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THE PATH TOWARDS DEFINING "INVESTMENT" IN ICSID INVESTOR-STATE ARBITRATIONS: THE OPEN-ENDED APPROACH

Melissa María Valdez García*

Article 25 of the International Convention on the Settlement of Investment Disputes left the notion of "investment" intentionally undefined, thus leaving its interpretation in the hands of arbitration tribunals, which has led to inconsistencies, confusion and debate regarding the true essence of what may appear as a routine concept. This article tries to explain that the proper meaning of "investment" under the Convention must be clarified not only by discussing the drafting history of the Convention, but by also examining doctrinal tendencies, key aspects of corresponding arbitration awards and customary international law and argues that arbitration tribunals should show strong deference to states' interpretations on the question of what constitutes an "investment," as it is what the drafters' intended and that is what suggests a careful analysis of the convention's object and purpose.

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I. Introduction

Article 25 of the International Convention on the Settlement of Investment Disputes ("ICSID") states that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment,"[1] but does not go on to define *investment* and such omission creates the controversial debate that exists today. This article analyzes the impact created by the ICSID's lack of defining "investment" in Article 25 and examines the restrictive or open-ended approach to defining the term.[2]

Part I of this article discusses the drafting history or *travaux préparatoires* of Article 25 of the ICSID.[3] Furthermore, the content of the Working Paper and preliminary draft, the discussions that took place among legal experts at the Consultative Meetings, and the revised draft of the ICSID are topics that are analyzed in depth herein. Part II examines how doctrine and case law have interpreted the term "investment" and describes the distinction between the restrictive or outer-limit approach and the deferential or open approach, analyzing the key characteristics of each methodology. Finally, Part III argues in favor of the open-ended approach when defining the term "investment" since arbitration tribunals should show strong deference to States' interpretations regarding what constitutes an "investment," given the drafting history of ICSID and its respect for state autonomy.[4]

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[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art.25, opened for signature Aug. 27, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx.

[2] ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID or Washington Convention). This multilateral treaty has over one hundred and forty member States and was created by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It entered into force on October 14, 1966. For more details see: https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx (last visited Mar. 1, 2017).

[3] "The *travaux Travaux Préparatoires* are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. These documents may be consulted and taken into consideration when interpreting treaties." Ryan Harrington, Collected Travaux Préparatoires, Yale Law School's Lillian Goldman Law Library, http://library.law.yale.edu/collected-travaux-preparatoires (last visited Mar. 1, 2017).

[4] Julian Davis Mortenson, *The Meaning of Investment: ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 318 (2010), http://ssrn.com/abstract=1911364.

II. Drafting the Meaning of Investment in ICSID: A Brief Overview

What is an investment? Many experts agree that there is no single definition for the term.[5] The absence of a concrete, legal explanation is due to the fact that the meaning of the concept fluctuates according to the object and purpose of the different investment instruments that encompass the term.[6] Most multilateral and bilateral investment treaties ("BITs") and trade agreements with investment chapters have a broad, nonexclusive definition of investment, [7] followed by a non-limitative list of the assets that are covered,[8]

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[5] *See generally*, R. RUDOLF DOLZER & C.CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW. Oxford University Press, (2007); MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES. Oxford International Arbitration Series, (Lukas Mitelis ed., Oxford University Press. 2008); Catherine Yannaca-Small & L.Lahra Liberti. *The, Definition of Investor and Investment in International Investment Law*, in International Investment Law: Understanding Concepts and Tracking Innovations, Chapter 1 (OECD 7 (2008); Sebastién Manciaux, *Actualité de la Notion D'investissement International* (2008); *in* LA PROCÉDURE ARBITRALE RELATIVE AUX INVESTISSEMENTS INTERNATIONAUX: ASPECTS RÉCENTS 145 (2010); Devashish Krishan. *A Notion of ICSID Investment*, in Investment Treaty Arbitration and International Law. (TJ Grierson Weiler ed., JurisNet LLC 2008. E.); Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice,* in International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer. Oxford University Press, 403 (2009) Cited in: Katia Yannaca-Small, Katia. *Definition of "Investment": An Open Ended Search for a Balanced Approach*, in Arbitration Under International Investment Agreements: A Guide to the Key Issues. Oxford University Press, 243 (2010).

[6] DOMINIQUE CARREAU & PATRICK JULLIARD, DROIT INTERNATIONAL ECONOMIQUE 407 (3d ed., 2007), *noted in* Yannaca-Small & Liberti, *supra* note 5, at 46, http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf (last visited Mar. 1, 2017).

[7] According to Noah Rubbins, *The Notion of "Investment" in International Investment Arbitration*. According to Noah Rubbins, investment treaties could be classified into three categories for the purposes of defining investment: those that contain an "illustrative list" of assets (broad definition of investment); an "exhaustive list" (which sets out elements that are not to be considered investments); and "hybrid list" (which defines investment broadly, and includes non-exhaustive list of forms an investment may take). Noah Rubbins, *The Notion of "Investment" in International Investment Arbitration*, http://0-www.kluwerarbitration.com.gull.georgetown.edu/CommonUI/document.aspx?id=ipn28297 (last visited Mar. 1, 2017).

[8] Examples of international investment treaties that follow this trend are: United States-Australia Free Trade Agreement, Energy Charter Treaty, 2004 U.S. Model BIT, U.S. FTAs, among others. U.S.-Austl., May 18, 2004, 43 I.L.M. 1248; Energy Charter Treaty, Dec. 17, 1994,34 I.L.M. 360; 2004 U.S. Model BIT, U.S. Free Trade Agreements ("FTAs"), among others.

a nod to the fact that it is a concept in constant evolution.[9] Other BITs set forth a broad but exhaustive list of economic activities covered.[10] Definitions of "investment" in national legislation often are quite terse, while others are more elaborate and follow the pattern of modern BITs.[11] Therefore, it is important to ask the following question: What meaning did the drafters of ICSID ascribe to "investment?"

Left intentionally undefined by the drafters of the Washington Convention of 1965, the concept of "investment" has developed in a disconcerting and inconsistent manner and has been referred to by some critics as being "mysterious" and even "damned."[12] Furthermore, the writers of ICSID did not define the concept because a consensus could not be reached across the board over its meaning, and they believed that it was the parties' consent that ought to determine what is and what is not to be considered an investment.[13] The following section will address the reasoning behind the drafters' decision.

A. Origins of the Washington Convention of 1965: The Working Paper and Preliminary Draft

In the hopes that private foreign investment would become an increasingly important source of funds to meet the needs of third world countries,[14] the World Bank Group ("World Bank") set out to find a way to

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[9] The general definition of "investment" in a BIT usually refers to "any kind of asset" plus a list of rights, for example: intellectual and industrial property rights, concession, money claims and right to performance, participation in companies, and traditional property rights. *See, e.g.*, United Kingdom Model BIT, art. 1, *as quoted in* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 123 (2d ed. 2009).

