

## **PART 2 – TREATY-BASED SUBSTANTIVE INVESTMENT STANDARDS**

### **Chapter 2.1**

#### **The Definition of “Investor” and “Investment”**

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This Chapter examines the meaning of “investment” and “investor” in investment law. It first focuses on the concept of “investment,” discusses the types of investment, and considers the challenge of narrowing the definition of protected investment under international investment treaties in the light of new generation investment reforms. The chapter then focuses on the concept of “investor” in international investment law.

#### **A. THE DEFINITION OF “INVESTMENT” IN INTERNATIONAL INVESTMENT LAW**

##### **I. The Definition of “Investment” in the Sources of International Investment Law**

Although numerous international and national legal sources aim to protect investment in various parts of the world, there is currently no single legal definition of the term “investment” accepted and consistently and uniformly applied at the international level. The term “investment” is generally defined as “...expenditure to acquire property or assets to produce revenue; a capital outlay”.<sup>1</sup> Yet, the exact meaning of investment diverges, depending upon the definition of the term provided in relevant multilateral, regional, or bilateral investment treaties, the national legislation of each respective country, and other sources of investment law.

Several multilateral treaties provide different definitions of the term “investment”. Among these are the North American Free Trade Agreement (NAFTA), and the Energy Charter Treaty.<sup>2</sup> There was

<sup>1</sup> Bryan Garner (ed.), *Black’s Law Dictionary* (2009), at p. 902.

<sup>2</sup> According to Article 1139 of NAFTA, “investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (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, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) 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 Party to an enterprise in the territory of another 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 (j) any other claims to money, that do not involve the kinds of interests set

an attempt to provide a definition of “investment” in the OECD-led draft Multilateral Agreement on Investment (MAI).<sup>3</sup> Yet, MAI negotiations failed, and the Agreement was ultimately not adopted.<sup>4</sup> Some multilateral conventions do not even attempt to provide a clear-cut definition of the term. Among those that do not contain a definition of investment are the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the Convention

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out in subparagraphs (a) through (h)”. See *North American Free Trade Agreement*, 17 December 1992, <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&se-cid=539c50ef-51c1-489b-808b-9e20c9872d25>.

Article 1(6) of the Energy Charter defines investment as “every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) 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”. See *The Energy Charter Treaty*, 17 December 1994, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2427>.

<sup>3</sup> Investment in the draft MAI was defined as follows: “Investment means [e]very kind of asset owned or controlled, directly or indirectly, by an investor, including: (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation); (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom; (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (v) claims to money and claims to performance; (vi) intellectual property rights; (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits; (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges”. See OECD, *The Multilateral Agreement on Investment Draft Consolidated Text*, 22 April 1998, Sec. II (2), <http://www1.oecd.org/daf/mai/pdf/ng/ng-987r1e.pdf>. For analysis of the definition of investment in the draft MAI see generally Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 *Univ. Pennsylvania Journal of Int’l Economic Law* 731 (1998), at 755-757; and Stephen Canner, *Exceptions and Conditions: The Multilateral Agreement on Investment*, 31 *Cornell International Law Journal* 657 (1998), at 666-668.

<sup>4</sup> For greater analysis of MAI and reasons for its failure see Mitsuo Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* (2004), at 523; LawGlen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 *Columbia Journal of Transnat’l Law* 483 (2001), at 483-498; Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 *North Carolina Journal of Int’l Law & Commercial Regulation* 33 (2009), at 66-71; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investments* (2010), at 261; Vaughan Lowe, *Changing Dimensions of International Investment Law*, in *Collected Courses of the Xiamen Academy of International Law* (v. I, 2006), at 421; Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (2002), at 1136-1140; Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 *Fordham Int’l Law Journal* 275 (2000), at 275-316; Petros Mavroidis, *All Clear on the Investment Front: A Plea for a Restatement*, in José Alvarez et al. (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (2011), at 97-99.

establishing the Multilateral Investment Guarantee Agency (MIGA).<sup>5</sup> For example, Article 25 of the ICSID Convention provides that “the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.”<sup>6</sup> This article provides jurisdictional requirements for ICSID disputes.<sup>7</sup> However, it fails to define the term “investment”.

