THE EVOLVING NOTION OF 'INVESTMENT' IN INVESTMENT LAW

Governing the access to the international investment protection framework

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ABSTRACT

The evolving notion of 'investment' in investment law: Governing the access to the international investment protection framework

The core of this thesis is a comprehensive study on the evolving notion of 'investment' in investment law, with an emphasis on the imperative role it serves in governing the access to the international investment protection framework. The objective is to determine if there exists a viable approach for defining its meaning.

The majority of states prioritize securing meaningful protection for the foreign investment of their investors, given its necessity for economic and social development. The most meaningful way of doing so is to provide investors with direct recourse to international arbitration pursuant to the international investment protection framework, consisting of nearly 3000 bilateral investment treaties (BITs) and the International Centre for Settlement of Investment Disputes (ICSID). While BITs provide foreign investors with a body of substantive guarantees for their investments, ICSID, through its distinctively binding enforcement mechanism ensures that these guarantees have a real-world force. Although ICSID specializes in the settlement of investor-state investment disputes, it provides no definition of 'investment'. This is no coincidence; rather the omission was intentional, following the unsuccessful end of long-standing negotiations between states and the Convention's drafters on the delineation of 'investment'. For half a century, this lack of a definition has caused complications in ICSID arbitral proceedings. Although two competing approaches for defining 'investment' have emerged, neither has commanded a clear consensus. Rather, the proposed solutions of tribunals are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals. As a result, it remains uncertain what constitutes an ICSID 'investment', and regrettably so given the legal uncertainty it inherently leads to for foreign investors. This author proposes that ICSID tribunals, when defining the notion of 'investment', apply a version of the hybrid 'outer-limits' principle, outlined in the final chapter of this thesis.

ÚTDRÁTTUR

Hugtakið "fjárfesting" í fjárfestingarrétti: Stjórnar aðgangi að alþjóðlega fjárfestingarverndunarregluverkinu

Kjarni ritgerðarinnar er ítarleg rannsókn á hugtakinu "fjárfesting" í alþjóðlegum fjárfestingarrétti, með sérstakri áherslu á hlutverkið sem það þjónar varðandi aðgang að alþjóðlega fjárfestingarverndunarregluverkinu. Markmiðið er að ákvarða hvort að það sé til staðar raunhæf aðferðarfræði til að skilgreina merkingu þess.

Meirihluti ríkja leggja áherslu á að tryggja fjárfestum sínum haldbæra vörn í tengslum við erlendar fjárfestingar vegna mikilvægis þeirra fyrir efnahags- og félagslega þróun ríkja. Áhrifaríkasta leiðin til þess er að veita fjárfestum beinan aðgang að alþjóðlega fjárfestingarregluverkinu, sem samanstendur af tæplega 3000 tvíhliða fjárfestingar-samningum (BITs) og Alþjóða miðstöðinni fyrir úrlausn fjárfestingardeilna (ICSID). Tvíhliða fjárfestingarsamningarnir innihalda efnislegar ábyrgðir um vörn fjárfestinga, meðan að ICSID tryggir að þær ábyrgðir hafi raunverulegt gildi. Þó svo að ICSID sérhæfi sig í uppgjöri fjárfestingardeilna milli fjárfesta og ríkja er enga skilgreiningu á hugtakinu að finna í ICSID sáttmálanum (ICSID Convention). Þetta er engin tilviljun; vöntunin á skilgreiningu var fremur málamiðlun eftir að langvarandi samningsviðræður milli ríkja og fulltrúa Alþjóða Bankans (The World Bank) höfðu strandað. Í hálfa öld, hefur þessi vöntun á skilgreiningu valdið erfiðleikum við úrlausn ICSID mála. Þrátt fyrir að tvær aðferðir til að skilgreina "fjárfestingu" hafa komið á sjónarsviðið hefur hvorug þeirra náð fram ríkjandi samstöðu. Þvert á móti eru úrlausnir gerðardóma ófyrirsjáanlegar, ef ekki mótsagnakenndar og veita litla sem enga leiðsögn fyrir næstu gerðardóma. Sökum þess er það alls óvíst hvað telst vera ICSID "fjárfesting". Er það miður vegna þeirrar réttaróvissu sem það óhjákvæmilega leiðir til fyrir erlenda fjárfesta. Höfundur þessi leggur til að ICSID gerðardómar, þegar þeir skilgreina hugtakið "fjárfesting" beiti útgáfu af "ytri-marka" meginreglunni, sem lýst er í lokakafla ritgerðarinnar.

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1 Introduction

Ever since 1966, [1] the notion of 'investment' has been at the core of the international investment protection framework. [2] In consequence, the topic has been one of the most controversial issues in international investment law (IIL).[3] The notion of 'investment' has remained topical in various arbitral regimes, including arbitral proceedings initiated under the ICSID convention[4] (hereafter the Convention). When analyzing ICSID[5] jurisprudence, this might come as a surprise, as determining the existence of an investment often requires no intricate analysis. For instance, most if not all ICSID tribunals can agree that the construction of a local hospital is an investment, while an ordinary sale of a shopping mall is not. So why is the definition of 'investment' so controversial? The controversy primarily arises out of its fundamental importance in IIL; it's the cornerstone of the whole system of investment treaty protection, as an investment agreement, and its guarantees, only apply to an investment, made by an investor.[6] Article 25 of the Convention sets forth this main jurisdictional prerequisite by stating that its jurisdiction only covers disputes arising 'directly out of an *investment*'.[7]

Access to ICSID, the dispute resolution and enforcement mechanism of the international investment protection framework discussed in this thesis, therefore depends entirely on the existence of an investment, as other disputes are excluded. Failing to gain access to ICSID can leave foreign investors in a precarious situation as ICSID is the key multilateral treaty in this specific field of law, [8] and as such handles the vast majority of investor-state arbitrations.[9]Although other options are available for enforcing investment commitments, these options are scarce, not available in all cases and not as effective.[10] ICSID member states, and

[1] Jean Ho, 'The Meaning of "Investment" in ICSID Arbitrations' (2010) 26 Arbitration International 633, 633.
[2] Walid Ben Hamida, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control - Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo' (2007) 24 Journal of International Aribtration 287, 288.
[3] Emmanuel Gaillard, 'Identify or Define? Reflections on The Evolution of The Concept of Investment in ICSID Practice.' *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 403.
[4] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States'.
[5] 'International Centre for Settlement of Investment Disputes'.
[6] Mavluda Sattorova, 'Defining Investment nder the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' (2012) 2 Asian Journal of Internationl law 267, 267.
[7] (emphasis added).
[8] Vejo Heiskanen, 'Of Capital Import: The Definition of "Investment" In International Investment Law' in Anne K Hoffmann (ed), *Protection of Foreign Investments Through Modern Treaty Arbitration: Diversity and Harmonisation* (Association Suisse de l'Arbitrage 2010) 51.
[9] Mahnaz Malik, 'Recent Developments in the Definition of Investment in International Investment Agreements' (International Institute for Sustainable Development 2008) 9.
[10] Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harvard International Law Journal 257, 259.

their investors, therefore have a vested interest in accessing the framework in question, securing meaningful protection for their investments.[11]

By limiting access to ICSID and its distinctively binding dispute resolution mechanism, 'investment' functions as the 'jurisdictional gateway for access to ICSID'.[12] If given a narrow and specific meaning, a number of disputes that the parties have decided to submit to ICSID may have no forum for resolution. However, if given a comprehensive and flexible meaning, most, if not all, cases submitted to ICSID will be accepted as arising out of an 'investment'.[13]

What constitutes an 'investment' in IIL is therefore a question of fundamental importance. Despite its importance, it is generally acknowledged that there is no single definition of the term.[14] This has led to a debate on 'investment', which has spanned decades and been at the forefront of IIL. The often-complex debate can be traced back half a century, when ICSID was established pursuant to the formulation of the Convention;[15] a multilateral treaty, which sets forth its order, body and primary functions.[16] Although it was reported that 'no attempt was made to define the term' when drafting the Convention, that is simply incorrect. As a compromise between the two diverging camps of the Convention's drafters and negotiating states, and out of fear that defining 'investment' would limit ICSID's scope and cause unnecessary jurisdictional problems, the deliberate decision was made not to include a definition of 'investment'.[17]

Theoretically speaking, the lack of a definition should make the determination of ICSID's jurisdiction a relatively straightforward task; the definition should be contingent on the parties consent in their respective bilateral investment treaties (BITs).[18] As chapters 5 and 6, which

[11] Davide Rovetta and Ashley R Riviera, 'The Ad Hoc Committe Annulment Decision in Malaysian Historical Salvors: The Meaning of "Investment" Re-Established?' (2011) 6 Global Trade and Customs Journal 75, 75.
[12] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 65.
[13] Peter HF Bekker and others (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010) 326.
[14] Organisation for Economic Co-operation and Development (OECD), *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 46.
[15] Dolzer and Schreuer (n 12) 238.
[16] ICSID, 'About ICSID' (*ICSID - International Centre for Settlement of Investment Disputes*) <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx> accessed 28 February 2015.
[17] GR Delaume, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (1966) 1 The International Lawyer 64, 70.
[18] Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 63.

analyse the relevant ICSID jurisprudence, will demonstrate, that has however unmistakeably not been the case. Although two competing approaches for defining 'investment' have emerged, neither has commanded a clear consensus. Rather, 'the proposed solutions of tribunals are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals'.[19] Therefore, the notion of 'investment', despite and because of its paramount significance, remains in a state of flux, and regrettably so, considering the legal uncertainty it inherently leads to for foreign investors.

The objective of this thesis is to analyse the evolving notion of 'investment' in IIL and the imperative role it serves in governing the access to the international investment protection framework. In particular, the objective is to determine, through review of ICSID jurisprudence, if there exists a viable approach for defining 'investment' for the purpose of ICSID arbitral proceedings.

The structure of this thesis is as follows. In the second chapter, the rationale behind foreign investment protection will be clarified by verifying the necessity of foreign direct investment (FDI) for development, and with an ICSID case study that demonstrates the paramount importance of adequate investment protection by highlighting the inevitable inequality between investor and host state during a long-standing affiliation. Furthermore, the inefficiency of international law on foreign investment, prior to the emergence of the international investment protection framework will be discussed. In the third chapter, the interplay and workings of the international investment protection framework will be elaborated on. The nucleus of that chapter is the study of BITs and ICSID, which combine to form the framework in question. In the BIT section, their emergence and rapid growth, as well as the substantive protections and procedural guarantees they provide for will be highlighted. In the ICSID section, the significance of ICSID for foreign investors and host states' will be demonstrated. Also, the so-called Achilles' heel of the Convention and the criticism levied towards ICSID will be discussed with the aim of determining whether ICSID is losing some of its appeal as has been argued. In the fourth chapter, which is divided into three sections, the notion of 'investment' will be analysed. First, the fundamental uncertainty that exists on its meaning will be discussed. Second, the imperative role 'investment' serves in governing the access to ICSID will be elaborated on. Third, the BIT definitions of 'investment' will be reviewed. In the fifth

[19] *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20. Award Para 97.

chapter, the conflicts regarding the definition of 'investment' will be reviewed by analysing arbitral jurisprudence and the two competing approaches for defining 'investment'. In the sixth chapter, the capabilities of the competing approaches of 'investment' will be analysed further with the aim of determining whether there exists a viable approach for defining 'investment' for the purpose of ICSID arbitral proceedings. By doing so, this author seeks to contribute to the ongoing debate on the meaning and scope of 'investment' in IIL. In conclusion, I intend to summarise my key findings.

2 The rationale behind foreign investment protection

With the importance of foreign investment being recognized and commandingly endorsed, the international community has actively tried to establish a legal framework for the resolution of investor-state investment disputes.[20] The reason for this effort is not only to provide investors with the necessary protection for their investments, but also to better position host states to attract FDI.[21] [22]

2.1 The necessity of foreign direct investment

In spite of the equivocal and often-conflicting empirical evidence,[23] the collective scholarly inference seems to be that FDI is, and for the foreseeable future will be, 'an essential element for achieving sustainable development'.[24] Although its impact on development, which has at times been glorified and generalized,[25] is reliant on a number of host state factors, such as the host state's infrastructure, economic sector, political stability, regulatory environment and technological advancement,[26] FDI has undeniably contributed significantly to improved living conditions by financing the economic and social development of host states. As a result, FDI can rightly be considered an 'integral part of an open and effective international economic system and a major catalyst to development'.[27]

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[20] R Doak Bishop, *Foreign Investment Disputes: Cases, Materials, and Commentary* (Kluwer Law International ; Sold and distributed in North, Central, and South America by Aspen Publishers 2005) 8.

[21] Omar E Garcia-Bolivar, 'The Teleology of International Investment Law - The Role of Purpose in the Interpretation of International Investment Agreements' (2005) 6 The Journal of World Investment & Trade 751, 751.

[22] FDI has been defined as: 'an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor.' United Nations Conference on Trade and Development, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development.* (United Nations, 2007) 245. What separates FDI from portfolio (indirect) investment, the other main category of foreign investment, is primarily the longevity of the investment and difference in degree of influence; as the primary aim of FDI is control and operation of a business enterprise, while a portfolio investor is generally only interested in maximizing his investment returns. *Foreign Portfolio And Direct Investment: Complementarity, Differences, and Integration* (OECD, 2002) 4.

[23] Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011) 8–9.

[24] Peter Nunnenkamp and Economics & Environment (Jaipur, India) CUTS Centre for International Trade, *Foreign Direct Investment in Developing Countries: What Economists (don't) Know and What Policymakers Should (not) Do!* (CUTS Centre for International Trade, Economics & Environment 2002) 27.

[25] FDI is not the same as FDI. There are numerous forms of FDI; some may serve as an invaluable impetus to host development, while others may have little or no impact on development.

[26] Liesbeth Colen, Miet Maertens and Jo Swinnen, 'Foreign Direct Investment As An Engine For Economic Growth And Human Development: A Review Of The Arguments And Empirical Evidence' (Leuven Centre for Global Governance Studies 2008) Working paper 24–8 <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp11-20/wp16.pdf>; Fabienne Fortanier, 'Foreign Direct Investment and Host Country Economic Growth: Does the Investor's Country of Origin Play a Role?' (2007) 16 Transnational corporations (United Nations Publ) 41, 47–8.

[27] 'Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs' (Organisation For Economic Co-operation and Development (OECD) 2002) 3.

Recognizing the strong incentive they have to attract FDI,[28] the majority of developing states that until the 1990s resisted FDI now seek to attract it by establishing a foreign investor 'friendly' economic and legal climate;[29] the aim being to further their economic and social development.[30] Following this change in perception towards foreign investment amongst developing states, there exists a nearly universal consensus that FDI is 'a key ingredient of economic development,'[31] rendering the debate regarding its necessity obsolete.[32] This consensus was reached at 'The Monterrey consensus', an international conference on financing for development, where member states of the United Nations stressed the absolute necessity of foreign investment, in particular FDI, by concluding that:

> Private international capital flows, particularly foreign direct investment, along with financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term. It is especially important for its potential to transfer knowledge and technology, create jobs, boost overall productivity, enhance competitiveness and entrepreneurship, and ultimately eradicate poverty through economic growth and development.[33]

FDI inflows have consequently accelerated at an astounding pace during the past decades, easily surpassing the pace of foreign trade,[34] skyrocketing from roughly $55 billion in 1980[35] to $1,979 trillion in 2007, representing an all-time high.[36] Although the global

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[28] Anne van Aaken, 'Perils of Success? The Case of International Investment Protection' (2008) 9 European Business Organization Law Review 1, 13.
[29] United Nations Conference on Trade and Development, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (United Nations 2003) 86–87; *EU Foreign Investment Law (Oxford University Press, 2011)* 10*;* Omar E Garcia-Bolivar, 'The Teleology of International Investment Law - The Role of Purpose in the Interpretation of International Investment Agreements' (2005) 6 The Journal of World Investment & Trade 751, 754. Favorable investment conditions are an essential element in acquiring foreign investment, as stipulated in *International Protection of Foreign Investment – 2nd edition (Juris Publishing, 2010)* 24.
[30] Liesbeth Colen, Miet Maertens and Johan Swinnen, 'Foreign Direct Investment as an Engine For Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence.', *Foreign Direct Investment and Human development: The Law and Economics of International Investment Agreements* (2013) 70.
[31] José E Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011) 155.
[32] Bishop, Crawford and Reisman (n 20) 7.
[33] 'Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11, Chapter 1, Resolution 1, Annex)' (United Nations (UN) 2002) Monterray Consensus of the International Conference on financing for Development 9, para 20.
[34] Melek Us, 'Removing Administrative Barriers to FDI: Particular Case of Turkey', *OECD Global Forum on International Investment: New Horizons For Foreign Direct Investment.* (OECD 2001) 1 <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/2423736.pdf> accessed 13 November 2014.
[35] Nunnenkamp (n 24) 8,9.
[36] United Nations Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (United Nations 2009) xix.

financial crisis of 2008 notably impacted the continuing acceleration of FDI flows,[37] with 2008[38] and 2012[39] seeing a significant drop, 2013 represented a return to growth, with FDI inflows amounting to $1,45 trillion.[40]

Numerous factors have facilitated this rapid growth, including the liberalization of trade, privatization of previously state-controlled economies, added competition, lower transportation and communication costs and the swift evolution of technology.[41]

2.2 The inequality between investor and host state

Contrary to foreign trade, which ordinarily only entails a singular interchange of capital[42] and thus comes with minimal risk, FDI most often instigates a long-standing affiliation with the host state:[43]

> A common feature of foreign direct investment is that the investor has sunk substantial capital in the host state, and cannot withdraw it or simply suspend delivery and write of a small loss as might a trader in a long-term trading relationship. The Romans said 'potior est conditio defendentis,' and this is likely to be the situation in foreign direct investment. So rather than having an equality of bargaining power in an exclusively negotiation-based regime, parity will cease and things will tilt heavily in favor of the respondent state.[44] [45]

This long-standing affiliation necessitates that foreign investors be provided an adequate protection for their investments. Otherwise they will be subjected to a variety of risks,[46] which may diminish any possibility of long-term profit. This is clearly demonstrated in the case of

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[37] ibid xvii, Key Messages; Karl P Sauvant, Wolfgang A Maschek and Geraldine McAllister, 'Foreign Direct Investment By Emerging Market Multinational Enterprises, The Impact of the Financial Crisis And Recession And Challenges Ahead' 3 <http://www.oecd.org/investment/globalforum/44246197.pdf> accessed 13 November 2014.

