

# The Notion of ‘Investment’ in International Investment Law

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## ABSTRACT

*This article treats main approaches to the term ‘investment’ under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and international investment treaties. Discussion of different trends does not only involve a purely theoretical question; it also creates practical consequences due to the role of investment in the determination of the jurisdiction of investment tribunals. After having analysed the method adopted by each approach, this article aims to find the most plausible definition for the term ‘investment’. It suggests that ‘investment’ is defined in investment arbitration as dedication of some assets (element of contribution) according to a plan (element of duration) in order to achieve some benefits (element of risk). This approach would fit to the ordinary economic meaning of the term.*

## I. INTRODUCTION

The notion of ‘investment’ constitutes the *clef de voûte* of investment arbitration. With consent to arbitration and the nationality of the investor, it is one of the most fundamental conditions of an investment tribunal’s jurisdiction. Both Article 25(1) of the ICSID Convention and dispute settlement clause of international investment treaties provide for jurisdiction over disputes arising out of an investment. This is normal, considering that ICSID stands for International Centre for Settlement of Investment Disputes and that international investment treaties provide substantive and procedural rights in respect of foreign investment.

Despite its essential role, ‘investment’ is not defined in the ICSID Convention<sup>1</sup> and the definition of investment under international investment treaties is either not actually a definition but rather an enumeration of a series of rights<sup>2</sup> or it does not sufficiently clarify the notion. This obscurity, especially within the context of ICSID arbitration, has been tried to be resolved by three main approaches. One of these approaches has gained

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1 See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 27.

2 See *Romak S.A. v The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26.11.2009, para. 180; *Abaclat and Others v The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 04.08.2011, para. 347.

a broader acceptance, however some tribunals have found new elements in the notion of ‘investment’ although they categorically remained in the same approach. This article will discuss each approach and their respective sub-categories in turn.

## II. THREE APPROACHES TO THE NOTION OF ‘INVESTMENT’

The lack of definition of ‘investment’ within the ICSID Convention has pushed tribunals to adopt a particular approach in order to decide whether they have jurisdiction to hear the dispute brought before them. The main approaches in respect to the notion of ‘investment’ are: (a) identification of the characteristics of the investment, (b) reference to a more specific document involving a definition of investment, and (c) definition of the term by constitutive elements.<sup>3</sup>

### a) Identification of Characteristics of the Investment

Instead of putting the transaction that constitutes the subject of the dispute to the test under a definition of investment, the approach introduced by Schreuer identifies certain features of ‘investment’ that are typical to most of the operations<sup>4</sup> and analyses whether the transaction at hand is alike. Accordingly, a certain duration, a certain regularity of profit and return, the assumption of risk, substantial commitment, and the operation’s significance for the development of the host state are among the typical features or characteristics of an investment.<sup>5</sup>

This approach was first followed by the *Fedax* Tribunal. The Tribunal used the *features* – not *elements* of investment – that had been identified by Schreuer and concluded that ‘the transaction meets the basic features of an investment’.<sup>6</sup> Another case which followed this approach is the *CSOB* case. The Tribunal noted that suggested elements of ‘investment’ are not ‘formal prerequisites’ for a transaction to be deemed as an investment.<sup>7</sup> Accordingly, a transaction may qualify as an investment even in the absence of some of the features determined by Schreuer.

This approach is not analytical: it actually establishes a sample of investment by enumerating some features and asserts that a transaction that is alike would constitute an investment. Thus, rather than provide clarity, it in fact creates obscurity by raising an open-ended question as to which features of a transaction might still be missing for the operation to be qualified as an investment and under which conditions the likeness to an

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3 The language used in the distinction of different approaches to the notion of ‘investment’ (especially the terms used in a) and c) is borrowed from E. Gaillard, ‘Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’, Binder, et al. (eds), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (OUP, 2009) 403.

4 C.H. Schreuer, et al., *The ICSID Convention* (CUP, 2<sup>nd</sup> edn, 2009), 128.

5 *Ibid.*

6 *Fedax N.V. v The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11.07.1997, para. 43.

7 *CSOB v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24.05.1999, para. 90.

'investment' would be kept. This approach does not determine minimum conditions for the notion of investment and it does not establish an applicable test for the purposes of ICSID jurisdiction.

