareholders can only be found in international instruments such as BITs or the Washington Convention. It should be noted that 1970 was only four years since the entry into force of the Washington Convention (1966) and there were only a few hundred BITs instead of the thousands today.

As it was to be expected, this decision drew a considerable discussion.¹²⁵ It also constituted the basis for Argentina's defence¹²⁶ in the numerous claims brought against this country in the recent years. However, an important element to retain in relation to this case is that, as the ICJ itself recognised, it was decided under customary international law and limited to the exercise of diplomatic protection and did not rule on the protection of shareholders in a corporation outside of that context under investment protection agreements.

A few years later, a Chamber of the ICJ, in the case concerning *Elettronica Sicula S.p.A. (ELSI)*,¹²⁷ permitted the US to bring a claim against Italy on behalf of US shareholders with respect to their wholly owned Italian company, ELSI. This case was based on a claim brought by the ELSI shareholders whose plant and assets were requisitioned by local Italian authorities, allegedly interfering with certain rights of the shareholders to own and manage the company. In that case the Chamber did not rule on the basis of *Barcelona Traction*, but rather focused on terms of the governing Treaty of Friendship, Commerce and Navigation, which expressly provided for the protection of US shareholders in Italy.

Since then, the jurisprudence related to investor-state disputes has decided in favour of the right of shareholders to be accepted as claimants with respect to the portion of shares they own or control.¹²⁸

Minority shareholders. Tribunals have found in some cases that minority shareholders may also rely on the inclusion of shares as part of the definition of qualifying investments in the investment treaty concerned and claim for loss of shareholder value rather than for loss or damage to the company.¹²⁹

125. Recent writings on the rights of shareholders in general, with comments on the *Barcelona Traction* case include: C.H. Schreuer, "Shareholder Protection in International Investment Law", (2005) 2(3) *Transnational Dispute Management*, available at www.transnational-dispute-management.com; S. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals – Shareholders as 'Investors' under Investment Treaties", (2005) 6(3) *The Journal of World Investment and Trade*.

126. Argentina repeatedly stated in its defence that the shareholders are entitled to bring a claim only when their own rights have been infringed and not the rights of the corporation of which they are shareholders.

127. *Elettronica Sicula S.p.A (US v. Italy)*, I.C.J. Reports, 20 July 1989, 15.

128. Schreuer (n. 125).

129. Other cases which dealt with the rights of the minority shareholders are: *Compania de Aguas Aconquija, S.S. & Compagnie Générale des Eaux v. Argentine Republic* (the Vivendi case), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, 6 ICSID Reports 340; *Champion Trading Co. and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/01, Decision on Objections to Jurisdiction, 30 April 2004.

AAPL v. Sri Lanka¹³⁰ was a case based on the UK-Sri Lanka BIT. AAPL was a minority shareholder in a Sri Lankan company. Its status was never challenged nor its right to bring a claim.

In **Lanco v. Argentina**,¹³¹ 18.3% shareholding was sufficient to find jurisdiction as an investment. It was the first time an ICSID tribunal expressly recognised a minority shareholder's right to asset claims under an investment treaty.¹³² The Tribunal noted that there was nothing in the Treaty that required an investor in the capital stock to have either control over the administration of a company, or a majority share, in order to qualify as an investor for the purposes of the Treaty.¹³³ The Tribunal further noted *inter alia* that Lanco was liable for all contractual obligations "to the extent of its equity share" and concluded that Lanco was a party to the Agreement "in its own name and right".¹³⁴

In **CMS v. Argentina**,¹³⁵ the CMS Gas Transition Company ("CMS") purchased shares of an Argentine company, Transportadora de Gas del Norte ("TGN"), pursuant to Argentina's privatisation program in 1995. Argentina argued that CMS lacked standing to file its claim because it was merely a minority non-controlling shareholder and thus did not have standing to claim damages suffered by TGN.¹³⁶ The Tribunal ruled that the Convention did not require control over a locally-incorporated company in order to qualify under the Convention. It also ruled that the Convention does not bar a claim brought by a minority non-controlling shareholder such as CMS, observing that previous ICSID tribunals in also finding jurisdiction had "not been concerned with the question of majority [ownership] or control but rather whether shareholders can claim independently from the corporate entity".¹³⁷ In affirming the acceptance of this

130. *AAPL v. Sri Lanka*. Award, 27 June 1990, 4 ICSID Reports 246.

131. *Lanco Int'l Inc. v. Argentina Republic*, Preliminary Decision on Jurisdiction, 40 I.L.M.457, 463 (2001).

132. See *Alexandrov* (n. 125).

133. *Lanco*, Sect. 10.

134. *Ibid.*, Sect. 12, 14.

135. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID case No. ARB/01/8, Decision on Objections to Jurisdiction, in (2003) 42 ILM 788, www.asil.org/ilib/cms-argentina.pdf.

136. The only claim that it could make, argued Argentina, was one regarding direct damages to its shares in TGN (infringement of voting rights) not for its proportionate share of TGN's damages. Because the ICSID Convention does not provide a definition of the term "investment", the Tribunal analysed both the pre-Convention commentary on ownership of shares and a line of cases dealing with the issue of majority ownership of control. The Tribunal ruled that the Convention did not require control over a locally-incorporated company in order to qualify under the Convention.

137. *CMS*, para. 55.

concept, the Tribunal referred to the “*approach now prevailing in international law in respect of claims arising out of foreign investments*”.¹³⁸

In **Sempra v. Argentina**,¹³⁹ the Tribunal made findings in line with those cited above. Based on the definition of investment and investor in the US-Argentina BIT, it held that “*there is no question that this is a broad definition, as its intent is to extend comprehensive protection to investors*”.¹⁴⁰ It then referred to previous tribunals acting under both ICSID and UNCITRAL rules [the *Goetz, Enron, CMS and Enron (Additional Claim) Tribunals*] which have concluded that “*in the light of the very terms of the provision, it [the definition] encompasses not only the majority shareholders but also the minority ones, whether they control the company or not*”.¹⁴¹ It finally concluded that “*if the purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would void the Treaty of all useful effect*”.¹⁴²

In **GAMI v. Mexico**,¹⁴³ GAMI, a US company held 14 per cent equity interest in Grupo Azucarero Mexico S.A. de C.V. (GAM). After the Mexican government expropriated five of GAM’s sugar mills, GAMI initiated a NAFTA claim against Mexico. The tribunal held that GAMI had an independent right to seek redress for damages to its investment and the fact that it was “*only a minority shareholder does not affect its right*”.¹⁴⁴

Indirect shareholders. In some cases the claimant is not the immediate shareholder of the affected company. This raises the issue whether an investor can claim for damages inflicted to a company of which it owns shares only indirectly through the intermediary of another company.

138. CMS, para. 49.

139. *Sempra Energy International v. Argentina*, ICSID case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005. Sempra, participated in Argentina’s privatisation of the gas sector, a program beginning in 1989. It owns 43.09% share capital of Sodigas Sur S.A. (“Sodigas Sur”) and Sodigas Pampeana S.A. (“Sodigas Pampeana”), Argentine companies that hold licenses granted by Argentina to supply and distribute natural gas in several Argentine provinces. Sempra maintained that the suspension of licensee companies’ tariff increases that were based on the US producer index and the subsequent pesification of these tariffs pursuant to Law No. 25561, gave rise to a breach of investment protections afforded under the BIT.

140. *Ibid.*, para. 93.

141. *Idem.*

142. *Ibid.*, para. 94.

143. *GAMI Investments, Inc. v. United Mexican States*, Final Award, 15 November 2004.

144. GAMI, at 15, para 37. The US, in its submission argued that “[...] a minority non-controlling shareholder may not bring a claim under the NAFTA for loss or damages incurred directly by an enterprise. A minority non-controlling shareholder has standing to bring a claim only for loss or damage to itself proximately caused by a breach”, Submission of the United States of America, 30 June 2003.

In **Azurix v. Argentina**,¹⁴⁵ the Tribunal found that “given the wide meaning of investment in the definition of Article, the provisions of the BIT [US-Argentina] protect indirect claims”. It cited the CMS Tribunal saying that “jurisdiction can be established under the terms of the specific provision of the BIT. Whether the protected investor is in addition a party to a concession agreement or license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions since there is a direct right of action of shareholder”.

In **Gas Natural SDG S.A. v. Argentina**,¹⁴⁶ Argentina also maintained that the claimant could not, pursuant to the BIT between Argentina and Spain, qualify as an investor under the BIT as it was only an indirect shareholder of the Argentine company. The Tribunal found that the claimant qualified within the definition of investment clearly stating that “assertion that a claimant under a Bilateral Investment Treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the State party to the BIT, has been made numerous times, never, so far as the Tribunal has been made aware, with success”. The Tribunal made clear that for example the CMS v. Argentina tribunal’s analysis “was very close to the analysis of the present Tribunal”.

In **Siemens v. Argentina**,¹⁴⁷ the underlying BIT between Germany and Argentina defined investment to include shares and other forms of interests in legal entities. The claim was brought by Siemens A.G., which wholly owned SNI A.G. Both German companies owned SITS S.A., an Argentinian company. Argentina argued that indirect claims could only be brought, if there was express authorisation to do so in the treaty. The tribunal rejected Argentina’s argument and concluded that the shareholder was allowed to bring proceedings for a wrong inflicted upon an indirect subsidiary:

“The plain meaning of this provision [Article 1(1)b) of the Treaty] is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, the

145. *Azurix Corp. v. Argentina*, ICSID case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003.

146. *Gas Natural SDG S.A. v. Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction Case No. ARB/03/10, 17 June 2005. Gas Natural is a corporation organised under Spanish law and has its principal place of business in Spain. In 1992, the claimant took part in a tender offer by the Argentine government as part of the privatisation of its gas sector. It then participated in a consortium that purchased 70% of the shares of an Argentine corporation and formed an Argentine company. According to the claimant, it invested in Argentina in reliance on Law No. 23, 928 and Decree 2/28 of 1991, which established the parity and convertibility of the Argentine peso with the US dollar. The claimant alleged that the measures taken by the Argentine government pursuant to the emergency law breached the guarantees set forth in the BIT.

147. *Siemens A.G. v. Argentine Republic*, ICSID case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005).

literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.”¹⁴⁸

In **Enron v. Argentina**,¹⁴⁹ the claimants owned 35.2 per cent of the shares in TGS, an Argentine corporation. Enron’s shareholdings in the affected local company TGS was not only indirect but involved a number of other locally registered companies and several layers of ownership. Argentina again argued the governmental measures affected only TGS. The tribunal decided not to repeat the reasoning of prior ICSID tribunals on this point. It upheld the “concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company”¹⁵⁰ but was nevertheless concerned by the several intermediate companies that were also involved.¹⁵¹ It sought and found a solution in Argentina’s consent to arbitration – Enron had been specifically invited by Argentina to make its investment and the investors had decision making powers in the management of TGS.¹⁵² Therefore Enron had *jus standi* to pursue its claim.

Part II. Definition of “investment”

I. Definition of “investment” in international instruments

There is no single definition of what constitutes foreign investment. According to **Juillard** and **Carreau**, the absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments which contain it.¹⁵³ The multiplication of definitions of investment thus results from the proliferation of different sources.¹⁵⁴

148. *Siemens*

149. *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

150. *Enron*, para. 39.

151. The tribunal noted that: “[...] *The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain [...] there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company.*” *Enron*, paras. 50, 52.

152. See analysis by *Schreuer* (n. 125).

153. *D. Carreau, P. Juillard, Droit international économique* (3^e édition, Dalloz, Paris, 2007), 403 : “La difficulté que l’on rencontre, lorsque l’on veut proposer une définition de l’investissement international, vient de la multiplicité des conceptions en cette matière – cette multiplicité des conceptions, en définitive, ne reflétant que la prolifération des sources.”