As far as bilateral investment treaties are concerned, they mostly contain broad definitions of “investment”. For instance, the United Kingdom – Kyrgyzstan BIT defines investment in the following way:

*“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.*<sup>8</sup>

This is a rather broad definition of “investment” which includes a general statement on types of assets covered, and a list of examples of assets that may fall under “investment”. Many other BITs generally follow the same approach. The same broad language may also be found in most states’ national legislation on investments.<sup>9</sup> Hence, investment, as a term, has a potentially broad scope, depending on what source of law is applicable in a given case.

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<sup>5</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 14 October 1966, [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf); and Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention), 11 October 1985, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2805>.

<sup>6</sup> ICSID Convention, [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf).

<sup>7</sup> Christoph Schreuer, *The ICSID Convention: A Commentary* (2001), at 149 (Comment on Art. 25).

<sup>8</sup> Kyrgyzstan – United Kingdom of Great Britain and Northern Ireland Agreement for the Promotion and Protection of Investments, 8 December 1994, Art. 1, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1863>.

<sup>9</sup> For example, according to Kyrgyzstan’s Law on Investment, “[i]nvestments mean tangible and intangible assets of all kinds that are owned or controlled directly or indirectly by the investor and are invested in objects of economic activity with the purpose of deriving profit and (or) attainment of any other beneficial effect in the form of: money; movable and immovable property; property rights (mortgages, liens, pledges and others); stock and other forms of participation in a legal entity; bonds and other debenture liabilities; non-property rights (including the right to intellectual property, in particular, goodwill, copyrights, patents, trademarks, industrial designs, technological processes, trade names and know-how); any right to activity based on a license or in other form given by State bodies of the Kyrgyz Republic; concessions based on Kyrgyz Republic legislation, including those for search, development, mining or exploitation of natural resources; profit and revenue derived from investment and re-invested on the territory of the Kyrgyz Republic; other forms of investments that are not prohibited by the legislation of the Kyrgyz Republic”. See *Zakon Kyrgyzskoj Respubliki ob investiciyah v Kyrgyzskoj Respublike* [Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic], 27 March 2003, No. 66, Art. 1.

## II. Interpretation of the Term “Investment” in Arbitral Jurisprudence

To provide a comprehensive explanation of the nature of the term “investment”, it is crucial to analyze major relevant arbitral awards. Arbitral tribunals have generally agreed that “a contribution by the investor, duration, and risk” must be present in order for an activity to constitute investment.<sup>10</sup> For example, in *Romak v. Uzbekistan*, the arbitral tribunal noted that “contribution” is to be understood as “[a]ny dedication of resources that has economic value,”<sup>11</sup> duration of investment as “...commitment...beyond a one-off transaction,”<sup>12</sup> and assumption of risk as “...a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending...”<sup>13</sup>

While these three characteristics of investment are widely agreed upon, there are several other criteria that are rather controversial. One example is the intention to make regular profit. Some tribunals have held that regularity of profit is a constitutive element of “investment” For instance, the tribunal in *Fedax v. Venezuela* noted that 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”.<sup>14</sup> Yet, this approach has not necessarily been shared by other tribunals.<sup>15</sup>

Apart from profits, another controversial criterion used in defining “investment” has been the contribution of the investment to the host state’s economic development. Some tribunals have found that contribution to a state’s economic development is an important element for defining a certain activity as investment. The most widely cited award in this regard is *Salini v. Morocco*. In this case, the tribunal noted, since the Preamble of the Morocco – Italy BIT contained the goal of a contribution to the economic development of the signatory states as one of the purposes for signing the BIT, the term “investment” should be interpreted in light of this objective.<sup>16</sup> Nevertheless, many other

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<sup>10</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2012), at 75.