[10] Examples of international investment treaties that follow this trend are NAFTA, Canadian Model FIPA, Japan-Korea BIT, among others. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289.

[11] SCHREUER, *supra* note 9, at 121.

[12] Walid Ben Hamida, *La Notion D'investissement: La Notion Maudite du Systeme CIRDI?* in 349 GAZETTE DU PALAIS 33 (2007), *as quoted in* Charbel A. Moarbes, *Introductory Note to the International Centre for Settlement of Investment Disputes: Malaysian Historical Salvors SBN., BHD v. Government of Malaysia & Phoenix Action Ltd v. Czech Republic,* 48 I.L.M. 1081 (2009), *available at* http://www.jstor.org/stable/25691403.

[13] ARON BROCHES, SELECTED ESSAYS: THE WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 168 (1995).

[14] The U.N. General Assembly encouraged developed States to intensify their support to increase growth rates of developing countries, and designated the 1960s as the "United Nations Development Decade." ANTONIO R. PARRA, THE HISTORY OF ICSID 12. (Oxford Univ. Press ed. 2012).

encourage foreign investment and ameliorate the risks in investing in these developing nations.[15] After considering multiple multilateral approaches to help promote private foreign investment, such as investment insurance and a code of conduct, the World Bank decided that creating an arbitral body for investment disputes was the best way moving forward.[16]

The drafting process of the legal framework that would govern future investment disputes (later known as "The ICSID Convention"), initially took place at the World Bank after its General Counsel, Aron Broches ("Broches"), first brought the subject to the Executive Directors' attention.[17] The first draft of the ICSID, which was formally named "Working Paper in the Form of a Draft Convention for the Resolution of Disputes Between States and Nationals of other States," was completed on June 5, 1962, internally reviewed and discussed for further consideration, and was later sent to member governments for their input.[18] However, the Working Paper was eventually discarded,[19] primarily since there were concerns over the lack of subject matter restrictions and concerns that excessive specificity might foreclose unanticipated uses of ICSID that "could advance international development."[20] The preliminary draft of the ICSID, which was completed October 1963, took into consideration the views expressed by the Executive Directors in the meetings of the Committee of the Whole; therefore, establishing the Center's jurisdiction to allow proceedings of "any existing or future investment [] of [] legal character."[21] According to the drafters, a more

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[15] The World Bank took great interest in the settlement of disputes between its member countries and foreign investors because one of its objectives is to promote foreign investment, as stated in the articles of Agreement of the IBRD (International Bank for Reconstruction and Development). Additionally, it considered that its position in capital markets would be put in jeopardy if it were to lend to financially recalcitrant countries and those that do not make reasonable efforts to settle its investor related disputes. PARRA, *supra* note 14, at 21.

[16] The World Bank, feeling immensely pressured on the encouragement of foreign investment front, considered that the dispute settlement approach would be the most appropriate, as it would not require much organization nor money. PARRA, *supra* note 14, at 21.

[17] *Mortenson*, *supra* note 4, at 281.

[18] PARRA, *supra* note 14, at 26. Said Working Paper was comprised of seven draft articles, including comments regarding the proposed system of conciliation and arbitration. Its purpose was to: "Promote the resolution of disputes arising between Contracting States and nationals of other Contracting States." *Id.* at 30.

[19] The Committee of the Whole on the Settlement of Investment Disputes of the World Bank's Executive Directors convened to discuss the Working Paper. PARRA *supra* note 14, at 37.

[20] *Mortenson*, *supra* note 4, at 282.

[21] *Id.*

precise definition would have been detrimental to the efforts of creating assurances for foreign investors.[22]

B. Legal Experts at Consultative Meetings: Relevant Discussions

The four consultative meetings of legal experts sponsored by the World Bank and conducted by Broches were held in Addis Ababa, Santiago, Geneva, and Bangkok between December 1963 and May 1964, for the purpose of receiving feedback on the preliminary draft from delegates designated by the eighty-six participating States.[23] There was much controversy over the jurisdiction of the Center, since many of the developing country experts stated that both "investment" and "dispute of legal character' should be defined, while others, mostly from developed nations, found even a loose reference to "dispute of a legal character" restrictive.[24] At these meetings, Broches explained that,

> The scope of the jurisdiction of the Center should be stated in broad terms to accommodate the different ways in which States deal with foreign investors in different parts of the world. The concern that signing a Convention of this scope could raise false expectations in the minds of investors, and engender criticism of consent were then refused, might be addressed by allowing each state to declare in advance which types of disputes it would or would not consider submitting to the Center.[25]

On September 11, 1964, an official first draft, which took into consideration the concerns expressed at the regional consultative meetings, was created out of the existing preliminary draft of the ICSID.[26] The draft defined the Center's jurisdiction as "all legal disputes . . . 'arising out of or in

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[22] *Id.* at 284.

[23] *Id.* at 283.

[24] PARRA, *supra* note 14, at 57. "Experts from developing countries were of the opinion that relying on the voluntary nature of the mechanism to obviate the need for such definition placed a heavy burden on States, exposing them to the possible embarrassment of having to withhold consent to an overly broad jurisdiction." *Id*.

[25] *Id.* at 58.

[26] ICSID, *Background Paper on Annulment for the Administrative Council of ICSID,* 8 (2012), http://documents.worldbank.org/curated/en/476921468092664604/pdf/726620WP0Box370d0Paper0on0Annulment.pdf.

connection with any investment'" and investment as "any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years."[27] Discussions about the first draft began on November 23, 1964, between representatives of over sixty-one interested nations, at the Legal Committee on Settlement of Investment Disputes.[28] It became clear after the meeting commenced that developed and developing countries had different ideas on how 'investment' should be defined; the former opposed any attempts to limit the scope of the term (as it would create arbitrary barriers to agreements between parties), while the latter (with the notable exception of Colombia) urged the use of a narrower definition of the concept. After some of the countries made their views known,[29] Broches, who insisted that the defining of the Center's jurisdiction was best left to the parties,[30] had no choice but to conclude that the definitions suggested by the delegates concerned differed so widely that it would be almost impossible to arrive at a proper definition.[31] Nevertheless, that would all change at the meeting of the Legal Committee held on December 8, 1964.

C. Revised Draft of the ICSID: A Compromise

During said meeting, the delegation from the United Kingdom came up with a proposal that would ultimately satisfy all sides: a broad and open-ended reference to investment without limitation, combined with mechanisms designed to allow each state to create an individualized definition of 'investment' after the convention is ratified.[32] This meant that a state had the

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[27] SCHREUER, *supra* note 9, at 106, 115 (citation omitted).

[28] ICSID, *supra* note 26, at 9.

[29] Some countries wanted to limit ICSID jurisdiction to specific agreements between host government and foreign investors; others suggested that terms like "financial operations," government guarantees and "'productive' investments to which the State was not a party," be included in the broader definitions; another group wanted the convention to include an "illustrative list of types of investment that would qualify" as such for ICSID purposes. Other proposals sought to rule out "any disputes that 'affect the security of the State concerned'" or required "that eligible investments be 'regarded as being of public interest.'" Mortenson, *supra* note 4, at 288-89.

