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GROUPS OF COMPANIES AND SUBJECT-MATTER JURISDICTION IN INVESTOR-STATE ARBITRATION: INVESTMENT 'UNVEILED'?

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Abstract

Increasingly, investor-state arbitral tribunals have found themselves faced with claims by holding companies, subsidiaries or ultimate beneficiaries within "corporate groups," where the basis of the claim concerns property acquired in*, or* from*, a fellow group member. Whilst the primacy of the state of incorporation for the purposes of nationality jurisdiction remains fundamentally intact, the question remains as to whether the shifting of assets entirely within a group can be considered an 'investment' in terms of a tribunal's* ratione materiae *jurisdiction. This paper offers an analysis of corporate groups predicated on their observed economic behaviour, with a view to how this might impinge on the economic conception of investment proffered in the jurisprudence of arbitral tribunals since* Salini v Morocco*. The author suggests that the activities of closely-held subsidiaries cannot technically be classed as investments, lacking a sufficient independent contribution and expectation of a pecuniary return. However, the outcome which is more consistent with the purposes and the consensus of prior awards is that such transactions still amount to an investment by reference to the underlying commitment of the parent company. This paper concludes with a brief discussion of whether such claims nevertheless represent an abuse of process.*

Key Words: Investment, economic materialisation, *Salini v Morocco,* corporate groups, subsidiary companies, abuse of process.

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I Introduction

The requirement that a claimant in investor-state arbitration demonstrate, for jurisdictional purposes, that their grievance arises out of an 'investment' has laid bare the challenges in ascribing legal significance to an otherwise flexible term of art in the world of commerce. Most recently, the 'economic conception' of investment, prominent in the jurisprudence of arbitral awards since *Salini v Morocco,*[1] has assisted in bringing a measure of clarity to the content of this somewhat amorphous term. However, tribunals are still beset with challenges in navigating the application of the *Salini* requirements in the increasingly complicated modes by which international business is conducted.

This essay will consider what economic content should be ascribed to the term investment with particular regard to the conceptual challenges posed by so-called 'corporate groups.' Specifically, it addresses an emerging quandary for investment law regarding the status of restructurings of capital or other assets *within* those groups across borders. Such cases intuitively appear as being of a different character to ordinary investments between parties at an arms-length. They may not occur at the express election of the entity involved, instead serving a corporate strategy designed in the boardrooms of the holding company's headquarters. In a real sense, the manoeuvre may not be thought of as a movement of funds at all - merely an artificial transfer to avoid tax or other regulatory obligations. This paper suggests that, from the standalone perspective of the claimant subsidiary, the characteristics which we would ordinarily assume of the term investment are not present in cases of internal equity or debt restructurings, particularly for no or nominal consideration. In such circumstances, a subsidiary is unlikely to have contributed capital in expectation of a return. Yet, drawing largely upon the concept of the 'single economic entity,' this paper nevertheless concludes that a corporate group restructuring should still be considered an investment insofar as the group as a *whole* is engaged in an economic venture within the host state.

After introducing the concept of the 'economic materialisation of investment' in Part III, Part IV of this paper provides an introduction to the nature of the corporate group and the common

[1] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction)* (2004) 6 ICSID Rep 398.

economic relations which lie at its heart. Part V combines the previous two parts to consider the treatment of intra-group transactions in the realm of international investment law to date. Part VI seeks to answer the question whether, based on what can be discerned about the dynamics of the relationship between group members, such transactions can be considered an investment for the purposes of admission to arbitration. In the process, it offers some reflections on the relationship of intra-group claims with the underlying policy rationale behind the operation of a requirement of investment. Finally, a corollary argument that is often raised in these contexts, namely whether intra-group claims represent an 'abuse of process,' is discussed in Part VII.

II The Issue: Manipulation of the Corporate Form in Investor-State Arbitration

For the purposes of this essay, the author adopts a definition of the corporate group as "companies associated by common or interlocking shareholders, allied to unified control or capacity to control."[2] Today, such groups dominate both the national and world economy.[3] For simplicity, this essay will focus on relationships between limited liability companies, rather than more complicated structures involving trusts, partnerships or nominee shareholders.

The issues raised in these contexts are challenging, and illustrate the peculiarities of investor-state arbitration in terms of the competing rights and interests it holds in check. Although investor-state arbitration might classically be thought of as assisting to remediate imbalances of position between the individual investor and the apparatus of the state,[4] the *jurisdictional* position of states *vis-a-vis* the multinational corporation reveals a far more complicated reality. Elementary to the organisation of contemporary economic life is a relationship between corporates and states which

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[2] *Walker v Wimborne* (1976) 137 CLR 1 at 6 per Mason J in Jason Harris and Avril Hargovan "Corporate Groups: the intersection between corporate and tax law – *Commissioner of Taxation v BHP Billiton Finance Ltd*" (2010) 32(4) Sydney L Rev 723 at 725.

[3] Philip I Blumberg "The Transformation of Modern Corporation Law: The Law of Corporate Groups" (2005) 37 Conn L Rev 605 at 608. For empirical studies on the widespread use of corporate groups, see for example Ian Ramsay and Geofrey Stapledon "Corporate Groups in Australia" (2001) 29 Australia Business Law Review 7 and Philip I Blumberg *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations* (Little, Brown and Company, Toronto, 1983) at [2.02.1].

[4] Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007) at 152.

permits the organisation of corporate groups in a manner which transcends national borders. By contrast, a state is defined by reference to the territory under its sovereignty.[5] Intra-group investments, which serve to push this conflict of paradigms to its limits, are therefore fraught with conceptual and policy complications.

Furthermore, implicit in the notion of foreign direct investment is a connection between the foreign investor and an economic activity which bears some result *within* the relevant state.[6] In seeking to promote the inward flow of this investment by way of a Bilateral Investment Treaty ("BIT"), states can be taken to have intended the regime would generate activities which produce their effects within the territory of that host state.[7] This paper advances the view that "investment," insomuch as that term is used in an investor-state context, must be inherently intertwined with some territorial reference.

A 'Capital Flight:' Multinational Enterprise and its Relationship with Investment Protection Regimes

The growth of investment activity carried out by multinational enterprises has undoubtedly allowed states to reap the benefits of increased economic diversification and the efficient transfer of capital, technology and human and natural resources.[8] Often it is precisely because of the multi-nationality of these organisations that they can ascend to become the engines of wealth generation which many perceive them to be.[9] Equally, it is fairly clear that such enterprises have contributed to greater inequality of world resources.[10] One of the perceived benefits of investment by multinationals, the facilitation of economic growth, can often be of a fleeting nature without any lasting impact on a host state's development. This is due to the nature of a trans-national corporate

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[5] Malcolm N Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 352.

[6] J H Dunning *Multinational Enterprises and the Global Economy* (Addison Wesley, Workingham, 1993) at 5; *ADC Affiliate Ltd v The Republic of Hungary (Award)* ICSID Case No ARB/03/16, 2 October 2006 at [322].

[7] Harrison G Blaine (ed) *Foreign Direct Investment* (Nova Science Publishers, New York, 2009) at vii.

[8] Organisation for Economic Co-operation and Development *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) at 14.

[9] Peter T Muchlinski *Multinational Enterprises and the Law* (2nd ed, Oxford University Press, Oxford, 2007) at 9.

[10] Janet Dine *the Governance of Corporate Groups* (Cambridge University Press, Cambridge, 2000) at 151.

structure, under which the entity has the ability to absorb a significant degree of financial gain back towards its 'centre,' and therefore away from the host state which would otherwise stand to gain from the inflow of capital.[11] It is not an overstatement to say that the general purpose of many multinational corporations is to maximise profit for the overall enterprise, rather than a concern for the welfare of the host nation.[12] When considered in concert with the dynamics of corporate group structures, which allow for relative ease of movement of resources between members, this can result in 'capital flight,' where assets or money flow rapidly out of a country in response to changes in its economic, political or regulatory landscape.[13]

Contemporaneously, international investment law is faced with its own particular challenge of the manipulation of corporate group structures by these entities in order to acquire the benefits incumbent upon protection under a BIT.[14] Chief among these is access to investor-state arbitration. Prominent academics in the field increasingly support the idea that 'corporate restructurings' for these ends, generally by way of the transfer of ownership of equity capital, are illegitimate.[15] One common device employed in operations of this nature is the so-called "shell company."[16] In the face of a dispute settlement regime that is predicated on the performance of economic activities, these shell companies can be defined precisely by their *lack* of engagement in such matters.

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[11] Volker Bornschier and Hanspeter Stamm "Transnational Corporations" in Sally Wheeler (ed) *A Reader on the Law of Business Enterprise: selected essays* (Oxford University Press, New York, 1994) at 336.

[12] Paul Harrison *Inside the Third World: The Anatomy of Poverty* (Penguin Books, Harmondsworth, 1993) at 356; Dine, above n 10 at 154.

[13] See generally John T Cuddington "Capital Flight: Estimates, Issues and Explanations" (Princeton Studies in International Finance No 58, Princeton University, 1986).

[14] See for example *Mobil Corporation, Venezuela Holdings BV v Bolivarian Republic of Venezuela (Jurisdiction)* ICSID Case No ARB/07/27, 10 June 2010; *Phoenix Action, Ltd. v Czech Republic (Award)* ICSID Case No ARB/06/5, 15 April 2009.

[15] Zachary Douglas *the International Law of Investment Claims* (Cambridge University Press, Cambridge, 2009) at [317]; Campbell McLachlan, Laurence Shore and Matthew Weiniger *International Investment Arbitration: Substantive Principles* (Oxford University Press, Oxford, 2008) at [5.81].

[16] That is, a "non-trading company used as a vehicle for various company related-manoeuvres, or kept dormant for future use in some other capacity:" Jonathan Law (ed) *A Dictionary of Finance and Banking* (5th ed, Oxford Unversity Press, Oxford, Online ed).

B The Influence of Saloman v A Saloman & Co.

Even those with the most rudimentary understanding of company law will appreciate the centrality of the doctrine of 'separate corporate personality,' or, the principle in *Saloman v Saloman & Co.*[17] While a detailed exposition of the rationale and merits of corporate personality is not the focus of this essay, a few points must be made about the complications that *Saloman* presents with respect to the presence of large multinational conglomerates in modern international commerce.

Orthodox company law, owing to the *Saloman* ruling, views each member of the group as having separate rights and duties from one another.[18] However, it has long been noted that, in the corporate group context, many decisions are unlikely to be made at the individual entity level.[19] Separate corporate personality thus creates a conflict between legal form and economic substance. In truth, the enterprise more closely aligns with the model of a 'single economic entity.'

Separate corporate personality is buttressed by the concept of the limited liability of shareholders to the value of their capital contribution. Although *Salomon* was concerned only with natural persons, limited liability was later extended to corporate shareholders.[20] Such a development was said to "change the policy dynamic" behind separate corporate personality from protecting individual persons to permitting a business enterprise whereby both parent and affiliate are protected from the liabilities of the other.[21] The notion of limited liability also leads to the situation where, in the event of one group-member's insolvency, only very limited recourse will be available against the remainder of the group to satiate creditor or liquidator claims.[22]

Of course, there are several bases upon which the *Saloman* principles may be set aside in view of exceptional circumstances. For common lawyers, the most apparent example of a derogation from

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[17] *Saloman v A Saloman & Co Ltd* [1896] UKHL 1 [1897] AC 22.

[18] at 51.

[19] Clive Schmitthoff and Frank Woolridge *Groups of Companies* (Sweet & Maxwell, London, 1991) at 1.

[20] at 24.

[21] at 24.

[22] Companies Act 1993 (NZ), s 271(1)(a); See *Steel and Tube Holdings Ltd v Lewis Holdings Ltd* [2016] NZCA 366.

separate corporate personality is the equitable doctrine empowering the court to 'lift the corporate veil,' usually in order to render a significant person within the company, such as a director or major shareholder, liable for the entity's obligations.[23] There is no uniform principle which articulates when a court should undertake to lift the veil; the case law instead offers a series of situational examples where lifting the veil will be the likely result. The most common sphere in which the doctrine of lifting the veil operates is where the corporate entity is operating as a sham or façade, such as where the company is the mere *agent* of a dominant shareholder,[24] or is being used to cloak fraud.[25]

On occasion, the veil has been lifted to recognise that a group of companies are operating as a single economic entity.[26] But a persuasive body of case law in support of this thinking has not amassed and, indeed, submissions to lift the veil on such a basis have been rejected in other cases.[27] Of particular importance in this regard is the leading decision of *Adams v Cape Industries Plc*,[28] itself concerned with the question of the legal status of widely-dispersed corporate groups. The Court of Appeal of England and Wales rejected the group of companies doctrine[29] in favour of the more conventional exceptions of agency, unlawful behaviour or impropriety, or where the veil amounts to a mere "façade concealing the true facts."[30] To a large extent then, the courts exhibit a permissive view of group enterprises which is sensitive to their role in the modern economy. As summarised in a leading New Zealand case on the point, *Chen v Butterfield*: "corporate structures

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[23] Given the wealth of literature that has been afforded to the question of lifting the veil, this issue included in this paper only as essential context. For a general consideration of the scope and application of this doctrine, see Paul L Davies (ed) *Principles of Modern Company Law* (8th ed, Sweet & Maxwell, London, 2008) at 193.

