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## REQUIREMENT OF AN INVESTMENT TO CONTRIBUTE TO THE DEVELOPMENT OF THE HOST STATE UNDER THE ICSID CONVENTION

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### I. INTRODUCTION

Every investment dispute cannot be heard by the International Center for the Settlement of Investment Disputes (ICSID). The same can be said about investors, i.e., not all investors are entitled to be heard by ICSID tribunals irrespective of what the State parties have agreed to in the relevant international investment agreements (IAAs). Analysis of previous awards and relevant ICSID documents suggest that there are certain criteria to define the jurisdiction of an ICSID tribunal *ratione materiae* and criteria to define the jurisdiction of an ICSID tribunal *ratione personae*. Therefore, tribunals should carefully consider such criteria so as to avoid the misuse of the system of international law of foreign investment. While considering these criteria; the notion of development has been doing the rounds. This paper attempts to analyse whether development as a contribution to the host state is indeed a requirement under Article 25 of ICSID Convention.

The foundation of the Salini test can be found in the first edition of Christoph Schreuer's seminal treatise on the ICSID Convention. In his discussion of Article 25, Schreuer posited five features that have been the subject of ICSID proceedings include: (i) duration of the enterprise, (ii) regularity of income and return, (iii) an assumption of risk, (iv) a substantial commitment by the investor, and (v) some significance for the host State's development.

To look into the necessity of the fifth criterion "host state's development", this paper will consider ICSID caselaw that involve this point of law along with Article 25 of the ICSID Convention. The Preamble of the Convention will be addressed to understand the object

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behind the treaty. The Report of the World Bank Executive Directors on the Convention shall be read into for the purpose behind the Convention. Lastly, the travaux préparatoires of the Convention, the words of Mr Aron Broches who was instrumental in establishing ICSID will serve to answer what the requirements of an ICSID investment are.

As with every investment dispute, one party consists of the private investor company and the other is a developing host state. This paper too, shall approach it such with Part II elaborating on the Investment Company's perspective and Part III building the case for the host state. The authors will do this by relying on the sources as brought out in the above paragraph. Finally Part IV will deal with the conclusion including the most recent caselaw on this subject, *Deutsche Bank AG v Sri Lanka*.

## II. INVESTOR COMPANY'S PERSPECTIVE

Investor Companies have repeatedly pointed out that the ICSID convention does not require than an "investment" contribute to the development of the host state.

### *A. Investors Do Not Rely On A Strict Interpretation Of The Salini Test And The Inclusion Of Development As A Criterion*

For concluding whether the contract was an investment for ICSID purposes, the Salini<sup>1</sup> Tribunal adopted what it described as an "objective" interpretation of Article 25 and employed a checklist of criteria almost exactly similar to Schreuer's.<sup>2</sup> This reasoning was subsequently used by many tribunals. The repeated application of these criteria has strengthened the perception of tribunals that they were mandatory standards.<sup>3</sup> Contrary to Schreuer's description of the individual factors as mere "typical features," Salini described the

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1 Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, Decision on Jurisdiction, ICSID Case No ARB/00/4 2001 [52]

2 Ibid. , [52–57]

3 CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY*, [159] (Cambridge University Press 2009)

factors as a mandatory “test” for Article 25 purposes. Salini converted Schreuer’s descriptive typical features into a prescriptive test. Schreuer had later criticized the tribunal for misunderstanding his discussion of Article 25.<sup>4</sup>

The Biwater Tribunal award also rejected a strict interpretation of the criteria identified in Salini and stated that they are not fixed or mandatory and they do not appear in the ICSID Convention.<sup>5</sup> This approach was subsequently also adopted in *Malaysian Historical Salvors v. Malaysia* (annulment proceedings).<sup>6</sup>

*1. Private Companies Do Not Believe Development Should Be Included Within The Definition Of Investment*

In *MHS v. Malaysia*, the Tribunal quoted the paragraph setting out the list of typical features of investment from the First Edition of Schreuer’s Commentary.<sup>7</sup> It also quoted from the Convention’s Preamble and the Executive Directors’ Report; all these three sources refer to economic development.

