question is not treated as the investor but as the investment. This protection extends not only to ownership in the shares but also to the assets of the company.

This generous extension of rights to shareholders can lead to some novel issues. For instance, practical problems can arise where claims are pursued in parallel, especially by different shareholders or groups of shareholders. In addition, the affected company itself may pursue certain remedies while a group of its shareholders may pursue different ones. The situation becomes even more complex where indirect shareholding through intermediaries is combined with minority shareholding. In such a case, shareholders and companies at different levels may pursue conflicting or competing litigation strategies that may be difficult to reconcile and coordinate.

2. Investments

(a) Terminology and concept

Economic science often assumes that a direct investment involves (a) the transfer of funds, (b) a longer term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk. These elements distinguish foreign direct investment from a portfolio investment (no element of personal management), from an ordinary transaction for purposes of sale of a good or a service (no management, no continuous flow of income), and from a short-term financial transaction.[116]

In legal terms, investment regimes need to define their scope *ratione materiae.* Contemporary treaties do not, as a rule, reflect the classical formula 'property, rights, and interests' found in traditional friendship, commerce, and navigation (FCN) treaties, in treaties to settle claims after hostilities, or in human rights documents.[117] Instead, they are built on the modern term 'investment'.[118] This usage is now fully accepted, even though the phrase 'property, rights and interests' had to a considerable extent acquired a distinct legal meaning and the term 'investment' has its origin in economic terminology and needed to be understood and defined as a legal concept when first used in investment agreements.

The reasons the drafters of investment treaties switched from 'property, rights, and interests' to 'investment' is tied to the purpose of such treaties; they were not meant to cover all types of 'property, rights, and interests'. While usage of the term 'investment' is convenient, it also presents the challenge of defining the term to

[116] R Dolzer, 'The Notion of Investment in Recent Practice' in S Charnovitz, D P Steger, and P van den Bosche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005) 261, 263; N Rubins, 'The Notion of "Investment" in International Investment Arbitration' in N Horn (ed), *Arbitrating Foreign Investment Disputes* (2004) 283.

[117] See R Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (1985) 157–63; R Lillich and B Weston, *International Claims: Their Settlement by Lump Sum Agreements* (1975) 180.

[118] In French treaties: 'investissements'; in Spanish treaties: 'inversiones'; in German treaties: 'Kapitalanlagen'; in Austrian treaties: 'Investitionen'.

make it legally manageable and operational, both for purposes of clauses which define the coverage of a BIT and also for the consent of parties to submit their disputes to arbitration.

In practice, two conceptual approaches have been developed to give legal meaning to the term. Bilateral and multilateral treaties have included specific elaborate definitions, usually at the beginning of the operative parts of the agreement. The second approach is based on the usage of the term in regular economic parlance and leaves the interpretation and application to the practice of states and tribunals.

The complexity of the current debate on the term 'investment' arises out of its simple, non-defined use in the jurisdictional clause of the ICSID Convention (Art 25). One approach to the interpretation of 'investment' in Article 25 will orient itself to the definitions in investment treaties, the other to its understanding in the economic literature. In effect, the latter approach requires two separate examinations ('a double keyhole approach'): one under the BIT, the other under Article 25.

A review of the use of the term in treaty practice and in economic discourse establishes that the two approaches may lead to different results in individual cases, but also that variants of the two versions may turn out to yield very similar or identical outcomes. The divergence in the conceptual premises has so far been resolved neither by arbitral jurisprudence nor by academic commentary. However, it appears that a synthesis of the different strands of interpretation may emerge.

(b) Investments as complex, interrelated operations

Tribunals have repeatedly emphasized that an investment typically consists of several interrelated economic activities each of which should not be viewed in isolation. The tribunal in *CSOB v Slovakia*[119] stated:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[120]

Whether costs arising in the course of unsuccessful negotiations for a contract amount to an investment depends upon the circumstances. In the absence of a specific applicable treaty clause, current understanding is that when the negotiations do not lead to a contract and no other type of investment is made, the

[119] *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999.

[120] At para 72. See further *Enron v Argentina*, 14 January 2004, para 70; *Joy Mining v Egypt*, Award, 6 August 2004, para 54; *Mitchell v Congo*, Decision on Annulment, 1 November 2006, para 38; *Duke Energy v Peru*, Decision on Jurisdiction, 1 February 2006, para 92; *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras 110, 114.

potential investor is not in a position to raise a claim under a BIT. The applicability of the BIT presupposes the existence of an investment. In the leading case, *Mihaly v Sri Lanka*, the majority of the Tribunal concluded: 'The Tribunal is consequently unable to accept, as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.'[121]

The *Mihaly v Sri Lanka* Tribunal even went as far as stating, in an *obiter dictum*, that the existence of a duty, on the part of the host state, to negotiate in good faith would not be covered by the notion of investment.[122]

(c) Definitions in investment protection treaties

Multilateral treaties typically define the term 'investment' and provide for ICSID jurisdiction. Examples are the NAFTA, which defines 'investment' in Article 1139[123] or the ECT with its definition in Article 1 section 6.[124] Similarly, the draft of a Multilateral Agreement on Investments[125] contained a definition along

[121] *Mihaly v Sri Lanka*, 15 March 2002, para 61. See further *Generation Ukraine v Ukraine*, Award, 16 September 2003, para 18.9; *PSEG v Turkey*, Decision on Jurisdiction, 4 June 2004, paras 67–105, Award, 19 January 2007, para 304.

