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".[1] 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.[2] There was

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[1] Bryan Garner (ed.), *Black's Law Dictionary* (2009), at p. 902.

[2] 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

an attempt to provide a definition of "investment" in the OECD-led draft Multilateral Agreement on Investment (MAI).[3] Yet, MAI negotiations failed, and the Agreement was ultimately not adopted.[4] 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

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covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set 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&secid=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.

3 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.

4 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.

of Investment Disputes between States and Nationals of Other States (ICSID) and the Convention establishing the Multilateral Investment Guarantee Agency (MIGA).[5] 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."[6] This article provides jurisdictional requirements for ICSID disputes.[7] 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.*[8]

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'

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5 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; and Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention), 11 October 1985, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2805.

6 ICSID Convention, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

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

8 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.

national legislation on investments.[9] Hence, investment, as a term, has a potentially broad scope, depending on what source of law is applicable in a given case.

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.[10] 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,"[11] duration of investment as "…commitment…beyond a one-off transaction,"[12] 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…".[13]

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".[14] Yet, this approach has not necessarily been shared by other tribunals.[15]

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9 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.

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

11 *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.

12 *Id.* at 227.

13 *Id.* at 230.

14 *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; 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.

15 *Malaysian Historical Salvors Sdn, BHD v. The Government of Malaysia*, International Centre for Settlement

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.[16] Nevertheless, many other 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…".[17] 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".[18]

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

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of Investment Disputes [ICSID], ARB/05/10, 17 May 2007, Sec. 108, http://www.italaw.com/sites/default/files/case-documents/ita0496.pdf.

16 *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 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.

17 *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").

18 *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.

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.[19] 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."[20] 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 jurisdiction.[21] 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.[22]

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.

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.[23] 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.".[24] In portfolio investments, investors do not "…maintain control over the management or use of the invested assets.".[25]

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19 *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.

20 *Id*. at 143.

21 *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.

22 *Id.* at 80.

23 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.

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

25 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.

From all types of investment, FDI remains the form of investment that is most widely flowing to developing countries.[26] 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."[27] 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".[28] In the USA, 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".[29] 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*

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

27 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. (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").

28 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.

29 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.

> *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.*[30]

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.[31] 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 broadly formulated definition of "investment" may even result in ordinary commercial transactions being protected as investments under investment protection treaties.[32] 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".[33] 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".[34] Another

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30 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.

31 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.

32 UNCTAD, *Scope and Definition* (United Nations, 2011), http://unctad.org/en/Docs/diaeia20102_en.pdf.

33 *Id.*

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

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".[35] 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.[36] 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.[37]

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…".[38] At the same time, the Parties specified the meaning of "investment" by noting that

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35 *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.

36 *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.

37 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 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).

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

"…[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…".[39] 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

I. The Definition of "Investor" in the Sources of International Investment Law

An investment treaty is a bilateral (BITs) or multilateral international agreement that establishes the terms and conditions of the private investment by nationals and companies of one sovereign State on the territory of another State. These treaties, although made between States, benefit investors by allowing them to challenge host States that breach their respective treaty obligations. The unique feature of these international agreements is that only investors, usually private individuals or companies, and not States, can initiate dispute resolution proceedings to claim their rights vis-à-vis States. However, host States have extended the standing offer to submit to arbitration such disputes with protected investors, through investment treaties, provided that these investors meet the eligibility criteria for treaty protection.[40] In the context of investment arbitration, whether an investor qualifies for treaty protection hinges on nationality.

1. Customary International Law

Historically, nationality issues in international law have been influenced by cases of diplomatic protection extended by States to individuals and companies of their nationality.[41] The practice of international law concerning nationality issues has largely evolved within the framework of diplo-

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39 *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.

40 It is important to note that investment arbitration may also be based on contracts or foreign investment laws. See e.g., https://icsid.worldbank.org/node/20966.