Customary international law and earlier international agreements did not use the notion of investment but the one of “foreign property”¹⁵⁵ dealing in a similar manner with imported capital and property of long-resident foreign nationals.¹⁵⁶ According to **Juillard** the static notion of property has been substituted by the more dynamic notion of investment which implies a certain duration and movement.¹⁵⁷

Traditionally, investments have been categorised as either direct or portfolio investments. During the nineteenth and the early years of the twentieth century, the predominant form of foreign investment was portfolio investment, mainly in the form of bonds issued by governments of developing countries floated in the financial markets. The first half of the twentieth century was marked by the contraction of investment flows brought about by the two Wars, stagnation of direct investment and virtual collapse of portfolio investment in developing countries.¹⁵⁸ The post-war period was characterised by the growing expansion of multinational corporations setting up wholly or majority owned subsidiaries with the consequent change in the form of foreign investments which became predominantly direct in character. The increase of direct investment in several sectors led to the steady evolution of new forms of investment, when the investor enters a country and markets a product or service but does not own the asset.¹⁵⁹ A great variety of assets are included today in the definition of investment and broad definitions appeared in national investment codes and international instruments.

A narrow approach was followed by earlier agreements which were aiming at the gradual liberalisation of capital movements and preferred to enumerate the transactions covered by these agreements. Today, most

154. See also Ph. Khan, “Les investissements internationaux, nouvelles données : vers un droit transnational de l’investissement”, in Ph. Kahn, Th. Wälde (eds.), *New Aspects of International Investment Law* (Martinus Nijhoff Publishers, Leiden/Boston 2007) 17-19. See also Id., “L’extension de la notion d’investissement” in J. Bourrinet (ed.), *Les investissements français dans le tiers-monde* (Economica, Paris, 1984).

155. UNCTAD “Scope and Definition”, UNCTAD Series on issues in international investment agreements (1999) UNCTAD/ITE/IIT/11 (Vol. II).

156. See for instance the “OECD Draft Convention on the protection of foreign property” (OECD, Paris, 1967).

157. “[...] la notion d’investissement, notion dynamique, a fait son apparition dans la langue du droit international, et s’est substituée à la notion de bien, notion statique. La notion d’investissement est, en effet, une notion dynamique, en ce sens qu’elle ne peut se concevoir que dans la durée et dans le mouvement [...]” P. Juillard, “L’évolution des sources du droit des investissements” (1994), 250 *Recueil des cours de l’Académie de droit international*, 9-216, 24.

158. *Ibid.*, 11.

159. These new forms are found in license agreements, management contracts, joint venture, service and production sharing agreements in which there is transfer of capital but no establishment of an entity, nor is the transaction executed through the stock exchange.

international investment instruments, in particular investment protection treaties, adopt a broad definition of investment.

A. OECD Code of Liberalisation of Capital Movements

Among the liberalisation instruments, the OECD Code of Liberalisation of Capital Movements¹⁶⁰ is the main representative example. The Code covers all categories of capital operations, including direct investment. In the Code, the investor's control over the company is a necessary element of a direct investment which is defined in its Annex A as follows:

“Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof:

A. In the country concerned by non-residents by means of:

1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership or an existing enterprise;
2. Participation in a new or existing enterprise;
3. A loan of five years or longer.

B. Abroad by residents by means of:

1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership or an existing enterprise;
2. Participation in a new or existing enterprise;
3. A loan of five years or longer.”

The existence of a direct investment requires the combination of several elements:

- There should be a contribution.
- This contribution should be in capital.
- It should allow the establishment of durable relations between the investor and an enterprise.
- The investor should be in a position to exercise a real influence on the management of the company where it had invested.

A similar list of elements is found in the OECD Benchmark Definition of Foreign Direct Investment (Benchmark Definition), which sets the standard for foreign direct investment statistics. This definition characterises direct investment as follows:

“Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy

160. See www.oecd.org/dataoecd/10/62/4844455.pdf.

other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a *strategic long-term relationship* between the direct investment and the enterprise which allows a *significant degree of influence* by the direct investor in the management of the direct investment enterprise. The *lasting interest* is evidenced where the director investor owns at least 10 per cent of the voting power of the direct investment enterprise”.¹⁶¹

B. Investment Agreements

Most multilateral and bilateral investment treaties and trade agreements with investment chapters include a broad definition of investment. They usually refer to “every kind of asset” followed by an illustrative but usually non-exhaustive list of covered assets. Most of these definitions are open-ended and cover both direct and portfolio investment. Their approach is to give the term “investment” a broad, non exclusive definition, recognising that investment forms are constantly evolving. However, there are some agreements which provide a different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities.¹⁶²

Multilateral and Regional Instruments. The *draft MAI* defined investment broadly in terms of assets. It was however accompanied by an interpretative note stipulating that in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk.¹⁶³

Article 1(6) of the *Energy Charter Treaty* defines investment as “every kind of asset” and refers to any investment associated with an economic activity in the energy sector.

NAFTA, in its Article 1139 provides for a broad business activity related, exhaustive list of assets, with specific exclusions. Investments under the NAFTA include FDI, portfolio investment (equity securities), partnership and other interests and tangible and intangible property acquired “in the expectation [...] of economic benefit”. Loan financing is only protected when funds flow within a business group or when debt is issued on a relatively long-term basis (more than three years). Contract rights not falling under other categories of investment are

161. OECD Benchmark Definition of Foreign Investment (Draft) – 4th Edition, DAF/INV/STAT(2006)2/REV. 3, 2007.

162. Rubins uses three categories of International Investment Agreements in order to organise the different approaches to defining investment: those which contain an “illustrative list of elements” (broad definition, most BITs), an “exhaustive list” (NAFTA) or a “hybrid list” (US-Singapore FTA for instance). See N. Rubins, “The Notion of ‘Investment’ in International Investment Arbitration” in N. Horn, S. Kroll (eds.), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, The Hague, 2004).

163. See Schreuer (n. 17).

covered only if they involve a “commitment of capital or other resources in the territory of a party [...] to economic activity in such territory”. NAFTA complements its exhaustive list of investment categories with a negative definition, establishing certain types of property not to be considered investments, such as money claims arising solely from commercial contracts for the sale of goods or services.

BITs. The broad formula which refers to “every kind of asset” has become a standard definition in most BITs¹⁶⁴ which contain a general statement followed by a non-exhaustive list of categories of covered investments directly or indirectly controlled by investors of either Party. An exception is the new **Canadian Model FIPA** which continues to use the NAFTA approach with a broad definition of investment combined with specific exclusions.¹⁶⁵

According to some commentators, most BITs take four basic definitional dimensions into consideration: 1) the form of the investment; 2) the area of the investment’s economic activity; 3) the time when the investment is made; and 4) the investor’s connection with the other contracting state.¹⁶⁶

Usually, the broad definition is followed by a list that typically includes at least five categories:

- iii) *Movable and immovable property* which covers tangible property.
- iv) *Interests in companies* which usually covers debt and equity investment.
- v) *Claims to money and claims under a contract having a financial value* which suggests that investment includes not only property but also certain contractual rights. Some agreements however, such as **BITs** negotiated by **Canada, Mexico and the United States** exclude from the definition of investment claims to money that arise exclusively from commercial contracts for the sale of goods and services. In addition, some of these BITs also exclude from the definition of investment debt instruments with short-term maturity periods, usually less than three years (Mexico).
- vi) *Intellectual property rights*, which may include trademarks, patents and copyrights. In some investment agreements such as the **2005 UK Model BIT**, intellectual property rights include “goodwill”, “technical processes” and “know how”.
- vii) *Business concessions under public law*, including concessions to search for, extract and exploit natural resources (1995 and 2001, **German Model BITs**, Art. 1).

164. Dolzer and Stevens (n. 15).

165. The 2004 Canada FIPA has recently undergone a revision which is reflected in the new definitions section reproduced in Annex 1.A1.

166. J.W. Salacuse and N.P. Sullivan, “Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain”, (2005) Harv. Int’l L.J. 67.

Such a definition is sufficiently broad to encompass foreign direct investments as well as portfolio investment. There are BITs which expressly include in the list of covered assets bonds, debentures and other debt instruments (**2007 Canada FIPA**, **1998 Austria-Mexico BIT**) as well as futures, options and other derivatives (**2004 US Model BIT**). While referring to the same broad asset-based definition, other BITs do not contain such a provision. Examples may be found in the **2005 Germany Model BIT** and Turkey treaty practice.

Under the **1994 US Model BIT**, the notion of investment is described as “any kind of investment owned or controlled directly or indirectly” followed by a non-exhaustive list of asset categories falling within the definition of investment. The **2004 US Model BIT** and the recent **US FTAs** represent a departure from the previous definition: they define investment broadly as every asset owned or controlled, directly or indirectly, by an investor, “which has the characteristics of an investment” and include a non-exhaustive list of “forms” such investments may take. Besides the typical “core” investment types, they also cover various debts instruments, “futures, options and other derivatives” and “turnkey, construction management production, concession, revenue sharing and other similar contracts”. They also include certain explanatory notes, designed to clarify certain elements of the definition.¹⁶⁷ Hence, the “characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk”.¹⁶⁸

167. Footnote 1 stipulates that some forms of debt such as bonds, debentures, and long-term notes that are more likely to have the characteristics of an investment while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services are less likely to have such characteristics. Footnote 2 provides indications as to whether or not a particular type of license, authorisation, permit or similar instrument has the characteristics of an investment: “whether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorisations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorisation, permit, or similar instrument has the characteristics of an investment”. Footnote 3 clarifies that the term “investment” does not include an order or judgment entered in a judicial or administrative action.

168. Some forms of debts, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics. (US-Singapore FTA, Art. 15.1.13; US-Chile FTA, Art. 10.27; US-Australia FTA, Art. 11.17.4; US-DR-CAFTA, Art. 10.28; US-Morocco FTA, Art. 10.27; US Model BIT, Art. 1).

The new **Canadian Model FIPA** which replaces the 2004 model still provides for a finite but more comprehensive definition of investments based on NAFTA's Article 1139 definition. The highly detailed requirements for a loan to qualify as an investment which characterised the 2004 model no longer figure in the revised model, while intellectual property rights have been added to the list of covered assets. The new definition of investment still follows the NAFTA model by excluding ordinary commercial transactions from the definition of investment. It now reads as follows:

"investment means:

- a) an enterprise;
- b) shares, stocks and other forms of equity participation in an enterprise;
- c) bonds, debentures, and other debt instruments of an enterprise;
- d) a loan to an enterprise;
- e) notwithstanding subparagraphs c) and d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;
- f) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;
- g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
- h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:
 - i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions such as to search for and extract oil and other natural resources, or
 - ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
- i) intellectual property rights; and
- j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purpose;

but investment does not mean,

- k) claims to money that arise solely from:
 - i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or
 - ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph d); or
- l) any other claims to money, that do not involve the kinds of interests set out in subparagraphs a) to j)."

In Article 1.2 of the **Belgium-Luxembourg Model BIT (2002)**, investment is defined as “any kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity”.

Article 1.2 of the **Japan/Korea BIT (2003)** provides a straightforward definition of investment that includes namely “[...] an enterprise; [...] shares, stocks or forms of equity participation [...] bonds, debentures, loans and other forms of debt, including rights derived there from, [...] rights under contracts, [...] claims to money and to any performance under contract having a financial value, intellectual property rights, [...] any other tangible and intangible [...] property [...]”. In addition, the term investment includes “the amounts yielded by investment, in particular profit, interest, capital gains, dividends, royalties and fees”.

While Article 1 of the **Mexico-Greece BIT (2000)** explicitly provides for a non-exhaustive definition of investment, it also provides a negative definition of investment “... but investment does not include, a payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise [...] but investment does not mean, claims to money that arise [...] from: i) commercial contracts for the sale of goods or services by an investor in the territory of a Contracting Party to a company or a business of the other Contracting Party; or ii) the extension of credit in connection with commercial transaction [...]; iii) any other claims to money that do not involve the kinds of interests set out in subparagraphs a) through e).”

II. “Investment” for jurisdictional purposes

The definition of investment is also crucial for the establishment of the jurisdiction of arbitral tribunals. Dispute settlement clauses in investment treaties usually provide for the submission of investment disputes between states and investors to arbitration. Foreign investors are frequently given the choice to submit the investment dispute to more than one dispute settlement mechanism. International arbitration under either the ICSID Convention or its Additional Facility is widely included in many investment treaties. Alternatively reference is frequently made to the Rules of arbitration of the International Court of Arbitration of the International Chamber of Commerce (ICC), the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) or to *ad hoc* arbitration under the UNCITRAL Arbitration Rules. Jurisdictional questions relating to the scope of arbitrable investment disputes may arise, no matter which forum of arbitration is selected, since the jurisdiction of an arbitral tribunal under an applicable BIT relies on a showing of the existence of an “investment.” At the same time it should be pointed out that neither the ICC, nor UNCITRAL nor

SCC arbitration rules “filter claims through their own autonomous notion of investment as a condition of jurisdiction *rationae materiae*”.¹⁶⁹

In this section the interplay between the definition of investment under investment treaties and the choice of different potential venues for the settlement of investment disputes is reviewed and compared.