[122] At para 51.

[123] NAFTA, Art 1139 reads: investment means:

> (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
>
> but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

[124] ECT, Art 1(6) reads:

> 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

[125] See p 10.

the conventional lines of BITs together with an 'interpretative note', which would have had a limiting effect.[126]

Most bilateral treaties contain a general phrase defining investment (such as 'all assets') and several groups of illustrative categories. No special problems in interpreting such a clause will arise if the investment in question is covered by one of the illustrative categories. An example for this approach is found in the BIT between Argentina and the United States:

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

Other treaties are worded more in line with economic usage. For instance, the BIT between the Ukraine and Denmark (1992) focuses on the purpose of establishing lasting economic relations: 'For the purpose of this Agreement, the term "investment" shall mean every kind of asset connected with economic activities acquired for the purpose of establishing lasting economic relations . . .'[127]

The agreement between the United States and Chile (2003) relies—in a special, at first sight circular, way—on the term 'characteristics of an investment', referring alternatively to commitment of resources, expectation of profit, or assumption of risk:

> 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.[128]

[126] The draft consolidated texts provided for a broad definition of the term 'investment' ('Every kind of asset owned or controlled, directly or indirectly, by an investor'), followed by an illustrative list including claims to money, claims to performance, or intellectual property rights. However, it was foreseen that 'an Interpretative note will be required to indicate that, in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'. See R Dolzer, 'The Notion of Investment in Recent Practice' in S Charnovitz, D P Steger, and P van den Bosche (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005) 261, 265–6.

[127] Agreement Concerning the Promotion and Reciprocal Protection of Investments concluded between the Kingdom of Denmark and the Ukraine on 23 October 1992, Art 1(1).

[128] Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, Art 10.27, 6 June 2003 (available at <http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html>).

The Free Trade Agreement between the European Free Trade Association (EFTA) and Mexico (2000) emphasizes the exercise by the investor of effective influence on management, thus implicitly distinguishing portfolio investment:

> For the purpose of this Section, investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.[129]

In practice, the terms 'rights conferred by contracts' or 'rights granted by the general laws' will often be part of the definition in investment agreements. The matter becomes more complicated if the definition itself contains a reference to the term 'investment' (eg 'a claim to money related to an "investment"'), as is the case in the US-Chile BIT or in a clause contained in the ECT.[130] In such circumstances, recourse to a general concept of 'investment' may be necessary.

Special issues may arise if the definition of an investment in treaties refers to rights governed by the domestic laws of the host state. This is especially so if the treaty recognizes as investments contractual rights or other rights granted under national law. In such situations, the existence of an investment will depend upon an examination of the relevant national law. For instance, an ICSID tribunal may have to rule on the validity of a contract under the national laws of the host state or may have to consider which rights are granted, or not granted, to the investor under domestic law. In the individual case, the international tribunal will take into account the understanding of the law by the organs of the host state and may defer to this understanding. But the final ruling falls to the international tribunal.

BITs frequently include the formula 'in accordance with host state law' or similar formulae in their definitions of the term 'investment'. Host states argued that this meant that the concept of 'investment', and hence the reach of protection under the treaty, had to be determined by reference to their own domestic law. Tribunals have rejected this approach. They have held that reference to a host state's domestic law concerns not the definition of the term 'investment' but solely the legality of the investment.[131] The tribunal in *Salini v Morocco*[132] stated in this respect:

[129] Free Trade Agreement between the EFTA States and the United Mexican States, Art 45, 27 November 2000 (available at <http://secretariat.efta.int>).

[130] See in this respect *Petrobart v Kyrgistan*, Award, 29 March 2005 and the discussion of the ECT, Art 1(6) ('claims to money and claims to performance pursuant to contract having an economic value and associated with an investment').

[131] *Tokios Tokelės v Ukraine*, Decision on Jurisdiction, 29 April 2004, paras 83 et seq; *PSEG v Turkey*, Decision on Jurisdiction, 4 June 2004, paras 109, 116–20; *Yaung Chi Oo v Myanmar*, Award, 31 March 2003, paras 53–62; *LESI—Dipenta v Algeria*, Award, 10 January 2005, para 24(iii); *Plama v Bulgaria*, Decision on Jurisdiction, 8 February 2005, paras 126–31; *Gas Natural v Argentina*, Decision on Jurisdiction, 17 June 2005, paras 33, 34; *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, 21 October 2005, paras 139–55; *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 105–10; *Saluka v Czech Republic*, Partial Award, 17 March 2006, paras 183, 202–21; *Inceysa v El Salvador*, Award, 2 August 2006, paras 190–207.

[132] *Salini v Morocco*, Decision on Jurisdiction, 23 July 2003.

> This provision [the required compliance with the laws and regulations of the host state] refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected because they would be illegal.[133]

(d) 'Investment' in Article 25 of the ICSID Convention

The current wide-ranging debate on 'investment' does not arise out of the definitions in investment treaties, but out of the search for the proper understanding of the non-defined term found in the ICSID Convention. As Article 25 of the Convention serves as the jurisdictional gateway for access to ICSID, the understanding of an investment has increasingly been at the forefront of jurisdictional arguments and tribunals have had to set forth their views in decisions on jurisdiction. In disputes arising outside ICSID, the point does not normally arise in the same way.