<sup>11</sup> *Romak S.A. v the Republic of Uzbekistan*. Permanent Court of Arbitration [PCA], Case No. AA280, 26 November 2009, Sec. 214, <http://www.italaw.com/sites/default/files/case-documents/ita0716.pdf>.

<sup>12</sup> *Id.* at 227.

<sup>13</sup> *Id.* at 230.

<sup>14</sup> *Fedax N.V. v. The Republic of Venezuela*, ICSID ARB/96/3, 11 July 1997, Sec. 43, [http://www.italaw.com/sites/default/files/case-documents/ita0315\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf); For a case that upheld the regularity of profit criterion see *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID ARB/03/11, 6 August 2004, Sec. 53, 57, [http://www.italaw.com/documents/JoyMining\\_Egypt.pdf](http://www.italaw.com/documents/JoyMining_Egypt.pdf).

<sup>15</sup> *Malaysian Historical Salvors Sdn, BHD v. The Government of Malaysia*, International Centre for Settlement of Investment Disputes [ICSID], ARB/05/10, 17 May 2007, Sec. 108, <http://www.italaw.com/sites/default/files/case-documents/ita0496.pdf>.

<sup>16</sup> *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID ARB/00/4, 23 July 2001, Sec. 52, <http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>. For examples of other tribunals that have found a contribution to the host state’s economic development to be a necessary criterion in defining investment see *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID ARB/97/4, 24 May 1999, Sec. 76, <http://www.italaw.com/sites/default/files/case-documents/ita0144.pdf>; *Patrick Mitchell*

tribunals have refrained from adopting the same approach. For instance, in *L.E.S.I. v. Algeria*, the tribunal held that "...it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain...".<sup>17</sup> A position somewhere in between *Salini* and *L.E.S.I.* has been taken by the tribunal in *Phoenix v. Czech Republic*, where the tribunal decided that instead of using the criterion of contribution to economic development, a "...less ambitious approach should...be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed".<sup>18</sup>

The overall controversy of defining investment in arbitral jurisprudence may be best illustrated by the case of *Malaysian Historical Salvors v. Malaysia*. In this case, the Claimant Malaysian Historical Salvors entered into a contract with Respondent, according to which it was under obligation to locate a sunken British vessel, bring it to the surface, clean it, and arrange for its auction. The Respondent country of Malaysia was under obligation to pay the company 70% of the proceeds of the sale of the vessel in case its total price turned out to be less than US\$ 10 million.<sup>19</sup> As the Respondent did not fully perform its obligations under the contract, Claimant brought an arbitration claim against it.

The Malaysian Historical Salvors-tribunal dismissed this claim, holding that the contract was not an "investment," as it "...did not make any significant contributions to the economic development of Malaysia."<sup>20</sup> However, this decision was subsequently annulled by the ICSID Ad Hoc Committee. The Committee held that the lack of contribution to the economic development or the absence of any other criteria set for defining investment would not by themselves be enough to deny

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*v. The Democratic Republic of Congo*, ICSID ARB/99/7, Decision for Partial Annulment of the Arbitral Award of 9 February 2004, Sec. 33, <http://www.italaw.com/sites/default/files/case-documents/ita0537.pdf>.

<sup>17</sup> *Consorzio Groupement L.E.S.I. – Dipenta v. People's Democratic Republic of Algeria*, ICSID ARB/03/08, 10 January 2005, Sec. 13, <http://www.italaw.com/sites/default/files/case-documents/italaw4321.pdf>. For cases with a similar position with respect to the criterion of contribution to economic development see also *Saba Fakes v. Republic of Turkey*, ICSID ARB/07/20, 14 July 2010, Sec. 111, <http://www.italaw.com/sites/default/files/case-documents/ita0314.pdf>. ("The Tribunal is not convinced...that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention... Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment"); and *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID ARB/06/2, 27 September 2012, Sec. 225, <http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf>. ("...the Tribunal considers that a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State is not an element of the objective definition of investment").

