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INTERNATIONAL INVESTMENT LAW

Edited by

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CHAPTER 2

INVESTMENT, INVESTOR, NATIONALITY, AND SHAREHOLDERS

ENGELA C SCHLEMMER*

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THE present chapter covers certain basic issues of definition common to all international investment agreements (IIAs). The starting point for understanding the scope of an IIA is the definition of the terms that activate the protection afforded under the agreement. Specifically, such protection usually extends to the 'investor' and/or their 'investment'. The term 'investor' is normally defined by reference to the nationality of the investor. In relation to natural persons this should not pose many problems. However, in the context of investment by multinational enterprises (MNEs) such issues acquire additional levels of complexity. For example, what is the nationality of an MNE where it is formed of a network of companies incorporated in various jurisdictions? Can a company owned and controlled by a foreign parent but possessing the nationality of its host country take advantage of the protection of an IIA by reason of its foreign control despite its possession of host country nationality? The term 'investment' is usually defined either by reference to the assets that constitute the investment, such as shareholding or contractual rights to profits, or by reference to certain characteristics of the investment, for example whether it is a direct investment made by an enterprise. Equally, what types of assets can be protected under an IIA: should their definition have a connection with a tangible investment or can mere future expectations of profit be protected?

This chapter will seek to outline how such questions have been answered in practice. It will review the nature of the various definitions of 'investor' and 'investment' as found in IIAs and in arbitral practice. The context for such a discussion lies within the process of the development of IIAs, and, in particular, dispute settlement provisions, to which issues of definition are key in determining the enforceability of rights under the agreement for the investor. This has been particularly important in relation to the investor–state dispute settlement process established under the Centre for the Settlement of Investment Disputes between States and Nationals of Other Contracting States (ICSID). Constituted in 1965, this procedure grants a private investor, whether a natural or legal person, the legal capacity to act internationally with reference to qualifying investment disputes.[1] The limitation is that the private investor must be a national of a Contracting State and that the other state party to the dispute must also be a Contracting State.

There are a number of methods that investors can rely on to ensure that disputes concerning their investment will be dealt with by ICSID, or for that matter, by any other international arbitration tribunal that the parties to the IIA agree to offer as a means of dispute settlement. The investor must ensure that during the negotiations of the investment agreement, the state party to the contract consents to ICSID arbitration or to another form of international arbitration.[2] This presupposes that

[1] For a brief historical survey of ICSID, see David R Sedlak, 'ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?' 23 Penn St Int'l L Rev 147 (2004) 149 ff.

[2] One has to remember that the reference to ICSID arbitration is only available if the host state and the home state are both ICSID Contracting States. If only one of the states involved is a Contracting State, then the referral for arbitration could be under the rules of the ICSID Additional Facility. See further Schreuer, 'Consent to Arbitration' ch 21 below.

the state and the investor both consider the agreement pertaining to which the dispute resolution provisions were included, as an investment. There are three, possibly four, situations arising out of the source of consent to ICSID arbitration where one will have to determine whether the transaction in the midst of the dispute is indeed an investment. The first of these is if there is a national law dictating special requirements for a transaction in order to be accepted as an investment; secondly, if the investment contract at first glance does not seem like an investment but the contracting parties have determined that their agreement indeed amounts to an investment; and then thirdly, if the transaction is an investment covered by the protection afforded by a Bilateral Investment Treaty (BIT). In this case, the issue arises whether the investment is one covered by the scope and definition provision of the BIT, a situation distinct from that of whether or not the parties have consented to ICSID arbitration under the investment contract. The fourth determination of the meaning of 'investment' comes in when the dispute is referred for arbitration under ICSID; this time round, for jurisdictional purposes.

The jurisdiction of ICSID and the application of a BIT are not only dependent upon the element of 'investment', but also on the element of 'investor'. Even though an investment is made by an investor, it does not automatically entitle the investor to the protection under a BIT or any other investment treaty. The investor's right to protection under these treaties is based on his or her nationality. The determination of his, her, or its nationality is done according to specific rules, rules which differ depending on whether the investor is a natural person or a juridical person.

Against this background the remainder of the chapter will consider in more detail the meanings of the key definitional terms under IIAs, commencing with the definition of 'investment', followed by an examination of the term 'investor', in relation to both natural and legal persons. In each case, the general usage of these terms in IIAs will be charted as well as the interpretation given to the terms for the purposes of determining the jurisdiction of ICSID tribunals over investor–state disputes brought before them.

(1) THE DEFINITION OF 'INVESTMENT'

This section considers the definition of 'investment' under both national laws and international law. The former may be found in national foreign investment laws and the latter in specific IIA provisions. In relation to the latter a core issue is

whether investment is a term limited to transfers of capital or whether a wider range of assets is included. This issue has been considered in ICSID arbitral decisions and so these will be studied in some detail. Generally, definitions of investment for the purposes of investment law fall under three broad models. The first is the 'asset-based' model, which contains a broad range of specified assets that can be protected under the legislation or agreement in question. This may be contrasted with a 'transaction-based' model, which protects the underlying capital transfer rather than the assets owned or controlled by the investor,[3] and an 'enterprise-based' model, which defines the protected investment in terms of the business organization of the investment through an enterprise. Such an approach usually limits the protection afforded to a foreign direct investment made by a foreign-owned and controlled company or other type of enterprise. As will be seen in the following two sub-sections, national foreign investment laws tend to have transaction or enterprise-based approaches to definition while most BITs tend towards a broad asset-based definition.

(a) National Legislation

A significant number of states have foreign investment laws in place which contain a definition of 'investment'. These investment laws sometimes contain their own definition of investment and very often also contain other requirements that a transaction must comply with in order to be considered an investment or to be entitled to certain benefits or privileges. An example of this is provided by the Namibian Foreign Investment Act of 1992, which provides in section 5 that:

(1) For the purposes of this Act, an investment is an eligible investment—
  (a) if it is an investment, or proposed investment, in Namibia by a foreign national of foreign assets of a value of not less than the amount which the Minister may determine from time to time by notice in the Gazette for this purpose;

[3] The best example being the OECD Codes on the Liberalisation of Capital Movements and Invisibles. See *Code on the Liberalisation of Current Invisible Operations* (OECD/C(61)95) (hereinafter Invisibles Code); *Code on the Liberalisation of Capital Movements* (OECD/C(61)96) (hereinafter Capital Movements Code). The Codes are regularly updated by Decisions of the OECD Council to reflect all changes in the positions of Members. The updated Codes are periodically republished. Both are available for download at <http://www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html>. For background to the Codes see: OECD *OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations User's Guide* (Paris, OECD, 2003), available for download at <http://www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html>; *Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements* (Paris, OECD, October 2002), summary and conclusions available for download at the above website reference.

  (b) if it is a reinvestment, or proposed reinvestment, by a foreign national of the profit or proceeds of sale of an enterprise specified in a Certificate, irrespective of the amount of such reinvestment.

(2) Where the investment is for the acquisition of shares in a company incorporated in Namibia, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1)(a), qualify as an eligible investment only if—
  (a) not less than ten per cent of the share capital of the company is held or will, following the investment, be held by the foreign national making the investment; or
  (b) the Minister is satisfied that the foreign national making the investment is or will be actively involved in the management of the company.

(3) Where the investment is for the acquisition of a participating share in an unincorporated joint venture, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1)(a), qualify as an eligible investment only if—
  (a) not less than ten per cent of the participating share of the joint venture is held or will, following the investment, be held by the foreign national making the investment; or
  (b) the Minister is satisfied that the foreign national making the investment is or will be actively involved in the management of the joint venture.[4]

If an investment in Namibia complies with section 5, the investor may apply for a Certificate of Status Investment.[5] Once such a Certificate is issued, the holder is entitled to a number of benefits.[6] This definition does not offer a full understanding of what is meant by 'investment' as such. The Act does not include a definition of

[4] See <http://www.mti.gov.na/allaboutus_text/full_text_of_foreign_investment.htm> or ICSID, *Foreign Investment Laws of the World* (Oxford University Press) Vol. VI, Release 2004-2 November 2004.

[5] S 6(3) provides as follows: 'In considering an application for a Certificate of Status Investment, the Minister shall have special regard to: (a) the extent to which the proposed investment is likely to contribute towards Namibia's development objectives; (b) the extent to which the enterprise in which the proposed investment is to be made will utilize Namibian resources, including labour and natural resources so as to contribute to the economy, by, *inter alia*: (i) increasing employment opportunities in Namibia; (ii) providing for the training of Namibians; (iii) earning or saving foreign exchange; (iv) generating development in the less developed areas of Namibia; (c) the extent to which the enterprise in which the proposed investment is to be made will contribute to the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices or will facilitate the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society; (d) the extent to which the enterprise in which the proposed investment is to be made will make provision for equal opportunities for women; (e) the impact which the activities of the enterprise in which the proposed investment is to be made is likely to have on the environment and, where necessary, the measures proposed to deal with any adverse environmental consequences'.

[6] *Inter alia* that foreign currency will be available for certain payments (s 8); that disputes will be settled through international arbitration (s 13); etc.

the term in the interpretation section. However, it is clear that the provision connotes a direct investment of shares in an enterprise constituted as a company or joint venture under Namibian law and is, as such, an enterprise-oriented approach. Similarly section 3 of the Tanzanian Investment Act 1997 defines investment as 'the creation or acquisition of new business assets, and includes the expansion, restructuring, or rehabilitation of an existing business enterprise'.[7] The clear implication is that investments under the Act relate to business assets and business enterprise which is defined as 'any industry, project, undertaking or business to which this Act applies or an expansion, restructuring, rehabilitation or technical improvement of the industry, project, undertaking or any part of the business, provided that the business enterprise is profit motivated and operated on commercial principles'.

Some investment treaties also refer to additional formal requirements that have to be complied with domestically, even though no specific foreign investment legislation exists. In ASEAN, for example, it is required that additional formal requirements be met before a transaction will qualify as an investment. In this case, specific approval in writing and registration is required.[8] It was *inter alia* noncompliance with this requirement that caused the tribunal in *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar* to find that it lacked jurisdiction.[9] The necessary approval for the investment was granted prior to the signing of the BIT, but there was no later ratification and therefore the investment did not qualify for protection under the treaty.

By contrast, some national laws follow the broad asset-based definition of investment. For example, the Albanian Law on Foreign Investments, Law No. 7764 of 2 November 1993, defines 'foreign investment' in Article 1(3) as:

> every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor, which consists of:
> (a) real and personal property, tangible and intangible, or any other kind of property right;
> (b) a company [and] rights that flow from every form of participation in a company, with shares etc;

[7] See ICSID, *Foreign Investment Laws of the World* (Oxford University Press) Vol IX, Release 99–1 May 1999. Also see Mexico's Foreign Investment Act of 1993: 33 ILM 207 (1994), which, by Art 2, defines foreign investment as: '(a) The participation of foreign investors, in whatever proportion, in the capital of Mexican corporations; (b) Investment made by Mexican corporations with a majority of foreign capital; and (c) The participation of foreign investors in activities and acts contemplated by this Act'.

[8] See Art II of the Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments Manila, 15 December 1987, which provides 'This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and *which are specifically approved in writing and registered* by the host country and upon such conditions as it deems fit for the purposes of this Agreement'. (emphasis added; the text of the Agreement can be found at <http://www.aseansec.org/6464.htm>.

[9] ASEAN Case No. ARB/01/1 31 March 2003, 42 ILM 540 (2003); this is the first ASEAN arbitration.

> (c) loans, monetary obligations or obligations in an activity that has economic value and is connected with an investment;
> (d) intellectual property, including literary, artistic and technical-scientific works, vocal recordings, inventions, industrial projects, designs for integrated circuits, 'know-how' trade marks, trade mark designs and trade names;
> (e) every right recognized by law or contract, and every license or permission given in accordance with the laws.[10]

This type of provision has many similarities with the asset-based definition provision found in many BITs as will be shown below.