The Tribunal said, “As stated by Schreuer, there must be positive impact on a host State’s development.”<sup>8</sup> Schreuer states that the First Edition of his Commentary stated more tentatively<sup>9</sup>: “...it may be argued that the Convention’s object and purpose indicate that there should be some positive impact on development.”<sup>10</sup>

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4 Ibid., [171–74]

5 *Biwater Gauff (Tanzania) Ltd v Tanzania*, Award and Concurring and Dissenting Opinion, ICSID Case No ARB/05/22; IIC 330 2008 [312]

6 *Malaysian Historical Salvors Sdn Bhd v Malaysia*, Decision on the Application for Annulment, ICSID Case No ARB/05/10; IIC 372 2009

7 Ibid., [44]

8 *Supra* note 7, [125]

9 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* [88] (University of Cambridge 2001)

10 *Supra* note 4, [123]

In light of Article 31(2) of the VCLT, the preamble of the ICSID Convention can be interpreted to understand the purpose of the treaty.<sup>11</sup> The preamble states that:

“Considering the need for international cooperation for economic development, and the role of private international investment therein;”<sup>12</sup>

Schreuer points out that while this would support the proposition that an international transaction that is designed to promote the host State’s development enjoys the presumption of being an investment. However it does not follow that an activity that does not obviously contribute to economic development must be excluded from the Convention’s protection.<sup>13</sup>

These basic criteria mentioned in the preamble cannot be regarded as a *numerus clausus*. There are instances, involving non traditional types of investment transactions, where one cannot just rely on these criteria in abstracto but has to look at all the circumstances of the case in a flexible manner.<sup>14</sup> The preamble of the ICSID Convention is a given consideration in formulating the Convention, not a contentious issue requiring litigation.<sup>15</sup>

The Applicant in MHS<sup>16</sup> relies on the Award in *Pey Casado v. Chili* to argue that this sentence of the Preamble does not establish a condition for investment, but merely reflects that such ‘economic development’ would be a desirable and natural consequence of investment.<sup>17</sup>

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11 Art-31(2), Vienna Convention on the Law of Treaties, 1969

12 Paragraph 1, Preamble, ICSID Convention

13 *Supra* note 4, [173]

14 ENGELA C. SCHLEMMER, INVESTMENT, INVESTOR, NATIONALITY, AND SHAREHOLDERS in PETER MUCHLINSKI, FEDERICO ORTINO, CHRISTOPH SCHREUER, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW p.66 (Oxford University Press 2008)

15 Devashish Krishnan, A Notion of ICSID Investment, TDM 1 2009, p. 16

16 *Supra* note 7, [30]

17 *Pey Casado and Pr sident Allende Foundation v Chile*, Award, ICSID Case No ARB/98/2, IIC 324 2008 [232]

The Report of the Executive Directors states that in submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development.<sup>18</sup> This statement cannot be construed to conclude that the drafters of the convention imposed “economic development” as a condition for investment.

The Report explains<sup>19</sup> the purpose behind ICSID as:

“The creation of an institution designed to facilitate the settlement of disputes between States and foreign investor...and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.”

Hence looking into the preparatory works of the ICSID Convention will confirm that the drafters never defined investment. The preparatory works will be analyzed later in the paper.

## 2. *Article 25 Of The Icsid Convention*

Development is not included within the definition of Article 25 of the ICSID Convention as per investors. Tribunals simply look at the consent document’s definition of investment, assess whether it covers the asset or enterprise in question, and take that conclusion to be determinative of ICSID jurisdiction as well.<sup>20</sup>

The Report of the Executive Directors, as adopted, says<sup>21</sup>: No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the However, it has been held that there are objective requirements of investment in the

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18 Report of The Executive Directors on The Convention on The Settlement of Investment Disputes Between States and Nationals of Other States, [9]

19 Ibid. [9–12]; Report of a Group of Eminent Persons, The Impact of Multinational Corporations on the Development Process and on International Relations, UN Doc. E/500/Add. 1, Part 1 (May 24, 1974) 13 ILM 800, 1974, [4, 12]

20 For example *Parkerings-Compagniet AS v Lithuania*, Award on jurisdiction and merits, ICSID Case No ARB/05/8; IIC 302 2007 [249–254]

21 Supra note 19 [27-28]

Convention. In *Joy Mining v. Egypt*, it was held that the parties to a dispute cannot by contract or treaty define an investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.<sup>22</sup>

Article 32 (a) of the VCLT says that recourse may be had to preparatory works of the treaty to determine the meaning behind a provision when it is ambiguous.<sup>23</sup> The purpose of Article 25, Mr. Broches concluded<sup>24</sup>, was not to define the circumstances in which recourse to the facilities of the Centre would in fact occur, but rather to indicate the outer limits within which the Centre would have jurisdiction provided that the consent of the parties had been attained. Beyond these outer limits, no use could be made of the facilities of the Centre even with such consent.