[38] ibid xix, As stated there, 2008 saw a 14 % decline from 2007.

[39] United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013) ix, as stated; 2012 saw a 18 % decline in global FDI from 2011.

[40] United Nations Conference on Trade and Development, *Investing in the SDGs: An Action Plan* (2014) ix, xiii.

[41] Stefán Arnarson, 'Icelandic Foreign Direct Investment' (Seðlabanki Íslands 2000) Monetary Buletin 53 <http://www.sedlabanki.is/uploads/files/mb001_8.pdf> accessed 14 November 2014.

[42] Dolzer and Schreuer (n 12) 21.

[43] ibid.

[44] W Michael Reisman, 'International Investme-nt Arbitration and ADR: Married but Best Living Apart' (2009) 24 ICSID Review 185, 190–191.

[45] potior est conditio defendentis: 'Better is the condition of the defendant, than that of the plaintiff'. John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union; With References to the Civil and Other Systems of Foreign Law*, Vol II (Sixth Edition, Revisited, Improved, and Greatly Enlarged, Childs & Peterson 1856) 140.

[46] Norbert Horn, 'Arbitration and the Protection of Foreign Investment: Concepts and Means', *Arbitrating Foreign Investment Disputes* 7. Examples there given are: 'exposure to the different and less known environment of the host country with its different culture and traditions, mentalities, bureaucracy, legal system and political infrastructures, not to forget potential corruption, and above all, a specific vulnerability to the interference of the Host State affecting the investment'.

Wena Hotels Limited v Arabic Republic of Egypt,[47] one of countless illustrations of government exploitation that brought economic misfortune to foreign investors.[48]

Wena Hotels had signed two nearly identical long-term agreements (21 and 25 years) with the Egyptian Hotels Company (EHC),[49] a public sector company which was 100 % under the ownership of the Egyptian government,[50] regarding the lease and development of two hotels situated in Cairo and Luxor;[51] specifying that EHC would not, in any way, interfere with the lease and overseeing of the hotels.[52] However, briefly after having signed the agreements, differences between EHC and Wena regarding their respective contractual obligations arose. Claiming to have received the hotels in subpar state, Wena Hotels suspended further payments, which EHC counter-measured as a violation of the signed agreements.[53] Negotiations came to a halt and EHC, with the use of force,[54] took full control of both hotels and placed them under its own management on April 1st of 1991.[55]

The following year, the Chief Prosecutor of Egypt ruled that the forceful seizure of the hotels had been unlawful and ordered EHC to return the hotels to Wena.[56] However, as the hotels, in particular the Nile Hotel, were visibly damaged, Wena Hotels initiated two domestic arbitrations against EHC, seeking appropriate compensation. [57]

With minimal damages being awarded to Wena Hotels, and the awards also demanding Wena to relinquish control of the hotels to EHC, or resulting in said outcome,[58] Wena hotels initiated ICSID arbitral proceedings against Egypt in 1998[59] under the provisions of the 1975 Egypt-UK BIT,[60] asserting that 'as a result of Egypt's expropriation of and failure to protect Wena's

[47] *Wena Hotels Limited v Arab Republic of Egypt,* ICSID Case No ARB/98/4. Award.
[48] Christopher F Dugan (ed), *Investor-State Arbitration* (Oxford University Press 2008) 11.
[49] *Wena Hotels Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4. Award (n 47).
[50] ibid Para 65.
[51] ibid Para 15.
[52] ibid Para 17.
[53] ibid Para 19.
[54] ibid Para 33–50.
[55] ibid Para 28.
[56] ibid Para 57.
[57] ibid Para 60.
[58] ibid Para 61-62.
[59] ibid Para 1.
[60] ibid Para 16.

investment in Egypt, Wena had suffered enormous losses leading to the almost collapse of its business'.[61]

Recognizing the illegality of EHC's actions under the Egypt-UK BIT, the tribunal found that Egypt had 'breached its obligations to Wena by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security'[62] and that Egypt's actions had 'amounted to an expropriation without prompt, adequate and effective compensation'.[63] As a result, ICSID awarded Wena Hotels damages of no less than US$ 20,600,986,43,[64] rectifying, at least in large part, Wena Hotels' substantial loss.

The case of *Wena Hotels* clarifies why states and their investors prioritize securing meaningful protection for their foreign investments.[65] Without access to an international remedy such as ICSID, investor's linger in a precarious situation, left only with the inefficient options of initiating domestic proceedings or seeking diplomatic protection from their home state government.[66] Prudent investors will therefore not sink considerable resources into a foreign project, unless adequate investment protection is provided for.[67] Particularly when taking into account that the estimated date of profitability of large-scale FDI operations may run up to 30 years or more.[68] Without protection, the risks of investing in a foreign state, especially in politically and economically unstable climates, may outweigh the potential for profitability, the other key aspect of foreign investment viability.[69]

2.3 The inefficiency of international law on foreign investment

The international community has, despite repeated efforts failed to establish a multilateral framework that could provide foreign investors with adequate protection for their investments.

[61] ibid Para 1. Claimant's Request for Arbitration (submitted on July 10,1998)
[62] ibid Para 134.
[63] ibid Para 135.
[64] ibid Para 136.
[65] Rovetta and Riviera (n 11) 75.
[66] Mark S McNeill, 'Investor-State Arbitration: Striking a Balance Between Investor Protections and States' Regulatory Imperatives.' *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2013) 270 Why these options are not optimal for foreign investors will be expanded on in greater detail in this and the following chapter.
[67] Bishop, Crawford and Reisman (n 20) 8.
[68] Rudolf Dolzer, *Principles of International Investment Law* (Second edition, Oxford University Press 2012) 21.
[69] Bishop, Crawford and Reisman (n 20) 8. That is however not always the case as there are numerous examples of foreign investors in essence ignoring the lack of adequate investment protection, instead looking solely at the potential for high profits. Case being the situation in Argentina in recent years where foreign investors continue to invest in spite of the lack of protection provided for by the Argentinian government.

As a result, investment disputes, prior to World War II, [70] were 'settled' by way of diplomatic protection,[71] 'a concept of customary international law whereby a state espouses the claim of its' national against another State and pursues it in its own name'.[72] The structural foundation of diplomatic protection can be traced back to the the words of E de Vattel in the year of 1758:[73]

> Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety.[74]

Undeniably more political than legal, the slow and ambiguous process of diplomatic protection[75] not only required foreign investors to exhaust all possibly prolonged and expensive local remedies prior to seeking other ways of enforcement,[76] it also provided them with no legal recourse for initiating a claim against a foreign government.[77] As a result, foreign investors were left to rely on their home state governments for enforcement of claims.[78] Should the home state government decide to pursue their claim, which was in reality wholly dependent on the political discretion of said state,[79] the investor would have no control over the case, partaking only to the degree sanctioned by his home state.[80] Finally, in the event that the home state received remuneration on behalf of the claimant from the host state, it bore no legal duty, only a moral one, to hand over the remuneration to the claimant.[81]

As no generally accepted rules on the subject had been adopted, and with the lack of a binding mechanism for the enforcement of investment disputes also evident, the existing international

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[70] Freya Baetens, 'Enforcement of Arbitral Awards: "To ICSID or Not to ICSID" Is Not the Question.' (2012) 5 Investment Treaty Arbitration and International Law 211, 211.
[71] (n 44) 185–186.
[72] Christoph Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 415.
[73] Kate Parlett, 'Diplomatic Protection and the International Court of Justice.', *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 87.
[74] E de Vattel, *The Law of Nations; or Principles of the Law of Nature Applied to the Conduct and Affairs and Nations and Sovereigns: Book II.* (1758) 161.
[75] Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harvard International Law Journal 427, 439.
[76] Christian Tietje (ed), *International Investment Protection and Arbitration: Theoretical and Practical Perspectives* (BWV, Berliner Wissenschafts-Verlag 2008) 20.
[77] Christoph Schreuer, 'Investment Arbitration' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 296; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 96.
[78] Dolzer and Schreuer (n 12) 232.
[79] Raymond Vernon, 'The Multinationals: No Strings Attached' (1978) 33 Foreign Policy 121, 126–7.
[80] Tony Cole, *The Structure of Investment Arbitration* (Routledge 2013) 6.
[81] DP O'Connell, *International Law* (2nd ed, Stevens 1970) 111.

law on foreign investments remained inadequate and ambiguous.[82] While there were numerous reasons for this, the wide differences in views of capital exporting and importing states regarding the appropriate treatment of foreign investment, proved to be the main obstacle to establishing a suitable framework.[83]

[82] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer 655, 659.
[83] Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business ; Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers 2009) 41.

3 The international investment protection framework

The inefficacy of diplomatic protection, that is its inability to provide foreign investors with adequate and efficient protection for their investments, ultimately led to the emergence of nearly 3000 BITs, and the establishment of ICSID;[84] the leading arbitral institution in the field of investor-state investment disputes.[85] This transformed IIL from a mechanism of inter-state diplomacy into a genuine legal framework,[86] seeking to promote the growth of FDI, by recognizing that 'reciprocal protection under international agreement to be beneficial to (its) simulation'.[87]

Overlapping in their function of protecting investment,[88] thus forming a 'theoretical' framework, BITs provide foreign investors with a body of substantive protections for their investments, while ICSID, through its distinctively binding enforcement mechanisms ensures that said guarantees have a 'real-world force'.[89] This provides parties with an effective and neutral forum for the settlement of investor-state investment disputes, a key element for achieving one of IIL's principle aims, protecting foreign investment.[90]

3.1 Bilateral investment treaties

As their name indicates, the primary object of investment treaties or International investment agreements (IIAs) as they are most often referred to, is to promote and protect foreign investment.[91] This dual objective is noticeably evident in the full title of most BITs,[92] which were the first IIAs to focus exclusively on the treatment of foreign investment[93] as their titles convey: 'Treaty concerning the Reciprocal Encouragement and protection of Investments'.[94]

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[84] Peter Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution', *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009) 341.
[85] 'About ICSID' (*ICSID - International Centre for Settlement of Investment Disputes*) 1.
[86] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 242.
[87] Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (First edition, Oxford University Press 2014) 175.
[88] Sattorova (n 6) 272.
[89] Ho (n 1) 263.
[90] Christoph Schreuer, 'The Dynamic Evolution of the ICSID System', *The International Convention on the Settlement of Investment Disputes (ICSID): taking stock after 40 years* (2007) 15.
[91] Salacuse (n 75) 427–428.
[92] ibid 441–442.
[93] Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 3.
[94] See, e.g., 'The Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, Signed at Washington on September 23, 1992 and Entered into Force March 29, 1996.' <http://www.state.gov/documents/organization/43477.pdf> accessed 10 May 2015.

In its simplest form, a BIT can be described as a 'legal instrument through which two countries set down rules that will govern investments by their respective nationals in the other's territory'.[95] By providing the foundation for a sufficient legal framework for investor-state relations, BITs seek to encourage the flow of FDI and enable host states to present their territory to foreign investors as an attractive venue for investments.[96]

BITs contribution to investment protection primarily involves the creation of a body of substantive legal guarantees. The vast majority of BITs grant protection in case of expropriations, usually by providing for full, prompt and effective compensation, as well as requiring fair and equitable treatment of the investor. Also often containing a most-favoured nation clause, and to a lesser extent an umbrella clause which is frequently disputed as it may elevate contractual claims to international law claims.[97] Furthermore, BITs may contain provisions ensuring the investor that the host state government will not interfere, in any way, with the foreign investment.[98] In doing so, host states substitude 'credibility for sovereignty' in an effort to attract more FDI.[99]

Despite a slow start, BITs are now undoubtedly the most prevalent type of IIAs,[100] and more importantly the key source of law governing the protection and promotion of foreign investment.[101] As such, BITs have significantly influenced and transformed international investment law,[102] while also providing invaluable guidance regarding the notion of 'investment'.[103]

Prior to reviewing the fundamental role BITs have in ensuring the efficacy of the framework in question, as well as their definitions of 'investment', it is necessary to briefly review the

[95] Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 109.
[96] Noah Rubins, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (Oceana Publications 2005) 192.
[97] Michael Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business ; Sold and distributed in North, Central and South America by Aspen Publishers 2010) 539.
[98] Bishop, Crawford and Reisman (n 20) 10.
[99] Aaken (n 28) 3.
[100] Sauvant and Sachs (n 95) 37.
[101] Newcombe and Paradell (n 83) 1.; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, Oxford University Press 2012) 13.
[102] Sauvant and Sachs (n 95) 109.; R Doak Bishop, James Crawford and W Michael Reisman (eds), Foreign Investment Disputes: Cases, Materials, and Commentary (Kluwer Law International ; Sold and distributed in North, Central, and South America by Aspen Publishers 2005) 6.
[103] Schreuer, *The ICSID Convention* (n 72) 122.; Organisation for Economic Co-operation and Development, International Investment Law: Understanding Concepts and Tracking Innovations (OECD 2008) 49.

historical background from which they emerged. By doing so, the essence and object of BITs can be better understood.

3.1.1 The emergence of BITs

Although the number of BITs increased phenomenally after 1990,[104] that in no way means they are new to the field of IIL. In fact, they have a long history which can be traced all the way back to 1778, when the United States and France concluded the first Treaty of Friendship, Commerce and Navigation (FCN),[105] establishing trade between the two states.[106] FCN treaties are generally considered to have been the first form of BITs[107] and have thusly been described either as predecessors or the first generation of BITs. This description however tends to exaggerate the similarities among the two treaty regimes, as BITs are almost exclusively concerned with the regulation and protection of foreign investment while FCN treaties like their name indicates were mainly concerned with facilitating trade, also covering a wide range of other issues.[108] The underlying object of the treaty regimes in question was therefore different. In fact, it was not until after WWII, when a new series of FCNs negotiated by the United States emerged, that the protection of foreign investment became a primary goal. Designed to facilitate the rebuild of post-war Europe,[109] the object of the post-war FCNs became more similar to that of BITs. In fact, they became so similar that the investment protection standards provided in the first BIT and in the FCN treaty between the United States and Pakistan from the same year were nearly identical.[110] Ultimately, the FCN era ended due to the widespread view that BITs were more suitable as an instrument for bilateral economic cooperation.[111] While FCN treaties were convoluted and wide-ranging, BITs were plain and most importantly, decidedly more specialized towards the protection and promotion of foreign investment.[112]

[104] Schill (n 86) 41.
[105] Dolzer and Schreuer (n 12) 6.
[106] Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 203, 203.
[107] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (M Nijhoff 1995) 10.
[108] John F Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 Columbia Journal of Transnational Law 302, 350.
[109] Newcombe and Paradell (n 83) 23.
[110] Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5 Goettingen Journal of International law 1, 6.
[111] Dolzer and Stevens (n 107) 11.
[112] Alschner (n 110) 10.