41 See e.g., J. Ho, *The Evolution of Contractual Protection in International Law: Accessing Diplomatic Archives, Discovering Diplomatic Practice, and Constructing Diplomatic History*, in Stephan Schill, Christian J. Tams & Rainer Hofmann (eds.), *International Investment Law and History* (2018), pp. 213, 218-24.

matic protection. According to customary international law, a State can offer diplomatic protection to its nationals for claims against another State, even if the individual also holds the nationality of that other State, as long as the individual's dominant and effective nationality is that of the State providing diplomatic protection.[42]

While the right to grant and withdraw the nationality of a natural person remains a State sovereign right, the question of whether and to what extent a State can refuse to recognize the nationality of a natural person who is a claimant has been an important question.[43] In the Nottebohm case,[44] the International Court of Justice (ICJ) determined that while a State can decide under its own laws whether to grant nationality to an individual, there must be a genuine connection between the State and the national. The ICJ stated:

> *"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."*[45]

However, applying the Nottebohm principle to demonstrate effective nationality in the modern era has become increasingly difficult.[46] The International Law Commission's (ILC) Report on Diplomatic Protection highlights these challenges, noting that strict adherence to the 'genuine link' requirement proposed by the Nottebohm principle would exclude millions from diplomatic protection.[47] Owing

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42 OECD, *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives* 12 (2008) (hereinafter OECD).

43 Id.

44 In the *Nottebohm* case, Friedrich Nottebohm, a German who had resided in Guatemala since 1905, acquired Liechtenstein nationality in 1939 to gain the status of a neutral national, but Guatemala did not recognize this nationality after detaining and deporting him during World War II. He then tried to rely on his Liechtenstein nationality to seek diplomatic protection against Guatemala. The ICJ held that he could not assert his Liechtenstein nationality against Guatemala where he had settled for 34 years. See *The Nottebohm Case (Liechtenstein v. Guatemala)*, 2nd phase, Judgment of 6 April 1955, ICJ Reports 4, 23.

45 Id., emphasis added.

46 "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." See C.F. Amerasinghe, *The Jurisdiction of the International Centre for Settlement of Investment Disputes* (1979) 19 Indian Journal of International Law 166, 203.

47 The ILC's Report recognizes 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

to globalization and widespread migration, many individuals have left their home countries and established themselves in nations where they either never obtained citizenship or only held it precariously.[48]

Notably, arbitral tribunals in investment law cases have generally "disavowed the principle of the genuine link with a view to recognizing the primacy of the domestic rules on nationality."[49]

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." Report of the International Law Commission on the Work of its Fifty-Eighth Session, 1 May-9 June and 3 July-11 Aug. 2006, U.N. Doc. A/61/10, ch. IV, at 33 (2006) (hereinafter ILC Report).

48 Id.

49 Alice Sironi, *Nationality of Individuals in Public International Law: A Functional Approach*, in Alexandra Annoni & Serena Forlati (eds.), *The Changing Role of Nationality in International Law* (2013), pp. 53, 57.

2. Investment Agreements

a) *Nationality Criteria*

By contrast, in the context of international investment agreements, investor protection has evolved differently from those principles governing diplomatic protection.[50] In international investment law an investor's nationality, along with other criteria, dictates which treaty they can rely on and, consequently, which substantive protection standards guaranteed by that treaty can be used.[51] It also bears on the jurisdiction of the arbitral tribunal. The personal jurisdiction of arbitral tribunals is restricted to investors who are nationals of a contracting State other than the respondent State in dispute.[52] The nationality requirement, thus, plays a pivotal role in shaping the jurisdictional boundaries of arbitral tribunals. It ensures that only those investors who are nationals of a contracting State other than the respondent State can seek protection and redress under the treaty.[53]

The determination of nationality – primarily based on the law of the State whose nationality is claimed[54] – also involves a thorough examination of various factors, including the residence for natural persons, and, in cases of dual nationality of natural persons, the determination of dominant and effective nationality, the place of incorporation for juridical persons, and the existence of substantial business activities. These criteria ensure that the investor has a substantial connection to the contracting State whose treaty protections they seek to invoke. This connection must be genuine and not merely a facade for exploiting treaty benefits, thereby preserving the legitimacy and purpose of international investment agreements.

b) Categories of Protected Investors

The category of protected investor is construed as either physical persons or juridical persons. It is common knowledge that companies typically represent most investors; however, individuals also participate in investment activities.