The method of interpreting 'investment' must follow Article 31 of the Vienna Convention on the Law of Treaties. As regards the 'ordinary meaning' as the starting point, academic commentary and arbitral jurisprudence have focused in the initial phase on economic terminology, but have more recently looked to the understanding of the term in the broad treaty practice of states. The more treaties were concluded based on the same (or similar) definition by an increasing number of states, the more natural it became to rely on this contemporary legal practice, and the more artificial it appeared to turn to an amorphous understanding of the term in traditional economic literature.

This view is supported by a careful review of the *travaux préparatoires* which has established that the ICSID negotiations did not base their approach on any particular traditional (economic or legal) etymology. Indeed, the Report of the Executive Directors, which is frequently cited on this point by arbitral tribunals, summarized the negotiations by way of concluding that the negotiating parties deliberately refrained from adopting any (legal or economic) definition so as to leave room for an understanding by the parties:

> No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can 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)).[134]

As is evident from the history of the Convention, several rounds of discussions focused on efforts to delimit the term. However, the majority was not in favour of setting a minimum duration of investment, such as three or five years, or a minimum financial commitment. Also, there is no evidence in the record to the effect that parties or tribunals should turn to the term as employed in economic terminology; instead, what was to determine the content of the term 'investment'

[133] At para 46.

[134] 1 ICSID Reports 28, para 27.

was the manner in which the states and the parties to a dispute understood the concept.

(e) Case law

In its initial phase of the evolving case law, *Fedax v Venezuela*[135] had a major influence on the understanding of 'investment'. The Tribunal ruled that Article 25 provided a broad framework of 'investment' and also that the BIT in question (similar to other agreements) gave a very broad meaning to the term, concluding that the promissory notes held by the claimant were covered. In a separate step, the Tribunal went on to examine whether the dispute concerned an 'ordinary commercial transaction' and therefore would not be protected. In this context, relying on academic commentary, the Tribunal turned to the 'criteria approach' and listed five criteria ('the basic features of an investment') which it applied as follows to the promissory notes the claimant had acquired:

> The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development. The duration of the investment in this case meets the requirement of the Law as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payments through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial instrument. It follows that, given the particular facts of the case, the transaction meets the basic features of an investment.[136]

Among the five points in this approach, four (substantial commitment, a certain duration, assumption of risk, and a significance for the host state's development) came to be widely accepted, while regularity of profit was subsequently seldom considered relevant.

The four criteria were clearly set forth in *Salini v Morocco*[137] in 2001 and, thus, out of the legacy of the *Fedax* decision, the approach arose that would become known as the '*Salini* criteria' for investment. The four criteria were now folded into the understanding of an 'investment' within the meaning of Article 25, apparently as cumulative mandatory requirements. The criteria had their origin in the manner in which 'investment' was understood in economic terminology. Thus, economic parlance was transformed into a legal definition which relied on the existence of objective criteria inherent in a project.

An early case in which an ICSID tribunal emphasized that party autonomy finds limits in the general understanding of an 'investment' and denied its jurisdiction

135 *Fedax v Venezuela*, Decision on Jurisdiction, 11 July 1997, paras 21–33.
136 At para 43.
137 *Salini v Morocco*, Decision on Jurisdiction, 23 July 2001, para 56.

was *Joy Mining v Egypt*.[138] In that case, the Tribunal found that the dispute essentially concerned the question whether the claimant was entitled to the release of a bank guarantee that depended upon adequate performance of equipment supplied by the claimant. The Tribunal examined whether such a bank guarantee was to be characterized as an 'investment' or as an 'ordinary feature of a sales contract'.[139] It found that 'it would really go far beyond the concept of an investment, even if broadly defined'[140] to characterize the guarantee—a contingent liability—as an investment. As for Article 25 of the ICSID Convention, the Tribunal emphasized 'that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals'.[141] The Award notes that in 1999 ICSID refused to register a request for arbitration of a dispute arising out of a supply contract for the sale of goods.[142] The Tribunal recognized that the guarantee was given in the context of a contract with the state, which also provided for a number of services such as engineering, stocking of parts, duties of supervision, training, and technical services.[143] However, the decision does not attach significance to these elements in its analysis of an investment.

In subsequent rulings, a series of arbitral decisions cited and accepted the *Salini* approach which, for a while, appeared to be firmly accepted.[144] A degree of divergence from this line became apparent in *Malaysian Historical Salvors v Malaysia*,[145] when the Tribunal argued that the *Salini* criteria should be considered not so much for their mere existence, but for the intensity of their presence ('their quality').

The first digression from the *Salini* approach came in *Biwater Gauff v Tanzania*.[146] The case involved a water project to which the claimant had contributed more than US$ 1 million, plus personnel and know-how. The respondent's main argument to deny the existence of an investment was that the project was not reasonably profitable. The Tribunal assumed, not surprisingly, that an investment was present.