A. Definition of investment and non-ICSID arbitration

Recently one of the most critical question in BIT cases has been whether rights conferred by contract constitute covered investments.

1. Trade in goods. In the case **Petrobart v. Kyrgyz Republic**¹⁷⁰ brought under the **Energy Charter Treaty (ECT)** under the auspices of the **Arbitration Institute of the Stockholm Chamber of Commerce**, the arbitral tribunal had to decide whether a contract for the sale of gas condensate, which did not involve any transfer of money or property as capital in a business, qualified as an investment under the ECT. It should be pointed out that in a previous action brought by Petrobart against the Kyrgyz Republic under Kyrgyz Foreign Investment Law, an UNCITRAL Tribunal declined jurisdiction. The question before the Stockholm Tribunal was whether the sale of goods constituted an investment under the ECT. In the Tribunal’s view:

*“There is no uniform definition of the term investment, but the meaning of this term varies (cf. Dolzer-Stevens, *Bilateral Investment Treaties*, 1995, p. 25-31, and Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, *Collected Courses of the Hague Academy of International Law* 1997, Tome 269, p. 305-310). While in ordinary language investment is often understood as being capital or property used as a financial basis for a company or a business activity with the aim to produce revenue or income, wider definitions are frequently found in treaties on the protection of investments, whether bilateral (BITs) or multilateral (MITs).*

The term investment must therefore be interpreted in the context of each particular treaty in which the term is used. Article 31(1) of the Treaty on the Law of Treaties provides, as the main rule for treaty interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is obvious that, when there is a definition of a term in the treaty itself, that definition shall apply and the words used in the definition shall be interpreted in the light of the principle set out in Article 31(1) of the Treaty on the Law of Treaties.

169. S. Jagusch and A. Sinclair, “The Limits of Protection for Investments and Investors under the Energy Charter Treaty” in C. Ribeiro (ed.), *Investment Arbitration and the Energy Charter Treaty* (Juris Publishing, 2006), 73, 75.

170. *Petrobart v. Kyrgyz Republic*, Stockholm Chamber Case No. 126/2003, Final Award, 29 March 2005.

*The relevant treaty in this case is the Energy Charter Treaty which protects investments of an investor of one Contracting Party in the Area of another Contracting Party, and the terms Investor and Investment are defined in Article 1 of the Treaty.*¹⁷¹

In order to appreciate whether Petrobart's right to payment for goods delivered constituted an investment the tribunal turned to Article 1(6) of the ECT. The tribunal found that relevant items of the provisions were Article 1(6)c) which covers claims to money and claims to performance pursuant to contract having an economic value and associated with an investment and Article 1(6)f) relating to any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. "Economic Activity in the Energy Sector" is in Article 1(5) defined as "economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises". The Tribunal found that a right conferred by contract to undertake an economic activity concerning the sale of gas, including the right to be paid for such a sale, is an investment according to the Treaty.

Although supported by some commentators who have interpreted the extensive definition of investment in the ECT to encompass proprietary rights of any sort, including claims to money based on sales contract,¹⁷² it has been pointed out by some others that this conclusion is not indisputable with regard to the requirement that the claims to money and performance be associated with an investment under Article 1(6)c).¹⁷³

In **NAFTA-based cases** submitted to arbitration under the **UNCITRAL rules**, a few tribunals have shown some readiness to retain jurisdiction even when the governmental measures of the host state concern trade in goods, so long as those measures relate to an "investor" or its "investment" within the meaning of Chapter 11.

171. *Ibid.*, pp. 69-70.

172. Th. Wälde, "Energy Charter Treaty-based Investment Arbitration – Controversial Issues", (2004) *The Journal of World Investment & Trade*, 373, 409-410.

173. The reference to the presence of distribution facilities in the host state in the "understandings" which appear in the text of the Final Act for the adoption of the ECT regarding economic activities in the energy sector has also been interpreted as casting into doubt the conclusion that international supply contracts qualify as investments under Art. 1(6)(f). See further B. Poulain, "Petrobart vs. The Kyrgyz Republic – a few reservations regarding the Tribunal's constructions of the material, temporal and spatial application of the Treaty" (2005) 2(5) *Transnational Dispute management* 1, www.transnational-dispute-management.com. See also F. Yala, "La notion d'investissement", *Gazette du Palais*, December 2005, (2006) 3(2) *Transnational Dispute management* 22, 24-27 www.transnational-dispute-management.com.

In **Pope and Talbot v. Canada**,¹⁷⁴ the claimant challenged the implementation of the Canada-US Softwood Lumber Agreement and the allocations of export quota that had been made under that Agreement and alleged multiple breaches of the NAFTA. The respondent claimed that “softwood lumber” was a “good” and therefore the dispute related to trade in goods, which should be heard under Chapter 20, rather than Chapter 11, of the NAFTA. In response, the tribunal observed that the claimant had alleged breaches of the NAFTA that both related to, and harmed, the “investor” or its “investment” within the meaning of Chapter 11. Assuming the truth of those allegations, the tribunal found jurisdiction over the claim. It added: “*There is no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other [...]*.”¹⁷⁵

In **S.D. Myers, Inc v. Canada**¹⁷⁶ the US company alleged that Canada violated Chapter 11 by banning the export of PCB waste to the United States where S.D. Myers operated a PCB remediation facility. S.D. Myers claimed that the promulgation of the export ban by Canada was done in a discriminatory and unfair manner. Unlike the *Pope & Talbot* tribunal, the one in *S.D. Myers* looked first at the definition of “investment” contained in NAFTA and found that the Canadian subsidiary was an “enterprise” and therefore among the assets enumerated in Article 1139. In addition, the tribunal noted that the chapters of NAFTA form part of a “single undertaking” under which a measure can relate to an “investor” or its “investment” within the meaning of Chapter 11 even if the measures concern “goods” within the meaning of Chapter 3:

*“The chapters of the NAFTA are part of a ‘single undertaking’. There appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as ‘cumulative’ and complementary. The view that different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict, was accepted by the decision of the Arbitral Tribunal in Pope and Talbot. The reasoning in the case is sound and compelling. There is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11).”*¹⁷⁷

Notably, although a measure concerning trade in goods does not necessarily preclude jurisdiction under Chapter 11, claimants must demonstrate that they were seeking to make, were making, or had made an investment in the territory of the host state to qualify as an “investor” under Chapter 11.¹⁷⁸

174. *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL Award, 26 January 2000.

175. *Idem*, para. 26.

176. *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 November 2000.

177. *Idem.*, paras. 292-294.

178. See *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award on Jurisdiction, 11 June 2007.

2. Debt and rights derived from shares. In the case *Link-Trading v. Department for Customs of Republic of Moldova*,¹⁷⁹ the claimant submitted to an *ad hoc UNCITRAL arbitration* a claim under the **1993 US-Republic of Moldova BIT** alleging to have suffered an indirect expropriation because of a change in the rates of duties and VAT exemptions, the effect of which was to destroy the economic viability of the claimant's business consisting essentially of the duty-free import of consumer products into the Free Economic Zone of Chisinau and their resale to Moldovan customers. Since the BIT permits claims to expropriation to be brought to UNCITRAL arbitration if they constitute an investment dispute, the arbitral tribunal found that an investment was defined very broadly in Article I(1)a), including:

“Every kind of investment in the territory of one Party owned or controlled directly or indirectly by [...] companies of the other Party, such as equity, debt, and service and investment contracts; and includes: i) tangible and intangible property [...] (V) any right conferred by law or contract, and any licences and permits pursuant to law.”

The tribunal was satisfied with the evidence submitted by the claimant showing the existence of such investments, both equity and debt. In the tribunal's view, the fact that an investment consists of debt financing did not appear to affect its characterisation as an investment under the BIT. The tribunal thus recognised to have jurisdiction over the subject matter of the dispute before it.

In *Eureko B.V. v. Poland*,¹⁸⁰ the claimant submitted to an *ad hoc arbitration* a dispute arising from the privatisation of a Polish insurance company and the related alleged breaches of the **1992 Netherlands-Poland BIT**. Eureko sought protection for its investment in Poland which allegedly consisted not only of PZU 20% shareholding, but also of the rights derived from those shares, namely corporate governance rights and the right under certain conditions to acquire additional shares in the company. To establish whether the claimant made an investment entitled to protection, the tribunal noted that the term investment used in Article 1 of the Dutch-Polish BIT is very broad: covered investments include *inter alia* [...] ii) rights derived from shares, bonds and other kind of interests in companies and joint ventures; iii) title to money and other assets and to any performance having an economic value; [...] v) right to conduct economic activity [...] granted under contract [...]. The tribunal examined in turn the different rights, which Eureko derived from its shareholding in PZU and considered whether they amounted to investments entitled to protection under the treaty. The tribunal held that the grant to Eureko to its corporate governance rights derived from the shareholding as a key element of the investment had some economic value and are thus entitled to protection as well as the right to an international public offer.

179. *Link-Trading v. Department for Customs of Republic of Moldova*, UNCITRAL Arbitration, Award on Jurisdiction, 6 February 2001.

180. *Eureko B.V. v. Republic of Poland*, Partial Award on Liability, 19 August 2005.

The Tribunal found that the Republic of Poland contracted obligations and Eureka acquired rights derived from its shareholding in PZU which were an investment entitled to protection under the Treaty.

3. Limitations as to what can be an investment. In the case **William Nagel v. Czech Republic**¹⁸¹ brought under the **1990 UK-Czech BIT** before the **Arbitration Institute of the Stockholm Chamber of Commerce**, the claimant filed a request of arbitration, arguing that he had been deprived of his rights, claims to money or to any contractual performance under a cooperation agreement with a Czech wholly owned state-enterprise created in order to make joint efforts to obtain the necessary licenses to establish and operate a telecommunication business. The Czech authorities went on to hold a public tender for two mobile phone contracts, neither of which was awarded to Mr. Nagel. The tribunal had to determine first whether the claimant had an asset, which constituted an investment under the bilateral investment treaty. The tribunal found that the rights derived from a co-operation agreement between the Claimant and a state owned enterprise were not deemed to have a financial value, and therefore did not constitute an investment in the meaning of the bilateral investment treaty. The tribunal recognised that:

*“the question as to whether or not [Mr. X] was an investor who made an investment within the meaning of Article 1 of the Investment Treaty is an important question in this case.”*¹⁸²

Article 1(1) of the UK-Czech BIT contains a broad asset-based definition of investment, including claims to money or to any performance under contract having a financial value. The claimant argued that his rights arising from the Cooperation Agreement were indeed “investments” within the definition of the BIT because they were “claims to money or to any performance under contract having a financial value”. After a careful examination of the terms of the cooperation agreement, the arbitral tribunal came to the conclusion that the basic undertaking under the contract was that the parties should work together for the purpose of obtaining a licence. The tribunal considered that a claim could have financial value “only if it appears to be well-founded or at the very least creates a legitimate expectation of performance in the future.” In the tribunal’s view, the claimant’s mere prospects of obtaining the deal could not be raised to the level of legitimate expectations with a financial value since there was not and could not be a guarantee that a licence would in fact be obtained. The arbitral tribunal therefore concluded that Mr. Nagel’s rights under the Cooperation Agreement were not such as to constitute an “asset” and an “investment” within the meaning of Article 1 of the investment treaty.

181. SCC Case 49/2002, Award 9 September 2003, in 1 Stockholm Arbitration Report (2004) 141 with observations by Sarah François-Poncet & Caline Mouawad.

182. *Ibid.*

B. Definition of investment and ICSID arbitration

Investor-state arbitration under the aegis of the ICSID Convention and ICSID Arbitration Rules deserves a separate analysis in consideration of its specific features. Unlike other arbitral regimes, bilateral and multilateral investment treaties which include ICSID clauses, provide for the submission of investment disputes between states and foreign investors under another multilateral treaty, namely the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As clearly put by **A. Parra** in these cases the dispute concerned must qualify for coverage not only under the bilateral or multilateral investment treaty, but also under the ICSID Convention.¹⁸³ In other words, the dispute must be a legal dispute arising out of what is an investment for investment treaties as well as for ICSID Convention purposes.