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50 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2012), hereinafter Dolzer & Schreuer, at p. 45.

51 Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 Arb. Int'l (2004), pp. 179, 183 et seq.

52 See, among others, Dolzer & Schreuer, at p. 45.

53 C. L. Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration* (2nd ed. 2021), hereinafter Lim, Ho & Paparinskis, at p. 299.

54 *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction of 21 October 2003, at s 3.4.1, 19 ICSID Rev. 2004 275, at pp. 282-289; see also *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction of 11 April 2007, at paras 195-201, ICSID, ORIL IIC 288; as well as *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Decision on Jurisdiction of 24 September 2008, at paras 86, 101, ICSID, ORIL IIC 339.

One example of many is the United Kingdom–Kyrgyzstan BIT which defines ‘investor’ to encompass both categories:

> *(c) “nationals” means: (i) in respect of the Kyrgyz Republic: physical persons deriving their status as Kyrgyz Republic nationals from the law in force in the Kyrgyz Republic; (ii) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;*
>
> *(d) “companies” means: (i) in respect of the Kyrgyz Republic: juridical persons incorporated or constituted under the law in force in the Kyrgyz Republic; (ii) 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 [...].*[55]

c) Individual Investors

The determination of nationality is primarily determined according to the law of the State whose nationality is claimed.[56] A pertinent example is *Soufraki v. United Arab Emirates* which concerned whether Soufraki met the requirements of Italian law to be considered an Italian national, which was a requirement for establishing jurisdiction under the Italy-UAE BIT. The Tribunal stressed that nationality is mainly decided by the domestic legislation of the alleged home state in Investor-State Dispute Settlement (ISDS) disputes. Soufraki had been claiming Italian nationality, but the Tribunal determined that even though he held an Italian passport, his long-term residence outside of Italy without the required registration had caused him to lose his nationality under Italian law. As a result, he was not eligible for protection under the BIT.[57] This decision emphasizes how important domestic legislation is in confirming investors’ nationality in ISDS proceedings.

d) Dual Nationality of Individuals

Generally, the nationality requirement aims to prevent individuals from seeking treaty protection against their own State. Determining an individual's nationality can be particularly complex in cases where the investor holds dual nationality, especially when the investor is also a national of the host State.[58]

Provisions on dual nationality can be found in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[59] The ICSID

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55 Article ??? Kyrgyzstan - United Kingdom BIT (1994).

56 *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, supra, note 54, at s. 3.4.1.; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, supra, note 54, at paras 195-201; and *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, supra, note 54, at paras 86, 101.

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

58 Lim, Ho & Paparinskis, supra, note 54, at p. 308.

59 The Convention was signed on 18 March 1965 and entered into force on 14 October 1966; 575 UNTS 159.

Convention specifically excludes dual nationals from the protection scope if one of the investor's nationalities is that of the host State. According to Article 25 (2),

> *"National of another Contracting State" means: (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 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 Contracting State party to the dispute (emphasis added); and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute (emphasis added) 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.*

Some investment treaties explicitly address dual nationality through their definition of eligible investors. For example, the 2012 U.S. Model Bilateral Investment Treaty refines the definition of physical persons as eligible investors by treating the issue of dual nationality: Article 1(2) stipulates

> *"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 national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*[60]

On the other hand, other treaties use the residence of a natural person as an eligibility criterion; the ASEAN Comprehensive Investment Agreement Article 4(g) states that:

> *"natural person" means any natural person possessing the nationality or citizenship of, or right of permanent residence in the Member State in accordance with its laws, regulations and national policies.*[61]

e) Juridical Persons

The definition of "investor" also encompasses certain types of legal persons, most prominently private individuals and businesses. The complexity of corporate structures and ownership can complicate determining a company's nationality. There are diverse approaches found in investment

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60 The 2012 Model U.S. BIT is available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download.