Schwebel in his book<sup>25</sup> discusses what the “outer limits” consist of. It precludes that “nature of the dispute” appears to refer to the dispute being a legal dispute; the “parties thereto” means that, for a dispute to be within ICSID’s jurisdiction, the parties must be a Contracting State and a national of another Contracting State. These fundamentals, and the assumption that the term “investment” does not mean “sale,” appear to comprise “the outer limits,” the inner content of which is defined by the terms of the consent of the parties to ICSID’s jurisdiction.

#### *B. Icsid’s Travaux Préparatoires*

As “investment” is an “ambiguous” term as per Article 32.1 of VCLT justifying recourse to the preparatory work of the treaty and the circumstances of its conclusion.<sup>26</sup> The ICSID travaux should also be

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22 *Joy Mining Machinery Ltd v Egypt*, Award on jurisdiction, ICSID Case No ARB/03/11; IIC 147, 2004 [50]

23 Article 32 (a), Vienna Convention on the Law of Treaties 1969 (VCLT)

24 ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on Settlement of Disputes between States and Nationals of Other States*, 1970, Vol. II-1, p. 566.

25 STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW: FURTHER SELECTED WRITINGS* p.245 (Cambridge University Press 2011)

26 Art. 32, VCLT

considered when tribunals make their decisions as historical evidence clearly establishes that the parties intended a special meaning for investment, which should therefore be given effect.<sup>27</sup>

As mentioned before no attempt was made to define the term “investment” and consent is the “cornerstone” for ICSID. To hold, as other tribunals have, that the expansive definitions of investment in BITs must yield to “exclusionary definitions contrived and embroidered upon by some tribunals and commentators, is to act inconsistently with the authority conferred on those tribunals to adjudicate the investment disputes submitted to them.”<sup>28</sup>The Salini test dilutes neutrality and the reputation of ICSID by aligning with ideology.<sup>29</sup>

A British proposal that omitted any definition of the term investment on the ground that a definition would only create jurisdictional difficulties was adopted by a large majority in the Legal Committee.<sup>30</sup> The Convention reached a compromise and established a “set of opt-out mechanisms” that individual countries can exercise to “tailor the forms of investment eligible for protection in their particular cases.”<sup>31</sup>

Mr. Broches explained that refusal of consent would be an adequate safeguard for host States.<sup>32</sup> Mr. Broches also referred to the danger that a definition might provide a reluctant party with an opportunity to frustrate or delay the proceedings by questioning whether the dispute was encompassed by the definition.<sup>33</sup>

The preparatory work of the Convention thus shows that<sup>34</sup>: (a) deliberately investment was not defined;(b) a floor limit to the value of

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27 Article 31.4, VCLT

28 Supra note 26, p. 284

29 Supra note 16, p.3

30 Supra note 10, [6] ; Supra note 25, p.826

31 Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 *Harvard International Law Journal* Winter (2010), p. 260

32 Supra note 25, p. 566

33 *Ibid.*, p. 54

34 Supra note 7, [71]

an investment was rejected; (c) a requirement of indefinite duration of an investment or of a duration of no less than five years was rejected; (d) the critical criterion adopted was the consent of the parties. By the terms of their consent, they could define jurisdiction under the Convention.