[24] *Smith, Stone & Knight v Birmingham Corporation* [1939] 4 All ER 116.

[25] *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1961] 1 WLR 832.

[26] *DHN Food Distributors Ltd (in liq) v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

[27] See for example *Re Securitibank Ltd* [1980] 2 NZLR 714 and *Attorney General v Equiticorp Industries Group Ltd (in stat man)* [1996] 1 NZLR 528.

[28] *Adams v Cape Industries plc* [1990] Ch 433 (CA), [1990] 2 WLR 657.

[29] at 536.

[30] at 539.

and concepts of separate corporate personality are legitimate facets of commerce. If they are genuinely and honestly used, they will not be set aside."[31]

C An Alternative? The "Single Economic Entity" Approach in National and International Law

Outside of this equitable jurisdiction exists an emerging suite of largely statute law which begin from a wholly different conception of the corporate group – that of the 'single economic entity.' Although in the context of lifting the veil, Lord Denning MR in *DHN Food Distributors v Tower Hamlets* articulated the nature of the single economic entity as thus:[32]

> … a parent company … can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.

1 Domestic Legislation

In New Zealand and other common law jurisdictions, there are exceptions to the veil of incorporation provided in company law legislation, particularly in the insolvency context. As noted above, the parent company of a subsidiary in liquidation may be obligated to pay the whole or a part of all or any outstanding debts to a liquidator.[33] This arises in situations where it is apparent that a transaction was not entered into in the interests of the debtor company, but in order to further the interests of the parent company or the wider group.[34] In addition, the typical fiduciary duties on company directors of loyalty and concern for the company's best interests have been modified in the case of wholly or partly owned subsidiaries, who may also be required to observe such duties in favour of their parent.[35]

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[31] *Chen v Butterfield* [1996] BCL 278 at 11.

[32] *DHN Food Distributors,* above n 26 at 860.

[33] Companies Act 1993 (NZ), s 271(1)(a); See *Steel and Tube Holdings,* above n 22.

[34] D D Prentice "Group Indebtedness" in Schmitthoff and Woolridge, above n 19 at 66.

[35] See for example Companies Act 1993 (NZ), s 131(2)-(3).

In perhaps the most extensive comparative development, the company law of Germany includes a comprehensive law of groups known as the '*Konzernrecht*,' providing a visible departure from the primacy of separate corporate personality in domestic legal regimes.[36] Contained in the '*Aktiengesetz*' – its purpose is to provide safeguards to 'vulnerable' controlled corporations who may have been shouldered with group debts, or whose interests are likely to be foregone in favour of the larger group.[37] The idea of a group of companies operating as a single economic unit has also flourished in the area of competition or antitrust law. In the European Union, the concept provides an important defence for potential allegations of cartel conduct and market manipulation, on the basis that interactions between controlled and controlling entities may not result in any event that is of competitive significance for the market.[38]

It is now common commercial practice, informed by the international harmonisation of financial reporting standards, for corporate groups to account for their financial position by way of 'consolidation.'[39] Consolidated group accounts treat the assets of each member of the group as if they were part of the assets and liabilities of the parent company.[40] In so doing, shareholders and creditors are said to receive a greater picture of their investment - for instance, by providing

[36] A collection of entities may be regulated together as a 'konzern' (concern) by way of an express 'enterprise agreement' (*Unternehmensvertrage*) or by the de facto influence of the holding company (*faktischer Konzern*). Under an enterprise agreement, a subsidiary might be required to relinquish corporate opportunities, make discounted deliveries and transfer proprietary information. They can also require that the subsidiary divest all or part of its profits to the parent: Stock Corporation Act (*Aktiengesetz)* 1965 (Germ), § 291(1).

[37] Andreas Cahn and David Donald *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge University Press, Cambridge, 2010) at 682.

[38] Okeoghene Odudu and David Bailey "The Single Economic Entity Doctrine in EU Competition Law" (2014) 51(6) C M L Rev 1721 at 1726; Treaty on the Functioning of the European Union (25 March 1957, entered into force 1 January 1958), art 101-102.

[39] See for example Companies Act 2006 (UK), ss 404-405; s 1162; "Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and related Reports of certain types of Undertakings" (2013) OJ L 182/19.

[40] International Accounting Standards Board *IFRS 10: Consolidated Financial Statements* (2011); Ellis Ferran and Look Chan Ho *Principles of Corporate Finance Law* (2nd ed, Oxford University Press, Oxford, 2014) at 22.

information on inter-company lending.[41] Firms may also elect to centralise matters such as tax returns. Within a wholly owned group which elects to opt-in to a tax consolidation regime, the head company may lodge a single income tax return or PAYG instalment on behalf of the group.[42] Indeed, the idea of consolidation is now of central significance to the law of taxation.[43] By way of overview, national tax laws tend to embrace a treatment of corporate groups as a single enterprise through the provision of 'group relief'[44] which, with the exception of dividends, enables the tax-free transfer of intra-group assets.[45] Furthermore, although limited to *domestic* groups, the losses of one group member (which do not trigger tax liability) may be surrendered and shared with another, profitable group member, which are subtracted from net income to mitigate the tax payable by that profitable entity.[46] These developments are based on a view that, being under the common control of the parent (much like an internal branch), transfers of assets between subsidiary group members should merely be thought of as an "internal asset realignment" rather than a transaction between arms-length parties giving rise to taxable income.[47]

2 International Jurisdiction

On the international plane, the question of a state's jurisdiction over foreign corporate bodies starts from the position that, as a consequence of the separate corporate personality of the subsidiary and parent, the state of the parent is without jurisdiction over the foreign subsidiary as a matter of

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[41] K J Hopt "Legal Issues and Questions of Policy in the Comparative Regulation of Groups" (1996) 1 Gruppi di Societa 45, at 54-55.

[42] Paul Kenny, Michael Blissenden and Sylvia Villios *Australian Tax 2016* (LexisNexis, Chatswood, 2016) at [4.65].

[43] John Avery Jones, Peter Harris and David Oliver (eds) *Comparative Perspectives on Revenue Law* (Cambridge University Press, Cambridge, 2008) at 246.

[44] *New Zealand Taxation 2016: Principles, Cases and Questions* (Thomson Reuters, Wellington, 2015) at [12.5.3]; Lisa-Jane Harper and Kevin Walton *Tolley's Corporation Tax 2014-15* (LexisNexis, London, 2014) at [33.1].

[45] Income Tax Act 2007 (NZ), ss FM 1-FM 42. See also Taxation of Chargeable Gains Act 1992 (UK), s 171; Harper and Walton at [13.4].

[46] ITA 2007 (NZ), s IC 1. See also Corporation Tax Act 2010 (UK), s 99; Harper and Walton at [33.2].

[47] Y Masui "Group Taxation, General Report" in (2004) 89b Institute of Financial Advisers, Cahier de Droit Fiscal International 21 at 35; Antony Ting *The Taxation of Corporate Groups under Consolidation: an International Comparison* (Cambridge University Press, Cambridge, 2013) at 25.

international law.[48] For New Zealand purposes, the law is principally as stated in *Adams v Cape Industries,* namely that the court may find the 'presence' of a foreign corporation only where that entity establishes or maintains, at its own expense, a fixed place of business, or if a domestic 'representative' carries on the overseas corporation's business.[49]

In specific jurisdictions, however, this has evolved. In the United States, the law of jurisdiction over foreign corporations was restated in *International Shoe Company v Washington* as allowing for the jurisdiction of the host state following any liability creating conduct, whether economic or non-economic, having a "substantial relationship" to the forum.[50] Economic activities, that is, the conduct of persistent activities within the forum from which economic benefit is received, are the major basis for the assertion of this jurisdiction.[51] Where a foreign subsidiary is added into the factual matrix, US courts have still been able to rationalise the exercise of jurisdiction over an alien entity, opining that there is "little distinction from conducting [economic activities] through the officers and employees of the parent corporation" with ostensibly little regard for the separate corporate personality of each entity.[52] Despite being the exception, rather than the norm in matters of jurisdiction over foreign entities, the US doctrine provides an example of courts looking to the economic substance, rather than legal form of the arrangement in order to determine its jurisdiction.

[48] FA Mann "The Doctrine of International Jurisdiction Revisited after Twenty Years" in (1984) 3 *Recueil Des Cours – Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers, London, 1985) at 56.

[49] *Adams v Cape Industries,* above n 28 at 530. See David Goddard QC and Campbell McLachlan QC "Private International Law – litigating in the trans-Tasman context" (NZLS Seminar, August 2012) at 58 and Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [14-056].

[50] *International Shoe Company v Washington* 326 US 310 (1945) at 318.

[51] Eugene F Scoles and Peter Hay *Conflict of Laws* (5th ed, West Publishing Co, St Paul Minn, 2010) at 334.

[52] *Andrulonis v United States* 924 F 2d 1210 (2d Cir 1991); Scoles and Hay at 338.

D *Jurisdiction* Ratione Personae: *Questioning the* Locus Standi *of Claimants within Corporate Groups*

Within investment arbitration, nowhere does the problem of separate corporate personality make itself more apparent than in the pre-requisite jurisdictional question of whether the claimant is an 'investor.' The traditional objection that has been raised where the putative investor is a member of a multinational corporate group has been in respect of its corporate 'nationality' – a *ratione personae* objection to the tribunal's jurisdiction.[53] The veil of incorporation allows for the practice of 'forum shopping,' meaning that it is often the case that the formal place of incorporation does not align with the economic reality of the group's operation. Multinational enterprises are thus seen to profit from the limits that territoriality imposes on the ability of states to control them.[54]

In objecting to this state of affairs, some have argued that the imperative of "state-consent" which buttresses the operation of the BIT regime requires that nationality be assessed in terms of the *genuine* nationals of the relevant state party, rather than extending to *de facto* nationals of third states.[55] In essence, the argument suggests that the tribunal should adopt a more inquisitorial approach when the legal nationality of the claimant is at odds with economic reality of the centre of power within the enterprise. However, attempts to look behind the corporate structure in order to reflect the real nature of the transaction have borne little fruit as a general principle. In the context of the customary law of diplomatic protection, the leading ruling of the ICJ in the *Barcelona Traction* decision is that it is the state of *incorporation* of the company that is relevant for nationality purposes.[56] Such was carried forward to the treaty regime for investment arbitration in *Tokios-Tokelés v Ukraine*, which confirmed that for general purposes, the state of incorporation is the orthodox means of establishing *ratione personae* jurisdiction under a BIT.[57]

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[53] Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Oxford University Press, Oxford, 1996) vol 1 at 859-60.

[54] Ignaz Seidl-Hohenveldern *Corporations in and under international law* (Grotius Publications, Cambridge, 1987) at 12.

[55] Mark Feldman "Settling Limits on Corporate Nationality Planning in Investment Treaty Arbitration" (2012) 27 ICSID Rev 281 at 282.

[56] *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Merits)* [1970] ICJ Rep 3 at 46; 88.

[57] *Tokios Tokelés v Ukraine (Jurisdiction)* (2007) 11 ICSID Rep 313 at 330.

It is possible to divert from this general rule, as a BIT may direct the tribunal to consider an alternative test for nationality, such as locating the state "where the effective management [of a company] takes place."[58] This 'corporate seat' approach looks to assess where the "real economic relationship" between the investor and the state is founded, however, it undoubtedly presents challenges for tribunals in assessing where exactly this 'seat' is located.[59] A further alternative approach involves looking to whether the owners or controlling shareholders of the entity have the nationality of a contracting state, rather than the entity itself.[60] Both approaches aim to recognise the genuine economic links at work in a particular transaction.[61] This is in addition to the advent of mechanisms such as 'denial of benefits' clauses within BITs, which enable treaty parties to refuse recourse to investor-state arbitration where a corporate claimant is owned or controlled by persons from either the host state or a third, non-signatory state.[62]

In the context of subsidiary or shell companies, it is often the case that the requirements of *ratione materiae* and *ratione personae* jurisdiction become blurred.[63] Intertwined with the question of nationality are concerns about who made the investment, or where it originated.[64] Acknowledging that the nationality debate has largely run its course, this paper attempts to instead focus on the

[58] UNCTAD *Scope and Definition* 2 Series on Issues in International Investment Agreements UN Doc UNCTAD/ITE/IIT/11 (1999) at 39. See for example The German Model BIT of 1991, art 1(4) in ICSID Rev FILJ 221 (1996).

[59] at 39.

[60] See Agreement on the Promotion and Reciprocal Protection of Investments, Philippines-Switzerland (Opened for signature 31 March 1997, entered into force 23 April 1999), art 1(a)(ii); Agreement on the Promotion and Reciprocal Protection of Investments Switzerland-Nigeria BIT (Opened for Signature 30 November 2000, Entered into Force 1 April 2003), art 1(a)(iii).

[61] UNCTAD, above n 58 at 39.

[62] See for example the Energy Charter Treaty (opened for signature 17 December 1994, entered into force 1 April 1998), art 17, which reads: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized."