The outer limits of the jurisdiction *ratione materiae* of the Centre are clearly set out in Article 25(1) which provides as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

The term investment is not defined in the Convention. The relevant passage of the World Bank Executive Directors’ Report accompanying the Convention reads as follows:

“no attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can be made known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the centre [Article 25(4)]”.

An account of these negotiations given by **A. Broches** is pertinent:

“During the negotiations, several definitions of ‘investment’ were considered and rejected. It was felt in the end that a definition could be dispensed with ‘given the essential requirement of consent by the parties’. This indicates that the requirement that the dispute must have arisen out of an ‘investment’ may be merged into the requirement of consent to jurisdiction. Presumably, the parties’ agreement that a dispute is an ‘investment dispute’ will be given great weight in

183. A. Parra “Investments and Investors covered by the ECT and other investment protection treaties” in C. Ribeiro (n. 169) 51.

any determination of the Centre's jurisdiction, although it would not be controlling."¹⁸⁴

The Report of the Executive Directors on the ICSID Convention further remarked that:

*"[w]hile the consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."*¹⁸⁵

In order to accept jurisdiction under the ICSID Convention, arbitral tribunals have to consider whether there is an "investment" under Article 25(1) of the Convention, as well as under the relevant investment agreement. So far, they have given wide interpretations of the term.¹⁸⁶ The approach adopted in the Convention gives parties to ICSID arbitration wide discretion to describe a particular transaction as an investment which results from the fact that the notion of investment is broad. But the parties do not have unlimited freedom in determining what constitutes an investment. Any such determination is not conclusive for a tribunal deciding on its competence. Under Article 41 of the Convention, a Tribunal may examine on its own motion whether the requirements of jurisdiction are met.

In this connection the ICSID tribunal in the **Joy Mining v. Egypt**, case made it clear that:

*"The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."*¹⁸⁷

In 1985, the Secretary General of ICSID refused to accept a request for arbitration of a dispute involving a sale of goods, on the ground that such an

184. A. Broches "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction" (1966) 5 *Columbia Journal of Transnational Law*, 261-280, 268.

185. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1993) 1 ICSID Reports 23, 28.

186. The tribunal in *CSOB v. Slovak Republic* observed in this regard: "This statement [in the Report of the ICSID Executive Directors] also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning [...]." *Ceskoslovenska Obchodni Banka AS (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, 24 May 1999, para. 64.

187. *Joy Mining Machinery Ltd. v. The Arab republic of Egypt*, Award, 6 August 2004.

operation could not be considered an investment.¹⁸⁸ This was done despite the fact that the request

*“had been made on the basis of a BIT [bilateral investment treaty] providing for arbitration under the Convention in respect of disputes arising out of investments which, as defined in the BIT, could be understood as including sale of good transaction.”*¹⁸⁹

1. Typical features of an investment

According to **C. Schreuer**,¹⁹⁰ it is possible to identify certain features of an investment under the Convention on the basis of ICSID case-law:

- the project should have a certain duration;
- there should be a certain regularity of profit and return;
- there is typically an element of risk for both sides;
- the commitment involved would have to be substantial;
- the operation should be significant for the host state’s development.

C. Schreuer has clarified that these features should not be necessarily understood as jurisdictional requirements but as typical characteristics of an investment. The expectation of a long-term relationship and return would exclude that a one-spot transaction or a one-time lump sum agreement can qualify as an investment. With regard to the last feature, Schreuer also remarked that, although not necessarily a characteristic of investments in general, the operation’s significance for the host state’s development becomes a relevant feature under the ICSID Convention:

*“The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble’s first sentence, which speaks of ‘the need for international co-operation for economic development and the role of private international investment therein’. This declared purpose of the Convention is confirmed by the Report of the Executive Directors which points out that the Convention was ‘prompted by the desire to strengthen the partnership between countries in the cause of economic development.’ Therefore it may be argued that the Convention’s object and purpose indicate that there should be some positive impact on development.”*¹⁹¹

188. See *Asian express v. Greater Colombo Economic Commission* (1985) ICSID Annual Report 6.

189. I. Shihata and A. Parra “The Experience of the International Centre for Settlement of Investment Disputes” (1999) 14 ICSID Review – Foreign Investment Law Journal 299, 308.

190. See C. Schreuer (n. 17) 139-141.

191. See C. Schreuer (n. 17) 124-5.

Under ICSID case-law, the reference to the these typical features of an investment operation has varied according to the specific circumstances of each case and to the more or less readily recognisable character of the activity at stake.

i) Readily-recognisable investments.¹⁹² Until the tribunal in **Fedax N.V. v. Venezuela**¹⁹³ was faced with an objection to jurisdiction on the ground that the underlying transaction, promissory notes, did not meet the investment requirement under the Washington Convention, the term “investment” had been broadly understood in the ICSID practice as well as in scholarly writings. Before this case, ICSID tribunals¹⁹⁴ had examined on their own initiative the question whether an investment was involved, and in each case have reached the conclusion that the “investment” requirement of the Convention had been met on the basis of a global assessment of an economic operation often composed of interrelated transactions. In **Kaiser Bauxite v. Jamaica** as in **Alcoa Minerals of Jamaica Inc. v. Jamaica**, the Tribunal established the Centre’s jurisdiction both on the consent given by the parties and on the fact that the case “in which a mining company has invested substantial amounts in a foreign state in reliance upon an agreement with that state, is among those contemplated by the Convention”. Amounts paid out to develop a concession and other undertakings based on a concession agreement, were also considered to qualify as an investment under the Convention in **LETCO v. Liberia**. Also in **SOABI v. Senegal** the tribunal considered the issue of jurisdiction in respect of an operation encompassing separate agreements, but this dealt only indirectly with the existence of an investment. In **Holiday Inns v. Morocco**, the tribunal emphasised “the general unity of an investment operation”, in spite of it being composed of multiple interrelated transactions.

Even in certain recent cases, ICSID tribunals have not deemed it necessary to review all the hallmarks of an investment. In the **PSEG Global Inc. v. Republic of Turkey**,¹⁹⁵ the dispute concerned a contract for the development

192. A. Broches, cited by C. Schreuer, (n. 17), 124, para. 86: “[...] Mr. Broches recalled that none of the suggested definitions of the word ‘investment’ had proved acceptable. He suggested that while it might be difficult to define the term, an investment was in fact readily recognisable.”

193. *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 Decision on Objection to Jurisdiction, 11 June 1997, (1998) 37 ILM 1378.

194. *Kaiser Bauxite Company v. Government of Jamaica*, 1975 (1993), 1 ICSID Reports, 296; *Alcoa Minerals of Jamaica Inc. v. Government of Jamaica* 1975, (1979) *Yearbook Commercial Arbitration*, Vol. IV, 206; *Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia*, 1984, (1994), 2 ICSID Reports, 346; *Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal*; 1988, (1994), 2 ICSID Reports, 165; *Holiday Inns S.A., Occidental Petroleum Corporation et al. v. Government of Morocco*; case No. ARB/72/1.

195. *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5 Decision on Jurisdiction, 4 June 2004.

of an energy plant in Turkey. The tribunal did not discuss in detail how a concession contract amounted to an investment, because the operation in question was a readily recognisable investment.

In **M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador**,¹⁹⁶ the claimant carried on the business of acquiring, assembling and installing two electricity generating plants and selling their power to INECEL, an Ecuadorian state-owned entity. After these operations were completed and the power generating assets sold, Seacoast continued to hold and manage its accounts receivable and other contractual rights against INECEL. In the tribunal's view, Article 1a) of the **Ecuador-United States BIT** gives a broad definition of investment. The rights and interests alleged by the Claimants to have subsisted as a consequence of the so-called Seacoast project, after the entry into force of the BIT – such as the intangible assets of accounts receivable, the existence of an operating permit – would fit that definition. It also added that “*the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence*”.¹⁹⁷ Nevertheless, without giving a detailed explanation, the tribunal concluded that the very elements of the project and the consequences thereof did fall within the characterisations required in order to determine the existence of protected investments.

ii) Construction contracts In several other cases ICSID arbitral tribunals have scrutinised more closely whether the operation under consideration was an investment under the BIT and whether it did meet the features of an investment under the ICSID Convention.

In **Salini Costruttori S.P.A. and Italstrade S.P.A. v. Marocco**¹⁹⁸ the arbitral tribunal held that a civil construction contract was an investment within the meaning of the **Italy-Morocco BIT** since it created “*a right to a contractual benefit having an economic value*” covered by Article 1c) as well as a “*right of economic nature conferred [...] by contract*” under Article 1e). The tribunal observed that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre, which cannot be diluted by the consent of the parties. Of the contributions made by the two claimants, the Tribunal considered that:

196. *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007.

197. *Ibid.*, para. 165.

198. *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Marocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

“It is not disputed that they [i.e. the two claimants] used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then at the end of the tendering process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry.”

The project indeed required not only heavy capital investment but also services and other long-term commitments. The risk, as noted by the tribunal in that case, was quite evident, as were the elements of duration (36 months) and contribution to development. With particular regard to this last feature the tribunal observed that:

“[...] the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how in relation to the work to be accomplished.”¹⁹⁹

While recalling the usual hallmarks of investment such as contributions, a certain duration of performance of the contract, a participation in the risks of the transaction and, as an additional condition derived from the Convention’s preamble, the contribution to the economic development of the host state, the tribunal pointed out that “in reality, these various elements may be interdependent” and that “these various criteria should be assessed globally, even if, for the sake of reasoning” they are considered individually. The acknowledgment of the interdependent character of the various hallmarks of “investment” and the favor for a global assessment indicates that the tribunal was actually approaching the issue of whether there was an “investment” from an empirical perspective.

The need for the contribution to the host state’s development in the qualification process was cast into doubt by the ICSID tribunal in the **L.E.S.I. S.p.A. and ASTALDI S.p.A. v. Algeria**.²⁰⁰ The dispute arose out of a concession agreement for the construction of a dam. The tribunal acknowledged that some

199. *Ibid.*, para. 57.

200. *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, Decision on Jurisdiction, ICSID Case No. ARB/05/3, 12 July 2006. See also *L.E.S.I. – DIPENTA v. Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005.

objective criteria have emerged from ICSID case-law and that a contract should fulfill the following three conditions: 1) the contracting party has made contributions in the host country which have an economic value such as loans, materials, labour and services. The investor must also incur some outlay of expenses, in pursuit of an economic objective; 2) those contributions had a certain duration, keeping in mind that an excessively rigorous appreciation of this test should be avoided; 3) they involved some risks for the contributor. The tribunal was satisfied that the claimant had made initial expenditures or loans justifying payment. It also went on to note that it was not necessary that the investment contributes more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.

In **Bayindir v. Pakistan**²⁰¹ the operation at stake was a highway construction contract. In determining whether there was an investment, the Tribunal relied once again on the *Salini*-test. It took the view that Bayindir made a significant contribution, both in terms of know-how, equipment and personnel and in financial terms. The duration of the contract was considered as a paramount factor to distinguish investments from ordinary commercial transactions, having in mind that the bar should not be put very high. In the present case, the project extending over three years was deemed sufficient to meet the duration test. The tribunal recognised that besides taking the risk inherent to long-term contracts, Bayindir incurred an obvious risk related to the very existence of a defect liability period of one year and of a maintenance period of four years against payment. On the last feature, the tribunal while recognising that an investment should be significant to the host state's development, it also pointed out that as stated by the *LESI* tribunal this condition is often already included in the three classical conditions set out in the *Salini* test. In any event, Pakistan did not challenge the declarations of its own authorities on the importance of the road infrastructure for the development of the country. The tribunal indicated that all these elements "may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case".²⁰²

In **Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt**,²⁰³ the tribunal concurred in relying on the so-called *Salini*-test to qualify as an investment the activities carried out in connection with the dredging operation of the Suez Canal. It identified the following elements as indicative

201. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.

202. *Ibid.*, para. 130.