(b) Bilateral and Other Investment Protection Treaties

It is the usual practice for BITs to contain definitions of 'investment' and a number of arbitration tribunals have been confronted with this as a requirement *ratione materiae*.[11] This is particularly so in the case of ICSID which deserves special consideration in this regard and will be considered in sub-section (d) below.

Some agreements take a broad, open-ended, approach to defining what constitutes an investment. For example, Article 1(d) of the US–Honduras BIT defines 'investment' to mean 'every kind of investment' followed by an illustrative list of what constitutes an investment. The illustrative list refers to a company, stocks and shares, other forms of equity, bonds, debentures and other forms of debt interest in a company; contractual rights, tangible property, intellectual property, and rights conferred pursuant to law, such as licences and permits.[12] This is a typical 'asset-based' definition and is used in a significant number of BITs.[13] These definitions

[10] ICSID, *Foreign Investment Laws of the World* (Oxford University Press) Vol I, Release 95–1, January 1995. See too, for a discussion of 'foreign investment' as defined by this law *Tradex Hellas SA v Republic of Albania*, ICSID Case No. Arb/94/2 24 December 1996, 14 ICSID Review–FILJ 197 (1999); 5 ICSID Rep 47 (2002) at paras 103–131.

[11] In a few cases where the existence of an investment was disputed, the tribunal rejected the argument based on the fact that the specific definition of 'investment' in the relevant BIT covered the facts of the dispute under discussion. See for eg *AMT v Zaire* (36 ILM 1531 (1997)); *Fedax v Venezuela* (37 ILM 1378 (1998)). The requirement of 'investment' *ratione materiae* for purposes of establishing the jurisdiction of ICSID is discussed below.

[12] See <http://www.unctad.org/sections/dite/iia/docs/bits/us_honduras.pdf>. See also the definition of 'investment' in NAFTA and ECT. See further Steven Jarreau, 'Anatomy of a BIT—the United States–Honduras Bilateral Investment Treaty' 35 U Miami Inter-Amer LR 429 (2004). Jarreau points out that 'every kind of investment ... includes investment consisting or taking the form of any or all of six categories of juridical entities, legal rights and assets' and that this definition was drafted in terms that would encompass new, yet undeveloped forms of investment.

[13] See UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (New York and Geneva, United Nations, 2007) at 7. Another example is provided by the BIT between Jordan and Lebanon. Art 1(1) provides as follows: 'The term investment means every kind of investment of assets invested in accordance with the laws and regulations of the other contracting party hosting the investment including but not limited to: A. Movable and immovable assets and any property rights

aim to ensure that the protection of the agreement is not limited to foreign direct investment but can also protect indirect investment by way of a shareholding or debt interest in a company and, in addition, any risk-bearing activity undertaken by the investor which can be diminished in economic values by reason of state intervention in the enjoyment and functioning of that activity. Hence, the need to cover both tangible as well as intangible assets, and direct and portfolio investment.[14]

Some IIAs will contain narrower definitions, for example those which focus only on a 'closed list' of investments.[15] The 1998 Framework Agreement on the ASEAN Investment Area, for example, explicitly excludes portfolio investments from its coverage.[16] A further significant exception arises where the BIT extends protection

connected herewith such as mortgages, pledges and guarantees; B. Bonds, shares and securities in companies ownership; C. Titles and claims to money or right in any obligation to work having financial value; D. Intellectual property including rights relating to publication, patents, trademarks, trade names, industrial designs, commercial secrets, technical manufacturing processes, know-how and goodwill; E. Business privileges granted by law or contract prospecting and discoveries and extraction or exploitation of natural resources, any change in invested funds form shall not have effect in their classification as investment provided that such change shall not contradict the laws and regulations of the contracting party hosting the investment.' See <http://www.unctad.org/sections/dite/iia/docs/bits/lebanon_jordan.pdf>. See for further examples Art 1(1) Agreement between the Government of the Republic of Chile and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments 28 May 1993 (reproduced at <http://www.unctad.org/sections/dite/iia/docs/bits/chile_denmark.pdf>); Art 1(a) Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Cuba (reproduced at <http://www.unctad.org/sections/dite/iia/docs/bits/cuba_netherlands.pdf>).

[14] This approach is found not only in BITs but also in Free Trade Agreements, some regional agreements, and the Energy Charter Treaty. For example, Art 10.27 of the United States–Morocco Free Trade Agreement defines investment as 'every asset, that an investor owns or controls, directly or indirectly, that has the characteristics of an investment,... forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;... and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.' See too the Energy Charter Treaty Art 1(6); ASEAN Agreement for Promotion and Protection of Investment Art 1(3): UNCTAD, *Scope and Definition*, Series on issues in international investment agreements (New York and Geneva, United Nations 1999) at 18–23.

[15] See eg NAFTA Art 1139(h), which includes portfolio investment but excludes debt securities of, or loans to, a state enterprise and excludes claims of money that arise solely from commercial contracts for the sale of goods or services across borders, and the extension of credit in connection with commercial transactions: NAFTA 32 ILM 605 (1993) at 647. In addition during the negotiations for a Multilateral Investment Agreement (MAI) there was some resistance to an open definition of investment which included portfolio investment: UNCTAD, *Lessons from the MAI*, Series on issues in international investment agreements (New York and Geneva, United Nations, 1999) at 11. See further Jürgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment', Jean Monnet Working Paper (6/02 New York, New York School of Law, 2002) 47ff.

[16] Art 2 provides as follows: 'This Agreement shall cover all direct investments other than: (a) portfolio investments; and (b) matters relating to investment covered by other ASEAN Agreements, such as the ASEAN Framework Agreement on Services'. See Framework Agreement on the ASEAN Investment Area 8 October 1998, available at <http://www.aseansec.org>. The exclusion of portfolio investments is often due to legitimate concerns regarding the negative consequences of the volatility of such investment flows: see UNCTAD, *World Investment Report 1997* (New York and Geneva, United Nations, 1997) ch III.

to any kind of asset provided that 'the investment has been made in accordance with the laws and regulation of the contracting party receiving it...'.[17] Some agreements also restrict protection to investments made in the territory of another contracting party or investment that is owned or controlled by an investor of a contracting party on the territory of the other contracting party.[18]

From the above it is clear that the making of lists of assets and investment types is common in IIAs. Noah Rubins[19] identifies three categories of such lists. He calls them treaties with an 'illustrative', an 'exhaustive' or a 'hybrid' list. The so-called 'illustrative list' treaties define investment in very broad terms and then illustrate the scope of their application by furnishing a list, which does not contain a *numerus clausus* of categories. The above examples of broad asset-based definitions illustrate this approach. Rubins refers to the North American Free Trade Agreement (NAFTA) as an example of a treaty which uses the exhaustive list approach.[20] The 'hybrid list' has elements of both a broad definition of investment as well as a non-exhaustive list of different forms of investment. The US–Singapore Free Trade Agreement offers an example.[21] Such lists are not generally seen as exhaustive unless the treaty so spe-

[17] See eg Chile–New Zealand BIT 1999 cited in UNCTAD, above n 13 at 9. Also see *Empresas Lucchetti SA and Lucchetti Peru SA v Republic of Peru*, ICSID Case No. Arb/03/4 7 February 2005 where the Peru–Chile BIT defines 'investment' in Art 1(2) as follows: 'The term "investment" refers to any kind of asset, provided that the investment was made in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made' and then a non-exhaustive list of transactions, rights etc, is listed. The award is published at <www.ita.law.uvic.ca/documents/luchetti.pdf>. See too *Inceysa Vallisoletana v El Salvador*, ICSID Case No. Arb/03/26 Decision on Jurisdiction 2 August 2006. The tribunal held that where the claimant obtained a concession contract through fraud they could not bring a claim for breach of the applicable BIT against the termination of the concession on the ground that the concession was not obtained 'in accordance with the law' as required for the protection of the BIT to apply. The ICSID tribunal therefore had no jurisdiction to hear the claim, see <http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf>.

[18] See UNCTAD, above n 13, for examples.

[19] See Noah Rubins, 'The Notion of "Investment" in International Investment Arbitration' in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (The Hague, Kluwer Law International, 2004) at 292 ff.

[20] Above n 15 and Rubins, above n 19 at 293.

[21] See Rubins, ibid at 294. The text of the US–Singapore FTA is available at <http://www.tcc.mac.doc.gov/pdf/singaporeFTA/text_final.pdf>. Art 15.1(13) provides as follows: 'Investment means every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. [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.] Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar

cifies. Thus, where an illustrative list is used, the categories of covered investments are open to scrutiny on a case-by-case basis. On the other hand, where a hybrid approach is taken, careful reading of the provision is required to ascertain just how much freedom is given to the parties to determine what constitutes a covered investment. Thus where a functional definition of investment is given, only activities and assets that come within it can be covered.

(c) 'Investment' Equal to a Transfer of Capital?

An interesting aspect that has been raised by recent arbitral tribunals, is whether, for an 'investment' to qualify as a foreign investment, a transfer of capital is required. Some commentators have indicated that the distinction between foreign direct investment and portfolio investment, and the resultant question of whether a capital injection is necessary or not, is long outdated.[22] Others seem adamant that this is not the case and that in order to have an investment, there should be a transfer of or a movement in capital: thus, that the origin of the capital should be known and that it must clearly transpire that the capital moved across borders.

The traditional point of view is that the 'decisive criteria for the existence of a foreign investment is the nationality of the investor', the source of the funds being irrelevant. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of foreignness in terms of its origin or in terms of the currency in which it is made.[23]

However, in the decision in *SGS v Philippines*,[24] the tribunal reaffirmed the decision in *SGS v Pakistan*[25] where it was stated that an investment was made where there

contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.' (One footnote has been included in square brackets, other footnotes have been omitted.)

[22] See Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure' in Aron Broches (ed), *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Boston and Dordrecht, Martinus Nijhoff, 1995) at 205. The issue played a role during the drafting phase of the ICSID Convention where the argument was raised that the nationality of the investment should play a more important role than the nationality of the investor. The Chairman (Mr Broches) said that he could not see how the Convention could make a distinction based on the origin of the funds (History of the Convention Vol II 261, 397–8); as a result, this aspect was not pursued. See also Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) at 266.

[23] But see *Yaung Chi OO*, above n 9 at paras 43–5 where the tribunal found that a capital transfer had in fact been made.

[24] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. Arb/02/6, 29 January 2004, available at <www.worldbank.org/icsid>.

[25] *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No. Arb/01/13, 6 August 2003, available online at <www.worldbank.org/icsid>.

had been an 'injection of funds into the territory... [of a Contracting State other than the State of nationality of the investor] ... for carrying out... [the activities pertaining the investment]'.[26] There is thus a clear indication that the tribunals in these instances were looking for a movement in capital. In the decision in *Tokios Tokelės v Ukraine*,[27] the majority of the tribunal held that since the parties to a BIT have the discretion to determine what they consider to be an investment and what requirements have to be complied with in order for ICSID to have jurisdiction, they cannot read an additional requirement, such as the transfer of capital, into the BIT if none was expressly stated. Thus, if there is no express requirement of funds, or capital to originate in a foreign country or in the other contracting state, the tribunal cannot read that requirement into the BIT:

> In our view, however, neither the text of the definition of 'investment', nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text. ... the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which ... is to provide broad protection to investors and their investments in the territory of either party.[28]

The tribunal noted that neither the ICSID Convention nor the Ukraine–Lithuania BIT contained a requirement that capital used by an investor should originate in its state of nationality or indeed originate outside the host state. The tribunal said:

> The Respondent alleges that the Claimant has not proved that the capital used to invest in Ukraine originated from non-Ukrainian sources, and, thus, the Claimant has not made a direct, or cross-border, investment. Even assuming, *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment.[29]

They also concluded that the ICSID Convention does not contain any requirement that the investment in issue has to have 'an international character in which the origin of the capital is decisive'.[30]

Other international tribunals deciding investment disputes have held that the origin of the capital that goes into an investment is irrelevant for the investment's

[26] Ibid, at para 111, citing *SGS v Pakistan* at para 136.

