Northwestern Journal of International Law & Business

Volume 38
Issue 3 *Spring*

Spring 2018

Contractual Joint Ventures in International Investment Arbitration

Dmitry A. Pentsov

Contractual Joint Ventures in International Investment Arbitration

Dmitry A. Pentsov*

Abstract: Contractual joint ventures, sometimes also called as "consortiums", where several participants, without creating a new entity, unite their personal efforts and material resources with a view of achieving a certain common goal, remain a popular organizational form of large-scale international investment projects all over the World. In view of significant amount of their investments in these projects, any prospective foreign participants may wish to consider whether structuring their activities through a contractual joint venture would allow them to effectively protect their economic interests against possible adverse actions of a host State. Or, they should rather create a joint venture in the form of a partnership or a corporation under the laws of the project's host State or under the laws of another country? To answer these questions, the article analyses the status of contractual joint ventures and their participants in international investment arbitration and compares it with the status of partnership and corporate joint ventures and their participants. The analysis is primarily carried out on the example of contractual joint ventures under Swiss law, because this law has been frequently chosen by participants of international investment projects as applicable law in a wide variety of international projects. Although the absence of legal personality of contractual joint ventures prevents them from acting as a claimant in both ICSID and non-ICSID investment arbitration, it does not by itself preclude individual claims of their participants in both types of arbitration. Furthermore, the comparison between possible amounts of participants' individual claims reveals that under similar circumstances foreign investors in contractual joint ventures could potentially recover the same amount of damages as those in partnership and corporate joint ventures. On the basis of this comparison, the article argues that the use of contractual joint ventures would not put foreign investors in a disadvantageous position as concerns the possibility to protect their economic interests against an adverse action of a host State as compared with the participants in other two types of joint ventures.

---

* Partner, FRORIEP Legal Ltd. (Geneva, Switzerland); Member of the New York State Bar Association, St. Petersburg City Bar Association (Russia) and "avocat" (Switzerland). The views expresses in this article are solely of its author.

I. INTRODUCTION

Contractual joint ventures, sometimes also called consortiums,[1] where

1 See, e.g., Terence Prime, Sarah Gale & Gary Scanlan, The Law and Practice of Joint Ven-

several participants, without creating a new entity, unite their personal efforts and material resources with a view of achieving a certain common goal, remain a popular organizational form of large-scale international investment projects. Although the exact statistics may be difficult to assemble, the analysis of published decisions and arbitral awards rendered under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) reveals that over the past several decades this legal form has been repeatedly used to carry out a wide variety of projects all over the world.[2] To name just a few, these projects included the construction of the hydroelectric power facilities downstream of the Tarbela Dam on the Indus River in northern Pakistan,[3] the joint performance of dredging operations in the Suez Canal under a contract awarded by the Suez Canal Authority in Egypt,[4] the conduct of the Terra Nova Oil Development Project off the coast of the Province of Newfoundland and Labrador in Canada,[5] a joint operation of the Science-Hotel Complex in Ukraine,[6] the realization of the Petrozuata and the Hamaca extra-heavy oil projects in the region in Venezuela known as the Orinoco Oil Belt (*Faja Petrolífera del Orinoco*),[7] as well as the implementation of a mixed-use residential and commercial real estate development project, known as Ispartakule III, in Istanbul, Turkey.[8]

---

tures 53–54 (Bloomsburry Professional, 2d. ed. 1998); Joint Ventures & Shareholders' Agreements 8 (Chris Wilkinson, ed., 3d ed., 2009).

2 The International Centre for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). Its purpose is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention. See International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules 12 (2006), https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf. The decisions and arbitral awards rendered under the auspices of the ICSID are available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx and at: http://www.italaw.com/ (last visited July 15, 2017).

3 Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, Apr. 22, 2005.

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

5 Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB (AF)/07/4, Decision on liability and principles of quantum, May 14, 2012.

6 Bosh International Inc. and B & P Ltd. Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award, Oct. 22, 2012.

7 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhilips Gulf of Paria B.V. & ConocoPhillips Company v. Bolivarian Republic of Venezuela, ICSID Case No. 07/30, Decision of jurisdiction and the merits, Sep. 3, 2013.

8 Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, Feb. 25, 2014.

Such popularity of contractual joint ventures in international investment projects may be explained by various advantages offered by this form to their participants. First, unlike corporate joint ventures, which internal organization mirrors standardized corporate form, involving large number of imperative norms, contractual joint ventures may be created in a wide variety of tailor-made forms on the basis of freely negotiated contractual arrangements.[9] The existence of this choice offers the participants a greater flexibility, allowing them to adjust the joint venture's internal structure and organization to the particular needs of their specific project.

Second, unlike shareholders in a corporate joint venture where the choice of law governing their internal relations to a large extent is predetermined by the choice of place of its incorporation,[10] the participants in a contractual joint venture may, in principle, freely chose this law. This possibility could be particularly important in the projects carried out in the emerging markets, where foreign investors, for whatever reason, may not wish to submit regulation of their internal relations to a law of the project's host state. In this case, the form of a contractual joint venture allows a foreign investor to propose the law of its own state or, in case other participants do not agree, the "neutral law" of a third state.

Third, the absence of a separate legal personality of a contractual joint venture exempts it from the mandatory state registration required for corporate joint ventures. As a result, the participants in a contractual joint venture may keep its ownership structure, internal organization and activities confidential not only from the government of the project's host country but also from the public at large.[11] While the absence of juridical personality could potentially result in an unlimited responsibility of joint venture's participants for their common operations, this risk could be mitigated by creating a joint venture between special purpose companies, established by the economic beneficiaries of the project, rather than directly among its economic beneficiaries themselves. Moreover, in large construction projects there is always a possibility that a customer may not be willing to engage a corporate contractor, created, for example, in the form of a joint-stock company, limiting the risk of shareholders' losses by the amount of their contributions to the share capital of the company. That is why, in case of international construction projects, this "shortcoming" of an unlimited liability should be

---

[9] *See, e.g.*, TERENCE PRIME, SARAH GALE & GARY SCANLAN, THE LAW AND PRACTICE OF JOINT VENTURES 53–54 (Bloomsburry Professional, 2d. ed. 1998), MODEL JOINT VENTURE AGREEMENT WITH COMMENTARY 5–20 (Am. Bar Ass'n, Section of Business Law 2006).

[10] *See, e.g.*, ERIC P.M. VERMEULEN, THE EVOLUTION OF LEGAL BUSINESS FORMS IN EUROPE AND THE UNITED STATES 30 (2003).

[11] *See, e.g.*, KATHERINE REECE THOMAS & CHRISTOPHER RYAN, THE LAW AND PRACTICE OF SHAREHOLDERS' AGREEMENTS 275 (3d ed., 2009).

rather seen as an additional advantage of contractual joint ventures.

Fourth, a contractual joint venture is not considered as a separate subject of taxation and, therefore, it would be transparent from the tax point of view. The resulting taxation on a "pass-through" basis allows joint venture participants to directly attribute to themselves all losses related to their common activities, which in turn, could reduce the participants' own taxable income. The possibility of this attribution may be particularly attractive during the initial stage of a joint project, when significant investments have to already be made, but the profits are yet to come.[12]

While the absence of a separate legal personality of contractual joint venture presents undeniable advantages during the "ascending" stage of an investment project, it could also create difficulties for its foreign participants willing to protect their interests on the basis of a bilateral investment treaty (BIT) when the project is adversely affected by its host state. The existence of these difficulties was highlighted in the ICSID case of *Impregilo S.p.A. v. Islamic Republic of Pakistan*, where the arbitral tribunal upheld the respondent's objections against claims brought by a joint venture leader, an Italian company, under the Pakistan-Italy BIT[13] on behalf of a contractual joint venture as well as on behalf of its other participants.[14] Referring to the ICSID Convention's drafting history, the tribunal noted that for the purposes of this Convention the quality of legal personality was inherent in the concept of "juridical person" and was part of the objective requirement for jurisdiction.[15] It followed that the consent of Pakistan to arbitration contained in the BIT did not cover the claims of a contractual joint venture, since it was not a "juridical person" for the purposes of the Convention.[16] Although under the joint venture agreement Impreglio was entitled to represent the joint venture, the tribunal equally rejected its claims on behalf of the joint venture on the grounds that the scope of the BIT could not be expanded by a municipal law contract to which Pakistan was not a party.[17]

---

[12] *See, e.g.*, IAN HEWITT, JOINT VENTURES 59-60 (2008); KATHERINE REECE THOMAS & CHRISTOPHER RYAN, THE LAW AND PRACTICE OF SHAREHOLDERS' AGREEMENTS 275 (3d ed., 2009).

[13] Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments (the "Pakistan – Italy BIT"). Italy-Pakistan Bilateral Investment Treaty, It.-Pak., July 19, 1997, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1702.

[14] Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, Apr. 22, 2005, ¶¶ 131, 144.

[15] *Id.* at ¶¶ 132–133 (*citing* CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 276-277 (¶¶ 457 -458) (2001)).

[16] *Id.* at ¶ 134.

[17] *Id.* at ¶ 136.

In view of this decision, any prospective foreign participants in international investment project may wish to ask themselves whether its organization as a contractual joint venture would allow them to effectively protect their economic interests against the activities of the host state negatively affecting this project. Alternatively, they should create a joint venture in the form of a partnership or a corporation under the laws of the project's host state or under the laws of another country? In view of the extensive use of contractual joint ventures in international investment projects a clear answer to these questions becomes crucial for choosing an appropriate legal form for a certain project, which, in turn, could contribute to its smooth implementation, resistance to outside interference and ultimate commercial success.

Correspondingly, this article analyzes of the status of contractual joint ventures in international investment arbitration. The analysis is primarily carried out on the example of contractual joint ventures under Swiss law, because this law has been frequently chosen by participants of international investment projects as applicable law in a wide variety of international projects. These projects included a joint venture between an Italian and a Turkish construction companies to build a highway in Turkey,[18] a joint venture involving three French and one German company, to make tunnels and build all underground and three elevated stations for the metro lines 2 and 3 in the Athens (Greece),[19] or an international consortium, created by one US company, three companies from the Federal Republic of Germany and one company from Canada to jointly operate a concession to explore, develop and extract natural resources, granted by a government of a Middle East country.[20] The status of contractual joint ventures and their participants is then compared with the status of joint ventures created in the form of unincorporated partnerships and corporations as well as the status of their participants. This comparison focuses on the status of three types of joint ventures as "investors" and shares in these joint ventures as "investments" within the meaning of bilateral investment treaties, the status of joint ventures and their participants as claimants in international investment arbitration as well the possibilities of their participants to recover damages caused by violations of bilateral investment treaties.

---

[18] A.A.S. v. B. SpA, Tribunal fédérale Sept. 28, 2004 (4P.146/2004) (Switz.), http://www.bger.ch (last visited July 15, 2017).

[19] Dumez-GTM S.A. v. Campeon Bernad SGE Snc., Hochtief AG & SPIE Batignolles T.P. S.A., Cour Civile [Civil Court] June 14, 2000 (4P.12/2000) (Switz.), http://www.bger.ch (last visited July 15, 2017).

[20] ICC case No. 6286 (Partial award) (Aug. 28, 1991), *in* COLLECTION OF ICC ARBITRAL AWARDS 1991-1995, 258-276 (1997).

II. JOINT VENTURES AS "INVESTORS"

A. The Meaning of "Investor" in Bilateral Investment Treaties

1. Natural Persons and Companies

Generally speaking, the bilateral investment treaties offer protection to the investments of investors from one of the contracting states in the other contracting state.[21] This protection would normally include the guarantees of fair and equitable treatment,[22] as well as of full protection and security,[23] prohibition of expropriation except for a public purpose, in a non-discriminatory manner and upon payment of prompt, adequate and effective compensation,[24] the requirement to provide to foreign investors national treatment,[25] and the undertaking of a contracting state to observe any obligation it may have specifically entered into with regard to investments made on its territory by the investors of the other contracting state (the so-called "umbrella clause").[26] Thus, unless a particular joint venture can be

---

[21] *See, e.g.,* RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 13 (2d ed, 2012).

[22] *See, e.g.*, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 247–250 (2007); Agreement between the Swiss Federal Council and the Government of the Union of Soviet Socialist Republics on the Promotion and Reciprocal Protection of Investments (the "Switzerland-USSR BIT"), Switz.-U.S.S.R., Dec. 1, 1990, art. 4(1), https://www.admin.ch/opc/fr/classified-compilation/19900303/199108260000/0.975.277.2.pdf (last visited July 15, 2017). Following the dissolution of the USSR, its bilateral investment treaties remain applicable to the Russian Federation.

[23] *See, e.g.*, RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 160–166 (2d ed., 2012); Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, (the "USA - Ukraine BIT"), Ukr.-U.S., March 4, 1994, art. II(3)(a), http://www.state.gov/documents/organization/210531.pdf (last visited July 15, 2017).

[24] *See, e.g.*, August Reinisch, *Expropriation, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 407, 410–417 (Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, 2008); Treaty between the Swiss Confederation and the Islamic Republic of Pakistan Concerning the Promotion and Reciprocal Protection of Investments(the "Switzerland - Pakistan BIT"), Pak.-Switz., July 11, 1995, art. 6(1), https://www.admin.ch/opc/fr/classified-compilation/19983263/199605060000/0.975.262.3.pdf (last visited July 15, 2017).

[25] *See, e.g.*, Andrea K. Bjorklund, *The National Treatment Obligation, in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 385, 443–444 (Katia Yannaca-Small, ed., 2010); Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments (the "USA - Argentina BIT"), Arg.-U.S., Nov. 14, 1991, art. II(8), http://2001-2009.state.gov/documents/organization/43475.pdf (last visited July 15, 2017).

[26] *See, e.g.*, Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20(4) ARB. INT'L 411, 411–13 (2004); KATIA YANNACA-

recognized as an "investor" within the meaning of a certain treaty, it cannot benefit from the protection offered by this treaty.[27]

The bilateral investment treaties define this term by reference to two categories of investors, namely natural persons[28] and companies,[29] sometimes also called enterprises.[30] Some treaties draw further distinction between "company" and "company of the Party."[31] While the first term refers to a company as a possible type of investment, the second one designates investors whose investments are protected by these treaties.[32]

The term "company" is usually defined through a non-exhaustive list of "entities" or "organizations", such as corporations, companies, associations, state enterprises, or other organizations, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned.[33] Depending on the treaty, this list could also expressly mention unincorporated entities such as trusts, partnerships, sole proprietorships, branches or, generally, "any legal person and any commercial or other company or association with or without legal personality, having its seat in the

---

SMALL, *What About This "Umbrella Clause"? in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 479, 479–80 (2010); Agreement between the Government of the People's Republic of China and Swiss Federal Council on the Promotion and Reciprocal Protection of Investments, Switz-China, art. 8, Jan.27, 2009, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/4811.

[27] *See* K. Scott Gudgeon*, United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105, 117 (1986).

[28] *See, e.g.,* Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, Austl.-Arg., art. 1(1)(c), Aug. 23, 1995, art. 1(1)(c), 1985 UNTS 85, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/72.

[29] *See, e.g.,* Treaty between the United States of America and Armenia Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Arm., art. I(1)(b), Sep. 23, 1992 (the "USA - Armenia BIT"), art. I(1)(b), 103 U.S.T. 11, *available at:* http://2001-2009.state.gov/documents/organization/43477.pdf (last visited July 15, 2017).

[30] Agreement between the Swiss Confederation and the United Mexican States concerning the encouragement and reciprocal protection of investments, Switz-Mex., art 1(1), Jul. 10, 1995 (the "Switzerland-Mexico BIT"), *available at*: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2006.

[31] *See, e.g.,* Treaty between the Government of the United States of America and the Government of the Republic of Azerbaijan Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Aze., Aug. 1, 1997 (the "USA-Azerbaijan BIT"), art. 1(a) and 1(b), *available at:* http://2001-2009.state.gov/documents/organization/43478.pdf (last visited July 15, 2017).

[32] KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 154–55 (2009).

[33] USA - Argentina BIT, art. I(1)(b).

territory of one of the Contracting States, regardless of whether their activities are for profit or not."[34] Some U.S. treaties take an even broader approach, defining company as "any kind of juridical entity, including any corporation, company association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability."[35] Since the term "juridical entity" covers every association of persons regardless whether it has legal personality,[36] this definition would cover both incorporated and unincorporated entities. Finally, in certain treaties, these lists also specifically indicate "joint ventures."[37]

While the definition of "company" generally relies upon the formal criteria of "incorporation" or "constitution" under the laws of a contracting party, sometimes it is supplemented by the certain additional requirements. One of them could be the requirement of having in the corresponding state the company's seat and real economic activities.[38] Other possible requirement is that investors, including companies shall have the legal right, in accordance with the laws of the Contracting Party, to make investments in the

---

[34] *See, e.g.,* Treaty between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments, Apr. 9, 1991 (the "Germany - Argentina BIT"), art. 1(4), *available at:* http://investmentpolicyhub.unctad.org/Download/TreatyFile/92 (last visited July 15, 2017).