138 *Joy Mining v Egypt*, Award, 6 August 2004, para 63. See also *Mitchell v Congo*, Decision on Annulment, 1 November 2006, paras 39–40, annulling the underlying Award for failure to state reasons in the context of the qualification of a legal consulting firm as an investment under the ICSID Convention.
139 At para 44.
140 At para 45.
141 At para 49.
142 At para 52.
143 At para 55.
144 *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, para 133, footnote 113; *AES Corporation v Argentina*, Decision on Jurisdiction, 26 April 2005, para 88; *Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, paras 130–8; *Jan de Nul v Egypt*, Decision on Jurisdiction, 16 June 2006, paras 90–6; *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras 99–106.
145 *Malaysian Historical Salvors v Malaysia*, Award, 17 May 2007.
146 *Biwater Gauff v Tanzania*, Award, 24 July 2008, paras 323 et seq.

The Award's reasoning amounts to a frontal attack on the *Salini* approach, even though the consequences are not drawn in an equally clear manner.[147] The *Biwater Gauff* Tribunal's criticism of the *Salini* Award rests on two points: that the text of Article 25 of the ICSID Convention contains no reference to the *Salini* criteria,[148] and that the negotiating history clearly establishes that the definition of 'investment' was intentionally left open.[149] On this basis, the Tribunal concluded that ICSID tribunals had no authority to impose their own view of appropriate fixed criteria applicable to all cases.

The *Biwater Gauff* Tribunal further elaborated that the *Salini* approach in effect may arbitrarily exclude certain types of project from protection by ICSID, that this may run counter to individual agreements among investors and host states, and that the *Salini* approach is inconsistent with the developing broad consensus reflected in bilateral investment treaties and their definitions of 'investment'. Moreover, the argument was considered untenable that only 'special and privileged arrangements' were envisaged to fall under the Convention, given that the term 'investment' was intentionally left undefined.[150]

In view of these considerations, the *Biwater Gauff* Tribunal opted for 'a more flexible and pragmatic approach', which 'takes into account the features identified in *Salini*, but along with all the circumstances of the case'.[151] It was not so much this conclusion—aiming at a compromise between party autonomy and the *Salini* approach—as the reasoning of the Tribunal which amounted to an attack on the conceptual foundations of the *Salini* approach and its progeny.

A second, harder strike against the *Salini* concept came with the Annulment Decision in *Malaysian Historical Salvors v Malaysia*.[152] This time, the critique of *Salini* was more direct and elaborate, and the *Salini*-based Award was now designated 'a gross error that gave rise to a manifest failure to exercise jurisdiction'. In an unprecedented Annulment Decision, a sizeable line of arbitral jurisprudence was to be discarded as manifestly in error.

In a first step, the Decision on Annulment concluded that, under the BIT, the claimant's contract had to be considered as an 'investment', a point left open in the Award. The Annulment Committee started its discussion of Article 25 with its view of the ordinary meaning of investment, being 'the commitment of money or other assets for the purpose of providing a return', noting that the term 'investment' is

[147] At para 317, the Tribunal suggests that its approach followed a series of other Awards; this reading seems to stretch earlier jurisprudence. As early as 2002, one Award had determined that 'the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment' (*Mihaly v Sri Lanka*, Award, 15 March 2002, para 33); see also *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, para 90.

[148] At para 312.

[149] At para 313.

[150] At para 315.

[151] At para 316.

[152] *Malaysian Historical Salvors v Malaysia*, Decision on Annulment, 16 April 2009. The Decision came out of a divided ad hoc committee.

unqualified in Article 25.[153] Next, the Committee turned to the *travaux préparatoires* of Article 25 in considerable detail. The result was that the history nowhere points to the *Salini* criteria. The outer limits of the term 'investment' considered in the *travaux* were that simple sales and transient commercial transactions fell outside the scope of the Convention. Within these boundaries, the parties were free to submit whatever dispute they wished to be decided.[154] The *Salini* position is characterized as unduly narrowing the circumstances under which parties could have recourse to ICSID[155] and as running the 'risk of crippling the institution'.[156]

Since the decisions in *Biwater Gauff* and the *Malaysian Historical Salvors* annulment, jurisprudence has not yet settled. As shown below, some tribunals now adhere, in different versions, to the new reasoning based on party autonomy. Others continue to rely on the *Salini* approach, albeit in a modified manner, mostly without discussion of the reasons given in *Biwater Gauff* and the *Malaysia* case.

An award that clearly supports party autonomy in the definition of 'investment' was rendered in *Pantechniki v Albania*.[157] In this case, the claimant had won a bid in an international tender for works on bridges and roads. When a dispute arose concerning these works, the respondent submitted that no 'investment' within the meaning of Article 25 of the ICSID Convention had been made by the claimant.

Similar to the decision in the *Historical Salvors* annulment, the Tribunal considered that the *Salini* criteria were not found in the Convention and that they introduced elements of subjective judgement and led to unpredictability.[158] Cases which at first sight are not covered under Article 25 might nevertheless be submitted to ICSID by the parties for good reasons.[159] The Tribunal left open the circumstances under which a project might not be called an 'investment', given that it was clear that the claimant had made an investment. 'For ICSID arbitral tribunals to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it.'[160]

RSM v Grenada[161] considered that the *Salini* criteria ('certain objective elements') may serve only as flexible benchmarks. An agreement to express a commitment to apply for an oil and gas agreement was considered to amount to 'a readily recognizable investment', given that the claimant had agreed to supply resources for carrying out exploration. This was so even though exploration had not yet begun; the Tribunal looked to the envisaged overall project and not only to the pre-exploration phase.[162] Specifically in regard to Article 25 of the ICSID Convention, the Tribunal stated that 'certain objective elements' (which it did not specify) were required for ICSID jurisdiction, but that the parties' agreement on ICSID as the forum for dispute settlement would be viewed as a presumption in favour of the existence of an investment.