Despite previous efforts to establish an international legal framework for foreign investment, the wide differences in views of capital-exporting and importing states regarding the appropriate treatment of foreign investment derailed the conclusion of a specialized investment multilateral treaty.[113] Capital-exporting states, which have been the key force in driving the negotiation of BITs,[114] therefore saw no other option than to initiate BIT programs dedicated to the protection and promotion of foreign investment.[115] That is, the economic interests of their nationals overseas.[116] The first capital-exporting country to do so was Germany, which concluded the first BIT with Pakistan in 1959.[117] As it was the first BIT concluded, the assumption widely remains it marks the origination of the modern-day era of BITs.[118] However, as it was not until a decade later in 1969, when Chad and Italy concluded their respective BIT, that BITs started to combine substantive protections with procedural guarantees, providing foreign investors with direct access to binding investor-state arbitration; a fundamental aspect of all modern BITs, the Chad-Italy BIT has to be considered the rightful predecessor to the modern BIT.[119]

While other European countries, such as Switzerland and France followed Germanys initiative,[120] BITs remained relatively scarce until the 1990s; a decade that saw a rapid increase in the number of BITs concluded by countries in every area of the world.[121] Even though no reason can be attributed to the slow start of BITs, the initial negative attitude of developing countries towards foreign investment and its protection has been mentioned as a contributing factor.[122] A prime example being that until 1978, only one BIT among developing states had been concluded. Another telling example is that major developing states such as China and India, the two most populated countries in the world, entered the BIT field late, China in 1982 and India not until 1994.[123]

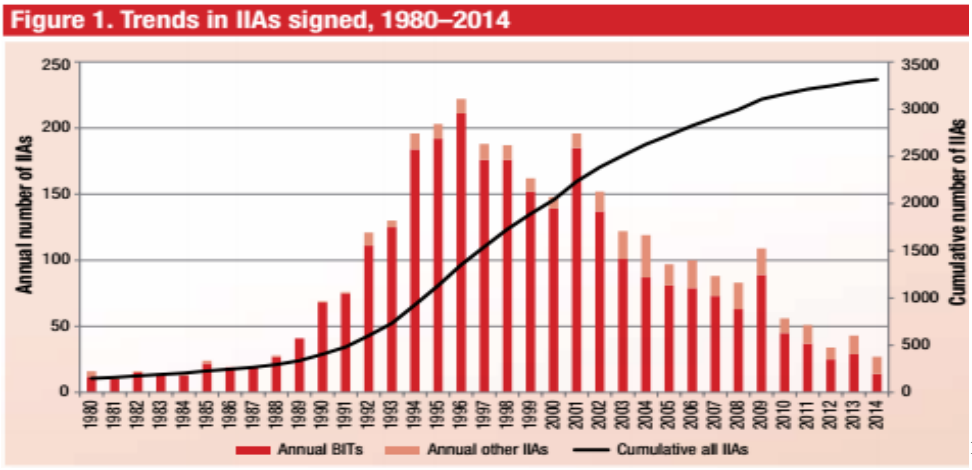
[113] Newcombe and Paradell (n 83) 41.
[114] Salacuse (n 75) 436.
[115] Newcombe and Paradell (n 83) 41.
[116] ibid 43.
[117] ibid 42.
[118] Jonathan Bonnitcha, *Substantive Protection under Investment Treaties a Legal and Economic Analysis* (Cambridge University Press 2014) 2.
[119] Newcombe and Paradell (n 83) 45.
[120] Dolzer and Schreuer (n 12) 6–7.
[121] Schill (n 86) 41.; Andrew Paul Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Wolters Kluwer Law & Business ; Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers 2009) 47, the number of BITs in fact quintupled during said decade.
[122] ibid.
[123] Newcombe and Paradell (n 78) 43-4.

It's especially noteworthy to observe the fundamental change of philosophy towards foreign investment in numerous Latin American states; a region that used to rely on the once prominent Calvo Doctrine; 'premised upon the notion that jurisdiction over investment disputes rests with the domestic courts of the host State and that foreign investors are entitled to the same rights as nationals,'[124] but has now, mostly, shifted its sights towards international economic cooperation, resulting in the frequent conclusion of BITs.[125] Consequently, the flow of FDI to Latin America has increased rapidly,[126] a prime example being the case of Chile, which has become renowned for its achievements in attracting FDI;[127] positioning itself as the 11th largest FDI recipient in the world in 2012.[128]

Gradually realizing the need for further investment protection for their nationals as a way to foster economic development, developing states became involved, primarily by concluding BITs,[129] resulting in a remarkable increase of a new generation of BITs,[130] so-called 2nd generation BITs. The increase has been rapid; in 1990, there were only 42 2nd generation BITs, but by the end of 2006 that number had risen to 679, representing just over a quarter of all BITs.[131] Due to the explosion of 2nd generation BITs, the number of BITs has reached a new level as it's now estimated that BITs are close to 3,000 in number,[132] with at least 179 countries having concluded one or more BIT.[133] Worth mentioning is the wide difference in the number of BITs concluded by states. Germany and China have been particularly active; concluding

[124] Mary Helen Mourra, 'The Conflicts and Controversies in Latin American Treaty-Based Disputes', *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (2008) 8; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, Oxford University Press 2012): As noted by Dolzer and Schreuer, the Calvo Doctrine entailed a complete lack of protection for foreign investors, preventing them from exercising diplomatic protection or accessing international tribunals.
[125] Schill (n 86) 42. It must however be emphasized that not all Latin American states have embraced economic cooperation and the 'theoretical' framework discussed. Venezuela has for example long opposed the BIT system, while Brazil, for both economical and political reasons has not ratified any of the 14 BITs they signed in the 1990's, in essence ignoring the international arbitration system.
[126] It must be noted that BIT practice is however not a absolute prerequisite for attracting FDI, as the case of Brazil has demonstrated; attracting a steady flow of FDI through the years, in spite of having not ratified any BITs.
[127] Karen Poniachik, 'Chile's FDI Policy: Past Experience and Future Challenges.' (2002) 3.
[128] United Nations Conference on Trade and Development, *World Investment Report 2013* (n 39) xiv.
[129] Salacuse (n 75) 441.
[130] Dolzer and Schreuer (n 12) 7.
[131] Newcombe and Paradell (n 83) 58.
[132] Dolzer and Schreuer (n 12) 13; UNCTAD, 'International Investment Agreements Navigator' (*Investment Policy Hub*) <http://investmentpolicyhub.unctad.org/IIA> accessed 15 April 2015 As of April 15th, 2015, the exact number of BITs worldwide was 2922.
[133] Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 1.

over 100 BITs,[134] while Iceland for example has only concluded 7.[135] However, as the UNCTAD histogram below illustrates, the discussed rapid growth of BITs has undeniably decelerated in recent years. Since 2001, the number of IIAs concluded has gradually declined, a development that is in contrast with the rise in conclusion of free trade agreements and other treaties on economic collaboration comprising investment provisions.[136]



[137]

Figure 1

While there were on average 4 IIAs concluded weekly from 1994-1996, the number was down to only one per week in the years of 2010-2012. 2012 in particular was a down year, as only 30 IIAs were concluded, thereof 20 BITs.[138]

3.2 International Centre for Settlement of Investment Disputes (ICSID)

Although the body of substantive protections (BITs) forms the basis of contemporary investment protection in IIL[139] it requires an effective enforcement mechanism for it to have a 'real-world force'.[140] As former Supreme Court Justice Wendell Holmes noted in one of his judgments: 'legal obligations that exist, but cannot be enforced, are ghosts that are seen in the law but that are elusive to the grasp'.[141] In order to avoid this predicament, BITs, usually

[134] Dolzer and Schreuer (n 12) 13.
[135] Utanríkisráðuneytið, 'Fjárfestingasamningar' (*Utanríkisráðuneytið*) <http://www.utanrikisraduneyti.is/nyr-starfssvid/vidskiptasvid/vidskiptasamningar/verkefni/nr/5484> accessed 27 March 2015. However, if the BIT between EFTA and Singapore and the BIT between the three EFTA states of Iceland, Swiss and Liechtenstein with South Korea are included, Iceland has concluded 9 BITs.
[136] United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations 2007) 1.
[137] UNCTAD, 'Recent Trends in IIAs and ISDs' (2015) 1 2 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 15 April 2015.
[138] United Nations Conference on Trade and Development, *World Investment Report 2013* (n 39) 101.
[139] Rubins (n 96) 190.
[140] Mortenson (n 10) 263.
[141] *The Western Maid, 257 US 419 (1922)* (US Supreme Court) 433.

through provisions for international arbitration, also offer procedural guarantees in the event that a dispute between investors and host states arises, the majority of which refer to ICSID, as the principle forum.[142]

Established in 1966 'under the auspices of the World Bank'[143] ICSID became the first universal forum[144] devised entirely for the resolution of investor-state investment disputes.[145] Prior to its establishment, investment disputes were primarily resolved through the use of diplomatic protection;[146] a restricted and archaic process, reminiscent of an earlier era of 'gunboat diplomacy';[147] with states, at times, resorting to the use of military force to enforce diplomatic protection claims.[148] By providing facilities for the settlement of investor-state investment disputes,[149] ICSID was to remove the large-scale impediments and risks associated with FDI,[150] and thus 'stimulate foreign investment and hence economic development by improving the standard of protection for foreign investments and the overall investment climate'.[151] The importance of ICSID is therefore difficult to overstate. Not only has it fundamentally contributed to IIL's rapid development,[152] its establishment greatly benefitted both foreign investors and host states. Foreign investors gained direct recourse for the first time to an effective and de-politicized enforcement mechanism for pursuing claims against host states that infringed their rights. At the same time contracting states were able to offer investors an effective remedy for investment settlements, and therefore attract more FDI;[153] in a more

[142] Aaken (n 28) 8.
[143] Newcombe and Paradell (n 83) 27.
[144] Schill (n 81) 45; ICSID is a forum, and not an International court or tribunal. ICSID does therefore not in itself adjudicate investor-state investment disputes. It however provides the neccessary institutional framework, with the settlement of disputes primarily taking place through Ad Hoc arbitral tribunals.
[145] Bishop, Crawford and Reisman (n 20) 5.
[146] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 97.
[147] Muchlinski (n 84) 362; Dugan (n 48): The use of the term 'Gunboat Diplomacy', although dramatic in tone, was no exaggeration as 'it was the literal practice of capital-exporting nations well into the 1890's'.
[148] Newcombe and Paradell (n 83) 9.
[149] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")' Section 1, Article 1, Para 2; Francisco Orrego Vicuña and Lauterpacht Research Centre for International Law, International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization (Cambridge University Press 2004). 'ICSID's central jurisdictional task is to decide disputes between private investors and states, it has no jurisdiction to arbitrate disputes between two states or between two private entities'.
[150] Yaraslau Kryvoi, *International Centre for Settlement of Investment Disputes* (Kluwer Law International 2010) 15.
[151] Schreuer, 'The Dynamic Evolution of the ICSID System' (n 90) 17.
[152] Alvarez and others (n 31) 123.
[153] Schreuer, 'Investment Arbitration' (n 77) 296–7.

advanced investment climate. After facing a slow start,[154] with its first case[155] not registered until 1972,[156] ICSID is now the foremost arbitral institution in the field of investor-state investment disputes.[157] With the last fifteen years marking an era of growth for ICSID, echoing the rapid growth of cross-border investment,[158] ICSID's caseload has surged from an average of only roughly one case per year from 1972-1992 to seeing upwards of 30 cases being filed yearly since 2003, reaching an all-time high in 2012, when 50 cases were filed.[159] ICSID's symbiotic relationship with BITs[160] is seen as the primary reason for this growth.[161]

Number of ICSID cases from 1972 to 2014

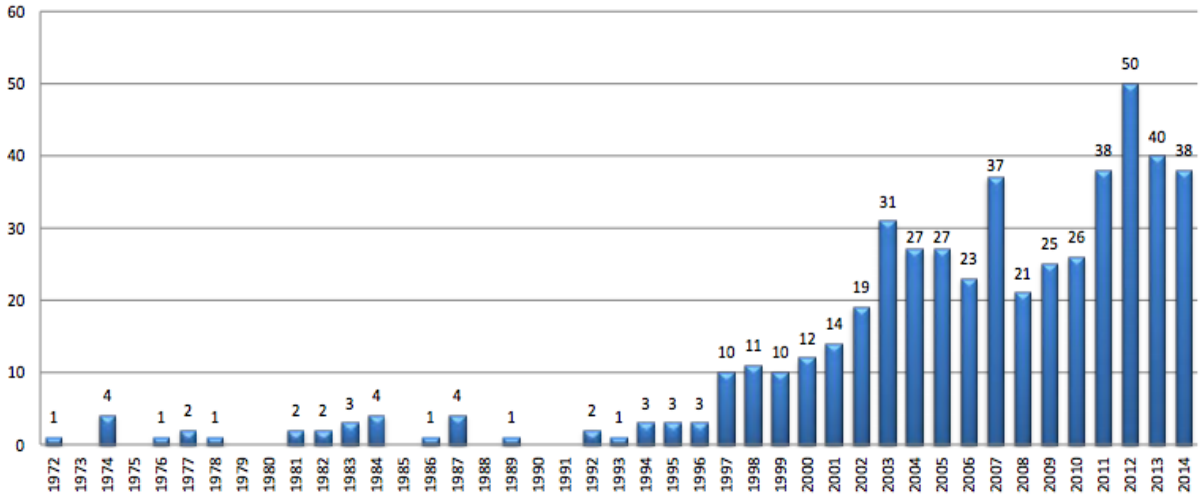


Figure 2 [162]

[154] Rainer Hofmann and Christian J Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (1 Aufl, Nomos 2007) 19.
[155] *Holiday Inns SA and others v Kingdom of Morocco*, ICSID Case No ARB/72/1.
[156] Salacuse (n 75) 439 This has mainly been attributed to the hesitancy of member states in giving the specific consent required for ICSID jurisdiction to be exercised.
[157] ICSID, 'About ICSID' (n 16) 1.
[158] 'Background Information on the International Centre For Settlement Of Investment Disputes (ICSID)' (ICSID 2005) 4. <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf> accessed 28 February 2015.
[159] ICSID, 'The ICSID Caseload - Statistics (Issue 2015-1)' (2015) 7 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf> accessed 28 February 2015.
[160] Symbiotic in the sense that the majority of BITs provide for ICSID jurisdiction.
[161] Kathleen S McArthur and Pablo A Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28 The Review of Litigation 559, 560; José E Alvarez and others (eds), The Evolving International Investment Regime: Expectations, Realities, Options (Oxford University Press 2011) 122.
[162] ICSID, 'The ICSID Caseload - Statistics (Issue 2015-1)' (n 159) 7.

3.2.1 Direct recourse

Established due to the absence of transnational remedies for foreign investors under customary international law,[163] diplomatic protection proved incapable of providing investors with adequate protection for their investments. Not only did it require foreign investors to exhaust all local remedies, the efficacy of which was a cause for concern,[164] prior to seeking other ways of enforcement, it provided them with no direct recourse for initiating a claim against a foreign government.[165] The reason being, that the exercise of diplomatic protection is under customary international law considered the right of the state and not of the investor, as the *Mavrommatis* case,[166] and subsequent cases of the International Court of Justice (ICJ), which validated the 'Mavrommatis formulation',[167] manifestly established:[168]

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.[169]

As a result, foreign investors, under diplomatic protection, had no control over the investment dispute proceedings. Full control had to be ceded to their home state government, which was provided the authority to decide if, and when the right to diplomatic protection would be exercised.[170] As the well-known *Barcelona Traction*[171] case clearly demonstrated, this left foreign investors in a precarious situation, with the ICJ concluding that under diplomatic protection, the home state not only had no legal obligation to purse its national investor's case, the decision on whether diplomatic protection would be exercised could be left up to the political discretion of the home state government:[172]

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[163] Schreuer, *The ICSID Convention* (n 72) 415.
[164] Dugan (n 48) 15.
[165] Dolzer and Schreuer (n 12) 232.
[166] *Mavrommatis Palestine Concessions, Judgment No 2, Series A* (The Permanent Court of International Justice (PCIJ)).
[167] Parlett (n 73) 94.
[168] ibid 89. There have, however, certainly been cases where states (in particular capital-exporting states) initiate arbitrational proceedings on behalf of their nationals on the basis of diplomatic protection, only to lose interest in the process of diplomatic protection, for example after having lost a case before the ICJ in spite of the court finding evidence of legal breach. The ICJ cases of *ELSI v. Italy* and *Djallo v. Congo*, among others, serve as precedent for this.
[169] *Mavrommatis Palestine Concessions, Judgment No 2, Series A* (n 166) 12.
[170] Carmen Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (M Nijhoff Publishers 2001) 59.
[171] *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Second Phase* (International Court of Justice (ICJ)).
[172] Malcolm D Evans (ed), *International Law* (3rd ed, Oxford University Press 2010) 476.