[63] Matthew Weiniger and Elizabeth Kantor "Case Comment: KT Asia Investment Group BV v Republic of Kazakhstan: *Ratione Personae and Ratione Materiae*" (2015) 30(3) ICSID Rev 533 at 534.

[64] at 534.

economic character of corporate group transactions in terms of the second jurisdictional plank – subject-matter, or *ratione materiae* jurisdiction.

III The Investment Threshold: Jurisdiction Ratione Materiae

A cross-border transaction can broadly be classified into three distinct modes of investment.[65] "Portfolio investment," including publicly traded securities such as shares and bonds, are primarily a financial investment and do not afford to the investor a significant management or decisive influence. This is in contrast with Foreign Direct Investment (FDI) - in which money, equipment, expertise or other assets are advanced to another country on a medium or long-term basis, in order to acquire a "lasting interest" in a foreign enterprise which entails a management influence.[66] A third category, indirect investment, lacks the emphasis of FDI on effective participation, but equally extends beyond portfolio investment to include intellectual property transfers and technical assistance.[67] The origins of the present regime of investment law, in the customary international law of diplomatic protection, limited the ambit of its principles to those who had made a *direct* investment.[68] However, the establishment of a regime of bilateral investment treaties, to which this section will now turn, extended the scope of the term so that an investment now need not be classed as FDI to be capable of protection.[69]

Instinctively one might assume that a shift from customary to treaty law would lead to greater specificity in the boundaries of what is, and is not, an investment. Rather, the investment treaty

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[65] Christopher F Dugan and others *Investor State Arbitration* (Oxford University Press, Oxford, 2008) at 1.

[66] OECD "Benchmark Definition of FDI" (4th ed, Paris, 2008) at 17; International Monetary Fund *Balance of Payments Manual* (5th ed, Washington DC, 2005) at [360].

[67] Dugan and others, above n 65 at 2.

[68] Muthucumaraswamy Sornarajah *The International Law on Foreign Investment* (3rd ed, Cambridge University Press, Cambridge, 2010) at 9.

[69] *Siemens AG v Argentina (Jurisdiction)* (2007) 12 ICSID Rep 174 at 206. See also *Sedelmeyer v Russian Federation (Award)* SCC, 7 July 1998; *Kardassopoulos v Republic of Georgia (Jurisdiction)* ICSID Case No ARB/05/18, 6 July 2007.

regime is subject to continual uncertainty and debate.[70] The architects of the modern system of investment protection refrained from putting forward a definitive interpretation of the term. Combined with the very understandable concern about unduly restricting the flexibility that is at the heart of the notion of investment, this has left the scope of this term extremely open-ended. A corollary of this general uncertainty is a lack of clarity as to whether the term, for investment *law* purposes, should be ascribed some *sui generis* meaning to account for the particular investor-state relationship that lies at its heart. The following sub-sections illustrate the dimensions of the issue to date.

A An Objective or Subjective Concept?

The provision of most central importance in this area, and the source of the most contention, is Article 25 of the Washington Convention establishing the International Centre for the Settlement of Investment Disputes ("ICSID").[71] Beyond prescribing that a tribunal's jurisdiction extends to disputes arising "directly out of an investment," Article 25 gives no elaboration on the content of that term.

The explanation for this is apparent from the *travaux préparatoires* associated with the Convention. Those involved with its drafting noted that it was difficult to find a satisfactory definition and, to that end, there were concerns about the exclusion of otherwise meritorious claims if they did not precisely fit within its bounds.[72] Additionally, it was thought that the bilateral expression of state consent to arbitration was the proper forum in which notions of investment could be agreed.[73]

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[70] Dugan and others, above n 65 at 247; Surya P Subedi *International Investment Law: Reconciling Policy and Principle* (2nd ed, Hart Publishing, Oxford, 2012) at 62.

[71] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (signed 18 March 1965, entered into force 14 October 1966), Art 25 ("ICSID Convention").

[72] Christoph Schreuer *The ICSID Convention: A Commentary* (Cambridge University Press, Cambridge, 2001) at 123; International Centre for Settlement of Investment Disputes ("ICSID") *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States* (Washington DC, 1968) vol 2(1), at 54.

[73] *Fedax NV v The Republic of Venezuela (Award)* (2002) 5 ICSID Rep 200 at 204.

The Bilateral Investment Treaty provides the principal expression of the discretion afforded to the relevant states.[74] The state parties to each BIT are tasked with elucidating the precise transactions or categories of assets which will amount to an investment capable of protection. In view of this, the concept of investment within each treaty may vary significantly depending on the relevant definition provisions.

The descriptions afforded to the term investment within this suite of treaty instruments has been described by one commentator as "broad and unhelpful."[75] A survey of the most recent BITs reveals that a comprehensive, descriptive approach to the term investment is the norm, with relevant BIT provisions specifying the classes of assets under which a person may undertake an investment. While detailed, these provisions are not phrased so exhaustively as to preclude the development of new methods to inject capital. One notable example which typifies this approach is the controversial Trans-Pacific Partnership agreement (TPP), which provides in Chapter 9, dealing with investment matters, that:[76]

> **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments and loans;
>
> (d) futures, options and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and

[74] *Tokios Tokelés,* above n 57 at 331.

[75] Dugan and others, above n 65 at 247.

[76] Trans-Pacific Partnership (released 26 January 2016, not yet in force), art 9.1.

> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges,
>
> but investment does not mean an order or judgment entered in a judicial or administrative action.

The issue is whether the parties to the BIT are free to define 'investment' however they please, or whether there is some objective *limit* to the notion of investment which may circumscribe the availability of arbitration to the dispute.[77]

One school of thought regards the words of the parties as the *paramount* consideration – therefore, the meaning of investment could extend as far as the parties provided. Under this approach, some saw the content of investment as being limited to a "legal conception" of the term, which prominent scholar Zachary Douglas summarised as the "acquisition of a bundle of rights in property that has the characteristics of one or more categories of investment defined by the applicable investment treaty where the property is situated in the host state."[78] Notably, Douglas limits the legal conception of investment to activities which generate *property* rights.[79] Seemingly, this would exclude mere contractual rights, such as under a straightforward contract of sale, from this legal conception. In *Emmis v Hungary,* the distinction was made clear that the loss of a contractual right is not automatically excluded from protection, but is protected only when the claimant, via contract, acquires an *asset* to which a monetary value might be ascribed.[80]

A purely legal conception of investment is undoubtedly the classical exposition of the term. However, in the context of ICSID arbitration, it has long been recognised that the mere expression of consent to arbitrate, through a BIT, is not the sole criterion for the exercise of the tribunal's *ratione materiae* jurisdiction. Rather, it is one factor to be afforded "great weight" in the broader

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[77] Dugan and others, above n 65 at 258.

[78] Douglas, above n 15 at [335].

[79] at [276].

[80] *Emmis International Holding, BV v The Republic of Hungary (Award)* ICSID Case No ARB/12/2, 16 April 2014 at [169]; *Accession Mezzanine Capital LP v The Republic of Hungary (Award)* ICSID Case No ARB12/3, 17 April 2015 at [188].

question of whether an investment has eventuated.[81] This view sees the term investment as having some *objective* existence as a term of art which finds expression in the ICSID convention. As stated in *Global Trading Resource Corp v Ukraine*:[82]

> it is now beyond argument that there are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions.

So, too, has this 'twin test' approach been confirmed as orthodox in other, *ad hoc* arbitral settings.[83] Even outside the ambit of Article 25, there appears to be a recognition that there is some inherent meaning of investment that is central to the nature of investor-state arbitration as a process. In *Romak SA (Switzerland) v Uzbekistan,* it was said that the use of the word investment within the BIT invites an analysis of the *underlying transaction*, which will not necessarily comprise an investment simply because rights have crystallised that comply with the technical specifications set out within the treaty instrument.[84]

In light of the ascendency of a dual test for investment, it has been noted that BITs themselves have begun to reflect the centrality of the notion that activities must have the character of an investment in a real sense to come within the scope of the agreement.[85] Notable in this tradition is the practice apparent from US BITs enacted post-2004, which phrase the definition of investment as "every asset that has the characteristics of investment."[86] Further still, the relevant definition in the Energy Charter Treaty animates the concept of investment by explicitly linking the categories

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[81] *Alcoa Minerals of Jamaica Inc v Jamaica (Jurisdiction)* ICSID Case No ARB/74/2, 6 July, 1975 at 9.

[82] *Global Trading Resource Corp v Ukraine (Award)* ICSID Case No ARB/09/11, 1 December 2010 at [43].

[83] *Romak SA (Switzerland) v The Republic of Uzbekistan (Award)* PCA Case No AA280, 26 November 2009, an UNCITRAL *ad hoc* arbitration.

[84] at [211].

[85] Kenneth J Vandevelde *US International Investment Agreements* (Oxford University Press, Oxford, 2009) at 114-115, 121-122.

[86] US Model Bilateral Investment Treaty (2012), art 1.

of assets to an "Economic Activity in the Energy Sector … designated by a Contracting Party in its Area" (i.e., the host state).[87]

While the acceptance of this dual test is widespread, there are divergent opinions as to the precise relationship between the legal and economic models. Several awards appear to view the two in terms of a hierarchy – namely that, however widely defined a BIT is, the accretion of assets in compliance with an investment clause will not grant the tribunal jurisdiction where such cannot objectively be taken to comprise an investment.[88] However, leading scholars have come to advocate that they are complementary,[89] and indeed, as stated in *Malicorp Ltd v Egypt,* the two serve very different functions:[90]

> … [a BIT] emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets.

B The Economic Conception of Investment: Salini v Morocco[91]

The principles that have taken hold since *Salini* can be thought of as a means to ascribe some discernible content to the notion of investment beyond merely recognising that an objective meaning exists. *Salini* does not represent the genesis of this thesis, as a definition of investment based on the traditional economic characteristics of that term was in fact first propounded in academia by Christoph Schreuer.[92] His interpretation was relied upon and brought to prominence in arbitration law in the *Salini* award.

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[87] Energy Charter Treaty, above n 62, art 1(6).

[88] *Romak SA,* above n 83 at [207]; *Anizian v The United Mexican States (Award)* ICSID Case No ARB(AF)/97/2, 1 November 1999 at 90.

[89] Douglas, above n 15 at [340]; Brigitte Stern "The Contours of the Notion of Protected Investment" (2009) 24(2) *ICSID Rev* 534 at 535.

[90] *Malicorp Ltd v Arab Republic of Egypt (Award)* ICSID Case No ARB/08/18, 7 February 2011 at [110].

[91] above n 1.

[92] Schreuer, above n 72 at 140.

There is a clear purpose to be served from considerations of this nature, as there is a consensus that a mere proprietary test is insufficient in delineating between investments and transactions which do not engage the party concerned in an economic venture in the host state.[93] For instance, in the earlier example of a sales contract, the purchaser acquires only the goods, absent a stake in any venture, whether his own or his counterparty's. By the same token, however, we might say that the notion of a defined economic conception of investment is counter-intuitive given the fact that, as a business term of art, investment has an essential fluidity, defined as broadly as "[t]he purchase of assets…with a primary view to their financial return, either as income or capital gain.[94] When imported as a jurisdictional requirement in a legal regime, in which specificity and predictability are central objectives, a jurisdictional test of 'investment' presents a marked collision of norms.

The *Salini* award offers five characteristics against which a putative investment may be measured: a certain and substantive duration, generation of regular profits and returns, participation of both parties in risk, a substantial commitment of capital and a contribution to the economic development of the host state.[95] These five criteria are not jurisdictional requirements, merely expressing certain common characteristics of investments.[96] Nevertheless, in several subsequent awards tribunals have followed a 'conceptualist' approach, treating the *Salini* criteria as *mandatory* elements so as to deny jurisdiction over an alleged investor's claim.[97] In particular, the requirement that a purported investment make a contribution to the economic development of the host state has been

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[93] Even decisions which have concerns about an objective test for investment accept that there are some notional *limits* to the concept. For instance, in the Annulment decision in *Malaysia Historical Salvors,* it was accepted that the term investment "excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre:" ICSID Case No ARB/05/10, 16 April 2009 at [69].

[94] Law, above n 16.

[95] *Salini*, above n 1 at 413; Scheurer, above n 72 at 140.

[96] Dugan and others, above n 65 at 265.

[97] *Romak v Uzbekistan,* above n 83 at [197]; *Joy Mining Machinery v Egypt (Jurisdiction)* ICSID Case No ARB/03/11, 6 Aug 2004 at 53; *Malaysia Historical Salvors Sdn, Bhd v Malaysia (Award)* ICSID Case No ARB/05/10, 28 May 2007 at 69-72; 105.

a "focal point" in dismissing potential claims.[98] However, despite the enthusiasm with which these tribunals have embraced the five-pronged test, it is now largely accepted that the *Salini* criteria are merely *indications* of an investment, rather than jurisdictional prerequisites.[99] As the framers of the ICSID Convention deliberately declined to define the bounds of the term,[100] it would be counter-intuitive to restrict the meaning of investment to those transactions with the character described above.[101]

A more conservative rendering of the economic conception was put forward by Zachary Douglas, who confined himself to *three* criteria: the commitment of resources; assumptions of risk; and an expectation of return.[102] The other aspects of the *Salini* formulation were discarded for fear of imposing too much subjectivity into the analysis.[103] However, for the purposes of this paper, *all* elements of the *Salini* criteria, as they have been applied by subsequent tribunals, will be elaborated on.