[153] At para 57. [154] At para 72. [155] At para 62. [156] At para 73.

[157] *Pantechniki v Albania*, Award, 30 July 2009. [158] At para 43. [159] At para 44.

[160] At para 42. [161] *RSM v Grenada*, Award, 13 March 2009. [162] At para 255.

Alpha v Ukraine[163] ruled that the definition in a BIT was entitled, in the context of Article 25, to 'great deference'[164] and should be set aside only in the presence of highly persuasive reasons. The Tribunal had earlier found that an investment is an asset 'for which "an investor of one Contracting Party" caused money or effort to be expended and from which a return or profit is expected in the territory of the other Party'.[165]

Inmaris v Ukraine[166] is based on similar reasoning. The case concerned several contracts for the financing, repair, and operation of a windjammer sail training ship.

Under the wording of the applicable BIT, these contracts fell under the definition of 'investment'. However, the respondent argued that the claimant's activity had not led to a significant contribution to Ukraine's development.

This Tribunal, too, pointed out that the ICSID Convention contains no definition along the lines of the *Salini* criteria. It was 'not persuaded to improve such a mandatory definition through case law where the Contracting States to the ICSID Convention chose not to specify one'.[167] The Tribunal underlined the role of party autonomy:

> in most cases—including, in the Tribunal's view, this one—it will be appropriate to defer to the State's parties' articulation in the instrument of consent (e.g. the BIT) of what constitutes an investment. The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means that they believe that that activity constitutes an 'investment' within the meaning of the ICSID Convention as well. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment.[168]

In the Tribunal's view, the *Salini* criteria may be useful to identify 'investments' in BIT or contract practice which would define the term so broadly that the provision deviated from any reasonable definition.[169] In the case presented by the claimant, no aberration of this kind was found.

With regard to other tribunals which, in principle, continue to look to the *Salini* approach in spite of the rulings in *Biwater* and *MHS*, most have modified the original concept by way of eliminating the requirement of a contribution to the host state's development. *Société Générale v Dominican Republic*[170] relied on general rules of treaty interpretation and concluded that the protections of the BIT are those listed specifically in the operative part of its text; provisions in the preamble (such as those on the transfer of capital and technology) only spell out the overall objective of the treaty, without influencing the applicable provision on 'investment'. In this view, the issue of the specific contribution of an investment does not

163 *Alpha v Ukraine*, Award, 8 November 2010. 164 At para 314.
165 At para. 308. 166 *Inmaris v Ukraine*, Decision on Jurisdiction, 8 March 2010.
167 At para 129. 168 At para 130. 169 At para 131.
170 *Société Générale v Dominican Republic*, Award, 19 September 2008.

arise in determining the existence of an 'investment'.[171] Therefore, the transfer of a company for a nominal price of US$2 was not excluded from the sphere of rights covered, given the relevance of other factors of the transaction, such as the market value.[172] Also, the complexity of the organizational structure on the part of a claimant has no bearing on the right to be protected under a BIT as long as no illegality is involved.[173]

According to *Fakes v Turkey*,[174] the requirement of a contribution to the economic development of the host state is not covered by the wording of Article 25. It is to be considered only as an expected consequence of an investment, uncertain at the time of the investment.[175] The Tribunal added that the ordinary meaning of 'investment' also does not pertain to matters of its legality or good faith.[176] The Tribunal ruled that the term 'investment' had an objective meaning with three criteria only (contribution, duration, risk).[177] The Award based its view of 'investment' on its understanding of the ordinary meaning, as also used in the context of the education of a child.[178]

In *Alpha v Ukraine*[179] the investor had agreed, in a number of contracts, to spend more than US$3 million on the renovation and improvement of a hotel and to assist in its promotion. In return, the investor acquired the right to a share of the regular income of the hotel.

The Tribunal considered that loans may qualify as investments,[180] as did the complex business arrangements as a whole. Also, the Award stated that the economic activities took place in the Ukraine, although the flow of the investor's money was mainly outside the Ukraine.[181] Minor errors in the documents submitted by the claimants to Ukraine would not make the investment unlawful.[182]

The conclusion was that the claimant had an investment under the applicable BIT, as the claimant had 'a claim to money' and had acquired an 'asset'. The Tribunal found that an investment is an asset 'for which an "investor of one Contracting Party" caused money or effort to be expended and from which a return or profit is expected in the territory of the other Party'.[183]

With regard to the ICSID Convention, the Tribunal emphasized that a contribution to a host state's development should not be seen as a definitional element of an investment, as its identification by the Tribunal implied second-guessing the assessments that prompted the claimant's investment.[184] More generally, as stated above, the decision of two states underlying the definition of an 'investment' in a BIT was entitled to deference and should only be set aside based on very strong grounds.[185] In addition, the claimant's project also satisfied the *Salini* criteria.[186]

171 At paras 32 et seq. 172 At para 36. 173 At para 47.
174 *Fakes v Turkey*, Award, 10 July, 2010. 175 At para 111. 176 At para 112.
177 Following *Lesi-Dipenta v Algeria*, Award, 10 January 2005, para II.13(iv).
178 At para 110.
179 *Alpha v Ukraine*, Award, 8 November 2010.
180 At para 273. 181 At para 279. 182 At para 297. 183 At para 308.
184 At para 312. 185 At para 314. 186 At paras 317 et seq.