> *The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.* It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, *the State enjoys complete freedom of action*.[173]

With this in mind, it should come as no wonder, that in the view of Dr. Aron Broches, the 'principal architect' of ICSID,[174] the most important legal aspect of ICSID is:

> (…) that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a state in an international forum, thus contributing to the growing recognition of the individual as a subject of international law.[175]

In line with the mounting recognition of private investors as a subject of international law, ICSID thus avowed to provide foreign investors with direct recourse to its international arbitration,[176] which, as, professor Sir Elihu Lauterpacht noted, represented 'significant new developments'[177] in international law and the practice of states:

> For the first time a system was instituted under which non-State entities—corporations or individuals—could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the States parties.[178]

By virtue of this direct recourse, an anomaly in international law,[179] IIL gained immeasurable influence; as foreign investors would much rather pursue their own case than cede full control to their home state government, as was previously the case with diplomatic protection.[180] 'Insulated from the arbitrariness of the practice of diplomatic protection', [181] foreign investors legal position 'vis-à-vis' the host state also advanced considerably.[182] Not only did they obtain more control over the arbitral proceedings, allowing them to affect the conclusion of the case

[173] *Case Concerning The Barcelona Traction, Light and Power Company, Limited. (Belgium v. Spain) Second Phase* (n 171) Para 79. (emphasis added).
[174] Schreuer, *The ICSID Convention* (n 72) 2.
[175] Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (M Nijhoff 1995) 198.
[176] Schreuer, *The ICSID Convention* (n 72) 160.
[177] ibid xi.
[178] ibid.
[179] Waibel (n 97) 539.
[180] ibid.
[181] Florian Grisel, 'The Sources of Foreign Investment Law', *The Foundations of International Investment Law: Bringing Theory Into Practice* (2014) 245.
[182] Christoph Schreuer, 'Investment Protection and International Relations', *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (2007) 346.

by putting forth legal arguments that better fit their situation than that of their home state,[183] they gained access to an impartial forum in which they can file their claims directly against host state governments.[184]

3.2.2 De-politicized investment disputes

The direct recourse to ICSID not only benefitted investors as noted above, as contracting states also benefitted greatly from the disencumbering of diplomatic protection. Under diplomatic protection, there existed a risk that political relationships of states would suffer, as they had to become directly involved in decidedly politicized investment disputes.[185] This could instigate detrimental diplomatic conflicts and 'destructive zero-sum games between States affected by the conflict',[186] at times resulting in the use of military force.[187] Considering this, the drafters of the ICSID convention incorporated a provision in the Convention barring contracting states from exercising diplomatic protection on behalf of their national investors,[188] as is evidently expressed in Article 27:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.[189]

By prohibiting the use of diplomatic protection, ICSID transferred the settlement of investments 'from the realm of politics and diplomacy'.[190] In doing so, ICSID provided contracting states with a de-politicized forum 'that carefully balances the interests and requirements of all the parties involved',[191] allowing investment disputes to be arbitrated without any interference from both host and home states.[192] This development was of paramount importance for contracting states. Not only did it improve their investment climate,

[183] Grisel (n 181) 245.
[184] McArthur and Ormachea (n 161) 583.
[185] Ibrahim FI Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 ICSID Review - Foreign Investment Law Journal 1, 1.
[186] Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards A Goal-Based Empirical Agenda' (2012) 36 Fordham International Law Journal 1, 12.
[187] Schreuer, 'Investment Protection and International Relations' (n 182) 345.
[188] ibid 346–7.
[189] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")' (n 149) Article 27.
[190] World Bank, *The History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol II (1970) 464.
[191] Shihata (n 185) 5.
[192] Newcombe and Paradell (n 83) 28.

fashioning an impetus for FDI,[193] it allowed them to avoid the previously discussed interstate confrontation diplomatic protection frequently led to, thus 'liberating a tense space between states to be employed for building constructive relationships'.[194]

Having been particularly exposed to the use of diplomatic protection and military force; encountering numerous armed intrusions and occupations by foreign forces,[195] the primary beneficiaries of ICSID's de-politicization efforts were seen to be Latin American states. In fact, the notion of de-politicization may have encouraged some formerly indifferent and opposed Latin American states to join ICSID.[196]

3.2.3 Enforcement mechanism

From the onset, it has been recognized that ICSID's enforcement capabilities are unlike that of any other arbitral institution.[197] Providing parties with 'a complete, exclusive and closed jurisdictional system, insulated from national law' [198] ICSID aims at safeguarding the effectiveness of an ICSID award after it has been adjudicated,[199] by encompassing authoritative provisions, requiring contracting states to enforce awards rendered against them.[200] With the effectiveness of international dispute settlement altogether depending on whether the arbitral award can be enforced,[201] the unusually high level of enforceability of ICSID awards[202] is of paramount importance for foreign investors wishing to rely on ICSID.

Not only are ICSID awards final and binding (*res judicata*),[203] and as such, not subject to review and possible subsequential challenge of validity by domestic courts,[204] contracting states are legally required to recognize ICSID awards 'as if it were a final judgment of a court

[193] Schreuer, 'Investment Protection and International Relations' (n 182) 346.
[194] Puig (n 186) 12.
[195] Shihata (n 185) 1.
[196] Sergio Puig, 'Emergence & Dynamism In International Organizations: ICSID, Investor-State Arbitration & International Investment Law' (2013) 44 Georgetown Journal of International Law 3, 17.
[197] CF Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation.' (1976) 9 Vanderbilt Journal of Transnational Law 793, 815.
[198] Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID Review - Foreign Investment Law Journal 287, 288.
[199] Shihata (n 185) 10.
[200] Dany Khayat, 'Enforcement of Awards in ICSID Arbitration' [2010] International Arbitration Perspectives 1, 15.
[201] Jan van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arbitration International 1, 2.
[202] Yannaca-Small (n 93) 692.
[203] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")' (n 149) Art. 53. I.e.
[204] Khayat (n 200) 16.

in that State'.[205] Furthermore, with ICSID tribunals having a great degree of control over the dispute at hand, including the choice of procedure and substantive law, domestic courts 'have no jurisdiction to support or intervene directly in ICSID proceedings'.[206]

The *res judicata* effect makes defaulting on an ICSID award considerably more problematic then failing to comply with awards of other arbitral tribunals,[207] such as of the New York Convention.[208] While an independent ICSID ad hoc committee can only annul ICSID awards, which excludes domestic courts from reviewing the facts of the award,[209] the New York Convention, domestic courts are granted the authority to review the award.[210] This may cause problems for prevailing investors, as the role of domestic courts, may, in certain circumstances complicate and elongate the enforcement of New York Convention awards.

Further distinguishing ICSID's enforcement capabilities from that of other arbitral tribunals are its close ties with the World Bank,[211] arguably the foremost lending institution in the world. As ICSID is one of the five divisions of the World Bank,[212] most contracting states find it imprudent to endanger their position with the Bank by failing to comply with an ICSID award.[213] Also, and this is of great significance for foreign investors wishing to submit their claims to ICSID; any violation of ICSID awards automatically becomes a violation of international law as ICSID is supported by the Convention, a multilateral treaty,[214] signed by 159 states.[215] Considering this, the drafters of the ICSID Convention never contemplated non-compliance of parties to become a problem once ICSID was established, assuming that the

[205] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")' (n 149) Art. 54 (1).
[206] Rubins (n 96) 316.
[207] Aaken (n 28) 9–10. As Aaken rightly remarks, the effect of *res judicata* allows for the execution of an ICSID award if the host state has any property (e.g. bank accounts) in the contracting states, unless the rule on state immunity comes into play.
[208] 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention)'.
[209] Newcombe and Paradell (n 83) 29.
[210] Aaken (n 28) 10. See articles 5-7 in 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (The New York Convention).
[211] Khayat (n 200) 15.
[212] 'www.worldbank.org' <http://www.worldbank.org/en/about> accessed 22 March 2015.
[213] Christoph Schreuer, 'The World Bank/ICSID Dispute Settlement Procedures', *Settlement of Disputes in Tax Treaty Law* (Linde 2002) 582.
[214] Bishop, Crawford and Reisman (n 20) 11.
[215] ICSID, 'List of Contracting States and Other Signatories of the Convention (as of April 18, 2015)' (2015) <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

principle of *pacta sunt servanda*,[216] as well as the 'international stigma'[217] of non-compliance, namely the adverse effect ancillary consequences of non-compliance, such as possible irreparable damage to the host state's reputation as an attractive venue for foreign investment,[218] would lead to compliance by all contracting states.[219]

For the foregoing reasons, ICSID arbitration has to be considered a more attractive option for foreign investors than that of other arbitral tribunals.[220] Particularly when taking into account the expansive recognition of ICSID awards, as well as their previously discussed high level of enforceability, which can only benefit both parties, as it ensures a certain degree of legal certainty, given the inevitability of arbitration and eventual adjudication.[221] Furthermore, with investment disputes under the ICSID system being arbitrated without any interference from the host and home states, investors can rest assured that the states they are in litigation with have no influence on the verdict, as ICSID's commanding enforcement provisions ensure that domestic courts 'have no jurisdiction to support or intervene directly in ICSID proceedings'.[222]

3.2.3.1 Increasing criticism and enforcement difficulties

Given the variety of ways ICSID has improved foreign investors rights within international law, it is difficult to overstate its historical importance in IIL. In fact, it may arguably be 'the boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment'.[223] ICSID is however not without its flaws or immune to criticism, as the cracks that have surfaced in recent years have demonstrated.[224] In particular, Argentina's invocation of the state immunity defence and the denuncation of several Latin American states have proved a thorn in ICSID's side, as the following discussion will demonstrate.

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[216] Stanimir A Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention.', *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* 326–7.
[217] James Calvin Baker, *Foreign Direct Investment in Less Developed Countries: The Role of ICSID and MIGA* (Quorum 1999) 47.
[218] Shihata (n 185) 12.
[219] Alexandrov (n 216) 326–7.; Christoph Schreuer, The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (2nd ed, Cambridge University Press 2009) 1087-8.
[220] Aaken (n 28) 14.
[221] Baker (n 217) 47.
[222] Rubins (n 96) 316.
[223] Dolzer and Schreuer (n 12) 9.
[224] Ilija Mitrev Penusliski, 'A Dispute Systems Design Diagnosis of ICSID', *The Backlash Against Investment Arbitration: Perceptions and Reality* 520.

The rule on state immunity, a concept that can be traced back to the origins of international law,[225] represents a potential hindrance to the execution of ICSID awards.[226] As stipulated in Article 55: 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'.[227] As a result, a successful invocation of Article 55 by a contracting state may prevent the forced execution of an ICSID award,[228] to the obvious dismay of the prevailing investor. Throughout ICSID's history, Article 55 has however seldom proved a hindrance for the prevailing investor, as the majority of defendant states have complied with ICSID awards rendered against them.[229]

Given the lack of any universal compulsory authority in international arbitration, this prevalent compliance has been considered 'a saving grace for international arbitration'.[230] There have however been isolated examples of Article 55 non-compliance, where states have successfully invocated the state immunity defence. The most recent illustration - and by far the most difficult one for ICSID and foreign investors, is the case of Argentina,[231] which has following a dire financial crisis been outspoken about its aim to fight by all possible means the execution of arbitral awards rendered against it.[232] Having already failed to pay numerous ICSID awards,[233] Argentina announced in 2013, its forthcoming withdrawal from ICSID. Claiming the move would allow Argentina to reclaim its regulatory sovereignty, Eduardo Barcesat, the chief legal advisor of the Argentine treasury, harshly criticized ICSID, calling it 'a tribunal of butchers that only rules in favour of multinational companies'.[234] As of now, Argentina remains a party to ICSID. However, considering the words of Mr Barcesat and Argentina's forthright stance

[225] Dugan (n 48) 14.
[226] *Yannaca-Small (n 93) 693.*
[227] 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")' (n 143) Article 55.
[228] ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (ICSID 1965) Para 43 <http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR_English-final.pdf>.
[229] Alexandrov (n 216) 329. The previously discussed international stigma non-compliance result in has undeniably been one of the key reasons for this near universal compliance.
[230] Dugan (n 48) 676.
[231] Andrea K Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards.', *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* 310.
[232] Alexandrov (n 216) 311.
[233] Examples being the awards of *CMS Gas Transmission Company v. Argentine Republic* (the award was later purchased and assigned to Blue Ridge Investments) and *Azurix Corporation v. Argentine Republic*, which were decided in 2005 and 2006 respectively. Embassy of the United States, 'GSP Fact Sheet' (*Embassy of the United States - Buenos Aires Argentina*) <http://argentina.usembassy.gov/gsp2.html> accessed 5 May 2015.
[234] 'Argentina in the Process of Quitting from World Bank Investment Disputes Centre' (*MercoPress*, 31 January 2013) <http://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-disputes-centre> accessed 22 March 2015.

on the many defects of the ICSID system, as well as its denial to pay numerous awards rendered against it, it is probably not long until that changes.

As the case of Argentina, arguably IIL's black sheep, has demonstrated, prevailing investors are finding it gradually more difficult to enforce ICSID awards, when defendant states invoke the state immunity defence.[235] The material execution of awards, has therefore proven to be the weak link of ICSID' in an otherwise efficient arbitration mechanism,[236] calling into question whether ICSID awards are in fact as 'self-enforcing',[237] as had previously been assumed, and clarifying why Article 55 is seen in some quarters as 'the Achilles heel of the Convention'.[238]

Argentina is not the only Latin American state to oppose ICSID, as the opposition towards ICSID and investment arbitration in general has increasingly amounted in the region,[239] with several states openly denouncing and criticizing ICSID.[240] One example being the verbal attack on ICSID by Raphael Correa, the president of Ecuador in May of 2009, where he declared Ecuador's withdrawal from ICSID to be essential for 'the liberation of our countries because [it] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank'.[241] The denouncing states have amongst other cited ICSID's bias towards capital-exporting states, its close ties with the World Bank, a troubling lack of legal consistency given the organizational lack of *stare decisis*[242] and crippling costs of ICSID defence,[243] which has in jurisprudence amounted to nearly 8 million dollars,[244] as the reasons for their denunciation.

[235] Bjorklund (n 231) 303, 310.
[236] Schreuer, *The ICSID Convention* (n 72) 1154.
[237] Lucy Reed, *Guide to ICSID Arbitration* (Kluwer Law International 2004) 107.
[238] Schreuer, *The ICSID Convention* (n 72) 1154.
[239] 'ICSID in Crisis: Straight-Jacket or Investment Protection?' (Bretton Woods 2009) <http://www.brettonwoodsproject.org/2009/07/art-564878/> accessed 27 November 2014.
[240] Nicolas Boeglin, 'ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives.' (*bilaterals.org*, 2013) <http://www.bilaterals.org/?icsid-and-latin-america-criticisms> accessed 5 May 2015.
[241] 'ICSID in Crisis: Straight-Jacket or Investment Protection?' (n 239).
[242] Silvia Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Arbitration.' (2011) 2 Bejing Law Review 134, 134–5.
[243] Nakib Nasrullah, 'FDI Related Dispute Settlement and the Role of ICSID: Striking Balance Between Developed and Developing Economies' (2013) 1 The International Law Annual 87, 98.
[244] *Ioannis Kardassopulos and Ron Fuchs v The Republic of Georgia,* ICSID Cases No ARB/05/18 and ARB/07/15. Award Para 692.

Although the opposition towards ICSID has by far been most vocal in Latin America, it has not been limited to that region. In April of 2011, Australia unexpectedly revealed it would no longer endorse investment arbitration, citing the inequality of greater legal rights being provided for foreign than domestic investors and the restrictions investment arbitration inherently places on the Australian government's regulatory freedoms.[245] The Australian government furthermore stated it would suspend the conclusion of IIAs with developing states.[246]

Considering the foregoing, it has become evident that not all is well within the ICSID system. Consequently, numerous scholars have questioned the legitimacy of ICSID[247] and whether ICSID and the international arbitration system have lost some of its initial appeal that attracted both foreign investors and states alike.[248] This author is however of the view that it is still far too premature to make any such doomsday declarations regarding the fate of ICSID and international investment arbitration. The majority of the 'larger' states have shown little or no indication of any real dissatisfaction with ICSID and the arbitration system, as is evident by the high number of cases registered by ICSID in recent years.[249]

[245] This denunciation of investment arbitration by Australia may also be linked to its dissatisfaction with the so-called Philip Morris case, in which the Asian subsidiary of Philip Morris initiated UNCITRAL arbitral proceedings against Australia in response to its new legislation that further limits the presentation of brand names on cigarette packages.
[246] Australian Government: Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' 14 <http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx> accessed 11 December 2014.
[247] For example; William W Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System.' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199.
[248] For example; Leon E Trakman, 'The ICSID Under Siege' (2012) 45 Cornell International Law Journal 603.
[249] See the histogram on page 19, which illustrates the number of ICSID cases registered since 1972.