*C. Uncertain Meaning Of The Word “Development”*

The definition of the word “development” is not contained in the Convention or in the BIT. Neither has it been enumerated in the Salini test that advocates it. The BIT does not stipulate that the investment should contribute towards development of the host state. On the other hand the United States-Democratic Republic of Congo BIT provided that it applied to investments that contribute to the economic and social development of the host State.<sup>35</sup>

All investments are in essence pro-development. The competence of tribunals to decide on the point of development can also be considered shaky. ICSID tribunals are neither competent nor equipped to make value judgments about investments, otherwise the ICSID system will collapse upon itself. ICSID is concerned with the law of investment. Its reach into the so called “law of development” is only to the extent such principles form part of its applicable legal system.<sup>36</sup>

There is also the problem of what is considered development to one country may not be so to the other.<sup>37</sup> Schreuer asserts that any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection under ICSID, should be treated with some flexibility.<sup>38</sup>

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35 Mitchell v Congo, the Democratic Republic of the, Decision on the Application for Annulment of the Award, ICSID Case No ARB/99/7; IIC 172 2006 [36]

36 Supra note 16, p.26

37 MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION, p. 48 (Kluwer Law International 2010)

38 Supra note 4, [174]

1. *Icsid Tribunals Have Not Exhibited Consistency In Defining “Development”*

In *Mitchell v Congo* when referring to economic development it was held that it does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.<sup>39</sup>

Also, in *Joy Mining v Egypt*, the value of the bank guarantee had a value of GBP 9.6 million and yet failed to qualify as a contribution to the economy of Egypt.<sup>40</sup> In *Salini*<sup>41</sup>, the tribunal found that the Italian claimants had contributed their know-how, provided the equipment and personnel necessary to carry out the project. The tribunal in *MHS v Malaysia* specifically rejected any “perceived political or cultural benefits” except where these would have a significant impact on the State’s economic development.<sup>42</sup>

In the two closely related LESI cases the Tribunals rejected the relevance of a contribution to the host State’s development as a separate criterion. The Tribunals said that it is not necessary that the investment contribute more specifically to the host country’s economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.<sup>43</sup>

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39 Supra note 36, [33]

40 Supra note 23, [66]

41 Supra note 2, [53]

42 Supra note 4, [170]

43 *Consorzio Groupement LESI and ASTALDI v Algeria*, Decision on Jurisdiction, ICSID Case No ARB/05/3; IIC 150, 2006, [II. 13(iv)]; *Consorzio Groupement LESI-DIPENTA v Algeria*, Award, ICSID Case No ARB/03/08; IIC 149, 2005, [72(iv)]

Therefore it can be observed that the ICSID awards have not collectively laid down what “development” comprises of. Hence its inclusion in the definition of investment will lead to an unascertainable condition.

*D. Salini Test Invalidates Sovereignty Of States*

It can be summarized that<sup>44</sup> there is no multilateral grant of authority over objective interpretation granted to individual tribunals sitting in cases of particular investor –State disputes. It follows then that it amounts to an abrogation of sovereign authority of each of the 156 states for the tribunal sitting in an investor–State arbitration to define any provision of the Convention for any purposes other than the dispute at hand. They are simply empowered to determine, on a case by case basis, whether the transaction put before them is an investment or not.

The Salini approach is opposed to party-autonomy as it concludes irrespective of the clarity of consent, the “Convention must be interpreted autonomously and its words and intent must be given further crescendo even if the consent does not damage the Convention.”<sup>45</sup> It has been observed rightly that tribunals’ inchoate impulse to draw back in the face of a growing backlash against investment law is at least one motivating force behind the rise of restrictive jurisdiction.<sup>46</sup>

### III. DEVELOPING HOST STATE’S PERSPECTIVE

Developing host states have maintained the position that the ICSID Convention requires than an “investment” contribute to the development of the host state.

*A. Host States Rely On ‘Salini’ Test’ And Its Inclusion Of Development In The Definition*

In *Salini Costruttori, S.p.A. v. Kingdom of Morocco*<sup>47</sup>, when concluding whether the contract was an investment for ICSID purposes, Salini

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44 Supra note 16, p.10

45 Ibid. at p.11

46 Supra note 32, p. 278

47 Supra note 2, [52]

adopted what it described as an “objective” interpretation of Article 25 and employed a checklist of criteria almost exactly similar to Schreuer’s.<sup>48</sup> The arbitral tribunal here was of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty and the Convention, in accordance with the case law.<sup>49</sup>