1 Contribution of Capital

The requirement of a 'contribution' has been treated broadly, involving any dedication of resources with economic value, whether in cash, kind or labour.[104] The mere performance of a contractual obligation, such as a transfer of title to goods, does not amount to a contribution in kind, which

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[98] Dugan and others, above n 65 at 266; *Mitchell v Democratic Republic of the Congo (Annulment)* ICSID Case No ARB/05/10, 1 November 2006 at [23]; *Malaysia Historical Salvors (Award),* above n 97 at 130.

[99] Notably, the Award in *Malaysia Historical Salvors* was annulled on this basis: ICSID Case No ARB/05/10, 16 April 2009. See also *Ceskoslovenska Obchodni Banka AS v The Slovak Republic (Jurisdiction)* 5 ICSID Rep 330 at 357; *MCI Power Group, LC v Republic of Ecuador (Award)* ICSID Case No ARB/03/6, 31 July 2007 at 165; *CMS Gas Transmission Company v Argentine (Annulment)* ICSID Case No ARB/01/8, 25 September 2007 at 71; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award)* ICSID Case No ARB/05/22, 24 July 2008 at 312-317.

[100] International Bank for Reconstruction and Development *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) at [27].

[101] *CSOB*, above n 99 at 351; 357.

[102] Douglas, above n 15 at 191.

[103] at 198.

[104] *Romak*, above n 83 at [214].

must be offered in furtherance of a *venture* between the parties.[105] Similarly, 'mere ownership' of a share or other security, even though such behaviours characteristically align with a *legal* conception of investment, has been held to be insufficient economic contribution (particularly where the claimant merely receives a share for no consideration).[106] To this end, the mere contribution of money or assets has been described as a "preliminary step."[107] A contribution must be supplemented by both risk and duration in order to come within the notion of investment in an economic sense.

An associated issue that arises is the quantum of contribution required. In drafting the ICSID Convention it was thought that it would be unnecessary and arbitrary to include a minimum threshold for the monetary amount of an investment.[108] However, in reality the magnitude or proportion of the putative investment to the overall project is frequently drawn upon by claimants to put forward the affirmative case for a tribunal's jurisdiction.[109] However, this is not always determinative, as monetary contributions can be supplemented with the provision of expertise or physical or human capital.[110]

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[105] *Romak*, above n 83 at [222].

[106] *Caratube International Oil Company LLP v Republic of Kazakhstan (Award)* ICSID Case No ARB/08/12, 5 June 2012 at [435]-[437]; *Saba Fakes v Republic of Turkey (Award)* ICSID Case No ARB/07/20, 14 July 2010 at [434].

[107] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Jurisdiction)* ICSID Case No ARB/06/2, 27 September 2012 at [234].

[108] "Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, December 16-20, 1963" (1968) 2(1) Documents Concerning the Origin and Formulation of the ICSID Convention 1 at 257-258.

[109] See for example *Liberian Eastern Timber Corp v Liberia (Award)* (1993) 2 ICSID Rep 343.

[110] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (Jurisdiction)* ICSID Case No ARB/03/29, 14 November 2005 at 131.

2 Risk

An investment requires the application of the investor's own resources at her own financial risk.[111] For investment purposes, risk can be thought of as "the chance that the actual outcome will differ from the expected outcome."[112]

The mere risk of contractual non-performance, being common to all business transactions, has been held to be insufficient.[113] Rather what is required is an 'investment risk,' where the investor cannot be sure of a return on investment and may not know precisely the financial commitment involved.[114] It was this which led many to the view that a loan was not an investment, as the lender typically acquires only a right to repayment by the borrower, subject principally to the risk of the counterparty's non-performance.[115] The Decision on Jurisdiction in *CSOB v Slovakia* clarifies that the pertinent question is whether the loan was made in circumstances which would service activities by the debtor of economic significance to the lender. In such cases, a loan could indeed be classed as an investment.[116]

3 Expectation of Return

Risk has often been thought to include the objective or expectation of a commercial return.[117] Nevertheless, the notion of return has at times been considered its own free-standing element of the *Salini* criteria, described in one award as the "precise purpose" for which any true investment is made.[118] Infusions of capital made without a reasonably substantiated belief that a profit would

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[111] *Caratube,* above n 106 at [416].

[112] Philip Ryland *Investment: an A-Z Guide* (The Economist, London, 2009) at 201.

[113] *Romak*, above n 83 at [229].

[114] at [230].

[115] FA Mann *the Legal Aspect of Money* (6th ed, Oxford University Press, Oxford, 2005) at [7.04].

[116] *CSOB,* above n 99 at 357. At issue in the case was a loan advanced by CSOB to a Slovak company to allow them to purchase certain of CSOB's non-performing loan receivables. The aim of the transaction was to improve CSOB's accounts to enable its restructuring and privatisation.

[117] *Quiborax SA,* above n 107 at [219].

[118] *CME Czech Republic BV (The Netherlands) v Czech Republic (Separate Opinion of Ian Brownlie)* 9 ICSID Rep 412 at 419.

result, or where there is a lack of sufficiently *regular* returns, have been touted as grounds for denying the materialisation of an investment.[119] Despite this, it is doubtful whether this requirement would be enforced too strictly, as intuitively we would regard ventures of a speculative nature as nevertheless still investments.[120]

4 Duration

Duration is typically said to require evidence of a substantive commitment which surpasses a mere one-off transaction.[121] In *Salini* itself, it was said that arbitral doctrine indicated that a minimum length of two to five years.[122] However, it is also recognised that short term projects are not necessarily *not* investments. To this end, no fixed minimum duration has generally been adopted, instead relying on an objective assessment of all the relevant circumstances.[123] This element makes plain the problems inherent in treating the *Salini* formulation as a fixed set of mandatory elements, given the malleable nature of many of these economic concepts.

5 Contribution to Economic Development of the Host State

In standard economic discourse, it is clear that a 'contribution to economic development' is not a pre-requisite of the notion of investment. Such a requirement, for the purposes of investor-state arbitration, is based on a purposive interpretation of the ICSID Convention. In *Phoenix Action Ltd v Czech Republic,* it was stated that:[124]

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[119] *Joy Mining,* above n 97 at 57.

[120] One apparent explanation is that the origins of this rule are in the international law of compensation, where the court is faced with the problem of being unable to quantify the loss of a *proven* expropriation in respect of highly speculative purchases: *Liamco American Oil Company v The Libyan Arab Republic (Award)* (1982) 62 ILR 140 at 214.

[121] *Romak,* above n 83 at [227].

[122] *Salini*, above n 1 at 414; See also *Consortium RFCC v Kingdom of Morocco (Jurisdiction)* ICSID Case No ARB/00/6, 16 July 2001 at 62.

[123] *Romak*, above n 83 at [225].

[124] *Phoenix Action* above n 14 at 27.

> if the investor carries out no economic activity, which is the goal of the encouragement of the flow of international investment, the operation, although possibly involving a contribution, a duration and some taking of risk will not qualify as a protected investment, as it does not satisfy the purpose of the ICSID Convention. The Tribunal recalls that the object of ICSID Convention is to encourage and protect international investment made for the purpose of contributing to the economy of the host State.

Nonetheless, the credibility of this requirement within the *Salini* test has been queried on numerous occasions.[125] A contribution to economic development has been characterised as merely the *result* of a successful investment, rather than a qualitative pre-requisite of the existence of one itself.[126] Additionally, whether such a contribution has eventuated is an inherently uncertain requirement, unlikely to be capable of objective identification.[127]

Furthermore, those awards which *do* analyse this issue do not evidence a consensus as to its precise content.[128] A stricter approach sees a 'contribution to economic development' as involving a lasting growth effect on the economy which exceeds the duration of the venture itself.[129] In other awards, tribunals have foregone references to development in favour of a more generic requirement that the claimant make a contribution to an economic *venture* in the host state.[130] This would appear to confine the analysis to whether the claimant's property right is being utilised in support of an economic activity, rather than a more complex appraisal of the macroeconomic benefit of that venture for the host state. While it is therefore open to debate whether this element

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[125] *Quiborax SA*, above n 107 at [220]; *Saba Fakes v Republic of Turkey (Award)* ICSID Case No ARB/07/20, 14 July 2010 at 110-111; *Consorzio Groupement LESI-DIPENTA v People's Democratic Republic of Algeria (Award)* ICSID Case No ARB/03/08, 10 January 2005 at 72.

[126] *Quiborax SA,* above n 107 at [220]; *Casado v Republic of Chile (Award)* ICSID Case No ARB/98/2, 8 May 2008 at 232.

[127] *LESI-DIPENTA,* above n 125 at 72.

[128] Stern, above n 89 at 542.

[129] *Fedax NV v Venezuela (Jurisdiction)* (2002) 5 ICSID Rep 183 at 199; *Joy Mining,* above n 97 at [53]; *Malaysia Historical Salvors (Award),* above n 97 at 144.

[130] *CSOB,* above n 99 at 355; *Phoenix Action,* above n 14 at 85.

can be considered a true part of the economic conception of investment, it is nevertheless included in this paper for the sake of completeness.

IV The Economic Behaviour of Corporate Groups

In order to consider the investment activities of subsidiary companies as against the *Salini* criteria, it falls to elucidate what the economic reality of the corporate group actually entails. This presents significant practical limitations, as one commentator described attempts to generalise the subject of corporate behaviour as representing a "heroic simplification of reality."[131] Although many comprehensive studies have been conducted, certainty in these matters is almost impossible due to both corporate information barriers and the sheer breadth and flexibility of the modes of international business. However, stimulated by a growing public interest in the activities of multinational corporations, certain common trends can be identified with relative certainty in the relationships that lie at the group's heart.[132]

A Capitalising Multinational Enterprise: an Overview of Intra-Group Transactions

The methods employed by corporate groups to transfer funds *within* their structures (and in so doing, allegedly, to 'invest' in one another) can be said to rely on several traditional modes of transaction.

Broadly, a parent company may 'call-in' funds from a foreign subsidiary by way of payments tied to existing obligations, or more flexible arrangements.[133] Examples of the former include granting

[131] Raymond Vernon *Sovereignty at Bay: the Multinational Spread of US Enterprises* (Basic Books, New York, 1971) at 114.

[132] The origins of this field of literature can be traced to Stephen H Hymer, whose work *The international operations of national firms, a study of foreign direct investment* (Massachusetts Institute of Technology, Cambridge (Mass), 1960), advanced an approach based on the 'theory of the firm.' See also Charles P Kindleberger *The International Corporation* (Cambridge, MIT Press, 1976). For a modern compendium of sources on the MNE, see UNCTAD *Journal of Transnational Enterprises*, <www.unctad.org>.

[133] Sidney M Robbins and Robert B Stobaugh *Money in the Multinational Enterprise: A Study in Financial Policy* (Basic Books, New York, 1973) at 75.

a loan, the payment of interest on a loan, granting credit on accounts receivable or deferring collection of accounts due.[134] The archetypal example of a 'flexible payment' is that of dividends arising from the equity stake the parent holds in the subsidiary. Also common are cross-group pledges, mortgages and guarantees to support the borrowing or other activities of another group member.[135] However, as such transactions do not strictly involve an inflow of capital to the recipient they are unlikely to be seen as investments in their own right, although they undoubtedly present evidence of a substantial commitment when seen in concert with other obligations. Finally, in the early stages of a foreign-incorporated subsidiary's existence the parent will commonly supply not only the initial capital requirements but all management and human capital, corporate infrastructure and intellectual property.[136] This can often result in a further flow of funds in the royalties or management fees payable by the subsidiary to compensate for the initial expertise rendered by the parent.

Loan financing of a foreign subsidiary presents an attractive degree of flexibility for the parent in seeking to call in assets.[137] Principally, this is for tax reasons. Where a dividend is classed as 'income,' the repayment of a loan ordinarily will not subject the parent to income tax.[138] Payments of principal and interest are also typically subject to less government regulation than dividend payouts.[139] In large enterprises, loans are generally advanced to foreign subsidiaries on a fixed repayment schedule.[140] A company in the position of creditor may also transfer or assign loans it holds against a fellow group member to a third party group member, either to improve the assignee or transferee's liquidity, or as a device to direct flows of money into portions of the enterprise which will result in the greatest financial gain for the group as a whole. Although historically contested, commentary on the ICSID Convention now appears to accept that so long as elements

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[134] Robbins and Stobaugh, above n 133 at 13.

[135] Companies & Securities Advisory Committee (Aus) *Corporate Groups Final Report* (May 2000) at [2.7].

[136] Robbins and Stobaugh, above n 133 at 88.

[137] Bhagwan Chowdhry and Vikram Nanda "Financing of Multinational Subsidiaries: Parent Debt vs. External Debt" (1994) 1(2) J Corp Financ 1 at 1.

[138] Robert Burgess *Corporate Finance Law* (2nd ed, Sweet & Maxwell, London, 1992) at [2.03].