[35] *See, e.g.*, Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Encouragement and the Reciprocal Protection of Investment, U.S.-Bangl., March 12, 1986 (the "USA-Bangladesh BIT"), art. I(a), *available at*: http://2001-2009.state.gov/documents/organization/43480.pdf (last visited July 15, 2017).

[36] Vandevelde, *supra* note 33, at 149.

[37] *See, e.g.,* Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the promotion and reciprocal protection of investments, Can.-USSR, Nov. 20, 1989 (the "Canada - USSR BIT"), art. I(d)(ii), CTS 1991 No. 31, *available at*: http://www.treaty-accord.gc.ca/text-texte.aspx?id=101516&lang=eng (last visited July 15, 2017). In the United States, the term "joint venture" is used in the definition of "company" in the 1994 U.S. Model Investment Treaty as well as in the definitions of "enterprise" in 2004 and the 2012 U.S. Model Bilateral Investment Treaties. *See*, Vandevelde, *supra* note 33, at 817-824; 2004 U.S. Model Bilateral Investment Treaty (the "2004 U.S. Model BIT"), art. 1, *available in*: Vandevelde K.J. at 825-848; 2012 U.S. Model Bilateral Investment Treaty (the "2012 U.S. Model BIT"), art. 1, http://www.state.gov/documents/organization/188371.pdf (last visited July 15, 2017).

[38] *See, e.g.,* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 160-166 (2nd. ed, 2012); Treaty between the Swiss Confederation and the Republic of Belarus concerning the promotion and reciprocal protection of investments, Switz-Belr., May 22, 1993 (the "Switzerland-Belarus BIT"), art. 1(1)(b), *available at:* https://www.admin.ch/opc/fr/classified-compilation/19983454/199407130000/0.975.216.9.pdf (last visited July 15, 2017).

territory of the other Contracting Party.[39]

Finally, although the term "company" primarily covers foreign companies making investments in the other contracting state, the ICSID Convention allows to include in the definition of "National of another Contracting State" any judicial 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.[40] The parties to certain bilateral investment treaties took advantage of this possibility and agreed to consider local companies, established under the law of one contracting state, but controlled by nationals or companies of another contracting state, as foreign companies for the purposes of their dispute resolution provisions.[41] The existence of such "control" is a complex question requiring the examination of several factors such as equity participations, voting rights and management.[42]

In its turn, the definition of "natural person" (in some treaties referred to as "national")[43] is primarily based upon the criteria of citizenship.[44] Nevertheless, some treaties, particularly those concluded by the countries with a large influx of immigrants, in order to expand the scope of their protection may use other alternative or cumulative criteria, such as residence—permanent[45] or otherwise.[46] Unlike the ICISD Convention, which expressly

---

[39] *See, e.g.,* Agreement between the Government of the United Kingdom or Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, U.K.-USSR, Apr. 6, 1989, (the "UK - USSR BIT"), art. 1(d), Gr. Brit. T.S. No. 3(1992) (Cm. 1791), *available at:* http://treaties.fco.gov.uk/docs/pdf/1992/TS0003.pdf (last visited July 15, 2017).

[40]ICSID, *Convention of the Settlement of Investment Disputes between States and Nationals of Other States* at art. 25(2)(b), *available at*: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap02.htm.

[41] *See, e.g*., USA - Ukraine BIT, art. VI(8); Switzerland-Pakistan BIT, art. 9(3).

[42] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 327 (¶ 864) (2001); Dolzer & Schreuer, *supra* note 39, at 52.

[43] *See, e.g.,* Treaty between the Government of French Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, Fr.-China, Nov. 26, 2007 (the "France - China BIT"), art. I(2)(a), *available at:* http://investmentpolicyhub.unctad.org/Download/TreatyFile/734 (last visited July 15, 2017).

[44] *See, e.g.,* Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Rom., May 28, 1992 (the USA - Romania BIT), art. I(1)(c), *available at:* https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Treaty-between-the-Government-of-the-United-States-of-America-and-the-Government-of-Romania-Concerning-the-Reciprocal-Encouragement-and-Protection-of-Investment.pdf (last visited July 15, 2017).

[45] *See, e.g.,* Treaty between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Kaz., May

excludes from protection dual nationals if one of their nationalities is that of the host state,[47] most bilateral investment treaties are silent on this issue.[48]

2. Definitions of "Company" Not Specifically Referring to "Joint Venture"

When the definition of "company" in a certain BIT does not expressly mention joint ventures, in order to be recognized as "investor" within its meaning, an entity denominated as a "joint venture" shall be covered by one of the categories listed in that definition. The starting point of this analysis shall be the determination whether it is fits into one of the specific types of entities, such as "corporation" or "partnership." In case of a negative answer, the analysis shall continue with the determination whether this entity is covered by one of their broader types, such as "other organization," "any legal person," or "any commercial or other company or association with or without legal personality."

Taking into account that the bilateral investment treaties do not define individual categories listed in the definition of "investor," the meaning of the terms "corporation," "partnership," and similar terms shall be made in accordance with the general rules of treaty interpretation, as consolidated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[49] Under these rules, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[50] Recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[51]

The process of determination whether a certain joint venture may be considered as an "investor" within the meaning of a bilateral investment treaty which definition of "company" does not specifically refers to "joint

---

19, 1992 (the "USA - Kazakhstan BIT"), art. I(1)(c), *available at:* http://2001-2009.state.gov/documents/organization/43566.pdf (last visited July 15, 2017).

[46] *See, e.g.,* Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, H.K.-Ausl., Sep. 15, 1993 (the "Hong-Kong - Australia BIT"), art. 1(f)(ii)(A), (1993) ATS 3 (Austl.), *available at:* http://www.austlii.edu.au/cgibin/sinodisp/au/other/dfat/treaties/ATS/1993/30.html?stem=0&synonyms=0&query=hong%20kong (last visited July 15, 2017).

[47] *Supra* note 41, at 25(2)(a).

[48] CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 30304 (2008).

49 Vienna Convention on the Law of Treaties art 31-32, May 23, 1969, 1155 U.N.T.S. 331, available at: http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited July 15, 2017).

50 Vienna Convention, supra note 50, at art. 31(1).

51 Vienna Convention on the Law of Treaties, supra note 50, at art. 32.

ventures" may be illustrated on the example of the Pirelli Tyre Russia Joint Venture[52] and the Russia-Italy BIT.[53] This treaty defines "investor" as any natural or legal person, which under the legislation of the contracting party has the right to make investments in the territory of another contracting party.[54] Under the same BIT, the term "legal person" is understood as corporation and/or its subsidiary corporation, firm, company or any other organization, having its location on the territory of a contracting party and considered in accordance with its legislation as legal person, regardless of whether it has limited or other liability.[55]

Since these definitions in the Russia-Italy BIT contain specific references to "the legislation of a contracting party," in accordance with the "context" rule of Article 31(1) of the Vienna Convention, the ordinary meaning of the terms "legal person" and "company" ("*obeshestvo*") as concerns Russian investors shall be determined on the basis of Russian law. As it follows from the extract from the Unified State Registry of Legal Persons of the Russian Federation, the Pirelli Tyre Russia JV is created in the form of a limited liability company.[56] Taking into account that under Russian law, limited liability companies are considered as legal persons,[57] it may be concluded that the Pirelli Tyre Russia JV will be considered as investor within the meaning of the Russia-Italy BIT.

3. Definitions of "Company" Specifically Referring to "Joint Venture"

Although certain bilateral investment treaties may expressly include "joint venture" among entities listed in their definitions of "company,"[58] or

52 The Pirelly Tyre Russia Joint Venture is the joint venture of Rostec (Russia) and Pirelli (Italy) manufacturing truck and passenger car winter tyres for consumer markets of Russia and CIS. See, ROSTEC CORPORATIONS/INVESTMENTS/PIRELLI, rostec.ru/en/investors/partners/98 (last visited July 15, 2017).

53 The Treaty between the Government of the Russian Federation and the Government of the Italian Republic on the Promotion and Protection of Investments (dated April 9, 1996), http://investmentpolicyhub.unctad.org/Download/TreatyFile/3417 (hereinafter the "Russia-Italy BIT").

54 Id. at art. 1(2), part 1.

55 Id. at art. 1(2), part 3.

56 Unified State Registry of Legal Persons of the Russian Federation, https://egrul.nalog.ru/ (last visited July 15, 2017).

57 Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 50(2) and 87 (Russ); Federal'nyi Zakon RF "Ob obshestvakh s ogranichennoi otvetstvennostyu" [Federal Law No. 14-FZ "On limited liability companies"], Feb. 8, 1998; [Sobranie Zakonodatel'stva Rossiskoi Federatsii] [SZ RF] [Russian Federation Collection of Legislation], 1998, No. 7, item 785, art. 2(3).

58 See, e.g., Agreement between the Government of Canada and the Government of the Re-

as the case may be, "enterprise,"[59] they do not determine the meaning of this term. At the same time, in the area of international business relations this concept does not refer to a particular form of an enterprise, covering instead a wide variety of legal forms.[60] As a result, the meaning of "joint venture" has to be determined for each individual bilateral investment treaty. This determination shall also be made in accordance with the general rules of treaty interpretation of the Vienna Convention on the Law of Treaties.[61]

The process of inquiry into the ordinary meaning of the term "joint venture" in the definitions of "company" ("enterprise") in the bilateral investment treaties may be illustrated on the example of the Switzerland-Mexico BIT, which specifically includes "joint venture" into its definition of "enterprise."[62] To determine the scope of its personal application, this treaty uses the term "investor of a Party," defined as "national or enterprise of this Party which seeks to make, is making or has made an investment".[63] It defines "enterprise of a Party" as an enterprise incorporated or organized under the legislation of a party and a branch situated in the territory of a Party and engaged in economic activities therein.[64] In its turn, the "enterprise" in this treaty means any entity, legally incorporated or organized for profit or non-profit purposes, including any registered company, branch, "trust," joint venture, partnership, sole proprietorship, joint venture or other association.[65] Since the above definition of "enterprise of a Party" expressly refers to incorporation or organization "under the legislation of a Party", and joint venture is one of possible forms of such enterprises, the scope of the term "investor of a Party" will cover entities considered as joint ventures

---

public of Argentina for the promotion and protection of investments, (Nov. 1, 1991), art. I(1)(2), CTS 1993 No. 11, http://www.treaty-accord.gc.ca/text-texte.aspx?id=101514&lang=eng (hereinafter the "Canada-Argentina BIT"); Agreement between the Government of the Republic of Korea and the Government of Japan for the liberalization, promotion and protection of investment, (March 22, 2002), art. 1(1)(b), http://investmentpolicyhub.unctad.org/Download/TreatyFile/1727. (hereinafter the "Republic of Korea - Japan BIT).

59 Switzerland – Mexico BIT, supra note 31, at art. 1(1).

60 See, e.g., Wolfgang G. Friedmann & Jean-Pierre Béguin, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES 412-415 (1971); Ronald Charles Wolf, A GUIDE TO INTERNATIONAL JOINT VENTURES WITH SAMPLE CLAUSES 1 (2nd ed. 1999); Paul Luiki, JOINT VENTURES: DEFINITIONS AND LEGAL ISSUES IN JOINT VENTURES IN THE INTERNATIONAL Arena 1 (Darell Prescott & Salli A. Swartz, eds., 2nd ed., 2010); Luiz Olavo Baptista & Pascal Durand-Barthesz, LES JOINT VENTURES DANS LE COMMERCE INTERNATIONAL 66-67 (2012); Jeswald W. Salacuse, THE THREE LAWS OF INTERNATIONAL INVESTMENT 206 (2013).

61 Vienna Convention on the Law of Treaties, art. 31 and 32 (May 23, 1969).

62 Switzerland-Mexico BIT, supra note 31, at art. 1(1).

63 Switzerland-Mexico BIT, supra note 31, at art. 1(5).

64 Switzerland-Mexico BIT, supra note 31, at art. 1(2).

65 Switzerland-Mexico BIT, supra note 31, at art. 1(1).

under the laws of Mexico or Switzerland. Thus, in case of a joint venture created under Swiss law, the ordinary meaning of this term in the treaty shall be made on the basis of this law.

In Swiss law, the term "joint venture" denominates both contractual joint ventures and corporate joint ventures.[66] As concerns contractual joint ventures, under this law they are usually qualified as ordinary partnerships (*société simple*),[67] governed by Title XXIII of the Swiss Code of Obligations (hereinafter, "CO").[68] The Code defines an ordinary partnership as a contract according to which two or more persons agree to unite their efforts or their resources in order to achieve a common goal.[69] Under the Code, an ordinary partnership is not considered as a juridical person and it can't be entered into commercial registry.[70] Moreover, it can neither have nor exercise rights, become party to judicial or debt enforcement proceedings.[71] The objects, claims, and rights *in rem* transferred to or acquired for an ordinary partnership belong jointly to the partners on the conditions stipulated in the partnership agreement.[72]

At the same time, unlike "pure" contracts, ordinary partnerships under Swiss law may have a certain internal structure. From the point of view of the Code of Obligations overall organization, the existence of this structure places simple partnerships between contracts and those partnerships which have separate legal personality, such as limited partnership (*société en commandite*)[73] or limited liability company (*société à responsabilité limitée*).[74] Depending on their internal structure's sophistication, simple partnerships are usually divided into two major types, namely partnerships of a predominantly contractual nature and partnerships of a predominantly institutional nature.[75]

---

66 See, e.g., N.P. Vogt & R. Watter, JOINT VENTURES IN SWITZERLAND 5 (1995).

67 Tribune Fédéral May 5, 2005, 4C.22/2006 (Switz.), http://www.bger.ch (last visited July 15, 2017); Claude Reymond, le contrat de "joint venture", Innominatvertäge. Festgabe zum 60. Gebursage von Walter R. Schluep 385 (1988).

68 Code des obligations March 30, 1911, RS 210 (Switz.).

69 Code des obligations March 30, 1911, art. 530, para. 1 (Switz.).

70 Grossi v. Consortium Diga Sambucco, March 3, 1953, ATF 79 I 179, JT 1954 I 67 (Switz.).

71 Banuamm et consorts v. Administration fédérale des contributions, May 4, 1945, ATF 71 I 179, JT 1945 I 606 (Switz.); Rossi, May 16, 1946, ATF 72 III 42, JT 1947 II 7 (Switz.); Lempet et consorts v. Commune de Nideau et Conseil exécutif de canton de Berne, Apr. 30, 1952, ATF 78 I 104, JT 1953 I 77 (Switz.).

72 Code des obligations March 30, 1911, art. 544, para. 1 (Switz.).

73 Code des obligations March 30, 1911, Title XXV (Switz.).

74 Code des obligations March 30, 1911, Title XXVIII (Switz.).

75 Pierre Tercier & Pascal Favre, LES CONTRATS SPECIAUX 1115 (2009).

While the participants of the first type of simple partnerships are usually private individuals, who are not using this form to pursue any profit-making objectives,[76] the participants of the second type of ordinary partnerships are usually individual entrepreneurs and legal entities, who are using this form to pursue their common profit making activities, frequently on a large scale. The legal framework of these partnerships is normally highly developed, mostly in the partnership agreement and associated agreements. Although ordinary partnerships do not have separate legal personality, the partnerships of this type may have independent bylaws. The internal organization of partnerships of a predominantly institutional nature could be complex and may provide, in particular, for the creation of separate management bodies. Despite the existence of personal connections between the partners, these connections have a lesser significance than in partnerships of a predominantly contractual nature. Furthermore, a partnership of an institutional nature's main activities are usually directed towards third persons.[77] Among possible examples of this second type of partnership would be a consortium created to carry out a construction project and having permanently operating management bodies, such as committee of works,[78] project leader,[79] technical directorate,[80] commercial directorate,[81] directorate of construction area,[82] control bodies,[83] as well as a participant responsible for quality.[84] Other possible examples include a shareholder agreement[85] as

76 For example, an agreement between two private individuals on the joint purchase, use and sale of a car with the equal sharing of expenses (Vögti v. Müller, May 2, 1973, ATF 99 II 315, JT 1974 I 458 (Switz.)); an agreement between spouses on the acquisition of real estate into their joint marital property (Dame Sigrist-Niffeler, March 2, 1942, ATF 68 III 42, JT 1942 II 113 (Switz.); Stutz v. Dame Stutz, July 11, 1952, ATF 78 II 302, JT 1953 I 354 (Switz.); A.R. v. B.R., Dec. 15, 2000, ATF 127 III 46, JT 2000 II 103 (Switz.)) or an agreement between neighbors on the joint use of an antenna, situated on the property of one of them (Decision of the Court of Appeals of the Canton of Zurich (Obergericht Zurich), July 11, 1974, 47 Société anonyme Suisse (SAS) 156 (1975)).

