INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY

Essays in Honour of Christoph Schreuer

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IDENTIFY OR DEFINE? REFLECTIONS ON THE EVOLUTION OF THE CONCEPT OF INVESTMENT IN ICSID PRACTICE

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At the time of the adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) it could hardly have been foreseen that, more than forty years later, the notion of investment would become one of the most controversial issues as regards the determination of ICSID arbitral tribunals' jurisdiction.[1] Under Article 25 of the Convention, such jurisdiction extends to disputes between contracting States and investors of other contracting States 'arising directly out of an investment'. 'Investment', however, is not defined. It has become commonplace in arbitral case law to refer to the World Bank Executive Directors' observation that '[n]o attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of dispute which they would or would not consider submitting to the Centre'.[2] When the jurisdiction of an arbitral tribunal is based on an investment protection treaty, as is most often the case today, it is the treaty that defines what the host State and the investor's State intended to include in the concept of investment. In such cases, except for the claimant's satisfaction of the investment requisite as defined by the treaty on which the claim is based, the concept of investment within the meaning of the ICSID Convention should not give rise to particular difficulty. The recent case law, however, shows that the Executive Directors' observation on the intentional absence of a definition of 'investment' is, with a few exceptions, as often overlooked as it is referred to.

An important milestone in the evolution of the ICSID case law on the notion of investment is the decision rendered on 23 July 2001 in *Salini v Morocco*.[3] One often refers to

[1] See eg the discussion that followed, at the Washington Conference of 17 May 2007, on 'Investment Treaty Arbitration', the presentation by D. Krishan, 'A Notion of ICSID Investment: Panel Discussion: Are the ICSID Rules Governing Nationality and Investment Working?', in T. Weiler (ed), *Investment Treaty Arbitration and International Law* (2008). See also W. Ben Hamida, 'La notion d'investissement: la notion maudite du système CIRDI?', *Gazette du Palais* (14–15 December 2007) 33.

[2] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 *ICSID Reports* (1993) 28.

[3] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; English translation published in 42 *ILM* (2003) 609.

the '*Salini* test' in this respect.[4] Prior to this decision, other ICSID tribunals had been faced with challenges to the existence of an investment in their respective disputes, but the question had always been resolved without difficulty. In *Fedax v Venezuela*, the tribunal decided that a loan could constitute an investment under the ICSID Convention without engaging in a vast debate on the notion of investment.[5] In *CSOB v The Slovak Republic*, the tribunal applied this finding in the context of the partition of former Czechoslovakia and the allocation among the Czech and Slovak Republics of non-performing receivables generated by the activity of the entity entrusted with the task of supporting Czechoslovakian enterprises.[6] In most other cases, the objection as to the existence of an investment was not even raised by the parties. In *Salini*, on the other hand, the tribunal had to determine whether a public works contract could be considered an investment falling within its jurisdiction. Responding in the affirmative, the *Salini* tribunal developed a reasoning that contains all of the ambiguities that have ensued in the most recent cases.

The four-element definition of an investment that has become known as the *Salini* test was justified, in the tribunal's reasoning, as follows:

> The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transaction (*cf commentary by E. Gaillard cited above* [*JDI* (1999), 278 *et seq.*], *p 292*). In reading the Convention's Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
>
> In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.[7]

When applying these criteria to the case at hand, the tribunal treated the existence of a contribution and the participation in the risks as factual matters. However, with respect to the duration element, it set forth a new rule by requiring a two-year 'minimal duration' for a transaction to qualify as an investment:

> Although the total duration for the performance of the contract, in accordance with the CCAP [*Book of General Administrative Clauses*], was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with minimal length of time upheld by the doctrine, which is from 2 to 5 years *(D. Carreau, Th. Flory, P. Juillard, Droit International Economique: 3rd ed., Paris, LGDJ, 1990, p. 558–578. – C. Schreuer, 'Commentary on the ICSID Convention', ICSID Review – FILJ, vol. 11, 1996, 2, p. 318–493).*[8]

The tribunal thus transformed into a legally binding condition what had been presented in the scholarly literature as a mere description of the typical duration of mid-term investments.[9]

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[4] See the decisions cited below, nn. 35–7, 59.

[5] *Fedax NV v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, 37 *ILM* (1998) 1378.

[6] *CSOB v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, 14 *ICSID Review–Foreign Investment Law Journal* (1999) 251. See also below, text at n. 19.

[7] *Salini v Morocco*, above n. 3, para 52.

[8] Ibid, para 54.

[9] In fact, the first authors cited by the tribunal in this respect only stated that 'investment is [...] a mid-term or long-term transaction—that is to say, according to the most generally accepted definition, a

More generally, the justification of the four-fold test established by the *Salini* decision is based on the combination of two fundamentally diverging approaches.