[139] Robbins and Stobaugh, above n 133 at 51.

[140] at 53.

of substantial expenditure, risk, duration and relevance to economic development are also engaged, loan transactions *can* comprise an investment.[141]

As either the sole or majority shareholder in a subsidiary, it is perhaps unsurprising that the most common method for a parent company to receive capital is the payment of dividends.[142] As with loan and other debt financing, tax considerations (particularly tax rates in the jurisdiction of the subsidiary) are often paramount in the decision as to the quantum and regularity of a distribution. Where taxes are levied against the parent for income received by the foreign subsidiary, the tax paid by the subsidiary in its operative jurisdiction can be used for reducing the rate of tax paid by the parent company.[143] While dividends are not distributed 'as of right,' and generally require that the enterprise be solvent before a distribution is made, it is often the case that intra-group dividends are issued by a subsidiary "according to a centrally-determined policy, with little or no regard to their cash needs."[144] This is, of course, subject to potential government restrictions on inappropriate 'leakage' of share capital.

An additional transaction which falls to be considered here is the transfer of title to the shares themselves. Beyond the prohibition in some jurisdictions on subsidiaries holding shares in their parent, domestic legal systems generally place few restrictions on the purchase, or endowment, of shares by a subsidiary in one of its so-called "sister" companies.[145] Often these 'internal group restructurings' will be employed in order to create a legal appearance which masks the true extent of the control exercised by the parent or other dominant group members.

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[141] United Nations Conference on Trade and Development (UNCTAD) *2.4 Requirements Ratione Personae* UNCTAD/EDM/Misc232/Add3 (2003) at 24.

[142] Stephen Young, Neil Hood and James Hamill *Decision-making in foreign-owned multinational subsidiaries in the United Kingdom* (ILO Working Paper No 35, Geneva, 1985) at 11.

[143] Robbins and Stobaugh, above n 133 at 27. For an introduction to double taxation, see David R Davies *Principles of International Double Taxation Relief* (Sweet & Maxwell, London, 1985).

[144] "Report of the Review Committee on Insolvency Law and Practice" Cmnd 8558 (1982, London, Her Majesty's Stationery Office) at [1926] ("the Cork Report").

[145] See for example Companies Act 2006 (UK), s 136; Corporations Act 2001 (Aus), s 259D.

B Theories of Corporate Group Behaviour: Control and Centralisation

Behind these transactions will most likely be a detailed corporate strategy which provides a behavioural blueprint for the interactions between the group's constituent parts. While firm structures and modes of business inevitably vary, it is commonly accepted that there are two principal modes for the organisation of large, multinational enterprises: a centralised, functionally departmentalised structure with heavy central control, or alternatively a multidivisional, decentralised structure allowing for firm autonomy.[146] It can be difficult in any given case to decide where a decision was actually made, although generally the ultimate decision falls within the remit of the parent.[147] To what extent a particular corporate group aligns with either of these models is highly important in resolving whether an investment has materialised.

Despite recorded instances of autonomy, it should nevertheless be emphasised that the use of subsidiary companies is often precisely *because* of the control that is exercisable by the parent.[148] In the conduct of international business a wholly or majority-owned subsidiary is customarily seen as preferable to alternatives such as a local affiliate or joint venture partner, who will rarely act as a passive shareholder would.[149] This has resulted in the phenomena of 'global company planning,' where top management makes certain that each subsidiary's activities are consistent with the whole and that the parent company has the ability to correct diversions from central strategy.[150]

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[146] Alfred D Chandler *The Visible Hand – The Managerial Revolution in American Business* (Harvard University Press, Cambridge (Mass), 1977) in Blumberg *Procedural Problems in the Law of Parent and Subsidiary Corporations,* above n 3 at [2.05.2].

[147] at [2.06].

[148] John M Stopford and L T Wells *Managing the Multi-national Enterprise: Organisation of the Firm and Ownership of the Subsidiaries* (Basic Books, New York, 1972) at 107; Karl C Alorbi and Sam Agyei-Ampomah "The growing importance of United States affiliates of transnational corporations based in the United Kingdom" (2007) 16(3) Transnational Corporations UNCTAD/ITE/IIT/2007/4 61 at 61.

[149] Stopford and Wells at 107.

[150] Arvind Phatak *Managing Multinational Corporations* (Praeger Publishers, New York, 1974) at 221.

Various studies have identified a suite of influences on the degree of centralisation of decision-making between a parent and its foreign subsidiaries.[151] Apparent trends were that centralisation decreased over time, with more mature affiliates increasingly taking on key responsibilities. Importantly for the purposes of this paper, given its concern with *trans-national* corporate groups, there is a general recognition that centralisation increases in enterprises of a more multinational character.[152] Also demonstrative of greater overall control was the degree of inter-subsidiary production integration and intra-group trade.[153]

The dynamic of control is especially prevalent in the area of finance, as the centre tends to exert "tight control over major money flows."[154] Among multinational corporations there is a tendency to treat foreign subsidiaries as "profit-centres" whose performance is measured on the basis of profit and return on investment.[155] In furtherance of this objective, it is common for large multinational groups to incorporate specified 'finance subsidiaries,' whose sole purpose is to provide working capital to finance the operating arms of the group.[156]

V Current Arbitral Jurisprudence

In light of the behaviour of corporate groups observed above, what then, is the current thinking of investor-state arbitral tribunals as to the status of claims based on intra-group transactions?

The subject of the most frequent consideration in these contexts is 'internal group restructurings.' These can be categorised as transactions which result in an exchange of one group member's

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[151] Young, Hood and Hamill, above n 142 at 11; Grazia Ietto-Gillies "Conceptual issues behind the assessment of the degree of internationalisation" (2009) 18(3) Transnational Corporations UNCTAD/DIAE/IA/2009/12 59 at 63.

[152] Young, Hood and Hamill at 11; Ietto-Gillies at 64.

[153] at 11.

[154] Raymond Vernon *Sovereignty at Bay: the Multinational Spread of US Enterprises* (Basic Books, New York, 1971) at 29.

[155] Phatak, above n 150 at 226; Robert D Hamilton III, Virginia A Taylor and Roger J Kashlak "Designing a Control System for a Multinational Subsidiary" (1996) 29(6) Long Range Planning 857 at 859.

[156] See Joshua Livnat and Ashwinpaul C Sondhi "Finance Subsidiaries: Their Formation and Consolidation" (1986) 13(1) JBFA 137.

property or rights to another, including the sale or transfer of shares or the trading of one company's 'loanbook' of rights to collect payment against other parties within (or external to) the group. As will become apparent, the awards discussed below exhibit a strict reliance on the plain textual wording of the BIT in question. Arbitral tribunals have treated investments indirectly owned through a string of intermediary companies as a sufficient basis for their jurisdiction.[157] In cases involving chains of corporations within a group, tribunals have permitted any company in such an arrangement to bring a claim on behalf of a group member.[158]

A Mobil v Venezuela[159]

Various members of the Mobil group of companies had invested in Petroleum exploration in Venezuela by way of a share in a multinational venture known as the "Cerro Negro Agreement."[160] The subject of the dispute was a series of rate and tax increases by the Venezuelan government which were disadvantageous to Mobil, prompting them to rearrange their investment by way of the interposition of a Dutch company for the single purpose of gaining the protection of the Netherlands-Venezuela BIT.[161] The Dutch entity, Venezuela Holdings BV, was to be the indirect owner of Mobil's investment in the exploration.

Venezuela objected to the Tribunal's jurisdiction partly on the basis that the Dutch company was a "corporation of convenience" which made only *indirect* investments in Venezuela by virtue of its mere presence in a corporate chain.[162] However, the Tribunal held that the fact that the investment was made through a string of foreign companies incorporated in foreign jurisdictions did not detract from a finding of investment. It was said that a literal reading of the BIT at issue did not require that there be no interposed companies between the ultimate owner of the company

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[157] *Berschader v The Russian Federation (Award)* SCC Case No 080/2004, 21 April 2006 at [148]; *Société Générale v The Dominican Republic (Preliminary Objections)* UNCITRAL, LCIA Case No UN 7927, 19 September 2008 at [37].

[158] McLachlan, Shore and Weiniger, above n 15 at [6.87].

[159] *Mobil,* above n 14.

[160] at [19].

[161] at [21].

[162] at [144].

and the investment.[163] *Mobil* is therefore the latest in a long tradition of awards which place few, if any, restrictions on the viability of claims by all members of a corporate group through which a measure of capital passes.

B Yukos (Isle of Man) v Russian Federation[164]

The award in *Yukos* concerned three parallel sets of proceedings issued by three of the major shareholders in the Russian OAO Yukos Oil Company. The substantive allegation made was that the Russian government had taken a number of measures which had the effect of bankrupting and nationalising the company, then one of the largest oil and gas corporations in the world. In denying jurisdiction over the claims, Russia relied on the now familiar assertion that the claimants were shell companies, owned and controlled by Russian oligarchs, and were mere nominees who did not own or control the Yukos shares that were the subject of these proceedings.[165]

It was alleged by the respondent that a 'fresh' injection of capital was required under the Treaty.[166] However, the relevant article defining investment did not contain any reference to a necessary origin or injection of capital, which the Tribunal, drawing on previous awards, was not prepared to read in.[167] In response to a supplementary argument raised by the respondent that the ECT was intended to promote *foreign* investment, rather than the divestment of capital which in reality was generated domestically, the Tribunal did acknowledge that the reasoning they had adopted was vulnerable to abuse in the form of investments which are foreign in form only.[168] However such concerns, whilst of great potential significance, were not seen to be sufficient to modify the plain wording of the treaty text.[169]

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[163] *Mobil,* above n 14 at [164].

[164] *Yukos Universal Ltd (Isle of Man) v The Russian Federation (Jurisdiction and Admissibility)* UNCITRAL, PCA Case No AA 227, 30 November 2009.

[165] at [71].

[166] at [432].

[167] See *Saluka Investments BV v The Czech Republic (Partial Award)* UNCITRAL, 17 March 2006.

[168] *Yukos,* above n 164 at [434].

[169] at [435].

Nor was the Tribunal persuaded that, in order for the purchase of shares to qualify as an investment, real or beneficial ownership, rather than nominal or record ownership was required.[170] In response to the respondent's assertion that the claimant's nominal ownership of a parcel of shares had not resulted in any contribution of foreign capital,[171] the Tribunal concluded that the protections of the Treaty at issue applied to an "investment" owned nominally by a qualifying "investor."[172] This conclusion was based both the plain meaning of the text of the Energy Charter Treaty (buttressed by Article 31 of the Vienna Convention on the Law of Treaties) and a perceived wealth of academic literature confirming a wide interpretation to be afforded to the term 'investment.'[173]

But whether this reasoning continues to hold good may be doubted given the decision reached by the Annulment Committee in *Occidental Petroleum v Ecuador*. Here, the Committee annulled 40% of the original award to the claimant out of a recognition of the claimant's agreement to assign that portion of its rights to the relevant investment (an oil exploration contract) to a third party company.[174] Although incomplete at law, the assignment contract operated to immediately vest the beneficial ownership of that portion of the contract rights in the counterparty.[175] Accordingly, the Committee felt it was an excess of the Tribunal's jurisdiction to compensate the claimant for an investment beneficially owned by a non-protected investor.[176] In reaching this conclusion, the Committee drew upon *Impregilo v Pakistan* and *PSEG v Turkey* (concerning respectively another arms-length company and a joint venture partner) as authorities for the denial of compensation for contributions to which other parties were beneficially entitled.[177]

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[170] *Yukos,* above n 164 at [420].

[171] at [421].

[172] at [430].

[173] at [430]. See Thomas W Wälde (ed) *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International, London, 1996).

[174] *Occidental Petroleum Corporation v The Republic of Ecuador (Annulment)* ICSID Case No ARB/06/11, 2 November 2015 at [185].

[175] at [203].

[176] at [266].

[177] *Impregilo SpA v Islamic Republic of Pakistan (Jurisdiction)* (2007) 12 ICSID Rep 242 at 280; *PSEG Global Inc v Republic of Turkey (Award)* ICSID Case No ARB/02/5, 19 Jan 2007 at [325].

C KT Asia v Kazakhstan[178]

The *KT Asia* award provides perhaps the most recent pronouncement on issues of corporate group restructurings and importantly for the purposes of this essay, expressly left open the question of whether such transactions amount to an investment.[179]

At the centre of the award was a Kazakhstani national, Mr Ablyazov, who controlled a majority of shares in the BTA Bank, incorporated in Kazakhstan, through various nominee companies and individuals. This "group structure" was intended to mask the true extent of Ablyazov's influence. The transaction at issue was the purchase of shares for no consideration by the claimant, KT Asia (a company incorporated in the Netherlands) from another of Mr Ablyazov's nominees. The issue of whether an investment had materialised therefore turned on that fact that the claimant had not made any active economic contribution, and indeed did not even plead as such.[180] By way of defence to Kazakhstan's objection to jurisdiction, it was argued for KT Asia that Ablyazov had made the initial contribution and that, just as the origin of capital was seen as irrelevant for investment purposes, so too was the timing of the injection of capital.[181] Otherwise, it was argued, an "internal corporate restructuring" would never result in the acquisition of investment treaty protection.[182]

The conclusion reached in the award was that no investment had materialised, but seemingly under the rubric of an 'abuse of process,' rather than a factual consideration of the inter-relationships between members of corporate groups.[183] Of particular concern for the Tribunal was perceived inconsistences in the claimant's *ratione personae* and *ratione materiae* arguments; namely that, while relying on the veil of incorporation to assert that KT Asia was a Dutch national, the claimant

[178] *KT Asia Investment Group BV v Republic of Kazakhstan (Award)* ICSID Case No ARB/09/8, 17 October 2013.