77 Tercier & Favre, Les contrats spéciaux, supra note 76, at 1115.

78 *See, e.g.*, Société Suisse des Entrepreneurs, CONTRAT D'ASSOCIATION POUR ENTREPRISES DE CONSTRUCTION (CONSORTIUM) art. 20 (2007) (Switz.) [hereinafter STANDARD CONSTRUCTION CONSORTIUM CONTRACT].

79 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 21.1.

80 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 21.2.

81 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 21.3.

82 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 21.5.

83 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 22.

84 STANDARD CONSTRUCTION CONSORTIUM CONTRACT, art. 21.4.

85 *Spinedi v. Bornand et Cavazza*, ATF 88 II 172, JT 1963 I 189 (Jun. 12, 1962) (Switz.), https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F88-II-172%3Ade&lang=de&zoom=&type=show_document; *A.A. v. X. SA*, Case 4C.5/2003, (Mar. 11, 2003) (Switz.), http://www.bger.ch (last visited July 15, 2017).

well as a syndicate of banks, created to jointly provide a loan.[86]

Despite having internal organizational structure, the ordinary partnerships of a predominantly institutional nature under Swiss law will still be considered to be contracts.[87] Since a contract can't be qualified as an "entity," and the definition of the enterprise in the Swiss-Mexican BIT expressly refers to "entities," the definition of "investor" in this treaty will not cover contractual joint ventures under Swiss law.

Similarly to the Switzerland-Mexico BIT, the U.S. bilateral investment treaties which specifically include "joint ventures" into their definition of "enterprise" also consider them as a form of "entity."[88] However, unlike Switzerland, where the legislation in the area of creation of business entities belongs to competence of the Swiss Confederation,[89] in the Unites States of America this matter is governed by laws of individual states.[90] Thus, in order to determine, for example, whether a certain U.S. entity may be considered as a "joint venture" for the purposes of a U.S. bilateral investment treaty, it is necessary to establish the ordinary meaning of this term under the laws of the state of its formation.

Even though there is no universally accepted definition of "joint venture" in different U.S. states,[91] there appears to be a consensus that this concept covers associations of persons or entities jointly undertaking a particular transaction for mutual profit.[92] On the other hand, there is no uniformity among the U.S. courts and legal scholars as to whether a joint venture is merely a form of partnership,[93] or a separate legal form, distinct from a

---

[86] Christian Bovet, LA NATURE JURIDIQUE DES SYNDICATS DE PRET ET LES OBLIGATIONS DES BANQUES DIRIGEANTES ET Gérantes 266 (1991).

[87] *See, e.g.*, COMMENTAIRE ROMAND: CODES DES OBLIGATIONS – II 48 (Pierre Tercier & Dr. Marc Amstutz eds., 2008); Florence Guillaume, LEX SOCIETATIS : PRINCIPES DE RATTACHEMENT DES SOCIETES ET CORRECTIFS INSTITUES AU BENEFICE DES TIERS EN DROIT INTERNATIONAL PRIVE SUISSE 10-11 (2001).

[88] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 1.

[89] BUNDESVERFASSUNG Apr. 18, 1999, SR 101, art. 122, ¶ 1 (Switz).

[90] *See, e.g.*, William Burnham, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 510-11 (1995).

[91] *See,* Maree C. Chetwin, *Joint Ventures-A Branch of Partnership Law?* 16 U. QUEENSLAND L.J. 256, 257 (1990-1991).

[92] *See*, Michael I. Sanders, JOINT VENTURES INVOLVING TAX EXEMPT ORGANIZATIONS 3 (4th ed., 2013) (*citing* BLACK'S LAW DICTIONARY 839 (6th ed., 1990); *Harlan E. Moore Charitable Trust v. United States*, 812 F.Supp. 130 (C.D. Ill. 1993), *aff'd*, 9 F.3d 623 (7th Cir. 1993)).

[93] *See, e.g.*, Unif. P'ship Act § 202, cmt. 2 (1997) ("*Relationships that are called "joint ventures" are partnerships if they otherwise fit the definition of a partnership. An association is not classified as a partnership, however, simply because it is called a "joint venture*."); *Pedersen v. Manitowoc Co.*, 25 N.Y.2d 412 (1969) ("*The legal consequences of a joint ven-*

partnership.[94] When such distinction is made, the key difference is usually that, unlike a partnership, a joint venture does not entail a continuing relationship among the parties, but pursues a single transaction or venture.[95] In the latter case, the term "joint venture" would cover only contractual relationships not amounting to any organizational form and, therefore, not considered as "entity."[96] However, since the definitions of "enterprise" in U.S. BITs consider joint ventures as a form of "entity," such contractual relationships will not be covered by this definition.

B. Contractual Joint Ventures as "Investors"

Since the definitions of "company" or, as the case may be, "enterprise," in bilateral investment treaties provide non-exclusive lists of "organizations" or "entities," from the logical point of view, in order to be covered by these definitions, a joint venture, first, shall be capable of being recognized as an organization (entity). Although they may have some internal structure and management bodies, contractual joint ventures by their nature are still contracts and, therefore, cannot be considered as organizations (entities). That is why contractual joint ventures cannot be recognized as "investors" regardless of whether the definition of "company" or "enterprise"

---

ture are almost identical with that of a partnership"); Frank L. Mechem, *The Law of Joint Adventures*, 15 MINN. L. REV. 644, 667 (1930-1931) ("*there is no reason for distinguishing partnership and joint adventure situations by making a separate classification for the later, unless perhaps for purposes of convenience in describing a kind of partnership*"); Robert Flannigan, *The Joint Venture Fable*, 50 AM. J. LEGAL HIST., 200, 222 (2008-2010) ("*The claim of distinct status for the joint venture is illusory*").

[94] *See, e.g.*, Comment, *Joint Adventures, distinguished from Partnerships*, 3 DAKOTA L. REV. 49, 50 (1930-1931) ("*A given relationship may amount to that of partnership, or merely to the less extensive one of joint adventure, according to its special circumstances*"); Comment, *Joint Venture or Partnership*, 18 FORDHAM L. REV. 114 (1949) ("*it should be recognized that they are separate concepts, serving separate ends and susceptible of independent interpretation in the law*"); Walter H.E. Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U. L. REV. 1, 23 (1960) ("*The ultimate conclusion which may be drawn from the examination of the cases indicates that differences have developed between the legal concepts of joint venture and partnership, and that the courts will distinguish between them*"); Walter H.E. Jaeger, *Partnership of Joint Venture?* 37 Notre Dame Law 138, 150-159 (1961-1962) ("*In short, the joint venture has become (or in some jurisdictions, is becoming) a distinct form of business organization, a legal relationship*"); Comment, *Reviewing the Law on Joint Venture with an Eye Toward the Future*, 63 S. CAL. L. REV. 487, 488 (1990) ("*even if the historical characterization of joint ventures as equivalent to partnerships is assumed correct, current economic conditions necessitate a reformation of contemporary joint venture law*").

[95] *See, e.g.*, BLACK'S LAW DICTIONARY 839 (6th ed., 1990); Robert Flannigan, *The Legal Status of the Joint Venture*, 46 ALTA. L. REV. 713, 715 (2009).

[96] *Cf*, Robert R. Keatinge, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY 17 (¶ 1:17) (2013); MODEL JOINT VENTURE AGREEMENT 5-6 (AM. BAR ASS'N 2006).

may be in certain bilateral investment treaties, specifically referring to "joint ventures."

C. Comparison with the Status of Other Types of Joint Ventures

1. Partnership Joint Ventures as "Investors"

Unlike contractual joint ventures, partnership joint ventures may be recognized as "investors," but the possibility of such recognition under a certain BIT depends on the exact content of the definition of "company" in this treaty. First, partnership joint ventures may be recognized as "investors" under those treaties, which definitions specifically refer to "partnerships."[97] Second, taking in account that unincorporated partnerships may be classified as "companies of persons" or "associations of persons without legal personality," these partnerships could be recognized under those treaties, which definitions use these terms.[98]

2. Corporate Joint Ventures as "Investors"

Taking into account that the term "corporation" or its equivalents (such as "registered company" or "limited liability company")[99][100] may be found in virtually any definition of "company" (or, depending on the treaty, in the definition of "investor" in general), setting up a joint venture in a corporate form under the laws of a foreign investor's state practically predetermines its qualification as an "investor" for the purposes of a relevant treaty. As a result, the status of corporate joint ventures essentially depends on the compliance of their founders with a set of formal requirements prescribed by this law in order to create this type of business enterprise. Furthermore, taking into account the apparently less frequent use of the term "partnership" and its equivalents in the definitions of "investors," this universal use of the term "corporation" would also result in lesser chances of the recognition as "investor" of partnership joint ventures as compared to corporate joint ven-

---

[97] *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Azer., art. 1(a), Aug. 8, 2000, https://2001-2009.state.gov/documents/organization/43478.pdf.

[98] *See, e.g.*, Tratado Sobre Promoción y Protección Preciproca de Inversiones, Ger.-Arg., art. 1(4), Apr. 9, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/92; Treaty on the Promotion and Reciprocal Protection of Investments, Switz.-Mex., art. 1(1), Jul.10,1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2006.

[99] *See, e.g.*, Treaty on the Promotion and Reciprocal Protection of Investments, Switz.-Mex., art. 1(1), Jul. 10, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2006.

[100] *See, e.g.*, Concernant L'Encouragement et la Protection Réciproque des Investissements, Switz.-Indon., art. 3(b)(2), Jun. 6, 1974, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1640.

tures.

III. SHARES IN JOINT VENTURES AS "INVESTMENTS"

A. The Meaning of "Investment" in Bilateral Investment Treaties

1. The Absence of a True Definition of "Investment"

Even though a certain joint venture might not be covered by the definition of "investor" of an applicable treaty, its foreign participants could still benefit from the protection offered by this treaty, provided that they qualify as "investors," making their shares an "investment" within the treaty's meaning. Although modern bilateral investment treaties would normally contain a definition of "investment,"[101] the meaning of this term in international investment arbitration remains unclear.[102] That is why, before arguing that a share in a certain joint venture shall be recognized as an "investment," a foreign investor may first need to establish the exact meaning of this term in an applicable treaty.

This task may provide to the claimant's legal counsel an excellent opportunity to demonstrate their rigorous analytical skills, creative legal thinking, and persuasion abilities. To begin with, rather than defining the meaning of "investment," modern bilateral investment treaties merely describe the content of this term. As concerns, European treaties and their definitions of "investment" usually open with a general statement that it comprises every kind of asset, followed by an illustrative list of their categories which it "includes, in particular, though not exclusively."[103] The five categories of assets are: movable and immovable property rights, interests in companies, monetary claims and rights to performance having economic value, copyrights, and industrial property rights, as well as concessions and all other rights conferred by law, by contract or by decision of an authority taken pursuant to law.[104] While certain treaties impose certain additional condi-

---

[101] *See, e.g.,* Rudolf Dolzer & Margrete Stevens, BILATERAL INVESTMENT TREATIES 63-65 (1995).

[102] *Romak S.A. v. Republic of Uzbekistan,* PCA Case No. AA 280, Award, Nov. 26, 2009, ¶ 191, *available at*: https://pcacases.com/web/sendAttach/491 (last visited July 15, 2017); Sébastien Manciaux, *The Notion of Investment: New Controversies*, 9 J. WORLD INVESTMENT & TRADE 443 (2008); Campbell McLachlan, Laurence Shore & Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, 171-73 (2007).

[103] Rudolf Dolzer & Margrete Stevens, BILATERAL INVESTMENT TREATIES 63-65 (1995).

[104] Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Pak.-Switz., Nov. 7, 1995; Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 25 - 27 (1995).

tions on the meaning of this term such as making investment in accordance with the laws and regulations of the host state[105] or investment of assets in the territory of the other contracting party,[106] none of them prescribes any specific criteria allowing distinguishing "investments" from "non-investments."

As compared with the European treaties and the earlier versions of the U.S. model BIT,[107] the 2004 and the 2012 U.S. model treaties,[108] as well as signed treaties based on them,[109] provide additional guidance as to the meaning of "investment." Their identical definitions of this term open with a general statement that it 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.[110] Similarly to the European treaties, this introductory statement is also followed by a non-exclusive list of forms which an investment may take, notably (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, per-

---

[105] Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, It.-Pak., Jul. 7, 1997; Agreement between the Government of the Republic of Philippines and the Government of the Republic of Italy concerning the encouragement and the reciprocal protection of investments, It.-Phil., Jun. 17, 1988.

[106] The Treaty between the Italian Republic and the Argentine Republic on the promotion and protection of investments, Arg.-It., May 22, 1990; Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, It.-Pak., Jul. 7, 1997.

[107] The 1982 U.S. Model Bilateral Investment Treaty (the "1982 U.S. Model BIT"), art. 1(1)(c); the 1983 U.S. Model Bilateral Investment Treaty (the "1983 U.S. Model BIT"), art. 1(1)(c); the 1984 U.S. Model Bilateral Investment Treaty (the "1984 U.S. Model BIT"), art. 1(1)(b); the 1987 U.S. Model Bilateral Investment Treaty (the "1987 U.S. Model BIT"), art. 1(1)(b); the 1991 U.S. Model Bilateral Investment Treaty (the "1991 U.S. Model BIT"), art. 1(1)(a); the 1992 U.S. Model Bilateral Investment Treaty (the "1992 U.S. Model BIT"), art. 1(1)(a); *available in* Vandevelde K.J., U.S. International Investment Agreements, at 769-816; the 1994 U.S. Model BIT, art. 1(d).

[108] U.S. Dep't of State, 2004 Model BIT (2004); U.S. Dep't of State, Office of the United States Trade Representative, 2012 Model BIT (2012).

[109] Treaty between the United States of America and the Oriental Republic of Uruguay concerning the encouragement and the reciprocal protection of investment, U.S.-Uru., Nov. 4, 2005.

[110] U.S. Dep't of State, 2004 Model BIT (2004); U.S. Dep't of State, Office of the United States Trade Representative, 2012 Model BIT (2012).

mits, 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.[111] This list is supplemented by three footnotes, which identify the forms of debt which are most likely to have the characteristics of investments, the factors determining whether licenses, authorizations permits, and similar instrument possess these characteristics as well as state that "investment" does not include an order or judgment entered in a judicial or administrative action.[112]

Even though the definitions of "investment" in two most recent U.S. model treaties expressly name three of its characteristics, they do not require that in order to be recognized in this capacity a certain asset to simultaneously possess all of them. At the same time, the choice of the word "including" clearly suggests that there could be other characteristics that an investment may possess. However, no indication is provided as to what these additional characteristics could be or what would be their relative weight as compared with those three specifically listed in the definition. As a result, similarly to their European counterparts, these two definitions also do not prescribe any clear set of criteria allowing distinguishing investments from non-investments.

The absence of these criteria in the definitions of "investment" in bilateral investment treaties was not redressed by arbitral tribunals, which expressed on this subject a wide variety of views. On the one end of their broad spectrum, in *Romak S.A. v. Republic of Uzbekistan* the tribunal refused to recognize rights under a milling wheat supply agreement and an arbitral award as "investments" within the meaning of the Switzerland-Uzbekistan BIT,[113] even though "claims to money or to any performance having an economic value" were specifically listed in its broad definition of "investment."[114] Recalling several previous decisions dealing with the meaning of investment in Article 25 of the ICSID Convention, notably *Salini v. Morocco*,[115] *CSOB v. the Slovak Republic*,[116] *LESI - Dipenta v. Algeria*[117] and *Pey Casado v. Chile*,[118] the tribunal held that the term "in-

---

[111] *Id*.

[112] *Id*.

[113] Agreement between the Swiss Confederation and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investments, Switz.-Uzb., Apr. 16, 1993.

[114] Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA 280, Award, ¶ 101 (Nov. 26, 2009).

[115] *Salini Construttori SpA and Italtrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 23, 2001).

[116] *CSOB v. the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, ¶ 64 (May 24, 1999).