203. *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006.

of an investment for purposes of the ICSID Convention: 1) a contribution; 2) a certain duration over which the project is implemented; 3) sharing of operational risks and 4) a contribution to the host state's development. The tribunal also emphasised that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case. The tribunal found that the amount of work involved and the related compensation showed that the Claimants' contribution was substantial. The operation was deemed of such magnitude and complexity that there could be no question as to the involvement of a risk. Lastly, the tribunal noted that it could not be seriously denied that the operation of the Suez Canal was of paramount significance for Egypt's economy and development.

The typical features of an investment operation have also been referred to in the ***Helnan International Hotel A/S v. The Arab Republic of Egypt***.²⁰⁴ The tribunal accepted the Respondent's argument that to be characterised as an investment a project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host state's development. The tribunal found that the project for the refurbishment and transformation of a hotel into a five-star tourist site did meet these requirements in spite of their excessive narrowness. A twenty-six years project was deemed to be of a certain duration, the refurbishing activity implied some risk of no commercial success and the amount of money necessary to transform the hotel into a five-star building and keep such classification was supposed to involve a substantial commitment and to provide the claimant with regular remuneration. As to the contribution to the development of the Egypt economy, the tribunal held that the importance of the tourism industry in the Egyptian economy made it obvious. According to the tribunal, the project did qualify as an investment under both the ICSID Convention and Art. 1 of the bilateral investment treaty between Denmark and Egypt, which by covering "any other rights [...] pursuant to contract having an economic value" encompasses the management contract and the obligations deriving from it.

In ***Saipem S.P.A. v. The People's Republic of Bangladesh***,²⁰⁵ Saipem and Petrobangla entered into a contract to build a pipeline of 409 km to carry condensate and gas in various locations of the north east of Bangladesh. To determine whether Saipem made an investment within the meaning of

204. *Helnan International Hotel A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006.

205. *Saipem S.P.A. v. The People's Republic Of Bangladesh*, ICSID Case No. Arb/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

Article 25 of the ICSID Convention, the Tribunal applied the *Salini*-test, making reference to the following elements: a) a contribution of money or other assets of economic value, b) a certain duration, c) an element of risk, and d) a contribution to the host state's development. However, the Tribunal emphasised that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention the entire operation should be taken into consideration. In the present case, the entire or overall operation included the construction contract as well as the credits for sums of money deriving from an ICC award.

iii) Financial instruments. The *Fedax v. Venezuela* and *CSOB v. Slovak Republic* cases are frequently invoked to demonstrate that financial instruments such as promissory notes and loans were held to qualify as investments both under the bilateral treaties and the ICSID Convention. But, in *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, the arbitral tribunal declined jurisdiction considering that bank guarantees did not qualify as an investment neither under the bilateral investment treaty nor under the ICSID Convention. The reference to the typical features mentioned above has assisted tribunals in assessing whether and to what extent the operation under consideration was an investment.

In the case of *Fedax v. Venezuela*,²⁰⁶ the respondent challenged the claimant's argument that promissory notes acquired by way of endorsement from the respondent qualified as investments under the **Netherlands-Venezuela BIT** and the ICSID Convention, because they did not amount either to foreign direct investment or to portfolio investment carried out through approved stock market transactions. The tribunal disagreed, noting that according to the underlying BIT, the phrasing "every asset" justifies a broad interpretation and that in addition "[...] this interpretation is also consistent with the broad reach that the term 'investment' must be given in light of the negotiating history of the Convention".²⁰⁷ It held that promissory notes were covered by the definition of investment in both instruments and stated that:

"Loans qualify as an investment within ICSID's jurisdiction [...] Since promissory notes are evidence of a loan and a rather typical financial and credit instrument there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this."

The particular circumstances of the case which the tribunal referred to have regard to the fact that promissory notes were issued by the Republic of Venezuela under the terms of the Law on Public Credit, which specifically

206. *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objection to Jurisdiction, 11 June 1997, 37 ILM 1378 (1998).

207. *Ibid.*, para. 29.

governs public credit operations aimed at raising funds and resources “to undertake productive works, attend to the needs of national interest and cover transitory needs of the treasury”. It is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest. The tribunal further noted that:

“The status of the promissory notes under the Law of Public Credit is also important as evidence that the type of investment involved is not merely a short-term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter – i.e. ‘volatile capital.’ 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. The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.”²⁰⁸

In **CSOB v. Slovakia**²⁰⁹ the respondent argued that the transaction underlying the claimant’s case, a loan, did not involve a transfer of resources into the Slovak Republic and therefore, did not constitute an investment.²¹⁰ Although loans were not expressly mentioned under the **Czech Republic-Slovakia BIT**, the tribunal found that terms as broad as “assets” and “monetary receivables or claims” clearly encompassed loans extended to a Slovak entity by a national of the other Contracting Party. In order to establish whether there was an investment under Art. 25(1) of the ICSID Convention, the tribunal recalled that 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.²¹¹ The Slovak Republic suggested that an investment should be essentially understood as the acquisition of property or assets through the expenditure of resources by one party in the territory of a foreign country which was expected to produce

208. *Ibid.*, para. 43.

209. *Ceskoslovenska Obchodni Banka, A.S.(CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999.

210. *Ibid.*, para 76.

211. *Idem*, para. 72.

a benefit on both sides and to offer a return in the future, subject to the uncertainties of the risk involved. In the tribunal's view, while these elements tend as a rule to be present in most investments, they are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention. Nevertheless, the tribunal found that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The tribunal upheld jurisdiction by stressing the basic and ultimate goal of the Consolidation Agreement which was to ensure a continuing and expanding role of the banking sector:

*"[...] this undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic [...] this is evident from the fact that CSOB's undertakings include the spending or outlays of resources in the Slovak Republic in response to the need for the development of the Republic's banking infrastructure."*²¹²

In **Joy Mining Machinery Limited v. The Arab Republic of Egypt**²¹³ the arbitral tribunal had to decide whether bank guarantees issued in support of a project entailing the supply, installation of equipment and the provision of related incidental services for a fixed, pre-determined and certain price constituted an investment within the meaning of the bilateral investment treaty between the United Kingdom and Egypt. The tribunal noted that "[e]ven if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterising as an investment dispute a dispute which in essence concerns a contingent liability".²¹⁴

The tribunal summarised the elements that an activity must have in order to qualify as an investment by making reference to a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host state's development. But at the same time the tribunal clarified that the appreciation of the existence of these criteria "is of course specific to each particular case as they will normally depend on the circumstances of each case. 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".²¹⁵ On these basis, the tribunal noted that the activities carried out by the claimant fell squarely under the features

212. *Idem*, para. 88.

213. *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004.

214. *Ibid.*, para. 47.

215. *Ibid.*

of the contract for the supply of complex equipment with the related additional activities and incidental services, which cannot be considered an investment.

Under the specific circumstances of the case, the duration of the commitment was not particularly significant as evidenced by the fact that the total price was paid at an early stage. Neither was therefore the regularity of profit and return. As to the element of risk, that was not different from that involved in any commercial contract. The tribunal drew a distinction between the present case and *Fedax* in which financial contributions made in the form of promissory notes did qualify as an investment, being the proceeds of an earlier credit transaction pursuant to which the state received value in exchange for its promise of future payment. In reaching this conclusion, the tribunal relied on the fact that “*the financing in question had and was being used by the State to finance its budget under a law of public credit, designed for raising funds and resources to undertake productive works, attend to the needs of national interest and cover transitory needs of the treasure*”. Unlike the *Fedax* case in which the transactions at stake involved a fundamental public interest, in *Joy Mining* the Egyptian Government did not benefit from the bank guarantees. The Tribunal declined jurisdiction because the claim fell outside both the Treaty and the Convention. It held the view that a bank guarantee is simply a contingent liability and “*to conclude that a contingent liability is an asset under Article 1a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do*”.

iv) Services. *SGS v. Pakistan*²¹⁶ and *SGS v. Philippines*²¹⁷ have been relied on as having recognised inspection services as an investment. In both cases the dispute arose out of the non-payment by Pakistan and the Philippines respectively, of invoices allegedly due to SGS, a Swiss company, under contracts for the provision of pre-shipment inspection and certification services.

In ***SGS v. Pakistan***, the tribunal held that the provision of pre-shipment inspection services did fall under the non-exhaustive and sufficiently broad definition of investment of the ***Switzerland-Pakistan BIT***, which included claims to money deriving from rights conferred by law or by contract. The tribunal also emphasised the fact that Pakistan entrusted SGS with the public function of raising the financial revenue of the state by putting into place trustful and simplified proceedings, conduct enquiries in conjunction with the Pakistan Customs, educate the Pakistani Custom authorities on the techniques of evaluation and application of Customs rules. The tribunal

216. *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003.

217. *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Objection to Jurisdiction, 29 January 2004.

concluded that by doing so SGS did not perform a simple commercial activity, but was granted the right to operate in a field which is normally left to the public power of the state. Accordingly, the tribunal held that the expenditures made by SGS pursuant to the agreement constituted an investment within the meaning of the BIT and that it amounted to a concession under public laws falling well within the BIT's definition of investment. Moreover, the tribunal found that the ICSID Convention's requirement that there be a legal dispute arising directly out of an investment was satisfied.

In order to decide whether an investment was made, the **SGS v. Philippines** tribunal also considered relevant that the functions delegated to SGS were performed in aid of the collection of tax revenue.

v) Non-readily recognisable investments ICSID Tribunals have also been confronted with the question of whether such activities as the provision of professional services or a salvage operation could qualify as investments.

In the **Patrick Mitchell v. Democratic Republic of Congo**²¹⁸ arbitration, the *ad hoc* Committee which was formed to preside over the annulment proceedings ultimately annulled the award rendered under the 1984 **US-Zaire** (now DRC) **BIT** in which the tribunal upheld jurisdiction over the alleged expropriation of claimant's law firm. The *ad hoc* Committee held that the tribunal had "manifestly exceeded its power" and failed to state its reasons for finding that Mr. Mitchell had made "investments" in the DRC covered under the relevant BIT and the ICSID Convention. The Committee expressly recalled that the case at hand did not involve a "readily recognisable" investment, as it concerned a legal counseling firm established by a US citizen in the DRC, which was deemed to be a rather "uncommon" operation from the standpoint of the concept of investment. As noted by **Schreuer**, it would be atypical to qualify a contract with an individual consultant as an investment.²¹⁹

In spite of the fact that it was the first time that such an operation was brought before ICSID, the arbitral tribunal affirmed its jurisdiction by identifying the elements of the operation falling within the scope of application of the BIT and assuming that the definition of investment under the BIT was as broad as that found under the Convention. No further discussion was devoted to the existence of an investment within the meaning of the ICSID Convention. With regard to the terms of both the ICSID Convention and the US-Zaire BIT, the *ad hoc* Committee held that the arbitral tribunal's

"[a]ward is incomplete and obscure as regards what it considers an investment: it refers to various fragments of the operation, without finally indicating the

218. *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

219. *Schreuer* (n. 17) 140.

reasons why it regards it overall as an investment, that is, without providing the slightest explanation as to the relationship between the ‘Mitchell & Associates’ firm and the DRC. Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses, to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.”²²⁰

The existence of an investment was seriously contested by the respondent mainly in respect of the criterion of the contribution to the economic development of the country. The *ad hoc* Committee did not exclude the possibility that the services provided by a legal counseling firm could qualify as an investment under the ICSID Convention if the contribution to the economic development or at least the interests of the state were somehow present. As pointed out by the *ad hoc* Committee, it was the same BIT which expressly recognised in its preamble the relevance of the economic development of both parties. That’s why it would have been necessary for the arbitral tribunal to indicate that, through his know-how, the claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors. Doing otherwise would imply the risk of genuine abuses by granting the qualification as investor to any legal counselling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.

The *ad hoc* Committee clarified that:

“the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.”²²¹

The tribunal in **Malaysian Historical Salvors, SDN, BHD v. Malaysia**²²² declined jurisdiction in a case involving a salvage operation off the coast of Malaysia. The investor, Malaysian Historical Salvors, had retrieved some 24 000 pieces of Chinese porcelain from the Strait of Malacca in the early 1990s. Much of the porcelain was sold at auction in 1995 for USD 3.4 million. Malaysian

220. *Mr. Patrick Mitchell v. The Democratic Republic of Congo* (n. 226), para. 40.

221. *Ibid.*, para. 33.