The high-water mark for the autonomous approach, with a requirement of six criteria, came with *Phoenix v Czech Republic*[187] in which commitment, duration, and risk were examined. A contribution to the development of the state was not required, given that it would be impossible to ascertain;[188] instead, a contribution to the economy would suffice and such a contribution should be presumed (rebuttably) in the presence of the three first factors. However, in the Tribunal's view, for an investment to benefit from ICSID, it must also be made in accordance with the laws of the host state and, finally, the assets had to be invested bona fide.[189]

GEA v Ukraine[190] concerned a conversion contract in which the claimant agreed to provide fuel for conversion and also to assist with the delivery of logistics, pay for freight, resolve custom's matters, and supply materials. The applicable BIT implied that only such operations would be covered which by their nature had to be considered as 'investments'. The Tribunal did not elaborate on the 'nature of an investment', but was satisfied that an investment existed under the BIT in the circumstances of the case.[191] Also, immoveable property held by the investor formed an integral part of the contract and fell under the BIT.

As regards Article 25 of the ICSID Convention, the Tribunal inquired whether the claimant had made a contribution (delivery of materials), lasting a sufficient time (three years), and had undertaken a risk (market risk, credit risk, political risk). The Tribunal ruled that these three criteria were met; a link to the development of the state was not discussed. In contrast to the actual investment, the Tribunal denied that a settlement agreement, an ICC Award, or a repayment agreement pertaining to relations between an investor and a host state could be seen as an investment.[192]

The Tribunal reached its conclusions on the view that it did not have to take an independent position on the definition of an 'investment' inasmuch as it assumed that all approaches led to the same conclusion.[193]

A different line of reasoning is set forth in *Abaclat v Argentina*.[194] The Tribunal in this instance drew on the analysis in *Malicorp v Egypt*[195] and distinguished between the contribution made by an investor, reflected in Article 25 of the ICSID Convention, and the rights and values deriving from that contribution, set out in the definition of 'investment' in a BIT; values are only protected if generated by a specific contribution, contributions only if they generate a certain value.[196]

In pursuit of these premises, the *Abaclat* Tribunal concluded that an investment has to fit into the BIT definition and into the scheme of Article 25 of the ICSID Convention.[197] The Tribunal added that the silence of Article 25 on the definition of an investment was intended to leave a certain amount of room for the parties further to develop the concept of investment.[198] Article 25 was meant to encourage

[187] *Phoenix v Czech Republic*, Award, 15 April 2009. [188] At para 85.
[189] At para 114. [190] *GEA v Ukraine*, Award, 31 March 2011.
[191] At para 150. [192] At paras 157 et seq. [193] At para 143.
[194] *Abaclat v Argentina*, Decision on Jurisdiction, 4 August 2011.
[195] *Malicorp v Egypt*, Award, 7 April 2011, paras 109 et seq.
[196] *Abaclat* at para 350. [197] At para 351. [198] At para 347.

foreign investments, thereby giving the parties 'the tools to further define what kind of investment they want to promote'. The *Salini* criteria were never included in the ICSID Convention, 'while being controversial and having been applied by tribunals in varying manners and degrees . . . '.[199]

Following its distinction between rights and values, on the one hand, and contributions, on the other hand, the Tribunal considered that the purchase of security entitlements by the claimants qualified as an investment, because these entitlements were covered by BITs and amounted to a contribution.[200] As the funds were listed and protected as values under the BIT, they qualified as an 'investment' even though they were not linked to a particular enterprise or operation; the forum selection clauses had no bearing on this result. Also, the Tribunal ruled that the investments were made in Argentina where the funds were used.[201]

The borderline between an ordinary commercial transaction and an 'investment' was addressed in *Global Trading v Ukraine*.[202] The case had to address the sale of chicken by a US firm to a Ukraine state entity. The claimant pointed to the special circumstances under which the sales agreements were concluded. The Prime Minister of the Ukraine had requested the US Embassy to identify suitable US poultry exporters with the aim of reducing soaring domestic prices for poultry in the Ukraine, and the resulting poultry and purchase import programme had the purpose of promoting the economic development of the Ukraine; the state undertook to honour its contractual commitments.