[27] *Tokios Tokelės v Ukraine*, ICSID Case No. Arb/02/18, 29 April 2004, available at <www.ita.law.uvic.ac.ca>.

[28] Ibid at para 77.

[29] Ibid at para 80.

[30] Ibid at para 82. The tribunal also referred to the *Tradex* case (above n 10) where, the tribunal came to a similar conclusion. See also Carlos G Garcia, 'All the other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' 16 Fla J Int'l L 301 (2004) at 309.

international nature. In *Tradex v Albania*[31] there was a dispute between the parties on the legal relevance of the financial sources of Tradex's alleged foreign investment in Albania. Tradex claimed that the financial sources of its investment were irrelevant. The tribunal agreed with Tradex on this point and noted that the law that formed the basis for jurisdiction contained a broad definition of investment that did not give room for further conditions.[32] The tribunal said: 'The Tribunal concludes here that the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law'.[33] In *Olguín v Paraguay*,[34] the respondent argued that in order to be protected, the funds invested must originate in the country of which the investor is a national. The tribunal found that this requirement was not expressly indicated in the relevant BIT and therefore rejected this argument.[35]

It follows from the above authorities that the origin of the funds is irrelevant. Whether the affected investments were made from imported capital, from profits made locally, from payments received locally, or from loans raised locally makes no difference to the degree of protection enjoyed. The foreign nature of an investment is determined exclusively by the nationality of the investor that exercises ownership and control. However, the dissenting arbitrator in the *Tokios Tokelės* case, the tribunal president, Prosper Weil, stated 'when it comes to ascertaining the international character of an investment, the *origin of the capital is relevant, and even decisive*'.[36] He stated that if the determination of the origin of the capital is not from another country, one cannot speak about an 'international' investment. In the same vein then, when applied to BITs, the capital will have to be from a state other than the host state.

We thus have two opposing views from tribunals and arbitrators concerning this aspect when dealing with international investments. Vandevelde,[37] in turn, in his economic analysis of BITs, states the following:

> *Control*, then, is a key element of the rationale for establishing foreign direct investment. Indeed, foreign direct investment *may not involve movement of capital* at all, but only a shift in control, as acquisition of control could be wholly financed within the host state.[38]

[31] *Tradex v Albania*, Award, 29 April 1999, above n 10.

[32] Ibid at paras 105, 108–11.

[33] Ibid at para 111.

[34] *Olguín v Paraguay*, Award, 26 July 2001, 6 ICSID Reports 164.

[35] Ibid at para 66 n 9. In *Wena Hotels v Egypt*, Award, 8 December 2000, 41 ILM 896 (2002) at para 126, Decision on Annulment, 28 January 2002, 41 ILM 933 (2002) at para 54, both the tribunal and the ad hoc committee found the alleged origin of the funds from other investors who were not entitled to benefit from the applicable BIT irrelevant.

[36] *Tokios* case, Dissenting Opinion, para 20; emphasis added.

[37] Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties', 41 Harv Int'l LJ 469 (2000) at 476.

[38] Emphasis added.

This is a very important statement especially when considering the problem that tribunals are faced with, as can be seen from the cases just referred to. Vandevelde then continues:

> In contrast to foreign direct investment, portfolio investment, by definition, offers a way to increase return *without exercising control over* the company in which the investment is made. Foreign portfolio investment also offers mechanisms for risk reduction, particularly through geographic diversification.[39]

Where one deals with portfolio investments, there is a definite transfer of capital, and as has been pointed out, portfolio investments are sometimes expressly *excluded* from coverage by a treaty.[40] He concludes as follows:

> In the crudest sense, then, BITs encourage and protect foreign ownership or control of host state assets, whether new or existing. In other words, *BITs do not promote the movement of capital*, but rather *the movement of control over capital*. ... control is often precisely what the foreign investor seeks, both to increase return and decrease risk. Therefore the test of whether a particular asset is protected by the BIT is whether it is of value to a foreign investor, not whether it serves the economic policy of the host or home state.[41]

If one were to follow Vandevelde's argument, which sounds very convincing, then the tribunals will have much less difficulty in finding for the existence of international investments. The question that will still remain is whether this is indeed the result that the parties intended when concluding the BIT.

Juillard, in his discussion of the freedom of establishment, capital movements and investment makes a statement similar to that of Vandevelde. He says that

> the freedom of investment and the freedom of movements of capital do not totally coincide with each other, if for no other reason than that *all investments do not necessitate a capital movement*, i.e., a payment associated with a capital transaction. Freedom of investment and freedom of movements of capital, therefore, should not be considered synonymous.[42]

Thus the cross-border movement of capital may not be decisive in determining whether an investment exists for the purposes of an IIA. Ultimately, the intention of the contracting parties to the BIT should be followed unless that leads to an absurd result. An easy solution would be to make an express statement in the BIT as to the relevance, or not, of the origin of the capital. It is interesting to note that in two recent

[39] Vandevelde, above n 37 at 476. Emphasis added.

[40] See in this regard Vandevelde's following statement: 'The investment also need not be advantageous to the host state in any other specific way. For example, it may be financed locally, thus bringing no foreign currency into the host state. In fact, the foreign investment may crowd out domestic investment—and the latter may be more likely to purchase local inputs (labor, supplies, machinery, etc.), rather than import them. BITs do not require that the investment result in technology transfer or worker training' (ibid at 492).

[41] Vandevelde, ibid; emphasis added.

[42] Patrick Juillard, 'Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment' 15 ICSID Rev–FILJ 322 (2000) 335; emphasis added.

Free Trade Agreements between the USA and Singapore and the USA and Morocco, the element of a 'commitment of capital' was included in the definition of investment. The relevant parts read as follows: 'investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, *including* such characteristics as *the commitment of capital or other resources*, the expectation of gain or profit, or the assumption of risk'.[43] In the US–Singapore Free Trade Agreement, 'investment means every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment'. The footnote following this sentence reads as follows: '[w]here 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'.[44] *Commitment* of capital, however, does not require a *movement* of capital. Taking all of the above into account, one has to conclude that the movement of capital (i.e. the nationality of capital) does not play a role. If that were to be the case, then it must be clearly spelt out in the relevant investment treaties.

(d) 'Investment' for Purposes of ICSID

Before one can conclude on the issue of investment, there is still one area where the requirement of an 'investment' plays an important role and forms the basis of most arbitration tribunals' decisions, and that is an 'investment' as a requirement *ratione materiae* for purposes of determining the jurisdiction of the ICSID Convention. A provision in an investment contract or BIT, in terms of which investment disputes may or must be submitted to ICSID for arbitration, normally provides the necessary consent that ICSID requires. However, this does not mean that the ICSID tribunal will automatically have jurisdiction; the jurisdictional requirements of ICSID must still be met.[45] Article 25(1) of the ICSID Convention provides as follows:

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

The determination of ICSID's jurisdiction thus depends primarily on whether an investment exists, plus compliance with the other requirements. For our purposes, the current focus is purely on what is meant by 'investment'. This concept

[43] Art 10.27 US–Morocco FTA; emphasis added.

[44] US–Singapore FTA, above n 21 Art 15.1.13, emphasis added.

[45] See Schreuer, above n 22 at 121 paras 80 ff for a discussion of the drafting history of the Convention with specific reference to the issue of including a definition for 'investment' or not; also see Sedlak, above n 1 156 ff.

is not defined in the Convention.[46] The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[47] states that:

(no attempt[48] was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

It was, however, a deliberate decision not to include a definition of investment in the Treaty 'for fear that a concrete meaning would limit its scope and raise unnecessary jurisdictional problems'.[49] Technically speaking, the absence of a definition should make the determination of the jurisdiction of the Centre easier; the definition of 'investment' should depend on the parties' consent in the separate international investment agreements or in international instruments. But it is quite obvious that this has not been the case. The absence of a definition makes it possible to have a fairly liberal interpretation when it comes to deciding what an investment would be. Since the Convention contains no further *indicia* as to what an investment could be, arbitrators have resorted to the use of traditional definitions[50] as well as to more modern[51] definitions of investment.

[46] See Georges Delaume, 'ICSID Arbitration: Practical Considerations' 1 J Int'l Arb 101, (1984) 116–17 for a general discussion.

[47] In para 27; The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, IBRD, 18 March 1965.

[48] See however Schreuer, above n 22 who indicates that there were a number of attempts, none of them successful. See also David A Lopina, 'The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s' Ohio State Journal on Dispute Resolution 107 (1988) at 114 for a discussion of the drafting history of the Convention.

[49] Lopina, above n 48 at 114; see further Rubins, above n 19.

[50] Lopina, above n 48 at 115, lists the following as examples of traditional forms of investment: 'concessions, establishment agreements, joint ventures, loans made by private financial institutions to foreign public entities, and arrangements concerning industrial property rights'. He also gives a list of agreements which have become the subject of disputes before ICSID tribunals: '(i) the exploitation of natural resources, such as bauxite mining, (*Alcoa Minerals of Jamaica/Kaiser Bauxite Company/Reynolds Jamaica Mines and Reynolds Metals Company v Government of Jamaica* ICSID Cases Arb/74/2, 3 & 4) oil exploitation and exploration (*AGIP SPA v People's Republic of the Congo*, ICSID Case Arb/77/1; *Tesoro Petroleum Corp v The Government of Trinidad and Tobago*, Case Conc/83/1), and forestry exploitation (*Liberian Eastern Timber Corp (LETCO) v The Government of the Republic of Liberia*, Case Arb/83/2); (ii) industrial investments regarding the production of fibers for exports (*Adriano Gardella SpA v Government of Ivory Coast*, Case Arb/74/1), or of plastic bottles for domestic consumption (*Société Ltd Benvenuti & Bonfant v People's Republic of the Congo*, Case ARB/77/2), liquefaction of natural gas (*Guadalupe v Nigeria*, Case Arb/78/1), and the production of aluminum (*Swiss Aluminium Ltd (ALUSUISSE) and Icelandic Aluminium Company Ltd (ISAL) v The Government of Iceland*, Case Arb/83/1); and, (iii) tourism development in the form of construction of hotels (*Holiday Inns/Occidental Petroleum v The Government of Morocco*, Case Arb/72/1; *AMCO Asia Corp, Pan American Development Ltd and PT Indonesia v Indonesia*, Case Arb/81/1), and urban development in the form of housing construction (*Société Ouest Africaine des Bétons Industriels (SOABI) v The State of Sénégal*, Case Arb/82/1)' (footnotes have been included in parentheses). This gives a clear indication as to the vast number of transactions that can be and have been considered to be investments.

[51] Lopina, above n 48 at 115 ff gives a list of so-called non-traditional forms of investment: 'profit-sharing, service and management contracts, contracts for the sale and erection of industrial plants,

The arbitral tribunal in *CSOB v Slovak Republic*[52] said the following in this regard:

> This statement [in the Report of the Executive Directors] also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that 'the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein.' This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.[53]

However, an agreement between parties describing their transaction as an investment is not conclusive for determining the jurisdiction of ICSID based on Article 25(1). If, however, the parties do not expressly characterize their transaction as an investment, their acceptance of the Centre's jurisdiction 'with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention'.[54] The final decision or interpretation lies with the relevant arbitration tribunal, which is not bound by the parties' express or implied choice.[55] The only limiting factor should be the first preambular sentence of ICSID which speaks of 'the need for *international*

turn-key contracts, international leasing, arrangements and agreements for the transfer of know-how and technology. Illustrations of non-traditional investment include the construction of a chemical plant on a turn-key basis coupled with a management contract providing technical assistance for the operation of the plant (*Klöckner Industrie Anlagen GmbH v The United Republic of Cameroon and Société Camerounaise des Engrais (SOCAME)*, Case Arb/81/2), a management contract for the operation of a cotton mill (*SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie mbH v The Government of the Democratic Republic of Madagascar*, Case Conc/82/1), a contract for the conversion of vessels into fishing vessels and the training of crews (*Atlantic Triton Company Ltd v The Republic of Guinea*, Case Arb/84/1), and technical and licensing agreements for the manufacturing of weapons (*Colt Industries Operating Corp, Firearms Div v The Government of the Republic of Korea*, Case Arb/84/2).' (Footnotes have been included in parentheses.)