[179] at [204].

[180] at [147].

[181] at [155].

[182] at [155].

[183] The doctrine of 'Abuse of Process' will be discussed in Part VII of this paper.

appeared to simultaneously deny its separate existence by arguing that it had essentially co-opted a domestic contribution of assets made by Ablyazov.[184]

The Tribunal also took issue with the suggestion that a corporate group was even in existence, taking care to distance the complicated chains of nominees in the present case from the traditional group structure of a common *corporate* parent exercising ownership and control.[185] What was not elucidated in the award was precisely what difference the Tribunal thought this made as, on one level, the distinction between the traditional corporate group and the present dispute was solely whether the ultimate controlling body was a *natural* or *legal* person. The most apparent explanation is in the Tribunal's characterisation of the arrangement before them as being designed to *conceal* the degree of Mr Ablyazov's control and present an appearance of autonomy.[186] This was described as the "antithesis of the group," presumably meaning that true corporate groups present to the outside world an appearance of unity.[187]

In being unconvinced that a true corporate group was in existence, the Tribunal passed no judgment on whether the transfer of shares for no or little consideration in a group restructuring is, in economic substance, an investment.[188] The question this essay is left with is whether situations such as the use of the various companies as Ablyazov's "pockets," shifting assets from one to the other solely to suit his own purposes, are capable of protection as an investment in a conventional group arrangement.[189]

[184] Weiniger and Kantor, above n 63 at 537.

[185] *KT Asia,* above n 178 at [195].

[186] at [197].

[187] at [197].

[188] at [204].

[189] at [204]-[205].

VI Assessing the Corporate Group against the Economic Conception of Investment

Consider the following scenario:

> 'X Ltd' is the parent company of the 'X Group,' operating across multiple jurisdictions. 'A Ltd' is the X Group's operating subsidiary in New Zealand. At the direction of X Ltd, the controlling share of the equity in A Ltd is transferred from B Ltd (a US based subsidiary) to C Ltd (another subsidiary, incorporated in the UK) for nominal consideration. Assuming a relevant BIT is in force between the UK and New Zealand, can C Ltd invoke the jurisdiction of an investor-state arbitral tribunal?

The above provides a typical example of situations where a movement of capital, which has technically occurred entirely *within* a group, is alleged to comprise an 'investment' in the host state. It is the submission of this paper that, in the case of a closely-held subsidiary considered in isolation from the surrounding circumstances, it is doubtful whether such a claimant can be said to have 'contributed' capital in expectation of a return – elements which go to the very heart of the notion of investment. However, such a conclusion is liable to ignoring the presence of an overall contribution to an economic activity by the group as a whole. Therefore, this paper concludes that the answer is not inherently discernible from the nature of a corporate group, but whether by the underlying activities that they are engaged in.

A Expectation of Return

The most immediately apparent cause for concern, based on the clear economic reality of group activities, is whether the subsidiary can in truth be said to expect a return on any intra-group acquisition of property. This is principally due to the idea of subsidiaries as 'profit-centres.'[190] If a subsidiary exists solely for the benefit of the parent, with no expectation of achieving its own profit, it could well be said that the essential objective of an investment is lacking.[191]

[190] Phatak, above n 150 at 226.

[191] *CME Czech Republic BV,* above n 118 at 419.

In the scenario described above, although the transfer of shares could, as a matter of legal form, be said to import an expectation of future income through dividends, the reality of the subsidiary's prospects of a return will most likely depend on whether it has the function of "cash provider" for the aggregate group.[192]

Whether or not the subsidiary receives financial benefits will also turn on the political and economic climate of state in which the subsidiary operates.[193] If that state is deemed unfavourable as a host for the profits of the group, the incurrence of a benefit may be illusory and in actuality will be channelled back towards the centre (often through a tax-haven jurisdiction) through mechanisms such as "transfer-pricing."[194] This is essentially the price payable for movements of goods or assets between entities across borders.[195] It has long been documented that transfer pricing allows for large multinational enterprises to easily manipulate the location of assets to either inject, or remove, cash from a subsidiary.[196] Often, this is an attempt to decrease the net amount of tax payable by the group; high prices may be charged for goods or services sold in jurisdictions with low taxes, with the inverse in countries with robust tax regimes.[197] While there are laws which require that parents pay or charge 'arms-length' prices in respect of their subsidiaries, sales or transfers of assets at an undervalue are nevertheless common in an intra-group context.[198] This is particularly common in the area of intellectual property rights and other intangibles which are inherently more difficult to price.[199] In essence, for a subsidiary to receive a return depends on its profitability as part of the parent firm's carefully designed corporate strategy.

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[192] Robbins and Stobaugh, above n 133 at 51.

[193] International Monetary Fund *Understanding Financial Interconnectedness* (4 October 2010) at 19.

[194] Jean-Thomas Bernard and Robert J Weiner "Multinational Corporations, Transfer Prices, and Taxes: Evidence from the US Petroleum Industry" in Assaf Razin and Joel Slemrod (eds) *Taxation in the Global Economy* (University of Chicago Press, Chicago, 1990) at 124.

[195] See generally Mark Loveday and Hilary Jamieson *Transfer Pricing: A Practical Guide for New Zealand Business* (Wolters Kluwer, Auckland, 2013).

[196] Phatak, above n 150 at 227.

[197] Fiona C Beveridge *The treatment and taxation of foreign investment under international law* (Manchester University Press, Manchester, 2000) at 87.

[198] Ellís Ferran *Company Law and Corporate Finance* (Oxford University Press, Oxford, 1999) at 39.

[199] Michelle Markham *The Transfer Pricing of Intangibles* (Kluwer Law International, The Hague, 2005) at 3.

On the other hand, subsidiaries are nevertheless central to the parent *and* the group in aggregate for its success and growth.[200] While a subsidiary may superficially appear to be a mere conduit of capital for the benefit of others, they can still be integral to growing the profit base of the group as a whole. In support of this argument is the notion of 'replacement investment' (that needed to *maintain,* rather than *expand* current capacity), which is characterised in economic scholarship as still involving a rate of return in avoiding the loss of profitability that would occur should the investment *not* take place.[201] Ensuring the continual profitability of the group may, in this way, operate as a return (if it is accepted that the group functions as a single economic entity). Case law concerning the directors' duties that apply upon or nearing an insolvency has previously opined that a "direct or derivative financial benefit" may accrue to the subsidiary when they advance funds to another group member upon whom the continuing survival of the group depends.[202] Additionally, in most centralised groups the parent has dominion over the funding and managerial structure of the group, which will be subject to review depending on business conditions. It has been observed that a profitable group member will often receive rewards by the centre in recognition of their value to the overall enterprise (often through the reinvestment of dividends received by the parent in the form of additional shares or loans).[203] Thus, even in spite of the common off-loading of subsidiary income towards the centre of the group, there are arguably *alternative* models upon which a valid expectation of return can be proven.

B Risk

One factor which lessens the risks accompanying an intra-group transaction is the common role of the parent as guarantor for its subsidiary's commitments. Typically in an intra-group loan, one

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[200] PJ Buckley and PN Gauri *The Global Challenge for Multinational Enterprises: Managing Increasing Interdependence* (Pergamon, Oxford, 1999) at 9.

[201] Frank Livesey *Economics: an Introduction for Students of Marketing and Business* (3rd ed, Butterworth-Heinemann, Oxford, 1990) at 167.

[202] *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62 at 74; *Sydlow v Melwren* (1994) 13 ACSR 144 at 147.

[203] Robbins and Stobaugh, above n 133 at 78.

member will be the primary borrower or debtor, with another member assuming some secondary liability for it, such as a guarantee.[204] Even absent a legal guarantee, the parent may provide a moral guarantee in so-called 'comfort letters,' which provide a written expression of a willingness to fulfil such an obligation.[205] However, such activities can at most be said to mitigate, rather than render nugatory, the existence of risk.

A firm will always attach a risk premium to an investment in a foreign country that it would not in relation to domestic investments.[206] This is due to factors such as foreign exchange fluctuation, cultural and language barriers and physical isolation.[207] Economic risk is commonly defined by reference to macroeconomic factors such as these, as well as sovereign risk.

It is also plausible that the relationship of a subsidiary to its parent might, in fact, *augment* the risks of a particular transaction for the subsidiary. As has previously been noted, changes in the regulatory environment in the state of residence of the subsidiary may result in the entity being less attractive as a host for the group's assets. A subsequent change in internal group planning might move assets away from that subsidiary through the financial mechanisms already discussed. Thus, the risk of non-materialisation of a return is animated by the characteristic lack of control that a closely-held subsidiary has over its own financial affairs. By the same token, due to the co-dependency often exhibited by members of a corporate group, activities such as loans to a fellow group member, which as between arms-length parties would only be subject to the risk of non-performance, become intimately connected with the subsidiary investor's survival and maintenance of the careful design of the group's financial structure. Arguably this elevates such transactions beyond mere 'contractual' risk.

[204] D D Prentice "Group Indebtedness" in Schmitthoff and Woolridge, above n 19 at 57.

[205] Robbins and Stobaugh, above n 133 at 68.

[206] Hymer, above n 132 at [30].

[207] Phatak, above n 150 at 221-222.

C Commitment of Capital

1 Authorship

Central to the submissions in both *KT Asia* and *Yukos* was the argument by the respondents that the claimants has authored no "fresh injection of capital" into the host state.[208] Such arguments speak to a larger debate in investment law as to whether the claimant must be the author of its own capital contribution. The issue is brought sharply into focus where the purported 'investment' is the acquisition of shares in another group member in support of an underlying investment already incurred.

Undoubtedly there is a strong corpus of authority for the view that an *indirect* investment is sufficient for jurisdictional purposes. [209] *Yukos* provides one of the latest statements for the view that the origin of the capital in question is irrelevant for the purposes of ascertaining the presence of an investment.[210] Notably, the majority of proceedings which reach this conclusion have been presided over by tribunals who appear to embrace only a 'legal' conception of investment.[211] However, in *Caratube v Kazakhstan* the Tribunal articulated these same principles while at the same time recognising that the economic characteristics of investment must be considered.[212] In other awards, however, repeated attempts have been made to further colour the *Salini* element of 'contribution' by requiring the putative investor have *control* of such contributions. In *Standard Chartered Bank v Tanzania,* the Tribunal held that "investment *of*, not merely *held by* the investor" was required – essentially, that mere passive ownership would not suffice.[213] Although not decided

[208] *KT Asia,* above n 178 at [188]; *Yukos,* above n 164 at [432].

[209] *Caratube*, above n 106 at [355]; *Tradex Hellas SA v Republic of Albania (Award)* 5 ICSID Rep 70; *Wena Hotels Limited v Arab Republic of Egypt (Jurisdiction)* (2004) 6 ICSID Rep 74; *Olguin v Republic of Paraguay (Award)* (2004) 6 ICSID Rep 164.

[210] Yukos, above n 164 at [434].

[211] *Yukos* confines its analysis solely to the text of the ECT, without apparent consideration of *Salini. Tradex Hellas, Wena Hotels Limited* and *Olguin* pre-date the *Salini* decision.

[212] *Caratube,* above n 106 at [353].

[213] *Standard Chartered Bank v The United Republic of Tanzania (Award)* ICSID Case No ARB/10/12, 9 June 2015 at [257].

on this point, a similar statement was made in *Toto v Lebanon* that investment implies an "economic operation initiated and conducted by an entrepreneur using its own financial means."[214]

Some assistance in delineating when a subsidiary lacks authorship might be found in the "standard exceptions" to separate corporate personality espoused in *Adams v Cape Industries*.[215] Although their principles were not formulated in response to concerns about the potential abuses attendant on creative corporate restructurings, they nevertheless articulate a concern about situations where property which might look to be owned by one party is in fact the property of another.[216] Were the subsidiary to be treated as an *agent* of its parent, the acts of the subsidiary would typically be treated as attributable to, and therefore binding upon, the parent.[217] In the circumstances in which the sham or façade doctrine would be invoked, the subsidiary's acts are not only attributable but are deemed to *be* those of the parent, with the corporate form merely a weapon of concealment.[218] Thus, the circumstances in which the general law recognises that "the true rights and obligations are that of the parent"[219] are available to tribunals as a comparator in assessing whose actions would economically be recognised as comprising a 'contribution' of assets for investment purposes.

Mirroring these concerns is the previously discussed annulment decision in *Occidental v Ecuador* which suggests that the person entitled at international law to bring a claim over compromised property rights is the *beneficial* owner.[220] Notably, this is somewhat at odds with norms of property law, at least in a Common Law sense, where a legal owner who has divested herself of the beneficial ownership of property is merely constrained by the principles of equity in the actions

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[214] *Toto Costruziono Generali SpA v The Republic of Lebanon (Jurisdiction)* ICSID Case No ARB/07/12, 11 September 2009 at [84].