### **b) Reference to the Instrument Containing Consent for the Definition of Investment**

Considering that the ICSID Convention does not define the notion of 'investment', the *consensual* approach<sup>8</sup> suggests referring to the definition of investment adopted by the parties within the instrument incorporating consent to ICSID arbitration. This approach is underpinned by the reference to the importance of consent where the Report of the Executive Directors explained the intentional abstention of the Contracting States from defining the term 'investment'.<sup>9</sup> Henceforth, this approach opines that referring to the parties' agreement would provide a more flexible and pragmatic approach to the meaning of 'investment' instead of a rather 'strict autonomous' definition.<sup>10</sup>

In accordance with this view, the lack of a definition in the ICSID Convention would be filled by the intention of the parties. The Annulment Committee in *MHS* stated that 'the inner content of [the term "investment"] is defined by the terms of the consent of the parties to ICSID jurisdiction', whereas the outer limit is the fundamental assumption that sale is not investment.<sup>11</sup> The most apparent consequence of this approach would be the incorporation of the definition of investment from an international investment treaty. The *CMS* Annulment Committee said, for instance, that 'Article 25 of the ICSID Convention did not attempt to define "investment". Instead this task was left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based'.<sup>12</sup> Another example is the *ATA* Tribunal who asserted that '[t]he ICSID Convention leaves the definition of the term investment open to the parties, allowing them to determine its scope and application pursuant to mutual agreement in the relevant BIT'.<sup>13</sup> One may also find some support for this view in the *Abaclat* case. The Tribunal – in the hypothesis that the claimants' contributions could not meet the *Salini* test –<sup>14</sup> found it contradictory to the ICSID Convention's aim

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8 For this denomination, see M Dekastros, 'Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention', *JWIT*, 14 (2013) 286, 294.

9 See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 27.

10 *Biwater v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24.07.2008, paras 316 – 317.

11 *Malaysian Historical Salvors (MHS) v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16.04.2009, para. 72.

12 *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Application for Annulment, 25.09.2007, para. 71.

13 *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18.05.2010, para. 111.

14 For the *Salini* test, see Section III a).

not to afford the procedural protection under the Convention insofar as parties to the relevant international investment treaty expressly agreed 'to protect the value generated by these kinds of contributions'.<sup>15</sup> Namely, the *Abaclat* Tribunal considered that the intention of the Contracting Parties expressed in an investment treaty is binding in determining what an investment is under the ICSID Convention.

The *Biwater* Tribunal suggested an approach that is based on consensus, but on a rather different footing. Having noted that an 'autonomous' definition may exclude some transactions from the scope of the ICSID Convention, it acknowledged the possibility that 'very substantial numbers of BITs across the world ... [may] constitute ... any type of international consensus' on a broader understanding of the notion of 'investment'.<sup>16</sup> Whereas this approach referred to the definition in BITs, it did not directly and clearly suggest using the definition within the instrument containing the relevant consent as the sole authority to determine the scope of the 'investment'.<sup>17</sup> Additionally, the Tribunal justified the use of this approach only when an international consensus had been formed following the adoption of the same definition by very substantial numbers of BITs. This should mean that a definition of investment within a BIT can only be taken into account only when there is an international consensus in considering such transactions or assets as an investment.

Reference to the instrument containing consent for the definition of investment is problematic because under this method, there is a risk that the jurisdiction of ICSID arbitration might be expanded without limitation covering disputes that do not actually arise from an investment. It is not plausible to recognise any dispute as an investment dispute just because parties have considered it so. More importantly, when it is accepted that consent alone would decide whether a dispute is an investment dispute, 'investment' would lose its role as a jurisdictional requirement under Article 25(1) of the ICSID Convention. One should note that, consent is a distinct condition from the condition of investment for the jurisdiction of investment tribunals.<sup>18</sup> Therefore, the Tribunal in *Joy Mining*, although acknowledging the role of consent in interpreting the term 'investment',<sup>19</sup> rightfully indicated that '[t]he Convention itself, in resorting to the concept of investment in connection with jurisdiction, established a framework to this effect' and that 'there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals'.<sup>20</sup> Accordingly, the Tribunal concluded that:

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15 *Abaclat*, para. 364; *contra Ambiente Ufficio S.p.A. and Others v The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 08.02.2013, paras 438-439, but see also para. 472.