[52] *Ceskoslovenska Obchodni Banka AS (CSOB) v The Slovak Republic*, ICSID Case No. Arb/97/4, 24 May 1999, 14 ICSID Rev–FILJ 251 (1999).

[53] Ibid at para 64.

[54] Ibid at para 66.

[55] In terms of Art 41(1), ICSID is the 'judge of its own competence'. Arbitration tribunals have in the past looked at the requirement of 'investment' without one of the parties contesting it and in all these cases have come to a positive finding: *LETCO v Liberia* Decision on Jurisdiction, 24 October 1984 2 ICSID Reports 349; *SOABI v Senegal* Award, 25 February 1988 2 ICSID Reports 219; see also Schreuer, above n 22 at 126–8.

co-operation for *economic development*[56] and the role of *private international investment* therein'.[57]

Through the years, specific criteria have been used by ICSID tribunals to determine whether the transactions they were confronted with were indeed investments.[58] These criteria with small variations are the following: the existence of a substantial contribution; the project should have a certain duration; participation in the risks of the transaction for both parties; and the operation should be significant for the host state's development.[59]

[56] This seems to give an indication that the investment should have some positive implication for development; see Schreuer, above n 22 at 125; see also Emmanuel Gaillard, 'International Arbitration Law, The First Association of Southeast Asian Nations Agreement Award' NYL J 7 August 2003 at 3, 8; *Salini Costruttori SpA & Italstrade SpA v Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, *Journal de Droit International* 196 (2002) 42 ILM 609 (2003); Omar E García-Bolívar, 'The Recent Jurisprudence of ICSID on Jurisdiction as of June 2004' at <http://www.bg-consulting.com/docs/presentation_icsid_062004.doc>. In *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, above n 52 the following was said: 'This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention' (paras 64, 73, 76); and in para 88: 'This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention'. One will also have to look at the relevant BITs because some of them may also contain a similar provision which would then emphasize this aspect of the decision. See eg the US–Uruguay BIT, 25 October 2005: 44 ILM 268 (2005), the second preambular sentence, which reads as follows: 'Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties'. The claimant in *Joy Mining Machinery Limited v The Arab Republic of Egypt* (ICSID Case No. Arb/03/11, 6 August 2004, 44 ILM 73 (2005); settled 16 December 2005) also relied on this aspect (para 40) but to no avail—*Joy Mining*, para 61.

[57] Emphasis added. This seems to be in line with the statement by Aron Broches, above n 22 at 208, where he says that the lack of definition in the Convention 'leaves a large measure of discretion to the parties ... this discretion is not unlimited and *cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention*' (emphasis added).

[58] *Fedax NV v Venezuela*, Decision on Jurisdiction, 11 June 1997, 31 ILM 1378 (1998) para 43, *Salini Costruttori SpA et Italstrade SpA c/ Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, *Journal de Droit International* 196 (2002) 42 ILM 609 (2003) para 53; *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003 para 133 n 113; *Joy Mining Machinery Ltd v Egypt*, Award on Jurisdiction, 6 August 2004, paras 53, 57, 62; *AES Corporation v Argentina*, Decision on Jurisdiction, 26 April 2005, para 88; *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 130–8.

[59] These were also the criteria applied by the Tribunal in ASEAN (in their first arbitral award, *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN Case No. Arb/01/1, 31 March 2003, 42 ILM 540 (2003)) to define 'investment'. They relied on capital contributions made over a period of time, equipments and supplies shipped from Singapore to Myanmar and paid for from YCO's resources. See also the tribunal's report in *Salini Costruttori SpA & Italstrade SpA v Kingdom of Morocco* Decision on Jurisdiction, 16 July 2001, *Journal de Droit International* 196 (2002) para 52. The tribunal refers to Gaillard in JDI 1999 292 ff; 30 ILM 577 (1991). It is interesting to note that in two recent Free Trade Agreements, between the USA and Singapore and the USA and Morocco some of these criteria were included in the definition of investment. The relevant parts read as follows: 'investment means every asset that an investor owns or controls, directly or indirectly, that has the *characteristics*

Although these basic criteria are generally applied, it cannot be regarded as a *numerus clausus*. There are a number of instances, involving non-traditional types of investment transactions,[60] where one cannot just rely on these criteria *in abstracto* but has to look at all the circumstances of the case in a flexible manner.[61] For instance, in *CSOB v Slovakia*,[62] the contract between the parties merely contained a reference to a BIT (which in turn contained an ICSID clause)[63] and, taking all the facts into account, this was considered sufficient amongst the parties to infer that they regarded their agreement as an investment.[64] However, certain limits must be observed. As Professor Brownlie has pointed out investments should include only 'legal entitlements' and the concept does not extend to 'mere expectations'.[65]

In this regard, there have been early instances where pre-investment expenditure was found not to be an investment, as was the case in *Mihaly International Corporation v The Democratic Socialist Republic of Sri Lanka*.[66] Expenditures of this kind are nowadays normally treated as part of an investment. Since the *Mihaly* award, more and more BITs and other international investment instruments have

of an investment, *including* such characteristics as *the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*. Forms that an investment may take include…' (Art 10.27 US–Morocco FTA; emphasis added) and Art 15.1.13 of the US–Singapore FTA, above n 21: 'investment means every asset owned or controlled, directly or indirectly, by an investor, that has the *characteristics* of an investment 15-1'. Footnote 15-1 reads as follows: '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*'. (emphasis added). This is also known as the *Salini* test. See also *Jan de Nul NV Dredging International NV v Arab Republic of Egypt*, ICSID Case No. Arb/04/13 Decision on jurisdiction, 16 June 2006, para 91.

[60] See the list offered by Lopina, above n 48.

[61] As Roberto Bruno and Joseph HH Weiler note, 'this flexibility is important because foreign investment takes continuously new economic and legal forms. Moreover, while it is important that in their request the parties specify out of which investment their dispute has arisen, any definition of investment by the parties would be of little relevance, since it would always be subject to the tribunal's scrutiny, when it determines whether it has subject matter jurisdiction or not': 'Access of Private Parties to International Dispute Settlement: A Comparative Analysis', Jean Monnet Working Paper No 1397, available at <http://www.jeanmonnetprogram.org/papers/97/97-13.html>.

[62] *Ceskoslovenska Obchodni Banka AS v The Slovak Republic*, above n 52.

[63] Art 7 of the Agreement provided as follows: 'this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Reciprocal Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992' (paras 4, 49 of the award).

[64] Para 89. See also *Liberian Eastern Timber Corporation (LETCO) v Government of the Republic of Liberia*, 2 ICSID Rep 343 (1986), 26 ILM (1987) 647; *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela*, ICSID Case No. Arb/00/5, Decision on Jurisdiction at 12, 78 (27 September 2001), reprinted in 16 ICSID Rev–FILJ 469, 474, 494 (2001) or <http://www.worldbank.org/icsid> where the dispute was submitted to arbitration pursuant to contractual agreement.

[65] Separate Opinion Ian Brownlie in *CME Czech Republic SA v Czech Republic*, Final Award 13 March 2003 at <http://www.cetv-net.com/articlefiles/439-Final_Award_Quantum.pdf> at para 20 (citing *Metalclad v United Mexican States*, Final Award, para 122). This was said in arguing that the damages that should have been awarded in that case should have been limited to the amount of money actually invested and not to include lost profits—see para 21 and the sources referred to.

[66] Decision of 15 March 2002 41 ILM 867 (2002).

phrased their definitions of investment in such a way as would include pre-investment expenditure. The US–Singapore FTA currently provides that an investor 'means a Party or a national or an enterprise of a Party that is *seeking to make, is making, or has made* an investment in the territory of the other Party…'[67] thus broadening the scope of the investment protection to people who are merely seeking to invest.

The question whether a construction contract falls under the concept of investment was raised during the drafting phases of the Convention, but it was left open.[68] In *Salini v Morocco*[69] this aspect was dealt with in some detail. The dispute arose from the construction of a highway by Italian contractors in Morocco. Morocco argued that the construction contract did not constitute an investment. The tribunal examined the criteria listed above with reference to the facts of the particular case and found that the contract constituted an investment pursuant to the definition of investment in the BIT read together with the definition in Article 25 ICSID Convention.[70] In *Salini v Jordan*[71] the dispute arose from a contract for the construction of a dam. The respondent in this case did not object to the tribunal's jurisdiction based on the fact that the dispute did not arise out of an investment.[72] The issue was evidently too clear to provide a basis for a promising challenge.

In another case, *Fedax NV and the Republic of Venezuela*,[73] the ICSID tribunal dealt with the question whether promissory notes would qualify as an investment and it was found that in the circumstances of this case, the investment-related promissory notes did indeed qualify as an investment.[74] In the more recent decision in *Joy Mining v Egypt*[75] the tribunal had to determine whether the giving of certain performance guarantees amounted to an investment. This time round, even after

[67] Art 15.1.17 US–Singapore FTA, above n 21. In the US–Morocco FTA, Art 10.27 provides that an investor is someone who 'concretely attempts to make, is making, or has made an investment', thus there is a very small difference between the two definitions (see <www.unctad.org/iia>).

[68] History of the Convention, Vol II, 500.

[69] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco*, above n 56.

[70] 'The construction contract creates a right to a "contractual benefit having an economic value" for the Contractor'—as was referred to in the definition of the BIT. The contractor also had a benefit in terms of 'right of an economic nature conferred … by contract' as stipulated in the same definition (para 45). Authorization for the construction contract was also obtained as required in the BIT definition. See also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, Case No. ARB/03/29 Decision on Jurisdiction, 14 November 2005, available at <http://www.worldbank.org/icsid>.

[71] *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 29 November 2004 44 ILM 573 (2005).

[72] Ibid at para 6.

[73] Above n 11 at ILM, 1378.

[74] See further the discussion by Raul Emilio Vinuesa, 'Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience' 8 L & Bus Rev Am 501 (2002) at 513.

[75] *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, 6 August 2004, 44 ILM 73 (2005); also published at <www.ita.law.uvic.ca>.

referring to the reasoning in the *Fedax* case, the tribunal came to a different conclusion. It is doubtful whether this decision is correct. The tribunal's argument that there was no risk involved and that the period was too short does not appear convincing. It seems as if the tribunal also rejected, albeit not expressly, the requirement set out in the preamble of the ICSID Convention, that an investment should also be aimed at economic development, which, in this case, it definitely was.

On the latter point, there is a lively discussion about the requirement of a contribution to the host state's economic development. In *LESI v Algeria*, the tribunal found this criterion to be irrelevant.[76] By contrast, there are two recent decisions that have found this element decisive for the existence of an investment. In *Patrick Mitchell v Democratic Republic of the Congo*,[77] the ad hoc committee rejected the claimant's argument that the contribution to economic development was merely a supplementary condition and not an essential element in the definition of an 'investment':

> 33. The *ad hoc* Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential—although not sufficient—characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.