<sup>18</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID ARB/06/5, 15 April 2009, Sec. 85, <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>.

<sup>19</sup> *Malaysian Historical Salvors Sdn, BHD v. The Government of Malaysia*, ICSID ARB/05/10, Award of 17 May 2007, Sec. 7-13, <http://www.italaw.com/sites/default/files/case-documents/ita0496.pdf>.

<sup>20</sup> *Id.* at 143.

jurisdiction.<sup>21</sup> It further held that the tribunal should have also given weight to the investment's "contributions of a cultural and historical nature" instead of focusing only on the contribution to *economic* development.<sup>22</sup>

As can be seen, although there are general characteristics, such as the commitment of capital, a certain duration, and an assumption risk that are understood to be essential in defining investment, other features, such as regularity of profit and contribution to host states' economic development, remain controversial. Therefore, the meaning of "investment" depends not only on the definition provided in relevant primary sources of law but also on the approach taken by arbitral tribunals concerning their interpretation.

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<sup>21</sup> *Malaysian Historical Salvors Sdn, BHD v. The Government of Malaysia*, ICSID ARB/05/10, Decision on the Application for Annulment of 16 April 2009, Sec. 79-81, <http://www.italaw.com/sites/default/files/case-documents/ita0497.pdf>.

<sup>22</sup> *Id.* at 80.

### III. Foreign Direct Investment (FDI) and Other Types of Investment

There are different types of investment recognized in the world. Investment is generally divided into foreign portfolio investment, foreign direct investment (FDI), and other types of investment.<sup>23</sup> Portfolio investment is the type of investment that "...covers investment in equity and debt securities, excluding any such instruments that are classified as direct investment or reserve assets."<sup>24</sup> In portfolio investments, investors do not "...maintain control over the management or use of the invested assets."<sup>25</sup>

From all types of investment, FDI remains the form of investment that is most widely flowing to developing countries.<sup>26</sup> It is generally understood to have the following features which distinguish it from other types of investment: "(a) the transfer of funds, (b) a longer-term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk."<sup>27</sup> Despite these generally recognized features, the definition of the term "direct investment" varies, depending which of the various sources of law are applied. For example, according to the Kyrgyz Republic legislation, "direct investments mean the holding, acquisition by an investor of no less than one third percent of stocks or stockholder votes in joint stock companies registered on the territory of the Kyrgyz Republic, or any equivalent of such participation in business entities of other types, and all further operations between an investor and the company, investment of capital to the fixed assets of branches, representative offices of a legal entity created on the territory of the Kyrgyz Republic".<sup>28</sup> In the USA,

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<sup>23</sup> Among other types of investment are trade credits, official loans, and commercial bank loans. See UNCTAD, *World Investment Report on "Non-Equity Modes of International Production and Development"* (United Nations, 2011), at 21, [http://unctad.org/en/PublicationsLibrary/wir2011\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf).

<sup>24</sup> OECD, *Portfolio Investment*, <https://stats.oecd.org/glossary/detail.asp?ID=2092>.

<sup>25</sup> Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 *University of Miami Int'l and Comparative Law Review* 403 (2006), at 407.

<sup>26</sup> UNCTAD, *World Investment Report on "Non-Equity Modes of International Production and Development"*, supra note 23, at x-xii, 21.

<sup>27</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2012), at 60; See also John Wild, *International Business* (2003), at 197 (defining FDI as the purchase of "the physical assets or a significant amount of the ownership (stock) of a company in another country to gain a measure of management control"); UNCTAD, *World Investment Report on "Transnational Corporations, Extractive Industries and Development"* (United Nations, 2007), at 245, [http://unctad.org/en/Docs/wir2007p4\\_en.pdf](http://unctad.org/en/Docs/wir2007p4_en.pdf). (FDI is understood as "an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate) [and it]...implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy"); and Imad Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (2002), at 1 ("There is no agreement...on what constitutes a controlling interest, but most commonly a minimum of 10 per cent shareholding is regarded as allowing the foreign firm to exert a significant influence (potentially or actually exercised) over the key policies of the underlying project").