[117] *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*,

vestment" under this BIT has an inherent meaning (irrespective of whether the investment resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution which extends over a certain period of time and that involves some risk.[119] It further pointed out that by their nature, asset types enumerated in the BIT's non-exclusive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of investment, the fact that it falls within one of the specific categories listed in Article 1 does not categorize it as an "investment."[120]

On the opposite end of this spectrum, in *Petrobart Limited v. Kyrgyz Republic,*[121] the tribunal recognized as "investment" Petrobart's right under a contract to payment for goods delivered under this contract, even though the usual criteria for investment under the ICSID Convention, notably a contribution which extends over a certain period of time, were not met.[122] According to the tribunal, it followed from the case law dealing with the interpretation of treaty clauses referring to "claims for money" that investment was often a wide concept in connection with investment protection and these claims may constitute investments even if they were not part of a long-term business engagement in another country.[123] Relying on previous ICSID decisions in *Fedax v. Venezuela*,[124] *Salini v. Morocco*,[125] and *SGS v. Pakistan*,[126] the tribunal concluded that it was not unusual that claims to money, even if not based on any long-term involvement in a business in another country, were included in treaties within the concept of investment.[127]

ICSID Case No. ARB/03/8, Award, ¶ 13(iv) (Jan. 10, 2005).

[118] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008).

[119] *Romak S.A. v. Republic of Uzbekistan,* PCA Case No. AA 280, Award, ¶ 207 (Nov. 26, 2009).

[120] *Id*.

[121] *Petrobart Limited v. the Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award at 72 (March 29, 2005).

[122] CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 172 (2008).

[123] *Petrobart Limited v. the Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award, at 71 (Mar. 29, 2005).

[124] *Fedax N.V. v. the Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶¶ 20–21 (Jul. 11, 1997).

[125] *Salini Construttori SpA and Italtrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul. 23, 2001).

[126] *SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objection to Jurisdiction (Aug. 6, 2003).

[127] *Petrobart Limited v. the Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitral Award, at 72 (Mar. 29, 2005).

2. The Ordinary Meaning of "Investment" and Its Characteristics

Against this background, in order to benefit from protection offered by a certain bilateral investment treaty, a foreign participant in a joint venture will have to conduct its proper inquiry into the meaning of "investment" under this treaty. Assuming that the treaty contains the definition of this term, the starting point of this inquiry shall be the analysis of this definition's text. Since both European and U.S. bilateral investment treaties define "investment" by reference to "any kind of assets," this analysis shall begin with the interpretation of the meaning of "asset." In view of the requirements of Article 31 of the Vienna Convention on the Law of Treaties, it shall be made in good faith in accordance with the ordinary meaning to be given to the term "asset" in its context and in the light of the object and purpose of the treaty.[128]

The ordinary meaning of "asset" can be established on the basis of the analysis of the non-exclusive lists of assets in the definitions of "investment." This analysis reveals that the term "asset" in both European and U.S. bilateral investment treaties means property of all kinds, both in tangible and intangible form.[129] At the same time, as it follows from the preparatory work of certain U.S. BIT[130] and arbitration awards dealing with the application of European BIT,[131] the definition of "investment" in these treaties was not meant to include purely commercial transactions. That is why, although the definition of "investment" may refer to "any kind of asset," the next stage of the inquiry into the meaning of "asset" shall be drawing the distinction between those assets which are "investments" and those assets which could not be recognized in this capacity.

When the definition of "investment" in a certain treaty expressly identifies several of its characteristics, namely the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk,[132] they shall be used as the starting point for making this distinction. Since these characteristics are preceded by the word "including," the next step of the analysis shall be the determination of other characteristics of investment not expressly named in their non-exhaustive list. In view of the

---

[128] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969.

[129] *Cf.*, *Assets*, Black's Law Dictionary, 117 (6th ed, 1990); *Romak S.A. v. Republic of Uzbekistan,* PCA Case No. AA 280, Award, ¶177 (Nov. 26, 2009).

[130] *See*, *e.g.*, Investment Treaty with Georgia, U.S.-Geor., Mar. 7, 1994, S. TREATY DOC. NO. 104-13; Investment Treaty with Azerbaijan, U.S.-Azer., Aug. 1, 1997, S. TREATY DOC. NO. 106-47.

[131] *See*, *e.g.*, *Fedax N.V. v. the Republic of Venezuela*, *supra* note 125, ¶ 42; *Joy Mining Machinery Ltd. v. the Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004).

[132] U.S.-Uruguay BIT, *supra* note 110, at art. 1.

interpretation rules of the Vienna Convention on the Law of Treaties,[133] these "additional" characteristics could be deducted from the ordinary meaning of the term "investment." Such meaning can be established by analyzing the arbitral awards dealing with the interpretation of the term "investment" in bilateral investment treaties[134] as well as in Article 25 of the ICSID Convention.[135] While it is generally admitted that the investment arbitration awards do not have value of a binding precedent,[136] they could still serve as a reflection of an ordinary meaning of this term. Furthermore, since many of these past awards dealt with the application of those BIT, which do not specifically list any of the characteristics of investment in its definition, the results of this analysis could be equally used for determining the meaning of investment in these treaties as well.

The analysis of the awards rendered over the last several decades reveals that arbitral tribunals identified five possible characteristics of "investment." First, an investment is a contribution.[137] It may be understood as any dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance.[138] Second, an investment shall have certain duration. [139] According

---

[133] Vienna Convention on the Law of Treaties, *supra* note 50, at art. 31(1).

[134] *See*, *e.g.*, *Petrobart Limited v. the Kyrgyz Republic*, *supra* note 122, at 72; *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, ¶ 145 (Aug. 19, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf (last visited July 15, 2017); *Romak S.A. v. Republic of Uzbekistan, supra* note 103, ¶ 207.

[135] *See*, *e.g.*, *Fedax N.V. v. Republic of Venezuela*, *supra* note 125, ¶ 43; *CSOB v. the Slovak Republic*, *supra* note 117, ¶ 64; *Salini Construttori SpA and Italtrade SpA v. Kingdom of Morocco*, *supra* note 117, ¶ 52; *Joy Mining Machinery Ltd. v. the Arab Republic of Egypt*, *supra* note 132, ¶ 63; *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, *supra* note 118, § 2 ¶ 13(iv); *Bayindir Insaat Turizm Tecaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 130 (Nov. 14, 2005); *Jan de Nul N.V. & Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 64 (Jun. 16, 2006); *Saipem SpA v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 99 (Mar. 21, 2007); *Victor Pey Casado v. Republic of Chile*, *supra* note 119, ¶ 232; *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, ¶¶ 108-9 (July 14, 2010); *Global Trading Resource Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, ¶ 56 (Dec. 1, 2010); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, ¶ 150, (Mar. 31, 2011).

[136] *Bayindir Insaat Turizm Tecaret Ve Sanayi AŞ v. Pakistan*, *supra* note 136, ¶ 76; *Jan de Nul N.V. v. Arab Republic of Egypt*, *supra* note 136, ¶ 64 (citing *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 30-32 (July 13, 2005).

[137] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 52; *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, *supra* note 118, § 2 ¶ 13(iv).

[138] *Romak S.A. v. Republic of Uzbekistan*, *supra* note 103, ¶ 214.

to certain arbitral awards, the minimum duration of investment transaction from 2 to 5 years shall be sufficient.[140] Third, an investment involves a participation in the risk of the transaction.[141] Unlike ordinary commercial risk of non-performance of contractual obligations, the risk associated with an investment involves a situation when an investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even when all relevant counterparties discharge their contractual obligations.[142] Fourth, an investment shall contribute to the host state's development.[143] Fifth, an investment should display regularity of profit and return.[144]

Since the ordinary meaning of the term investment is the commitment of funds or other assets with the purpose to receive a profit or return from that commitment of capital, the existence and extent of which is uncertain,[145] the "contribution" and the "participation in the risk of the transaction" characteristics deserve unconditional support. Furthermore, taking into account that from the economic point of view any investment involves the sacrifice of current consumption to increase future consumption,[146] the existence of a certain period of time between the moment when the contri-

---

[139] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 52; *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, *supra* note 118, § 2 ¶ 13(iv).

[140] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 54; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 62 (July 16, 2001); *Jan de Nul N.V. v. Arab Republic of Egypt*, *supra* note 136, ¶¶ 93–95; *Malaysian Historical Salvors SDN BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 65 (Apr. 16, 2009). *See also*, CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 130–31 (2d ed. 2009).

[141] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 52; *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, *supra* note 118, § 2 ¶ 13(iv).

[142] *Romak S.A. v. Republic of Uzbekistan, supra* note 103, ¶¶ 229–30; Emmanuel Gaillard, *Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI): Chronique des Sentences Arbitrales*, 126 JOURNAL DU DROIT INTERNATIONAL 273, 292 (1999).

[143] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 52; *Consortium R.F.C.C. v. Kingdom of Morocco*, *supra* note 141, ¶ 65.

[144] *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, *supra* note 132, ¶ 53; *Helnan International Hotels A/S v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, ¶ 77 (Oct. 17, 2006).

[145] *Romak S.A. v. Republic of Uzbekistan, supra* note 103, ¶ 177 (citing *Investment*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

[146] *See e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 408 (15th ed., 1995); WILLIAM F. SHARPE & GORDON J. ALEXANDER, INVESTMENTS 1 (4th ed., 1990).

bution is made and the moment when the return on this contribution is received shall also be seen as its mandatory element. The same idea of giving up current consumption in exchange for a possible increase of future consumption also leads to the conclusion that the recognition of a particular contribution as an investment depends on the existence of this period, but not on its duration. While it could be shorter or longer, contrary to certain arbitral awards,[147] the threshold of 2 to 5 years should not affect the qualification of a contribution as "investment," but only its qualification as a short term or medium-term investment.[148]

On the other hand, the "contribution to the host State's development" cannot be retained as a characteristic of "investment." Although the economic development of a host state may be considered as one of the proclaimed objectives of the ICSID Convention,[149] the benefits of a particular investment for this state shall be seen as its desirable result, but not as its essential characteristic.[150] While certain investments may turn out to be useless for the host sate, they should not fall, for that reason alone, outside the ambit of the concept of investment.[151]

Similarly, the "regularity of profit and return" element shall also be removed from the list of the characteristics of investment. By its very nature, an investment involves a risk of loss, meaning that despite all efforts of a foreign investor, the implementation of a particular project still could result in a loss. It may be caused by external reasons which could be unrelated to this project and have nothing to do with the nature of a contribution, such as the discovery of natural resources or the evolution of the oil price on the world market.[152] From this perspective, the absence of profit shall not affect the nature of contribution as an investment.[153]

---

[147] *Salini Construttori SpA & Italtrade SpA v. Kingdom of Morocco*, *supra* note 116, ¶ 54; *Consortium R.F.C.C. v. Kingdom of Morocco*, *supra* note 141, ¶ 62; *Malaysian Historical Salvors SDN BHD v. Malaysia*, *supra* note 141, ¶ 65. *See also*, SCHREUER ET AL., *supra* note 141, at 130–31.

[148] *See also*, Emmanuel Gaillard & Yas Banifatemi, *The Long March Towards a Jurisprudence Constante on the Notion of Investment*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 97, 103-04 (Meg Kinnear et al. eds, 2015).

[149] Jan Asmus Bischoff, Richard Happ, The Notion of Investment, *in International Investment Law: A Handbook* 513 (Marc Bungenberg et al. eds, 2015).

[150] *Victor Pey Casado v. Republic of Chile*, *supra* note 119, ¶ 232; *Saba Fakes v. Republic of Turkey*, *supra* note 136, ¶ 111.

[151] *Victor Pey Casado v. Republic of Chile*, *supra* note 119, ¶ 232; *Saba Fakes v. Republic of Turkey*, *supra* note 136, ¶ 111.

[152] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, ¶ 305 (Oct. 31, 2012).

[153] *Id.*; *Electrabel S.A. v. the Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 5.43 (Nov. 30, 2012); Gaillard & Banifatemi,

In view of the above, in order to be considered as an "investment" under a bilateral investment treaty, an asset shall have certain economic value, shall be committed for a certain period of time with the expectation of benefits, and the person committing this asset shall bear the risk that these benefits are not received. Depending on the circumstances of a particular project, an asset may have other characteristics, namely, the contribution to the host state's development or the regularity of profits. Nevertheless, for its recognition as an "investment," an asset is not required to possess these "additional" characteristics.

Once the three characteristics of "investment" which allow a distinction to be drawn between assets which could and could not be recognized in this capacity have been identified, the next step of the inquiry into the meaning of this term should be the determination of the role of the specific categories of assets listed in its definition. From the point of view of logical relationship between the whole and its constituent parts, these three characteristics shall be present in all illustrative categories of assets. As a result, even though a certain asset may bear close resemblance to an item on the list of assets, it cannot be considered an "investment" unless it possesses all these characteristics.[154] On the opposite side, the impossibility to fit a certain asset into any of their illustrative categories does preclude its recognition as "investment," provided that has its three characteristics.[155]

Finally, from the practical point of view, the determination of whether a share in a joint venture may be recognized as an "investment" should start with the determination of whether the share fits into one of the five illustrative categories. Out of these categories, the two most closely resembling shares in joint ventures are "participation in a company" and "monetary claims and rights to performance having economic value." Correspondingly, prior to analyzing whether a share in a certain joint venture is covered by one of these two categories, their exact scope shall be established.

3. Two Categories of Assets Most Closely Resembling Shares in Joint Ventures

Participation in a Company

Regardless of the exact wording of "participation in a company" cate-

---

supra note 149, at 119-20.

[154] *See*, *e.g.*, *Alp Finance and Trade AG v. the Slovak Republic*, Investment Ad Hoc Arbitration, Award, ¶¶ 231, 237 (Mar. 5, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0027.pdf (last visited July 15, 2017).

[155] *Romak S.A. v. Republic of Uzbekistan, supra* note 103, ¶ 207.

gory in a certain BIT[156] and independently of how an interest in a company or in a joint venture may be denominated, in order to be covered by this category it shall possess all three characteristics of "investment". This would be clearly the case of shares, representing an equity participation in a company. First, a share represents a contribution to the share capital of a company, which has an economic value.[157] Second, assuming that purchased shares are not immediately re-sold, the "duration" characteristic of "investment" will also be present. Third, since the profits are distributed in proportion to share ownership, subject to any dividend preferences and other rights when there is more than a single class of shares outstanding,[158] an economic success of a shareholder is tied to the commercial success of a company. Furthermore, the bankruptcy of a company may result in a complete loss of the value of shares. Consequently, shares involve the risk of not receiving the expected benefits as well as the risk of completely losing the contribution. This means that in case of shares the "risk" characteristic of "investment" will also be present.

Since shares possess all three characteristics of "investment", their qualification in this capacity shall not depend on the size of the shareholding in a company. This conclusion was consistently confirmed by various arbitral tribunals, which recognized as an "investment" a 14.18% shareholding,[159] a 18.3% shareholding,[160] a 29.42% shareholding,[161] as well as a

---

[156] While certain BIT's do not distinguish between participations in companies and participations in joint ventures (*See*, *e.g.*, Bilateral Investment Treaty, H.K.-Austl., art. 1(e)(ii), *available at* https://www.tid.gov.hk/english/ita/ippa/files/01.IPPAAustraliae.PDF; Bilateral Investment Treaty, Switz.-Pak., art. 1(2)(b), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2130.) some others make such distinction (*See, e.g.*, Bilateral Investment Treaty, Can.-U.S.S.R., art. I(b)(ii), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/632; Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, (Bilateral Investment Treaty, Neth.-Czech and Slovk. art. 1(a)(ii), Apr. 29, 1991, *available at*: https://treaties.un.org/doc/Publication/UNTS/Volume%202242/v2242.pdf (last visited July 15, 2017); Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments (Bilateral Investment Treaty, Neth.-Pol.), Sep. 7, 1992, art. 1(a)(ii), *available at*: https://treaties.un.org/doc/Publication/UNTS/Volume%202240/v2240.pdf (last visited July 15, 2017)).

[157] *See, e.g.*, Harry G. Henn & John R. Alexander, Law of Corporations 396-97 (3d ed. 1983).

[158] *Id.* at 129-30.

[159] GAMI Inv. Inc. v. the Gov't of the United Mexican States, Final Award, ITA Inv. Treaty Cases, Nov. 15, 2004, ¶ 26, http://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf (last visited July 15, 2017).

[160] Lanco Int'l Inc. v. Arg. Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, ¶ 10 (Dec. 8, 1998).