[30] SCHREUER, *supra* note 9, at 115.

[31] Mortenson, *supra* note 4, at 289 (quoting Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964) in 2 History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 59 (1968), at 707 (General Counsel Aron Broches).

[32] *Id.* at 289-90. The ICSD, as ratified, left open at least three ways for individual countries to regulate the scope of investments subject to ICSID jurisdiction: through reservations of the Convention, arbitration agreements, and notifications through the Center under article 25(4). *Id.* at 293.

power to limit ICSID's jurisdiction and tailor it to its liking without forcing other states to comply with those same restrictions.[33] This is the approach that was finally approved, which means that ICSID offers no explanation of the concept of investment.[34]

III. Interpretation of the Definition of Investment: Doctrine and Cases

It is evident that the aspects surrounding this debate, mainly whether the definition of 'investment' in Article 25 of ICSID acts as an outer limit to any BIT notion of the term,[35] and if so, what the proper meaning of the concept is under the ICSID must be clarified not only by discussing the existing doctrinal tendencies but by also examining key aspects of corresponding arbitral awards and customary international law.[36] ICSID arbitration tribunals have been employing one of the following two tactics: either 1) the tribunal relies solely on the BIT to clarify the notion of the term, or 2) it tries to convey an objective meaning of "investment," in which the definition is different from the meaning of the term confined in the corresponding BIT.[37]

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[33] *Id.* at 290.

[34] SCHREUER, *supra* note 9, at 116. Additionally, it must be pointed out that the comment made by the Report of the Executive Directors that "no attempt was made to define the term investment" is erroneous, as history shows that there were a number of failed attempts to arrive at a meaning. *Id.* A possible reason for this description was to appease the only delegate who voted against the Convention, Colombian World Bank Director Jorge Mejía-Palacio, who objected to the comment "[t]he Executive Directors did not think it necessary or desirable to define the term 'investment'" written in the draft Report. Mortensen*, supra* note 4, at 292.

[35] The concept "outer limit" was coined by the Chairman of the July 9, 1964 Regional Consultative Meeting of Legal Settlement of Investment Disputes. About outer limits, he pointed out that they are used to indicate up until when the Center would have jurisdiction, provided that the parties' consent had been attained. Beyond these outer limits, any action would be inadmissible, even with the consent of the parties. Michael Hwang S.C. & Jennifer Fong Lee Cheng, Definition of "Investment" - A Voice From the Eye of the Storm, *in* SELECTED ESSAYS ON INTERNATIONAL ARBITRATION 410, 413 n.6 (2013), http://www.transnational-dispute-management.com/downloads/MH_Selected-Essays_on_IA.pdf.

[36] *Id.,* at 415.

[37] Jean Ho, *The Meaning of 'Investment' in ICSID Arbitrations*, 26 ARB. INT'L 633, 634 (2010), http://www.heinonline.org.gull.georgetown.edu/HOL/Page?handle=hein.kluwer/arbint0027&div=37&collection=kluwer&set_as_cursor=1&men_tab=srchresults#641; *see generally* Gruslin v. State of Malay., ICSID Case No. ARB/99/3, Award, (Nov. 27, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0385.pdf; SGS Société Génerale de

In other words, there are two primary lines of analysis: the first one views 'investment' as being determined by the consent of the parties to arbitration, while the second views the term as a freestanding requisite: an autonomous clause, meaning that 'investment' in Article 25 has an independent meaning to that endorsed by the parties to the arbitration.[38] This view states that the autonomous clause is non-waivable, as parties cannot either include or exclude certain transactions as ICSID investments by their agreements.[39] The autonomous clause approach is being used by arbitration tribunals in two ways: some have considered that the clause must be interpreted broadly, which holds the presumption that transactions are investments unless the contrary is proven, while others reason that the clause can be construed via the *Salini Test*,[40] which was construed in a case that will be analyzed and discussed later in Part III. The following section will help explain the difference and similarities between these divergent approaches and arrive at a conclusion over which one the arbitration tribunals should apply.

Surveillance S. A. v. Islamic Republic of Pak., ICSID Case No. Arb/01/13, Decision of the Tribunal on Objections to Jurisdiction, (Aug. 6, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf; Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, (Sept. 16, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf; SGS Sociéte Généralede Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02,6, Objections to Jurisdiction, (Jan. 29, 2004), 8 ICSID Rep. 518 (2005); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (Apr. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0863.pdf; Vecchi; v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, (Apr. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0785.pdf; New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, (July 31, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0500.pdf; Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf; CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, (Sept. 25, 2007) *('CMS* Annulment Decision'), https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf;); Malaysian Historical Salvors, SDN, BHD *Sdn Bhd* v. Government of Malay., ICSID Case No. ARB/05/ 10, Decision on the Application for Annulment, (Apr. 16, 2009) *('Salvors* Annulment Decision'), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf;); Inmaris Perestroika Sailing *Services*Servs.v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, (Mar. 8, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0427.pdf2010; ATA Construction v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, (May 18, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0043.pdf.

[38] Devashish Krishan, *A Notion of ICSID Investment*., TRANSNAT'L DISP. MGMT. 1, 3-6 (2009), http://www.transnational-dispute-management.com/article.asp?key=1348.
[39] *Id.*
[40] *Id.*

A. The Restrictive or Outer Limit Approach: A Two-fold Test

The two-fold, or "double barreled," test to decide the jurisdiction of the tribunal, which is a manifestation of the outer limit approach, was first developed in the *Ceskoslovenská Obchodní Banka, AS v Slovak Republic* decision.[41] It established that in order to answer the question of whether the tribunal has the authority to hear the case it must be determined whether the conflict arising out of an investment complies with what is stated in ICSID, and if so, whether the conflict at hand relates to an investment as defined in the parties' consent to ICSID arbitration.[42] This means that the parties' consent alone is not enough to determine jurisdiction; the activity cannot be outside the scope of ICSID.[43]

There are many other cases that adopt the outer limit approach or have undertaken separate examinations of the existence of consent to jurisdiction under Art. 25.1 of ICSID.[44] Among them, it is crucial to highlight *Phoenix*

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[41] Hwang & Cheng, *supra* note 35, at 416. In *Ceskoslovenska Obchodni Banka* ("CSOB") the arbitral tribunal had to decide whether loans made by CSOB to a collection company established by the Slovak Republic in virtue of a consolidation agreement was indeed an investment under Art. 25.1 of ICSID. The panel agreed that the description of the transaction as an investment in the consolidation agreement is insufficient to consider it as such—the transaction had to be considered objectively; however, it also noted that there exists strong presumption that parties considered the transaction to be an investment, as the parties had consented to ICSID jurisdiction. Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 66, 68 (May 24, 1999), https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf. The CSOB tribunal agreed that "The concept of 'investment' as spelled out in Article 25.1 of ICSID is objective in nature in that the parties may agree on a more precise and restrictive definition of their acceptance of the Centre's jurisdiction but they may not choose to submit disputes to the Centre which are not related to investment." *Id.* at 68.