[215] *Adams v Cape Industries,* above n 28 at 539.

[216] Lord Cooke of Thorndon "A Real Thing: *Saloman v A Saloman & Co Ltd*" 6 VUWLRP 102/2016 1 at 13.

[217] *Smith, Stone and Knight*, above n 24; *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

[218] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415.

[219] Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford, 2013) at 204.

[220] *Occidental Petroleum,* above n 174 at [266].

she may take over it, rather than barring their entitlement to claim.[221] Whilst the *Occidental* line of decisions did not concern a formal corporate group,[222] there are conceivably analogous situations in which an intra-group transaction could evince an intention to disassociate legal and beneficial ownership of a group member's assets. This would particularly be the case in the realm of debt finance, where the obligations of the subsidiary to repay the principal are generally highly formalised, and standard or revolving loan agreements are used to give legal force to the business dynamic of control.[223] Furthermore, the beneficial ownership may be said to have vested in the parent even *absent* a contract for its express transfer as in *Occidental.* There are indications that international law regards 'beneficial ownership' as having a broader content than its equivalent within the law of trusts.[224] A bifurcation of legal and beneficial ownership may be found to exist where the "facts and circumstances show that, in substance, the recipient clearly does not have the *full right to use and enjoyment*" of the property.[225] Admittedly, this would be more difficult to show where the flow of funds from the subsidiary to the parent existed by way of a dividend; being subject to the requirement of solvency, the shareholder has no formal legal right to receive them and, in the corporate group context, the entitlement will likely only be on the basis of an informal group dividend policy, which *ostensibly* is subject to change depending on business conditions.[226]

In addition, tribunals would need to take care to account for the almost inevitable 'commingling' of the assets of group members.[227] While foreign subsidiaries can obtain capital through a loan or other advance by the parent, it has been noted that they may still, and to a significant extent do, finance their expansion through their own "retained earnings," that is, net income which is not distributed as dividends but are reinvested in the business.[228] On the other hand, in the case of a

[221] Jamie Glister and James Lee *Modern Equity* (20th ed, Sweet & Maxwell, London, 2015) at [2-001].

[222] *Impregilo,* above n 177 at 280; *PSEG,* above n 177 at [325].

[223] Robbins and Stobaugh, above n 133 at 63.

[224] "OECD Model Tax Convention: Revised Proposals Concerning The Meaning Of "Beneficial Owner" In Articles 10, 11 And 12" (19 Oct 2012) at 6.

[225] at 6 (emphasis added).

[226] Burgess, above n 138 at [2.06]. But see the Cork Report, above n 144 at [1926].

[227] Frank Woolridge *Groups of Companies: The Law and Practice in Britain, France and Germany* (University of London, London, 1981) at [1].

[228] Buckley and Gauri, above n 200 at [11].

shell subsidiary, or subsidiaries located in tax and regulatory havens, capital which in substance is the parent's is vested formally in the subsidiary. The question of whose capital is actually being invested may therefore present a significant headache for tribunals in this regard.

2 *Real or Superficial Contribution*

More fundamentally, the question is whether these exchanges can be thought of as contributions of funds at all. As the facts of *KT Asia* typify, in a corporate group restructuring all that the *transferee* party might undertake to do is receive property or rights for which the expenditure has already been incurred by another group member. Further, because of the dynamic of control it is often the case that, while a legal exchange of rights has occurred, the asset at issue has been subject to no change in its substantive character or the decisions made over it. Meanwhile, the 'host company,' whose shares or debt is the asset that is the subject of the claim, receives no increase in capitalisation at the hand of the purported investor.

The concept of a restructuring, then, presents a multitude of issues, significant among which is the fact that commonly no or nominal consideration may have been paid by the purported investor.[229] It is clear that this conflicts with the overwhelming view in the arbitral jurisprudence that 'mere ownership' of an asset is insufficient, and likewise that payment of only a nominal price gives cause to doubt whether an economic arrangement is truly in existence.[230] Without a *contribution* of some form, there seems to be little separating an investment from the simple accretion of property rights as provided for by the legal conception of the term, rendering a separate, *economic* threshold largely devoid of any independent purpose. Indeed, as stated in *Malicorp,* Article 25 is fundamentally about the "contributions that give rise to the fruits or assets."[231]

In the corporate group context, however, the picture is complicated as any payment would as a matter of economic reality be superfluous to the overall financial position of the enterprise. The

[229] *KT Asia*, above n 178 at [200]; *Caratube*, above n 106 at [435]; *Phoenix Action*, above n 14 at [119]; *Saba Fakes*, above n 125 at [121].
[230] *Quiborax SA*, above n 107 at [233]-[234]; *Caratube*, above n 106 at [435]-[437]; *Saba Fakes*, above n 125 at [434].
[231] *Malicorp*, above n 90 at [110].

basic tenet of consolidated accounting practice, for instance, is that intra-group transactions should be *eliminated* from the balance sheets of the group.[232] To include such transactions would be to misrepresent the scale of the group's activities.[233] For the same reason, intra-group dealings can acquire (in firms which elect to consolidate) tax-free status.[234] Thus, even if the subsidiary *were* to advance a genuine contribution of money to a fellow group member, we would still not regard anything of economic significance as having occurred.

Ultimately, this reflects upon a much more fundamental point to be confronted based on what is known about the economic reality of corporate groups. Despite the legal separation of each entity, the corporate group, in truth, comprise *one economic actor*. Upon any true economic assessment, the subsidiary would be unlikely to be considered as having proffered a true contribution or exchange of capital. This also lends further support to the argument that such activities do not involve the expectation of a return, as an intra-group transfer does not create a *net* increase in wealth for the overall enterprise. Thus, whether furnished with consideration or not, a closely-held subsidiary most likely cannot be said to have made an investment by accumulating the property of a fellow group member – as they lack the necessary contribution or expectation of return.

D Contribution to an Economic Venture

Instinctively, we might hesitate to stand upon the conclusion reached above, which adopts a fairly rigid understanding of the economic dimensions of investment. As a basis for denying the admissibility of a claim, it seems to belie the spirit of the single economic unit approach by focussing too narrowly on the position of the individual subsidiary. In the context of the 'X Group,' for instance, the intra-group acquisition of shares by C Ltd still enables the continual execution of economic activities by A Ltd. Additionally, tribunals are, rightly, attentive to the reality of the modern practice of investment in which numerous component contracts, rather than a single movement of capital, are advanced in favour of an overall venture.[235] It is therefore the submission

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[232] Thomas B Robson *Consolidated and Other Group Accounts* (3rd ed, Gee and Company, London, 1961) at 16.

[233] at 16.

[234] Harper and Walton, above n 44 at [13.4].

[235] *CSOB,* above n 99 at 352.

of this essay that, even absent any real undertaking by the subsidiary, an intra-group transaction may still warrant the status of investment where it is supporting an underlying economic activity by the parent company.

Accordingly, it is suggested that the purpose of a requirement of investment is an *instrumentalist* one – namely, to ascertain whether the existence of some venture which has materialised in the host state. Although later annulled for its formalistic reliance on the *Salini* criteria, the Tribunal in *Malaysia Historical Salvors* posited that a contribution to economic development requirement might be especially important where the other elements of an investment were only superficially satisfied.[236]

Whether an intra-group transaction is covered under this approach may depend on the precise *measure* of development by which this component of *Salini* is characterised. As noted in Part III, this is subject to uncertainty. Should the more rigorous standard of a macroeconomic effect which *outlives* the injection of capital be employed,[237] wider policy concerns that have come to light concerning investment by multinational enterprises might cast doubts about their adequacy in this respect. The practice of 'transfer pricing' affects not only the *investing* subsidiary but also, if a group member as well, the 'host company' which undertakes the economic activity in the host state ('A Ltd' in the scenario given). As the recent 'Panama Papers' debacle brought to public attention, entities which are operative in such states can and often are deprived, through intra-group pricing, of any taxable income.[238] This could create the situation where the only benefit arising out of the venture goes to the investor, with little tangible macroeconomic impact. However, given the lack of international consensus on how to resolve, if at all, the problems attendant on the activities of multinationals, it would be peculiar for investment arbitration to adopt

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[236] *Malaysia Historical Salvors (Award),* above n 97 at 72.

[237] *Fedax (Jurisdiction,)* above n 129 at 199; *Joy Mining,* above n 97 at [53]; *Malaysia Historical Salvors (Award),* at 144.

[238] Sri Mulyani Indrawati "Panama Papers Underscore Need for Fair Tax Systems" (2016) The World Bank Blog <www.blogs.worldbank.org>.

such a paternalistic view.[239] Furthermore, the award in *Malaysia Historical Salvors* which posited this test was later annulled.[240]

A more simplistic test, which is touted in several recent awards, is that of a contribution to an "economic venture."[241] This would seem to be supported by a first principles consideration of the rationale underlying the jurisdictional requirement of investment. Both arbitral awards and theoretical literature reflect a view that the overarching purpose of a *ratione materiae* threshold is to locate an external property interest that is facilitating an economic activity in the host state. [242]

This interpretation is to be preferred to an approach which views the *sine qua non* of an investment as being the flow of private capital into that state. While some of the literature certainly espouses such a view,[243] it should nevertheless be seen as supplementary. If this aspiration was paramount, the admissibility of a claim would seem to depend on its ability to offer a net increase in resources, rather than a mere property interest, to the host state. The apparent consequence for corporate groups is that internal movements of assets from without to within a covered jurisdiction, with no *additional* benefit to the host state, would not gain the protection of a BIT. This would present an affront to the principles of the customary international law of diplomatic protection from which the current regime developed, the central function of which was to afford to the foreign investor the same treatment as a domestic investor would receive, by virtue of the property right they enjoy.[244] This is reflected in the substantive protection in most BITs for the 'National Treatment'

[239] Beveridge, above n 197 at 104.

[240] *Malaysia Historical Salvors (Annulment),* above n 99 at [83].

[241] *CSOB,* above n 99 at 352; *Phoenix Action,* above n 14 at 85.

[242] For example, in *Phoenix,* a central concern was the carrying out of economic activities by the investor with the "goal of encouraging the flow of international investment:" at 27.

[243] See for example the preamble the US Model BIT, which proclaims that the "agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties."

[244] Jean d'Aspremont "International Customary Investment Law: Story of a Paradox" in Tarcisio Gazzini and Eric Brabandere (eds) *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers, Leiden, 2012) at 13.

of foreign investors.[245] Ordinary notions of property would suggest that assets should be able to change hands within corporate groups without losing the protection of a BIT, just as domestic property rights are not extinguished upon assignment or transfer. This would align with the string of awards which suggest that that *indirect* investments, materialising in the host state only through chains of ownership, are adequate.[246] The arbitrators in such awards were sensitive to the fact that something of substance was in fact occurring in the host state.

The upshot of this appears to be that, on a true construction of the operation of the single economic entity, the subsidiary's equity or debt entitlement is protected where it reflects an *underlying* commitment made by the parent or a fellow subsidiary. Such a view, while economically coherent, leaves a number of important questions of legal policy unresolved. Among these are the question of whether the conclusion reached above that a contribution is required still holds good. In *KT Asia*, the Tribunal suggested that the gratuitous acquisition of shares in a true group restructuring "*may* be a sufficient explanation" for a lack of contribution.[247] But instinctively, the purely gratuitous acquisition of intra-group property involves no 'buy in' to the claim by the subsidiary investor. Even the most permissive of tribunals with regard to subsidiary claims have required some "*economic link* between the investment and the capital by way of the investors' own funds."[248] In the investment law context, it may well be that a contribution is as much a *legal* pre-requisite of one's standing to make a claim as it is an economic phenomena. To the extent that this does not accord with the reality of corporate groups, this may simply be a reflection of the inherent challenges in marrying an economic concept with a legal forum.

Additionally, allowing the subsidiary to "ride the coattails" of another group member seems to give rise to concerns about the number of potential claimants and the remoteness of those claims

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[245] Rudolf Dolzer and Christoph Schreuer *Principles of International Investment Law* (Oxford University Press, Oxford, 2008) at 178.

[246] *Mobil Corporation,* above n 14 at [165]; *Berschader v Russia*, above n 157 at [150]; *Société Générale v Dominican Republic*, above n 157 at [37].

[247] *KT Asia,* above n 178 at [204] (emphasis added).

[248] *Caratube*, above n 106 at [355].

from the host state, through the structuring of a corporate group to enable multiple claimants within the group standing to arbitrate essentially the same dispute.[249]

Ultimately, it is clear that the answer to these issues cannot be discerned solely by reference to the principles of jurisdiction *ratione materiae.* Rather, at heart this is a question of the juristic nationality of the corporate group – namely, whether the 'single economic entity' has only *one* jurisdictional location, in the state of the parent or locus of economic governance, or whether it acquires a legal personality which extends across multiple jurisdictions. Adopting a conception of investment which permits the claims of a subsidiary by reference to the true economic activities of the parent arguably entails the adoption, for all practical purposes, of the latter view. While undoubtedly the more *economically* faithful approach, such a view also leads the law into a state of considerable uncertainty, to which a renewed consideration of the principles of corporate nationality, an issue beyond the scope of this paper, seems to be the required resolution.