<sup>28</sup> Zakon Kyrgyzskoj Respubliki ob investiciyah v Kyrgyzskoj Respublike [Law of the Kyrgyz Republic on Investments in the Kyrgyz Republic], March 27, 2003, No. 66, Art. 1.

inward FDI is understood to mean the "...ownership or control, directly or indirectly, by one foreign entity of 10 percent or more of the voting securities of an incorporated U.S. business enterprise, or an equivalent interest in an unincorporated U.S. business enterprise".<sup>29</sup> The meaning of FDI is also provided in a number of soft law instruments. In particular, according to the OECD benchmark definition of FDI:

*Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship.*<sup>30</sup>

The critical part of this definition is the focus on the lasting interest. FDI is a long-term investment. This differentiates FDI from other forms of investment or mere speculation. The International Monetary Fund provides a similar definition.<sup>31</sup> Yet, despite some convergence toward treating ownership of ten percent or more of voting power as enough for establishing a lasting interest, there is no universal agreement on this matter. There is a wide variety of definitions provided to explain the meaning of the concept of foreign direct investment. Hence, the exact definition of FDI depends on the source of law applied in a given case.

#### **IV. The Challenge of Narrowing the Definition of Protected Investment in Cases of Short Term Involvement**

As the above analysis demonstrates, most investment treaties provide a broad definition of the term "investment" to advance an investment-friendly climate and attract investors. The fundamental question concerns the kinds of investment that these treaties protect. Are these treaties attracting and protecting only the much-needed FDI or are they also protecting ordinary and one-off commercial transactions? Broadly defined terms of "investment" in investment treaties may be protecting all types of investment, be they portfolio or direct. However, as noted by UNCTAD, a

<sup>29</sup> U.S. Department of Commerce Bureau of Economic Analysis, *Direct Investment Concepts*, at 76-77, [https://www.bea.gov/international/pdf/bach\\_concepts\\_methods/Direct%20Investment%20Concepts.pdf](https://www.bea.gov/international/pdf/bach_concepts_methods/Direct%20Investment%20Concepts.pdf).

<sup>30</sup> OECD, *Benchmark Definition of Foreign Direct Investment*, 2008, at 48-49, <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>. The OECD also notes the following with respect to its benchmark definition of FDI: "...Some compilers may argue that in some cases an ownership of as little as 10% of the voting power may not lead to the exercise of any significant influence while on the other hand, an investor may own less than 10% but have an effective voice in the management. Nevertheless, the recommended methodology does not allow any qualification of the 10% threshold and recommends its strict application to ensure statistical consistency across countries". See *Id.* at 49.

<sup>31</sup> International Monetary Fund, *Balance of Payments and International Investment Position Manual*, 2009, at 101-102, <https://www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf>.



broadly formulated definition of “investment” may even result in ordinary commercial transactions being protected as investments under investment protection treaties.<sup>32</sup> Consequently, UNCTAD calls for “[c]lear benchmarks...so as to assess whether a given asset or transaction is an investment or some other kind of uncovered commercial transaction”.<sup>33</sup> UNCTAD makes clear that without concrete benchmarks, the definition of investment may become too open-ended.

One example of such a benchmark is the OECD definition according to which FDI presupposes “...the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise” in the form of “[t]he direct or indirect ownership of 10% or more of the voting power of an enterprise”.<sup>34</sup> Another instructive example in this regard is the Azerbaijan–Turkey BIT which specifies that “...investments which are in the nature of acquisition of shares or voting power through stock exchanges amounting to, or representing of less than ten (10) percent of a company shall not be covered by this Agreement”.<sup>35</sup> While there is no reference to the OECD benchmark in this Agreement, the specification of the 10 percent rule is similar to it.