[42] Hwang & Cheng, *supra* note 35, at 416.

[43] Schreuer stated the following about consent: CSOB, as well as the Société Ouest-Africaine des Bétons Industriels v. The Republic of Senegal ("SOABI") cases, suggest that ICSID tribunals tend to take a broad view of consent clauses where the parties' consent can be appreciated in several successive instruments. SCHREUER, *supra* note 5, at 245.

[44] *See, e.g.,* Joy Mining v. Egypt, in which tribunal held that the parties cannot by contract or treaty define investment as, for the purpose of ICSID jurisdiction, something that does not satisfy the objective requirements of Art. 25 of the Convention. SCHREUER, *supra* note 5, at 118. *See generally* Joy Mining Machinery Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, on Jurisdiction, ¶ 50 (Aug. 6, 2004) (Craig and Weeramantry, Arb.). Salini Costruttori S.P.A v. Kindgdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 36, 44 (July 23, 2001) 6 ICSID Rep. 400 (2004) (Cremades and Fadlallah, Arb.); Aguas del Tunari v. Bol., ICSID Case No. ARB/02/3 Decision on Jurisdiction, ¶ 278 (Oct. 21, 2005) (Alberro-Semerena, Arb.); Jan de Nul v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 Decision on Jurisdiction, ¶ 90 (June 16, 2006)

Action Ltd. v. Czech Republic[45]("Phoenix Action"),[46] and *Ambiente Ufficio SpA v. Argentine Republic* ("Ambiente Ufficio").[47] The Phoenix Action case adopted the outer limit approach when it ruled that the BIT definition of investment must fall within the ICSID notion of it to be considered as such,[48] while the Ambiente Ufficio ruling held that a general authorization in the BIT for the investor to choose ICSID arbitration, plus an explicit definition of 'investment' in the corresponding BIT, should be taken into great consideration in deciding whether the transaction at hand is an investment for Article 25 purposes.[49] On the other hand, some arbitral tribunals have taken

(Mayer and Stern, Arb.); Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7 Decision on Annulment ¶ 31 (Nov. 1, 2006) (Dossou and Giardina, Arb.)31; Government of Malay., *supra* note 37, at 55.

[45] Inspired by the "Salini Test", the tribunal in Phoenix Action classified six elements that would distinguish a normal contribution of value from an investment: (i) contribution of money or assets; (ii) a certain duration; (iii) an element of risk; (iv) operation made in order to develop an economic activity in the host state; (v) assets invested according to the law of the host state; and (vi) assets invested in bona fide. Phoenix Action Ltd. v. the Czech Republic, ICSID Case No. ARB/06/05, Award, ¶ 114 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf . *See also* Yulia Andreeva, *Is there a Limit to the Outer Limits of ICSID Jurisdiction?*, KLUWER ARB. BLOG (Mar. 1, 2017), http://kluwerarbitrationblog.com/blog/2009/08/05/is-there-a-limit-to-the-outer-limits-of-icsid-jurisdiction/.

[46] Some background on the case: Phoenix Action Ltd., an Israeli company, was purchased by two Czech companies named Benet Praha and Benet Group, which had legal disputes of their own with Czech legal authorities. The Czech Republic challenged the jurisdiction of the arbitral tribunal on the basis that Phoenix is a sham entity created by a Czech national in order to establish diversity of nationality, and therefore, jurisdiction. The tribunal ruled in favor of respondent, as only investments made in accordance with the laws of the host State have access to ICSID, reasoning that was also echoed in the Fraport v. Phillippines decision. Christoph Von Krause, *Phoenix Action Ltd. v. the Czech Republic, ICSID Case No. ARB/06/05, Award of April 15, 2009-Concept of Investment under the ISID Convention Revisited*, KLUWER ARB. BLOG (Mar. 1, 2017), http://kluwerarbitrationblog.com/2009/07/08/phoenix-action-ltd-v-the-czech-republic-icsid-case-no-arb065-award-of-april-15-2009-concept-of-investment-under-the-icsid-convention-revisited/.

[47] Some background on the case: The ICSID tribunal ruled that it had general jurisdiction over multiple claims advanced by ninety Italian nationals against Argentina in respect to the alleged harm said to be suffered by them over Argentina's default and restructuring of its sovereign debt. Another favorable approach to "mass claims" is the Abaclat v. Argentine Republic decision, which confirmed its jurisdiction over claims commenced by around 60,000 claimants. Herbert Smith Freehills LLP, *Ambiente Ufficio S.p.A. and Others v Argentine Republic (ICSID Case No Arb/08/9)*, LEXOLOGY (Mar. 1, 2017), http://www.lexology.com/library/detail.aspx?g=054de59b-b5db-42f2-b3d4-e25800834549.

[48] *Hwang* & Cheng*, supra* note 35, at 417.

[49] *See* Alcoa Minerals of Jamaica v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, at 207 (July 6, 1975,), 4 Yearbook of Commercial Arbitration (1979); (Lauterpacht, Kerr, Rouhani, and Trolle, Arb.); *see also* Československa Obchodní Banká, A.S. v. Slovakia, ICSID

the view that an express acceptance and specific consent to ICSID jurisdiction creates a strong presumption that parties considered their transaction to be an investment for ICSID objectives.[50]

a. The *Salini* Case: Leading Expression of the Restrictive Jurisdictional Test

The *Salini Construttori SpA & Italstrade SpA v. Kingdom of Morocco* case ("Salini"), which created the so-called "Salini Test," in which a tribunal created an assessment based on several factors: including economic significance, duration, and risk, allowing one to distinguish a mere contribution of value from an investment that is entitled to treaty protection,[51] has caused a lot of controversy in the legal academic community. It has even been called a "very troubling interpretation increasingly being adopted by arbitral tribunals" by some, despite its strong influence on the subsequent arbitral practice.[52] In Salini, the tribunal examined the objections to jurisdiction raised by the respondent, among them the argument that construction contracts did not qualify as an investment under ICSID.[53] The tribunal pondered the criteria generally identified by ICSID's commentators, mainly: the existence of a contribution, a certain duration, risk participation,

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Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 66 (May 24, 1999) (Buergenthal, Bernardini, and Bucher, Arb.) (according to which the parties' acceptance of the Centre's jurisdiction "with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention." Ambiente Ufficio SpA v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 462 (Feb. 8, 2013)(Bockstiegel, Bernadez, and Simma, Arb.).

[50] Hwang & Cheng, *supra* note 35, at 418. A ruling that makes use of this approach is RSM v. Grenada, which stated that the agreement to the jurisdiction of ICSID in a transaction between a State and foreign party could be viewed as a presumption that the transaction is indeed an investment under Art. 25 of ICSID, even though the facts do not readily recognize that the transaction has all the typical characteristics of an investment.