This reasoning was subsequently used by many tribunals;<sup>50</sup> the tribunal in *Pey Casado v. Chile* had held that there exists a definition of an investment within the meaning of the ICSID Convention.<sup>51</sup> It was observed by the annulment committee in *Patrick Mitchell v. DRC* that before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.<sup>52</sup>

In *Joy Mining v. Egypt*, the tribunal held 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.<sup>53</sup>

*1. States Require That Development In Particular Should Be Included Within The Definition Of Investment.*

The Tribunal in *MHS* said<sup>54</sup>, “As stated by Schreuer, there must be positive impact on a host State’s development.” The annulment Committee in *Patrick Mitchell v. DRC*<sup>55</sup> cited the statement of Professor Schreuer in which he regarded a contribution to the economic

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48 Ibid. [52–57]

49 Ibid. [44]

50 Supra note 4

51 *Pey Casado v Chile*, Decision on Provisional Measures, ICSID Case No ARB/98/2; IIC 185 2001 [232]

52 Supra note 36, [31]

53 Supra note 23, [50]

54 Supra note 36, [125]

55 Supra note 52, [31]

development of the host State as ‘the only possible indication of an objective meaning’ of the term investment.

Therefore the transaction made by the investor has to qualify the objective interpretation of the Convention as per the “double barreled test”<sup>56</sup>. It is the dual examination of an ICSID investment. As the issue was addressed in CSOB:

A two-fold test must.....be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT.<sup>57</sup>

Under this test, both prongs are to be met in order to establish ICSID jurisdiction. Hence, if there is no investment within the meaning of Art. 25 ICSID Convention, it is unnecessary to examine whether or not there is an investment within the meaning provided under the relevant provisions of a BIT. Schreuer points out that the objective interpretation includes contribution to economic development in the host state.

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## 2. “Outer Limits” Of Article 25

According to host states, development to its economy is included within the outer limits of Article 25. Schreuer in his commentary says that<sup>58</sup> “investment” has an objective meaning independent of the parties’ disposition and is confirmed by Rule 2 of the ICSID Institution Rules. This Rule proves that a request for arbitration must provide information that the investment satisfies the requirements of the Convention

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56 Malaysian Historical Salvors Sdn Bhd v Malaysia, Award on jurisdiction, ICSID Case No ARB/05/10; IIC 289 2007 [55]

57 Ceskoslovenska Obchodni Banka AS v Slovakia, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4; IIC 49 1999 [251]

58 Supra note 4, [123]

regarding the consent of parties<sup>59</sup> and if the dispute is legal and arising out of an investment.<sup>60</sup>

The Tribunal in *Rompetrol v. Romania* case observed that, “as both Parties to this arbitration accept, Article 25 reflects objective ‘outer limits’ beyond which party consent would be ineffective.”<sup>61</sup>

Many tribunals have stated the increased importance of development to the host state over time thereby making its inclusion in “outer limits” necessary. In *Patrick Mitchell v Democratic Republic of the Congo*<sup>62</sup>, the ad hoc committee rejected the claimant’s argument that the contribution to economic development was merely a supplementary condition and not an essential element in the definition of an ‘investment’. Also in *Fedex v. Venezuela* the tribunal emphasized that “most importantly”, there is clearly a significant relationship between the transaction and the development of the host State”.<sup>63</sup>

In *Mitchell v. Congo Annulment*<sup>64</sup>, the annulment committee held that Tribunal’s failure to incorporate the characteristics of investment into the reasoning of the Tribunal among other reasons justified the decision to annul the Award.

### *3. Preamble And Executive Director’s Report*

As Schreuer stated<sup>65</sup>, “The only possible indication of an objective meaning” that can be derived from the Convention is contained in the Preamble’s first paragraph and the Report of the Executive Directors.