The first approach was put forward by Messrs Carreau, Flory, and Juillard and by the author of this contribution. While discussing the 'concept of investment', in a section entitled 'search for criteria', the former explained that:

> These criteria are based on three ideas. First, there can be no investment without a contribution—whatever the form of that contribution. Second, there can be no investment within a short period of time: an investment transaction is characterized by a 'durability' that can only be satisfied by a mid to long term contribution. Third, there can be no investment without risk, which means that the deferred compensation of the investor must be dependent upon the loss and profit of the venture. These three criteria are to be applied cumulatively.[10]

However, in subsequent developments focusing on the 'legal notion of investment' and no longer the 'economic notion',[11] the authors insisted that 'there exists not a singular but a multiplicity of legal translations for the economic notion of investment',[12] and that the absence of any definition of investment in the ICSID Convention is due to the:

> desire to disturb neither the formal nor the material unity of litigation regarding certain investments: the flexibility of contractual stipulations allows generally for the submission to the Centre of transactions whose nature and structure are complex but whose legal form dissociates them into a multitude of contractual arrangements, some of which might escape the Centre's jurisdiction.[13]

The second source cited in the *Salini* decision also suggested a traditional definition of the concept of investment founded on the three elements of a contribution, certain duration, and risk,[14] while noting that other, less strict, definitions were also put forward.[15]

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transaction whose duration is not less than three years (mid-term) or seven years (long-term)', D. Carreau, T. Flory, and P. Juillard, *Droit International Économique* (3rd edn, 1990), para 940. The reference to a three-year minimum time-frame thus became a two-year requirement in *Salini*. At the same time and without further explanation, the tribunal considered that a certain type of investment, namely mid-term investments, were the archetype of what was supposed to fall within the jurisdiction of the Centre. See also below, section entitled 'The Deductive Method'.

[10] Carreau *et al*, above n. 10, 560, para 935, 'Ces critères s'articulent autour de trois idées. En premier lieu, il ne saurait y avoir investissement sans apport—quelle que soit, par ailleurs, la forme que prend cet apport. En deuxième lieu, il ne saurait y avoir d'investissement dans le court terme: l'opération d'investissement présente un caractère de "durabilité" qui ne peut se satisfaire que d'un apport à moyen ou à long terme. En troisième lieu, il ne saurait y avoir investissement sans risque, en ce sens que la rémunération différée que l'investisseur perçoit doit être fonction des profits ou des pertes de l'entreprise. Ces trois critères ne sont pas d'application alternative, mais d'application cumulative.' Ironically, in 2001, when the *Salini* decision was rendered based on the third edition of this publication, this passage no longer existed in the fourth edition published in 1998.

[11] Ibid.

[12] Ibid, 568, para 953, 'il n'y a pas unicité mais multiplicité des traductions juridiques de la notion économique d'investissement'.

[13] Ibid, 570, para 956, 'par le souci de ne pas rompre l'unité, tant formelle que matérielle, du contentieux de certains investissements: la plasticité des stipulations conventionnelles permet de soumettre globalement au Centre des opérations de nature et de structure complexes, que leur habillage juridique dissocie en une pluralité d'arrangements contractuels dont certains seraient susceptibles d'échapper à sa juridiction'.

[14] E. Gaillard, note under *Fedax v Venezuela*, *JDI* (1999) 278.

[15] See S. Manciaux, who suggested taking into account only the 'growth of the host State's estate', *Investissements Étrangers et Arbitrage entre Etats et Ressortissants d'autres Etats: 25 Années d'activité du Centre International pour le Règlement des Différends Relatifs aux Investissements* (1998) 71 *et seq*, published in 2004

The second approach was advanced, as an alternative, by Georges Delaume, former Senior Legal Adviser to the World Bank, in reaction to the traditional definition. Because he deemed the definition based on contribution, duration, and risk to be too restrictive, Georges Delaume suggested a more flexible test based solely on the Preamble to the Convention: the contribution to the host State's economic development. In his words:

> [The] traditional concept, which is inspired by a *narrow* economic and legal conception, is today substituted by another concept, which is essentially economic in nature and *legally flexible* in its formulation, that is not based on contribution in the form of ownership but, to the contrary, on the *expected—if not always actual*—contribution of the investment to the economic development of the country in question.[16]

Having highlighted that direct investment is far from being the only means of associating a foreign party with the development of the host State, he further observed:

> Without going on at length about this contemporary phenomenon, it is still appropriate to deduce from it, for the purposes of the ICSID Convention, the sole consequence that follows, namely that as a result of this evolution, the scope of application of Article 25(1) is *considerably enlarged* and offers to those interested new opportunities for recourse to ICSID for the purposes of the settlement of their potential disputes.[17]

These two approaches were merged in *Salini*. While retaining from the first the idea that there exist real criteria for an investment that must be satisfied cumulatively, it borrowed from the second a fourth element, which it understood as an integral part of a new definition of an investment. Seemingly harmless, this combination has given rise to the ambiguities that have surfaced in the most recent case law on the concept of investment within the meaning of Article 25(1) of the ICSID Convention.