4 The notion of 'investment'

The notion of 'investment' is a comparatively recent term in international law. Not so long ago, international law and early IIAs relied on the notion of 'foreign property', rather than the notion of 'investment'.[250] However, as BITs succeeded FCN's, the purpose of IIAs changed in line with a transformed economic environement.[251] As a result 'the static notion of property' was 'substituted by the more dynamic notion of investment which implies a certain duration and movement'.[252] Following its incorporation in international law, the notion of investment, given its significance and ever changing nature, has eluded definition; 'There is no single, static conception of what constitutes foreign investment. Rather, the conception has changed over time as the nature of economic relations has changed'.[253]

4.1 A state of flux

As 'investment' is one of the key terms in IIL, in particular in investor-state arbitration, it would be reasonable to assume that there exists a consensus on its meaning. However, as it is generally acknowledged there is no universal definition of the term,[254] consensus has clearly not been reached. This has led to a debate on 'investment', which has spanned decades, and been at the forefront of IIL. The often-complex debate can be traced all the way back to the non-definition of 'investment' in Article 25 of the Convention:[255]

> No 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 disputes which they would or would not consider submitting to the Centre (Article 25(4)).[256]

Although it was reported that 'no attempt was made to define the term investment' during the draft of the Convention, that is far from the truth as the following discussion will demonstrate. Defining 'investment' was a contested issue during the drafting of the convention,[257] with several rounds of discussions devoted to delineating the term.[258] While numerous experts and delegates, primarily from developing states, favoured a clear-cut definition of 'investment',

[250] United Nations Conference on Trade and Development, *Scope and Definition* (United Nations 1999) 9.
[251] Dolzer and Schreuer (n 12) 60.
[252] Organisation for Economic Co-operation and Development (OECD) (n 14) 47.
[253] United Nations Conference on Trade and Development, *Scope and Definition* (n 250) 7.
[254] Organisation for Economic Co-operation and Development (OECD) (n 14) 46.
[255] Dolzer and Schreuer (n 12) 61, 65.
[256] ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 228) Para 27. Reproduced in *ICSID Convention, Regulation and Rules* (ICSID/15/Rev 1, January 2003 (2003).
[257] Antonio R Parra, *The History of ICSID* (Oxford University Press 2012) 79.
[258] Dolzer and Schreuer (n 12) 65.

others preferred 'a more flexible, open approach'.[259] Aron Broches, then General Counsel of the World Bank, and the 'founding father' of ICSID,[260] was very much in the second group; strongly urging against any restriction or definition of ICSID disputes, as it would, in his view, inherently lead to jurisdictional disputes and make it problematical to find a suitable definition.[261] With opinions thus differing significantly between these two 'camps', not a single proposal presented by state representatives and the World Bank Group, during the discussions, decreed a discernible consensus.[262] As a result, Broches decided on the 'pragmatic' and 'diplomatic' solution of leaving the definition up to the parties in each case,[263] as the prerequisite for ICSID jurisdiction was the consent of both parties.[264] The fact that the Convention contains no definition of 'investment' was therefore no coincidence, and certainly not an 'exasperated throw of hands in the hair by the drafters',[265] as described by G.R. Delaume briefly after the Convention was ratified:

> The term "investment" is not defined in the Convention. This omission is intentional. To give a comprehensive definition…would have been of limited interest since any such definition would have been too broad to serve a useful purpose (or) might have arbitrarily limited the scope of the Convention by making it impossible for the parties to refer to the Centre a dispute which would be considered by the parties as a genuine "investment" dispute though such dispute would not be one of those included in the definition in the Convention.[266]

4.2 Article 25: Governing the access to ICSID's gates

As the international investment protection framework centres on the effectiveness of a consistent procedural mechanism for enforcing BIT's substantive guarantees, the rules governing access to ICSID are of great significance to its efficacy.[267] Article 25 rules this access by setting forth ICSID's main jurisdictional prerequisite; its jurisdiction only covers disputes arising 'directly out of an *investment'*.[268] With the convention thus specializing in the settlement of investment disputes,[269] access to ICSID wholly depends on the existence of an investment, as other disputes are excluded.[270] This 'investment' prerequisite has been highly

[259] Parra (n 257) 79.
[260] Andreas F Lowenfeld, *International Economic Law* (2nd ed, Oxford University Press 2008) 539.
[261] Schreuer, *The ICSID Convention* (n 72) 114.
[262] Schreuer, *The ICSID Convention* (n 71) 114.
[263] ibid.
[264] ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 228) para 27.
[265] Mortenson (n 10) 280.
[266] Delaume (n 17) 70.
[267] Mortenson (n 10) 267.
[268] (emphasis added).
[269] Hofmann and Tams (n 154) 17.
[270] Mortenson (n 10) 259.

controversial in jurisprudence and has seen a considerable shift in ICSID tribunal's approach in recent years.[271]

By limiting access to ICSID and its distinctively binding dispute resolution mechanism, 'investment' functions as the 'jurisdictional gateway for access to ICSID'.[272] If given a narrow and specific meaning, then a number of disputes that the parties have decided to submit to ICSID may have no forum for resolution. However, if given a comprehensive and flexible meaning, most, if not all, cases submitted to ICSID will be accepted as arising out of an 'investment'.[273]

Fedax v. Venezuela[274] was the first case where ICSID jurisdiction was challenged on the basis that the underlying economic activity did not constitute an 'investment' in accordance with Article 25.[275] The claimant, a company established in the Netherlands Antilles, had acquired six promissory notes issued by Venezuela, each for nearly USD 100.000. With Venezuela failing to make payments of the notes, Fedax initiated ICSID arbitral proceedings as allowed for by the applicable BIT, arguing that this failure of payment amounted to a violation of Venezuela's investment protection obligations. With ICSID specializing in the settlement investment disputes, the argument understandably relied on the promissory notes being considered an 'investment' pursuant to the BIT and Article 25. The tribunal concluded that the dispute obviously fit within the BITs comprehensive scope ('every kind of asset'), [276] as well as within the scope of Article 25, finding no evidence that ICSID's jurisdiction was restricted to foreign direct investments, as Venezuela had argued.[277]

Failing to gain access to ICSID can leave foreign investors in a precarious situation as ICSID is the key multilateral treaty in this field of law,[278] and as such handles the vast majority of

[271] ibid 268. The jurisprudence concerning the controversial 'investment' prerequisite will be discussed in further detail in chapter 5.2. *Deconstructing the jurisprudence*.
[272] Dolzer and Schreuer (n 12) 65.
[273] Bekker and others (n 13) 326.
[274] *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3 Decision of the Tribunal on Objections to Jurisdiction.
[275] Laurens JE Timmer, 'The Meaning of "Investment" as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre' (2012) 29 Journal of International Aribtration 367, 366.
[276] Parra (n 257) 225.
[277] *Fedax N.V. v. The Republic of Venezuela,* ICSID Case No. ARB/96/3. Decision of the Tribunal on Objections to Jurisdiction (n 274) Para 24 (emphasis added).
[278] Heiskanen (n 8) 51.

investor-state arbitrations.[279]Although other options are available for enforcing investment commitments, these options are scarce, not available in all cases and not as effective.[280] ICSID member states, and their investors, thus have a vested interest in accessing the framework in question, securing meaningful protection for their investments.[281] With access being limited to investment disputes, the notion of 'investment' as exemplified in Article 25 and the applicable BIT are of fundamental significance. Not only does the term act as the 'jurisdictional gateway for access to ICSID', it's also the cornerstone of the whole system of investment treaty protection, as an IIA, and its guarantees, only apply to an investment, made by an investor.[282]

4.3 BIT definitions of 'investment'

Although not the only source of relevance when defining 'investment', BITs have undeniably provided invaluable guidance regarding the notion of investment. Analysing their scope and application is therefore essential to the aim of this thesis.[283]

Along with the definition of 'investor' *(ratione personae)*, the definition of 'investment' *(ratione materiae)* determines the scope of applicability of BITs.[284] Proving the existence of an 'investment' under the applicable BIT, is therefore essential for an investor if he wants to benefit from the substantive and procedural rights of a BIT. [285] The procedural rights primarily being the option to proceed with a case before an ICSID tribunal, as ICSID is the 'key mechanism' for enforcing BITs substantive guarantees.[286]

By comparing the context of the first BIT concluded, in 1959 between Germany and Pakistan,[287] and Germany's BIT with Malaysia the year after,[288] with that of the modern BITs, it becomes clear that while the number of BITs has risen significantly, the changes in the

[279] Malik (n 9) 9.
[280] Mortenson (n 10) 259.
[281] Rovetta and Riviera (n 11) 75.
[282] Sattorova (n 6) 267.
[283] Due to their extremely wide extent, and the relatively limited word count of this thesis, a detailed analysis of their scope of application cannot be concluded. However, as their definitions of 'investment' are widely similar, the following review should suffice.
[284] Engela C Schlemmer, 'Investment, Investor, Nationality, and Shareholders', *The Oxford Handbook of International Adjudication* (Oxford University Press 2008) 51.
[285] Schill (n 86) 71.
[286] Mortenson (n 10) 258.
[287] 'Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Date of Signature 25 November 1959, Entry into Force 28 April 1962'.
[288] 'Agreement Between the Federal Republic of Germany and the Federation of Malaysia Concerning the Promotion and Reciprocal Protection of Investments, Date of Signature 22 Desember 1960, Entry into Force 6 June 1963'.

context of BITs have been fairly insignificant. The substantive provisions, including 'investment' definitions are at the core comparable, as most modern BITs include a broad definition, same as the first BITs. While there are certainly some differences in which categories are included, the similarities outweigh the differences.[289] The main difference is, as previously discussed, that modern BITs provide for direct recourse to international arbitration, starting with the BIT between Italy and Chad in 1969.

Although nearly all-modern BITs include similar definitions of 'investment',[290] that does not mean that a universal definition of 'investment' has been reached, and generalizing from these definitions should be treated with prudence.[291] The widely similar BIT definitions tend to be broad; open ended and non-exclusive due to the ever-evolving forms of investments.[292] When defining 'investment', most of them include the wording 'every kind of asset' which makes the scope of the BIT protection extremely vast.[293] The aim of this expanse scope is to recognize the reality that modern investments of capital take a multitude of forms.[294] It has also been considered difficult to outline a more detailed definition that would incorporate all the assets that parties wish to be protected by the BIT.[295] Consequently, Christoph H. Schreuer considers it difficult to envisage a commercial operation that is not covered by BIT definitions.[296] When reviewing the 'investment' definitions of modern BITs, such as the BIT between Austria and Uzbekistan,[297] one has to agree with Schreuer that the definitions are certainly comprehensive:

> For the purpose of this Agreement
>
> (1) "investment" means every kind of asset in the territory of one Contracting Party owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:
>
> a) an enterprise (being a legal person or any entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether

[289] Newcombe and Paradell (n 83) 42.
[290] Schreuer, *The ICSID Convention* (n 72) 122.
[291] ibid 124.
[292] Organisation for Economic Co-operation and Development (OECD) (n 14) 49.
[293] Malik (n 9) 6.
[294] Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim?' (2006) 22 Arbitration International 521, 2.
[295] United Nations Conference on Trade and Development, *Scope and Definition* (n 250) 62.
[296] Christoph Schreuer, 'Investment Arbitration: A Voyage of Discovery' (2005) 3 Oil, Gas & Energy Law 73, 75.
[297] 'Agreement between the Republic of Austria and the Republic of Uzbekistan for the Promotion and Protection of Investments, Signed on June 2, 2000, Entered into Force on August 18, 2001' <http://investmentpolicyhub.unctad.org/Download/TreatyFile/226>.

private or government owned or controlled, including a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organization);

b) shares, stocks and other forms of equity participation in an enterprise, and rights derived therefrom;

c) bonds, debentures, loans and other forms of debts and rights derived therefrom;

d) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

e) claims to money and claims to performance pursuant to a contract having an economic value;

f) intellectual and industrial property rights as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organization, including copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;

g) any rights conferred by law or contract or by virtue of any concessions, licenses, authorisations or permits to undertake an economic activity;

h) any other tangible and intangible, movable and immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.[298]

Given the comprehensive scope of modern BITs, such as that of the Austria-Uzbekistan BIT above, ICSID tribunals have in the overwhelming majority of cases found the disputed economic activity to be an 'investment' as defined in the applicable BIT.[299] It has been argued that this renders them impractical in assessing whether an economic activity constitutes an ICSID 'investment',[300] in particular when the disputed economic activity does not fit aptly within one of the identified categories.[301] Moreover, it has generated concern amongst some states, which consider it to go beyond what was envisaged when the BIT was negotiated.[302] Ultimately however, the comprehensive scope of BITs reflects one of the primary reasons for why states conclude BITs, to encourage, promote and protect foreign investment, in its multitude of forms.

[298] ibid Article 1 (1).
[299] Schreuer, *The ICSID Convention* (n 72) 124.
[300] Dugan (n 48) 247.
[301] Ibid 50.
[302] Yannaca-Small (n 93) 11.

5 Conflicts regarding the definition of 'investment'

For half a century, the deliberate decision not to define 'investment' in the Convention has caused complications in ICSID arbitral proceedings. Althought two competing approaches for defining 'investment' have emerged, neither has commanded a clear consensus.[303] Rather, 'the proposed solutions of tribunals are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals'.[304] As a result, it remains uncertain what constitutes an 'investment' in the sense of Article 25.

5.1 Objective v. subjective

From the onset, the dispute over the meaning of 'investment' has predominantly been framed by a conflict between the objective and subjective approaches.[305] Predicated on the notion that Article 25 'investment' has an autonomous[306] 'objective' meaning, acting as an unconditional restraint to ICSID jurisdiction,[307] the objective approach 'is confronted with the need to go beyond the understanding of the parties and find support for its interpretation outside the understanding of the drafters of the ICSID convention' [308] when defining the notion of 'investment'. Consequently, BIT definitions of 'investment' have, pursuant to the objective approach, limited influence on the notion of an ICSID 'investment',[309] as ICSID levies outer limits on 'investment'. What this means is that an economic activity qualifying as an 'investment' under the respective BIT, must also fulfil the jurisdictional requirements of Article 25 and 'constitute an investment in an objective sense', for ICSID jurisdiction to be granted.[310]

The academic basis for the objective approach can be found in the first edition of The *ICSID Convention: A commentary*, penned by the leading academic on the Convention,[311] Christoph

[303] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20. Award (n 19) Para 97.
[304] ibid Para 97.
[305] Sattorova (n 6) 269. As noted by Sattorova on page 271, this conflict between the competing approaches 'may be regarded as a manifestation of a more systematic tension between competing visions of international investment law'.
[306] Devashish Krishan, 'A Notion of ICSID Investment' in Todd Weiler (ed), *Investment Treaty Arbitration and International Law*, vol 1 (JurisNet 2008) 65.
[307] Tony Cole and Anuj Kumar Vaksha, 'Power-Conferring Treaties: The Meaning of "Investment" in the ICSID Convention' (2011) 24 Leiden Journal of International Law 305, 315.
[308] Dolzer and Schreuer (n 12) 74.
[309] Krishan (n 306) footnote 16, 66.
[310] Sattorova (n 6) 269.
[311] Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 253.

H. Schreuer.[312] Following a comprehensive review of relevant case law, Schreuer concluded that due to repeated unsuccessful attempts at reaching a general definition of 'investment', it would not be rational to attempt yet another definition. Identifying certain economic features that are characteristic for investments in general would however be possible. In his assessment these features, which will from now be known as the 'criteria approach', are:[313]

1) Certain duration
2) Regularity of profit and return
3) Assumption of risk
4) Substantial commitment
5) Significance for the host state development

It's important to note that, according to Schreuer, the features above were not to be considered as jurisdictional requirements to ICSID, but rather as typical characteristics of investment.[314] Although these points were to begin with only economical and didn't have any legal meaning, that is no longer the case, as the 'criteria approach', with the omission of one criterion, in essence became the legal definition of 'investment'.[315]

Contrary to the objective approach, the subjective approach requires no additionary revelatory search for the true meaning of 'investment' to be established,[316] as it attributes primary significance to BIT definitions of 'investment'. When framing the outer limits to the notion of 'investment',[317] proponents of the subjective approach have proposed that states, when giving consent to ICSID arbitration in their respective BITs, should alone define the notion of 'investment'.[318] Accordingly, as long as the underlying consent to arbitration identifies the activity or asset as an investment, ICSID should enforce no additional jurisdictional limits[319] as the prerequisites to ICSID jurisdiction have already been met through BIT consent. This understanding is primarily founded on an excerpt from a Report by the Executive Directors of

[312] Mortenson (n 10) 271.
[313] Schreuer, *The ICSID Convention* (n 72) 128.
[314] ibid.
[315] Dolzer and Schreuer (n 8) 66; Emmanuel Gaillard, 'Identify or Define? Reflections on The Evolution of The Concept of Investment in ICSID Practice.', International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer (2009) 404.
[316] ibid 74.
[317] Sattorova (n 6) 270.
[318] Krishan (n 306) 65.
[319] Cole and Vaksha (n 307) 315.

the ICSID Convention, where reasoning for the lack of 'investment' definition is given,[320] although, as previously discussed in chapter 4.1. *A state of flux*, this reasoning was erroneous, with the lack of definition being intentional. The subjective approach has consequently been decidedly submissive to host states' assessments regarding the classification of which economic operations they wish to grant protection, to the point that several tribunals have nearly rendered the definition of 'investment' hollow as it merely consolidates with the issue of party consent.[321]

Although the objective approach has undeniably gained more following in ICSID jurisprudence as well as within the academic community,[322] the often-complex debate on which view should prevail, still remains in full force with seemingly no end in sight.

5.2 Deconstructing the jurisprudence

Although it is ordinarily 'very easy to ascertain the existence of an investment',[323] case being 'the construction and operation of a power plant',[324] the notion of 'investment', due to its innate vagueness[325] and its often-cited significance, has been at the heart of investor-state disputes for over a decade. As a result, there are numerous ICSID cases that address the 'investment' debate. In the following subchapters, the most notable and relevant of these cases, as well as the competing approaches of 'investment', will be analysed with the aim of shedding a light on the meaning of 'investment' in arbitral jurisprudence.