[161] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/08, Decision on Jurisdic-

100% shareholding.[162] Thus, regardless of whether a certain shareholder owns majority, minority, controlling or non-controlling stake in a company, his shares still shall be qualified as an "investment." From this perspective, it is not surprising that, according to a commonly held view, the foreign shareholding is by definition an "investment" and its holder an "investor."[163]

Monetary Claims and Rights to Performance Having Economic Value

Depending on the bilateral investment treaty, this category may be denominated as "claims to money or rights to performance having economic value,"[164] "claims to money, and claims to performance under contract having a financial value,"[165] "capitalized claims, including reinvested revenues, as well as rights to any contractual performance having an economic value,"[166] or "a claim to money or claim to performance having economic value, and associated with an investment."[167] An analysis of these descriptions reveals that, despite differences in its wording from one treaty to another, this category essentially covers two types of claims.

The claims of the first type may be defined as rights to receive certain amount of money. Examples include claims under promissory notes issued

---

tion, ¶¶ 57–65 (Jul. 17, 2003).

[162] Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 251–53 (Aug. 14, 2007).

[163] *See, e.g.,* Compañía de Aguas del Aconquija S.A and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment., ¶50 (Jul. 3, 2002).; Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitration 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); Christoph Schreuer, *Shareholder Protection in International Investment Law*, *in* COMMON VALUES IN INTERNATIONAL LAW. ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 601 (Pierre-Marie Dupuy et al, eds, 2006); Abby Cohen Smutny, Claims of Shareholders in International Investment Law, *in International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, 363 (Christina Binder et al., ed. 2009); Francisco Orrego Vicuña, *The Protection of Shareholders under International Law: Making State Responsibility More Accessible*, *in* INTERNATIONAL RESPONSIBILITY TODAY. ESSAYS IN MEMORY OF OSCAR SCHACHTER 161 (Maurizio Ragazzi, ed. 2005).

[164] Bilateral Investment Treaty, Switz.-Pak., art. 1(2)(c), *supra* note 157.

[165] Bilateral Investment Treaty ,U.K.-U.S.S.R., art. 1(a)(iii), *supra* note 157.

[166] Treaty between the Government of the Kingdom of Morocco and the Government of the Italian Republic on promotion and reciprocal protection of investments (Bilateral Investment Treaty, It.-Morocco), art. 1(1)(c), Jul. 18, 1990, *available at*: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1698 (last visited July 15, 2017).

[167] Bilateral Investment Treaty, U.S.-Ukr., art. 1(a)(iii), Mar. 4, 1994, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2366.

by a country and acquired by a foreign company from the original holder,[168] claim for payment for services rendered under a contract regarding the construction of a highway,[169] claims for payment of services under a contract on customs inspections for a government at foreign and domestic ports,[170] as well as claims for payment under a contract for the delivery of gas condensate.[171] On the other hand, the claims of the second type may be defined as rights to receive certain economic benefit in a non-monetary form. Examples of this type of claim include the rights of a shareholder of a joint venture, derived from the right of usufruct, which was irrevocably transferred to the capital of the joint venture by the state,[172] and the rights under the business contracts concluded by foreign investors with respect to their property located in a host state.[173]

While certain bilateral investment treaties state that in order to be considered as "investment," claims to money and claims to performance having economic value shall be directly related to an investment,[174] or expressly exclude claims to money that arise solely from commercial contracts for the sale of goods or services as well as any other claims to money that do not involve kind of specifically listed interests recognized as "investments,"[175] other treaties do not contain such qualification.[176] In view of this distinc-

---

[168] Fedax N.V. v. the Republic of Venez., ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, ¶¶ 37–43 (Jul. 11, 1997).

[169] Salini Construttori SpA and Italtrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 49 (Jul. 23, 2001).

[170] SGS Société Générale de Surveillance S.A. v. the Islamic Republic of Pak., ICSID Case No. ARB/01/13, Decision on Objection to Jurisdiction, ¶ 135 (Aug. 6, 2003).

[171] Petrobart Ltd. v. the Kyrg. Republic, Arbitration Inst. of the Stockholm Chamber of Commerce Arb. No. 126/2003, Arbitral Award, at 72 (Mar. 29, 2005).

[172] S. Pac. Prop. (Middle E.) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶¶ 164–165 (May 20, 1992).

[173] Tokios Tokelės v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 90–92 (Apr. 29, 2004).

[174] *See, e.g.*, Bilateral Investmet Treaty, U.S.-Arg., art. I(1)(a)(iii), Nov. 14, 1991, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/127.; Treaty between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments, (Bilateral Investment Treaty, U.S.-Morocco), art I(4)(h), July 22, 1985, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/20521 (last visited July 15, 2017).

[175] *See, e.g.*, Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments ("Bilateral Investment Treaty, Can.-China"), arts. 1(1)(k) and (l), Oct. 01, 2014, *available at*: http://www.treaty-accord.gc.ca/text-texte.aspx?id=105363 (last visited July 15, 2017).

[176] *See, e.g.*, Bilateral Investment Treaty, Can.-U.S.S.R., art. I(b)(iii), Nov. 20, 1989, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/632.; Bilateral Investment Treaty, Neth.-Pol. art. 1(a)(iii), Sept. 7, 1992, *available at* http://investmentpolicyhub.

tion, the arbitral tribunal in *Mytilineos Holding SA v. the State Union of Serbia & Montenegro and Republic of Serbia* held that in the absence of such exclusion, claims arising from purely commercial activities, such as sales contracts, are covered by the definition of "investment."[177] Other tribunals took a more restrictive approach, emphasizing the need to draw a distinction between rights arising out of a sales contract, a one-off commercial transaction, and investments.[178]

In view of the logical relationship between the term "investment" as a whole and the illustrative categories of assets as its constituent parts, this restrictive approach shall be supported. That is why, regardless of the claim's nature, in order to be covered by the category "monetary claims and rights of performance having economic value," it shall possess all three characteristics of "investment." Two of them, namely duration and risk, allow drawing a distinction between those claims which are investments and other claims which are not investments.

With respect to the duration characteristic, since no minimum length of a transaction is required for its recognition as an investment, monetary claims and claims to performance may constitute investments even if they are not part of a long-term business engagement in another country.[179] At the same time, despite absence of minimum length requirements, the duration characteristic still implies a certain period of time between the moment of making a contribution and receiving a return. The requirement of having this period may preclude, for example, recognition as investment of claims under assignment contract which exhausts its object and purpose by its sole stipulation by the parties and the effects of which—the assignment—takes place immediately.[180]

Insofar as the "risk" characteristic is concerned, it is the nature of the risk associated with a contract which allows to draw a line between investment claims and purely contractual claims. On the one hand, claims involving participation in the risk of the transaction—in the sense that the creditor is not assured of a return on his contribution, and may not know at the outset the total amount he will commit, even if all relevant counterparties dis-

---

unctad.org/IIA/treaty/2643.

[177] Mytilineos Holding SA v. the State Union of Serb. & Montenegro and Republic of Serb., UNCITRAL Arbitration, Partial Award on Jurisdiction, ¶¶ 109, 134–36 (Sept. 8, 2006).

[178] *See, e.g.*, Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 58 (Aug. 6, 2004); Romak S.A. v. Republic of Uzb., PCA Case No. AA 280, Award, ¶ 242 (Nov. 26, 2009).

[179] *See, e.g.*, Petrobart Ltd. v. the Kyrg. Republic, Arbitration Institute of the Stockholm Chamber of Commerce Arb. No. 126/2003, Arbitral Award, at 71 (Mar. 29, 2005).

[180] Alp Fin. and Trade AG v. the Slovk. Republic, Investment Ad Hoc Arbitration, Award, ¶ 232 (Mar. 5, 2011).

charge their contractual obligations—would be covered by this category. On the other hand, purely contractual claims, which involve only the ordinary commercial risk of nonperformance of contractual obligations, are not considered to be investments.

B. Shares in Contractual Joint Ventures as "Investments"

The process of determination whether a share in a certain contractual joint venture may be considered an investment for the purposes of an applicable bilateral investment treaty shall start with the analysis whether it fits into the "participation in a company" category. The outcome of this analysis depends on whether the term "company" or analogous term in this treaty covers contractual joint ventures. If the answer to this question is positive,[181] a share in such a joint venture may be recognized as an investment.

The answer to this question will be positive in case of a contractual joint venture governed by Swiss law. First, since by its legal nature such joint venture is a contract,[182] a share in this joint venture represents rights to performance under a contract having economic value directed against other participants. Second, a share in a contractual joint venture under Swiss law possesses all three characteristics of an investment. It is clearly a contribution because the participants in such ventures agree to unite their efforts or their resources in order to achieve a common goal.[183] It inherently involves certain duration between the moment of pooling efforts or resources and the moment when a common goal is achieved, or expected to be achieved. It also inevitably involves a risk element, because despite all efforts, the joint activities of the participants could still not lead to a profit or even result in a loss. Finally, the possession of these characteristics would, in any event, lead to the recognition of this share as an investment, regardless of whether it fits into one of the specific categories of assets and regardless of its size. As a result, shares in contractual joint ventures may be recognized as investments under all bilateral investment treaties.

C. Comparison with the Status of Shares in Other Types of Joint Ventures

1. Shares in Partnership Joint Ventures as "Investments"

Similar to shares in contractual joint ventures, shares in partnership

---

[181] Bilateral Investment Treaty, Switz.-Mex., art. 1(1), July 10, 1995, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2006.
[182] *X. NV v. Y.,* (2006) 4C.22/2006 (Switz).
[183] CO art. 530(1) (Switz.).

joint ventures may also be considered investments under all bilateral investment treaties, regardless of whether their definitions of "company" cover partnership joint ventures. Since an unincorporated partnership is normally based upon an agreement of its participants,[184] a share in this partnership may be considered as a right to performance under a contract having economic value. Furthermore, like shares in contractual joint ventures, these shares also possess all three characteristics of investment. As a result, a share in a partnership joint venture will also be covered by the "monetary claims and rights to performance having economic value" category and, in any event, by the general notion of investment, regardless of its size.[185]

2. Shares in Corporate Joint Ventures as "Investments"

While shares in corporate joint ventures will also be recognized as investments under all bilateral investment treaties, regardless of the size of the shareholding, the process of this determination may be shorter than in case of shares in contractual and partnership joint ventures. First, the reference to "shares in companies" may be found in all definitions of "investment," whereas the definition of "company" in bilateral investment treaties universally includes a reference to corporations. Second, regardless of its denomination, an equity interest in a corporation possesses all three characteristics of an investment. Thus, a share in a corporate joint venture will inevitably fit into the "participation in a company" category, regardless of the size of this shareholding.[186]

IV. JOINT VENTURES AS CLAIMANTS IN INTERNATIONAL INVESTMENT ARBITRATION

A. Methods for Resolving International Investment Disputes

In addition to offering substantive protection to investments, bilateral investment treaties also prescribe procedural methods for resolving international investment disputes. Depending on the treaty, a foreign investor

---

[184] *See, e.g.*, BARRY J. REITER & MELANIE A. SHISHLER, JOINT VENTURES: LEGAL AND BUSINESS PERSPECTIVES 75-79 (1999) (unincorporated partnerships in Canada); ARTHUR MEIER-HAYOZ & PETER FORSTMOSER, DROIT SUISSE DES SOCIÉTÉS 7 (2015) (unincorporated partnerships in Switzerland); J. DENNIS HYNES & MARC J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC IN A NUTSHELL 210-11 (5th ed. 2012) (unincorporated partnerships in the US).

[185] *Cf.*, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08, Decision on Jurisdiction, ¶ 47-48 (Jul. 17, 2003).

[186] *Id.*

which has not amicably settled its dispute with a host state within a certain time prescribed by this treaty may submit this dispute to one of several international arbitration institutions or to arbitration not supported by a particular institution, usually referred to as *ad hoc* arbitration.[187] First, a treaty may provide for a possibility of submitting this dispute to the ICSID under the ICSID Convention or, when the dispute is outside of its jurisdiction, to the Additional Facility.[188] Second, a foreign investor may have a possibility submit the dispute to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[189] Third, under certain treaties may force a dispute to settle in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[190] Finally, a treaty may provide for the possibility of submitting the dispute with a host state to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.[191]

As the statistical data reveals, the most popular method for the resolution of investment disputes by far remains the arbitration under the auspices of the ICSID.[192] *Ad hoc* arbitration under the UNCITRAL arbitration rules ranks second.[193] Arbitration under the auspices of the SCC occupies the

---

[187] *See, e.g.*, RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 238 (2d ed. 2012).

[188] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, U.K.-Ukr., art. 8(2)(a), Feb. 10, 1993. This would be the case when either a foreign investor's home state or the host state is not a party to the Washington Convention or when the dispute does not directly arise out of an investment. *See*, Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "Additional Facility Rules"), art. 2, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/AFR_2006%20English-final.pdf (last visited July 15, 2017).

[189] *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, U.K.-U.S.S.R., art. 8(3)(a), Apr. 6, 1989.

[190] *See, e.g.*, Hong Kong – Australia BIT, art.10; USA – Argentina BIT, art. VII(3)(a)(iii).

[191] *See, e.g.*, USA – Azerbaijan BIT, art. IX(3)(a)(iv); USA – Ukraine BIT, art. VI(3)(a)(iii).

[192] As of December 31, 2015, ICSID had registered 549 cases under the ICSID Convention and Additional Facility Rules. *See* Int'l Centre for Settlement of Investment Disputes [ICSID]. *The ICSID Caseload-Statistics (Issue 2016-1)*, at 7, (Dec. 31, 2015), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf (last visited July 15, 2017).

[193] As of the end of 2013, 158 investment treaty-based claims were brought under the UNCITRAL Rules. *See*, U.N. Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, 1 IAA Issues Note, at 9, (Apr. 2014), http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (last visited July 15, 2017). Six additional cases under the UNCITRAL Rules were filed in 2014. *See* U.N. Conference on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2014, 2 IIA Issues Note*, at 4, (May 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf (last visited July 15, 2017).

third place, including disputes where the SCC applied its own arbitration rules, as well as those disputes where it acted as Appointing Authority under the UNCITRAL arbitration rules.[194] The arbitration under the rules of the International Chamber of Commerce ranks fourth.[195]

It follows from this ranking that the arbitration rules most widely used in international investment arbitration are the ICISD Convention together with the Additional Facility Rules,[196] the UNCITRAL Arbitration Rules,[197] the SCC 2017 Arbitration Rules,[198] and the ICC Arbitration Rules.[199] Out of these arbitration rules, only the ICSID Convention prescribes specific requirement concerning the personality of claimants, establishing that claimants other than natural persons shall be juridical persons.[200] Does this requirement mean that joint ventures which are not juridical persons cannot

---

[194] From 1993 to 2015, the Stockholm Chamber of Commerce has administered a total of 85 investment disputes, including 34 BIT-based disputes. Out of these cases, 72% (62 cases) of the investment disputes registered have been administered under the SCC Rules. *See* Stockholm Chamber of Commerce Arbitration Institute, *Investment Treaty Arbitration 1993 – 2015*, http://sccinstitute.com/statistics/investment-disputes-2015/ (last visited July 15, 2017).

[195] According to the UNCTAD statistics, as of the end of 2013, there were six investment arbitration cases brought at the International Chamber of Commerce. *See* U.N. Conference on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS), 1 IAA Issues Note*, at 9, (Apr. 2014), http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (last visited July 15, 2017). Six cases were filed in 2014 on the basis of a BIT that listed ICC arbitration as one of the dispute resolution options available to the parties. *See* Int'l Criminal Court, *2014 ICC Dispute Resolution Statistics, in 1 ICC Dispute Resolution Bulletin*, 11, (2015).

[196] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966 (the "ICSID Convention"), ICSID/15, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited July 15, 2017); Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "Additional Facility Rules"), Apr. 10, 2006, ICSID/11, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/AFR_2006%20English-final.pdf (last visited July 15, 2017).

[197] U.N. Commission on Int'l Trade Law, UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) (the "UNCITRAL Arbitration Rules"), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (last visited July 15, 2017).

[198] Arbitration Institute of the Stockholm Chamber of Commerce, *2017 Arbitration Rules, in force as of 1 January 2017* (the "SCC 2017 Arbitration Rules"), http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf (last visited July 15, 2017).

[199] Int'l Criminal Court, *Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 2012* (the "ICC Arbitration Rules"), http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/ (last visited July 15, 2017).

[200] ICSID Convention, art. 25(2)(b).

bring their investment treaty claims to the ICSID proceedings? Does the absence of a similar requirement in other arbitration rules enable joint ventures which are not juridical persons to bring the same claims under these rules?