With that background in mind, one must, in order to fully appreciate the ICSID case law on the notion of investment and the underlying debate, identify in the clearest manner each of the two competing methodologies that today divide such case law. It is indeed not sufficient to discuss in isolation each of the possible elements of the notion of investment—namely contribution, duration, risk, and contribution to the development of the host State—without specifying which type of reasoning these elements are rooted in. Depending on the context, each of these individual components takes a very different meaning. This contribution will thus strive to identify each of the two competing

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under the title *Investissements Étrangers et Arbitrage entre Etats et Ressortissants d'autres Etats* (2004) especially 43 *et seq*. For a more recent position by the same author, see 'La compétence matérielle: actualité de la notion d'investissement international', speech delivered at the IHEI colloqium, La procédure arbitrale relative aux investissements internationaux: aspects récents, Paris, 3 April 2008 (forthcoming).

[16] G. Delaume, 'Le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)', *Journal de droit international* (1982) 775, at 801 (emphasis added), '[à] cette notion classique relevant d'une conception économique et juridique étroite se substitue aujourd'hui un autre concept, essentiellement économique dans sa nature *et juridiquement malléable* dans sa formulation, qui repose non plus sur l'apport en propriété mais, au contraire, sur la contribution *escomptée, sinon toujours effective*, de l'investissement au développement économique du pays intéressé'.

[17] Ibid 802 (emphasis added), 'Sans chercher à épiloguer sur ce phénomène contemporain, il convient néanmoins d'en tirer, pour les besoins de la Convention CIRDI, la seule conclusion qui s'impose, à savoir qu'à la suite de cette évolution, le champ d'application de l'article 25 (1) se trouve *considérablement élargi* et offre aux intéressés de nouvelles occasions d'avoir recours au CIRDI en vue du règlement des différends éventuels'.

methodologies before assessing, in one context or the other, the value of the components that may be used to determine whether an investment exists in a given case.

A. The Competing Methodologies for the Assessment of the Existence of an Investment

In assessing whether a dispute 'aris[es] directly out of an investment' within the meaning of the Convention, ICSID tribunals have followed two very distinct methodologies.

A number of arbitral tribunals have based their assessment on the presumption that there exists a true definition of an investment, and that such a definition is based on constitutive elements or criteria. Under this approach, a tribunal whose jurisdiction is challenged must ensure that all the constitutive elements are present, or that all the required criteria are fulfilled, in order to conclude that an investment exists for the purposes of its jurisdiction. Other tribunals, on the other hand, have considered the presence of certain 'characteristics' of an investment sufficient to satisfy the Convention's requirement that an investment exists, even if the same 'characteristics' are not always present from one case to the other. The first method is one of *defining*, which entails determining in the abstract the factors that are of the essence to an investment in order to then proceed in each case to a process of characterization. This process follows the classic methodology associating one or several constitutive elements with a legal consequence and can be described as deductive. The second method is more intuitive. Avoiding all generalizations, it merely *identifies* features or 'characteristics' that have already been observed in scholarly writings or in prior arbitral decisions that have accepted the existence of an investment. These two approaches would arguably differ only in their degree of abstractness if not for the insistence by the proponents of the intuitive method that the 'characteristics' allowing the 'identification' of an investment may, in fact, vary from one case to another. The two methods are thus very different and, in practice, often lead to opposing results.[18] We will examine each in turn, starting with the less traditional intuitive method.

The intuitive method

The *CSOB* decision of 24 May 1999 is the first clear example of the application of the intuitive method in ICSID case law. The *CSOB* tribunal placed emphasis on the commentary of the Executive Directors of the World Bank on the absence of a definition for investment:[19]

> This statement also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that 'the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein.' This language permits an inference that an international

[18] See below, Section B. [19] Report, above n. 2.

> transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.[20]

One can discern the influence of Georges Delaume's reasoning.[21] The tribunal went on to say that:

> [...] applying the definition of an investment proffered by the Slovak Republic [which was based on the classic definition requiring the existence of a contribution, duration, and risk], it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that these elements of the suggested definition, *while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.*[22]

The decision rendered on 31 July 2007 in *MCI v Ecuador* followed a similar line of reasoning. Responding to the State's contention that the transaction giving rise to the dispute did not fulfil the conditions of duration and shared risk, the tribunal observed:

> The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) *must be considered as mere examples and not necessarily as elements that are required for its existence.* Nevertheless, the Tribunal considers that the very elements of the project [giving rise to the dispute] and the consequences thereof fall within the characterizations required in order to determine the existence of protected investments.[23]

Similarly, the decision of 25 September 2007 by the ad hoc committee in *CMS Gas Transmission Company v Argentine* warrants mention. Here again, the committee pointed out 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.'[24]

The award rendered on 24 July 2008 in *Biwater v Tanzania*[25] provides a thorough justification for this approach. The tribunal rejected Tanzania's argument that a renovation project for water and sewage infrastructures could not be characterized as an investment due to its 'unprofitable' nature. Having recalled the four elements of the *Salini* test on which Tanzania relied, supplementing them with a fifth characteristic, that of the magnitude of the investment, the tribunal observed:

> 312. In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of

[20] *CSOB v The Slovak Republic*, above n. 6, para 64.

[21] See Delaume, above n. 16, 775.

[22] *CSOB v The Slovak Republic*, above n. 6, para 90 (emphasis added).

[23] *MCI Power Group, LC and New Turbine, Inc v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para 165 (emphasis added), available at <http://ita.law.uvic.ca/>.

[24] *CMS Gas Transmission Company v Argentine*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, 25 September 2007, para 71, available at <http://www.worldbank.org/icsid>.

[25] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; available at <http://www.worldbank.org/icsid>.

> 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 a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States [...].
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> 314. Further, the *Salini Test* itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the *Salini Test*, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.
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> [...]
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> 316. The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.
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> 317. The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of the meaning of 'investment' by reference to the parties' agreement, rather than imposing a strict autonomous definition, as per the *Salini Test*.

In scholarly literature, Christoph Schreuer has been an active proponent of the intuitive method.[26] After completing a detailed review of relevant case law, he observes that it 'would not be realistic to attempt yet another definition of investment on the basis of ICSID's experience. But it seems possible to identify certain features that are typical to most of the operations in question.' He identifies, among other factors, duration, regularity of profits, risk, the importance of the commitment, and the contribution to the development of the host State. However, in conclusion, he insists that 'these features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention'.[27]

In an article dedicated to the concept of investment, Ibrahim Fadlallah similarly considers that an approach which evaluates the factors of duration, contribution, risk, and, possibly, the development of the host State (which he views as a political rather than a legal consideration) as 'necessary cumulative criteria' leads to a 'dogmatic and formalistic definition', and presents several difficulties:

> First, it does not seem to be compatible with the specific language of the Convention which deliberately excluded any normative definition. It is also incompatible with

[26] See eg C. Schreuer, 'Commentary on the ICSID Convention', 11 *ICSID Review–Foreign Investment Law Journal* (1996) 318; *The ICSID Convention: A Commentary* (2001); and, most recently, id, 'Panel Discussion: Are the ICSID Rules Governing Nationality and Investment Working?', in T. Weiler (ed), *Investment Treaty Arbitration and International Law* (2008) 124–7, discussing the definition of investment since the decision in *Salini*.

[27] Schreuer, 'Commentary on the ICSID Convention', above n. 26, 372, para 122; id, *The ICSID Convention: A Commentary*, above n. 26, 121 *et seq.*

> [the Convention's] spirit of openness and liberalism. Second, imposing a mandatory criterion necessarily requires assigning a precise definition to that criterion. It would take many years to reach this definition, without any certainty of ever obtaining a uniform result: the liberalism favorable to investors and the constraints more and more required by States could lead to two irreconcilable approaches. In truth, it would be better to consider these elements as *relevant factors which guide arbitrators*, as do contract interpretation rules. *It is not necessary to identify all of them and it is important to leave arbitrators room for discretion.*[28]

This intuitive school of thought contrasts with the classical approach that follows a deductive reasoning, based on a genuine definition of an investment.

The deductive method

The deductive approach does not simply recognize the 'typical characteristics' of an investment, but rather endeavours to give it a true definition. It is based on the idea that the intuitive approach is in reality nothing but another iteration of the subjectivist theory, which merely merges the requisite of investment with the condition of consent.[29] Indeed, if the conditions set forth by the ICSID Convention are satisfied by the mere recognition of certain variable characteristics, one might conclude that no requirement of investment actually exists at all. Such a requirement would only consist of whatever the parties decided to characterize as such. In fact, the Centre itself has actively promoted a subjectivist understanding of the notion of investment for years. In a publication on the drafting of ICSID arbitration clauses, it advised parties who were unsure as to whether their transaction would qualify as an investment to stipulate that 'the transaction to which [their] agreement relates is an investment'.[30] Irrespective of the reservations one might have about the effectiveness of such clauses,[31] it is thus difficult to imagine that the drafters of investment protection treaties who included the ICSID option after having broadly defined covered investments could have envisaged that some of the transactions so defined could nonetheless be excluded from the Centre's jurisdiction because they do not constitute an investment under Article 25(1) of the Convention.