In the previously discussed *Fedax v. Venezuela* case, the tribunal evaluated whether the dispute between the parties concerned an 'ordinary commercial transaction' rather than an 'investment', and would therefore fall outside ICSID's scope.[326] When making that evaluation, the tribunal became the first tribunal to apply Schreuer's 'criteria approach'.[327] In particular, the tribunal highlighted the significance of host state development when concluding that the disputed

[320] Michail Dekastros, 'Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention' (2013) 14 The Journal of World Investment & Trade : Law, Economics, Politics 286, 294.
[321] Mortenson (n 10) 269.
[322] Heiskanen (n 8) 59. In his paper, Heiskanen gives his reasoning for why that is. He believes, and this author agrees, that it's due to the simplicity of the subjective approach, which is inherently more limited in scholarly ambition than the objective approach.
[323] *Phoenix Action, Ltd v The Czech Republic,* ICSID Case No ARB/06/5 Award Para 79.
[324] ibid Para 79.
[325] Dugan (n 48) 247.
[326] Dolzer and Schreuer (n 12) 66.
[327] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008) 165; *Fedax N.V. v. The Republic of Venezuela,* ICSID Case No. ARB/96/3. Decision of the Tribunal on Objections to Jurisdiction (n 274) Para 43.

promissory notes satisfied the 'basic features of an investment'.[328] As the first case where the meaning of 'investment' was considered in detail, the Fedax case greatly influenced the maiden phase of ICSID jurisprudence.[329] Moreover, while IIL doesn't formally rely on the concept of binding precedent, it is evident that numerous tribunals have followed the 'criteria approach' as put forth by the Fedax tribunal,[330] starting with the tribunal in *Salini v. Morocco.*[331]

5.2.1 The 'Salini test'

The tribunal in *Salini v. Morocco* followed the same approach as *Fedax,*[332] but omitted the criteria of regularity of profit and return,[333] and thus adopted 'a four-pronged' test[334] for defining 'investment' (hereafter the 'Salini test'), virtually indistinguishable from Schreuer's 'criteria approach'.[335] Where the 'Salini test', which has been labelled an 'objective' interpretation of Article 25,[336] however differed from Schreuer's 'criteria approach' was the requirement it put forth; the four criteria were to be a set of mandatory requirements for ICSID jurisdiction to be granted:[337]

> The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […] 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.[338]

Although the Salini tribunal found no discrepancy between the notion of an ICSID investment and the definition in the applicable BIT that does not mean the objective and subjective approaches constantly generate identical results when defining the notion of 'investment'. Given the broad scope of modern BITs ('every kind of asset'), the subjective approach is perceived as being more investor 'friendly', while the objective approach more

[328] ibid Para 43. '(…) most importantly, there is clearly a significant relationship between the transaction and the development of the host State, as specifically required under the Law for issuing the pertinent financial requirement'.
[329] Dolzer and Schreuer (n 12) 66.
[330] Malik (n 9) 11.
[331] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco,* ICSID Case No ARB/00/4. Decision on Jurisdiction.
[332] In spite of this, the Salini tribunal somewhat downplayed the decision reached by the Fedax tribunal, noting that there had hardly been a real discussion of the issue in other cases. Parra (n 257) 278.
[333] ibid.
[334] Dugan (n 48) 265, Footnote 81.
[335] Mortenson (n 10) 272.
[336] Laurence Burger, 'The Trouble with Salini (Criticism of and Alternatives to the Famous Test)' (2013) 31 ASA Bulletin 521, 522.
[337] Mortenson (n 10) 272.
[338] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4. Decision on Jurisdiction (n 331) Para 52.

often results in ICSID jurisdiction being denied, given the entrenched set of objective criteria the economic activity has to meet for ICSID jurisdiction to be granted.[339]

5.2.1.1 Validating the 'Salini test'

As subsequent tribunals frequently cited and confirmed the 'Salini test',[340] whilst reaching even further than *Salini* in imposing the 'criteria approach' as a set of mandatory jurisdictional requirements,[341] its jurisdictional relevance in ICSID arbitral proceedings was established, at least for the time being.[342] In fact, the precedent it set carried so much weight in ICSID jurisprudence that its legality was regularly not challenged by parties, case being the awards of *Bayindir v. Pakistan*[343] and *Saipem v. Bangladesh*.[344]

Schreuer's 'criteria approach', with the exception of regularity of profit and return, which has seldom been considered relevant, was therefore altered into a regulatory set of requirements for access to ICSID, and in essence into a legal definition of 'investment', contrary to his description of the individual points as mere 'typical characteristics of investment'.[345] Schreuer has referred to this development as being 'unfortunate' and stated that his 'criteria approach' should not be seen as a list of separate jurisdictional requirements. To the contrary, the features should be assessed as a whole as was confirmed by the Salini tribunal:[346]

> 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.[347]

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[339] Heiskanen (n 8) 62.
[340] For example; *SGS Société Générale De Surveillance SA v Islamic Republic of Pakistan, ICSID Case No ARB/01/13 Decision of the Tribunal on Objections to Jurisdiction*; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islam Republic of Pakistan,* ICSID Case No ARB/03/29 Decision on Jurisdiction; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt,* ICSID Case No ARB/04/13 Decision on Jurisdiction; *Saipem S.pA v The People's Republic of Bangladesh,* ICSID Case No ARB/05/07 Decision on Jurisdiction and Recommendation on Provisional Measures.
[341] Mortenson (n 10) 273; For example the tribunal in *Joy Mining Machinery Limited v The Arab Republic of Egypt,* ICSID Case No ARB/03/11 Award on Jurisdiction, noting in Para 50 that: 'The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision'.
[342] Dolzer and Schreuer (n 12) 67.
[343] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islam Republic of Pakistan,* ICSID Case No. ARB/03/29. Decision on Jurisdiction (n 340).
[344] *Saipem S.p.A. v. The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07. Decision on Jurisdiction and Recommendation on Provisional Measures (n 340).
[345] Schreuer, *The ICSID Convention* (n 72) 128.
[346] ibid 133.
[347] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4. Decision on Jurisdiction (n 331) Para 52; The tribunal in *Jan de Nul N.V. and Dredging International N.V. v. Arab*

This seems to have been lost in some later tribunals, which cited and accepted the 'Salini test', as they 'upped the ante' by demanding that each individual criteria be satisfied in some objective capacity, in lieu of assessing them globally,[348] as proposed by Schreuer and the Salini tribunal. Case being the *Malaysian Historical Salvors* Award, where the Sole Arbitrator noted that 'if any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of 'investment'.[349]

5.2.2 Divergence in jurisprudence

Although the 'Salini test' has fundamentally influenced the notion of 'investment', with numerous awards citing and accepting it as the benchmark for an ICSID 'investment', its validity is far from undisputed. Criticism towards the 'Salini test', primarily from the competing subjective approach,[350] has led to significant divergence in ICSID jurisprudence when defining 'investment', as this subchapter will demonstrate.

Biwater Gauff v. Tanzania

The first real departure from the 'Salini test' came in 2008 when the tribunal in *Biwater Gauff. v. Tanzania*[351] harshly criticized the precedent it set.[352] Its reasoning was in essence twofold; The Salini criteria cannot be considered a 'matter of law', as no reference to the Salini criteria can be found in Article 25 of the Convention,[353] and that it has been unmistakably established that the definition of 'investment' was deliberately left open, 'with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States'.[354] As a result, ICSID tribunals should not authoritatively impose the 'rote' and 'overly strict' Salini criteria.[355] Seemingly criticizing the amplified regulatory role previous ICSID tribunals had taken on, the tribunal furthermore noted:

> Given that the Convention was not drafted with a strict, objective, definition of "investment", it is doubtful that arbitral tribunals sitting in individual cases should

Republic of Egypt, ICSID Case No. ARB/04/13. Decision on Jurisdiction (n 340) adopted the same approach as Salini, noting in para 91 that 'these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstanes of each case'.

[348] Mortenson (n 10) 273. 'Moreover, none of them give any serious consideration to BIT definitions or contract terms; actual state practice on that point simply drops of the table'.

[349] *Malaysian Historical Salvors SDB, BHD v The Government of Malaysia,* ICSID Case No ARB/05/10 Award on Jurisdiction Para 106 (e).

[350] Sattorova (n 6) 269.

[351] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania,* ICSID Case No ARB/05/22 Award.

[352] Dolzer and Schreuer (n 12) 67–8.

[353] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22. Award (n 351) Para 312.

[354] ibid Para 312.

[355] ibid.

> impose one such definition which would be applicable in all cases and for all purposes.[356]

As the 'Salini test' was in the view of the tribunal in stark contrast with the broad consensus of BIT definitions of 'investment',[357] it decided on a 'more flexible and pragmatic approach.'[358] While the tribunal took the 'Salini test' into account, the circumstances of the case were to be considered as well,[359] as a rigid application of the 'Salini test' risks the omission of numerous categories of economic activity if the test is not met.[360]

Malaysian Historical Salvors v. Malaysia

The Ad Hoc Committee tribunal in *Malaysian Historical Salvors v. Malaysia,*[361] in its Annulment Decision, went even further in its attack against the 'Salini test', stating that the previous Award on jurisdiction, which relied heavily on the 'Salini test' and failed to even consider the 'investment' definition of the applicable BIT was a 'gross error that gave rise to a manifest failure to exercise jurisdiction'.[362] By overly narrowing the definition of 'investment', while failing to consider the will of states as put forth in their respective BITs, thus excluding certain categories of economic activity from ICSID jurisdictional scope, the 'Salini test' could ultimately cripple the ICSID institution:

> To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.[363]

As the tribunal was of the view that the 'Salini test' could cause irreparable damage to ICSID by ignoring the will of the states when defining the notion of 'investment', the tribunal proposed a 'holistic' reading of the notion of investment',[364] that would give considerably greater weight to BIT definitions of 'investment'.

The Malaysian Award and the subsequent Annulment Decision provide, perhaps the most illustrative example on the difference between the objective and subjective approaches. Relying heavily on the objective approach and its principal example, the 'Salini test',

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[356] ibid Para 313.
[357] ibid Para 314.
[358] ibid Para 316.
[359] ibid.
[360] ibid Para 314.
[361] *Malaysian Historical Salvors SDN BHD v The Government of Malaysia,* ICSID Case No ARB/05/10 Decision on the Application for Annulment.
[362] ibid Para 74.
[363] ibid Para 73.
[364] Rovetta and Riviera (n 11) 79.

Michael Hwang, the sole arbitrator of the Award, did not even consider the applicable BIT definition of 'investment',[365] as discussed above, instead citing repeatedly the 'Salini test' and the four criteria Malaysian Historical Salvors would need to meet for ICSID jurisdiction to be established. In particular he stressed the importance of a significant contribution to the economic development of the host State,[366] when declining ICSID jurisdiction,[367] as the four criteria presented by the Salini tribunal, had in his view, not been met. On the other hand, as the Annulment Decision harshly criticized the Award and its over reliance on the 'Salini test',[368] instead emphasizing the fundamental importance of BIT investments when defining the notion of 'investment' for ICSID jurisdiction,[369] it 'stands for the proposition that the BIT definition of 'investment' will suffice when determining if an 'investment' under the ICSID Convention exists'.[370]

Later tribunals ostensibly followed the lead set by the tribunals in *Biwater* and *Malaysian*, providing numerous reasons for the 'Salini test' to be disregarded. Primarily stressing the fact that the Convention includes no mention of a jurisdictional test such as the 'Salini test'. The tribunal in *Abalclat v. Argentina*,[371] for example, saw no merit in following and replicating the 'Salini test' given the fact it was never incorporated in the Convention, and has since been applied in a highly controversial manner.[372] It went on to conclude that while it may be valuable in describing the characteristics of investment contributions, it must not serve to fashion a jurisdictional constraint, which neither the Convention nor the contracting parties to a particular BIT intended to create.[373] Furthermore, the tribunal noted that the 'Salini test' was in open contradiction with the aim of the Convention, to encourage the flow of cross-border private investment and provide parties 'the tools to further define what kind of investment they want to promote'.[374]

[365] *Malaysian Historical Salvors SDB, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10. Award on Jurisdiction (n 349) Para 148-9.
[366] ibid Para 113–124.
[367] ibid Para 146.
[368] *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10. Decision on the Application for Annulment (n 361) Para 80.
[369] ibid Para 73.
[370] Ho (n 1) 635.
[371] *Abalclat and Others (formerly Giovanna A Beccara and Others) v The Argentine Republic,* ICSID Case No ARB/07/5 Decision on Jurisdiction and Admissibility.
[372] ibid Para 364.
[373] ibid.
[374] ibid.

As in *Abalclat v. Argentina*, the tribunal in *Alpha Projektholding v. Ukraine*[375] saw no merit in following the 'Salini test', given that it is not in conformity with the Convention. Furthermore, the tribunal criticized recent tribunals who have sought to apply general definitions of 'investment' pursuant to the Convention, despite the fact that the drafters of the Convention decided that it should not have one. In line with the deliberate lack of a definition, the tribunal did 'not impose any additional requirements beyond those expressed on the face of Article 25(1) of the ICSID Convention'.[376]

A lack of consensus

As ICSID tribunals have failed in reaching a consensus on how the objective and subjective approaches should be relied upon in practice, a clear consensus on 'investment' remains out of sight. The tribunals, which have ruled in favour of party autonomy, have differed significantly in reasoning when reaching a conclusion, whilst the tribunals who adhere to the 'Salini test' can't even agree on the number or which of the criteria should be used, a prime example being the *Phoenix v. Czech Republic*[377] ruling. Although the Phoenix tribunal followed the objective approach,[378] it modified the 'Salini test' markedly, introducing two new and subsequently controversial criteria;[379] (5) assets invested in accordance with the laws of the host state[380] and (6) assets invested bona fide,[381] demonstrating the complexity of the debate on 'investment'; it is not only about the disparities between the objective and subjective approaches; it is also about the various interpretations of the prominent 'Salini test'. This particular interpretation however seems to have failed to gain traction, as various tribunals have stressed the irrelevance of the criteria put forth by the *Phoenix* tribunal, such as the tribunal in *Saba Fakes v. Turkey.*[382]

[375] *Alpha Projektholding GmbH v Ukraine,* ICSID Case No ARB/07/16. Award.
[376] ibid Para 311.
[377] *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5. Award (n 323).
[378] ibid Para 96. Clearly rejecting the subjective approach, the tribunal noted 'BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID or notion or restrict it, but they cannot expand it in order to have access to ICSID…As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition'.
[379] ibid Para 114.
[380] ibid Para 101–105. In Para 101, the tribunal stipulated that 'States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws…These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process'.
[381] ibid Para 106–113. After stipulating in Para 100 that 'the purpose of international protection is to protect legal and bona fide investments' it stressed the necessity of good faith, stipulating in Para 106 that 'States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith'.
[382] *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20. Award (n 19).

> Likewise, the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be 'legal' or 'illegal,' made in 'good faith' or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasms, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons.[383]

In consequence, whether an economic activity is legal or illegal, made in good faith or bad faith, should have no bearing on whether it constitutes an 'investment' in the sense of Article 25.

[383] ibid Para 112.

6 A viable approach for defining 'investment'

The elementary lack of consensus on 'investment', and the legal uncertainty it inherently leads to, possibly discouraging foreign investors from initiating ICSID proceedings, represents one of the most serious problems facing ICSID:

> The risk of incoherence could lead the foreign agents who doubt the qualification attributed to their transactions to turn away from ICSID arbitration (in spite of the advantages it presents) for the benefit of other available modes of dispute resolution, in order to discard the uncertainty concerning ICSID ratione materiae jurisdiction.[384]

For this reason, a viable approach for defining 'investment' is needed. Not only can it minimize the legal uncertainty on 'investment', it would inevitably promote further consistency in jurisprudence, [385] as parties could identify with greater conviction what constitutes a protected investment, and what not.

6.1 Salini as a benchmark

The principal example of the objective approach, the 'Salini test' was a reaction to the lack of definition of 'investment' in Article 25. In particular, it was an attempt to identify the core elements of an 'investment' and delineate ICSID's jurisdictional scope by proposing four criterions that an investor would need to satisfy in order to gain access.[386] As discussed in chapter 5.2 *Validating the 'Salini test'*, contrary to Schreuer's wishes, the widespread acceptance of the 'Salini test' in essence transformed it into a legal definition of 'investment'. In fact, the traction it gained was so momentous that parties regularly did not challenge its legitimacy. This necessitates that the gist of the test be further analysed with the aim of determining whether ICSID tribunals should apply it as a benchmark for what constitutes an 'investment'.