222. *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

Historical Salvors later alleged that it received a smaller share of the profits than it was promised under its contract with Malaysia. The company sought relief through international arbitration under the UK-Malaysia BIT. In coming to a decision on jurisdiction, the sole arbitrator wrestled with whether the company had an investment in Malaysia as required under the ICSID Convention. After reviewing previous cases where there was discussion on the definition of investment, he considered to what degree the hallmarks of investment²²³ were met: i) regularity of profits and returns; ii) contributions in money, in kind and in industry; iii) the duration of the contract; iv) the risks assumed under the contract and v) contribution to the economic development of the host state. The Tribunal found that the Claimant made contributions in money, in kind and in industry although, as the Respondent has pointed out, their size was in no way comparable to those found in *Salini*, *Bayindir* and *Jan de Nul* or even in *Joy Mining*. The criterion of duration was not satisfied in the qualitative sense envisaged by ICSID jurisprudence. The fact that salvage contracts are typically on a no-finds-no-pay basis also showed that risks assumed under the Contract were no more than ordinary commercial risks assumed by many salvors in a salvage contract.

Finding that the unusual nature of the salvage company's activities meant that some of these criteria were either not met, or met only superficially, the arbitrator paid particular attention to the criterion whether the contract made a significant contribution to the economic development of the host state. In the tribunal's view, the term investment should be interpreted in light of the Preamble of the ICSID Convention so that the contributions result in some form of positive economic development for the host state. The tribunal ultimately decided that the retrieved treasure did not make a significant contribution to the Malaysian economy. The claim that local residents were employed to "wash, pack, inventory and photograph the porcelains" did not meet the "quantity or quality" envisaged by ICSID jurisprudence, nor should cultural and historical benefits be conflated with economic benefits. Having decided that Malaysian Historical Salvors' contract with Malaysia did not constitute an investment under the ICSID Convention, the arbitrator found it unnecessary to determine whether it met the definition of an investment under the UK-Malaysia BIT.

2. Limitations as to what can be an investment

Pre-investment expenditures. The question if expenditures prior to a mutual agreement with the host country on a project constitute an investment was raised in the cases *Mihaly v. Sri Lanka*, *Zhinvali v. Georgia* and *Nagel v. the Czech Republic* (see above).

In *Mihaly v. Sri Lanka*,²²³ an ICSID tribunal constituted under the **US-Sri Lanka BIT**, held that that pre-investment expenditure is not an investment

within the meaning of Article 25 of the ICSID Convention and that therefore it lacked jurisdiction. The Tribunal stated that:

“The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of states, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as ‘investment’ in the absence of the consent of the host state to the implementation of the project.”²²⁴

In *Zhinvali Development Ltd. v. Georgia*, Zhinvali mounted a claim under the terms of the Georgian national investment law. The dispute arose out of the firm’s negotiations for the rehabilitation of a hydro-electric power plant in Georgia. The firm reclaimed expenses of more than USD 26 million incurred during negotiations with the government. However, in the award rendered by an ICSID tribunal, the Tribunal argued that these up-front costs do not fall under the definition of investment as set out in the ICSID Convention. In addition, the required consent of the host state to treat development costs as an investment was missing.

3. Typical characteristics v. jurisdictional requirements: A meaningful distinction?

The review of the ICSID case-law suggests that in most cases the various features of an investment have been examined in their totality, that they have been frequently seen as interdependent and not always decisive.²²⁵ A closer look at ICSID case-law also shows that the approach of ICSID tribunals towards the issue of “investment” within the meaning of Article 25(1) tends more towards an empirical rather than a dogmatic analysis, the qualification of a specific operation essentially depending on the circumstances of each case. The need for a global assessment of the indicative elements of an investment and the recurring remarks calling for caution against casting them

223. *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award and Concurrent Opinion of 15 March 2002, 17 ICSID Review – FILJ 142 (2002); 41 ILM 867 (2002). Mihaly Internatioanl Corp., a US company, wanted to build a power plant in Sri Lanka. Although the negotiations between Mihaly and Sri Lanka were never finalised, Mihaly invested in the preparation of the BOT (build, operate, transfer) agreement and Sri Lanka issued a number of documents guaranteeing the exclusivity of negotiations with Mihaly.

224. *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID case No. ARB/00/1, Award of 24 January 2003, not published.

225. *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia* (n. 228) para. 108. The tribunal agrees with the claimant that the criterion of regularity of profits and return is not always critical. The claimant cited the example of a pharmaceutical company’s investment in the development of a drug. Before any profits and returns could be realised the drug would have to be discovered, tested, approved by the regulatory authority and accepted by the market.

as prerequisites, tend to deprive of any meaningful distinction any attempt to oppose the so-called typical characteristic approach to the jurisdictional requirements approach.²²⁶

C. Investment and ICSID Additional Facility

The Additional Facility provides for conciliation and arbitration proceedings for the settlement of legal disputes that fall short of the jurisdiction of the Centre because they do not arise directly out of an investment. However, as pointed out by **C. Schreuer**, this does not mean that any kind of dispute may be brought under the Additional Facility. The approval of the Secretary-General being always necessary, the underlying transaction must show features that distinguish it from an ordinary commercial transaction such as:

*“Economic transactions which a) may or may not, depending on their terms be regarded by the parties as investments for the purposes of the Convention; which b) involve long-term relationships or the commitment of substantial resources on the part of either party; and which, c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions. Examples of such transactions may be found in various forms of industrial cooperation agreements and major civil works contracts”.*²²⁷

Although many bilateral investment treaties expressly provide in their dispute settlement clauses for proceedings under the Additional Facility to fill a jurisdictional gap *ratione personae*, that would also open the door to for the settlement of disputes that are covered by the BIT but excluded from ICSID jurisdiction *ratione materiae*.

226. *Ibid.*, para. 72: “The Typical Characteristics Approach seeks to identify the established hallmarks of ‘investment,’ but cautions against casting them as prerequisites, no doubt to guard against the infinite variety of cases that would arise before ICSID tribunals that may deserve to be categorised as an ‘investment’ notwithstanding the absence, whether qualitatively or quantitatively, of a particular hallmark of ‘investment’ since these hallmarks of ‘investment’ may be interdependent. Similarly, the Jurisdictional Approach seeks to identify these established hallmarks of ‘investment’ but is expressed in such language as to lead to the conclusion that the failure to satisfy one or more of the hallmarks of ‘investment’ may be fatal to an investor’s claim. However, within the Jurisdictional Approach, ICSID tribunals often remark that these hallmarks may be interrelated, and must be examined in relation to other hallmarks as well as in relation to the circumstances of the case. In other words, it may be that a particular hallmark of ‘investment’ may not be present when it is viewed in isolation; yet, when examined in the light of other hallmarks of ‘investment’ or taking into account the circumstances of the case, a tribunal may still find jurisdiction for the Centre.”

227. Comment iii) to Art. 4 of the Additional Facility Rules, 1 ICSID Reports 220.

D. The relevance of the “in accordance with the laws” requirement

Many BITs provide for additional requirements by limiting the treaty protection to investments that have been made “**in accordance with the laws and regulations**” of the host state. Similar provisions are to be found, for example, in the **Sweden-Bosnia BIT**, Art. 1(1). An analogous provision is contained in the **Italy-Morocco BIT** according to which investments include “all categories of assets invested [...] by a natural or legal person, [...] on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party”. In the ICSID case **Salini v. Morocco**, the tribunal interpreted the reference to the requirement of the conformity with national laws and regulations as follows:

“The Tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of Article 1 refers to the law of the host State for the definition of ‘investment’. In focusing on the ‘categories of invested assets [...] in accordance with the laws and regulations of the aforementioned party’, this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal”²²⁸ [emphasis added].

In **LESI-Dipenta v. Algeria**, the ICSID tribunal similarly held that:

*“the reference by the provision to the requirement of the conformity to the applicable laws and regulations **does not constitute a formal recognition of the notion of investment as defined by Algerian law in a restrictive manner**, but, in line with a standard and perfectly justified rule, the exclusion of the protection for all investments that have been made in violation of the fundamental principles that apply”²²⁹ [emphasis added].*

The non-compliance with municipal law and regulations would not result in a jurisdictional bar since it “does not create an obstacle to treaty coverage *per se* and access to a neutral forum for the resolution of investment disputes, to the extent that the asset under consideration falls under the definition of an investment provided by the applicable treaty; rather, such alleged non-compliance may constitute a limitation with respect to the merits of the claim related to the covered investment”.²³⁰

In **Saipem v. Bangladesh** the tribunal concurred with the *Salini v. Morocco* tribunal previous case-law by noting that the phrase “in conformity with the laws and regulations [of the host state]” following the “investment” in Article 1(1) of

228. *Salini Costruttori S.p.A. & Italstrade S.p.A., v. Kingdom of Morocco*, (ICSID Case No. ARB00/4), Decision on Jurisdiction, 16 July 2001, (2003) 42 ILM 606.

229. *Consortium Groupement LESI-Dipenta v. Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, para. 24 (unofficial translation from the original French text available at www.worldbank.org/icsid).

230. E. Gaillard, “Investments and Investors Covered by the Energy Charter Treaty”, in C. Ribeiro (n. 169), 62.

the BIT does not limit the definition of investment under the treaty to investment within the laws and regulations of Bangladesh.²³¹

However, the non-compliance with national laws has been recently interpreted as a jurisdictional requirement. In **Fraport v. The Republic of the Philippines**,²³² the tribunal held by majority that an investment intentionally structured in violation of Philippine Law in order for the investor to gain the prohibited management and control of a project did not qualify as an investment and fell outside the ICSID jurisdiction and the competence of the tribunal. As a consequence, since the tribunal held by majority that there was no “investment in accordance with law”, it also found that it lacked jurisdiction *ratione materiae*. According to the majority of the tribunal economic transactions undertaken by a national of one of the parties to the BIT have to meet certain legal requirements of the host state in order to qualify as an “investment”.

In the dissenting opinion appended to the award, the third arbitrator took the view that since the claimant’s shareholdings do constitute an investment covered by Article 1(1) of the **Germany-Philippines BIT** which defines investment as an “asset” and includes shares as a kind of asset, the requirement that the investment shall be accepted in accordance with the Philippine law could not be interpreted as a jurisdictional bar. As pointed out in the dissenting opinion, “[t]he purpose of these provisions is not to condition the right to arbitrate on the minute compliance by the investor at all times and in all respects with the domestic law and regulation of the Host State. [...] Such an argument has been raised before an international arbitral tribunal and was properly rejected because ‘to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty’ (see *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, paras 83-86)”. The dissenting arbitrator also took care in distinguishing the present case from the award rendered in **Inceysa Vallisoletana S.L. v. Republic of El Salvador**²³³ which involved systematic fraud in securing a contract with the Republic of El Salvador, for the operation of vehicle inspection stations. In that case, the tribunal held that there was no jurisdiction on a number of grounds, including that the investment was not made in accordance with the laws of El Salvador. But both good faith and international public policy considerations were relevant in reaching this conclusion.

231. See also *PSEG et al. v. Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 109, 116-120; *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005), paras. 126-131; *Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 105-110.

232. *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007.

233. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.

E. Final remarks

The review of the investment treaty based arbitration case-law dealing with the question of the definition of investment confirms that a variety of activities can be included within this concept, which so far has been interpreted in broad terms within certain outer limits under both ICSID and non-ICSID arbitration. Another issue concern borderline operations, especially those related to the supply of services. As made clear by ICSID tribunals, the possibility that the supply of services might qualify as investments is not to be excluded. As clearly shown by analysis of the arbitral awards, ICSID jurisdiction is not open to any kind of operation that the parties might qualify as an investment. Contracts for the international supply or the sale of goods, no matter how complex they might be, have fallen outside ICSID jurisdiction. Nevertheless, any claim not related to a purely commercial transaction could be brought before ICSID under the Additional facility rules, if the parties do provide their consent in the submission clause. Purely commercial disputes have been successfully brought before *ad hoc* UNCITRAL tribunals or under the auspices of the Stockholm Chamber of Arbitration, which have upheld their jurisdiction on the basis of the ECT or BITs by extending the notion of investment to encompass sales transactions, thus covering mere commercial risks. Once the claim has been brought before an ICSID tribunal and jurisdiction denied on the basis of lack of investment for the purposes of Article 25 of the ICSID Convention, the same dispute could be resubmitted to one of the other available fora. But if the ICSID tribunal rejects its jurisdiction under both Art. 25 and the BIT, claimants would have no alternative options on the basis of Art. 53 of the ICSID Convention, according to which the award shall be binding on the parties.