In *Malaysian Historical Salvors, SDN, BHD v Malaysia*,[78] the tribunal reviewed the existing arbitral awards on this issue. It concluded:

> 123. The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State's economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an 'investment.' It also bears noting that in *Joy Mining*, the value of the bank guarantee had a value of GBP 9.6 million and yet did not qualify as a contribution to the economy of Egypt. Taking into account the entire factual matrix of the case, this feature may be of considerable, even decisive, importance. This is due in part to the Tribunal's findings that the other features of 'investment,' such as risk and duration of contract, only appear to be superficially satisfied on the facts of this case, and not in the qualitative sense envisaged under ICSID practice and jurisprudence. The Tribunal is therefore left only with the contributions made by the Claimant, and has to determine whether these contributions would represent a significant contribution to the host State's economic development.
>
> 124. In unusual situations such as the present case, where many of the typical hallmarks of 'investment' are not decisive or appear to be only superficially satisfied, the analysis of the remaining relevant hallmarks of 'investment' will assume considerable importance. The Tribunal therefore considers that, on the present facts, for it to constitute an 'investment' under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.

Thus while there is disagreement on the precise weight to be given to the issue of economic development, tribunals will usually take this criterion into account when determining whether they are faced with an 'investment' covered by the ICSID Convention.

[76] ICSID Case No. Arb/05/03, Decision on Jurisdiction at para 72 (iv), available at <http://ita.law.uvic.ca/documents/LESIAlgeria.pdf>.

[77] ICSID Case No. Arb/99/7, Annulment Decision, 1 November 2006 at <http://ita.law.uvic.ca/documents/mitchellannulment.pdf>.

[78] ICSID Case No. Arb/05/10, Decision on Jurisdiction, 17 May 2007, at <http://ita.law.uvic.ca/documents/MHS-jurisdiction.pdf>.

(2) The Definition of 'Investor'

All BITs and other international instruments dealing with investment provide definitions of whom they consider to be investors. The decisive criterion is the nationality of the investor. This is normally apparent from the different bilateral investment treaties which would accord protection to the nationals of the relevant contracting parties. For example, Article 1(c) of the BIT between Australia and Argentina defines 'investor' as follows:

> (i) in respect of Australia:
> (A) a natural person who is a citizen or permanent resident of Australia; or
> (B) a company; and
> (ii) in respect of the Argentine Republic:
> (A) a natural person who is a national of the Argentine Republic in accordance with its laws on nationality; or
> (B) a legal person;[79]
> (D) 'company' means any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised:
> (i) under the law of Australia; or
> (ii) under the law of a third country and is owned or controlled, directly or indirectly, by an entity described in paragraph 1(d)(i) of this Article or by a natural person who is a citizen or permanent resident of Australia;
>
> regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability.[80]

[79] By Art 1(e) of the Agreement 'legal person' means any entity constituted according to the laws and regulations of the Argentine Republic or having its seat in the territory of the Argentine Republic.

[80] Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol (Canberra, 23 August 1995), entry into force: 11 January 1997, Australian Treaty Series 1997 No. 4 available at <http://www.unctad.org/sections/dite/iia/docs/bits/argentina_australia.pdf>.

When looking at this definition, it is clear that a basic distinction is made between natural persons and legal persons and/or companies.[81] The determination of nationality on the side of both natural and juridical persons involves distinctive questions.

(a) Nationality of the Investor who is a Natural Person

The definition of investor in a bilateral investment treaty must always be read in conjunction with the definition provided in the ICSID Convention if ICSID is to play a role in the dispute settlement process. The mere inclusion of permanent residents in the BIT definition does not automatically extend the jurisdiction of ICSID to such an investor.[82]

Article 25(2) of the ICSID Convention requires that the individual or private investor that has the advantage of making use of this dispute settlement facility must be a 'national of another Contracting State'. Article 25(2)(a) reads as follows:

[81] Other examples confirm this approach. Thus the BIT between Lebanon and Switzerland defines investor in Art 1 (1) as: '(a) natural persons who, according to the law of that Contracting Party, are considered to be its citizens; (b) legal entities, including companies, co-operations, business associations and other organizations, which are established under the law of that Contracting Party, as well as legal entities not established under such law but effectively controlled by nationals or legal entities of that Contracting Party; these criteria also apply to holding and offshore companies'. Available at <http://www.unctad.org/sections/dite/iia/docs/bits/lebanon_switzerland.pdf>. The US–Morocco FTA, above n 67, defines an investor in Art 10 para 27 as follows: 'Investor of a non-Party means, with respect to a Party, an Investor that concretely attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party; Investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that concretely 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'. The BIT between South Africa and Korea defines investor in Art 1(2) in the following terms: 'The term "investor" means any natural or juridical person who invests in the territory of the other Contracting Party. (a) the term "natural person" means with respect to either Contracting Party, a natural person having the nationality or citizenship of that Contracting Party in accordance with its laws; (b) the term "juridical person" means with respect to either Contracting Party, any entity incorporated or constituted in accordance with, and recognized as a juridical person by its laws, such as public institutions, corporations, foundations, companies, partnerships and associations irrespective of whether their liabilities are limited or otherwise, and whether or not organized for pecuniary profit.' See <http://www.unctad.org/sections/dite/iia/docs/bits/korea_southafrica.pdf>. The Multilateral Agreement on Investment Guarantees (MIGA) provides in Art 13 that eligible investors are as follows: '(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'.

[82] For a general discussion, see EC Schlemmer, 'Die nasionaliteit van 'n belegger vir doeleindes van die internasionale beleggingsreg' *TSAR* 468 (2006) at 471–6.

'*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.

This requirement is also found in every bilateral investment treaty as well as the multilateral investment treaties.[83] The reason for this requirement is obvious. The individual's nationality accords him or her a particular position in international law. Nationality bestows on the individual the benefit of the protection provided by his state in particular circumstances, or as in these cases, the additional right or privilege to be able to refer an investment dispute to an international arbitration tribunal without having to rely on the state for protection or intervention.[84]

There are no international law principles applicable to the determination of the nationality of a particular individual. This is dependent on the national legislation of the relevant state.[85] Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provides the following:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[86]

Due to the different nationality laws in existence, it is possible for an individual to have the nationality of more than one state[87] or even reside in a state of which he or

[83] See the examples in n 81.

[84] See generally Schlemmer, above n 82.

[85] Subject to small variations, BITs define 'nationality' with reference to the parties' national laws on citizenship. See Rudolph Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague, Martinus Nijhoff, 1995) at 31–3; Schreuer, *The ICSID Convention: A Commentary*, above n 22 at 267–9. In *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No. Arb/05/15 Decision on Jurisdiction, 11 April, 2007 (available at <http://ita.law.uvic.ca/documents/Siagv.Egypt.pdf>) the tribunal held: '153. The Tribunal must determine the nationality of the Claimants. Application of international law principles requires an application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstances. Both Egyptian law and the practice of international tribunals is that the documents referred to by the Respondent evidencing the nationality of the Claimants are *prima facie* evidence only. While such documents are relevant they do not alleviate the requirement on the Tribunal to apply the Egyptian nationality law, which is the only means of determining Egyptian nationality.'

[86] 1937 League of Nations Treaty Series 4137. Even though this Convention never came into force, it contains the generally accepted position in international law on the issue.

[87] One has to be aware of the fact that dual nationality does not grant one automatic diplomatic protection from both states. Nor does the fact that a person has the nationality of a state also mean that he or she can rely on diplomatic protection in all instances. This was clearly seen in the *Nottebohm* case (*Liechtenstein v Guatemala*) (1955 ICJ Rep 4). Art 25(2)(a) of the ICSID Convention provides that the individual investor must not be the national of the host state at the same time as being a national of another Contracting State for the purposes of eligibility to bring a claim against that state, see

she has no nationality.[88] This however does not allow the individual to rely on the protection of both states should he or she be in need of such.

In the *Nottebohm* case, the International Court of Justice held that even though a state may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state providing the protection and the national in need of protection.[89] This decision indicated that in cases where a state seeks to protect its national against the actions of the state where he or she is habitually resident and has his or her 'fixed abode', the claim can only succeed if the national has a clear and valid connection with the protecting state.[90] It is also accepted in international arbitral or judicial proceedings, that when someone challenges the nationality of a person, the international tribunal is competent to adjudicate that matter.

Schreuer, above n 22 at 270–1. In a recent ICSID arbitral award, *Champion Trading Company and others v Arab Republic of Egypt*, ICSID No. Arb/02/9, Decision on Jurisdiction, 21 October 2003 (available at <http://www.worldbank.org/icsid>), it was found that Art 25(2)(a) of the ICSID Convention clearly provides that if a claimant has dual nationality, that is of both the host state and the home state, then he or she is not eligible as a party to an ICSID arbitration. The provision of Art 25(2)(a) was found to be absolute. The 'real and effective nationality' requirement does not come into play when one deals with dual nationality in this instance: 'Article 25 contains a clear and specific rule regarding dual nationals' (at 16). The Tribunal was of the opinion that a different decision may be necessary in instances where the 'exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable' (at 16). Also see the definition of investor in the US–Morocco FTA, quoted above n 67.

[88] It is sometimes found that a treaty extends its rights to permanent residents (see eg the definition of investor in the Australia-Argentina BIT, quoted above n 80). Schreuer, above n 22 at 269, suggests that this extension of treaty rights does not imply or amount to an extension of ICSID's jurisdiction, as an agreement to treat someone as entitled to protection under the BIT does not create a nationality that does not exist.

[89] The 1930 Hague Convention provides the following in Art 5: 'Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is *habitually and principally resident*, or the nationality of the country with which in the circumstances he appears to be in fact *the most closely connected*' (emphasis added).

[90] The *Nottebohm* case contained the following key statement (at 23): 'According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, 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.' This does not play as important a role when one deals with the protection provided in terms of MIGA. Art 13(b) of the Convention establishing the Multilateral Investment Guarantee Agency provides that 'in case the investor has more than one nationality, for the purposes of Section (a) above the nationality of a member shall prevail over the nationality of a non-member, and the nationality of the host country shall prevail over the nationality of any other member'.(see n 81 above). This is clearly done to provide the national of the member with the protection that is provided by a guarantee in terms of the MIGA and one cannot falter this.

In the recent ICSID arbitration *Hussein Nuaman Soufraki v The United Arab Emirates*,[91] the jurisdiction of the Centre was denied based upon the investor's inability to satisfy the nationality requirement of Article 25(2)(a). Briefly, the facts were the following: The investor claimed that he had dual nationality: that of Italy[92] as well as that of Canada.[93] He could only institute the action in reliance on the Italy–United Arab Emirates BIT if he was an Italian citizen. This claim was contested by the UAE. The tribunal investigated the investor's claim of Italian nationality and found that he lost his Italian nationality when he spontaneously acquired Canadian citizenship and established his residence abroad.[94] The mere fact that Soufraki could present certificates of nationality only provided prima facie evidence of his nationality.[95] He did not comply with the Italian nationality laws and the tribunal found that he lacked the necessary nationality and that the tribunal thus lacked jurisdiction to try the matter. A further line of argument was raised by the UAE, but not taken up by the tribunal, namely, that in instances of more than one nationality, the tribunal has to look at the *effective or dominant nationality* of the investor.[96] A brief reference to *Nottebohm* and the *nationality of convenience* was made, but was not considered to be relevant.[97]

It would have been very useful and interesting had the tribunal considered this aspect of dominant and effective nationality.[98] It might have enriched the

[91] ICSID Case No. Arb/02/7, 7 July 2004; see also *Champion Trading Company*, above n 87.

[92] He was able to produce two Italian passports and five certificates of Italian nationality. He claims his Italian nationality by right of *jus soli* and *jus sanguinis*. *Soufraki*, above n 91 at para 49.

[93] Which he acquired by reason of his naturalization in 1991, about six years prior to the institution of the ICSID arbitration.

[94] This is in accordance with Art 8 para 1 of the Italian Law No. 555 of 1912—see *Soufraki* at paras 24, 52–82.