6.1.1 Lack of consensus regarding the elements of an 'investment'

As the discussion in the previous chapter demonstrated, the interpretation of the 'Salini test' has varied, sometimes significantly, between ICSID tribunals. Consequently, a general

[384] Sébastien Manciaux, 'The Notion of Investment: New Controversies' (2008) 9 The Journal of World Investment & Trade 1, 6. As Mancieux furthermore notes, 'Contrary to ICSID, the other international arbitration institutions… do not limit *ratione materiae* the jurisdiction of arbitral tribunals ruling under them to disputes relating to an investment'.
[385] The lack of consistency in ICSID jurisprudence is increasingly becoming a cause for concern given the frequency of conflicting decisions. See for example; Schreuer, 'Investment Arbitration' (n 77) 313; McArthur and Ormachea (n 161) 561–2.
[386] Sattorova (n 6) 269.

consensus has only been reached regarding the use of three of the 'Salini test' criterions amongst the tribunals who apply it, when defining the notion of 'investment':

> While there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.[387]

The separate criterion of contribution to the economic development of the host state and regularity of profit and return, are, however not seen to be necessary elements of investment as the evolution of ICSID jurisprudence has strongly implied:

> The development of ICSID case law suggests that only three of the above criteria, namely contribution, risk and duration should be used as the benchmarks of investment, without a separate criterion of contribution to the economic development of the host State and without reference to a regularity of profit and return.[388]

6.1.1.1 Contribution to host state development: No longer a characteristic of investment

Analysed separately due to its controversial nature in ICSID jurisprudence and academic discussion,[389] contribution to the host state's development has been the most controversial of the four criterions cited in the 'Salini test'.[390] Numerous ICSID tribunals have rejected its relevance as a separate criterion,[391] and very few BITs include it in their definitions of 'investment'.[392] Due to this, various scholars have reached the conclusion that the criterion should no longer be considered a characteristic of 'investment'. Angelos Dimopoulos, the author of EU Foreign Investment Law, went so far as to conclude, 'it is obvious that it is no longer a characteristic of foreign investment devoid of any substantive content'. [393]

Although proponents of the criterion have pointed to the Convention's preamble reference to 'development of the host state', as a reason for the criterion's inclusion in the 'Salini test',[394]

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[387] *Electrabel SA v The Republic of Hungary,* ICSID case No ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability Para 5.43.
[388] *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka,* ICSID Case No ARB/09/02. Award Para 295.
[389] Pierre-Emmanuel Dupont, 'The Notion of ICSID Investment : Ongoing "Confusion" or "Emerging Synthesis"?' (2011) 12 The Journal of World Investment and Trade 245, 257.
[390] Brigitte Stern, 'The Contours of the Notion of Protected Investment' (2009) 24 ICSID Review 534, 541.
[391] For example; *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16. Award (n 375); For example: *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20. Award (n 19); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia,* ICSID Case No ARB/06/2.
[392] Heiskanen (n 8) 70.
[393] Dimopoulos (n 23) 31.
[394] Dolzer and Schreuer (n 12) 75.

that in itself does not suffice for it to be considered an essential characteristic of 'investment', as was confirmed by the tribunal in *Victor Pey Casado v. Chile*.[395] The tribunal concluded, and rightly so, that the preamble's reference to development could not make it 'a constitutive element of the concept of 'investment',[396] as the Convention's reference to contribution 'is presented as consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host State'. [397] This reasoning has subsequently been confirmed by various ICSID tribunals, examples being the tribunals in *Quiborax v. Bolivia*[398] and *Saba Fakes v. Turkey,* which emphasized that contribution to the economic development of the host state should merely be viewed as a consequence of an investment, and not a separate jurisdictional requirement to ICSID proceedings:

> (…) while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment. *The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement*, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.[399]

The tribunal in *Alpha Projektholding GmbH v. Ukraine*[400] went even further in its attack against the criterion, noting that it 'brings little independent to the inquiry', while allowing the tribunal to improperly second-guess the foreign investor's business motives through 'post hoc evaluation':

> The Tribunal is particularly reluctant to apply a test that seeks to assess an investment's contribution to a country's economic development. Should a tribunal find it necessary to check whether a transaction falls outside any reasonable understanding of "investment," the criteria of resources, duration, and risk would seem fully to serve that objective. *The contribution to development criterion, on the other hand, would appear instead to reflect the consequences of the other criteria and brings little independent content to the inquiry.* At the same time, the criterion invites a tribunal to engage in a post hoc evaluation of the business, economic, financial and/or policy

[395] *Victor Pey Casado and President Allende Foundation v Republic of Chile,* ICSID Case No ARB/98/2. Award.
[396] ibid Para 232.
[397] ibid.
[398] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2 (n 391).
[399] *Saba Fakes v. Republic of Turkey. ICSID Case No. ARB/07/20. Award.* (n 371) Para 111. (emphasis added).
[400] *Alpha Projektholding GmbH v. Ukraine,* ICSID Case No. ARB/07/16. Award (n 375).

> assessments that prompted the claimant's activities. *It would not be appropriate for such a form of second-guessing to drive a tribunal's jurisdictional analysis.*[401]

Given the significance the term has been granted in determining whether a particular economic activity constitutes an 'investment', and is thus granted protection through ICSID proceedings, it is of paramount importance that it be well defined.[402] As was confirmed by the *Phoenix* tribunal, that however is far from being the case; with the fundamental lack of consensus there exists as to what constitutes development,[403] making it 'impossible to ascertain' what form of economic activity satisfies this ambiguous jurisdictional requirement. The tribunal therefore proposed 'a less ambitious approach' for defining contribution:

> It is the Tribunal's view that the contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development". A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk, and should therefore in principle be presumed.[404]

Even tribunals, which have emphasized the importance of this criterion as an essential element of 'investment', such as the Ad Hoc Committee Tribunal of *Patrick Mitchell v. Congo*,[405] have failed to give it a clear-cut meaning.[406] ICSID tribunals have consequently grappled with defining what form of economic activity constitutes a contribution to the economic development of the host state. It remains entirely uncertain what form of contribution is needed for the requirement to be satisfied, and furthermore how it should be assessed.[407] Whether investors can merely contribute to the host State's development through infusion of capital or, for example, by transfer of know-how or technological innovation, has therefore not yet been settled by ICSID jurisprudence, and will in all likelihood remain uncertain until some sort of consensus on the criterion's meaning is reached.

For the foregoing reasons, one cannot consider the discussed criterion to be an essential characteristic of an ICSID 'investment'. Not only is its application unfair to foreign private

[401] ibid Para 312. (emphasis added)
[402] Hamida (n 2) 295.
[403] Stern (n 390) 543.
[404] *Phoenix Action, Ltd. v. The Czech Republic. ICSID Case No. ARB/06/5. Award* (n 283) Para 85.
[405] *Patrick Mitchell v The Democratic Republic of Congo,* ICSID Case No. ARB/99/7 Decision on the Application for Annulment of the Award.
[406] Hamida (n 2) 295.
[407] Rovetta and Riviera (n 11) 77.

investors,[408] especially given the widespread ambiguity on its meaning, it goes against the primary aim of the Convention; to encourage and promote foreign investment.[409] Furthermore, as Brigitte Stern, a prominent ICSID arbitrator noted; 'it seems hypocritical to state that only those investments which arbitrators consider as fostering development should be protected'.[410] Although her words might not be 'politically correct',[411] one would have to agree with her blunt assessment, as it cannot be considered ideal to grant ICSID arbitrators such inherently authoritarian powers.[412] If the disputed economic activity conforms to domestic laws, arbitrators should not interfere with the sovereign right of host states to determine what categories of foreign investment will further their economic development, by denying jurisdiction to ICSID[413] on the basis of an overly restricted criterion.[414]

6.1.2 Limit to the inherently flexible notion of 'investment'

The notion of 'investment' is ever changing and inherently flexible, 'There is no single, static conception of what constitutes foreign investment. Rather, the conception has changed over time as the nature of economic relations has changed'.[415] With this in mind, it is imperative that any jurisdictional test for access to ICSID is flexible and it recognizes that 'foreign investment takes continuously new economic and legal forms'.[416] By freezing the definition of 'investment' into four delineated criteria,[417] the 'Salini test' however, unmistakably fails to do so. For two reasons primarily, this has to be considered unfortunate. First, the ascension of the 'Salini test' into a rigid and uncompromising jurisdictional test 'risks the arbitrary exclusion of certain types of transactions from the scope of the Convention',[418] which do not satisfy the Salini criteria, but may nonetheless, constitute an 'investment' in accordance with the understanding of states and investors. For example; portfolio investments, the other primary category of foreign investment, i.e. securities, bonds, derivatives, and other multifaceted

[408] Heiskanen (n 8) 70–1. 'It is indeed a fair question whether it is reasonable to require from private investment that it must "significantly" contribute to the economic development of the host State in order to qualify as an investment. One would rather think that this is the very purpose of public investment.'
[409] ibid 71.
[410] Stern (n 390) 542–3.
[411] ibid 542.
[412] Hamida (n 2) 297. As discussed, this allows arbitrators to 'analyze state policies, to determine the conformity of a project with a host state's priorities, conceptions and own views as to development, prosperity and wealth'.
[413] Dolzer and Schreuer (n 12) 75.
[414] Burger (n 336) 535.
[415] United Nations Conference on Trade and Development, *Scope and Definition* (n 250) 7.
[416] Muchlinski, Ortino and Schreuer (n 18) footnote 61, 66.
[417] Krishan (n 306) 66–7.
[418] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. Award (n 351).

financial instruments do not satisfy all of the Salini criteria,[419] only FDI does,[420] but are widely regarded in today's economy to be a 'genuine' investment, and furthermore a valuable tool for development.[421] Moreover, as was established by the *Fedax* tribunal, it was never assumed that FDI would be the only form of investment covered by ICSID's jurisdiction. The term 'directly' in Article 25 relates to the 'dispute' and not the 'investment':

> (...) the text of Article 25(1) establishes that the 'jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment". *It is apparent that the term "directly" relates in this Article to the "dispute" and not to the "investment." It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction.* This interpretation is also consistent with the broad reach that the term "investment" must be given in light of the negotiating history of the Convention.[422]

There is therefore 'no rational justification' to exclude portfolio investments from the realm of ICSID.[423] Second, the ascension of the 'Salini test' may, quite possibly, dissuade states from joining ICSID;[424] i.e. why would states join ICSID if they oppose the application of its primary jurisdictional test?

6.1.3 Contrary to the Convention's aim, and understanding of states

When the application of the 'Salini test' results in claimants' contributions not being afforded procedural protection by the Convention, it is contrary to the Convention's aim; to encourage 'private investment while giving the Parties the tools to further define what kind of investment they want to promote'.[425] One could say the 'Salini test' discourages, rather than encourages foreign private investment by closing ICSID's gates unless the rigid criteria it puts forth are satisfied.

The 'Salini test' is further in contradiction with the understanding of BIT states, many of which are parties to ICSID. As noted by the tribunal in *Biwater,* it is difficult to see the reasoning for why ICSID tribunals should ignore an apparent near universal consensus amongst states regarding what they believe constitutes an 'investment', as expressed by the significant convergence of nearly 3000 BITs, in favour of the narrower 'Salini test':

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[419] Krishan (n 306) 73.
[420] ibid 72.
[421] Stern (n 390) 543.
[422] *Fedax N.V. v. The Republic of Venezuela,* ICSID Case No. ARB/96/3. Decision of the Tribunal on Objections to Jurisdiction (n 274) Para 24 (emphasis added).
[423] Krishan (n 306) 73.
[424] ibid 68.
[425] *Abalclat and Others (formerly Giovanna A Beccara and Others) v. The Argentine Republic,* ICSID Case No. ARB/07/5. Decision on Jurisdiction and Admissibility (n 371) Para 364.

> 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.[426]

Moreover, declining jurisdiction solely on the basis of failure to satisfy certain criteria, when the host and home state have previously agreed to protect and submit the contribution to ICSID arbitration, seemingly 'makes no sense':

> It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – *there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria.*[427]

As demonstrated by the direct words of the Ad Hoc *Malaysian* tribunal, it rather constitutes the 'penultimate reason why the Salini test is incorrect',[428] as it renders the only available arbitral recourse useless in cases where the Salini criteria are not satisfied:

> It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, "investment," as it is found in the provision of Article 25(1).[429]

6.1.4 Misinterpretation of the process that formed Article 25

As Julian Davis Mortenson concluded, following what can only be described as a comprehensive and furthermore, important review of the Convention's drafting history, the objective approach and its principle example, the 'Salini test' stem from a elementary misinterpretation of the process that formed Article 25.[430] As was discussed in chapter 4.1 *A state of flux*, the failure to define 'investment' was certainly no coincidence. It was rather 'an explicit choice that represented categorical adoption of the broad jurisdictional position in exchange for some crucial opt-out provisions aimed at taking the developing countries'

[426] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22. Award (n 351) Para 314.
[427] *Abalclat and Others (formerly Giovanna A Beccara and Others) v. The Argentine Republic,* ICSID Case No. ARB/07/5. Decision on Jurisdiction and Admissibility (n 371) Para 364. (emphasis added).
[428] Krishan (n 306) 74.
[429] *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10. Decision on the Application for Annulment (n 361) Para 62.
[430] Mortenson (n 10) 280.

concerns into account'.[431] Most importantly, the three key components of the 'Salini test' were explicitly rejected following a lengthy negotiation, in spite of persistent and recurring attempts to include them in Article 25.[432] In the view of Mortenson, what followed 'was a wide-open procedural vehicle that allowed states to decide what kinds of activities they wanted to protect and what kinds of protections they wanted to extend'. Furthermore, after assessing the words of Aron Broches, Mortenson concluded that the drafters left ICSID's gates 'open to any plausibly economic activity or asset', leaving states 'free to decide which categories of foreign economic activity they wanted to encourage'.[433]

6.2 Adhering to the will of the states

Contrary to the 'Salini test', there is certainly a convincing case to be made for the subjective approach as the approach for defining 'investment'. Not only is there a widely held notion that party consent to ICSID jurisdiction infers a strong presupposition that the case at hand involved an investment in accordance with Article 25,[434] the subjective approach also, inevitably gains support from the negotiating history of the Convention, as the Convention's failure to define 'investment' provided states with a considerable degree of leeway to regulate the meaning of the term through BIT practice.[435] As Aron Broches noted following the establishment of ICSID:

> During the negotiations several definitions of 'investment' were considered and rejected. It was felt in the end that a definition could be dispensed with 'given the essential requirement of consent by the parties.' This indicates that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction. *Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.*[436]

This understanding has been accepted by numerous ICSID tribunals, such as the tribunals in *Biwater v. Tanzania*,[437] *Mihaly v. Sri Lanka*[438] and *SGS v. Paraguay.*[439] The tribunal in

[431] ibid.
[432] ibid 299.
[433] ibid 301.
[434] Dolzer and Charnovitz (n 262) 266.
[435] Cole and Vaksha (n 307) 315.
[436] Broches (n 175) 168 (emphasis added).
[437] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22. Award (n 351).
[438] *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka,* ICSID Case No ARB/00/2 Award Para 33: (...) 'the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment'.
[439] *SGS Société Générale De Surveillance SA v The Republic of Paraguay,* ICSID Case No ARB/07/29 Decision on Jurisdiction.

SGS unmistakably emphasized the autonomy of parties when defining the notion of 'investment'. After recognizing that parties can certainly go 'too far' when defining 'investment' in their BITs, for example by including a simple sale of goods, the tribunal concluded that this did not change the fact that in the majority of cases, it would be 'appropriate to defer to the State parties' articulation in the instrument of consent (e.g. the BIT) of what constitutes an investment'. The tribunal further noted, and this author agrees, that a tribunal would 'have to have very strong reasons' to disregard the mutually agreed definition between states concerning what activity they believe constitutes an 'investment', and may thus be resolved through ICSID arbitration:

> *The State parties to a BIT agree to protect certain kinds of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, inter alia, ICSID arbitration, that means they believe that that activity constitutes an "investment" within the meaning of the ICSID Convention as well.* That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given the greatest weight. A tribunal would have to have very strong reasons to hold that the mutually agreed definition of investment should be disregarded.[440]

This reasoning is in line with the conclusion reached in chapter 6.1.1.1 *Contribution to host state development*; arbitrators should not interfere with the sovereign right of states to determine what categories of economic activity they believe constitutes an 'investment' and wish to protect. That is, unless the disputed economic activity falls squarely outside ICSID's boundaries, and outside the limit of freeom states are granted to regulate the meaning of 'investment' through BIT practice, as will be expanded on in the following subchapter.