ANNEX 1.A1

Definition of Investment in Bilateral Investment Treaties

Model BITs

Canada model FIPA (2007)

Article 1 – Definitions

“investment means:

- a) an enterprise;
- b) shares, stocks and other forms of equity participation in an enterprise;
- c) bonds, debentures, and other debt instruments of an enterprise;
- d) a loan to an enterprise;
- e) notwithstanding subparagraphs c) and d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;
- f) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;
- g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;
- h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:
 - i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions such as to search for and extract oil and other natural resources; or
 - ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

- i) intellectual property rights; and
- j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purpose;

but **investment does not mean,**

- k) claims to money that arise solely from:
 - i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party; or
 - ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph d); or
- l) any other claims to money, that do not involve the kinds of interests set out in subparagraphs a) to j).”

France model BIT

Article 1 – Definitions

For the purpose of this Agreement:

1. The term “investment” means every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively:

- a) movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;
- b) shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party;
- c) title to money or debentures, or title to any legitimate performance having an economic value;
- d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mock-ups, technical processes, know-how, trade names and goodwill;
- e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties.

It is understood that those investments are investments which have already been made or may be made subsequent to the entering into force of this Agreement, in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made.

Any alteration of the form in which assets are invested shall not affect their qualification as investments provided that such alteration is not in conflict with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made.

German model BIT (2005)

Article 1

For the purposes of this Treaty:

1. the term “investments” comprises every kind of asset, in particular:
 - a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens and pledges;
 - b) shares of companies and other kinds of interest in companies;
 - c) claims to money which has been used to create an economic value or claims to any performance having an economic value;
 - d) intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;
 - e) business concessions under public law, including concessions to search for, extract and exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their classification as investment.

UK model BIT (2005)

Article 1 – Definitions

For the purposes of this Agreement:

“investment” means every kind of asset and in particular, though not exclusively, includes:

- i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- ii) shares in and stock and debentures of a company and any other form of participation in a company;
- iii) claims to money or to any performance under contract having a financial value;
- iv) intellectual property rights, goodwill, technical processes and know-how;
- v) business concessions conferred by law or under contract, including concessions to search or, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement.

US model BIT (2004)

Article 1 – Definitions [...]

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

- a) an enterprise;
- b) shares, stock, and other forms of equity participation in an enterprise;
- c) bonds, debentures, other debt instruments, and loans;²³⁴
- d) futures, options, and other derivatives;
- e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- f) intellectual property rights;
- g) licenses, authorisations, permits, and similar rights conferred pursuant to domestic law;^{235, 236} and
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

234. Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

235. Whether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorisations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorisation, permit, or similar instrument has the characteristics of an investment.

236. The term “investment” does not include an order or judgment entered in a judicial or administrative action.

BIT by countries

Australia-Czech Republic BIT

(Canberra, 30 September 1993 – Entry into force: 29 June 1994)

Article 1 – Definitions

1) For the purposes of this Agreement:

a) “investment” means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time including activities associated with investments.

Investment includes but is not limited to:

- i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- ii) shares, stocks, bonds and debentures and any other form of participation in a company;
- iii) a loan or other claim to money or a claim to performance having economic value;
- iv) intellectual property rights, including industrial property rights such as patents, trademarks, trade names, industrial designs, copyright, know-how and goodwill; and
- v) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products.

Austria-Mexico BIT

(29 June 1998 – Entry into force: 26 March 2001)

Article 1 – Definitions [...]

2) “Investment by an investor of a Contracting Party” means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:

- a) an enterprise constituted or organised under the applicable law of the first Contracting Party;
- b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph a), and rights derived therefrom;
- c) bonds, debentures, loans and other forms of debt and rights derived therefrom;

- d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- e) claims to money and claims to performance pursuant to a contract having an economic value;
- f) intellectual and industrial property rights as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organisation, including copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;
- g) rights conferred by law or contract such as concessions, licenses, authorisations or permits to undertake an economic activity;
- h) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.

Commercial transactions designed exclusively for the sale of goods or services and credits to finance commercial transactions with a duration of less than three years, other credits with a duration of less than three years, as well as credits granted to the State or to a State enterprise are not considered an investment.

***Belgian-Luxembourg-Economic Union-China treaty
(Brussels, 4 June 1984 – Entry into force: 5 October 1986)***

Article 1 [...]

2. “Investments” means every kind of asset or property used as investments or reinvestment, in particular, though not exclusively, includes:

- a) movable, or immovable property and any other property rights such as mortgages, liens, pledges, usufructs and other similar rights;
- b) shares, stock, and interests in other forms;
- c) debentures, claims or claims to any performance having a financial value;
- d) copyrights, industrial property rights, technical process, registered trademarks, trade names and goodwill; or
- e) concessions to search for, extract or exploit natural resources.

The above asset or property used as investment shall be in conformity with the laws of the Contracting Party accepting the investment.

Any change in the form in which assets or property are invested does not affect their character as “investments” defined in this Agreement.

Canada-Argentina BIT
(Toronto, 5 November 1991 – Entry into force: 29 April 1993)

Article 1 – Definitions

For the purpose of this agreement:

- a) the term means any kind of asset defined in accordance with the laws and regulations of the Contracting Parties – in whose territory the investment is made, held or invested either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party, in Accordance with the latter’s laws It includes in particular, though not exclusively:
 - i) movable and immovable property and any related property rights, such as mortgages, liens or pledges;
 - ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture money, claims to contract having a and loans;
 - iii) money, claims to performance under financial value, related to a specific investment;
 - iv) intellectual property rights, including rights with respect to copyrights, patents, trademarks as well as trade names, industrial designs, good will, trade secrets and know-how;
 - v) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

Any change in the form of an investment does not affect its character as an investment.

Czech Republic-United States BIT
(Washington, 22 October 1991 – Entry into force: 19 December 1992)

Article 1

1. For the purposes of this Treaty:

- a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
 - i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;
 - ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

- iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- iv) intellectual property which includes, *inter alia*, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavour, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
- v) any right conferred by law or contract, and any licenses and permits pursuant to law.

Denmark-India BIT

(New Delhi, 6 September 1995 – Entry into force: 28 August 1996)

Article 1 – Definitions

For the purpose of this Agreement:

- 1) the term “investment” means every kind of asset established or acquired in accordance with the national laws of the Contracting Party in whose territory the investment is made and shall include in particular, but not exclusively:
 - a) movable and immovable property, as well as any other rights such as leases, mortgages, liens, pledges, privileges, guarantees and any other similar rights;
 - b) shares, stock or other forms of participation in a company or business enterprise and bonds and debt of a company or business enterprise;
 - c) returns reinvested, rights to money and performance pursuant to contract having an economic or financial value;
 - d) industrial and intellectual property rights, such as copy rights, patents, trade names, technical processes, trademarks, goodwill and know-how in accordance with relevant laws of the respective Contracting Party;
 - e) concessions or other rights conferred by law or under contract, including concessions to search for, extract or exploit oil and other minerals.

Finland-Turkey BIT

(Ankara, 13 May 1993 – Entry into force: 12 April 1995)

Article 1 – Definitions

1. For the purposes of this Agreement: [...]
 - b) “investment” means any kind of asset and in particular, though not exclusively, includes:

- i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- ii) shares or any other form of participation;
- iii) title or claim to money or right to any performance having an economic value and related to an investment;
- iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, business names, industrial designs, trade secrets, technical processes, know-how and goodwill;
- v) concessions conferred by law or under contract including concessions to search for, cultivate, extract or exploit natural resources.

**France-Mexico BIT
(12 November 1998)**

Article 1 – Definitions

For the purpose of this Agreement:

1. the term “investment” means every kind of asset, such as goods, rights and interest of whatever nature, including property rights, acquired or used for the purpose of economic benefit or other business purposes, and in particular though not exclusively:

- a) movable and immovable property as well as any other right *in rem* such as mortgages, liens, usufructs, pledges and similar rights;
- b) shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party;
- c) title to money or debentures, or title to any legitimate performance having an economic value;
- d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mock-ups, technical processes, know-how, trade names and goodwill;
- e) rights derived from any concession conferred by any legal means.

In accordance with the definition here above, any alteration of the form in which assets are invested shall not affect their qualification as investments provided that such alteration is not in conflict with the legislation of the Contracting Party in the territory or in the maritime area of which the investment is made.

But investment does not mean claims to money derived solely from commercial transactions designed exclusively for the sale of goods or services

by a national or legal person in the territory of one Contracting Party to a national or legal person in the territory of the other Contracting Party, credits to finance commercial transactions such as trade financing, and other credits with a duration of less than three years, as well as credits granted to the State or to a State enterprise.

However, this shall not apply to credits or loans provided by an investor of a Contracting Party to an enterprise of the other Contracting Party which is owned or controlled by that investor.

**Germany-Russian Federation BIT
(Bonn, 28 January 1993)**

Article 1

1) For the purposes of this Agreement:

- a) the term “investment” shall apply to all types of assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation, in particular:
 - i) property, and other real rights such as usufructs, mortgages and similar rights ;
 - ii) shares and other forms of participation in commercial enterprises and organisations;
 - iii) claims to money invested to create an economic value, or services having an economic value;
 - iv) copyright, industrial property rights such as rights to inventions, including rights deriving from patents, trademarks, industrial models, trading marks of retail bodies, models, trade names, and technology and know-how;
 - v) rights to engage in economic activity, including concessions for prospecting for, cultivating, mining or developing natural resources accorded under the legislation of the Contracting Party in whose territory the investments are made, or by virtue of a contract.

**Greece-Korea BIT
(Athens, 25 January 1995 – Entry into force: 4 November 1995)**

Article 1 – Definitions

For the purposes of this Agreement:

1. “investments” shall mean every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, include:

- a) movable and immovable property and any other property rights such as mortgages, liens and pledges;
- b) shares in, stocks and debentures of a company and any other form of participation in a company;
- c) claims to money or to any performance under contract having an economic value;
- d) industrial and intellectual property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets, technical processes and know-how and goodwill;
- e) business concessions of economic value necessary for conducting economic activities, conferred by law or under contract, including concessions to search for, cultivate, extract and exploit natural resources; and
- f) goods that, under a leasing agreement, are placed at the disposal of a lessee in the territory of a Contracting Party in conformity with its laws and regulations.

Any alteration of the form in which assets are invested shall not affect their character as investments, provided that such a change does not contradict the laws and regulations of the relevant Contracting Party.

Hungary-Spain BIT
(Budapest, 9 November 1989 – Entry into force: 1 August 1992)

Article 1

For the purposes of the present Agreement:

1. the term “investments” shall comprise every kind of asset connected with the participation in companies and joint ventures, more particularly, though not exclusively:

- a) movable and immovable property as well as any other rights *in rem* in respect of every kind of asset;
- b) rights derived from shares, bonds and other kinds of interests in companies;
- c) title to money, goodwill and other assets and to any performance having an economic value;
- d) rights in the field of intellectual property, technical processes and know-how;
- e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

**Iceland-Lebanon BIT
(Montreux, 24 June 2004)**

Article 1 – Definitions

For the purposes of this Agreement:

1. the term “investment” shall mean every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter and shall include, in particular, though not exclusively:

- a) movable and immovable property and derived rights, such as leases, mortgages, liens or pledges;
- b) shares, stocks and any other form of participation in a company;
- c) claims to money or to any performance under contract having a financial value associated with an investment or returns reinvested;
- d) intellectual property rights, including trademarks, patents, registered design rights, copyright, semiconductor topographies rights and plant varieties rights associated with an investment;
- e) any right conferred by laws or under contract and any licenses and permits pursuant to laws, including the concessions to search for, extract, cultivate or exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their character as investment.

**Ireland-Czech Republic BIT
(Dublin, 28 June 1996 – Entry into force: 1 August 1997)**

Article 1 – Definitions

For the purpose of this Agreement:

1. the term investment shall comprise every kind of asset investment in connection with business activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include, in particular, though not exclusively:

- a) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- b) shares, stocks and debentures of a company and any other form of participation in a company;
- c) claims to money or to any performance under contract having a financial value associated with an investment;

- d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, know how, trade secrets, trade names and goodwill associated with an investment;
- e) any right conferred by laws under contract and any licenses and permits pursuant to laws, including the concessions to search for, extract, cultivate or exploit natural resources.