61 The ASEAN Comprehensive Investment Agreement is available at https://asean.org/wp-content/uploads/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf.

treaties for defining juridical entities as investors. It typically involves evaluating factors[62] such as the place of constitution per the law in force in the country, the place of incorporation or registered office, the place of the seat or administration,[63] and the place of control.

The notion of control often intertwines with other formal criteria, such as incorporation and corporate seat. This is the case in the French Model BIT[64] and some BITs concluded by Sweden,[65] Switzerland,[66] and Belgium-Luxembourg.[67] Control can be assessed through factors like ownership percentage or voting power within a company. For example, both Article 25(2)(b) of the ICSID Convention, and Article 1(7)(a)(ii) of the Energy Charter Treaty (the 'ECT')[68] provide provisions for deviating from the principle of incorporation in cases where foreign control is acknowledged. In such scenarios, the host State may recognize a local company established by a foreign investor within its jurisdiction as a national of another Contracting State, granting the local subsidiary access to available arbitration mechanisms.[69]

Moreover, the concept of control is not limited to direct ownership or voting rights but can also include indirect means of exerting influence over the entity. This broader interpretation of control can encompass situations where the foreign investor holds a significant influence over the local entity through a series of intermediary companies.[70] This approach captures the nature of control in increasingly complex global corporate structures.

It is important to note also that the category of juridical persons as investors may sometimes include government-controlled entities if they operate in a commercial capacity (as opposed to a governmental capacity). In fact, some investment agreements explicitly provide that State entities are

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62 The Convention establishing the Multilateral Investment Guarantee Agency (1985) 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. The MIGA Convention is available at https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20(April%202018).pdf.

63 See, for example, the Germany-China BIT, which entered into force on 11 November 2005.

64 France Model BIT (2006), Article 1, point 3: *The term “company” means any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party and 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.*

65 See, for example, the Sweden-India BIT, which entered into force on 1 April 2001.

66 See, for example, the Switzerland-Ethiopia BIT, which entered into force on 7 September 1998.

67 See, for example, the Belgium/Luxembourg-Philippines BIT, which entered into force on 19 December 2003.

68 Art. 1(7)(a)(ii) of the Energy Charter Treaty 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.” See The Energy Charter Treaty, 2080 UNTS 100, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download.

69 Lim, Ho & Paparinskis, supra, note 54, at pp. 321-323.

70 Id., p. 323.

covered. The ASEAN Comprehensive Investment Agreement defines investors as follows: Article 4 (e) "'juridical person' means any legal entity duly constituted or otherwise organized under the applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any enterprise, corporation, trust, partnership, joint venture, sole proprietorship, association, or organization." In the same vein, Article 1 of the 2004 U.S. Model Bilateral Investment Treaty,[71] and Article 13(a)(iii) of the 1985 MIGA Convention[72] cover entities that are either fully owned or controlled by the government.

f) Temporal Consideration for Nationality Possession

The ICSID Convention also provides for determining the relevant dates for assessing nationality for both natural and juridical persons. Claimants must demonstrate that they held the nationality of a Contracting State both when they consented to ICSID's jurisdiction for arbitration and when the claim was registered.[73]

II. Interpretation of the Term "Investor" in Arbitral Jurisprudence

For a tribunal to establish personal jurisdiction in ICSID arbitration, two cumulative nationality requirements must be met: first, the conditions set forth in Article 25(2) of the ICSID Convention, and second, the investor criteria outlined in the relevant investment treaty. This is commonly referred to as the "double-barreled test."[74]

In non-ICSID arbitration, arbitral tribunals define the nationality of the investor based on the applicable investment treaty. The interpretation of nationality can depend on the tribunal, which may refer either to national law or exclusively to international law.