[51] *Salini Construtorri*Construttori *S.p.A. and Italstrade S.p.A. v. Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, (July 23, 2001,), 30 ILM 577 (2003).) (Cremades and Fadlallah, Arb.). *See* Yulia Andreeva, *Salvaging or Sinking Investment? MHS v. Malaysia Revisited*, 7 LAW & PRAC. INT'L CTS. & TRIBUNALS 161, 162 (2008), ,http://heinonline.org/HOL/Page?handle=hein.journals/lpict7&div=12&g_sent=1&collection=journals#169.

[52] *Krishan*, *supra* note 38, at 2.

[53] *New ICSID Decisions on Jurisdiction*.., BG CONSULTING 1, 1 (Mar. 1, 2017), ,http://www.bg-consulting.com/docs/icsid_122003.pdf.

and the contribution to the host state's development.[54] This set of standards that is being used to determine whether the activity under dispute constitutes an investment is known as the "Salini Test."[55] The tribunal found that a construction contract did qualify as an investment because all of these elements were present.[56]

It would be useful to shed light on the jurisprudential tendencies before Salini. Historically, the tribunal's approach in determining which forms of economic activities constitute investments had been highly deferential, respecting without serious scrutiny States' *ex ante* prerogative to bring all kinds of economic activities under the protection of ICSID.[57] In other words, the practice of tribunals was to deal indirectly with the notion of investment as part of examining the jurisdiction *ratione materiae* under Article 25(1) of ICSID.[58] Over the past decade, however, arbitral tribunals have taken a much tougher stance on this subject by imposing a strict definition of investment that threatens to exclude any economic activities outside of infrastructure projects, a fact that has the potential to damage the international investment regime.[59] The rise of this restrictive approach could be attributed to the backlash that currently exists in investment arbitration.[60] *Fedax v. the Republic of Venezuela* ("Fedax") was the first of such cases to involve an objection on jurisdiction on the grounds that the transaction did not qualify as an investment.[61]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Mortenson, supra* note 4, at 59.

[58] *See* Mavluda Sattorova, *Defining Investment: Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond*, ASIAN J. OF INT'L L. 269 (Mar. 1, 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2035593; *see generally*, Kaiser Bauxite Company v. Jamaica, Decision on Jurisdiction and Competence, ICSID Case No. ARB/74/3 (July 6, 1975) (Kerrl and Rouhani, Arb.) (involving a bauxite mining operation); Société Ouest Africaine des Betons Industriels v. Sénégal, Decision of Award, ICSID Case No ARB/82/1 (Feb. 25, 1988) (Broches, Arb.), (involving a construction of low-income housing units).

[59] *Mortenson*, *supra* note 4, at 259.

[60] Many countries are considering stepping away from ICSID; some have already denounced it: Bolivia, Venezuela and Ecuador. This is arguably due to the fact that there is a growing concern that investment law doesn't extend sufficient deference to States' sovereign regulatory authority. Mortenson, *supra* note 4, at 312-13.

[61] The five objective criteria that should be applied in order to establish the existence of 'investment' in accordance with Art. 25, was first established in Fedax, but it commonly became known as the Salini Test. Jean-Pierre Harb, *Definition of Investments Protected by International Treaties: An On-going Hot Debate*, 26 Mealey's International Int'l Arb. Rep. August1, 9 (Aug.

Christoph Schreuer, after contemplating and reviewing relevant case law, observed that it would not be realistic to attempt to define "investment" for ICSID purposes, but believed that it is possible to identify certain features that are typical to most transactions: a certain duration of activity, regularity of profits and returns, the assumption of risks by both parties, substantial contribution, and contribution to the economic development of host state of investment. [62] These features were later branded by jurisprudence as "requirements" in order to access ICSID jurisdiction under the Salini Test, even though Schreuer specifically recognized that "[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the ICSID."[63] To better understand this test, it is important to analyze each of its components or characteristics: (1) a certain duration of activity, (2) regularity of profits and returns, (3) the assumption of risks by both parties, (4) substantial contribution, and (5) contribution to the economic development of host state of investment separately.

i. A Certain Duration of an Activity

This criteria refers to the host state's willingness to increase the longevity of investments from abroad which it relies on for economic growth.[64] Capital infusions of limited duration are most undesired, because they are unpredictable from the host state's point of view and prone to withdrawal or nonrenewal when things go awry, thus worsening the host country's financial woes rather than improving them.[65] Duration is the most important factor in differentiating ordinary commercial transactions from investments that fall

2011),,http://www.jonesday.com/files/Publication/c24e6d62-3269-4b32-b93d-992f1d5e2e77/Presentation/PublicationAttachment/b4526438-d73b-4bd4-a780-8003fe19feaf/689472.pdf (last visited Mar. 1, 2017). Certainly, the hallmarks of the Salini Test were first stated in Fedax: "The basic features of an investment have been described as involving a certain duration, certain regularity of profit and return, assumption of risk, and a commitment to the host state's development." Fedax N.V. v. Venezuela, Decision on Jurisdiction, ICSID Case No. ARB/96/3, ¶ 43. (July 11, 1997) (Heth and Owen, Arb.).

[62] SCHREUER, *supra* note 9, at 128.

[63] SCHREUER, *supra* note 9, at 128.

[64] CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 266 (2008).

[65] *Id.*

within the scope of ICSID.[66] It is worth noting that even though "it's entirely clear from the negotiating history that the term 'investment' in article 25.1 of the Washington Convention does not exclude from its scope an investment simply because it is a short-term investment,"[67] tribunals, however, seem to have regarded a period of two to five years as sufficient.[68]

It is a given that the required duration seems to vary according to the nature of the activity involved. In the case of *Consortium R.F.C.C. v. Morocco*, because the contract was extended by the parties' mutual agreement for an additional six months, on top of the previously agreed 20 months, the tribunal ruled that it satisfied the minimum duration.[69] The tribunal who decided *Joy Mining*, on the other hand, ruled that it was not an investment, as payment was done early on in the contract and most risks of the sale ends when payment is made.[70] These jurisprudential tendencies suggest that when duration is unclear, the tribunals have put emphasis on the interdependence of the criteria in considering the duration; which means that the two-year minimum could be shortened under the right circumstances.[71]

ii. Regularity of Profits and Returns

An investment is supposed to involve an expenditure of money, assets or efforts in consideration of a return of profits (an indispensible aspect of any true investment),[72] which means that a one-time sale of goods probably will

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[66] *Id.* at 267 (citing Bayindir Insaat Turizm Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 132 (Nov. 14, 2005)).

[67] DUGAN, *supra* note 64, at 267 (citing U.S. Senate, 89th Congress, Second Session, Exec. Rep. No. 2, at 15).

[68] SCHREUER, *supra* note 9, at 130. *See, e.g.*, RFCC v. Morocco, ICSID Case No. ARB/00/6, Decision on Jurisdiction, ¶ 61 (July 16, 2001) IIC 75 (2001); Salini v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 54 (July 23, 2001), 42 ILM 609 (2001); Jan de Nul v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 93 (June 16, 2006) https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf ; MHS v. Malaysia, ICSID Case No. ARB/05/10, Decision on Award, ¶ 110–11 (May 17, 2007).