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[28] I. Fadlallah, 'La notion d'investissement: vers une restriction à la compétence du CIRDI?', in G. Aksen, K.-H. Böckstiegel, M.J. Mustill, P.M. Patocchi, and A.M. Whitesell (eds), *Liber Amicorum Robert Briner* (2005) 259 *et seq*, especially 267, para 15 (emphasis added), 'En premier lieu, elle ne paraît pas conforme à la lettre de la Convention qui a délibérément écarté toute définition normative. Elle n'est pas plus conforme à son esprit d'ouverture et de libéralisme. En second lieu, l'énoncé d'un critère obligatoire impose une définition précise de ce critère. Plusieurs années seraient nécessaires pour y parvenir, sans assurance de résultat uniforme: le libéralisme favorable aux investisseurs et la rigueur, de plus en plus requise par les Etats, peuvent dessiner deux courants difficilement conciliables. Mieux vaut, en vérité, considérer ces éléments comme des *facteurs pertinents susceptibles de guider les arbitres*, un peu comme la règle d'interprétation des contrats. *Il n'est pas nécessaire qu'on les retrouve tous, et il importe de laisser aux arbitres une marge confortable d'appréciation.*'

[29] For a discussion of the investment requisite as an objective condition of the jurisdiction of the Centre and the necessary distinction between this objective requirement and the notion of consent, see E. Gaillard, *Journal de droit international* (2006) 362, 365; *Journal de droit international* (2007) 359, 364 *et seq*.

[30] Doc. ICSID/5/Rev. 2/February 1993, reprinted in 8 *ICSID Review–Foreign Investment Law Journal* (1993) 134, 139.

[31] See E. Gaillard, 'Quelques Observations sur la Rédaction des Clauses d'arbitrage CIRDI', *Penant* (1987) 291 *et seq*, especially 295; S. Manciaux, *Investissements Étrangers et Arbitrage entre Etats et Ressortissants d'autres Etats*, above n. 15, para 45.

Today, however, most decisions recognize that the purely subjective approach, pursuant to which an investment is whatever the parties have decided to label as such, is difficult to reconcile with the specific language of Article 25(1) of the Convention, which requires a dispute 'arising directly out of an investment'.[32]

Among the decisions seeking to define the concept of investment through fixed criteria, in addition to the *Salini* decision of 23 July 2001, are the *LESI-Dipenta v Algeria* award of 10 January 2005,[33] the *Bayindir v Pakistan* decision of 14 November 2005,[34] the *Jan de Nul v Egypt* decision of 16 June 2006,[35] the *Saipem v Bangladesh* decision of 21 March 2007,[36] the *Kardassopoulos v Georgia* decision of 6 July 2007,[37] and the *Victor Pey Casado v Chile* award of 8 May 2008.[38] As the tribunal observed in the latter case:

> This Tribunal considers that a definition of investment does exist within the meaning of the ICSID Convention and that it does not suffice to note the existence of certain 'characteristics' which are typical of an investment to satisfy this objective requirement of the Centre's jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning, something that would be incompatible with the obligation to interpret the terms of the Convention in accordance with the *effet utile* principle, as was rightly stated by the award rendered in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case on August 6, 2004.[39]

While these decisions diverge in that they have adopted three or four—or sometimes more—constitutive elements to define investment, they share a common methodology, that of applying a definition of investment rather than identifying an investment by ascertaining the presence of certain typical, though variable, 'characteristics'.

The significance of the current debate regarding the number and nature of factors for the assessment of the existence of an investment can only be understood in the context of this profound division in ICSID case law and scholarly writings between the intuitive and deductive methods.

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[32] See the *CSOB* decision, above n. 6, para 68; the *Salini* decision, above n. 3, para 52; or the awards cited below nn. 47–50.

[33] *Consortium Groupement LESI-Dipenta v People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, para 13(iv); 19 *ICSID Review–Foreign Investment Law Journal* (2004) 426. See also, along the same lines, *LESI, SpA and Astaldi, SpA v People's Democratic Republic of Algeria*, Decision on Jurisdiction, 12 July 2006, ICSID Case No. ARB/05/3, para 72(iv).

[34] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para 130.

[35] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para 91.

[36] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 99.

[37] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 116.