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71 The 2004 US Model Bilateral Investment Treaty provides in Article 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 national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality. (...) "state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.*

72 Convention Establishing the Multilateral Investment Agency Article 13: *ELIGIBLE INVESTORS (a) Any natural person and any juridical person may be eligible to receive the Agency's guarantee provided that: (i) Such natural person is a national of a member other than the host country; (ii) 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; and (iii) Such juridical person, whether or not it is privately owned, operates on a commercial basis.*

73 See Art. 25(2)(b) of the ICSID Convention.

74 See, for example, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007, para 55.

1. Dual Nationality of Individuals

The question of dual citizenship has been examined by ICSID based arbitral tribunals in several cases.[75] In the *Champion Trading v. Egypt* case the claimants – individuals with dual U.S. and Egyptian citizenship – were found to have strong enough ties to Egypt to exclude them from ICSID arbitration pursuant to the application of Article 25(2)(a) of ICSID Convention.[76] However, the Tribunal upheld the claims of two U.S. claimant companies with greater U.S. ownership stakes and stated that there is no restriction on claims by companies owned by dual nationals in either the ICSID Convention or in the respective BIT.[77]

2. Tests to Determine the Nationality of a Company

Companies are often organized in complex layers of shareholders, individuals, and legal entities, operating across various countries, complicating nationality determination. For juridical entities, arbitral tribunals generally prefer the incorporation test over the control test (see below) to establish nationality. For instance, in the case of *Tokios Tokelés v. Ukraine*,[78] the Tribunal held that a company incorporated in Lithuania could bring a claim against Ukraine under the Lithuania-Ukraine BIT,[79] even though it was controlled and 99 percent owned by Ukrainian nationals.

In *Saluka v. The Czech Republic*,[80] the Tribunal reached comparable conclusions regarding the legitimacy of the place of incorporation as specified in the treaty. This was also illustrated in the case of *Yaung Chi v. Myanmar*,[81] where the focus was on qualifying the company's seat and denying the State's argument that the claimant, a company incorporated in Singapore, had transferred its effective management to Myanmar.

3. The Test of Control

Arbitral practice has adapted to handle the complexities associated with corporate structures and the notion of control. However, no tribunal has been able to formulate a comprehensive test for control.[82] For instance, the place of control, often evaluated through factors like ownership

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75 See, in particular, *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9; *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7; and *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15.

76 *Champion Trading*, supra, note 75, Decision on Jurisdiction of 21 October 2021.

77 Id., at p. 18, point 3.4.2.

78 *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004.

79 Lithuania - Ukraine BIT (1994), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5033/download.

80 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006.

81 *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, ICSID Additional Facility Rules, Award of 31 March 2003.

82 See, e.g., Lim, Ho & Paparinskis, p. 321.

percentage or voting power, can sometimes override the place of incorporation in determining the nationality of a juridical person.[83] This nuanced approach helps to capture the true nature of control and influence within global corporate structures, ensuring that treaty protections are extended to those genuinely intended by the contracting States.

The notion of control has been interpreted in several ICSID cases.[84] In *Thunderbird Gaming Corporation v. United Mexican States*, the Tribunal held that: "[c]ontrol 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."[85]

Sometimes it is held that the test of control is met through the criterion of direct shareholding,[86] which grants voting rights and the ability to engage in the company's decision-making. Thus, while direct shareholding may not be the only criterion for defining foreign control, it was ruled that it is a reasonable and valid test for control.[87] In *Aguas de Tunari v. Republic of Bolivia*,[88] the Tribunal explained the phrase in Article 1 (b) (iii) of the Netherlands-Bolivia BIT (1992) "controlled directly or indirectly" to mean that one entity can be considered to control another if it has the legal authority to do so, whether this control is exercised directly or through intermediary entities.