[69] DUGAN, *supra* note 64, at 267 (citing RFCC v. Morocco, Decision on Jurisdiction, ¶ 62) (2001).

[70] DUGAN, *supra* note 64, at 268 (citing Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award (Aug. 6, 2004)).

[71] *See* DUGAN, *supra* note 64, at 269.

[72] Such was the sentiment of the tribunal in CME Czech Republic B.V. v. The Czech Republic, UNCITRAL Arbitration, Separate Opinion on the issues at the quantum phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C., ¶ ¶ 19-21(Mar. 14, 2003).

not be considered a transaction that involves the regularity of profit and return.[73] Therefore, it is reasonable to conclude that infusions of capital made without any reasonable belief that profit would result could be excluded from the definition of investment.[74]

iii. Assumption of Risk by Both Parties

Because of the lengthy duration of the transaction and the anticipation of profit, an investment typically entails the assumption of risk by both parties.[75] This risk, which is economic in nature, does not cover mere instances of non-performance by the other contracting party, or other risks deemed to be "normal commercial risks."[76] Tribunals have considered the following to be types of risks that distinguish investments: changes in production costs, of a warranty period, a work stoppage, and in posting guarantee money.[77]

iv. Substantial Commitment

Commitment by the investor, an element that must be present in every investment,[78] can be financial but also involves know-how, and does not to depend on the amount of expenses incurred by the investor;[79] indeed, the drafters of the Washington Convention considered and rejected a minimum amount in a dispute as a jurisdictional requirement for ICSID.[80] Nevertheless,

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Likewise, in the Joy Mining case the tribunal ruled that the sales contract was not an investment because of lack of regularity in returns. Cited in Harb*, supra* note 61, at 10.

[73] An exception to this reasoning can be found in the MHS case, as the arbitrator stated that the regularity of profit and return "is not always critical." *See* MHS, *supra* note 69, at 108.

[74] DUGAN, *supra* note 64, at 269.

[75] *Id.*

[76] *Harb, supra* note 61, at 10.

[77] DUGAN, *supra* note 64, at 270.

[78] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decisions of the Tribunal on Objections to Jurisdiction, ¶ 43 (July 11, 1997).

[79] "The question of whether an expenditure constitutes an investment or not is hardly governed by whether the expenditure is large or small" Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 51 (Mar. 15, 2002). *See also* Harb, *supra* note 61, at 10.

[80] The Working Paper of ICSID "provided that the Center would not exercise jurisdiction in respect of claims below US$100,000 [equivalent to US$720,000 in today's market] . . . determined as of the time of the submission of the dispute." However, "[t]his provision did not survive in subsequent drafts

arbitral tribunals do take into account the magnitude of the claimant's expenditures in determining whether an investment actually exists, for which they may appreciate a series of factors: among them monetary contributions, contributions in know-how, equipment, finances, etc.[81]

v. Contribution to the Economic Development of the Host State of the Investment

The contribution to the economic development of the host state of the investment factor looks at the state's motivation to accept and protect the investment in question, a sentiment that would arise for projects that would contribute to their development, including some that are largely commercial, contractual, or trade-related in nature.[82] This factor has been derived from the preamble of the Washington Convention, which confirms that the purpose of ICSID is to promote private international investment that contributes to economic development.[83]

Tribunals have not arrived at a consensus regarding the interpretation of this factor, as they have not agreed to what extent an investment should contribute to the economic development of the host state. The arbitral tribunal in *Malaysian Historical Salvors v. Malaysia* ("MHS") ruled that "the term 'investment' should be interpreted as an activity that promotes some form of positive economic development for the host state;"[84] meanwhile, others have ruled that the objective is not in and of itself an independent criterion for the definition of investment, meaning that development is an expected consequence, not a separate requirement, of investments made in the host

. . . as it was realized that the pecuniary value of a claim might not always reflect its importance." *See* PARRA, *supra* note 14, at 34.

[81] DUGAN, *supra* note 64, at 271.

[82] *Id.* at 272.

[83] Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7 (Annulment Decision of Nov. 1, 2006), para 28.

[84] MHS v. Malaysia, Award, ICISD Case No. ARB/05/10, Award on Jurisdiction, ¶ 68 (May 17, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0496.pdf. This case was dismissed over failure of contribution to the host state's development, as the benefits of the contract did not create a continuing benefit to the economy, but only lasted as long as the contract itself (Para. 144). This case was later overturned by an Annulment Committee. Malaysian Historical Salvors Sdn., Bhd. ("MHS") v. Malaysia, ICSID Case No.ARB/05/10, Decision on the Application for Annulment, ¶ 83 (dispatched Apr. 16, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf.

state;[85] other cases state that this contribution must be a significant one;[86] while others rule that the contribution need not be significant.[87]

b. The *Salini* Test: Aftermath

While the Salini Test has been followed by a large number of tribunals, including *Salini v. Morocco*,[88] *Joy Mining v. Egypt*,[89] *MHS v. Malaysia*,[90] *L.E.S.I. Dipenta v. Algeria,*[91] *Bayindir v. Pakistan*,[92] *Kardassoupulos v. Georgia*,[93] among others, it has also been heavily criticized, and some tribunals distanced themselves from these hallmarks, while others use some but not all of them and do not make reference to the Salini Test.[94]

The arbitral tribunal in the *Biwater Gauff ltd v. Tanzania* case had some very interesting observations regarding Salini:

> [Some tribunals have found that] there is no basis for a rote, or overly strict, application of the five ***Salini*** criteria in every case. These criteria are not fixed . . . as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate

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[85] Fakes v. Republic of Turkey. ICSID Case No. ARB/07/20, Award 14 of July 2010, ¶ 111 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf.

[86] *See* CSOB, *supra* note 42, ¶ 88, MHS Award, *supra* note 84, at ¶ 123; Joy Mining, *supra* note 70, at ¶ 57. Cited in DUGAN, *supra* note 64, at 273.

[87] Mitchell, *supra* note 83, ¶ 33. This case was dismissed over lack of contribution to the host state's development, as Mitchell's law firm and related legal services were not an investment for ICSID purposes. Patrick Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7 (Annulment Decision of Nov. 1, 2006), para. 33. Even though the presence of a contribution to the economic development of the host state is an essential, although insufficient characteristic, that does not mean that said contribution must be sizeable or successful. *Id*. ¶ 33.

[88] *See* the Salini Construttori S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf.

[89] *See* Joy Mining*, supra* note 70.

[90] MHS Award, *supra* note 84.

[91] L.E.S.I. Dipenta v. Algeria, Award, ICSID Case No. ARB/03/08, (July 10, 2005), https://www.italaw.com/sites/default/files/case-documents/italaw4321.pdf.

[92] Bayindir v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov.14, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0074.pdf.

[93] Kardassoupulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0444.pdf.