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

[39] Ibid, para 232, 'Le présent Tribunal estime pour sa part qu'il existe bien une définition de l'investissement au sens de la Convention CIRDI et qu'il ne suffit pas de relever la présence de certaines des "*caractéristiques*" habituelles d'un investissement pour que cette condition objective de la compétence du Centre soit satisfaite. Une telle interprétation reviendrait à priver de toute signification certains des termes de l'article 25 de la Convention CIRDI, ce qui ne serait pas compatible avec l'exigence d'interpréter les termes de la Convention en leur donnant un effet utile, comme l'a justement rappelé la sentence rendue dans l'affaire *Joy Mining Machinery Limited c. République arabe d'Egypte* le 6 août 2004.'

B. The Factors to be Taken into Account in the Assessment of the Existence of an Investment

The nature and number of factors to be taken into consideration when assessing the existence of an investment take on a very different meaning depending on whether they are applied in the context of a deductive method relying on a true definition or that of an intuitive approach based on typical characteristics. In the former case, the more numerous the factors, the more difficult it is to satisfy the investment requirement and the narrower the jurisdiction of the Centre becomes. In the latter case, the addition of new 'characteristics' facilitates the recognition of an investment as this methodology accepts that an investment be recognized on the basis of some, but not all, of the said characteristics. In this logic, the addition of a new characteristic may well serve as a substitute for the lack of another. In other words, in a true definition, the accumulation of constitutive elements stems from a restrictive approach, whereas, in an impressionist approach, increasing the number of characteristics of what might be considered as an investment denotes a liberal stand.

Thus, in the context of an intuitive method, Christoph Schreuer's observation that the contribution of the investor must be generally substantial[40] does not necessarily lead to the addition of a minimum threshold of contribution below which one could never accept the characterization of a transaction as an investment. In fact, this idea of a minimum threshold was proposed during the negotiations of the Convention and was formally rejected.[41] For the same reason, when Georges Delaume, seeking flexibility, presented the idea of the 'expected—if not always actual' contribution to the economic development of the host State,[42] he was proposing a substitution for the traditional test, not the addition of a criterion to a system that he already considered to be excessively formalistic. Likewise, when the *CSOB* decision of 24 May 1999 referred to the contribution of the transaction to the economic development of the host State, it was not seeking to impose a new barrier to the jurisdiction of the Centre. Rather, it intended to lighten the reasoning with respect to the traditional criterion of contribution, something not as easily justifiable in the context of a transaction concerning the sharing of non-performing receivables.[43] As a result, reliance on these positions as a justification for a reasoning that aims at adding new criteria to a strict definition is, to say the least, a paradox.

This background should be kept in mind when assessing whether the reasoning regarding the satisfaction of the requirement of an investment should include, along with the classical criteria of duration, contribution, and risk, the concept of a contribution to the economic development of the host State or that, even more restrictive when used in the context of the deductive method, of a positive and significant contribution to such development.

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[40] 'The fourth typical feature is that the commitment is substantial': Schreuer, 'Commentary on the ICSID Convention', above n. 26, 372, para 122.

[41] A threshold of US$100,000 dollars was considered and then rejected, see *History of the ICSID Convention* (1968), volume II, 34 and the discussion in Schreuer, 'Commentary on the ICSID Convention', above n. 26, para 83.

[42] Delaume, above n. 16, 775.

[43] *CSOB v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, 14 *ICSID Review–Foreign Investment Law Journal* (1999) 251.

A fourth factor: the concept of contribution to the economic development of the host State?

As discussed above, the authors or tribunals that reason in terms of typical, though not necessary, characteristics of an investment do not restrict the jurisdiction of the Centre in any way by adding new elements of recognition of an investment. In this context, the reference to the notion of contribution to the economic development of the host State is in line with the intentions of the drafters of the Convention, who clearly did not want to define the notion of investment in a very stringent manner.[44] In the words of Christoph Schreuer, such reference may 'be superfluous, but it is not limiting'.[45]

On the other hand, if one reasons in terms of the cumulative conditions of a true definition of an investment, the addition of the contribution to the economic development of the host State has a restrictive effect. In such a line of reasoning, the absence of any one criterion might lead to the disqualification of a transaction as an investment within the meaning of the Convention. Any addition of a new feature to the three-element traditional definition of an investment thus results in a further constraint that pushes the definition of investment away from the spirit of liberalism intended by the drafters of the Convention.