B. Requirements of Different Arbitration Rules Concerning Personality of Claimants

1. International Arbitration Rules Which do not Prescribe a "Juridical Person" Requirement

When certain arbitration rules do not contain a juridical person requirement, from the logical point of view, the determination of a joint venture's ability to bring its claims under these rules shall be made on the basis of general rules governing the capacity to be a party in arbitration proceedings. As was repeatedly stated by various tribunals operating under the UNCITRAL Arbitration Rules,[201] the SCC Arbitration Rules,[202] the ICC Arbitration Rules,[203] as well as by different scholars,[204] this capacity shall be determined on the basis of law applicable to the general capacity of this party to have rights and obligations, sometimes referred to as the party's "national law," which, in its turn, shall be chosen on the basis of relevant conflict of law provisions.[205] For instance, considering an appeal against the

---

[201] *See* Banque Arabe et Internationale D'Investissement et al. v. Inter-Arab Investment Guarantee Corporation, Ad-Hoc UNCITRAL Arb., Award, ¶ 13, (Nov. 17, 1994), XXI Y.B. COM. ARB. 13, 20 (van den Berg A.J. ed., 1996).

[202] *See* Claimant 1 (Spain), Claimant 2 (Spain) v. Russian Federation, SCC Case 21/1999, Jurisdictional Award, SCC ARB. AWARDS 1999 – 2003, 203 – 236 (Jarvin S., Magnusson A., eds., 2006); Renta 4 S.V.S.A. at al. v. Russian Federation, Award on Preliminary Objections, ¶ 123-134, (Mar. 20, 2005), (Arbitration Institute of the Stockholm Chamber of Commerce), *:* http://www.italaw.com/sites/default/files/case-documents/ita0714.pdf (last visited July 15, 2017).

[203] *See* Vivendi S.A. et al v. Vivendi Telecom International S.A., Elektrim Telekomunikacja Sp. Z o.o. and others, No. 4A_428/2008 (Switz.), (Mar. 31, 2009), XXXIV Y.B. COM. ARB., 286 (Albert Jan van den Berg, ed., 2009).

[204] *See, e.g.*, NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 95-96 (2009); BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND 116-18 (3rd ed. 2015); DANIEL GIRSBURGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION. COMPARATIVE AND SWISS PERSPECTIVES 297 (3rd ed. 2016); THOMAS H. WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION: COMMENTARY, PRECEDENTS AND MATERIALS FOR UNCITRAL BASED ARBITRATION Rules 34–37 (2010).

[205] *See* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 405 (3rd ed. 2014).

ICC arbitration award in *Vivendi S.A. at al. v. Vivendi Telecom International S.A., Elektrim Telekomunikacja Sp. Z o.o. and others*, the Swiss Supreme Court held that the determination of the legal capacity of the respondent, a joint-stock company under Polish law, and thus of its capacity to be a party in an international arbitration is governed by Polish law in accordance with Articles 154 and 155(c) of the Swiss Federal Private International Law Act.[206]

Furthermore, this view is also consistent with the approach consistently taken by the International Court of Justice, according to which the determination of whether a company possesses independent and distinct legal personality shall be made on the basis of relevant domestic law.[207] Thus, when certain international arbitration rules do not expressly require that a claimant other than natural person shall be a juridical person, the capacity of a joint venture to bring its investment treaty claim under these rules shall be determined on the basis of law applicable to this joint venture. It follows that those joint ventures which cannot have rights and obligations in their own name under their national law will be unable to act as claimants in international arbitration.

2. The ICSID Convention

The jurisdiction of the ICSID covers legal disputes arising out of investment between a contracting state and someone else from another contracting state.[208] That is why, in addition to satisfying requirements concerning personality of claimants under the applicable national law, in order to bring its claim to the ICSID, a foreign investor shall be also covered by definition of this term in the ICSID Convention.[209] For the purposes of the

---

[206] Vivendi S.A. et al v. Vivendi Telecom International S.A., Elektrim Telekomunikacja Sp. Z o.o. and others, at 290-91. In accordance with Article 154(1) of the Swiss Federal Private International Law Act, companies are governed by the law of the state under which they are organized, provided they fulfill the publicity or registration requirements of this law or, where such requirements do not exist, if they are organized under the law of this state. According to Article 155(c) of the same Act, the law applicable to a company applicable law governs, in particular, its legal capacity and capacity to act. *See*, Loi fédérale sur le droit international privé [LDIP] [Federal Private International Law Act], Dec. 18, 1987, RS 291, art. 154, 155(c), https://www.admin.ch/opc/fr/classified-compilation/19870312/201407010000/291.pdf (last visited July 15, 2017).

[207] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. Rep. 3, ¶ 38 (Feb. 5); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, Judgment, 2007 I.C.J. Rep. 58, ¶ 61 (May 24).

[208] *Jurisdiction of the Centre,* International Centre for Settlement of Investment Disputes art. 25 (1).

[209] *Id.* at art. 25(2).

Convention, someone else from another contracting states means 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 the Convention, but does not include any person who on either date also had the nationality of the contracting state party to the dispute;[210] and any juridical person which had the nationality of 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 that they should be treated as a national of another contacting state.[211]

While Article 25(2) of the ICSID Convention specifically refers to juridical persons, the Convention does not define this term. Certain guidance as to the meaning of this concept in the Convention may be found in the preparatory materials, notably, the various drafts and records of their subsequent discussions.[212] The starting point of the analysis shall be the definition of the "National of a Contracting State" in Article X of the Preliminary Draft.[213] Covering both natural and juridical persons, this definition specifically referred to "company," which, in turn, included "any association of natural or juridical persons, whether or not such association is recognized by the domestic law of the Contracting State concerned as having juridical personality."[214] The discussion of this provision at the Santiago Consultative Meeting of Legal Experts revealed that it had been deliberately drafted to take into account the fact that countries might differ in the way their national laws treated partnerships. For that reason it had been thought desirable to keep the definition as neutral as possible.[215]

Summarizing the discussions at four consultative meetings of legal ex-

---

[210] *Id.* at art. 25(2)(a).

[211] *Id.* at art. 25(2)(b).

[212] *See, e.g.*, Chittharanjan F. Amerasinghe, *Interpretation of Article 25(2)(B) of the ICSID Convention*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 223, 242–244 (Richard B. Lillich, Charles N. Brower, eds, 1994); CHRISTOPH SCHREUER AT AL., THE ICSID CONVENTION: A COMMENTARY ¶ 689 - 693 (2nd ed. 2009); ANTONIO R. PARRA, THE HISTORY OF ICSID 46 (2012).

[213] 2 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION (1970).

[214] *Id.*

[215] *Summary Record of Proceedings, Santiago Consultative Meetings of Legal Experts (Feb. 17-22, 1964), supra* note at 359.

perts, the Chairman's Report stated that the terms "national of a Contracting State" and "national of another Contracting State" may be used without further elaboration in the Convention and, consequently, that the definitions in Article X could be deleted without further disadvantage.[216] The same report further pointed out that each state may be relied upon to ascertain to its own satisfaction whether an individual or association of individuals, incorporated or unincorporated, is either (a) one which from a legal a practical point of view is capable of assuming and discharging contractual obligations, or (b) one which should be treated as a national of another contracting state.[217] These conclusions were taken into account by the staff of the World Bank in the process of preparing a new draft for the Legal Committee which was to advise the Executive Directors on a final text.[218] In the end, a new definition of the "national of a Contracting State" in this draft no longer contained specific reference to "company".[219] Following a number of further amendments, it became part of the present definition.[220]

Although the initial reference to "any association of natural or juridical persons, whether or not such association is recognized by the domestic law of the Contracting State concerned as having juridical personality" was not included into the final version of the Convention, the absence of this wording does not undermine the overall intent of its drafters behind the definition of "national of a Contracting State". This intent, as clearly revealed by the Chairman's Report, consisted in giving the ratifying States the possibility to attribute the status of "nationals" for the purposes of the Convention to both incorporated and unincorporated associations.[221] It follows that the scope of the term "juridical person" in Article 25(2) of the ICSID Convention is broad enough to cover unincorporated partnerships, provided that they are considered as "juridical persons" under the law of a contracting state.

This possibility of the ratifying states to attribute the status of its nationals to unincorporated partnerships may lead to a different treatment in the ICSID arbitration of partnerships organized in the same form, but under

---

[216] *Chairman's Report on the Regional Consultative Meeting of Legal Experts (Jul. 9, 1964), supra* note 214 ¶ 113.
[217] *Id.* at ¶ 113.
[218] Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in* 136 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 331, 360 (1972).
[219] *Draft Convention: Working Paper for the Legal Committee (Sep. 12, 1964),* art. 30(iii), *supra* note 214 at 623-624.
[220] Broches, *supra* note 219.
[221] *Chairman's Report on the Regional Consultative Meeting of Legal Experts*, *supra* note 217, ¶ 113.

the laws of different countries. By way of example, while a general partnership (*société en nom collectif*) is considered as "juridical person" under French law,[222] it does not have this status under Swiss law.[223] Similarly, a limited partnership (*société en commandite*) is a "juridical person" under French law,[224] but not under Swiss law.[225] As a result, a general partnership as well as a limited partnership organized under French law, which made in investment in the Democratic Republic of Congo, can bring a claim to the ICSID under the France-DRC BIT,[226] because both of them have status of "juridical person" under their domestic law. On the contrary, a general partnership and a limited partnership organized under Swiss law cannot bring a claim to the ICSID under the Switzerland-DRC BIT,[227] even though these two forms of partnerships are expressly mentioned in the definition of "company" in this BIT.[228]

---

[222] PAUL LE CANNU (AND) BRUNO DONDERO, DROIT DES SOCIETES 879 - 880 (6th ed. 2015). Under French law, a general partnership is a partnership in which all partners have quality of tradespeople and are indefinitely and jointly and severally liable for the partnership's obligations. *See* DOMINIQUE VIDAL, DROIT DES SOCIETES 365(2nd ed. 1998).

[223] *See Société en nom collectif Bianchi & C^ie v. Bourgeoisie de Collombey-Muraz*, Jun. 11, 1946 , ATF 72 II 180 (Switz.); *S. S. & Co. v. K.*, Nov. 13, 1990, ATF 116 II 651, JT 1991 I 381 (Switz.); *Masse en faillite de X. & Cie en liquidation v. A.*, Sep. 23, 2008 (No. 4A_264/2008), ATF 134 III 643 (Switz.). Under Swiss law, a general partnership is a partnership in which two or more natural persons join together without limiting their liability towards creditors of the partnership in order to operate a trading, manufacturing or other form of commercial business under one business name. *See* Code des obligations [CO] [Code of Obligations], art. 552(1) (Switz.).

[224] Under French law, a limited partnership is a partnership with two categories of partners: general partners having the same status as partner in a general partnership and limited partners liable only up to the amount of their contribution. *See* DROIT DES SOCIETES, *supra* note 223 at 371.

[225] *S. S. & Co. v. K.*, Nov. 13, 1990, ATF 116 II 651 (Switz.); FRANÇOIS CHAUDET, DROIT SUISSE DES AFFAIRES 41(2nd ed. 2004). Under Swiss law, a limited partnership is a partnership in which two or more persons join together in order to operate a trading, manufacturing or other form of commercial business under a single business name in such a manner that at least one person is a general partner with unlimited liability but one or more others are limited partners liable only up to the amount of their specific contributions. *See* Code des obligations, *supra* note 224 at art. 594(1).

[226] Treaty between the Government of the French Republic and the Government of the Republic of Zaire on the Protection of Investments, Oct. 5, 1972, FR-DRC, http://investmentpolicyhub.unctad.org/Download/TreatyFile/822 (last visited July 15, 2017).

[227] Treaty between the Swiss Confederation and the Republic of Zaire on the Protection and Encouragement of Investments, March 10, 1972, Switz-DRC, https://www.admin.ch/opc/fr/classified-compilation/19720040/197305100000/0.975.282.1.pdf (last visited July 15, 2017).

[228] *Id.* at art. 1, part 3.

C. Contractual Joint Ventures as Claimants

Contractual joint ventures cannot act as claimants in international investment arbitration for the same reasons as those precluding them from being considered as "investors" under bilateral investment treaties. In view of their contractual nature, they cannot be considered juridical persons, organizations, or entities possessing their own legal capacity. As a result, both ICSID and non-ICSID tribunals consistently refused to recognize their capacity to be a party in international investment arbitration.[229] For instance, in *Consortium Groupement LESI–Dipenta v. People's Democratic Republic of Algeria,* an ICSID tribunal declared inadmissible a request for arbitration filed by a "qualified" consortium, having capacity to act, because the contract giving rise to the investment dispute was signed by members of a simple consortium under Italian law.[230] Referring to the absence of the status of "entity" as well as to the lack of capacity of a simple consortium to act in its own name under applicable law, the arbitral tribunal noted that all its individual members would need to resubmit the request.[231] Similarly, in the Jurisdictional Award in SCC Case 21/1999, a tribunal operating under the SCC Arbitration Rules came to the conclusion that a consortium named itself as the contractual association for joint operation of three independent legal entities could not be, and was not, a party in that arbitration.[232]

D. Comparison with the Status of Other Types of Joint Ventures

1. Partnership Joint Ventures as Claimants

Partnership Joint Ventures Which Have the Status of "Juridical Person"

Unlike contractual joint ventures, certain partnership joint ventures may be claimants in ICSID arbitration. In view of the "juridical person" requirement of the ICSID Convention,[233] this would be the case of partner-

---

[229] *Consortium Groupement LESI – Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award (Jan. 10, 2005) ¶¶ 37–40; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005) ¶¶ 131–139; *Claimant 1 (Spain), Claimant 2 (Spain) v. Russian Federation*, SCC Case 21/1999, Jurisdictional Award, at 213–214 (2000), *available in*: SCC ARBITRAL AWARDS 1999 – 2003 203 – 236 (Sigvard Jarvin, Annette Magnusson, eds., 2006).

[230] *Consortium Groupement LESI–Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, ¶ 37.

[231] *Id.* ¶ 40(i).

[232] *Claimant 1 (Spain), Claimant 2 (Spain) v. Russian Federation*, SCC Case 21/1999, at 213-14.

[233] *Jurisdiction of the Centre,* ICSID art. 25(2)(b).

ships joint ventures which have this status under their domestic law. Moreover, since the capacity of enjoying and being subject to legal rights and duties is one of the characteristic features of legal personality,[234] and the capacity to be a party in arbitration proceedings is derived from that party's legal capacity,[235] legal personality will enable the same joint ventures to be claimants in non-ICSID arbitration.

Partnership Joint Ventures Which do not Have the Status of "Juridical Person"

Although partnership joint ventures that do not have the status of a "juridical person" cannot participate in the ICSID arbitration, the absence of this status does not automatically disqualify them from being claimants under other arbitration rules. For instance, despite the absence of legal personality, general partnerships and limited partnerships organized under Swiss law can still be a party in judicial proceedings under their own names.[236] As a result, while a partnership joint venture organized in the form of a general partnership or a limited partnership under Swiss law will be unable to be a party in ICSID arbitration because under this law it is not considered as juridical person, this joint venture will still be able to be a party in arbitration proceedings under UNCITRAL arbitration rules, SCC 2017 arbitration rules, ICC arbitration rules, or other rules that do not contain a "juridical person" requirement.

2. Corporate Joint Ventures as Claimants

By its very nature, a corporation is an artificial entity having separate legal personality[237] that presupposes the capacity to sue and to be sued in its own name.[238] That is why any corporate joint venture not only has a capacity to sue, but also perfectly satisfies the "juridical person" requirement of the ICSID Convention.[239] As a result, unlike contractual and partnership

---

[234] *See*, Oxford Dictionary of Law 349 (8th ed., 2015); Henry Hansmann, Reinier R. Kraakman, *What is Corporate Law?, in* The Anatomy of Corporate Law. A Comparative and Functional Approach 6 – 7 (Reinier R. Kraakman et al., eds., 2004).

[235] Bernhard Berger, Franz Kellerhals, International and Domestic Arbitration in Switzerland, at 116.

[236] CO, art. 562 (general partnerships) and 602 (limited partnerships) (Switz.).

[237] *See, e.g.*, John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea 3-4 (2003).

[238] *See* Harry G. Henn, John R. Alexander, Law of Corporations and Other Business Enterprises 144 – 147 (3rd ed., 1983).

[239] ICSID Convention, art. 25(2)(b). *See also*, Christoph Schreuer et. al, The ICSID Convention: A Commentary ¶ 693 (at 278) (2nd ed., 2009).

joint ventures, all corporate joint ventures may act as claimants under the ICSID Convention as well as under other arbitration rules.