16 *Biwater*, para. 314.

17 See *Biwater*, para. 316.

18 *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14.07.2010, para. 108.

19 *Joy Mining Machinery Limited v The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 06.08.2004, para. 42.

20 *Ibid*, para. 49.

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the *objective requirements of Article 25 of the Convention*. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.<sup>21</sup>

The *Phoenix* Tribunal also criticised the *consensual* approach and explained that there is not a total discretion, but 'some basic criteria' and that 'parties are not free to decide in BITs that anything ... is an investment'.<sup>22</sup>

The *MHS* Annulment Committee's statement '[t]o ignore or depreciate the importance of the jurisdiction [investment treaties] bestow upon ICSID ... risks crippling the institution'<sup>23</sup> does not justify the consensual approach. International investment treaties play a role in providing consent to ICSID arbitration, but it does not follow that ICSID jurisdictional requirements should be interpreted in conformity with those treaties.

### **c) Autonomous Definition of the Term by Constitutive Elements**

This third approach suggests a method, rather than a concrete determination of what an investment is. There are indeed different approaches – or sub-categories – using this method. These sub-categories will be analysed in Section III.

The method of autonomous definition regards the term 'investment' as a term having a self-standing meaning, especially for the purposes of Article 25(1) of the ICSID Convention. Namely, 'investment' has an objective and single meaning, which is not dependent on the instrument containing consent or agreement or intention of the parties. The *Salini* Tribunal noted as well that the requirement for an investment dispute under the ICSID Convention could not be diluted by the consent of the Contracting Parties.<sup>24</sup> After all, this is a *strict* requirement for the establishment of ICSID jurisdiction and the jurisdiction of other investment tribunals.

Under this method, the autonomous and objective definition of 'investment' is formed by the synthesis of several constitutive elements. Existence of investment entails presence of each of these elements; absence of any constitutive element would cause the lack of jurisdiction of an investment tribunal. In this regard, the *Salini* Tribunal acknowledged the investment requirement as an objective condition of the ICSID jurisdiction and determined the criteria that should be satisfied.<sup>25</sup> The *Romak* Tribunal accepted that the term 'investment' had an intrinsic meaning even under an international

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<sup>21</sup> *Ibid*, para. 50 (emphasis added).

<sup>22</sup> *Phoenix Action v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15.04.2009, para. 82.

<sup>23</sup> *MHS*, Annulment, para. 73.

<sup>24</sup> *Salini Construttori S.p.A and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23.07.2001, para. 52.

<sup>25</sup> *Salini*, para. 52.

investment treaty in a non-ICSID arbitration and that this meaning ‘cannot be ignored when considering the list contained in [the definition of investment within] the BIT’.<sup>26</sup> Accordingly, the Tribunal sought to apply the conceptualist approach or the approach of autonomous definition by constitutive elements, irrespective of whether the investor had resorted to an ICSID or non-ICSID arbitration.<sup>27</sup>

This approach seems more reasonable than the two previous approaches. Even if the ICSID Convention has not defined the term ‘investment’, it refers to a term that has an intrinsic meaning. This meaning determines the scope of the jurisdiction of ICSID tribunals. Similarly, international investment treaties – despite having a provision envisaging a list of assets that can constitute investment – use this term and thus incorporate this intrinsic meaning into the treaty.

### III. SUB-CATEGORIES OF THE THIRD APPROACH: WHAT ARE THE CONSTITUTIVE ELEMENTS OF AN INVESTMENT?

As mentioned above,<sup>28</sup> the *conceptualist* method is divided into some sub-categories, each proposing different elements for an operation to qualify as an investment. Proponents of this method have not, thus, arrived at an agreement on a particular definition of ‘investment’ or on the constitutive elements that should be present. This section will discuss these sub-categories.

#### a) The *Salini* Test

The analysis of the conceptualist method should start with the *Salini* test, which is the first and most dominant test that has accepted that the term ‘investment’ has an intrinsic meaning within the ICSID Convention. The *Salini* Tribunal enumerated the constitutive elements of the investment as follows: (1) contributions, (2) a certain duration of performance of the contract, (3) a participation in the risks of the transaction, (4) contribution to the economic development of the host state.<sup>29</sup> It then discussed whether the transaction had satisfied each of these conditions.<sup>30</sup>

Whereas many tribunals adopting the conceptualist method have followed the *Salini* test,<sup>31</sup> for others, it has become a point of departure. The latter have developed the test by adding new elements. None of them, however, have found much support in the investment arbitration case law. This article will now analyse these additional elements to the *Salini* test and then question whether the term ‘investment’ embraces

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<sup>26</sup> *Romak*, para. 180 and para. 188.