6.2.1 Outside the meaning of 'investment'

The subjective approach has been criticized for being unable to mark a well-defined line between an 'investment' and a routine commercial transaction, possibly leading 'to a slippery slope where anything may eventually go - where any transaction may count as an investment and where arbitral tribunals are unable to set any limits on their subject matter jurisdiction'.[441] Although an Article 25 'investment' is discernibly far-reaching, covering 'almost any area of economic activity', as illustrated by the review of cases adjudicated by ICSID tribunals,[442] it

[440] ibid Para 93 (emphasis added).
[441] Heiskanen (n 8) 68.
[442] Schreuer, *The ICSID Convention* (n 72) 125.

has its boundaries.[443] In particular, ICSID was, as the drafting history of the Convention confirms, never assumed to be available for ordinary commercial transactions, i.e. trade:[444]

> The drafting history leaves no doubt that the Centre's services would not be available for just any dispute that the parties may wish to submit. In particular, *it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties consent might be…*Therefore, while it is clear that the parties have much freedom in describing their transaction as an investment, *they cannot designate an activity as an investment that is squarely outside the objective meaning of that concept*.[445]

Although there is no denying that much freedom is given to the states to regulate the meaning of 'investment' through BIT practice, it is certainly not without its limits. [446] As was established in the *Report of the Executive Directors on the Convention,* it was never the intent of the Conventions drafters to allow states full discretion to define 'investment' for the purpose of ICSID arbitral proceedings:[447]

> While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.[448]

This limit is set forth in Article 41 of the Convention, which clearly states that a tribunal can examine if the jurisdictional requirements are met, as was manifestly confirmed in *Joy Mining v. Egypt*[449] and numerous other ICSID cases*:*[450]

> The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, *it means*

[443] Newcombe and Paradell (n 83) 66.
[444] Trade has for long been considered to be seperate from investment in international law, given the fundamental differences there exists between these two components of international business. Dolzer and Schreuer (n 12) 76.
[445] Schreuer, *The ICSID Convention* (n 72) 117 (emphasis added).
[446] Organisation for Economic Co-operation and Development (OECD) (n 14) 60.
[447] *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5. Award (n 323) Para 82; *Joy Mining Machinery Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/03/11. Award on Jurisdiction (n 341) Para 49.
[448] ICSID, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (n 228) Para 25.
[449] *Joy Mining Machinery Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/03/11. Award on Jurisdiction (n 341).
[450] For example; *Enron Corporation and Ponderosa Assets, LP v The Argentine Republic, ICSID Case No ARB/01/3 Decision on Jurisdiction* Para 42; *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5. Award (n 323) Para 82.

> *that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.*[451]

ICSID's jurisdiction was therefore never assumed to be limitless, in line with its 'investment' specialization:

> The ICSID Convention itself does not set forth a definition of the term "investment" which it mentions in its Article 25 as a requirement to bring a dispute within its jurisdiction. *However, as Lebanon points out, its preparatory works do not suggest in any manner that by leaving out such a definition the founders of ICSID intended to bestow upon the Centre a jurisidiction ratione materiae without limits.*[452]

Moreover, if states were given the freedom to 'decide in BITs that anything – like a sale of goods or a dowry for example – is an investment',[453] 'Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision'.[454] Mortenson's arguments that ICSID is 'open to any plausibly economic activity or asset', and that states are 'free to decide which categories of foreign economic activity they wanted to encourage', therefore do not hold water, as ordinary commercial transactions unmistakably fall outside ICSID's realm. [455]

6.3 The 'outer-limits' principle

The review of the competing approaches of 'investment', as well as the present state of jurisprudence, suggests that neither the objective approach and its principal example the 'Salini test', nor the autonomous subjective approach meet the requirements of a viable approach for defining 'investment'. [456] The 'Salini test', as noted by Michail Dekastros is inherently problematic:

> (…) it follows a highly desputed methodology in order to prevent limitations to the term investment which have not been agreed by the Parties to the ICSID Convention. It interprets restrictively the silence of the Treaty without providing a convincing reason to do so and without following any consistent legal interpretative methodology… it subsumes several descriptive criteria which have been put forward in the literature, takes them out of their context and creates a new, very restrictive and inflexible legal definition of investment.[457]

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[451] *Joy Mining Machinery Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/03/11. Award on Jurisdiction (n 341) Para 49.
[452] *Toto Costruzioni Generali SPA v The Republic of Lebanon,* ICSID Case No ARB/07/12. Decision on Jurisdiction Para 68 (emphasis added).
[453] *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5. Award (n 323) Para 82.
[454] *Joy Mining Machinery Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/03/11. Award on Jurisdiction (n 341) Para 50.
[455] Timmer (n 275) 364–5.
[456] Dolzer and Schreuer (n 12) 76; Sattorova (n 6) 289.
[457] Dekastros (n 320) 293–4.

Moreover, as Schreuer rightly noted following the transformation of the 'Salini test' into a legal definition of 'investment', the establishment of such an uncompromising list of criteria prevents ICSID tribunals from reaching the necessary legal consistency when defining 'investment', as their decisions inherently become unpredictable, resulting in legal uncertainty for investors.[458]

In spite of the convincing rationale in favour of the subjective approach, it, too falls short of meeting the requirements of a viable approach for defining 'investment', primarily due to its inability to differentiate between 'investment' and an 'ordinary commercial transaction'. Consequently, the subjective approach may lead to a slippery slope where nearly any economic activity is granted access to ICSID.

What is therefore left is to identify the ideal approach for defining the meaning of 'investment' for the purpose of ICSID arbitral proceedings.

This author considers the following version of the so-called 'outer-limits' principle to be both practical and in line with the aim of the Convention, to promote and protect foreign investment. Pursuant to this approach, ICSID's jurisdiction is extended to the Convention's 'outer-limits', that is jurisdiction is exerted 'over all investment disputes that are not clearly inconsistent with the Convention'.[459] Although elusive to the eye and broad in scope, these 'outer-limits' exist all the same:

> The purpose for using the term "investment" in article 25/1 was thus to set objective outer-limits to the types of disputes that can be treated within the ICSID (…) *It is true that these outer-limits bound a vast ambit, to the point of not being clearly visible to some. But they exist all the same.*[460]

In recent years, the majority of ICSID tribunals have applied the so-called 'double-keyhole' approach or the 'double-barrelled' test it is also known as, [461] to assess these outer limits. The majority of the Abalclat tribunal aptly defined the 'double-keyhole' approach as so:

- One the one hand, the alleged investment must fit into the definition of investment as provided by the relevant BIT, which reflects the limits of the State's consent;

[458] Schreuer, *The ICSID Convention* (n 72) 133.
[459] Joseph M Boddicker, 'Whose Dictionary Controls? Recent Challenges to the Term "Investment" in ICSID Arbitration' (2010) 25 American University International Law Review 1033, 1066.
[460] *Abalclat and Others (formerly Giovanna A Beccara and Others) v The Argentine Republic,* ICSID Case No ARB/07/5 Dissenting Opinion to Decision on Jurisdiction and Admissibility Para 45.
[461] Schreuer, *The ICSID Convention* (n 72) 117.

- One the other hand, the alleged investment must also correspond to the inherent meaning of investment as contemplated by the ICSID Convention, which sets the limits of ICSID's jurisdiction and the Tribunal's competence. [462]

Accordingly, while considerable significance is attached to BIT definitions,[463] in line with the arguments of tribunals such as in *Abalclat v. Argentina, Biwater v. Tanzania, Ad Hoc Malaysian, SGS v. Paraguay* and others, it is recognized that the notion of 'investment' has an 'inherent common meaning', [464] one that cannot be set aside, even by the agreement of states:

> *(...) the term "investment" in article 25/1 of the ICSID Convention, whilst flexible enough, is not infinitely elastic.* It leaves much latitude and a wide margin of interpretation and further specification to States in their BITs; but not to the point of rendering it totally vacuous, without any legal effect. *In other words, the term has a hard-core that cannot be waived even by agreement of States parties to a BIT*.[465]

ICSID jurisdiction will therefore be granted when parties to a BIT between host state and investor have agreed to treat the economic activity as an 'investment', as long as the definition of 'investment' does not stand in clear juxtaposition to its inherent common meaning.[466] This approach may therefore in a real sense be labelled a hybrid of the flexible versions of the competing approaches of 'investment'.

Although it may 'make no sense' to deny jurisdiction when parties have agreed to provide protection to the contribution, as can occur pursuant to the 'outer-limits' principle, there must be a limit as to how far the states' sovereign right to regulate the meaning of 'investment' reaches. Otherwise, jurisdiction may be granted in cases concerning a transaction 'so simple and instantaneous, that it cannot be possibly be called an "investment" without doing violence to the word'.[467]

The benefit of this approach is that it serves as a compromise between the competing approaches of 'investment', combining the best of both approaches. Furthermore, and most importantly, if a consensus were to be reached on the delineation of the Convention's 'outer-

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[462] *Abalclat and Others (formerly Giovanna A Beccara and Others) v. The Argentine Republic,* ICSID Case No. ARB/07/5. Decision on Jurisdiction and Admissibility (n 371) Para 344.
[463] *Ceskoslovenska Obchodni Banka, AS (CSOB) v The Slovak Republic,* ICSID Case No ARB/97/4 Decision of the Tribunal on Objections to Jurisdiction Para 67.
[464] *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania,* ICSID Case No ARB/07/21. Award Para 46.
[465] *Abalclat and Others (formerly Giovanna A Beccara and Others) v. The Argentine Republic,* ICSID Case No. ARB/07/5. Dissenting Opinion to Decision on Jurisdiction and Admissibility (n 460) Para 46. (emphasis added).
[466] Dolzer and Schreuer (n 12) 76.
[467] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21. Award* (n 464) Para 48.

limits', as well as on the limitation on BITs comprehensive scope, a greater degree of legal certainty on 'investment' might be reached, as parties could identify with greater conviction what constitutes a protected investment, and what not.[468] This would inevitably improve on the lack of consistency there exists in ICSID jurisprudence, making the decisions of tribunals more predictable and ultimately, promote and provide greater protection for foreign 'investment'.

[468] Boddicker (n 459) 1067.

7 Conclusion

The objective of this thesis was to analyse the evolving notion of 'investment' in investment law and the imperative role it serves in governing the access to the international investment protection framework. In particular, the objective was to determine if there exists a viable approach for its definition for the purpose of ICSID arbitral proceedings.

Driven by the explosion of BITs entered into by states and a sharp increase in international investment disputes, IIL, has become one of the fastest rising sub-fields in international law[469] and progressively prominent in the international legal order. In its simplest form, IIL is about providing a legal framework for the resolution of investor-state investment disputes in an increasingly global world,[470] which is to be conducive to the promotion and protection of foreign investment. Investors need a legal framework for the protection of their foreign investments, while host states see it as an ideal way to present their territory to foreign investors as an attractive venue for investments.[471] However, for centuries, and in spite of numerous attempts, customary international law failed in establishing a suitable framework for the promotion and protection of foreign investment, leaving foreign investors to rely on the inefficient and ambigous process of diplomatic protection. Due to numerous restrictions, diplomatic protection proved incapable of providing foreign investors with adequate investment protection. Rather, it left foreign investors in a precarious situation, having to rely on the political discretion of their home state government, which had full discretion to decide if, and when claims would be pursued.

IIL's emphasizes on foreign investment protection can be attributed to the invaluable impact foreign investment, in particular FDI has on the economical and social development of states, and thus global development. Despite being the subject of much debate in the academic community, FDI will in all likelihood remain 'a significant part of international business and the global economy'[472] for the unforeseeable future, as indicated by the high and furthermore rising numbers of FDI inflows, outlined in chapter *2.1 The necessity of foreign direct investment*. Whether FDI can eventually eradicate 'poverty through economic growth and

[469] Patrick Juillard, 'Bilateral Investment Treaties in The Context Of Investment Law' (OECD 2001) 1.
[470] Schill (n 86) 8.
[471] Garcia-Bolivar (n 21) 751.
[472] Leon E Trakman and Nick W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 1.

development',[473] as stipulated in the Monterray Consensus report is however likely too ambitious of a task for any component of international business, no matter its significance, although FDI has been considered to contribute to poverty mitigation.[474]

With foreign investors having to rely on the process of diplomatic protection, the establishment of the 'theoretical' international investment protection framework was of fundamental importance. Not only did BIT provide foreign investors with a body of substantive protections for their investments, ICSID, through its distinctively binding enforcement mechanisms ensured that said guarantees have a 'real-world force'.[475] This transformed IIL from a mechanism of inter-state diplomacy into a genuine legal framework,[476] providing parties with an effective and neutral forum for the settlement of investor-state investment disputes, 'a particularly important aspect of the legal protection of foreign investment'.[477] Despite its invaluable role in improving foreign investors' rights, the framework, and ICSID in particular has been the subject of increasing criticism, in particular and almost solely from Latin American states. Several Latin American states have openly denounced ICSID, Argentina most notably. Argentina has further invoked the state immunity defence of Article 55 on numerous occasions, deliberately failing to pay awards rendered against them. With this in mind, it has been argued that ICSID is losing its appeal. This author is however of the view that it's still far too early to question the appeal of ICSID, especially given the high number of cases registered in recent years and ICSID's standing amongst the 'larger' states, which have shown little or no real discontent with the ICSID system.

Moreover, although the case of Argentina shined a light on an obstacle to the enforcement of ICSID awards, which may make it more difficult for prevailing investors to enforce awards, ICSID remains the 'key mechanism' for enforcing BITs substantive guarantees,[478] and constitutes a far less perilous option for foreign investors than possibly hostile domestic courts.[479] As a result, ICSID will undoubtedly continue to influence the evolving notion of 'investment' and provide for foreign investment protection.

[473] United Nations (UN) (n 33) 9 Para 20.
[474] Garcia-Bolivar (n 21) 754.
[475] Ho (n 1) 263.
[476] Schill (n 86) 242.
[477] Schreuer, 'The Dynamic Evolution of the ICSID System' (n 90) 15.
[478] Mortenson (n 10) 258.
[479] Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 Journal of International Aribtration 1, 23.

The elementary lack of consensus there exists on the meaning of 'investment' represents one of the most serious problems facing ICSID, quite possibly discouraging foreign investors from initiating ICSID arbitral proceedings. For this reason a viable approach for defining 'investment' is needed. However, as was established following a thorough evaluation of the competing approaches of 'investment', through review of ICSID jurisprudence, neither the objective approach and its principal example, the 'Salini test', nor the autonomous subjective approach meet the requirements of such an approach.

The 'Salini test' is fundamentally flawed. First, there is an elementary lack of consensus regarding the elements of an 'investment' pursuant to the 'Salini test', in particular regarding the highly controversial criterion of contribution to host state development, which, as was established, can no longer be considered 'a characteristic of investment'. Second, by 'freezing' the inherently flexible and ever-changing notion of 'investment', the 'Salini test' restricts the types of investment transactions that may be considered an ICSID 'investment' far more radically than a reading of the Convention suggests. Third, it fails to recognize the apparent consensus amongst states on what constitutes an 'investment', as expressed by the significant convergence of BIT 'investment' definitions. Finally, the 'Salini test' is the result of an elementary misinterpretation of the process that formed Article 25, and goes against the primary aim of the Convention, to promote and protect foreign investment. It therefore cannot be considered ideal that ICSID tribunals apply the 'Salini test' as a benchmark for 'investment'.

In spite of the convincing rationale in favour of the subjective approach, best exemplified in Julian Davis Mortenson's article *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*,[480] it, too, falls short of meeting the requirements of a viable approach for defining 'investment'.[481] In particular, its inability to mark a well-defined line between an 'investment' and an ordinary commercial transaction may widen ICSID's jurisdictional scope far beyond what the drafters of the Convention envisaged; possibly leaving ICSID's gates open for nearly all economic transactions, such as a simple sale of goods. ICSID specializes in the settlement of *'investment'* [482] disputes, which is why it's called ICSID and not ICSD; its jurisdiction applies to investments and investments alone. This speciality

[480] Mortenson (n 10) 315–318.
[481] Sattorova (n 6) 270–1.
[482] (emphasis added).

distinguishes ICSID from other arbitration institutions. Were disputes arising out of ordinary commercial transactions to be granted ICSID jurisdiction on a regular basis that speciality would cease to be and ICSID might become 'just another arbitration institution':

> (…) if the liberal trend promoting an extension of ICSID jurisdiction to any kind of economic operation, even those without any connection to "authentic" investment, continues to grow, ICSID may well become just another arbitration institution, competing with a range of others (ICC, LCIA, AISCC, etc.).[483]

Moreover, it might, ultimately turn Article 25 into a meaningless provision,[484] which, as was established, it undeniably is not. The lack of definition in Article 25 does not change the fact that, 'investment', like other notions, has an inherent core meaning. That meaning must be respected in ICSID arbitral proceedings, and it cannot be set aside, even by the agreement of states. This however does not render BIT definitions of 'investment' meaningless, far from it. The version of the 'outer-limits' principle proposed by this author attaches considerable significance to the understanding of states, in line with the widely held notion that party consent to ICSID jurisdiction infers a strong presupposition that the case at hand involved an investment in accordance with Article 25 and the apparent near universal consensus amongst states regarding the meaning of 'investment'. This author is of the view that by doing so, greater legal certainty on the meaning of 'investment' may be reached, given the significant convergence of nearly 3000 BIT definitions.

[483] Farouk Yala, 'The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?: Some "Un-Conventional" Thoughts on Salini, SGS and Mihaly' (2005) 22 Journal of International Aribtration 105, 125.
[484] *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11. Award on Jurisdiction (n 341) Para 50.

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