Does this straightforward status of corporate joint ventures as claimants in international investment arbitration necessarily mean that foreign investors creating their joint ventures in this form would be in a better position to protect their rights under bilateral investment treaties as compared with investors choosing contractual or partnership joint ventures? The answer to this question may be found by comparing the amounts of possible recovery under individual claims available to participants of these three types of joint ventures. To provide a graphic example, this comparison will be made on the basis of the ICSID case of *Impregilo S.p.A. v. Islamic Republic of Pakistan.*[240] Although this particular case dealt with a contractual joint venture under Swiss law,[241] a hypothesis will be made as to what could have been the award amount of an individual claim brought by the participant of the same joint venture as well as when the same joint venture would have been organized as a general partnership (*société en nom collectif*) or as a joint-stock company (*société anonyme*) under Swiss law. This comparison will be preceded by the presentation of two types of individual claims of shareholders in corporate joint ventures, namely direct and indirect claims,[242] and the analysis of their availability to participants in contractual and partnership joint ventures.

V. JOINT VENTURE PARTICIPANTS AS CLAIMANTS IN INTERNATIONAL INVESTMENT ARBITRATION

A. Types of Individual Claims

1. Individual Claims Available to Participants in Corporate Joint Ventures

Depending on the identity of the injured party primarily affected by the adverse action of a host state in violation of an applicable BIT, the claims of shareholders in a corporate joint venture for damages caused by this action are usually divided into direct claims and indirect claims.[243] The direct

---

[240] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, Apr. 22, 2005.

[241] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ¶ 119.

[242] *See, e.g.*, Gabriel Bottini, *Indirect Claims under the ICSID Convention*, 29 U. Pa. J. Int'l L. 563, 565 (2008); Zachary Douglas, The International Law of Investment Claims 402 (2009); Gabriel Bottini, *Indirect Shareholder Claims, in* Building International Investment Law. The First 50 Years of ICSID 203-218 (Meg Kinnear at al., eds, 2016).

[243] *See, e.g.*, Christoph Schreuer, Shareholder Protection in International Investment Law, *in*

claims of shareholders seek compensation for damages caused by actions primarily affecting their own individual rights, including the right to dividends, voting rights, and the right to a share in the company's residual assets upon its liquidation.[244] Among possible examples of these claims are claims of a Dutch shareholder against the Republic of Poland to protect its corporate governance rights markedly more extensive than those that followed from the size of its shareholding in a Polish company,[245] claims of the same shareholder to protect acquired rights derived from its shareholding to participate in the next phase of privatization of a Polish company through an initial public offering,[246] and the claim of a Russian joint-stock company against Ukraine for damages caused by expropriation of shares in a joint venture company under Ukrainian law.[247]

On the other hand, the indirect claims of shareholders in corporate joint ventures, sometimes also referred to as "derivative claims" or "claims for reflective loss," may be defined as claims for damages caused by actions of the host state primarily affecting the value of the company's assets in which they hold their shares, rather than their individual rights.[248] As compared with the direct claimants, indirect claimant shareholders seek protection not with respect of measures that directly affect shares in their own right, but rather against the effect on their shares by measures taken by the

---

Common Values in International Law. Essays in Honour of Christian Tomuschat 601, 616 - 618 (Pierre-Marie Dupuy et al, eds, 2006); Dolores Bentolila, *Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration* 2(1) Trade L. Dev. 87, 104 - 105 (2010); Jimmy Skjold Hansen, *"Missing Links" in Investment Arbitration: Qualification of Damages to Foreign Shareholders*, 14 J. World Investment & Trade 434, 428 – 440 (2013).

[244] Zachary Douglas, The International Law of Investment Claims 407 - 408 (2009); Christoph Schreuer, Shareholder Protection in International Investment Law, at 616; Dolores Bentolila, *Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration,* at 105; Jimmy Skjold Hansen, *"Missing Links" in Investment Arbitration: Qualification of Damages to Foreign Shareholders,* at 438-439.

[245] *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, Aug. 19, 2005, ¶ 145.

[246] *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, Aug. 19, 2005, ¶ 157.

[247] *PAO Tatneft v. Ukraine*, Ad-Hoc UNCITRAL arbitration, Award, Jul. 29, 2014, aff'd *Ukraine v. PAO Tatneft*, Cour d'appel de Paris (CA), Pôle 1, Chambre 1, Nov. 29, 2016 (Fr.), *available at*: http://www.italaw.com/sites/default/files/case-documents/italaw7882.pdf (last visited July 15, 2017).

[248] *See, e.g.*, Zachary Douglas, The International Law of Investment Claims 402 (2009); Note, Rescuing International Investment Arbitration: Introducing Derivative Actions, Class Actions, and Compulsory Joinder, 98 Virginia L. Rev. 177, 186 (2012); Gabriel Bottini, *Indirect Shareholder Claims, in* Building International Investment Law. The First 50 Years of ICSID 203 - 218 (Meg Kinnear at al., eds, 2016).

host state against the company.[249] From a conceptual point of view, the distinction between these two types of claims reflects the company's separate legal personality, the core element of which is the company's ability to own assets that are distinct from the property of other persons, including its shareholders.[250]

While the indirect claims of shareholders are generally barred under many national laws,[251] various arbitral tribunals consistently recognize the possibility of such claims under bilateral investment treaties.[252] The admissibility of these claims in international investment arbitration is usually justified by the status of shares as "protected investments" under bilateral investment treaties.[253] Correspondingly, once the adverse action of a host state affects the value of the company's assets, it also affects the value of "protected investment," thus giving rise to indirect shareholder claims.[254]

---

[249] *RosinvestCo UK Ltd. v. the Russian Federation*, SCC Arbitration V (079/2005), Final Award, Sep. 12, 2010, ¶ 608, *available at*: http://www.italaw.com/sites/default/files/case-documents/ita0720.pdf (last visited July 15, 2017).

[250] *See*, Henry Hansmann, Reinier R. Kraakman, *What is Corporate Law? in* The Anatomy of Corporate Law. A Comparative and Functional Approach 7 (Reinier R. Kraakman et al., eds., 2004).

[251] Zachary Douglas, The International Law of Investment Claims 416 - 418 (2009); David Gaukrodger, Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division, at 15 - 20, *available at*: http://www.oecd-ilibrary.org/finance-and-investment/investment-treaties-as-corporate-law_5k3w9t44mt0v-en (last visited July 15, 2017).

[252] *See e.g., Antoine Goetz et consorts v. the Republic of Burundi*, UCSID Case No. 95/3, Award, February 10, 1999, ¶89; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, dated July 17, 2003, ¶¶ 66–69; *Siemens A.G. v. the Argentine Republic*, ICSID Case ARB/02/8, Decision on Jurisdiction, dated August 3, 2004, ¶142; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, dated May 12, 2005, ¶ 468; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004, ¶ 49; *GAMI Investments Inc. v. the Government of the United Mexican States*, proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, Final Award, Nov. 15, 2004, ¶ 24(A);. *See also*, Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitration and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis*, at 45; Christoph Schreuer, Shareholder Protection in International Investment Law, at 617-618.

[253] *See, e.g., CMS Gas Transmission Company v. the Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, dated Jul. 17, 2003, ¶ 68; Gabriel Bottini, *Indirect Shareholder Claims, in* Building International Investment Law. The First 50 Years of ICSID 215 (Meg Kinnear at al., eds, 2016).

[254] *See, e.g.*, *RosinvestCo UK Ltd. v. the Russian Federation*, SCC Arbitration V (079/2005), Final Award, Sep. 12, 2010, ¶608; Rudolf Dolzer, Christoph Schreuer, Principles of International Investment Law 59 (2nd ed., 2012).

Among possible examples of shareholders' indirect claims are the claim of a Hong Kong corporation against the Republic of Sri Lanka in connection with the decrease in the value of its shareholding in a public company, established for the purpose of undertaking shrimp culture in Sri Lanka, resulting from the destruction of its main producing center during a military operation conducted by the security forces of Sri Lanka against installations reported to be used by local rebels;[255] the claim of a U.S. company against the government of the United Mexican States in connection with the decrease in the value of its 14.18% share in a Mexican company resulting from various measures taken by the government, including "arbitrary conduct with respect to implementation and application of Mexico's sugar regime" as well as the "arbitrary and discriminatory expropriation" of sugar mills owned by this Mexican company;[256] and the claim of a U.S. company against the Argentine Republic in connection with the decrease in the value of its 29.42% shareholding in an Argentinean company resulting from the suspension by Argentina of a tariff adjustment formula for gas transportation applicable to this company.[257]

2. Individual Claims Available to Participants in Contractual Joint Ventures

Since contractual joint ventures, notably those created under Swiss law, do not have separate legal personality,[258] and by are "contracts" and not "entities" or "organizations" by their very nature, they may not hold any assets or rights in their own name.[259] As a result, any adverse action of a host state affecting operations of a contractual joint venture would be causing damage directly to the assets in the common ownership of its participants. Consequently, any claims of the participants in this type of joint ventures against the host state shall be qualified as "direct" claims. Thus, unlike

---

[255] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, ¶ 95.

[256] *GAMI Investments Inc. v. the Government of the United Mexican States*, proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, Final Award, Nov. 15, 2004, ¶ 24(A).

[257] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, dated May 12, 2005, ¶468.

[258] *Grossi v. Consortium Diga Sambucco*, March 3, 1953, ATF 79 I 179, JT 1954 I 67 (Switz.).

[259] *Banuamm et consorts v. Administration fédérale des contributions*, May 4, 1945, ATF 71 I 179, JT 1945 I 606 (Switz.); *Rossi*, May 16, 1946, ATF 72 III 42, JT 1947 II 7 (Switz.); *Lempet et consorts v. Commune de Nideau et Conseil exécutif de canton de Berne*, Apr. 30, 1952, ATF 78 I 104, JT 1953 I 77 (Switz.).

shareholders in corporate joint ventures, the participants in contractual joint ventures will have only direct actions against the host state for its actions adversely affecting operations of their joint venture, but not indirect claims.

3. Individual Claims Available to Participants in Partnership Joint Ventures

Participants in Partnership Joint Ventures Which Have the Status of "Juridical Person"

When a partnership joint venture has the status of "juridical person" under the applicable law, its participants may have at their disposal both direct and indirect claims. The availability of these two types of claims may be justified by the same reasons as those justifying the availability of these claims to shareholders in corporate joint ventures. First, similarly to shares in corporate joint ventures, a share in a partnership joint venture created, for example, in the form of a general partnership (*société en nom collectif*) under French law, entitles its owner to certain individual rights, namely the right to participate in the management of the partnership, the right to information, as well as the right to dividends.[260] Thus, when an adverse action of a host state primarily affects these individual rights, participants in a partnership joint venture will have a direct claim against this state.

Second, similarly to assets of corporate joint ventures, assets of partnership joint ventures having juridical personality are also separated from the assets of their individual members. As a result, any adverse action of the host state against a partnership joint venture may affect its participants only indirectly. Since the definition of "investment" in bilateral investment treaties usually expressly mentions shares in partnerships,[261] similar to shares in corporate joint ventures, shares in partnership joint ventures will also be considered as "protected investments" under these treaties. It follows that adverse actions of a host state affecting the value of the partnership's assets will indirectly affect the value of the protected investment, thus giving rise to the participant's indirect claim against this state.

Third, the possibility of indirect action of a participant in a partnership

---

[260] CODE DE COMMERCE art. L. 221-3, L. 221-8; Dominique Vidal, Droit des sociétés 366-69 (2nd ed. 1998).

[261] *See* 2012 U.S. MODEL BILATERAL INVESTMENT TREATY art. 1. For example, item (b) of the definition of investment in the 2012 U.S. Model BIT covers "shares, stock, and other forms of equity participation in an enterprise", whereas the definition of "enterprise" in the same Model BIT includes partnership.

joint venture against a host state for actions indirectly affecting the value of its own share is further confirmed by the award of the Iran-U.S. Claims Tribunal in *Housing and Urban Services International, Inc. v. the Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation*,[262] cited by the ICSID tribunal in *Impregilo S.p.A. v. Islamic Republic of Pakistan.*[263] Reviewing the decisions of other international tribunals, this Tribunal came to the conclusion that:

While international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership, where special reasons or circumstances required it, "international tribunals have had little difficulty in disaggregating the interests of partners and in permitting" partners to recover their *pro rata* share of partnership claims. The most relevant "special circumstance" in this sense exists when a partner's claim is for its own interest, which is independent and readily distinguishable from a claim of the partnership as such.[264]

While the need of such special circumstances as a general requirement to allow partner's individual claim was subsequently questioned in *Impregilo S.p.A. v. Islamic Republic of Pakistan*[265] as well as in scholarly comments,[266] in any event these circumstances will be present in case of a partner bringing an indirect claim against a host state for adversely affecting the value of its own share, and therefore, acting in its own interest.[267] Furthermore, in *Tippetts, Abbett, McCarthy, Stratton (TAMS) v. TAMS-AFFA at. al.,* the Iran-U.S. Claims Tribunal permitted a pro rata claim of a U.S. partner in a partnership joint venture for "expropriation or other measures af-

---

[262] *Housing and Urban Serv. Int'l, Inc. v. The Gov't.of the Islamic Republic of Iran, Tehran Redevelopment Corp.*, No. 201-174-1, Award, (Nov. 22, 1985), 9 Iran-U.S. C.T.R. 313 (1987). The Iran-United States Claims Tribunal was established on January 19, 1981 by the Islamic Republic of Iran and the United States of America to resolve certain claims by nationals of one State Party against the other State Party and certain claims between the State Parties. *See* IRAN-UNITED STATES CLAIMS TRIBUNAL, http://www.iusct.net/Default.aspx (last visited July 15, 2017).

[263] Impregilo S.p.A. v. Islamic Republic of Pakistan, Case No. ARB/03/3, Decision on Juridiction, ¶¶ 168-170 (April 22, 2005).

[264] Housing and Urban Services International, Inc. v. The Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation, Award, Case No. 201-174-1, Award, No. 201-174-1 (dated Nov. 22, 1985), 9 Iran-U.S. C.T.R. 313, 330 (1987).

[265] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, at ¶ 170.

[266] Scribner K. Fauver, Note, *Partnership Claims Before the Iran-United States Claims Tribunal*, 27 VA. J. INT'L L. 307, 324-25 (1987).

[267] *See, also*, David J. Bederman, *Nationality of Business Association Claims Before the Tribunal: Key Cases that International Arbitrators Should Know, in* Christopher R. Drahozal, Christopher S. Gibson, The Iran-U.S. Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International arbitration 30-34 (2007).

fecting property rights," without reference to any "such special reasons or circumstances."[268]

Participants in Partnership Joint Ventures Which do not Have the Status of "Juridical Person"

When a certain partnership joint venture does not have the status of juridical person, in the case of an adverse action of a host state against this joint venture, its participants may have only direct claims. This would be the case of partnership joint ventures created in the form of a general partnership (*société en nom collectif*) or a limited partnership (*société en commandite*) under Swiss law.[269] Although these two forms of partnership are considered as having "quasi legal personality,"[270] because they may acquire rights and undertake obligations in their own name as well as act as a party in judicial proceedings,[271] their assets and rights, with the exception of rights to real property, still belong to common property of their members.[272] Consequently, when an adverse action of a host state is directed against a partnership joint venture created in one of these forms, it will be immediately affecting the assets belonging to their participants. This is why any claims of the participants in this type of joint ventures against the host state shall be qualified as direct claims.

B. Amount of Individual Claims

1. Possible Amount of Individual Claims in Contractual Joint Ventures

Although the decision on jurisdiction in *Impregilo S.p.A. v. Islamic Republic of Pakistan* was already the object of numerous comments and its facts may be well known,[273] prior to analyzing the possible amount of par-

---

[268] Tippetts, Abbett, McCArthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran at al., Case No. 7, Award No. 141-7-2 (June 22, 1984), 6 Iran-U.S. C.T.R. 219 (1986).

[269] *See, e.g.*, Pascal Montavon, Abrege de droit commercial 117, 152 (4th ed. 2008).

[270] *See*, Arthur Meier-Hayoz, Peter Forstmoser, Droit Suisse des sociétés 72-4 (2015).

[271] CODE DES OBLIGATIONS, art. 562 & 602. These abilities of general partnerships and limited partnerships under Swiss law explains the recognition of their "quasi legal personality." *See* Arthur Meier-Hayoz, Peter Forstmoser, Droit Suisse des sociétés 72-74 (2015).

[272] *See, e.g., Erich Schaad und Erich Schaad & Co.*, Oct. 11, 1973, ATF 99 III 1, JdT 1974 II 42.