<sup>27</sup> *Romak*, para. 207.

<sup>28</sup> See Section II c).

<sup>29</sup> *Salini*, para. 52.

<sup>30</sup> See *Salini*, paras 53 – 57.

<sup>31</sup> See e.g. *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14.11.2005, para. 130; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16.06.2006, para. 91; *Saipem S.p.A v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, 21.03.2007, para. 99.

such conditions before turning to another basic test, which was mostly elaborated by Gaillard.

### **b) Requirement of Positive and Significant Contribution to the Host State**

The reference to economic development made within the Preamble of the ICSID Convention<sup>32</sup> underpins the opinion that the term 'investment' entails positive and significant contribution to the host state. This approach regards the condition prescribing the substantial contribution of the investment to the economy of the host state as a strict independent element and an essential characteristic of the investment.<sup>33</sup> The *MHS* Tribunal observed also that 'the weight of the authorities cited [in that case] swings in favour of requiring a significant contribution to be made to the host State's economy',<sup>34</sup> despite the fact that most of the cases analysed in that award had not required this and it was most of the time the Tribunal's own analysis that investment in those disputes entailed a significant contribution and thus satisfied this condition.<sup>35</sup>

The Annulment Committee in *Patrick Mitchell* annulled the award of the tribunal on a dispute involving a legal counselling firm established by a foreigner for having failed to state reasons explaining how the claimant contributed to the economy of the host state. This failure in the tribunal's assessment on investment made the award incomplete.<sup>36</sup> Of note, the Annulment Committee acknowledged that the legal consulting service might be considered as an investment, should it contribute to the interests of the host state, e.g., in case it provides legal services for new incoming foreign investors.<sup>37</sup>

Some other tribunals, however, did not require the investment to contribute to the economy of the host state<sup>38</sup> or at least they presumed that this condition would be inherent in other elements.<sup>39</sup> Despite a few authorities suggesting otherwise, it is not clear how the term 'investment' in Article 25(1) of the ICSID Convention could be construed in a way that an investment not contributing significantly to the host state should not be deemed as an investment. True, the Preamble mentions economic development of Contracting States. This is however merely a consequence of attracting

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32 The first paragraph of the Preamble reads as: 'Considering the need for international cooperation for economic development, and the role of private international investment therein'.

33 See *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment, 01.11.2006, paras 29 – 30 and 33.

34 *Malaysian Historical Salvors (MHS) v The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17.05.2007, para. 123.

35 See e.g. *ibid*, paras 116 and 119 –122.

36 *Patrick Mitchell*, para. 40.

37 *Ibid*, para. 39.

38 *LESI S.p.A. and Astaldi S.p.A. v Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12.07.2006, para. 72(iv).

39 *Phoenix*, para. 85.

foreign investment and not a threshold for the ICSID Convention to become operative.<sup>40</sup> Establishing a legal counselling firm that gives consulting service in family law matters can be an investment as much as another firm that provides services for foreign investors.

### c) The *Phoenix* Test: Requirement of *Bona Fide* Investments

There is an approach led by the *Phoenix* Tribunal that qualifies the ‘*protected* investment’ instead of focusing on the existence of an ‘investment’. The main idea here is to exclude investments that international investment treaties do not purport to protect.<sup>41</sup> This approach adds two supplementary conditions to the four-prong test of the *Salini* Tribunal. Accordingly, an investment needs to be legal (not in violation of the laws of the host state) and it has to be made in good faith.<sup>42</sup> As a consequence, the *Phoenix* Tribunal introduced a test composed of six elements – the four elements of the *Salini* test, plus investment in accordance with the laws of the host state, and *bona fide* investment.<sup>43</sup>