[95] Ibid at para 63; see also Schreuer, above n 22 at 268 para 433, who states: '… A certificate of nationality will be treated as part of the "documents or other evidence" to be examined by the tribunal in accordance with Art. 43 [of the Convention]. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.'

[96] *Soufraki* at paras 42 ff. 'An alternative argument advanced by the Respondent was that, even if Mr Soufraki should be found by the Tribunal to have been a national of Italy at the relevant dates, his dominant nationality was then not Italian but Canadian and hence his Italian nationality should not be treated as effectively Italian for purposes of an action under the Italy-UAE BIT.'

[97] Ibid at para 45. See too *Champion Trading*, above n 87, where it was held that Art 25 of the ICSID Convention did not leave room for a test of dominant or effective nationality. This was upheld in *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, above n 85 at para 198.

[98] Sinclair makes the following observation in his discussion of the *Soufraki* case: '… at stake is a matter of principle. Investment promotion and protection treaties are designed to create a mechanism of direct recourse to arbitration against a host state, independent of any need for further intervention by the investor's home state. The bond of nationality appears to have diminished in significance to a mere formality. The construction of this system for the resolution of international investment disputes is worthy and remarkable. Yet, in entering into investment treaties states generally act upon a desire to create favourable conditions for greater investment flows between the Contracting States in the mutual hope that this will increase their prosperity and the prosperity of their nationals. These goals might suggest that as between an investor and the state under whose treaty of protection it seeks to gain

jurisprudence of ICSID and investment treaty arbitration in general.[99] It is noteworthy that even though the tribunal did not consider the decision in *Nottebohm*, which concerned the acquisition of a nationality 'in exceptional circumstances of speed and accommodation', the tribunal makes the following remark: 'had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise'.[100] The ease with which the tribunal suggests a solution which would not have been acceptable in the case of an individual finding a suitable nationality, underlines the inconsistency between the requirements used for the determination of jurisdiction in the case of individuals and those used for juridical persons.[101]

The tribunal's clear suggestion that an investor should go 'nationality hunting'[102] or 'treaty shopping' by way of establishing a corporate presence in a jurisdiction that has a BIT with the host country, based on the best possible protection that such a BIT can offer, underscores the need for future development in this area or if it is found to be acceptable, to be aware of the doors of opportunity that can open for potential and future investors. In particular, such an approach may encourage non-nationals of any Contracting State to take advantage of the ICSID Convention, by reason of the nationality of the legal person that they have set up in a jurisdiction that offers a BIT with the host country and includes an ICSID dispute settlement clause. This raises issues of how corporate nationality is determined, to which attention now turns.

protection there is the need for a bond of more substance than mere nationality on paper.' Anthony C Sinclair, 'Nationality of Individual Investors in ICSID Arbitration' 6 Int ALR 191 (2004) at 194.

[99] Sinclair, ibid at 193. Also see his further exposition on the history of ICSID concerning the position of dual nationals and whether or not the intention really was to exclude them from making use of ICSID. In this connection, the decision of the tribunal in *Champion Trading Company*, above n 87, is worth noting. The case involved claims made by dual US and Egyptian nationals against Egypt. The claimants had acquired dual nationality on the basis of their father's Egyptian nationality at the time of their births, which under Egyptian law made them dual US and Egyptian nationals. According to the tribunal: 'What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. According to the documents, Dr. Mahmoud Wahba acted in this connection as the legal guardian of his then still minor three children. The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention.' *Soufraki*, at 17.

[100] Ibid at para 83.

[101] Sinclair, above n 98 at 194; Schlemmer, above n 82 474 ff. See the discussion below.

[102] Sinclair, above n 98 at 194 n 26: 'Shopping for treaty protection is indeed a recognised phenomenon. US investors in India are alleged to have adopted this tactic in order to avail themselves of investment treaties concluded by India with Mauritius.' He also refers to LE Peterson, 'Bechtel and GE Mount Billion Dollar Investment Treaty Claim against India' INVEST-SD News Bulletin (26 September 2003), available at <www.iisd.org/pdf/2003/investment_investsd_sept_2003.pdf>.

(b) Corporations as Investors—Nationality of a Corporation

There is a clear distinction between the way individuals and corporations are treated in international investment law, especially regarding the issue of nationality. A corporate person may have a nationality based on the place of incorporation, or the effective seat of management or principal place of business. As such, the link between the corporation and a particular state may be more tentative than for a natural person. Indeed, the 'brass plate company' that is incorporated in one country but which carries out its main operations elsewhere is a common phenomenon in international business. For the purposes of investor protection under an IIA, this may have significant implications. As noted above, incorporation could allow non-nationals of the ICSID Contracting States to benefit from the convention by incorporating in a Convention State. Equally, given the complexity of modern multinational corporate groups, the component companies in the group may each possess different nationalities, raising the prospect of multiple claims. However the most significant matter concerns the nationality of subsidiary companies within the host country. Were the limited doctrine of corporate nationality under international law, as espoused in the *Barcelona Traction Case*,[103] to be applied this would cause considerable problems in relation to the effectiveness of BITs that contain ICSID dispute settlement clauses.

Specifically, the ICJ in *Barcelona Traction* espoused the place of incorporation and principal seat theories of corporate nationality and rejected a control test that would allow for the lifting of the corporate veil between the company and its owners so as to establish the nationality of the latter as the effective nationality of the company. This approach would lead to the result that where foreign investors incorporate a local subsidiary in the host country, they would lose the right to use international institutional arbitration under a body such as ICSID, where the dispute in question arises as a result of the treatment accorded to the subsidiary by the host country. This is because the subsidiary has the respondent state's nationality. In order to avoid this result, which would in effect remove the most common type of investor–state dispute from ICSID jurisdiction, Article 25(2)(b) of the ICSID Convention provides as follows:

> 'National of another Contracting State' means:
> (b) any *juridical person* which had the nationality of a Contracting State other than the State party to the dispute *on the date* on which the parties *consented to submit* such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. (Emphasis added)

[103] *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (1970) ICJ Reports 3.

Two things transpire from a reading of this article: (i), the time at which the required nationality must exist is *only* on the date on which the parties consent to arbitration,[104] and (ii), the parties *may agree* that if a corporation has the nationality of the host state (which would normally exclude it from initiating proceedings), *but* it is controlled by foreign nationals, then that corporation will be treated as a national of another Contracting State.[105]

The concept 'juridical person' is not defined in the Convention, but within the context and taking the negotiating history into account, it is fairly certain that it relates to an enterprise with legal personality.[106] The nationality of a corporation is also not defined in the Convention.[107] As noted above, international law uses two main criteria in order to establish corporate nationality. The widest criterion assigns nationality to the state of incorporation or where the registered office is. A second criterion assigns nationality to the state in which the seat of the corporation is situated, thus the place of central administration or the so-called effective seat.[108] In both these instances

[104] There is no requirement of continuous nationality as was found to exist in NAFTA in the *Loewen* case under NAFTA (*Loewen Group Inc and Raymond L Loewen v United States of America*, Case No. Arb (AF)/98/3 award of 26 June 2003, 42 ILM 811 (2003)). Here it was stated that in 'international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.' (para 225). In this case, a former Canadian enterprise was reorganized in terms of US law and became a US corporation. The former Canadian corporation ceded its claim against the USA to a newly created Canadian corporation whose only asset was this claim and the pursuit of this claim its only business. The real beneficiary of the claim, it was found, was an American citizen and the mere fact that the claimant had the requisite nationality at the time the claim arose is of no consequence (see para 225). It seems that due to the fact that the NAFTA Agreement does not contain any reference to the existence of nationality at the time of the resolution of the claim, the tribunal felt that it had to apply customary international law to resolve the question of the need for continuous national identity (para 226). A similar situation has not arisen in the ICSID context. For a general discussion of the case, see Stefan Matiation, 'Arbitration with Two Twists: Loewen v United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes' 24 U Pa J Int'l Econ L 451 (2003).

[105] And it would bring it in line with the economic reality of the investing enterprise as a multinational entity. It also makes it possible for foreign investors who are shareholders of this company to be in a position to make use of the protection offered by an investment treaty. Furthermore, due to the fact that in many instances the capital importing country will prescribe the form that a corporation must take, *inter alia* requiring that it must be incorporated according to national laws of the host state, the nationality of the corporation will thus exclude it from the benefits of the BIT.

[106] See Schreuer, above n 22 at 276 para 459.

[107] The Convention does not provide any more guidance as to how the nationality of a corporation should be determined. That is left to the tribunal in the particular circumstances within the context of the particular facts and international instrument involved. According to Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' 107 Recueil des Cours 361 (1962–111): 'the parties should be given the widest possible latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion'.

[108] Judge Jessup (para 39) in his Separate Opinion in *Barcelona Traction* says: '[t]here are two standard tests of the "nationality" of a corporation. The place of incorporation is the test generally favoured in the legal systems of the common law, while the *sige social* is more generally accepted in the civil law

a piercing of the corporate veil is excluded. No allowance is thus made to look at the nationality of the controlling shareholders.[109] Schreuer[110] refers to the division amongst scholarly opinion on whether any other tests or criteria should be used or permitted for the determination of 'nationality' under article 25(2)(b). Delaume[111] is very much in favour of using the place of incorporation or *siège social* as the main criterion whereas Amerasinghe[112] is in favour of a more flexible approach; an adequate connection should exist between the juridical person and the state.

A reading of ICSID cases shows that the tribunals have adopted more or less uniformly the test of incorporation or seat in determining corporate nationality.[113] The majority of the tribunal in the *Tokios* case stated the following:[114]

> Moreover, '[t]he overwhelming weight of the authority... points toward the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b).' As Professor Schreuer notes, '[a] systematic interpretation of Article 25(2) (b) would militate against the use of the control test for a corporation's nationality.'[115]

Even though the determination of the nationality of a corporation is not based on control, it is a fact that in many instances, even though the nationality of the corporation may be that of state A, it is in essence being controlled by nationals of state B. Particularly for this reason, it is provided in the Convention that Contracting States may agree on a different nationality than the one that is indicated by applying the criteria mentioned in order to provide for the necessary protection that would otherwise be withheld and that would be contrary to the intention of promoting investments in capital importing countries.

Even though ICSID allows the parties to determine the nationality of the corporation according to their own criteria, when one deals with treaty-based arbitration, the starting point for the determination of the nationality of the corporation would be found in the relevant treaty. The Energy Charter Treaty, for example, follows this

systems. (See Kronstein, 'The Nationality of International Enterprises' 52 Col. LR 983 (1952)) There is respectable authority for requiring that both tests be met.'

[109] See Schreuer, above n 22 at 277; Vandevelde, above n 37 at n 198; UNCTAD, *Scope and Definition*, above n 14 at 37–41.

[110] Schreuer, above n 22 278 ff and the sources referred to.

[111] Georges R Delaume, 'ICSID Arbitration and the Courts' 77 AJIL 784 (1983) at 793, 794.

[112] Discussed in Schreuer, above n 22 at 278–9 para 464.

[113] Schreuer, ibid 279-80 (citing *Kaiser Bauxite Company v Jamaica*, Decision on Jurisdiction, ICSID Case No. Arb/74/3 6 Jul 1975, 1 ICSID Reports 296 303 (1993); *SOABI v Senegal*, Decision on Jurisdiction, ICSID Case No. Arb/82/1, 1 August 1984, 2 ICSID Reports 175, 180–81; *Amco Asia Corporation and others v Republic of Indonesia* (ICSID Case No. Arb/81/1), Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389, 396; see also *Autopista Concesionada de Venezuela CA v Bolivarian Republic of Venezuela*, Decision on Jurisdiction, Case No. Arb/00/5 27 September 2001, 16 ICSID Rev–FILJ 469 (2001) at para 108; these were also cited in the *Tokios* decision (above n 27) para 43. This is also in line with the provisions of many BITs where the incorporation or seat is usually used separately, or in combination, as the determining factors. See UNCTAD, above n 13 at 15–16.