The Tribunal started out from the premise that Article 25 of the ICSID Convention is of an autonomous nature, separate from the rules of a BIT. The ruling considered that the weight of authority was in favour of this view,[203] limiting the freedom of states to define the cases to be accepted by ICSID: 'Had the drafters of the Convention wished to accord an absolute freedom of that kind, they would have said so, not simply left Art. 25 without a formal definition for the term "investment".'[204] Thus, the Tribunal was not prepared to consider the argument that the lack of a definition indicated the will of the drafters to leave the matter to subsequent practice. As regards the argument by the claimants regarding the circumstances behind the sale programme, the Tribunal gave short shrift to the claimants' position; it considered that each contract was of limited duration on a commercial basis, and ruled, abruptly, that the claim was 'manifestly without merit'.[205]

The distinction between a sale and an investment was also central to the decision in *Romak v Uzbekistan*[206] which concerned deliveries of wheat over a period of five months. The Tribunal, sitting under the rules of UNCITRAL (not ICSID), considered that the word 'investment' in a BIT must have a meaning of its own. In support, the Tribunal (surprisingly) referred to the illustrative, non-exhaustive

[199] At para 364. [200] At para 365. [201] At para 374.
[202] *Global Trading v Ukraine*, Award, 1 December 2010.
[203] At para 43.
[204] At para 44.
[205] On certainty of law, see *Saba Fakes v Turkey*, Award, 10 July 2010, p 32.
[206] *Romak v Uzbekistan*, Award, 26 November 2009.

definition in the applicable BIT[207] and also to the conclusion of a trade agreement on the same day the BIT was signed.

To identify the autonomous meaning of 'investment', the Award turned to *Black's Law Dictionary*,[208] but subsequently decided to require three criteria; contribution, duration, and risk. In this context, the Tribunal assumed that the term 'investment' should be presumed to have the same meaning in the context of ICSID and outside ICSID.[209] At the same time, the Tribunal assumed that parties are free to define an 'investment' in any way they wish.[210] In the end, the Award examined the three criteria and ruled that the wheat sales satisfied none of them.

(f) Towards a new synthesis?

The evolving jurisprudence moves in meandering directions and does not follow a uniform approach. The main dividing line concerns the question whether the term 'investment' as found (but not defined) in Article 25 of the ICSID Convention must be understood on an autonomous basis ('the self-contained approach'), or whether it must be construed to refer to its understanding by the parties to the dispute in each particular case ('the party-defined approach'). Both approaches have been articulated in different variations. In particular, the *Salini* criteria were sometimes referred to as mandatory, sometimes as illustrative. The party-based approach was sometimes phrased as leaving full freedom to the parties, sometimes as restricted within reasonable boundaries.

The negotiating history of the ICSID Convention speaks in favour of a party-defined approach. From this viewpoint, there is no justification of criteria beyond the terms of the Convention or the BIT. The concrete terms by which an 'investment' is understood are those laid down by the parties, be it in a BIT or in a special agreement between the host state and the investor, and no further interpretative search for the proper meaning of the term is required. In general, the relevant segments found in the definition of BITs, being phrased in a wide manner, have so far not raised any particular problems. Exceptionally, difficulties arise when definitions of the term 'investment' use that same term.

The self-contained approach is confronted with the need to go beyond the understanding of the parties and find support for its interpretation outside the understanding of the drafters of the ICSID Convention. Beyond a non-explained, strictly intuitive conception, tribunals following this line chose to rely on their view of 'investment' either in everyday language—such as the phrase 'investment in children'—or in definitions found in dictionaries—such as *Black's Law Dictionary*.

Inasmuch as tribunals following the self-contained version aim to set out specific manageable criteria to delineate the contours of an 'investment', the task remained for these tribunals to derive, directly or indirectly, such criteria from their preferred definition.

[207] At para 188.
[208] '[T]he commitment of funds or other assets with the purpose to receive a profit' (at para 177).
[209] At para 194. [210] At para 205.

Based on such definitions, or simply on intuition, these tribunals have set forth their criteria for an 'investment'. The number of criteria so established has varied in arbitral practice between three, four, and six. All these tribunals included the following three factors: a contribution by the investor, duration, and risk. Other tribunals have added to these three criteria a contribution to the development of the host state, while regularity of profit was included only occasionally. In *Phoenix v Czech Republic*, the Tribunal ruled that legality of the investment and good faith also must be present to satisfy the conditions for the existence of an investment.

The most controversial criterion has been the need for a contribution to the development of the host state, with support mainly being drawn from the reference in ICSID's preamble to 'the development of the host State'. Other tribunals have focused on such a contribution because, in their view, there is a close nexus between the presence of a contribution and development: the investor's contribution generates, according to this view, the rights and values protected in the definition of the BIT.

All variants of the autonomous understanding of investment find it difficult to support their position by reference to the negotiating history or to the text of Article 25. It has been pointed out that the examination of a contribution to the development of the host state will depend on a subjective assessment; this view is supported by the (uncontroversial) position that each state has the sovereign right to decide which foreign investments will foster the development of its economy and will accordingly admit and regulate such investments. As long as the investment is lawful, under the host state's laws, there is no room for an investment tribunal to deny protections under a BIT with the argument that the host state's development stands in the way.

The criterion of risk has also turned out to be of limited value in the characterization of an 'investment'. Practically every business deal which extends beyond the day of its conclusion will in some way involve circumstances that endanger the certainty that both sides are able and willing to comply with what was agreed. In other words, the existence of a 'duration' for an investment will, in practice, imply the existence of a risk, and the operational significance of 'risk' and 'duration' practically coincides.

Inasmuch as these considerations point to 'commitment of risk' and 'duration' as the ultimate acceptable differentiating criteria embodied in the *Salini* formula, the definition of an investment will boil down to distinguishing an 'investment' from a one-off deal in the form of a trade transaction (or sale), with no component of duration.