4. Rights of Shareholders

The investment arbitral practice has developed to recognize the rights of shareholders to file claims for damages sustained by the company and for damages they sustained as shareholders.[89] Many investment treaties recognize shares or stakes in companies as types of investments, thereby possibly extending protection to shareholders as investors. These shareholders can be either controlling or non-controlling, hold majority or minority stakes, and have direct or indirect ownership

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83 OECD (ed.), *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Publishing (2008).

84 See, in particular, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1; and *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2.

85 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award of 26 January 2006, para 180.

86 See, for example, *Autopista Concesionada de Venezuela C.A. (Aucoven) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction of 27 Sept 2001.

87 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, 2e partie, p. 110.

88 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005.

89 Lim, Ho & Paparinskis, p. 323.

through another corporate structure.[90] In the *Barcelona Traction* case,[91] the ICJ acknowledged the crucial role played by shareholders as investors. Since then, arbitral investment practice has addressed this issue using various tests to determine nationality, supporting shareholders' rights to be recognized as claimants based on the shares they own or control.[92]

In certain instances, minority shareholders might assert their ownership of shares as a qualifying investment, seeking compensation for the decline in shareholder value rather than for direct loss or damage to the company.[93] This was the case in *CMS v. Argentina*,[94] where the Tribunal held that the ICSID Convention does not prevent a minority non-controlling shareholder from filing a claim. Sometimes, the claimant may own shares of the affected company indirectly through the intermediary of another corporate structure.[95]

Moreover, tribunals have recognized the rights of shareholders to bring claims even when the direct impact of the alleged wrongful act is on the company rather than the shareholder.[96] This reflects an evolving understanding of investment protection that recognizes the interconnected nature of modern corporate ownership and the potential for indirect harm to investors.[97]

III. Addressing the Challenges of "Treaty Shopping" and Parallel Proceedings

1. Treaty Shopping

The restriction arising from the nationality requirement has led local investors, who would not otherwise qualify for treaty protection, to obtain a nationality that allows them to be considered

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90 Id.

91 *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.

92 OECD (ed.), *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Publishing, Paris (2008).

93 Other cases which dealt with the rights of the minority shareholders are: *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (the *Vivendi* case), Decision on Annulment of 3 July 2002, 6 ICSID Reports 340; *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction of 21 October 2003; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction of 30 April 2004; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990, ICSID Reports 246; as well as *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of 8 December 1998, 40 I.L.M.457, 463 (2001).

94 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003.

95 See, for example, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, (2004) 43 ILM 262, IIC 23 (2003).

96 See, for example, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004.

97 Id.

protected investors. The phenomenon of treaty shopping usually involves obtaining a certain nationality by means of re-location or corporate re-structuring for the purpose of bringing the dispute under a particular treaty, or the investor making use of its registered office only to trigger the protection of a specific investment agreement.[98] Through this method, the investor seeks to benefit from the protection of an investment treaty to which it would otherwise not be entitled to.

Arbitral tribunals have frequently deemed claims inadmissible and declined jurisdiction when investors engaged in "treaty shopping." An oft-cited example is *Philip Morris Asia Ltd. v Australia* in which the Tribunal concluded that the share transfer that took place as part of a corporate restructuring only weeks after the introduction of the Australian plain-packaging tobacco regulation was litigation-oriented nationality acquisition.[99]

The primary criterion for determining the admissibility of such claims is whether the dispute was *foreseeable* when the nationality was adopted.

Another criterion is whether the nationality was adopted solely for the purposes of the dispute or if it would have been adopted regardless of the dispute (commonly referred to as "Nationality Planning").