The problem with this approach is that the two additional requirements concern the protection of an investment, which is a question of merits. An investment tribunal would establish its jurisdiction should there be an investment dispute. Therefore, the jurisdictional test should merely assess the existence of an investment.<sup>44</sup> Whether or not there is an investment dispute before the tribunal does not depend on the legality of the investment. The question of whether the investment would be protected is actually a part of the merits of the dispute and could only be dealt with by a tribunal that has jurisdiction to hear the dispute.<sup>45</sup>

A provision stipulating that the relevant international investment treaty applies to investments made in accordance with the laws of the host state should, however, be dealt with differently. This kind of a provision determines the scope of application of the treaty. Thus, the non-satisfaction of this condition would result in the non-application of the investment treaty. Given that the investment treaty does not apply, the dispute settlement clause giving consent of the host state to arbitrate investment disputes would not operate.<sup>46</sup> Therefore, an ICSID tribunal would not have jurisdiction to hear the dispute because of absence of consent, and not because of absence of investment. For example, in *Metal-Tech*, the Tribunal (after having established corruption) concluded that the dispute at hand did not fall within the scope of the dispute settlement provision in the BIT due to its reference to investments that should be implemented in compliance

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<sup>40</sup> *Victor Pey Casado et Fondation 'Presidente Allende' v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 08.05.2008, para. 232; *Fakes*, para. 111.

<sup>41</sup> *Phoenix*, para. 79.

<sup>42</sup> *Phoenix*, paras 100-113.

<sup>43</sup> *Phoenix*, para. 114.

<sup>44</sup> *Abaclat*, 382.

<sup>45</sup> *Abaclat*, 382.

<sup>46</sup> *Fakes*, 115.



with local law and thus host state's consent did not cover this dispute.<sup>47</sup>

#### **d) Ordinary (Economic) Meaning**

This final approach defines the term 'investment' by trying to find out its ordinary meaning. The ordinary meaning of 'investment' mostly refers to the economic definition of 'investment'. From this point of view, one may define 'investment' as dedication of some assets according to a plan in order to achieve some benefits. The *Fakes* Tribunal explained that both in the context of a complex international transaction and of the education of one's child, 'one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents' hopes or expectations'.<sup>48</sup>

Three elements might be identified in this definition: (1) contribution (dedication of some assets); (2) a certain duration (performing the plan); (3) risk (the uncertainty in achieving some benefits). Investment tribunals adopting the *ordinary meaning* approach have frequently referred to these three criteria.<sup>49</sup>

This approach is compatible with the principles of interpretation of treaties under Article 31 of the Vienna Convention on Law of the Treaties.<sup>50</sup> As stated by the *Ambiente Ufficio* Tribunal, 'reliance on the *travaux préparatoires* and the intentions of the parties must not lead to an outcome deviating from the interpretation of Art[icle] 25 "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"'.<sup>51</sup> Considering that the *ordinary meaning* approach takes the real meaning of 'investment' into account, as opposed to definitions that are artificially designed, it would be the most adequate approach.

### **IV. CONCLUSION**

From the analysis of different approaches regarding the notion of 'investment' in international investment arbitration, it seems more plausible to adopt an approach that argues that 'investment' has an objective meaning (*conceptualist* approach). Accordingly, not only does the term 'investment' in Article 25(1) of the ICSID Convention have an intrinsic meaning, but also the meaning of 'investment' cannot be confined to a list of assets as 'defined' in international investment treaties.

The next step would be to determine the constitutive elements of the term 'investment'. In this regard, referring to the economic meaning of the term and adopting

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<sup>47</sup> *Metal-Tech v The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 04.10.2013, para. 373.

<sup>48</sup> *Fakes*, para. 110.

<sup>49</sup> *LESI*, para.72(iv); *Pey Casado*, paras 231-233; *Romak*, paras 206-207; *Fakes*, para. 110.

<sup>50</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>51</sup> *Ambiente Ufficio*, para. 455. This Tribunal did not however adopt the ordinary meaning approach in the meaning used in this article (see paras 472 and 479).

the ordinary meaning would be the most reasonable approach. Therefore, ‘investment’ should be defined both for the purposes of the ICSID Convention and of international investment treaties as dedication of some assets according to a plan in order to achieve some benefits. This definition incorporates three elements: (1) contribution (dedication of some assets); (2) a certain duration (performing the plan); (3) risk (the uncertainty in achieving some benefits).