The arbitral decisions relying on a definition of an investment may be divided into two categories. Some follow the four-fold *Salini* test and require a contribution, duration, risk, and contribution to the economic development of the host State. The decisions in *Jan de Nul v Egypt* of 16 June 2006,[46] *Saipem v Bangladesh* of 21 March 2007,[47] *Kardassopoulos v Georgia* of 6 July 2007[48] and, with nuances, *Bayindir v Pakistan* of 14 November 2005[49] provide illustrations of this trend. In *Helnan v Egypt*, the tribunal also adopted the respondent's view that 'based on ICSID precedents, as summarized in the unchallenged statement by Professor Ch. Schreuer, [...] to be characterized as an investment a project "must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development" '.[50] This appears as somewhat of a paradox when one recalls that Professor Schreuer is himself an advocate of an approach that is not based on a strict definition but, rather, on 'features [that] should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention'.[51]

Other tribunals, on the contrary, have rejected the addition of a fourth requirement to the classic definition. This view was expressed in the *LESI-Dipenta v Algeria* award:

> [...] it seems that, in conformity with the objectives of the Convention, for a contract to be deemed an investment it must fulfill the following three conditions;

[44] See above, text at nn. 2–3.

[45] Schreuer, 'Panel Discussion: Are the ICSID Rules Governing Nationality and Investment Working?', above n. 26, 126.

[46] *CSOB v The Slovak Republic*, above n. 6, para 91.

[47] *Saipem SpA v People's Republic of Bangladesh*, above n. 36, para 99.

[48] *Kardassopoulos v Georgia*, above n. 37, para 116.

[49] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, above n. 34, para 130.

[50] *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006, para 77.

[51] See above para 11.

a) the contracting party has made a contribution in the country in question,
b) this contribution must extend over a certain period of time, and
c) it must entail some risk for the contracting party.

However, it does not seem necessary to establish that the contract addresses economic development of the country, a condition that is in any case difficult to establish and is implicitly covered by the three conditions adopted herein.[52]

The same view is found in the *Pey Casado v Chile* award of 8 May 2008:

> It is this Tribunal's view that the definition does not, however, comprise more than three elements. The requirement of contribution to the economic development of the host State, as difficult to establish as it is, relates not to the jurisdiction of the Centre but rather to the substance of the dispute. An investment could prove useful—or not—for a country without it losing its quality [as an investment]. It is true that the Preamble to the ICSID Convention mentions contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host State. This does not mean that the development of the host State becomes a constitutive element of the concept of investment. That is why, as was noted by some arbitral tribunals, this fourth condition is in fact encompassed by the first three.[53]

In this line of cases, the claim that an essential element of the notion of investment can be extracted from the first paragraph of the Preamble to the Convention is perceived as artificial. The Preamble states: 'considering the need for international cooperation for economic development, and the role of private international investments therein'. This appears to be a mere acknowledgment that investment fosters economic development. This acknowledgement does not mean that economic development is essential to the notion of investment. As noted by the tribunal in the *Pey* case, economic development is a consequence of an investment, not an essential component of the notion.

The contrast between these two deductive trends is exacerbated when one requires not only an 'expected' contribution—to use the words of Georges Delaume—but also a positive and significant contribution to the development of the host State. This raises the question of a potential fifth condition for an investment.

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[52] *Consortium Groupement LESI-Dipenta v People's Democratic Republic of Algeria*, above n. 33, para 13(iv), '[...] il paraît conforme à l'objectif auquel répond la Convention qu'un contrat, pour constituer un investissement au sens de la disposition, remplisse les trois conditions suivantes; il faut

a) que le contractant ait effectué un apport dans le pays concerné,
b) que cet apport porte sur une certaine durée, et
c) qu'il comporte pour celui qui le fait un certain risque.

Il ne paraît en revanche pas nécessaire qu'il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus.' See also *LESI and Astaldi v People's Democratic Republic of Algeria*, above n. 33, para 72(iv).

[53] *Victor Pey Casado and President Allende Foundation v Republic of Chile*, above n. 38, para 232, 'Selon le Tribunal, cette définition ne comprend en revanche que trois éléments. L'exigence d'une contribution au développement de l'Etat d'accueil, difficile à établir, lui paraît en effet relever davantage du fond du litige que de la compétence du Centre. Un investissement peut s'avérer utile ou non pour l'Etat d'accueil sans perdre cette qualité. Il est exact que le préambule de la Convention CIRDI évoque la contribution au développement économique de l'Etat d'accueil. Cette référence est cependant présentée comme une conséquence, non comme une condition de l'investissement: en protégeant les investissements, la Convention favorise le développement de l'Etat d'accueil. Cela ne signifie pas que le développement de l'Etat d'accueil soit un élément constitutif de la notion d'investissement. C'est la raison pour laquelle, comme l'ont relevé certains tribunaux arbitraux, cette quatrième condition est en réalité englobée dans les trois premières.'

A fifth factor: the concept of positive and significant contribution to the economic development of the host State?