[94] *Harb*, supra note 61, at 11.

> a definition of "investment" were made, but ultimately did not succeed. In the end, the term was left undefined, with the expectation . . . that a definition could be the subject of agreement between Contracting States . . . .[95]

In this case, the arbitral tribunal cautioned against the dangers of arbitrarily excluding certain transactions from the scope of ICSID by elevating certain characteristics to required categories as it would lead to a definition that would contradict individual agreements, as well as what has been expressed in BITs.[96] Likewise, the arbitral tribunal in *Alpha Projecktholding GmbH v. Ukraine* arrived at the conclusion that the hallmarks of the Salini Test, which tribunals have applied both cumulatively and mandatorily, are not found within article 25.1 of ICSID. By applying the conditions this way, they have applied a universal definition of "investment," despite the fact that the Contracting States have not agreed to this universal definition.[97]

Evidently, the Salini Test as currently construed is proving to be problematic, as typical characteristics of an investment are being elevated into a fixed and inflexible examination, which means that certain types of transactions are being arbitrarily excluded from ICSID jurisdiction unless the five criteria are satisfied.[98] The Salini hallmarks should not be intended to be

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[95] Biwater Gauff v. Republic of Tanzania, Award, ICSID Case No. ARB/05/22, Award, ¶ 312 (July 24, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf.

[96] Gaillard, Emmanuel, *'Biwater,'Classic Investment Bases: Input, Risk, Duration.* NEW YORK LAW JOURNAL (Dec. 31, 2008), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2008/12/Biwater-Classic-Investment-Bases-Input-Risk-Dura__/Files/View-full-text-Biwater-Classic-Investment-Bases-__/FileAttachment/IA123108BiwaterClassicalInvestmentBasesInputRisk__.pdf.

Gaillard, Emmanuel. *'Biwater,'Classic Investment Bases: Input, Risk, Duration.* New York Law Journal. Volume 240-No.126. Text Available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2008/12/Biwater-Classic-Investment-Bases-Input-Risk-Dura__/Files/View-full-text-Biwater-Classic-Investment-Bases-__/FileAttachment/IA123108BiwaterClassicalInvestmentBasesInputRisk__.pdf (last visited Mar. 1, 2017).

[97] Alpha Projecktholding GmbH v. Ukraine, Award, ICSID Case No. ARB/07/16, Award, ¶ 311 (Nov. 8, 2010) https://www.italaw.com/sites/default/files/case-documents/ita0026.pdf.

[98] Gaillard, Emmanuel, *Identify or Define: Reflection in the Evolution of the Concept of Investment in ICSID Practice.* 409. (2009) http://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/01/Identify-or-define-Reflections-on-the-evolution-__/Files/View-full-text-Identify-or-define-Reflections-on__/FileAttachment/IA2009IdentifyordefineReflectiononevolutionconce__.pdf (quoting Biwater,

a list of items that, if completely checked off, will automatically lead to the definite outcome that there is an "investment."[99]

Oscar Garibaldi said the following about the limits of the Salini Test at an investment arbitration conference in 2010, an assertion that really captured the essence of the problem: "One could describe a tiger as 'orange with black stripes'; but if that description is taken as a definition, it would exclude the most sought-after tiger of all: the Bengal Tiger,"[100] because it comes in four color variations, and only one of which is orange with black stripes.

C. The Deferential or Open Approach: Regime

This approach is highly deferential to host States' *ex ante* decisions over which categories of investment to protect, and in practice, some tribunals have almost rendered the definition of "investment" non-justiciable, meaning that it simply merges with the question of party consent.[101] In short, what happens is that tribunals look at the consent document's definition of investment, assess whether it covers the asset in question, and take that conclusion to be determinative of ICSID jurisdiction.[102] It is important to highlight that the States' decision to bind themselves gives them credibility in the eyes of the investors, and arbitral tribunals tend to show deference to the States' capacity as independent actors to take advantage of the ICSID structure and bind themselves accordingly.[103]

Tribunals rarely specify which truly exceptional cases would be ruled out but, [104] at the same time, have approved of a wide array of investments, which

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supra note 96, at ¶ 314). Emmanuel Gaillard, *Identify or Define: Reflection in the Evolution of the Concept of Investment in ICSID Practice,* 409. Text available at: http://www.shearman.com/~/media/Files/NewsInsights/Publications/2009/01/Identify-or-define-Reflections-on-the-evolution-__/Files/View-full-text-Identify-or-define-Reflections-on__/FileAttachment/IA2009IdentifyordefineReflectiononevolutionconce__.pdf (last visited Mar. 1, 2017).

[99] MHS, *supra* note 84, at ¶ 17(e).

[100] Harb, *supra* note 61, at 13.

[101] Mortenson, *supra* note 4, at 269.

[102] *Id.* at 270.

[103] *Id.* at 270-71.

[104] However, the jurisprudence is unified in certain fronts, like the fact that a single commercial transaction would be outside the scope. *See, e.g.,* Georges Delaume, ICSID and the Transnational Financial Community, 1 ICSID REV. FOREIGN INV. L. J. 37, 242 (1986) (discussing sales of services); Rand*, supra* note 33, at 36 (discussing ordinary sales contracts). *But see* Paul Szasz, A Practical Guide

include: hotel construction and operation contract, liaison customs office, concession agreement to operate a local port terminal, an advertising agency and print shop, portfolio investments in local securities, etc.[105]

It would be useful to examine closely the *MHS Annulment Decision* ("MHS Annulment"). The MHS Annulment decision set aside the original MHS decision, in which the sole arbitrator, Michael Hwang ("Hwang"), by adopting a fact specific and holistic assessment and by relying on the five factors of the Salini Test, concluded that the alleged investments did not meet the requirements of article 25.1 of ICSID.[106] It is interesting to note that Hwang has since expressed an attitude of remorse for the way he decided MHS, stating that "I was a victim of a historical process . . . when I did my research for my award, all previous cases had applied the Salini principles for determining the criterion of an 'investment' under the ICSID Convention and I was simply following in their wake."[107] Malaysian Historical Salvors requested and were granted the annulment of this award pursuant Art. 52.1.b of ICSID, on the grounds that the tribunal manifestly exceeded its powers.[108]

The academic community heavily praised this annulment decision, as the ad hoc committee's definition of investment is in accordance with the *travaux préparatoires* and the Report of the Executive Directors of the ICSID, which are the main sources of the ICSID Convention.[109] Additionally, they arrived at the conclusion that the notion of "investment" should be based on both art. 25.1 of ICSID and Salini, along with the circumstances of each particular case, and correctly reasoned that since the UK-Malaysia BIT specifically limited third party dispute settlements to ICSID, denying its access to ICSID jurisdiction would prejudice investment security.[110] It is noteworthy that

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to the Convention on the Settlement of Investment Disputes, 1 CORNELL INT'L L.J. 1, 15 (1968) (World Bank Group staffer agnostic whether jurisdiction extends to sales contracts). Mortenson, *supra* note 4, at 269.