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59 (Rule 2(1)(c)), Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (ICSID Convention)

60 (Rule 2(1)(e)), ICSID Convention

61 *Rompetrol Group NV v Romania*, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No ARB/06/3; IIC 413 2010 [80]

62 *Supra* note 36, [27]

63 *Fedax NV v Venezuela*, Decision on Jurisdiction, ICSID Case No ARB/96/3; IIC 101 1997 [43]

64 *Supra* note 36, [38]

65 *Supra* note 4, [121]

The preamble<sup>66</sup> emphasizes on international cooperation for economic development. Thus, the purpose of the ICSID settlement mechanism was to resolve disputes which might arise in connection with such “investment” which are concerned with “international cooperation for economic development.”<sup>67</sup> If the investment is to be entitled to the protection of the ICSID settlement procedures; this requirement is a condition of an ICSID investment.<sup>68</sup>

Also the fifth preambular paragraph of the ICSID Convention states: “Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development.”<sup>69</sup> Judge Mohamed Shahabuddeen in his dissenting opinion in *MHS Annulment* pointed out that reference to “Reconstruction and Development” leaves no reasonable doubt that it was the development of States which was being spoken of.<sup>70</sup> This is further proof that the purpose of the convention was to contribute to development of the host states.

Further he points out the influence of International Bank for Reconstruction and Development on ICSID which is illustrated in Article 2 of the Convention which provides that: “the seat of the Centre shall be at the principal office of the IBRD.”<sup>71</sup> He explains that the excess in expenditure of ICSID is covered by contracting states who are members of the bank. He argues that a state is unlikely to accept such burden if the investments do not contribute to the economic development of the states.<sup>72</sup>

In *CSOB v. Slovak Republic* the Tribunal referred to the Preamble of the ICSID Convention and found that to qualify as an investment a transaction must ‘contribute to cooperation designed to promote the economic development of a Contracting State’.<sup>73</sup>

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66 Paragraph 1, Preamble, ICSID Convention

67 Supra note 7, Dissenting Opinion, [17]

68 Ibid. [29]

69 Paragraph 5, Preamble ICSID Convention

70 Supra note 7, Dissenting Opinion, [18]

71 Art. 2, ICSID Convention

72 Supra note 7, Dissenting Opinion, [20-21]

73 Supra note 58, [64]

The Report of the Executive Directors states that: “in submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development.”<sup>74</sup> This is additional proof that economic development was envisaged as the goal behind an ICSID investment.

*B. Icsid’s Travaux Preparatoires*

The Report of the Executive Directors, as adopted, says<sup>75</sup>:

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)).

This statement can be misleading as there were many attempts made in defining investment. There was bloc of a substantial group of countries, largely from the developing world, that wanted a restrictive definition of “investment.”<sup>76</sup> However, as soon as these countries started “trying to nail down a specific definition”, their agreement fell apart. Mr. Broches concluded that since “the views differed so widely, it would hardly be possible to arrive at a proper definition.”<sup>77</sup>

The fact that they could not arrive at a proper definition cannot be construed as they were against a restrictive definition. Professor Schreuer has pointed out that the fact that definitions “were not adopted was motivated less by the feeling that they were redundant than by an inability to agree on them.”<sup>78</sup>

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74 Supra note 19, [9]

75 Ibid., [27]

76 Supra note 32, p. 287

77 Supra note 25, p. 59

78 Supra note 4, [6]

It has been found that the drafters of the Convention consciously established the objective limitations of ICSID jurisdiction as distinct from the issue of consent, “in part to prevent investors from using overweening bargaining power to compel small Host States to submit all disputes to ICSID arbitration.”<sup>79</sup> Judge Shahabuddeen notes in his dissenting opinion that the formative instruments of ICSID do not justify the view that ICSID was meant to be just another arbitration institution.<sup>80</sup> This proves that the drafters had established an “objective” notion of investment.

The Convention reached a compromise and established a “set of opt-out mechanisms” that individual countries can exercise to “tailor the forms of investment eligible for protection in their particular cases.” The word “compromise” has bearing here as the drafters had intended a restrictive definition and could not settle on one. With the advent of the Salini test, many tribunals have followed suit by applying it showing that ICSID has with time settled on the notion of investment. Hence the Tribunal was right in using the Salini criteria.