Any alteration of the form in which assets are invested does not affect their character as investments.

Italy-Korea BIT

(Seoul, 10 January 1989 – Entry into force: 26 June 1992)

Article 2

For the purpose of this Agreement:

1. the term “investment” means every kind of asset accepted in accordance with the respective laws and regulations of either Contracting party, 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, stocks and debentures of companies or interests in the property of such companies;
- c) claims to money utilised for the purpose of creating an economic value or to any performance having an economic value;
- d) copyrights, industrial property rights, technical process, know-how, trademarks and trade names;
- e) business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources.

Any admitted alternation of the form in which assets are invested shall not affect their classification as an investment.

Japan-Turkey BIT

(Ankara, 12 February 1992 – Entry into force: 12 March 1993)

Article 1

For the purposes of the present Agreement:

1. the term “investments” comprises every kind of asset including:

- a) shares and other types of holding of companies;
- b) claims to money or to any performance under contract having a financial value which are associated with investment;
- c) rights with respect to movable and immovable property;

- d) patents of invention, rights with respect to trademarks, trade names, trade labels and any other industrial property, and rights with respect to know-how ; and
- e) concession rights including those for the exploration and exploitation of natural resources.

**Korea-Belgian-Luxemburg economic union treaty
(Brussels, 20 December 1974 – Entry into force: 3 September 1976)**

Article 3

1) The term “investments” shall comprise every direct or indirect contribution of capital and any other kind of assets, invested or reinvested in enterprises in the field of agriculture, industry, mining, forestry, communications and tourism. The following shall more particularly, though not exclusively, be considered as investments within the meaning of the present Agreement:

- a) movable and immovable property as well as any other right “*in rem*” such as mortgages, pledges, usufructs and similar rights;
- b) shares and other kinds of interest in companies;
- c) debts and rights to any performance having economic value;
- d) copyrights, marks, patents, technical processes, trade-names, trade-marks and goodwill;
- e) concessions under public law.

**Mexico-Greece BIT
(Mexico City, 30 November 2000 – Entry into force: 26 September 2002)**

Article 1 – Definitions

For the purposes of this Agreement:

1. “investment” means every kind of asset acquired or used for economic purposes and invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party and, in particular though not exclusively, includes:

- a) movable and immovable property and any rights *in rem* such as servitudes, *ususfructus*, mortgages, liens or pledges;
- b) shares in and stock of a company and any other form of participation in a company;
- c) claims to money, to other assets and to any performance having an economic value, except for:
 - i) claims to money that arise solely from commercial contracts for the sale of goods and services;

- ii) the extension of credit in connection with a commercial transaction, such as trade financing;
- iii) credits with a maturity of less than three years, by an investor in the territory of a Contracting Party to a natural or legal person in the territory of the other Contracting Party. However, the exception concerning credits with a maturity of less than three years, shall not apply to credits granted by an investor of a Contracting Party to a legal person of the other Contracting Party that is an affiliate of that investor.
- d) intellectual property rights;
- e) rights, derived from a concession, conferred by any legal means;
- f) returns.

A possible change in the form in which the investments have been made does not affect their character as investments, provided that such a change is included in the definition of investment.

A payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise is not considered an investment.

Netherlands-China BIT (26 November 2001)

Article 1 – Definitions

For the purpose of this Agreement:

1. the term “investment” means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:

- a) movable and immovable property and other property rights such as mortgages and pledges;
- b) shares, debentures, stock and any other kind of participation in companies;
- c) claims to money or to any other performance having an economic value associated with an investment;
- d) intellectual property rights, in particular, copyrights, patents, trademarks, trade-names, technological process, know-how and goodwill;
- e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Any change in the form in which assets are invested does not affect their character as investments.

**New Zealand-China BIT
(Wellington, 22 November 1988 – Entry into force: 25 March 1989)**

Article 1 – Definitions

For the purposes of this Agreement:

1) the term “investments” means all kinds of assets which have been invested in accordance with the laws of the Contracting Party receiving them including though not exclusively any:

- a) movable and immovable property and other property rights such as mortgage, usufruct, lien or pledge;
- b) share, stock, debenture and similar interests in companies;
- c) title or claim to money or to any contract having a financial value;
- d) copyright, industrial property rights (such as patents for inventions, trademarks, industrial design), know-how, technical processes, trade names and goodwill; and
- e) business concessions conferred by law or under contract including any concession to search for, cultivate, extract or exploit natural resources.

**Norway-Czech Republic BIT
(Oslo, 21 May 1991 – Entry into force: 6 August 1992)**

Article I – Definitions

For the purpose of the present agreement:

1. the term “investment” shall comprise every kind of asset invested by an investor of one contracting party in the territory of the other contracting party, provided that the investment has been made in accordance with the laws and regulations of the other contracting party and shall include in particular, though not exclusively:

- a) movable and immovable property and any other property rights such as mortgages, liens, pledges and similar rights;
- b) shares, debentures or any other forms of participation in companies;
- c) claims to money which has been used to create an economic value or claims to any performance under contract having an economic value;
- d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and good-will;
- e) business concessions conferred by law, or under contract if permitted by law, including concessions to search for, cultivate, extract and exploit natural resources.

Poland-China BIT
(Beijing, 7 June 1988 – Entry into force: 8 January 1989)

Article 1

For the purpose of this Agreement:

a) the term “investments” means every kind of asset made as investment in accordance with the laws and regulations of the Contracting Party accepting the investment in its territory, including mainly:

- i) movable and immovable property and other rights *in rem*;
- ii) shares in companies or other form of interest in such companies;
- iii) a claim to money or to any performance having an economic value;
- iv) copyrights, industrial property rights, know-how and technical process;

Portugal-Mexico BIT
(11 November 1999 – Entry into force: 4 September 2000)

Article 1 – Definitions

For the purpose of this Agreement:

1. the term “investment” shall mean every kind of asset and rights invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter including, in particular, though not exclusively:

- a) movable and immovable property, acquired or used for economic purposes, as well as any other rights *in rem*, such as mortgages, liens, pledges and similar rights;
- b) shares, stocks, debentures, or other forms of interest in the equity of companies or other forms of participation and/or economic interests from the respective activity;
- c) claims to money, to other assets and to any performance having an economic value, except for:
 - i) claims to money that arise solely from commercial contracts for the sale of goods or services;
 - ii) the extension of credits in connection with a commercial transaction, such as trade financing;
 - iii) credits with a maturity of less than three years, by an investor in the territory of a Contracting Party to an investor in the territory of the other Contracting Party. However, the exception concerning credits with a maturity of less than three years, shall not apply to credits granted by an investor of a Contracting Party

to a company of the other Contracting Party owned by the former investor.

- d) intellectual property rights such as copyrights, patents, utility models, industrial designs, trademarks, trade names, trade and business secrets, technical processes, know-how and good will;
- e) concessions conferred by law under a contract or administrative act of a competent authority;
- f) assets that are placed at the disposal of a lessee, in the territory of a Contracting Party, under a leasing agreement and in conformity with its laws and regulations.

Any alteration on the form in which assets are invested does not affect their character as investments, provided that such alteration is included in the aforesaid definition and do not contradict the laws and regulations of the Contracting Party in which territory the investment was made.

A payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise is not considered an investment.

Slovak Republic-Republic of Korea BIT (Seoul, 24 May 2005)

Article 1 – Definitions

For the purposes of this Agreement:

1. “investment” means every kind of assets or rights invested by investors of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the legislation of the latter Contracting Party and in particular, though not exclusively, includes:

- a) movable and immovable property and any other property rights such as mortgages, liens, leases or pledges;
- b) shares in, stocks and debentures of, and any other form of participation in a company or any business enterprise and rights or interest derived therefrom;
- c) claims to money or to any performance under contract having an economic value;
- d) intellectual property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, technical processes, trade secrets and know-how, and goodwill; and
- e) business concessions having an economic value conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

Any change of the form in which assets or rights are invested or reinvested shall not affect their character as an investment.

Spain-Czech Republic BIT
(Madrid, 12 December 1990 – Entry into force: 28 November 1991)

Article 1 – Definitions

For the purposes of this Agreement:

1. the term “investments” shall apply to all types of assets acquired in accordance with the laws of the country in which such investment is made and particularly, but not exclusively, to:

- a) movable and immovable property and all other real rights such as mortgages, sureties, beneficial interests and similar rights as regards any type of assets;
- b) rights deriving from shares, bonds, and other types of participation in private or public companies, whether having a fixed or variable income, commercial financial bans and whether capitalised or not;
- c) monetary assets, claims and cash, other assets and any other benefit having an economic value;
- d) industrial property rights, trademarks and other rights derived from intellectual property including business assets and technical know-how;
- e) concessions accorded by law or by virtue of a contract, including concessions for prospecting, cultivating, mining or developing natural resources.

Sweden-Argentina BIT
(Stockholm, 22 November 1991 – Entry into force: 28 September 1992)

Article 1 – Definitions

1) The term “investment” shall comprise every kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include un particular, though not exclusively:

- a) movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights;
- b) shares and other kinds of interest in companies;
- c) title to money which is directly related to specific investment or to any performance under contract having an economic value;

- d) patents, other industrial property rights, technical processes, trade names, know-how and other intellectual property rights as well as good-will; and
- e) business concessions conferred by law, administrative decisions or contracts, including concessions to search for, cultivate, extract or exploit natural resources.

The meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Contracting Party in whose territory the investment was made.

No alteration of the legal form under which the assets have been invested or reinvested shall affect their qualification as investments according to this Agreement.

**Switzerland-Mexico BIT
(10 July 1995 – Entry into force: 14 March 1996)**

Article 1 – Definitions

For the purposes of this Agreement: [...]

3. **investment** means every kind of asset and particularly:

- a) movable property, immovable property acquired or used for economic purposes, as well as any other rights *in rem*, such as servitudes, mortgages, liens, pledges;
- b) shares, parts or any other kind of participation in companies;
- c) claims to money or to any performance having an economic value, except for claims to money that arise solely from commercial contracts for the sale of goods or services, and the extension of credit in connection with a commercial transaction, which maturity date is less than three years, such as trade financing;
- d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
- e) interests arising from the commitment of capital or other resources in the territory of one Party to economic activity in such territory, such as under contracts involving the presence of an investor's property in the territory of such Party, including turnkey or construction contracts, or concessions.

A payment obligation from, or the granting of a credit to, the State or a state enterprise is not considered an investment.

**Turkey-Denmark BIT
(Copenhagen, 7 February 1990 – Entry into force: 1 August 1992)**

Article 1 – Definitions

For the purpose of this Agreement:

- 1) a) The term “investment” means every kind of asset and in particular, but not exclusively:
 - i) stocks or any other form of participation in companies;
 - ii) returns reinvested, claims to money or other rights having a financial value to an investment;
 - iii) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights as defined in conformity with the law of the Contracting Party in the territory where the property is situated;
 - iv) industrial and intellectual property rights, patents, industrial designs, trademarks, goodwill, know-how and any other similar rights, business concessions conferred by law or by contract, including the concessions related to natural resources.
- b) The said term shall refer to all direct investments made in accordance with the laws and regulations in the territory of the Contracting Party where the investments are made.

The term “investments” covers all investments made in the territory of a Contracting Party by investors of the other Contracting Party before or after the entry into force of this Agreement.

**United Kingdom-South Africa BIT
(Cape Town, 20 September 1994 – Entry into force: 27 May 1998)**

Article 1 – Definition

For the purpose of this Agreement:

- a) “investment” means every kind of asset and in particular, though not exclusively, includes:
 - i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
 - ii) shares in and stock and debentures of a company and any other form of participation in a company;
 - iii) claims to money or to any performance under contract having a financial value;
 - iv) intellectual property rights, goodwill, technical processes and know-how;

- v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement.

**United States-Argentina BIT
(Washington, 14 November 1991 – Entry into force: 20 October 1994)**

Article 1

1. For the purposes of this Treaty:

- a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
 - i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
 - ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
 - iii) a claim to money or a claim to performance having economic value and directly related to an investment;
 - iv) intellectual property which includes, *inter alia*, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavour, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
 - v) any right conferred by law or contract, and any licenses and permits pursuant to law.