[273] *See, e.g.*, Crina Baltag, The Energy Charter Treaty: The Notion of Investor 136 (2012); R. Doak Bishop, *Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders, in* Multiple Party Action in International Arbitration 239, 248-249 (Permanent Court of Arbitration, ed., 2009); Chester Brown, Ashique Rahman, *Chapter 5: Juridical*

ticipant's individual claim under similar circumstances it would be still useful to briefly summarize the circumstances of this dispute. It related to the operations of a Ghazi-Barotha Contractors ("GBC"), a contractual joint venture formed under Swiss law in April 1995 in order to prepare and submit tenders for—and if successful to construct—hydroelectric power facilities in Pakistan.[274] GBC was established pursuant to a joint venture agreement, initially concluded between Impregilo S.p.A., a juridical person under the laws of Italy ("Impregilo"), one French company, one German company and two Pakistani companies.[275] Impregilo was selected as the leader of this joint venture.[276] In December of 1995, two contracts were concluded between Impregilo acting on behalf of the joint venture and the Pakistan Water and Power Development Authority (WAPDA). The performance of the contracts was to be controlled by Pakistan Hydro Consultants, an engineer acting as an agent for the WAPDA (the "Engineer"). The construction started in early 1996 with original completion dates foreseen in March 2000.[277]

The dispute arose when the Engineer and WAPDA denied Impregilo's request for extension of the contractual deadlines as well as demand for reimbursement of costs due, in Impregilo's view, to obstacles created by the Pakistani government through WAPDA and unforeseen geological conditions discovered over the course of works. Following its unsuccessful attempts to settle disputes through negotiations, Impregilo started the ICSID arbitration proceedings, claiming that Pakistan violated various provisions of the Pakistan-Italy BIT, notably Article 2(2), creating a breach of an obligation to ensure fair and equitable treatment of the investments, Article 5(1), a measure that could limit permanently or temporarily the right of ownership, possession, control or enjoyment of an investment, and Article 5(2), a measure with an effect similar to expropriation.[278] Aside from the

---

Persons and the Requirements of the ICSID Convention, in ICSID Convention after 50 Years: Unsettled Issues 167 (Crina Baltag, ed., 2016); Rudolf Dolzer, Christoph Schreurer, Principles of International Investment Law 175-176 (2nd ed. 2012); Emmanuel Gaillard, *Centre International Pour Le Règlement des Différends Relatifs Aux Investissements (CIRDI). Chronique Des Sentences Arbitrales*, 133 JOURNAL DU DROIT INTERNATIONAL CLUNET 219, 287-307 (2006); Federico Ortino, *Italy, in* Commentaries on Selected Model Investment Treaties 341-342 (Chester Brown, ed., 2013); Christoph Schreuer at al., The ICSID Convention: A Commentary, sec. 692, at 278 (2nd ed. 2009); David AR Williams, *Jurisdiction and Admissibility, in* The Oxford Handbook of International Investment Law 924-927 (Peter Muchlinski et al., eds, 2008).

[274] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, Apr. 22, 2005, ¶ 8.

[275] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, at ¶ 10.

[276] *Id.* at ¶ 11.

[277] *Id.* at ¶¶ 13-15.

[278] *Id.* at ¶¶ 54-56.

alleged breaches of the BIT, it also claimed that the Republic of Pakistan failed to honor its commitments under the contracts.[279] In Impregilo's view, its rights and assets in Pakistan were "investments" within the meaning of Article 25(1) of the ICSID Convention and of Article 1(1) of the BIT.[280] Correspondingly, it sought from the respondent compensation for the damages of approximately $450 million caused to the joint venture by these alleged breaches of the Pakistan-Italy BIT and contracts. In the alternative, if the tribunal were to find that it could not award Impregilo damages in excess of its proportionate interest in GBC, it claimed 57.80% of the total damages plus interest.[281]

Upholding Pakistan's jurisdictional objections, the arbitral tribunal held that Impregilo could not bring a claim on behalf of a contractual joint venture, which lacked legal personality.[282] It also ruled that Impregilo could bring claims on behalf of its partners, which were nationals of states other than Italy, and thus, were not covered by the scope of the Pakistan-Italy BIT.[283] At the same time, the tribunal expressly admitted the possibility of Impregilo to bring under this BIT a claim "for its own interest," in respect to its own alleged loss, being proportionate to its *pro rata* share of the joint venture.[284] Thus, supposing that Impregilo convinced the tribunal that the host state violated the Pakistan-Italy BIT and that these violations caused losses to the assets of the GBC commonly owned by its participants in the total amount of $450 million, it could have had a strong basis for claiming 57.80% of these losses, that is to say, the amount of $260.1 million, plus interest.[285]

2. Comparison with Possible Number of Individual Claims in Other Types of Joint Ventures

Possible Number of Individual Claims in Partnership Joint Ventures

Supposing that instead of an ordinary partnership, the participants of

---

[279] *Id.* at ¶ 57.
[280] *Id.* at ¶ 30.
[281] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, at ¶ 59.
[282] *Id.* at ¶ 134.
[283] *Id.* at ¶148.
[284] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ¶ 170.
[285] In real life, according to publicly available information, *Impregilo* settled its case for the amount of US$ 98 million. *See*, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Order of Discontinuance of Proceedings, dated Sep. 25, 2005, ¶¶ 4-6, *available at*: http://www.italaw.com/sites/default/files/case-documents/ita0423.pdf (last visited July 15, 2017).

GBC agreed to use the form of a limited partnership (*société en commandite*) under Swiss law,[286] they would have needed to include into this partnership at least one natural person, indefinitely responsible for the partnership's obligations.[287] Provided that all other facts of *Impregilo S.p.A. v. Islamic Republic of Pakistan* remained the same, Impregilo still could have brought its individual claim against Pakistan under the Pakistan-Italy BIT. To justify the possibility of such claim, the Italian investor could have argued that its *pro rata* share of joint venture's rights and assets in Pakistan should be qualified as an investment within the meaning of this BIT.[288] It could have also relied on the decisions on jurisdiction in *Azurix Corp. v. the Argentine Republic*[289] and *Ioannis Kardassopoulos v. Georgia*,[290] as well as on the arbitral awards in *Lauder v. Czech Republic,*[291] and *Waste Management, Inc. v. Mexico.*[292] In each of these cases, the tribunals admitted the possibility of claims of indirect shareholders making their equity investments into the host state through an intermediary company in a third state. Taking into account that in these four cases the existence of an intermediary separate legal entity did not prevent individual claims of its shareholders against a host state, the existence of a limited partnership without legal personality should be seen as an even lesser obstacle for individual claims of its partners with respect to their investments within the meaning of an applicable BIT.

Moreover, the definition of the term "investor" in the Switzerland-Pakistan BIT specifically requires that investors other than natural persons have the status of "juridical person."[293] For as much as limited partnerships under Swiss law are not considered to be "juridical persons,"[294] if the GBC

---

[286] Code des obligations, Title XXV.

[287] Under Swiss law, only natural persons can be members of a limited partnership who are indefinitely responsible. *See*, Code des obligations, art. 594, para. 2. Since all participants in GBC joint venture were juridical persons, they could have not created this joint venture in the form of a general partnership (*société en nom collectif*) under Swiss law, because its members could only be natural persons. *See*, Code des obligations, art. 552, para. 1.

[288] Pakistan-Italy BIT, art. 1(1)(a) and (e).

[289] *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶¶ 73-74 (Dec. 8, 2003).

[290] *Ioannis Kardassopoulos v. Georgia,* ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 141 (Jul. 6, 2007).

[291] *Lauder v. Czech Republic*, UNCITRAL arbitration, Final Award, ¶ 154 (Sept. 3, 2001), http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf.

[292] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Final Award, ¶ 85 (Apr. 30, 2004).

[293] Switzerland-Pakistan BIT, art. 1(1)(b).

[294] Pascal Montavon, Abrege de droit commercial 152 (4th ed., 2008); Commentaire Romand: Code des obligations II-Jean Paul Vuilliéty, art. 594 CO N 4 (Pierre Tercier, Marc

joint venture were created in this form, it would not have been considered as "investor" capable of bringing its own claim against the host state. As a result, there would be no additional "investor" within the meaning of an applicable BIT, interposed between an Italian investor and its investment in Pakistan.

Since assets and rights of general partnership under Swiss law, with the exception of rights to real property, belong to common ownership of their members,[295] an adverse action of the host state aimed at GBC, notably against its rights under the two contracts with WAPDA, would have directly affected its members. Correspondingly, this individual claim of Impregilo under the Pakistan-Italy BIT should have been qualified as direct claim. While justifying its amount, in view of the Iran-U.S. Claims Tribunal awards in *Tippetts, Abbett, McCarthy, Stratton (TAMS) v. TAMS-AFFA*[296] as well as in *Housing and Urban Services International Inc. v. the Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation,*[297] the Italian investor would have had a strong basis for claiming compensation of its pro rata share of GBC losses, which would amount to $260.1 million plus interest. Thus, a possible amount of Impregilo's direct claim in a partnership joint venture could have been the same as a possible amount of its direct claim in a contractual joint venture.

Possible Number of Individual Claims in Corporate Joint Ventures

Assuming that instead of an ordinary partnership, GBC was created in the form of a joint-stock company (*société anonyme*) under Swiss law,[298] and all other facts of the case remained unchanged, Impregilo could have also brought a claim against Pakistan under the Pakistan-Italy BIT. To justify the possibility of this claim, the Italian investor could have relied on the Decision on Jurisdiction in *Siemens AG v. Argentine Republic*,[299] which dealt with the meaning of "investment" in the Germany-Argentine BIT.[300] Faced with Argentine's jurisdictional objections, in this decision the tribu-

---

Amstutz, eds., 2008).

[295] *Erich Schaad und Erich Schaad & Co.*, Oct. 11, 1973, ATF 99 III 1, JdT 1974 II 42.

[296] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran at al.* Case No. 7, Award No. 141-7-2, (June 22, 1984), 6 Iran-U.S. C.T.R. 219 (1986).

[297] *Housing and Urban Services International, Inc. v. the Government of the Islamic Republic of Iran, Tehran Redevelopment Corporation*, Award, Case No. 174, Award No. 201-174-1, (Nov. 22, 1985), 9 Iran-U.S. C.T.R. 313 (1987).

[298] Code des obligations, Title XXVI.

[299] *Siemens A.G. v. the Argentine Republic*, ICSID Case ARB/02/8, Decision on Jurisdiction, (Aug. 3, 2004).

[300] Germany-Argentine BIT, art. 1(1).

nal came to the conclusion that alongside with direct investments this BIT also covered indirect investments, because it did not exclude indirect ownership of investments.[301] The tribunal pointed out that the BIT did not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal meaning of the BIT did not support the Argentine's allegation that the definition of "investment" excluded indirect investment.[302]

In view of this decision as well as the Decision on Jurisdiction in *Ioannis Kardassopoulos v. Georgia,*[303] Impregilo could have argued that the Pakistan-Italy BIT did not exclude indirectly owned investments, because it did not contain an explicit reference to direct or indirect investments. Moreover, an Italian investor could have argued that the contractual rights of GBC under the two contracts with WAPDA were covered by the category "any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for cultivating, extracting and exploiting natural resources," listed in the definition of the term "investment" in this BIT,[304] as well as "contribution," the "certain duration," and the "participation in the risk of the transaction" characteristics of an investment. Thus, Impregilo could have argued that its pro rata share of its joint venture's rights and assets in Pakistan should be qualified as its indirect investment within the meaning of the BIT,[305] made through an intermediary company under Swiss law.

Since the assets and rights of joint-stock company under Swiss law belong to the company itself, and not to its shareholders,[306] an adverse action of the host State aimed at GBC, notably against its rights under the two contracts with WAPDA, would have affected its shareholders only indirectly. That is why, in case of a corporate joint venture, an individual claim of Impregilo under the Pakistan-Italy BIT should have been qualified as an indirect claim. While justifying its amount, the Italian investor could have relied on the award in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* where the ICSID tribunal granted 94.4% of damages suffered by a local company to a 94.4% *de facto* foreign

---

[301] *Siemens A.G. v. the Argentine Republic*, ICSID Case ARB/02/8, Decision on Jurisdiction, ¶ 136-137 (Aug. 3, 2004).
[302] *Id.* at ¶ 137.
[303] *Ioannis Kardassopoulos v. Georgia,* ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 124 (Jul. 6, 2007).
[304] Pakistan-Italy BIT, art. 1(1)(e).
[305] Pakistan-Italy BIT, art. 1(1)(a) and (e).
[306] Code des obligations, art. 620, para. 2.

shareholder that held shares in the local company.[307] In view of this award, the Italian investor would have had a strong basis for claiming compensation of its pro rata share of GBC's losses, 57.80%, or $260.1 million plus interest. Thus, a possible amount of Impregilo's indirect claim in a corporate joint venture could have been the same as a possible amount of its direct claims in contractual and partnership joint ventures.

On the other hand, unlike contractual and partnership joint ventures, a corporate joint venture will be considered as investor under the Switzerland-Pakistan BIT, capable of bringing claim against Pakistan in its own name, provided that it conducts real economic activities in Switzerland.[308] That is why, unlike participants in contractual and partnership joint ventures, in case of a corporate joint venture Impregilo could have also protected its interests by initiating the claim of the joint venture under this BIT and subsequently benefiting from the possible award in the form of dividends or through the increase of the value of its 57.80% shareholding, resulting from the receipt by the company of the proceeds of the award. Assuming that at the same time, Impregilo would have also brought its individual claim under the Pakistan-Italy BIT, the filing of these two claims could have created not only the possibility of a double recovery within the framework of two parallel proceedings but also the risk inconsistent decisions.[309]

Finally, supposing that instead of a joint-stock company under Swiss law, the participants of GBC decided to create it in the form of a joint-stock company under Pakistani law, an Italian investor still would have been able to bring an individual claim against Pakistan under the Pakistan-Italy BIT.[310] In this case, its 57.80% shareholding in the Pakistani joint-stock company would have been clearly covered by the category "shares, debentures, equity holdings and any other negotiable instruments or documents of credit as well as Government and public securities in general" listed in the definition of the term "investment."[311] Since an adverse action of the host state aimed at GBC would have affected the value of this shareholding only indirectly, an individual claim of Impregilo under the Pakistan-Italy BIT

---

[307] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 8.3.20 (Aug. 20, 2007).

[308] Switzerland-Pakistan BIT, art. 1(1)(b).

[309] *See, e.g.*, Rudolf Dolzer, Christoph Schreuer, Principles of International Investment Law 60 (2nd ed., 2012); Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Trough Inconsistent Decisions*, 73 Fordham L. Rev 1521, 1559-68 (2005)

[310] *Cf.*, R. Doak Bishop, *Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders, in* Multiple Party Action in International Arbitration 239, 249 (Permanent Court of Arbitration, ed., 2009).

[311] Pakistan-Italy BIT, art. 1(1)(b).

should have been qualified as indirect claim. While filing its claim, in view of the Award in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,*[312] the Italian investor would have also had a strong basis for claiming compensation of its pro rata share of GBC's losses.

VI. CONCLUSION

The comparison of the status of various types of joint ventures and their participants in international investment arbitration demonstrates that the use of contractual joint ventures allows their participants to effectively protect their economic interests against an adverse action of a host State within the framework of international investment arbitration. First, the broad definition of the term "investment" in bilateral investment treaties clearly covers shares in contractual joint ventures. That is why, while contractual joint ventures cannot be considered to be "investors" within the meaning of these treaties, their foreign participants may still be considered as such and their shares are protected investments. As a result, although the lack of legal personality of contractual joint ventures prevents them from acting as a claimant in both ICSID and non-ICSID arbitration, it does not by itself preclude their participants from filing their direct individual claims against the host state in both types of arbitration. Moreover, the comparison between possible amounts of participants' individual claims reveals that the participants in contractual joint ventures could potentially recover the same amount of damages as the participants in partnership and corporate joint ventures under similar circumstances.

It follows that in the need to efficiently protect its investment against a possible adverse action, the host state shall not be considered as a decisive factor for a foreign investor when selecting among these three types of joint ventures an appropriate legal form for carrying out its large-scale investment project together with other participants. Instead, while making this choice, a foreign investor may concentrate on economic and organizational objectives of his particular project. When these objectives include the need to create a tailor-made solution for the joint venture's internal structure on the basis of a freely negotiated contractual arrangement without the need to respect the mandatory legal norms of the project's host state, the need to avoid the creation of an additional entity and associated formation and operational costs as well as the need of the joint venture's taxation on a "pass through basis," the most appropriate legal form for achieving these business

---

[312] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 8.3.20 (Aug. 20, 2007).

objectives could be the contractual joint venture.