[114] With reference to Schreuer, above n 22 at 281 para 468.

[115] *Tokios Tokeles*, above n 27, citing Schreuer, above n 22 at 279.

approach and then goes further and provides in Article 17(1) of Annex I to the Final Act of the Energy Charter Treaty that each Contracting Party reserves the right to deny the benefits of the Treaty to a legal entity if citizens or nationals of a third state own or control that entity and if that entity has no substantial business activities in the area of the Contracting Party in which it is organized.

As noted above, a juridical person that has the nationality of the host state may, in terms of ICSID Article 25(2)(b),[116] on agreement between the parties,[117] be treated as a national of another Contracting State because of foreign control.[118] The element of 'foreign control' has been dealt with extensively by different tribunals.[119] The control test is clearly only applied to the circumstances described in the article.[120] This includes an inference that the agreement on nationality must be causally connected to the element of foreign control and that, in turn, requires the tribunals to investigate objectively where the control lies.

Normally one would use the criterion of 'control' to assign the nationality of the corporation to the state whose nationals own or control the corporation. However, Article 25(2)(b) does not use the reference to foreign control to enable the tribunal to assign nationality to the corporation in accordance with the existence or fact of foreign control. The designation of nationality takes place according to the normal criteria of incorporation or seat. Only if that designation assigns the corporation with the nationality of the host state and there is an element of foreign control, may the parties agree that the nationality will be that of the other Contracting State. Due to the existence of the foreign control, the two states agree to treat the corporation as a national of the non-disputing party. The use of the word 'foreign' in the qualifying 'foreign control' indicates that the controllers may not be nationals of the host state. The following question is whether they may be nationals of *any* state or merely nationals of Contracting States. Schreuer concludes that a proper interpretation of the Convention and Article 25(2)(b) can only result in a finding that the nationals in control must also be nationals of other Contracting States.[121]

[116] The relevant part of Art 25(2)(b) reads as follows: '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 purpose of the Convention'.

[117] This aspect will not be dealt with in detail since it seems as if ICSID tribunals are readily prepared to accept even implicit agreements to this effect. For a more detailed discussion, see Christoph Schreuer, 'Access to ICSID Dispute Settlement for Locally Incorporated Companies', in Friedl Weiss, Erik Denters, and Paul de Waart (eds), *International Economic Law with a Human Face* (The Hague, Kluwer Law International, 1998) at 499–503 and the decisions he refers to.

[118] Agreement to this effect is required, but ICSID does not require any specific format that the agreement should take. See Schreuer, ibid at 497–8.

[119] See Schreuer, ibid at 504–7 and in *The ICSID Convention: A Commentary*, above n 22 at 308–12, where he discusses the different cases where the tribunals have examined the actual existence of foreign control as an objective requirement.

[120] *Tokios*, above n 27 para 45.

[121] Schreuer, above n 22 at 286 para 482. See also *SOABI v Senegal*, 1 August 1984, 2 ICSID Rep 182; this view was also supported by the Dissenting Opinion 2 ICSID Rep 288–9, 292.

It has become more and more pertinent to look at the aspect of the control of a corporation when one wants to determine its nationality especially for purposes of international investment arbitration. The currently applied test of incorporation requires no real link between the corporation and the state where it is incorporated; the corporate veil conceals the real appearance of the corporation. The test of the seat of the corporation requires something more, whether some activities are taking place and whether the corporation is managed from that particular state; yet still the corporate veil remains untouched. 'Control' or 'ownership' is the only criterion that requires a real 'connection' which can only be determined by lifting the corporate veil.[122] This test is not unfamiliar to traditional international law. A control test was applied in cases of enemy aliens, and that thus resulted in the piercing of the corporate veil.[123]

The question now is whether the time has not come to remove the corporate veil and look at the real owners and controllers of a corporation and assign its nationality accordingly. The real purpose of investment protection is to provide protection for the investors of Contracting States. When these investors are corporations, they should be receiving protection only in those instances where they can effectively be said to be nationals of the relevant Contracting States and not merely that of the Contracting State of convenience.

The recent decision in *Tokios Tokelės v Ukraine* is a prime example of the illogical result that can be achieved if nationality is determined based on the test of incorporation or seat and the reality is ignored. In this case, the claimant was incorporated under Lithuanian law, but 99 per cent of its shares were held by Ukrainian nationals and they comprise two-thirds of its management.[124] Ukraine argued that if the tribunal were to find jurisdiction in this case, it would be 'tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government' and this would be inconsistent with the object and purpose of the ICSID Convention.[125] Ukraine therefore urged the tribunal to pierce the corporate veil and to determine its nationality by looking at the nationality of its predominant shareholders.[126] The tribunal refused to do so, stating that,

[122] See Vandevelde, above n 37 and also UNCTAD, above n 14 at 37–9.

[123] See *Barcelona Traction*, above n 103 para 59; Schreuer, above n 22 at 277.

[124] Above n 27 at para 21.

[125] Ibid at para 22.

[126] The tribunal stated in para 63, citing the *Autopista* case (above n 64), that ' "arguments of an economic nature are irrelevant" where "the parties have specifically identified" the country of legal establishment "as the criterion to be applied" and "have not chosen to subordinate their consent to ICSID arbitration to any other criteria." This Tribunal, like the tribunal in *Autopista*, is obliged to respect the parties' agreement "unless it proves unreasonable." Far from unreasonable, reference to the state of incorporation is the most common method of defining the nationality of business entities under modern BITs and traditional international law.' But not once does the tribunal look at the purpose of ICSID in general, it merely looks at the intention of the parties, the wording of the BIT, and Art 25.

38. Rather, under the terms of the Ukraine-Lithuania BIT, interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. Thus, the Claimant is an investor of Lithuania under Article 1(2) (b) of the BIT.

39. We reach this conclusion based on the consent of the Contracting Parties, as expressed in the Ukraine-Lithuania BIT. We emphasize here that Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended.[127]

The tribunal then says that if they were to use the control-test, they would be limiting ICSID's jurisdiction and that would be inconsistent with the object and purpose of Article 25(2)(b).[128] In light of the set of facts and the whole object and purpose of ICSID, this statement by the majority seems to be inconsistent with that object and purpose.[129] The dissenting opinion by the tribunal president, Prosper Weil, seems to be more in line with that object and purpose. He feels that 'the approach taken by the Tribunal on the issue of principle ... is ... at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution'.[130]

One of the main purposes of ICSID is to 'facilitate the settlement of disputes between States and foreign investors' with a view to 'stimulating a larger flow of private international capital into those countries which wish to attract it'.[131] Weil emphasizes the fact that ICSID was aimed at the settlement of investment disputes between *foreign* investors and other states, thus clearly not between states and their own nationals. By not piercing the corporate veil in the current instance, this is indeed the result that was achieved and it does not fall within the scope and objective of the Convention.[132]

[127] Ibid at paras 38–9.

[128] Ibid at para 46 ff.

[129] The first preambular sentence of ICSID refers to 'the need for international cooperation for economic development, and the role of *private international investment* therein' (emphasis added).

[130] Above n 27 at para 1.

[131] Report of the Executive Directors on the Convention, para 9, as quoted in the Dissenting Opinion, ibid at para 3.

[132] In the *SD Myers* case, decided under NAFTA, the element of control played an important role in the tribunal's decision. It did not have an effect on the determination of nationality, but on the determination of investor: *Myers (SD) Inc v Canada*, NAFTA Arbitration, UNCITRAL Award of 12 November 2000, 40 ILM 1408 (2001). The tribunal found that SD Myers, even though it owned no shares in Myers Canada, was effectively controlled by the same individual and thus allowed the claim. Chris Tollefson, 'Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime' 27 Yale J Int'l L 141 (2002), sums it up: 'the tribunal rejected this argument on the ground that since the two legal entities were effectively controlled by the same individual, technical arguments with respect to corporate structure should not defeat "an otherwise meritorious claim"' (229). This tribunal clearly showed a willingness to look beyond the 'technicalities' at the real facts.

In the *Barcelona Traction* case, Judge Jessup, in his Separate Opinion,[133] stated the following:

the International Court of Justice in the instant case is 'not bound by formal conceptions of corporation law'. 'We must look at the economic reality of the relevant transactions' and identify 'the overwhelmingly dominant feature'.[134] The overwhelmingly dominant feature in the affairs of Barcelona Traction was not the fact of incorporation in Canada, but the *controlling* influence of far-flung international financial interests manifested in the Sofina grouping.[135]

At a later stage, he says (albeit in the context of extending diplomatic protection to the corporation) 'control may constitute the essential link'. This reasoning by the ICJ does not seem to be contrary to what we are dealing with at the moment. The *Tokios* case has clearly indicated that the strict application of the state of incorporation or seat tests does not reflect the economic realities nor the aim and purpose of investment treaties and thus that the time is ripe to introduce the 'control test' for the determination of the nationality of a corporation for purposes of the international law on foreign investment.

(c) Shareholders as Investors in their Own Right

It has been accepted in international law that shareholders have a right to seek protection independent from the corporation.[136] The decision by the ICJ in the *Barcelona Traction* case[137] which in the past has been held to indicate that shareholders did not have an action for compensation in international law[138] except in two specific cases, namely when the shareholder's direct rights were infringed,[139] or if there is a treaty in

This is also needed within the ICSID framework, especially in the determination of the nationality of corporations.

[133] Above n 103 at n 1.

[134] Mr Justice Marshall delivering the opinion of the Court in *United States v The Concentrated Phosphate Export Assn Inc et al* 89 S Ct, p 361 at pp 366–7, 1968. Note the statement of a leading member of the New York Bar: 'To give any degree of reality to the treatment, in legal terms, of the means for the settlement of international economic disputes, one must examine the international community, its emerging organizations, its dynamics, and relationships among its greatly expanded membership.' (Spofford, 'Third Party Judgment and International Economic Transactions' 113 Hague Recueil 1964, III, pp. 121–3.)' (n 1 in *Barcelona Traction*).

[135] Footnote in original, emphasis added.

[136] Stanimir A Alexandrov, 'The "Baby-Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*' 4 *The Law and Practice of International Courts and Tribunals* 19 (2005) at 27.

[137] *Barcelona Traction Light and Power Company Limited* (*Belgium v Spain*), 1970 ICJ 3. See also the discussion of the case in Paul E Comeaux and N Stephan Kinsella, *Protecting Foreign Investment under International Law Legal Aspects of Political Risk* (Dobbs Ferry, NY Oceana, 1997) 41 ff.

[138] Above n 103 at para 42.

[139] Ibid at para 47: 'It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend

international law-making provision for such an instance[140] has since been dispelled by ICSID tribunals and the ICJ itself. *Barcelona Traction* dealt with the diplomatic protection of a company and not with the issue of the protection of shareholders in investment-related cases;[141] it did not examine whether international law provided an independent source of rights for shareholders or for their protection. The only matter considered by the ICJ was whether a state could protect its shareholders in a foreign corporation affected by measures of a third state.[142] In the subsequent decision in *Elettronica Sicula SpA (ELSI)*[143] the ICJ accepted the protection of foreign shareholders by the state of their nationality against the state of incorporation. This was found even though, in this case, the corporation had the nationality of the host state.[144]

If one were to look at *Barcelona Traction* and read it together with the ICSID provision which determines that an investor may not rely on diplomatic protection when it wants to make use of investment protection provided by ICSID, it would mean that shareholders can initiate the dispute settlement mechanisms under ICSID (and BITs or other investment treaties) only in cases of acts by the host state that affect them directly. If the corporation suffers damage, then it (the corporation) must initiate the proceedings; the shareholders in such an instance will only have indirect claims.[145] This has been applied consistently by ICSID tribunals and was very eloquently stated in *Enron v Argentina*:

> ...what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim.[146]

and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.'