2. Denial of Benefit Clauses

To prevent such strategies, some States incorporate a denial of benefits clause in their investment treaties.[100] These kind of clauses enable a State to withhold treaty benefits from investors who, despite being incorporated in one of the treaty's parties, lack *substantial economic ties* to that State. This applies in cases where investors are controlled by entities from a third country not party to the treaty or fail to conduct significant business activities in their country of incorporation.[101]

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98 See, for example, M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed, Cambridge University Press (2010), p. 329.

99 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015. The tribunal concluded that "the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute" (at para. 588). See also Lim, Ho and Paparinskis, at p. 305.

100 The Austria-Libya BIT (2002), Article 9, and the Austria-Lebanon BIT (2001), Article 10, both 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." The North-American Free Trade Agreement (NAFTA) in Article 1132(2), the new US and Canada Model BITs, the US Free Trade Agreements with Chile, Australia, Colombia, Morocco, Panama, Peru and the Canada-Chile Free Trade Agreements contain similar language with some variation. This clause is also found in Part III, Article 17, of the Energy Charter Treaty.

101 See, e.g. Dolzer and Schreuer, pp. 55-56.

These provisions empower the host State to exclude shell companies owned by nationals or entities from a third country from the definition of "investor." For instance, the US-Ukraine BIT states: "Each Party reserves the right to deny the benefits of this treaty to any company controlled by nationals of a third country, particularly if the company from the other Party has no substantial business activities within its territory or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations."[102]

A similar clause is found in Part III, Article 17, of the ECT 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.

In *Plama v. Bulgaria*,[103] the Tribunal provided insights on interpreting the criteria for invoking the denial of benefits clause found in Article 17(1) of the ECT, emphasizing that it does not serve as a blanket denial of all benefits. Instead, it is explicitly limited to denying the advantages related to substantial protection about the merits of the dispute and cannot be used to challenge the Tribunal's jurisdiction. This was further corroborated in the *Generation Ukraine v. Ukraine* case.[104]

In contrast, unlike in the ECT, the denial of benefits provisions in other BITs may already bar the claims at the stage of admissibility.[105] [???pls explain what difference that makes???]

The application of denial of benefits clauses can vary significantly based on the specific treaty language and the particular facts of each case. Arbitral tribunals have shown a tendency to interpret these clauses narrowly, ensuring that their application is consistent with the treaty's overall purpose and objectives.

3. Parallel Proceedings by "Related" Investors

The problem of parallel proceedings in investment arbitration can arise when different but related entities (e.g., a company and its shareholders) file claims against a State for the same alleged violation. This situation can occur as investments are structured through layers of legal entities, each of which may have the right to bring claims against the State. A notable example are the parallel proceedings in the case of *CME Czech Republic v. The Czech Republic*,[106] and *Ronald S.*

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102 Ukraine - United States of America BIT (1994), Article 1(2).

103 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

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

105 See, for example, the Sweden-Bulgaria BIT (1994) at Art. 1(c); see also *Generation Ukraine v. Ukraine*, supra, note 104, at paras. 15.7 and 15.9.

106 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award of 13 September 2001.

Lauder v. Czech Republic.[107] These cases involved claims by both a company and its controlling shareholder, Mr. Lauder, for alleged actions by the Czech Republic's Media Council in the 1990s that impacted the profitability of a broadcasting investment. What could have been one claim was essentially divided into two. The two tribunals in these cases found no abuse of right and held that both Mr. Lauder and the company are protected by the respective treaty. Later tribunals have applied closer scrutiny to ensure that double recovery – which may result in unjust enrichment – can be avoided.[108]

IV. Conclusions

This chapter has examined the meaning of "investment" and "investor" in international investment law. In conclusion, it is important to reiterate that the meaning of the concepts "investment" and "investor" 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 these concepts, it is generally advisable for states to adopt clear rules delineating the meaning of these concepts in their international investment treaties.

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107 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 September 2001.

108 See, for example, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction of 1 February 2016.