[105] Mortenson, *supra* note 4, at 269-70.

[106] *See Gaillard*, *supra* note 5, at 409.

[107] Hwang & Fong, *supra* note 35, at 409.

[108] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID ARB/0510 (2009). The applicant relied on Vivendi v. Argentine Republic, which ruled that "an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments." Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, para. 86. (2002).

[109] Moarbes, *supra* note 12, at 1082.

[110] Moarbes, *supra* note 12, at 1082.

some cases have ruled that the deferential approach, by which an investment is defined and delineated by the parties, does not really reconcile with the specific language of article 25 (1) of the ICSID, which requires a dispute "arising out of an investment,"[111] and means that party consent should not be the only element that must be taken into account.

a. In Favor of a Deferential or Open Approach

Careful analysis of the ICSID's objective and purpose suggests that arbitral tribunals should give deference to the judgment of sovereign States. Tribunals should show strong deference to States' interpretations on the question of what constitutes an "investment" because doing so will satisfy a great number of state participants and allow for experimentation on the investment law system.[112] Evidently, maximizing flexibility puts into force the original promise of allowing ICSID participants to pursue their interest in the regime, expanding, or restricting as they see fit.[113] Deferring to state definitions of the term keeps tribunals out of the awkward legal situation of enforcing static boundaries in economic policy, which is not to say that States are free from legitimacy or competence problem themselves, but they have a better claim to legitimacy and competence on this particular issue.[114]

When the legal norm is intended to facilitate state activity rather than restrain it, tribunals should defer to state interpretation. By respecting a state's decision to commit itself to a particular use of ICSID, the tribunal is treating the state as an adult participant capable of making commitments, rather than as an infant incompetent to make a binding decision and therefore more likely to change its mind.[115]

As far as doctrinal analysis goes, the Vienna Convention on the Law of Treaties ("Vienna"), which has the force of international customary law, views the *travaux préparatoires* as having a secondary role in treaty interpretation, however, the interpretative process turns to the drafting history of the ICSID whenever a concept is ambiguous, as is the case here with "investment," which would make the *travaux* a very relevant tool for

[111] *Gaillard, supra* note 5, at 411.
[112] *Mortenson, supra* note 4, at 301.
[113] *Id.* at 302.
[114] *Id.* at 305.
[115] *Id.* at 307.

interpretation.[116] Vienna's directive to interpret treaty terms in light of the agreement's objective and purpose also supports the argument in favor of deference to the State's ICSID commitments, as the essence of ICSID was to provide States with new tools to promote economic development by protecting transnational investors.[117] On the other hand, the restrictive approach damages the States' ability to extend investment protection for many categories of economic activity, which is contrary to the ultimate goals of ICSID.[118]

No one can deny that ICSID is a procedural-enabling mechanism for an economic principle that can be taken advantage of by anyone who wants to join, and as long as States do not propose absurd definitions of "investment," i.e., as long as the definition is economic in nature, it should constitute an investment under Article 25, then States should be left to decide what kind of foreign economic activity to encourage as a way of developing their domestic economies.[119]

IV. Conclusions

The drafters of the ICSID Convention left the notion of "investment" intentionally undefined, thus leaving its interpretation to arbitration tribunals.[120] This has led to inconsistencies, confusion, and debates regarding the true essence of the concept. The drafters of ICSID did not define the concept because a consensus could not be reached across the board over its meaning; they believed that it is the parties' consent that ought to determine what is to be considered an investment and what is not.[121]

To help describe the reasoning behind the drafters' decision to leave "investment" undefined, I examined the *travaux préparatoires* of the ICSID Convention, which consists in the Working Paper, preliminary draft, first draft, and subsequent revised drafts. The Working Paper, preliminary draft,

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[116] *Id.* at 309.

[117] *Id.* at 311.

[118] *Id.*

[119] *Id.* at 318.

[120] *Id.* at 309.

[121] Aron BROCHES, *Selected Essays: The World Bank, ICSID, and other Subjects of Public and Private International Law* 168 (1999).

and first draft were ultimately discarded[122] as there were concerns over the lack of subject matter restriction, as well as the fact that excessive specificity might foreclose unanticipated uses of ICSID that "could advance international development."[123] As was explained in detail in this paper, participating countries could not arrive to a consensus, and they were clearly divided on the issue of the notion of investment until the delegation from the United Kingdom came up with a proposal during the meeting of the Legal Committee on December 8, 1964, that would ultimately satisfy all sides and the version that was finally approved: a broad and open-ended reference to investment without limitation, combined with mechanisms designed to allow each State to create an individualized definition of "investment" after the convention is ratified.[124]

It became clear during the course of this investigation that the identification of the proper meaning of "investment" under ICSID must be clarified not only by discussing the drafting history of ICSID, but by also examining doctrinal tendencies, key aspects of corresponding arbitration awards, and customary international law. Scholars and arbitral tribunals alike have established that there are two ways to interpret "investment:" (1) via the deferential or open approach, and (2) by the restrictive or outer limit approach.[125] The deferential or open approach is highly deferential to host States' *ex ante* decisions over which categories of investment to protect, meaning that it is simply a question of party consent.[126] On the other hand, the restrictive or outer limit approach set forth that the following must be determined so as to answer the question of whether the tribunal has the authority to hear the case: if the conflict arising out of an investment complies with what is stated in ICSID, and if so, whether the conflict at hand relates to an investment as defined in the parties' consent to ICSID arbitration.[127]

The Salini Test, a manifestation of the restrictive approach, is a set of "requirements" a transaction is supposed to have to qualify as an "investment"

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[122] The Committee of the Whole on the Settlement of Investment Disputes of the World Bank's Executive Directors convened to discuss the Working Paper, *in* Broches, *supra* note 121, at 37.

[123] Mortenson, *supra* note 4, at 282.

[124] *Id.* at 293-95. The ICSD as ratified left open at least three ways for individual countries to regulate the scope of investments subject to ICSID jurisdiction: through reservations of the ICSD, arbitration agreements, and notifications through the Center under article 25(4). *Id.*

[125] *See generally,* Mortenson, *supra* note 4.

[126] Mortenson, *supra* note 4, at 269.

[127] Hwang & Fong, *supra* note 35, at 416.

for ICSID purposes, and has been both praised and criticized by the investment law community. I conclude that the Salini Test as currently construed is proving to be problematic because typical characteristics of an investment are being elevated into a fixed and inflexible examination, which means that certain types of transactions are to be arbitrarily excluded from ICSID jurisdiction.[128]

It is my position that arbitration tribunals should show strong deference to States' interpretations on the question of what constitutes an "investment," as that was what the drafters' intended and that is what the careful analysis of the ICSID's object and purpose suggests. I therefore subscribe to the deferential or open-ended approach as long as what States designate as an "investment" is not totally disconnected from meaningful economic activity to be considered absurd.[129]

[128] Gaillard, *supra* note 98, at 409.

[129] Mortenson, *supra* note 4, at 281.