C. *“Substantial” Or “Significant” Development*

The tribunal in MHS rightly pointed out that without the requirement of “significance” in development, “any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an ‘investment.’”<sup>81</sup>

In a case where many of the typical hallmarks of ‘investment’ are tenuously satisfied, the analysis of the remaining hallmarks will assume considerable importance.<sup>82</sup> Judge Mohamed Shahabuddeen in his dissenting opinion in MHS Annulment concedes that there is nothing in the ICSID convention which requires development to be “significant”. But the law cannot be construed to mean that any contribution, even if marginal will constitute as an investment. He goes on to ask, “Is it the law that an infinitesimally small development suffices to convert the

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79 Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 *Arb. Int'l L.* 32-36 288 (2005)

80 *Supra* note 7, Dissenting Opinion, [64]

81 *Supra* note 57, [123]

82 PETER MUCHLINSKI, FEDERICO ORTINO, CHRISTOPH SCHREUER, *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* p. 69 (Oxford University Press 2008)

whole outlay into an ICSID investment which is designed to foster the economic development of the host State?”<sup>83</sup>

Some arbitrators have argued that condition of economic development is dependent on all the other ‘hallmarks’ and is in fact superfluous, as investment always contributes to the development of the host State.<sup>84</sup> This implies that a contract that involves an economic contribution of certain duration with some risk involved would always contribute to the host State’s development. This analysis is investor-oriented (the tribunal focusing on the investor’s actions) rather than State or effect-oriented (focusing on how the activity influences the host State’s economy) and should not be adopted.<sup>85</sup>

The Tribunal in MHS<sup>86</sup> concluded that the classical Salini hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an “investment”. However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID “investment”.

#### *D. Interests Of Developing Countries*

Scholars have observed that “less powerful nations as a class have less leverage in bilateral negotiations than they do in multilateral negotiations” where the weaker nations can group together.<sup>87</sup>

Hence Judge Shahabuddeen’s notion of investment which includes development as a condition under the ICSID Convention is more consistent with the decisions of previous tribunals than the majority reasons. They enhance the overall legitimacy of the system that suffers from accusations of awarding too much protection to foreign capital.<sup>88</sup>

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83 Supra note 7, Dissenting Opinion, [36]

84 Ibid., p. 226

85 Ibid., p. 226

86 MHS v. Malaysia, [106 (e)]

87 Supra note 32, p. 307

88 SEGGER CORDONIER, MARIE-CLAIRE GEHRING, ANDREW MARKUS W. NEWCOMBE, SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW, GLOBAL TRADE LAW SERIES, Volume 30, p.230 (Kluwer Law International 2011)

#### IV. CONCLUSION:

Both sides of the case have been presented in the preceding paragraphs with respect to the definition of investment and inclusion of development within in particular. The objective notion of investment in the Convention and whether it includes the Salini criteria, in turn imposing a condition for investment has been explored. Also, the degree of contribution required is brought up and whether it needs to be “significant”. The ICSID’s travaux préparatoires has been used both to suggest that the drafters were in favour of a restrictive definition and an expansive one. Further, the effect of such awards on the sovereignty of states and the interests of developing states have been brought out.

As for the status quo, the latest case on this subject is *Deutsche Bank AG v Sri Lanka*.<sup>89</sup> The Claimant accepted the existence of this “double-barrel test” to a very limited extent. But the tribunal’s position was in consonance with *Biwater v Tanzania* that since the Convention was not drafted with a strict, objective, definition of “investment”, it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes.<sup>90</sup>

The Tribunal held that:

“The development of ICSID case law suggests that only three of the Salini 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. It should also be recalled that the existence of an investment must be assessed at its inception and not with hindsight.”

Finally, the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal since it is generally considered that this criterion is unworkable owing to its

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<sup>89</sup> *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/02 2012

<sup>90</sup> *Supra* note 6, [313]

subjective nature. What is important is the commitment of the investor and not whether he positively contributed to the economic and social development of the host State.

Makhdoom Ali Khan, in his dissenting opinion stresses on the fact that while this characteristic is arguably subjective, it is not devoid of all utility and in fact preserves a vital link between an investment and the intended purpose of the Convention.<sup>91</sup> This is emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention. According to him, to entirely abandon this characteristic would be to sever this link.

This case affirms the opinion held by the authors, that this point of law is yet to be settled by ICSID. There exist two schools when it comes to inclusion of development within the ambit of definition of investment. Tribunals in future should be unanimous in their application of definition of investment so as to ensure consistency and justice in the process.

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91 *Deutsche Bank Ag v Democratic Socialist Republic Of Sri Lanka*, Dissenting Opinion Of Makhdoom Ali Khan, ICSID Case No. Arb/09/02, 2012 [46]