The remaining point is to differentiate between 'trade' and 'investment'; more precisely between an 'investment' and a one-time ordinary commercial action consisting of a one-off deal. At this point, the systematic analysis coincides with the *travaux* confirming that a one-time sale will not be considered as an 'investment', without any other definitional requirement. Moreover, the ordinary meaning of 'investment' refers to an economic transaction which is different from a trade transaction, both from the viewpoint of general usage and from the vantage point of international legal terminology. Trade and investment have for a long time been considered to be separate in international practice and in legal terminology.

Practice illustrates that issues other than the distinction of trade may arise in the definition of investment: for instance as regards a bank guarantee, articles bought by a foreign tourist, land acquired by way of inheritance, or the building of a church by a foreign organization or other matters. For such issues, the *Salini* criteria understood as benchmarks may indicate the proper solution. At the same time, the party-based approach may be limited in such cases in light of the 'nature of an investment', in line with the *travaux* of Article 25 of the ICSID Convention.[211] Tribunals may have to decide this matter without recourse to an abstract definition in light of the circumstances of each case.

Inasmuch as the will of the parties will properly be considered as the primary guidepost, deference to this will is appropriate and the 'nature of an investment' will operate as a corrective only in cases of a manifest departure from the ordinary understanding of 'investment' by the parties.

In summary, the current state of the art indicates that neither a strict insistence on objective criteria nor a strictly party-based approach may always be suitable for the general delineation of an investment. Instead, a survey of possible factual settings and existing case law appears to indicate that a combination of the flexible versions of the two approaches will best serve as the proper framework. As a result, an 'investment' within the meaning of Article 25 will exist when the parties to a BIT or an agreement between host state and investor have agreed to treat the project as an 'investment', provided that the use of that term does not stand in obvious contrast to its general understanding.

(g) Investment 'in the territory of the host state'

Some treaties refer to investments 'in the territory' of the host state.[212] At times respondents have argued that this requirement has not been met, since the would-be investor has not established a significant physical presence in the host state. The problem has arisen in cases involving financial instruments, such as loans, and in cases involving pre-shipment inspection services.[213]

In *Fedax v Venezuela* the investor had merely acquired promissory notes issued by the host country. The Tribunal rejected the respondent's argument that the claimant had not invested 'in the territory' of Venezuela:

> While it is true that in some kinds of investments . . . such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into

211 See *History of the Convention*, vol II, pp 952, 972, statements of A Broches.

212 The ECT in Art 26(1) refers to investments 'in the Area' of a contracting party. NAFTA, Art 1101(1) speaks of 'investments in the territory'.

213 In cases involving inspection services, tribunals have found that there had, in fact, been 'an injection of funds into the territory' of the host state and that 'a substantial and non-severable aspect of the overall service was provided in [the host state]' (*SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, para 136; *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, paras 99–112).

> the territory of the host country, this does not necessarily happen in a number of types of investments, particularly those of a financial nature. It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but are put at its disposal elsewhere.[214]

Unlike cases involving the acquisition of financial instruments, tribunals have taken a restrictive approach in cases in which a physical business was in question. In *Canadian Cattlemen v United States*,[215] the Canadian claimants were engaged in the beef and cattle business and brought their claim against the United States because of alleged discrimination against them in the US market. All the investors' investments were on Canadian territory, and the dispute concerned the conditions set by the United States for cross-border trade applicable to the claimants.

The Tribunal ruled that the NAFTA protected only investments made in the territory of another state, that is, foreign investment. The Tribunal carefully reviewed the structure of the NAFTA and various relevant specific provisions; the lack of specific language in the NAFTA regarding the territory of the investment did not stand in the way of its conclusion.

In *Bayview v Mexico*,[216] the claimants, US nationals, operated a business in Texas involving farms and irrigation facilities in Texas. For this business, the claimants depended upon water carried by the Rio Bravo/Rio Grande River which originates in Mexico. When Mexico took action which affected the flow of water, the claimants submitted their case under Chapter Eleven of the NAFTA. The water rights which the claimants held in Texas were granted by the State of Texas, and Mexico was allegedly obliged to provide certain water rights to Texas following a 1969 ruling of a Texas court.

The Tribunal considered that the NAFTA only covers investments made by a national of one party in the territory of another NAFTA party, primarily regulated by the legal order of the foreign state. Here, the investment was made by US citizens on the territory of the United States,[217] and under Mexican law the claimants held no rights to water on Mexican territory.[218] The NAFTA Tribunal therefore found that it had no jurisdiction for the claim.

In *Grand River v United States*,[219] the concept of 'investment' laid down in Article 1139 of the NAFTA was at issue;[220] different from most BITs, the definition relies on the term 'enterprise' and is not worded in an open-ended manner.

The claimants' cigarette business centred on the manufacture of cigarettes in Canada and the export of the products to the United States. Similar to the decisions in *Bayview* and *Cattlemen*, the Tribunal ruled that in such a setting the claimants'

214 *Fedax v Venezuela*, Decision on Jurisdiction, 11 July 1997, para 41. To the same effect: *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, paras 77, 78. See further *LESI & ASTALDI v Algeria*, Decision on Jurisdiction, 12 July 2006, para 73.

215 *Canadian Cattlemen v United States*, Award on Jurisdiction, 28 January 2008.

216 *Bayview v Mexico*, Award, 19 June 2007.

217 At para 113.

218 At para 116.

219 *Grand River v United States*, Award, 11 January 2011.

220 For the text see Appendix, p 355.