The ambiguity of the role that the contribution to the economic development of the host State might play in the determination of the jurisdiction of the Centre became apparent in the ad hoc committee's decision in *Patrick Mitchell v Democratic Republic of Congo* on 1 November 2006. The committee found that, in light of the Preamble to the ICSID Convention, it was 'quite natural that the parameter of contributing to the economic development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty'.[54]

The committee found that a law firm's activity could not be characterized as an investment under the Convention. It noted in passing that the firm in question did not provide any services to the Republic,[55] overlooking that, even if an investment is required to contribute to the economic development of the host State, such a contribution occurs through the role it plays in the country's economy in general. The ad hoc committee nuanced its reasoning by specifying:

> [The fact] that, in its view, the existence of a contribution to the economic development of the host State as an essential—although not sufficient—characteristic or unquestionable criterion of the investment, does not mean that this contribution *must always be sizable or successful*; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.[56]

This idea is reminiscent, albeit in a very different context, of what Georges Delaume identified as the 'expected—if not always actual' contribution to the development of the host State.[57] The difference in methodology between the two remains striking, however, as Georges Delaume's suggestion of the application of this notion was in lieu of the traditional definition of an investment, not in addition to it.

The award of 17 May 2007 in *MHS v Malaysia*[58] marked a new stage in the restriction of the concept of investment, and thus the jurisdiction of the Centre. In that case, the sole arbitrator refused to recognize as an investment the cash and services provided by an English company for the performance of a marine salvage contract over a period of 43 months. The operation resulted in the recovery of the cargo of a ship that had sunk

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[54] *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 29.

[55] Ibid, para 39: 'As a legal consulting firm is a somewhat uncommon transaction from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the transaction. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors.'

[56] Ibid, para 33 (emphasis added).

[57] See above text at nn. 16, 17.

[58] *Malaysian Historical Salvors (MHS), SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on Jurisdiction, 17 May 2007.

off the coast of Malacca, today Malaysia, making it possible for the government to recover Chinese porcelain that had been lost with the vessel. As is customary in this kind of contract, the salvor's payment depended solely on the result of the venture. Considering that it had not received the payment owed to it, the English company availed itself of the bilateral investment treaty between the United Kingdom and Malaysia to bring its action before ICSID. The sole arbitrator held that the transaction did not qualify as an investment, notably because it did not contribute significantly to the economic development of Malaysia:

> Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a contract an 'investment' within the meaning of Article 25(1). As stated by *Schreuer*, there must be a positive impact on a host State's development. *Schreuer* cites *CSOB* in concluding that an 'investment' must have a positive impact on a host State and, in *CSOB*, the tribunal stated that there must be significant contributions to the host State's economic development.[59]
>
> The Tribunal finds that [...] the Contract did not make any significant contributions to the economic development of Malaysia. [...] the Tribunal concludes that there was no substantial contribution because the nature of the benefits that the Contract offered to Malaysia did not provide substantial benefits in the sense envisaged in previous ICSID jurisprudence such as *CSOB*, *Jan de Nul* and *Bayindir*.[60]

Irrespective of whether the enrichment of a country's cultural heritage contributes to its development, the requirement by the *MHS* award of a contribution that is both quantitatively and qualitatively significant ignores the intention of drafters of the ICSID Convention. Many actors of relatively modest importance can play a role in a country's economy and their transactions deserve the protection of the Convention as much as the larger ones—at least that was the drafters' intention.[61] Further, the success or failure of a transaction is only relevant to issues pertaining to the merits and not of jurisdiction. If an oil company dedicates human and financial resources to the exploration of an oil field pursuant to a production-sharing contract with the host State, and if that activity does not lead to any discoveries, the company's contribution to the venture would still constitute an investment. The fact that, in the case of expropriation for example, the tribunal may take into account the failure of the exploration in the assessment of any potential damages does not mean that the operation is not an investment.[62]

Despite the confusion surrounding the concept of investment in recent ICSID case law, one may hope that these diverging trends will be harmonized in a manner consistent with the all too often overlooked intentions of the Convention's drafters.

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[59] Ibid, para 125. [60] Ibid, para 143. [61] See eg Krishan, above n. 1, 61 *et seq.*

[62] For further criticisms of the *MHS* decision, see Manciaux, 'La compétence matérielle: actualité de la notion d'investissement international', above n. 15; Ben Hamida, above n. 1, 33; Krishan, above n. 1; C. Baltag, 'Precedent on Notion of Investment: ICSID Award in MHS v. Malaysia', 4(5) *Transnational Dispute Management* (2007); Y. Andreeva, 'The Tribunal in Malaysian Historical Salvors v. Malaysia Adopts a Restrictive Interpretation of the Term "Investment"', *Journal of International Arbitration* (2008) 503 *et seq.* An application for the annulment of this decision has been brought before an ad hoc committee.