VII Abuse of Process

A common allegation made by respondent states is that it is an abuse of the corporate form for investments conducted through chains of subsidiary companies to gain the protections of a BIT. The Tribunal in *Phoenix v Czech Republic,* arguably the 'high water-mark' decision on this issue, applied considerations of abuse of process to characterise the claimed investment as a mere "rearrangement of assets within a family, to gain access to ICSID jurisdiction," for which the Tribunal dismissed the claim.[250] Given that the net effect of this paper's conclusion on the construction of the concept of investment might be considered unsatisfactory in distinguishing genuine from abusive corporate restructurings, the abuse doctrine is potentially an important supplementary tool.

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[249] See *CME Czech Republic BV,* above n 118; *Lauder v The Czech Republic (Award)* UNCITRAL, 3 September 2001 and *Grynberg and RSM Production Company v Grenada (Award)* ICSID Case No ARB/10/6, 10 December 2010 for examples of multiple claimants alleging damages arising from the same investment.

[250] *Phoenix* Action, above n 14 at [138]-[141].

Abuse of process can be seen as a division of the obligation of 'good faith' which forms part of the corpus of international law as a fundamental principle of law.[251] An important parallel is the doctrine of 'abuse of right,' under which the court may deny the recognition of one party's strict legal rights on the grounds that, in the circumstances, their exercise would amount to misuse.[252] Central to both is the idea that a right should not be exercised maliciously, fictitiously or in unreasonable disregard of the rights of others.[253] While a detailed consideration of the abuse doctrine is not the focus of this essay, a cursory glance at the issue is necessary given its recurrence in the existing jurisprudence.

A 'Bona Fide' Investment as an Element of the Economic Conception?

In *Phoenix,* the question of whether the putative investment was *bona fide* was posited as part of the test for the *ratione materiae* jurisdiction of the Tribunal, in addition to the objective criterion sourced from *Salini*.[254] In reaching this conclusion, the Tribunal opined that there is a distinction to be drawn between 'factual investments,' compliant with the objective meaning of that term, and a 'protected investment,' which must be seen to be within the purpose of the bilateral or multilateral treaty concerned.[255] This involved a contextual appraisal of the purpose of the international protection of investment, reticent of the general international treaty law rule that interpretation of treaties should be in good faith, in light of the ordinary meaning and purpose.[256]

[251] Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, Leiden, 2009) at 429; *Nuclear Tests (New Zealand v France) (Merits)* [1974] ICJ Rep 457 at 473; *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction)* [1988] ICJ Rep 69 at 105.

[252] Hersch Lauterpacht (ed) *The Development of International Law by the International Court* (Grotius, Cambridge, 2011) at 164.

[253] Bin Cheng *General Principles of Law as applied by International Courts and Tribunals* (Grotius, Cambridge, 2006).

[254] *Phoenix Action,* above n 14 at [114].

[255] at [79].

[256] Vienna Convention on the Law of Treaties, 1155 UNTS 332 (opened for signature 23 May 1969, came into force 27 January 1980), art 31.

At issue in the case was Phoenix's acquisition of two Czech companies that were, at the time, involved in domestic litigation. The claimed 'foreign investment' was Phoenix's interest in the companies, which, in failing to promptly judge the relevant proceedings, the Czech courts had purportedly inflicted an expropriation and breach of the principle of fair and equitable treatment.[257] In dismissing the claim as abusive, the court took into account several factors. Principally, the court doubted the legitimacy of the claimed investment due to the timing of both the *acquisition* of the companies (when the 'damages' suffered by the Czech companies had already occurred) and the *filing of proceedings* (before Phoenix's ownership of the companies was even confirmed).[258] The Tribunal also looked to the economic substance of the acquisition and the economic activity – or, rather, the lack of it – which followed the acquisition.[259] It was concluded that the true purpose of the claimed investment was to gain access to ICSID Arbitration through the internationalisation of what was essentially a domestic dispute.[260]

Abuse of process was also the subject of the *Mobil* Tribunal's attention. As in *Phoenix,* the timing of the investment was seen as critical, with the Tribunal denying jurisdictions over claimed expropriations by Mobil which *predated* its acquisition of shares in the host company, on the basis that to do so would damage the integrity of international investment law.[261]

It should be noted, however, that in *Saba Fakes v Turkey* the place of a requirement of 'legality and good faith' in the *ratione materiae* analysis of the Tribunal was doubted.[262] It was said that although "an investment might be "legal" or "illegal," made in "good faith" or not, it nonetheless remains an investment.[263] The Tribunal thus characterised the question of whether an investment had materialised in purely *economic* terms. A requirement of legality or good faith, so said the Tribunal, was only to be read in from a "legality clause" within the relevant BIT.[264] The

[257] *Phoenix Action,* above n 14 at [48].

[258] at [136].

[259] at [140].

[260] at [142].

[261] *Mobil Corporation,* above n 14 at [206].

[262] *Saba Fakes,* above n 125 at [112].

[263] at [112].

[264] at [113].

effectiveness of the abuse doctrine in respect of corporate restructurings is therefore hampered by the lack of certainty as to its legitimacy.

B Are Intra-Group Restructurings an Abuse of Process?

Corporate groups are instinctively suspected of abuses of process given their ability to create a discord between legal form and economic substance. The *KT Asia* award, although not directly decided on the point, provides a contemporary reminder of these pressing issues. Central to the Tribunal's dismissal of the claim was the fact that, having chosen to defend objections to the claimant's nationality by reference to the separate legal existence of KT Asia, Mr Ablyazov could not argue in the same proceedings that, for the purposes of *ratione materiae* jurisdiction, the claimant was no more than a shell existing for the purposes of himself and his "corporate group."[265] The Tribunal viewed the reliance placed on the separate corporate personality and identity of KT Asia as precluding the success of any argument that the company's own contribution of capital was not required.[266]

Less certain is the question of how far the doctrine of abuse of process extends beyond this to the internal restructuring of a *genuine* corporate group characterised by "centralised control and unified management."[267] *KT Asia* left open the question of whether the acquisition of shares in a restructuring for no consideration would be permitted as giving rise to a claim under a BIT.[268]

The existing jurisprudence offers a largely piecemeal answer to this question. It is clear that, should the structuring of shares to create a misleading perception of the group's involvement amount to a breach of the *domestic* law of the host state, jurisdiction may be denied.[269] *Phoenix* suggests that

[265] *KT Asia,* above n 178 at [178].

[266] at [205].

[267] Woolridge *The Law and Practice in Britain, France and Germany,* above n 227 at [1].

[268] *KT Asia,* above n 178 at [204].

[269] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Award)* ICSID Case No ARB/03/25, 16 August 2007; Michael Polkinghorne, Kristen Young and Eugenia Levin "The Scope of the Legality

a restructuring might be considered abusive when the parent company is a "domestic concern," incorporated in the host state.[270] The award also suggests that entities which undertake no *economic* activity further aggravates the suggestion that the purported investment was made with the purpose of promoting *legal* activity, not a true economic contribution, further underscoring the importance of the requirement of contribution to an economic venture expressed above.[271]

Beyond these situational examples, the doctrine offers little in the way of substantive guidance. Furthermore, in other awards, the practice of vesting assets in a corporate entity with access to the protections of a BIT for the purposes of tax advantages and protection from the general risk of *future* disputes has not been regarded as abusive.[272] Such practices were described in *Mobil* as "perfectly legitimate."[273] The scope of abuse of process in the context of restructurings does not seem to reach further than the situation as in *Phoenix* of a subsidiary claiming compensation for disputes which *preceded* its involvement.[274] Ultimately, if restructurings are in fact abhorrent to investment protection regimes then the proper forum for the expression of such concerns may simply be a "denial of benefits" clause.[275] These devices can speak directly to the concern about the legal form that an entity promulgates for itself being discordant with economic reality.

VIII Conclusion

It is clear that the multitude of dimensions in parent-subsidiary and subsidiary-subsidiary relations render any quest for a general principle about the status of group transactions largely futile. Indeed, while the focus of this paper has implicitly been on subsidiaries who exist in a highly integrated

Requirement in relation to Investments: recent case law" 26(4) *MEALEY's International Arbitration Report* (2011) at 4.

[270] *Phoenix Action,* above n 14 at 34.

[271] at 142.

[272] *Tidewater Inc v The Bolivarian Republic of Venezuela (Jurisdiction)* ICSID Case No ARB10/5, 8 February 2013 at [184]; *Philip Morris Asia Ltd v The Commonwealth of Australia (Jurisdiction),* PCA Case No 2012-12, 17 December 2015 at [554].

[273] *Mobil Corporation,* above n 14 at [204].

[274] Polkinghorne, Young and Levin, above n 269 at 12.

[275] *Saba Fakes,* above n 125 at [114].

group environment, there are nevertheless a multitude of corporate groups that are characterised by the relative independence and autonomy of their subsidiaries.[276]

Within these parameters a few points can, however, be gleaned with relative confidence. The first is that the *ratione materiae* jurisdiction of an investor-state tribunal should, and arguably already does, adopt a 'single economic unit' approach as a starting point for analysing corporate group behaviour. Indeed, tribunals have previously had "no difficulties" in looking through the veil of corporate structures,[277] and the *KT Asia* award appears to accept that a corporate group principally acts by way of unity.[278] Furthermore, it is an open question to what extent *Saloman* actually opposes such an approach. The principle of separate corporate personality is about extricating the legal rights and responsibilities of a company from its shareholders. To recognise that the use of subsidiaries is a "legitimate facet of commerce" does not require us to flout the influence which the accepted relationship of control has on the status of subsidiary company activities.[279]

Given the prevalent public discourse about alleged abuses and evasions of the law by large multinational enterprises, instinctively we may doubt the integrity of subsidiary 'investments' made at the apparent hand of its holding company. To this end, this paper has attempted to show that intrinsic to the nature of a subsidiary company which *is* subject to a relationship of control are sufficient causes to doubt the materialisation of an investment *as between the subsidiary and its intra-group counterparty,* for reasons of contribution and expectation of return. However, to make such a conclusion would be to rely on a formulistic interpretation of the economic conception which would do violence to the flexibility with which that test is overwhelmingly accepted to apply.[280]

[276] Cynthia Day Wallace *the Multinational Enterprise and Legal Control – Host State Sovereignty in an Era of Economic Globalisation* (Martinus Nijhoff Publishers, The Hague, 2002) at 137.

[277] McLachlan, Shore and Weiniger, above n 15 at [6.75].

[278] *KT Asia,* above n 178 at [197].

[279] For a critical reflection on the shortcomings of separate corporate personality in this regard, see LE Talbot *Critical Company Law* (Routledge-Cavendish, Oxon, 2008), ch 2.

[280] *Malaysia Historical Salvors (Annulment),* above n 97 at [79].

Thus, while there are valid grounds to put a tribunal on notice as to the presence of an investment, this paper has concluded that a subsidiary's acquisition of property nevertheless *is* an investment in its reflection of the underlying commitment of the parent. Therefore, the inquiry must turn on the activities to which the subsidiary engages itself – that is, the location of an economic activity in the host state. Such is a reflection of a more fundamental point that the contemporary economy permits the conduct of business through multiple subsidiary companies as a "legitimate facet of commerce."[281] To a large extent, the arbitral jurisprudence which holds that an indirect investment will suffice reflects that this idea is still compelling.[282]

The combination of those awards and the emphasis on a contribution to a venture[283] seems to suggest a trend towards a system of 'investment unveiled.' It is, of course, open for tribunals to make that conclusion and this essay has indeed argued that there are good reasons (out of deference to both economic reality and the overall purpose of an investment requirement) for adopting such a view. But in looking to interpret a word in a certain context, we should also consider the consequences of competing interpretations. While the conclusion reached by this paper is more economically authentic, its jurisdictional flow-on effects are cause for concern. Principally, it seems to lead to the situation where a corporate group can acquire, through a restructuring, a multinational juristic personality for investment purposes. Contemporaneously, they may continue to reap the benefits that orthodox company law bestows upon them. These concerns are exacerbated by the currently confused role for the abuse of process doctrine and the lack of an adequate resolution to the problem of 'double recovery.'[284]

This paper concludes, then, on a note of caution. If tribunals are content to continue on in a "halfway-house" between separate corporate personality and the single entity, this should only be done with a full appreciation of its implications.

[281] *Chen v Butterfield,* above n 31 at 11.

[282] *Mobil,* above n 14 at [164]; *Berschader,* above n 157 at [148]; *Société Générale,* above n 157 at [37].

[283] *CSOB,* above n 99 at 355; *Phoenix Action,* above n 14 at 85.

[284] Inna Uchkunova "Indirect Investments Through Chain of Intermediary Companies: A Philosopher's Stone or Not Anymore?" Kluwer Arbitration Blog <www.kluwerarbitrationblog.com>.

IX Word Count

The text of this paper (excluding non-substantive footnotes, abstract, table of contents and bibliography) is approximately 14,976 words.

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