Another possibility would be to use the *Salini* criteria in defining investment as requiring commitment of significant capital by investors, a certain duration, an investment risk, and a contribution to the economic development of the host state.<sup>36</sup> Although the criterion of contribution to the economic development of the host state is rather controversial, as has been demonstrated by the analysis of arbitral awards, many experts consider such an element in the definition of protected investment to be an important one since investments worthy of protection under investment treaties should contribute to host states’ economic development.<sup>37</sup>

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<sup>32</sup> UNCTAD, *Scope and Definition* (United Nations, 2011), [http://unctad.org/en/Docs/diaeia20102\\_en.pdf](http://unctad.org/en/Docs/diaeia20102_en.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> OECD, *Benchmark Definition of Foreign Direct Investment*, supra note 30, at 48-49.

<sup>35</sup> *Azerbaijan – Turkey Agreement on the Reciprocal Protection and Promotion of Investments*, 25 October 2011, Art. 1, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3144>. For a similar clause see also *Gabon – Turkey Agreement Concerning the Reciprocal Promotion and Protection of Investments*, 18 July 2012, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1307>.

<sup>36</sup> *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID ARB/00/4, 23 July 2001, Sec. 52, <http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>.

An interesting example of the use of specific criteria in defining investment is the Economic Partnership Agreement between Brunei and Japan. Article 56 of this Agreement provides a definition of investment, which the Parties qualify in the following way: “Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk”. See *Brunei – Japan Economic Partnership Agreement*, 18 June 2007, Art. 56, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2549>. Although the Agreement does not provide for the contribution to economic development as a criterion in defining investment, it nevertheless serves as a useful example for defining investment based on concrete criteria.

<sup>37</sup> For law review articles supporting the Salini criteria see Felix Okpe, *Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States*, 13 *Richmond Journal of Global Law and Business* 217 (2014), at 217-261; Alex

Another option to clarify the scope of “investment” can be to specify what the definition of “investment” does *not* encompass. For example, in the *2015 Brazil – Malawi Investment Treaty* the Parties defined investment as “...any type of property or right owned or controlled directly or indirectly by an investor from one of the Parties in the territory of the other Party for the purpose of establishing an enterprise with long lasting economic relation with a view to producing goods and services...”.<sup>38</sup> At the same time, the Parties specified the meaning of “investment” by noting that “...[f]or greater certainty, Investment does not include: a) debt securities issued by a government or loans to a government; b) portfolio investments; and c) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction...”.<sup>39</sup> Providing such specific benchmarks with respect to the meaning of investment in investment treaties allows to protect FDI, the type of investment which clearly needs to be protected as opposed to short-term forms of investment and various ordinary commercial transactions.

In conclusion, it is important to reiterate that the meaning of the terms “investment” and “direct investment” vary, depending on applicable sources of law and their interpretation by tribunals. As the broad nature of most definitions poses uncertainty with respect to the meaning and scope of the term “investment”, it is generally advisable for states to adopt clear rules delineating the meaning of protected investments in their international investment treaties.

## **B. THE DEFINITION OF “INVESTOR” IN INTERNATIONAL INVESTMENT LAW**

[to be continued]

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Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, 15 Chicago Journal of Int'l Law 287 (2014), at 287-309; See also Marek Jeżewski, Development Considerations in Defining Investment, in Marie-Claire Cordonier Segger et al. (eds.), *Sustainable Development in World Investment Law* (2011), at 215-235 (noting a broader understanding of contribution to state's economy as promoting sustainable development in host states).

<sup>38</sup> *Brazil – Malawi Investment Cooperation and Facilitation Agreement*, 25 June 2015, Art. 2, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715>.

<sup>39</sup> *Id.* For a similar clause see also *Mexico – Slovakia Agreement on the Promotion and Reciprocal Protection of Investments*, 26 October 2007, Art. 1, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2002>; and Canada's *Model Investment Treaty for the Promotion and Protection of Investments*, 2004, Art. 1, <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.