[140] Ibid at para 90: 'the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements.'

[141] See *Barcelona Traction* at 46–8. See also Alexandrov, above n 136 at 27 ff.

[142] See also *Azurix Corporation v Argentine Republic*, ICSID Case No. Arb/01/12, 8 December 2003, at para 71 available at <http://www.asil.org/ilib/azurix.pdf>.

[143] *Elettronica Sicula SpA (ELSI) (United States v Italy)* Judgment of 20 July 1989 (1989) ICJ Reports 15.

[144] *ELSI*, ibid at 15, 23, 48–82; Dissenting Opinion Judge Oda, 83; see also Alexandrov, above n 136 at 28. See too the latest ICJ decision on this topic: *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections, 24 May 2007, available at <http://www.icj-cij.org/docket/files/103/13856.pdf?PHPSESSID=32e957c1af5767a29f750a9c9ca52e5d>.

[145] These principles were also enunciated in the *Barcelona Traction*, *ELSI*, and *Diallo* decisions by the ICJ.

[146] *Enron Corporation and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary claim) 2 August 2004 at para 48 available at <http://ita.law.uvic.ca/documents/Enron-DecisiononJurisdiction-FINAL-English.pdf>. See also *LG&E Energy*

In most instances nowadays, the relevant investment treaties contain a definition of investment that includes a reference to shares, shareholding, or participation in corporations. The position of shareholders as investors is thus certain. This has also been dealt with in this way by ICSID tribunals. The tribunal in *Azurix Corporation v Argentine Republic*[147] came to the following conclusion:[148]

> The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by treaty, namely, under the BIT. The Tribunal does not find it necessary to resolve the controversy regarding the extent of the right of a State under public international law to protect its nationals who are shareholders in foreign companies.[149]

There is no doubt that currently in ICSID-related investment arbitrations the shareholder can bring an action (and rely on protection from) against the host state.[150]

The size of an investment is, as a general rule, not relevant when one deals with investor protection. There is also no requirement that an investor (shareholder) must be a majority shareholder. The percentage of shareholding is never an issue; the mere fact that an investment was made, suffices.[151] Article 25 of the ICSID Convention provides that the jurisdiction of the Centre extends to *any legal dispute* arising directly out of an *investment*. If the shareholder can indicate that he or she is an investor, he or she would be able to invoke the protection of a BIT or other investment instrument and initiate arbitration proceedings if his or her rights were infringed.[152] Nor does the fact that a shareholder is a corporation affect the situation.[153]

Corporation v Argentine Republic, ICSID Case No. Arb/02/1 30 April 2004 at para 52; *GAMI Investments Inc v United Mexican States*, NAFTA Final Award, 15 November 2004 at para 30. The tribunal in *Camuzzi International SA v The Argentine Republic*, ICSID Case No. Arb/03/2 11 May 2005 (paras 138–45) said the following: '[diplomatic protection] cannot be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel in its own right'.

[147] *Azurix Corporation v Argentine Republic*, ICSID Case No. Arb/01/12, 8 December 2003, 43 ILM 262 (2004).

[148] See also Alexandrov, above n 136 at 27.

[149] *Azurix*, above n 147 at para 72.

[150] See also *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. Arb/03/17, Decision on Jurisdiction, 16 May 2006, available at <http://www.investmentclaims.com/decisions/Suez-Argentina-Jurisdictional_Award.pdf>.

[151] *CMS Gas Transmission Co v Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction of 17 July, 2003, 42 ILM 788 (2003); see in general paras 51 ff.

[152] See *Siemens AG v The Argentine Republic*, ICSID Case No. Arb/02/8, 3 August 2004, 44 ILM 138 (2005) at paras 125, 142 and also *Azurix Corporation v Argentine Republic*, above n 147.

[153] See *Siemens*, para 142. The determination of the nationality of the corporation would obviously play a role, but in the same way as it plays a role in the case of an individual shareholder. In the *Siemens* case, Siemens was the investor. According to Siemens, its investment consists of: 'shares, rights of participation in companies and other types of participation', 'claims to money that has been used to create economic value or claims to any performance under a contract having an economic value', 'intellectual property rights', and 'business concessions conferred by public law.' (para 150).

One can thus state that it is without doubt that shareholders have standing in ICSID cases. They can state their claims independently and separately from the claims of the corporation and this principle should be applied to all shareholders regardless of the size of the shareholding.[154] This has been the position of ICSID tribunals since the decision of the Annulment Committee in *Vivendi*[155] where it was held that 'whatever the extent of its [the shareholder's] investment..., it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of substantive protection under the BIT'.[156]

In the *Lanco* case,[157] Lanco held 18 per cent of shares in a corporation that had obtained a concession from Argentina. Argentina argued that due to the fact that Lanco merely had shareholder equity status, it did not have *locus standi*; it was not a party to the concession contract. In the BIT, however, the definition of investment included shareholder equity. Nothing required the shareholder to have a majority shareholding or some other controlling share in the administration or management.[158] The ICSID tribunal found that the 18 per cent shareholding was enough to constitute Lanco an investor for the purposes of the BIT.

> [The] Argentina–U.S. Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share, thus the fact that LANCO holds an equity share of 18.3% in the capital stock of the Grantee allows one to conclude that it is an investor in the meaning of Article I [of the Treaty].[159]

On this basis and given the fact that it was also found that Lanco was a party to the contract with Argentina, jurisdiction was found to exist.[160]

In *CMS Gas Transmission Company v The Republic of Argentina,*[161] CMS was a shareholder in TGN, and the mere fact that it was a minority shareholder did not affect the matter. The definition of investment in the BIT did not limit protected investments to majority shares.[162] The tribunal investigated the rights of

[154] See also Alexandrov, above n 136 at 30.

[155] *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No. Arb/97/3, Decision on Annulment, 3 July 2002, 41 ILM 1135.

[156] Ibid at para 50; see also Alexandrov, above n 136 at 30.

[157] *Lanco v Argentina*, ICSID Case No. Arb/97/6, Decision on Jurisdiction, 8 December 1998, 40 ILM 457 (2001). See also the discussion by Vinuesa, above n 74 at 517 ff (2002).

[158] The tribunal in *Lanco* said the following (para 10): '[A]s regards shareholder equity, the Argentina-US Treaty says nothing indicating that the investor in the capital stock has to have control over the administration of the company, or a majority share'.

[159] Ibid.

[160] 'The investment by Lanco is not merely an investment in stock, but also a [c]oncession agreement made by signing with the Government of Argentina, under which certain rights and obligations arise for the investor.' Ibid at paras 10–19.

[161] See above n 151.

[162] Art I(1) of the US–Argentina BIT defines 'investment' as '... every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investments contracts; and includes without limitation: ... (ii) a company or *shares of stock or other interests in a company or interests in the assets thereof*;... (v) any right conferred by law or contract, and any licenses and permits pursuant to law' (emphasis added).

shareholders in general international law by referring *inter alia* to the *Barcelona Traction*[163] decision and the *Elettronica Sicula SpA (ELSI)*[164] decision. In both these instances, there was a fundamental change in the use of applicable concepts of municipal law in an international law context and state practice.[165] The tribunal came to the conclusion that international law had developed to such an extent that there was no bar to a shareholder bringing a claim independent from the corporation concerned, irrespective of its being a minority or majority shareholder.[166] The tribunal *in casu* concluded that it had jurisdiction over the matter since CMS had a direct right emanating from the BIT and it did not matter whether there was a licence agreement or something of a similar kind.[167] The fact that CMS was a minority shareholder did not detract from this fact. This is a clear confirmation of the decision in *Lanco*.[168]

A similar decision was given by the tribunal in *Enron v Argentina*[169] where it was held that '[t]he Claimants' [they were minority shareholders] right to bring an action on their own has been firmly established in the Treaty [the relevant BIT] and there are no reasons to hold otherwise in connection with this dispute. This situation is neither contrary to international law nor to ICSID practice and decisions'.[170] The tribunal referred to the other ICSID decisions and upheld 'the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in the control of the company'.[171]

[163] Above n 103.

[164] Above n 143.

[165] Even though the *Barcelona Traction* decision did not deal specifically with the issue under discussion, the ICJ did not rule out the possibility of extending protection to shareholders in a corporation when it falls outside the context of national law. In the *Elettronica Sicula* decision (above n 144), the ICJ accepted the protection of shareholders (see also paras 43 ff). See too *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections, General List No 103 ICJ Judgement 24 May 2007 at <http://www.icj-cij.org/docket/files/103/13856.pdf>.

[166] *CMS*, above n 151 at para 48.

[167] Ibid at para 65.

[168] The tribunal in *CMS* examined and referred to a number of decisions of other ICSID tribunals which dealt with the protection of shareholders, for eg: *Antoine Goetz et consorts v République du Burundi*, ICSID Case No. Arb/95/3 Award (10 February 1999) 2004 6 ICSID Rep 5; *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. Arb/87/3, Final Award (27 June 1990), 30 ILM 577 (1991) para 95; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. Arb/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 available at <http://www.worldbank.org/icsid>; *Alex Genin, Eastern Credit Limited Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No. Arb/99/2 Award (25 June 2001) 17 ICSID Rev–FILJ 395 (2002). See too *Vivendi*, above n 155.

[169] *Enron Corporation and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary claim), 2 August 2004; available at <http://ita.law.uvic.ca/documents/Enron-DecisiononJurisdiction-FINAL-English.pdf>.

[170] Ibid at para 27.

[171] Ibid at para 39.

The most recent ICSID case dealing with minority shareholders, *Champion Trading Company and others v Arab Republic of Egypt*,[172] found jurisdiction over the claims of two corporate minority shareholders without even discussing their minority position. This was also the finding of the recent NAFTA UNCITRAL arbitration in *GAMI Investments Inc v Mexico*.[173] A finding of indirect shareholding may increase the possibility of multiple claims. This issue was considered in the *Enron* case as follows:

> The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.... The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment.[174]

Thus the key to determining the extent of the chain of claimants is whether the respondent state has given consent to ICSID arbitration for that particular claimant to bring a claim. Much rests, therefore, on the facts of each case.

Concluding Remarks

The foregoing discussion has highlighted the major contemporary issues surrounding the definition of the key terms 'investment' and 'investor' in international investment law. The main questions in relation to the first term have concerned the breadth of the definition of investment and whether all types of investments, be they direct or indirect, be they enterprise-based or contractually based, should be covered or whether narrower definitions that relate the coverage of the IIA more precisely to

[172] *Champion Trading Company v Egypt*, Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003, at 3 and 18.

[173] UNCITRAL (NAFTA) Final Award, 15 November 2004, at para 37, available at <http://www.investmentclaims.com/decisions/GAMI-Mexico-FinalAward-15Nov2004.pdf>.

[174] Decision on Jurisdiction, above n 169 at paras 50–2.

cross-border capital movements and to foreign direct investment by enterprises rather than individuals should be covered. As to the second term, here issues of ascertainment of nationality are at the core of the legal analysis. The nationality of both natural and legal persons is left mainly to national law and practice, with international law intervening where this causes uncertainty, as in the case of dual nationality of natural persons, or the host country nationality problem for subsidiaries of multinational enterprises incorporated in the host country. A further issue has arisen in relation to the offshore incorporation of companies for the specific purpose of taking advantage of BIT protection in the host country. In this connection, especially after the *Tokios Tokelės* case, the state of arbitral case-law may not be fully satisfactory. The more straightforward and, perhaps, more prudent way to solve the problem would be to take another look at the tests to be applied in determining corporate nationality. The time seems right to address this issue in detail and to follow the route that has been indicated by so many authors and indeed, also referred to by Jessup in *Barcelona Traction*: look at the element of control. International law on this point should be made very clear.

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CHAPTER 3

APPLICABLE LAW

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